THE LAWYER'S QUANDARY: CLIENT-CENTERED LAWYERING IN THE TREATMENT PARADIGM*

MARISOL ORIHUELA**

Client-centered criminal defense attorneys endeavor to maximize their client's autonomy, using their expertise to counsel their client through the criminal process. Indeed, the criminal system relies on defense counsel to ensure fairness and, in turn, help legitimize the system. What does it mean for the system if the client-centered lawyer can't fulfill their goals?

This Article argues that, because today's criminal system uses a treatment paradigm reliant on mandated treatment for defendants with mental disabilities, defense attorneys must then confront a lawyering quandary. It does so by exploring the challenges client-centered lawyers face in representing clients with mental health conditions categorized as personality "disorders," who are likely to struggle completing mandated treatment programs, in turn complicating their path for lowering imprisonment exposure and accessing care. Through a discussion of the obstacles lawyers face on behalf of clients with personality conditions, this Article illuminates deeper systemic failures in how the criminal system handles mental health issues.

INTRODUCTION 1656
I. UNDERSTANDING PERSONALITY CONDITIONS IN THE CRIMINAL SYSTEM 1664
A. *Understanding Personality Conditions* 1665
B. *Personality Conditions in the Criminal System* 1666
C. *Challenges People with Personality Conditions Face in the Criminal System* 1669
II. THE TREATMENT PARADIGM AND PERSONALITY CONDITIONS 1672
A. *Personality Conditions and Treatment in the Criminal System* 1673
B. *Mandated Treatment for People with Personality Conditions* ..1679

* © 2024 Marisol Orihuela.

** Clinical Professor of Law, Yale Law School. I am deeply grateful to the many readers of earlier drafts—your feedback was invaluable. Many thanks to participants at CrimFest 2023, Decarceration Workshop 2023, and GO LILA 2024, and to the editors of the *North Carolina Law Review* for their careful editing. Thank you to Ryanne Bamieh and Yixuan Liu for excellent research assistance. A special heartfelt thank you to Mark Roland for the endless hours of support.

III. THE LAWYER'S QUANDARY 1682
A. *Client-Centered Lawyering and Legal Ethics in Criminal Defense* 1684
B. *The Lawyering Quandary in the Treatment Paradigm* 1687
1. The Conundrum of Counseling Defendants with Personality Conditions 1688
2. The Double-Edged Sword of Expertise.................... 1693
3 The Challenge of Client Autonomy......................... 1698
IV. DEVELOPMENTS IN INDIGENT DEFENSE: EASING THE LAWYERING QUANDARY? 1703
A. *Multidisciplinary Defense* 1704
B. *Declining Treatment as the Client's Interest* 1708
C. *Client-Centered Lawyering and Disturbing the Treatment Paradigm* 1711
CONCLUSION 1713

INTRODUCTION

Criminal system actors, scholars, and policymakers all lament the astounding overrepresentation and revolving door of people with mental health conditions[1] in American prisons.[2] In response, courts, prosecutors, or probation officers often require defendants to participate in "treatment," meaning psychotherapy programs provided through contractors. "Treatment" in the criminal system often connotes specialized courts, like drug or mental health court, but it arises in virtually all aspects of the criminal process, from pretrial supervision to diversionary programs, as part of plea agreements, or imposed

1. In this Article, I use people-first language, as opposed to identity-first language. For a summary of the principles behind people-first and identity-first language, see Ray Perry, *Person-First vs. Identity-First Language*, ACCESSATE (July 6, 2021, 10:25 AM), https://accessate.net/features/2519/person-first-vs-identity-first-language [https://perma.cc/4TTQ-BQNN]. *See also* Erin E. Andrews, Robyn M. Powell & Kara Ayers, *The Evolution of Disability Language: Choosing Terms to Describe Disability*, DISABILITY & HEALTH J., July 2022, at 1, 1.

2. COUNCIL OF STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 3–4 (June 2002), https://www.ojp.gov/pdffiles1/nij/grants/197103.pdf [https://perma.cc/9FRV-UYEY] (describing the "revolving door" of imprisonment that people with mental health conditions experience in the criminal system); *Callous and Cruel, Use of Force Against Inmates with Mental Disabilities in US Jails and Prisons*, HUM. RTS. WATCH (May 12, 2015), https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and [https://perma.cc/T934-ZN2M] (reporting statistics and concluding that "[j]ails and prisons in the United States are *de facto* mental health facilities"). A survey of incarcerated people reported that 43% of people in state prisons and 23% of people in federal prisons have a mental health condition. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIE ALPER, BUREAU JUST. STATS., NCJ 252643, SURVEY OF PRISON INMATES, 2016: INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/imhprpspi16st.pdf [https://perma.cc/D5SP-G45L].

after prison sentences through probation, parole, or other community supervision programs. I call this the "treatment paradigm."[3]

The treatment paradigm initially appears wise and humane—a rehabilitative alternative to incarceration for people with mental disabilities. A closer look, however, reveals that the paradigm introduces innovative pathways toward intensified punishment.[4] This is especially, although not uniquely, true for defendants who have mental disabilities categorized as "personality disorders," providing a helpful context to examine how the treatment paradigm functions more broadly. A staggering number of individuals in the criminal system meet the American Psychiatric Association's diagnostic criteria for personality conditions or "disorders," conditions marked by "long-standing, maladaptive patterns of experience and conduct that compromises the functioning of a person across time, relationships, and environments."[5] The treatability of personality conditions is established for borderline personality

3. This Article introduces the term "treatment paradigm" to encapsulate the pervasive use of mandated psychotherapy and medication on people with mental disabilities in the criminal system. Other scholars have discussed this topic using other related language. *See, e.g.*, FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 37–77 (2016) (critiquing the rise of "therapeutic policing" in response to mental disability and substance use); Fanna Gamal, *The Miseducation of Carceral Reform*, 69 UCLA L. REV. 928, 941–42 (2022) (describing carceral reform that "positions the carceral state to provide a plethora of state welfare services including drug treatment, healthcare, and education"). Most often, legal scholars critiquing the use of psychotherapy in the criminal legal system focus on its role in specialized courts. *See, e.g.*, Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1577–81 (2021) [hereinafter Collins, *The Problem*] (critiquing problem-solving courts as lacking in evidence supporting their efficacy); Jessica Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 597–98 (2016) (critiquing specialized courts that mandate psychotherapy for people with substance use disorder). More recently, Professor Evelyn Malavé has linked specialty courts to plea-based psychotherapy programs, using the term "treatment program complex." Evelyn Lia Malavé, *Distorted Narratives in the Treatment Program Complex*, 93 FORDHAM L. REV. (forthcoming 2024) (manuscript at 5–8) (on file with the North Carolina Law Review). This Article argues that the dynamics others have explored in specialized courts pervade the entire criminal system.

4. The treatment paradigm also fits within the broader concept of "carceral humanism," which activist James Kilgore describes as the move in carceral reform to "recast[] the jailers as caring social service providers." James Kilgore, *Repackaging Mass Incarceration*, COUNTERPUNCH (June 6, 2014), https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration/ [https://perma.cc/G4E8-DDCD]; *see also* Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 645 (2019) (describing carceral humanism as "the repackaging or rebranding of corrections and correctional programming as caring and supportive, while still clinging to punitive culture"); Jamelia Morgan, *Contesting the Carceral State with Disability Frames: Challenges and Possibilities*, 170 U. PA. L. REV. 1905, 1923 (2022) (describing forms of carceral humanism as increased incarceration to reduce overcrowding or providing psychopharmaceuticals).

5. Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745, 746 (2010). The diagnostic manual for the American Psychiatric Association defines a "personality disorder" as an "enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645 (5th ed. 2013) [hereinafter DSM-5].

disorder ("BPD") and otherwise has started to be explored and recognized, but effective treatment programs for personality conditions are not available in the criminal system.[6] Still, defendants with such conditions regularly face mandated treatment.[7] The impairments that defendants with personality conditions have (e.g., impulsivity, difficulties with self-regulation, emotion lability) can render it difficult to complete mandated treatment programs, and when defendants do not complete the required treatment program, they face re-incarceration. In these cases, the treatment paradigm fails to stop imprisonment's revolving door.

Enter the criminal defense attorney, the criminal system's vindicator of defendants' rights, ensuring defendants are adequately and properly advised through the process. For that attorney, the treatment paradigm is a quandary. The treatment paradigm offers their clients treatment for a lower *initial* term of incarceration, but it poses a serious risk of *future* imprisonment for people with personality conditions. The defense attorney wants to lower her client's custodial exposure, and if her client succeeds at treatment, the risks would be worth it. But if her client fails to complete the treatment program's requirements, her client could face more time imprisoned than if she had initially turned down treatment. The attorney feels stuck in her counseling role. She wants to know more about her client so as to better advise her, but she fears that prosecutors and judges may ask about her client's mental health and potentially use that information against her client. Further, in cases involving clients with personality conditions, the defense attorney's goal of empowering her client is complicated by how her client's impairment affects decision-making. As the protector of rights that help to guarantee fairness in the criminal system, defense attorneys are struggling to provide a client-centered defense to this group of defendants.[8]

A hypothetical case helps to illustrate the defense attorney's quandary. Ms. Boughton is charged with a felony for sales of narcotics. The plea offer would result in a prison sentence that would lead to release from imprisonment in six months, with community supervision to follow. That community supervision term would require mental health treatment, based on a police report indicating erratic and defiant behavior by Ms. Boughton at the time of arrest. Turning down the plea would likely result in a one-year prison term. Ms. Boughton's attorney is aware that she has a diagnosis of BPD, meaning that

6. *See infra* Section II.A.

7. *See infra* Section II.B.

8. This Article focuses on personality conditions because of the prevalence of personality condition diagnoses in the criminal system and because those conditions crystalize the risks the treatment paradigm poses. However, the lawyering challenges and ethical tensions explored herein are far from unique to this context. They can be present for clients with other mental health conditions, such as substance use disorder, and even outside the criminal defense context where mandated treatment is involved. *See infra* notes 135–38 and accompanying text.

her decision-making may be impaired.[9] The treatment offered through the community supervision program would consist of weekly group therapy and could include, at the discretion of the supervising officer, individual therapy.

Ms. Boughton's attorney is worried. He wants Ms. Boughton to get help for BPD, and participating in treatment would offer Ms. Boughton the chance to spend six months as opposed to one year incarcerated. But her attorney knows that if Ms. Boughton does not complete the group therapy program, she will have her community supervision program revoked and could spend *more* than one year in prison. He also fears sharing Ms. Boughton's diagnosis with the prosecutor to highlight the difficulty she may have in completing the treatment program, as that may lead the prosecutor to revoke the plea offer. Fundamentally, this defense attorney seeks to help Ms. Boughton assess what outcome is most likely were she to take the path of treatment. Will she be able to complete the program, potentially gain a benefit for herself, and thereby obtain the lowest ultimate term of incarceration? Or will she give up or get kicked out of the treatment program, only to face additional incarceration as compared to what she originally could have obtained? Will Ms. Boughton's condition affect her decision-making abilities?[10] When Ms. Boughton asks him what she should do, Ms. Boughton's attorney feels stuck between the options, and uncertain as to how to respond to his client.[11]

By examining the particular challenges people with personality conditions face in navigating the criminal process and by connecting those challenges to shortcomings of the criminal system, this Article makes four scholarly contributions, two specifically about personality conditions and two about the criminal system more broadly. First, while others have broached the subject of personality conditions in the criminal system, largely with regard to narrower questions about competency, insanity, or death penalty sentencing, this Article is the first to examine how personality conditions impact the ethical universe of everyday criminal defense and to urge a broader critique of the treatment "revolution" in decarceration efforts. Second, this Article draws attention to a group of defendants that receive insufficient attention in the policymaking world, despite research estimating that many, if not most, of the individuals involved in the criminal system have a personality condition.[12] It illuminates

9. *See, e.g.*, Beate Schuermann, Norbert Kathmann, Christian Stiglmayr, Babette Renneberg & Tanja Endrass, *Impaired Decision Making and Feedback Evaluation in Borderline Personality Disorder*, 41 PSYCH. MED. 1917, 1923 (2011).

10. *See* discussion *infra* Section III.B.3.

11. The plea negotiation stage of the criminal process is but one of numerous inflection points where defense attorneys navigate the complexities of representing individuals with personality conditions. Ms. Boughton's attorney would face similar challenges in advising his client regarding conditions of release pending trial, potential mitigation arguments at sentencing, or in traversing community supervision programs.

12. *See infra* notes 48–67 and accompanying text.

the need to focus on this population to meaningfully address the constant incarceration of people with mental disabilities and mass incarceration more broadly. Third, this Article furthers growing scholarship exposing limitations of the criminal system in providing fairness and justice in adjudication. Since the legal system relies on defense counsel to protect defendants' interests and uphold the system's aims, examining the role of the criminal defense attorney in the treatment paradigm sheds light on the ways the criminal system is—or is not—working toward its aims. Finally, this Article deepens the scholarly discussion on client-centered lawyering and legal ethics for people with mental disabilities in the criminal system. That scholarship has almost exclusively focused on competency and insanity cases, when the vast majority of defendants with mental disabilities do not face those proceedings.[13] Through its discussion of client-centered lawyering in the treatment paradigm, this Article exposes the impossible task placed on defense attorneys and how the system fails people with mental disabilities.

I focus on criminal defense attorneys because they stand in for the interests of someone accused of a crime, purportedly guarantee defendants' rights, and, as a result, help legitimize the criminal process.[14] My focus on defenders is not meant to downplay the importance of other legal actors, including judges, prosecutors, and probation and parole officers. The goal here is to not only reveal the manner in which the system fails people with mental disabilities, but also to validate the struggles defense lawyers have and to empower those who may enter a career in criminal defense and turn to legal scholarship as a source for guidance and motivation.[15] The challenges defense attorneys face in representing clients with personality conditions should not be viewed as unique to these conditions or the criminal system. The insights from the exploration

13. Insanity and other civil commitment proceedings constitute only a very small portion of the cases of people who are involved in the criminal system. Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 221 n.189 (2000) (noting that insanity proceedings represent 1% of all criminal adjudications); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/Q2TR-LBFX] (finding that out of the 1.9 million people who are imprisoned nationwide, civil commitment accounts for 22,000 whereas murder accounts for approximately 142,000 individuals).

14. This focus on defense attorneys is in sync with recent sociolegal scholarship that highlights the complex and sometimes disempowering roles defense attorneys play vis-à-vis defendants in the criminal legal process, even though they may not hold the most obvious forms of power in the process. *See generally* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020) (discussing the defense attorney-client relationship in Boston criminal courts); NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (discussing the defense attorney-client relationship in Chicago criminal courts).

15. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239 *passim* (1993).

that follows apply more broadly to how the criminal system treats mental disability and to other legal settings with similar dynamics, such as the family regulation system.[16]

As a preliminary matter, and for two reasons, I begin with a discussion of the language choices made in this Article. First, although disability advocates have long and forcefully expressed the importance of language,[17] there is no consensus about preferred language within disability activist communities.[18] Additionally, the client-centered model of lawyering seeks to empower clients. Consistent with that model of lawyering, and locating myself as scholar-practitioner, this Article chooses language with the aim to resist stigmatization of disabilities. Second, legal and clinical terms pertaining to mental disability are mutually constitutive,[19] reflecting the powerful exclusive dynamics operating in language and further supporting advocates' call for intentionality in language use. So, for these reasons, I will briefly distinguish between the terms used in different settings and in the literature.

The term "mental disorders" is a direct reference to the term used in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), the manual used by psychiatrists and other mental health professionals to diagnose conditions like anxiety, psychosis, and BPD, among others.[20] In criminal proceedings, diagnoses under the DSM-5 are regularly made and relied upon for legal determinations of competency and insanity, in addition to being used

16. *See* Stephanie Newberg, *Understanding How Your Client's Personality Disorder Affects Your Case*, 45 FAM. ADVOC. 10, 10 (2023) (providing summary descriptions of personality disorders for family law attorneys who may encounter clients involved in family proceedings at least in part "because they have personality disorders"). *See generally* DOROTHY ROBERTS, TORN APART (2022) (arguing that state agencies fail to address the mental health needs of children in the foster care system).

17. Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1200–01 (2020) ("As the A[mericans with Disabilities Act] increased access to society for people with disabilities, disability advocates were still pushing for more inclusive and less stigmatizing language to talk about disability throughout society and the law."); *see also* Shruti Rajkumar, *How To Talk About Disability Sensitively and Avoid Ableist Tropes*, NPR (Aug. 8, 2022, 6:00 AM), https://www.npr.org/2022/08/08/1115682836/how-to-talk-about-disability-sensitively-and-avoid-ableist-tropes [https://perma.cc/P99L-U2BY] (noting multiple guides on ableist language and quoting the founder of the Disabled Journalists Association, Cara Reedy: "Ableist language is so intertwined with our culture we don't even realize we're using it.").

18. *See generally* Andrews et al., *supra* note 1 (explaining the multiple approaches to preferred language within disability activists).

19. For example, the term "mental illness" or "disease" at times excludes certain types of mental health conditions, such as antisocial personality disorder ("ASPD"). *See infra* notes 23–26 and accompanying text. Further, even within legal systems, the term "mental disability" varies in its definition and significance. Michael L. Perlin & Mehgan Gallagher, *"Temptation's Page Flies out the Door": Navigating Complex Systems of Disability and the Law from a Therapeutic Jurisprudence Perspective*, 25 BUFF. HUM. RTS. L. REV. 1, 2 (2018–2019) (describing the variance in different legal systems as to what constitutes a mental disability and noting the concept of mental disabilities is underexplored in the criminal legal system).

20. DSM-5, *supra* note 5, at 89, 189, 645.

by advocates for purposes such as arguing for, or against, eligibility for diversionary programs and mitigation at sentencing,[21] among others.

"People with mental illness" is a widely used term to describe people with mental disabilities.[22] However, although policymakers and advocates tend to use the term "mental illness" to signify mental health conditions,[23] I opt not to use that term here. The mental health fields lack consensus on what the term "mental illness" includes, and at times social scientists use "mental illness" to exclude people with personality conditions.[24] The law tracks this debate.[25] The law excludes some or all personality disorders from legal definitions of "mental illness" in criminal law. This has at times resulted from courts relying on psychological and psychiatric evidence that a personality condition is not a "mental illness."[26] Other times such exclusion flows from the law intentionally carving out personality conditions from the legal definition of "mental illness" or related terms.[27] Such definitional interpretations have considerable legal ramifications.[28]

I use the term "people with mental disabilities" rather than "people with mental illness" and the term "conditions" rather than "disorders." Because this Article discusses sources that predominantly use a psychiatric model to categorize people, I will use similar terminology when engaging with those sources. I use the term "people with mental disabilities" not only to connect

21. *See infra* Section II.A.

22. The Department of Health and Human Services and the National Institute of Mental Health both define "mental illness" as "collectively [] all diagnosable mental disorders." SETH JACOB PRINS & LAURA DRAPER, IMPROVING OUTCOMES FOR PEOPLE WITH MENTAL ILLNESSES UNDER COMMUNITY CORRECTIONS SUPERVISION: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 8 (2009). The Council of State Governments also uses this definition. COUNCIL OF STATE GOV'TS, *supra* note 2, at 19.

23. *See, e.g.*, COUNCIL OF STATE GOV'TS, *supra* note 2, at 19; David Cloud & Chelsea Davis, *Treatment Alternatives to Incarceration for People with Mental Health Needs in the Criminal Justice System: The Cost-Savings Implications*, VERA INST. (Feb. 2013), https://www.vera.org/downloads/publications/treatment-alternatives-to-incarceration.pdf [https://perma.cc/S3HM-NQF8] (referring both to people with mental illness and people with mental health needs interchangeably).

24. *See, e.g.*, Christopher Slobogin, *Mental Illness and the Death Penalty* 3–4 (John M. Olin Found., Working Paper No. 00-4, 2000) (differentiating between psychoses and personality conditions and arguing the former should categorically not be subject to the death penalty under existing constitutional law); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCH. PUB. POL'Y & L. 534, 534 (1995) [hereinafter Winick, *Ambiguities*]; R.E. Kendell, *The Distinction Between Personality Disorder and Mental Illness*, 180 BRIT. J. PSYCHIATRY 110, 110 (2002).

25. Winick, *Ambiguities*, *supra* note 24, at 534 (arguing that the legal meaning of "mental illness" and what it should constitute for purposes of forcible medication, civil commitment, and criminal culpability "rarely have been addressed by the courts").

26. *See infra* Section II.A (discussing Foucha v. Louisiana, 504 U.S. 71 (1992)).

27. *See infra* note 89 and accompanying text.

28. *See* Keramet Reiter & Thomas Blair, *Superlative Subjects, Institutional Futility, and the Limits of Punishment*, 23 BERKELEY J. CRIM. L. 162, 175 (2018).

impairment to social disadvantage,[29] but also to reject a normative presumption that people who have mental impairments are disordered.[30] When referring specifically to diagnoses under the DSM-5, I use the term "mental health condition" as an alternative to "mental disorders," but use the term "disorder" when referring to a specific diagnosable condition, like paranoid personality disorder ("PPD").

This Article argues that the treatment paradigm puts criminal defense lawyers in a bind when representing clients with personality conditions, preventing meaningful client-centered defense and raising ethical challenges. It proceeds in four parts. Part I of the Article introduces personality conditions in the criminal system. Part II explains the treatment paradigm in the context of punishment. It focuses on defendants with personality conditions, who regularly face required treatment despite the inefficacy of that treatment in the criminal system. Part III argues that the treatment paradigm in punishment leaves criminal defense attorneys in a seemingly inevitable quandary. Applying the client-centered lawyering model, Part III discusses how defense attorneys seek to limit their clients' custodial exposure, but in doing so under the treatment paradigm, their efforts can backfire—thereby exposing their clients to more time in custody and under carceral surveillance than they otherwise might have experienced. Part IV engages with two recent developments in criminal defense—multidisciplinary defense and a broadening conception of a client's interests—highlighting both where these developments might ease ethical tensions for lawyers and the limitations of the reforms for ensuring a fair proceeding for defendants with personality conditions. The Article concludes by situating the specific discussion of defendants with personality conditions within broader critiques of how the criminal system treats people with mental disabilities, using personality conditions as a window through which to view shortcomings of the criminal system.

29. I use disability here to signal how mental impairments as a result of societal decisions face disadvantage. Arlene S. Kanter, *The Law: What's Disability Studies Got To Do with It* or *an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 433 (2011) (describing the social model of disability); Ziegler, *supra* note 17, at 1183 (arguing for lawyers to utilize a "social model of disability that reframe[s] disability as a condition created by physical and cultural barriers to inclusion rather than as an individual impairment"). In light of this discussion centering people with mental disabilities, I note that the social model of disability is not without critique and recent disability scholarship advocates the use of a bio-psycho-social model of disability. *See* Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1795 (2022) (describing evolution of the social model of disability and noting that the social model did not "account for the needs of people with mental and developmental disabilities").

30. *See* Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 976 (2019) (arguing that the dominant view in the criminal legal system that mental disability *is* a *problem*, to be fixed, itself reinforces ableism in the legal system). This is not to deny the negative impact impairment can have on an individual's life, but to reject a view that individuals are to blame for the impairment.

I. UNDERSTANDING PERSONALITY CONDITIONS IN THE CRIMINAL SYSTEM

People with mental disabilities are extraordinarily overrepresented in the criminal system.[31] In this Article, I use personality conditions as one way to explore the effect of the treatment paradigm on defendants with mental disabilities but focus on these specific conditions for several reasons. First, the estimates of how many people in the system have a personality condition are too high to ignore.[32] Thus, if we take seriously concerns about the overrepresentation of people with mental disabilities in jails and prisons, we must pay attention to the experience of people with personality conditions in the criminal system. Second, the literature on mental disability in the criminal system sometimes treats personality conditions as a less-disabling category of mental health,[33] owing in part to the fact that they tend not to produce incompetency or insanity determinations.[34] However, this approach overlooks developments in social science research detailing the significant impairments associated with these conditions,[35] challenging the status quo treatment of personality conditions in the criminal system. Third, as discussed in greater depth in Part III, personality conditions pose particular challenges for the defense bar, and consequently for criminal system stakeholders more broadly, meriting specific attention.[36] This part provides an overview of how mental health professionals, meaning psychiatrists and psychologists, define and categorize personality conditions. Additionally, it gives background on the

---

31. *See supra* note 2 and accompanying text.

32. *See infra* notes 49–57 and accompanying text.

33. Rachel Tollefsrud, *Saving the Insanity Defense: Insight into Personality Disorders and the Necessary Elements of the Test*, 48 MITCHELL HAMLINE L. REV. 372, 389–90 (2022) (arguing that "[f]or purposes of the insanity defense, personality disorders do not, and should not, qualify as severe mental illness" because "[a] person with a personality disorder is able to differentiate right from wrong; no mental deficit is making them lose touch with reality, but they may behave in ways society deems unacceptable anyway"); Jill O. Radwin, *The Multiple Personality Disorder: Has This Trendy Alibi Lost Its Way?*, 15 LAW & PSYCH. REV. 351, 353 (1991) (referring to multiple personality disorder defenses to criminal responsibility as "excuses" and describing "the doubts both the psychological and legal communities have over whether the defendant is legitimately suffering from this disorder or whether he is merely trying to escape a conviction"); Ricarda Münch, Henrik Walter & Sabine Müller, *Should Behavior Harmful to Others Be a Sufficient Criterion of Mental Disorders? Conceptual Problems of the Diagnoses of Antisocial Personality Disorder and Pedophilic Disorder*, FRONTIERS PSYCHIATRY, Sept. 15, 2020, at 1, 13 (arguing that antisocial personality disorder should be eliminated as a diagnosis from the DSM-5); Richard J. Bonnie, *Should a Personality Disorder Qualify as a Mental Disease in Insanity Adjudication?*, 38 J.L. MED. & ETHICS 760, 762–63 (2010) (arguing that personality disorders should be restricted as bases for an insanity defense because, since they do not uniformly cause "gross disturbances of a person's capacity to understand reality," those afflicted by them may still retain their ability to conform their conduct to the law). *But see* Kinscherff, *supra* note 5, at 746.

34. *See, e.g.*, Sheila E. Shea & Robert Goldman, *Ending Disparities and Achieving Justice for Individuals with Mental Disabilities*, 80 ALB. L. REV. 1037, 1041 (2016).

35. *See infra* Section I.C.

36. *See infra* Section III.B.

prevalence of these mental health conditions in the criminal system. After doing so, this part lays out two challenges defendants with personality conditions confront in the criminal system: (1) how their impairments impact their ability to succeed in the treatment paradigm and (2) how personality conditions are treated for purposes of punishment.

A. *Understanding Personality Conditions*

The DSM-5 lists ten personality conditions.[37] They are: paranoid, schizoid, schizotypal, antisocial, borderline, histrionic, narcissistic, avoidant, dependent and obsessive-compulsive personality disorders.[38] The DSM-5 defines personality conditions as an "enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to clinically significant distress or impairment."[39] In addition, the enduring pattern cannot be better attributed to another mental health condition, medical condition (e.g., head trauma), or physiological effects of a substance.[40] A personality condition arises in adolescence or early adulthood, and is diagnosed in adulthood.[41]

Within the DSM-5, personality conditions are categorized into three clusters. Cluster A, which is marked by symptoms of eccentricity, is made up of paranoid, schizoid, and schizotypal personality disorders.[42] Cluster B encompasses antisocial, borderline, histrionic, and narcissistic personality disorders. This cluster is grouped together by symptoms of impulsivity, unpredictability, and emotionality.[43] Cluster C, consisting of avoidant, dependent, and obsessive-compulsive personality disorders, are characterized by anxiety.[44] Cluster B conditions, particularly borderline personality disorder and antisocial personality disorder, are the ones most commonly identified in the criminal system.[45]

A complete explication of the diagnoses of personality conditions is beyond the scope of this Article; however, it is important to note that one of the core challenges personality conditions raise in the criminal system is an issue

37. I use a diagnostic framework to define personality conditions but recognize the need to move away from a strict diagnostic framework in discussing disability. *See* Viviana Bonilla López, *Beyond Medical Legal Partnerships: Addressing Recovery-Harming Social Conditions Through Clubhouse-Legal Partnerships*, 43 N.Y.U. REV. L. & SOC. CHANGE 429, 453 (2019); Dorfman, *supra* note 29, at 1809.

38. DSM-5, *supra* note 5, at 645.

39. *Id.*

40. *Id.* at 646.

41. *Id.*

42. Lindsay Sheehan, Katherine Nieweglowski & Patrick Corrigan, *The Stigma of Personality Disorders*, CURRENT PSYCHIATRY REPS., Jan. 16, 2016, at 1, 1.

43. *Id.*

44. *Id.*

45. *Id.* at 1, 2.

regarding the diagnosis and treatment of personality conditions generally: they can be troublesome to identify and diagnose. It can be difficult for a medical professional to account for whether a certain personality trait merely tracks normal variations in personality or rises to the level of a personality condition diagnosis.[46] The politics of diagnosis are complex and even controversial, with concerns about stigma (through diagnosis) running alongside concerns about disempowerment and erasure (through non-diagnosis).[47]

B. *Personality Conditions in the Criminal System*

The number of people involved in the criminal system who meet criteria for personality conditions is staggering,[48] even when taking into consideration the overrepresentation of people with mental disabilities in the system. A cross-national review found that incarcerated people meet criteria for antisocial personality disorder ("ASPD") at a rate of 47%, with other studies placing

46. *See* Gordon Cochrane, *The DSM-V and the Law: When Hard Science Meets Soft Science in Psychology*, N.Y. ST. BAR ASS'N J., June 2013, at 20, 20 (attributing the changes to categorization of personality conditions in the DSM-5 to "an experiential recognition that severity differs from individual to individual, that normality and pathology reside on a continuum where one slowly fades into the other, making assessment, diagnosis or a reliable prognosis quite difficult"). For a non-clinical perspective of this blurry line, see Maria Kantzavelos, *Handling Confrontational Clients*, 100 ILL. BAR J. 636, 638 (2012), which describes "high conflict personality" clients as potentially meeting criteria for a personality condition or not "even diagnosable." Robert Kinscherff has similarly critiqued the diagnostic criteria of personality conditions, arguing that they lack reliability in distinguishing personality conditions from other mental health conditions. *See* Kinscherff, *supra* note 5, at 749.

47. *See, e.g.*, Rose Papadopoullos, Paul Fisher, Adrian Leddy, Sarah Maxwell & Jo Hodgekins, *Diagnosis and Dilemma: Clinician Experiences of the Use of 'Borderline Personality Disorder' Diagnosis in Children and Adolescents*, 16 PERSONALITY & MENTAL HEALTH 300, 301–03 (2022); Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 804–05 (2010); *cf.* Karen McKenzie, James Gregory & Lorna Hogg, *Mental Health Workers' Attitudes Towards Individuals With a Diagnosis of Borderline Personality Disorder: A Systematic Literature Review*, 36 J. PERSONALITY DISORDERS 70 (2022) (describing stigmatization by mental health officials of people with formal borderline personality disorder diagnoses).

48. This section merits two caveats. First, it relies on statistical evidence to demonstrate the importance of exploring the experience of defendants with personality conditions in the criminal system. Nevertheless, I note that statistical evidence has its shortcomings and should be used with caution. *See, e.g.*, Jay S. Kaufman, *Statistics, Adjusted Statistics, and Maladjusted Statistics*, 43 AM. J.L. & MED. 193, 207 (2017) (pointing out that statistical models "inevitably describe imaginary circumstances" and that how researchers arrive at particular statistical models involves various assumptions and "is often a question of ethics and power, just as it is in so much of statistics and science"). Second, this section does not fully explore critiques of the "increasing psychiatrization of both socially 'deviant' behavior and incarcerated populations, as well as the psychic trauma associated with incarceration," which deserve further attention and discussion. Michael Rembis, *The New Asylums: Madness and Mass Incarceration in the Neoliberal Era*, *in* DISABILITY INCARCERATED 139, 139 (Liat Ben-Moshe, Chris Chapman & Allison G. Carey eds., 2014) (discussing the importance of including disability studies in the history of mass incarceration).

estimates even higher,[49] making it the most prevalent diagnosis outside substance use disorder for criminal-system-involved individuals.[50] By comparison, the estimated rates of the condition in the community range from 1% to 5%.[51] BPD is estimated in almost one-third of the incarcerated population,[52] as compared to 1% to 6% in the community.[53] The rates for these conditions are much higher than estimates of bipolar disorder, schizophrenia, and major depression in the criminal justice system, which is estimated at 6.4%.[54]

Over half of people diagnosed with personality conditions have another co-occurring mental health condition.[55] The most common condition affecting

49. Jason Schnittker, Savannah H. Larimore & Hedwig Lee, *Neither Mad nor Bad? The Classification of Antisocial Personality Disorder Among Formerly Incarcerated Adults*, SOC. SCI. MED. J., Aug. 17, 2020, at 1, 1. Studies of the prevalence of personality disorders in prison have produced a wide variety of results due to differing methods of assessment. Philip M.J. Brinded, Roger T. Mulder, Isobel Stevens, Nigel Fairley & Fiona Malcolm, *The Christchurch Prisons Psychiatric Epidemiology Study: Personality Disorders Assessment in a Prison Population*, 9 CRIM. BEHAV. & MENTAL HEALTH 144, 147–48 (1999) (reporting that studies have placed estimates of the prevalence of personality disorders in prison as low as 10% and as high as 78%, with several estimates in between).

50. *See* Roger H. Peters, M. Scott Young, Elizabeth C. Rojas & Claire M. Gorey, *Evidence-Based Treatment and Supervision Practices for Co-Occurring Mental and Substance Use Disorders in the Criminal Justice System*, 43 AM. J. DRUG & ALCOHOL ABUSE 475, 475–76 (2017); Jack Vognsen & Amy Phenix, *Antisocial Personality Disorder Is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick*, 32 J. AM. ACAD. PSYCHIATRY & L. 440, 442 (2004) (noting that 50% to 70% of the prison population has ASPD); Adrian P. Mundt & Gergő Baranyi, *The Unhappy Mental Health Triad: Comorbid Severe Mental Illnesses, Personality Disorders, and Substance Use Disorders in Prison Populations*, 11 FRONTIERS PSYCHIATRY 1, 2 (2020).

51. Kimberly B. Werner, Laren R. Few & Kathleen K. Bucholz, *Epidemiology, Comorbidity, and Behavioral Genetics of Antisocial Personality Disorder and Psychopathy*, 45 PSYCHIATRIC ANN. 195, 196 (2015) (placing estimate of ASPD in the community between 1% and 4%); Schnittker et al., *supra* note 49, at 1 (estimating rate of ASPD in the community between 3% and 5%).

52. Kelly E. Moore, Robyn L. Gobin, Heather L. McCauley, Chien Wen Kao, Stephanie M. Anthony, Sherly Kubiak, Caron Zlotnick & Jennifer E. Johnson, *The Relation of Borderline Personality Disorder to Aggression, Victimization, and Institutional Misconduct Among Prisoners*, 84 COMPREHENSIVE PSYCHIATRY 15, 15 (2018). One study concluded that 12% to 30% of imprisoned individuals have BPD whereas only about 1% to 2% of individuals in the community have BPD. Courtney Conn, Rebecca Warden, Jeffrey Stuewig, Elysha H. Kim, Laura Harty, Mark Hastings & June P. Tangney, *Borderline Personality Disorder Among Jail Inmates: How Common and How Distinct?*, 35 CORR. COMPENDIUM 6, 6 (2010). One estimate places the rate of BPD in the incarcerated population at 25% to 50%. Randy A. Sansone & Lori A. Sansone, *Borderline Personality and Criminality*, 6 PSYCHIATRY (EDGMONT) 16, 17 (2009).

53. Conn et al., *supra* note 52, at 1 (placing estimate of BPD at 1% to 2%); William D. Ellison, Lia K. Rosenstein, Theresa A. Morgan & Mark Zimmerman, *Community and Clinical Epidemiology of Borderline Personality Disorder*, 41 PSYCHIATRY CLINICS N. AM. 561, 561 (2018) (estimating rate at roughly 1%); Moore et al., *supra* note 52, at 15 (placing estimate between 2.7% and 5.9%).

54. Jennifer L. Skeem, Sarah Manchak & Jillian K. Peterson, *Correctional Policy for Offenders with Mental Illness: Creating A New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 110 (2011).

55. Sheehan et al., *supra* note 42, at 11; Mark F. Lenzenweger, Michael C. Lane, Armand W. Loranger & Ronald C. Kessler, *DSM-IV Personality Disorders in the National Comorbidity Survey Replication*, 62 BIOLOGICAL PSYCHIATRY 553, 557 (2007).

people in the criminal system is substance use disorder ("SUD"), with estimates reaching as high as 70% to 86%.[56] Studies suggest that the prevalence of a co-occurring mental health condition and a SUD is between 24% and 34% for the female population and 12% and 15% for the male population.[57] A particularly high correlation exists between ASPD diagnoses and substance use disorder within these populations.[58]

A particular note of caution about the extraordinarily high rate of ASPD in the criminal system is merited, as the diagnostic criteria risks overpathologizing behavior[59] and could have unjustified racialized effects.[60] Critics have questioned whether the diagnostic criteria for ASPD reflect an independent medical or mental health assessment.[61] To wit: diagnostic criteria for ASPD includes "performing acts that are grounds for arrest."[62] Because contact with the criminal system through an arrest does not necessarily indicate a violation of law, questions arise as to whether that criterion is a valuable and

56. Peters et al., *supra* note 50, at 475–76. Other estimates indicate approximately half of the imprisoned population meets criteria for substance use dependency. Steven Belenko, Matthew Hiller & Leah Hamilton, *Treating Substance Use Disorders in the Criminal Justice System*, 15 CURRENT PSYCHIATRY REPS. 414, 414 (2013).

57. Peters et al., *supra* note 50, at 476. In addition, people can often meet criteria for multiple personality disorders. Ronald Blackburn, *Personality Disorder and Psychopathy: Conceptual and Empirical Integration*, 13 PSYCH. CRIME & L. 7, 14 (2007).

58. In samples of people engaging in substance use treatment, studies find a rate of personality conditions at approximately 35% to 73%. R. Verheul, *Co-Morbidity of Personality Disorders in Individuals with Substance Use Disorders*, 16 EUR. PSYCHIATRY 274, 275 (2001). One study found that almost half of people with substance use disorder had a personality condition, the two most common of which were ASPD, at 16%, and BPD, at 13%. Anne-Marit Langas, Ulrik Fredrik Malt & Stin Opjordsmoen, *In-Depth Study of Personality Disorders in First-Admission Patients with Substance Use Disorders*, 12 BMC PSYCHIATRY 180, 180 (2012).

59. *See, e.g.*, Marie-Josephine Clare Ziemann, *Misdiagnosis of Borderline Personality Disorder in Current and Former Foster Youth*, FOSTERING CARE (Feb. 17, 2016), https://mjziemann.wordpress.com/2016/02/17/misdiagnosis-of-borderline-personality-disorder-in-foster-youth/ [https://perma.cc/W4AN-MVWD]. For a discussion of the risks of overpathologizing in addiction research, see Joel Billieux, Adriano Schimmenti, Yasser Khazaa, Pierre Maurage & Alexandre Heeren, *Are We Overpathologizing Everyday Life? A Tenable Blueprint for Behavioral Addiction Research*, 4 J. BEHAV. ADDICTIONS 119, 119 (2015). A related but independent concern is the effect of clinician and patient bias in pathologizing ASPD. Jeremy Paul Crosby & June Sprock, *Effect of Patient Sex, Clinician Sex, and Sex Role on the Diagnosis of Antisocial Personality Disorder: Models of Underpathologizing and Overpathologizing Biases*, 60 J. CLINICAL PSYCH. 583, 583 (2004).

60. Emily R. Edwards, Gabriella Epshteyn, Caroline K. Diehl, Danny Ruiz, Brettland Coolidge, Nicole H. Weiss & Lynda Stein, *Prison or Treatment? Gender, Racial, and Ethnic Inequities in Mental Health Care Utilization and Criminal Justice History Among Incarcerated Persons with Borderline and Antisocial Personality Disorders*, 48 LAW & HUM. BEHAV. 104, 106 (2024) [hereinafter Edwards et al., *Prison or Treatment?*] (noting a "potential inherent racial and ethnic bias to the ASPD construct").

61. Schnittker et al., *supra* note 49, at 2 (noting that the application of ASPD diagnostic criteria to population involved in criminal system "highlights the difficulty of categorizing psychiatric dysfunctions in a population whose environment might produce the symptoms thought to be indicative of that dysfunction").

62. DSM-5, *supra* note 5, at 659.

reliable diagnostic criterion for a psychiatric condition.[63] Another criterion of ASPD is "repeated failure to sustain consistent work or honor financial obligations"—a circumstance which, owing to the difficulty of obtaining work when one has a criminal record, can occur by virtue of having a criminal conviction.[64] Finally, because these criteria will overrepresent communities that are subject to over-policing—e.g, Black communities in the United States—there may exist racial inequities in the diagnosing of ASPD.[65] A full exploration of the problems in the diagnosis of ASPD, or other personality conditions, is beyond the scope of this Article,[66] but I note them for context and to signal that further exploration of the subject is needed.[67]

C. *Challenges People with Personality Conditions Face in the Criminal System*

The impairments that people with personality conditions have lower the likelihood that they would complete a course of mandated treatment.[68] People with some personality disorders have difficulty forming relationships (including with therapists), engage in impulsive behavior, and are reported to frequently drop out of treatment.[69] For example, people with BPD often have unstable

63. Schnittker et al., *supra* note 49, at 2; *see also* Blackburn, *supra* note 57, at 5 ("Defining a disorder of personality in terms of social deviance confounds the dependent with the independent variable and precludes any understanding of the relationship."). It also follows that a more expansive criminal statute subjects a larger population to an ASPD diagnosis.

64. Schnittker et al., *supra* note 49, at 3.

65. *See id.*; *see also* Gabriella Argueta-Cevallos, *A Prosecutor with a Smoking Gun: Examining the Weaponization of Race, Psychopathy, and ASPD Labels in Capital Cases*, 53 COLUM. HUM. RTS. L. REV. 624, 638 (2022); Edwards et al., *Prison or Treatment?*, *supra* note 60, at 106 (describing "structural barriers and discrimination" that contribute to "inflated rates" of judicial involvement, a strong predictor of ASPD diagnosis).

66. Broader critiques to the American Psychological Association's treatment of personality conditions and mental disability exist. Some critique the categorical model used to classify personality conditions in the Diagnostic and Statistical Manual of Mental Disorders. Andrew E. Skodol, John M. Oldham, Donna S. Bender, Ingrid R. Dyck, Robert L. Stout, Leslie C. Morey, Tracie Shea, Mary C. Zanarini, Charles A. Sanislow, Carlos M. Grilo, Thomas H. McGlashan & John G. Gunderson, *Dimensional Representations of DSM-IV Personality Disorders: Relationships to Functional Impairment*, 162 AM. J. PSYCHIATRY 1919, 1919, 1924 (2005) (setting forth a dimensional model for personality conditions and critiquing the categorical model used in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition). Other critiques to the diagnostic framework of mental disability stem from the neurodiversity and Mad Pride movements, both of which challenge the concept of the abled mind. Bonilla López, *supra* note 37, at 453; Andrea Lollini, *Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective*, 51 N.Y.U. J. INT'L L. & POL. 69, 76 (2018).

67. Edwards et al., *Prison or Treatment?*, *supra* note 60, at 106 (noting an "underassessment and understudy of personality disorders").

68. *Cf.* Adi Goldiner, *Moral Accommodations: Tolerating Impairment-Related Misconduct Under the Americans with Disabilities Act*, 54 COLUM. HUM. RTS. L. REV. 171, 171–72 (2022) (discussing challenges people with BPD may have in the workplace due to "impairment-related misconduct" and advocating for "moral accommodations" under a disability rights framework).

69. Sadie F. Dingfelder, *Treatment for the 'Untreatable'*, 35 MONITOR ON PSYCH. 46, 46 (2004).

relationships and engage in self-harm behavior.[70] Individuals with ASPD may experience irritability and aggressiveness and engage in consistent patterns of lying and acting irresponsibly.[71] The diagnostic criteria for ASPD include a lack of responsibility, a "[r]eckless disregard for the safety of others," and a lack of remorse,[72] all of which may impede a person's ability to successfully comply with treatment programs. Research studies show that some personality conditions have high dropout rates for treatment.[73] Similarly, studies report that people with mental disabilities on community supervision are disproportionately likely to face re-imprisonment due to violations of parole, probation, or other supervision program.[74]

A growing body of legal scholarship—especially that informed by practice, which provides windows into unrecognized systemic flaws—is beginning to recognize that personality disorders present specific challenges for the criminal system for which current theory and practice do not account. For example, public health practitioner-scholars Donna L. Hall, Richard P. Miraglia, and Li-Wen G. Lee draw on their experience in New York to reveal how personality conditions are particularly difficult to treat within the criminal system because the criminal system lacks the fine-toothed capacity to understand these conditions.[75] This is to say that, unlike some other mental disabilities, personality conditions are not consistently treated as per se legitimate mental disabilities in the criminal system.[76] Moreover, even when they are treated as

70. Arielle Baskin-Sommers, Sonia Ruiz, Brianna Sarcos & Cortney Simmons, *Cognitive-Affective Factors Underlying Disinhibitory Disorders and Legal Implications*, 1 NATURE REVS. PSYCH. 145, 146 (2022) [hereinafter Baskin-Sommers et al., *Cognitive-Affective Factors*]; Dingfelder, *supra* note 69, at 47–48.

71. DSM-5, *supra* note 5, at 659; Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 147.

72. DSM-5, *supra* note 5, at 659.

73. Treatment dropout rates for individuals with BPD in the community range from 24% to over 50%. Sara J. Landes, Samantha A. Chalker & Katherine Anne Comtois, *Predicting Dropout in Outpatient Dialectical Behavior Therapy with Patients with Borderline Personality Disorder Receiving Psychiatric Disability*, 3 BORDERLINE PERSONALITY DISORDER & EMOTIONAL DYSREGULATION 1, 1 (2016).

74. Skeem et al., *supra* note 54, at 110; E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515, 518 (2019) (citing studies showing that individuals with mental illness are more likely to re-enter prison than individuals without mental illness); *see also, e.g.*, United States v. Gallo, 20 F.3d 7, 15 (1st Cir. 1994) (affirming revocation of probation for failing to enter inpatient psychological treatment when he received condition of probation that he submit to "proper psychiatric treatment").

75. Donna L. Hall, Richard P. Miraglia & Li-Wen G. Lee, *The Increasingly Blurred Line Between "Mad" and "Bad": Treating Personality Disorders in the Prison Setting*, 74 ALB. L. REV. 1277, 1280 (2010) (questioning whether the criminal system is equipped to deal with the complex "question of whether personality disorders are true illnesses or an extreme of normal variation" given that "[a]ll people have personality traits").

76. *See, e.g.*, David Collins, *Re-Evaluating Competence to Stand Trial*, 82 LAW & CONTEMP. PROBS. 157, 169–70 (2019) (describing "judicial confusion about the significance of personality disorders" and explaining that according to the DSM-5, "personality disorders are a form of mental

legitimate, thorny questions about punishment arise. On one hand, the defendant is suffering from a medically recognized impairment, thus suggesting mitigation under a retributive theory of punishment.[77] On the other, the defendant has exhibited traits that yield a propensity to commit additional crimes, thus suggesting aggravation under a rehabilitative theory of punishment.[78] Richard Frase describes the resulting tension between the two theories of punishment when a defendant is, as a result of his mental health condition, both "less blameworthy" and "very likely to reoffend."[79] My own view, supported by recent evidence regarding the treatability of personality conditions described below,[80] is that personality conditions should, in appropriate circumstances, mitigate criminal punishment under both retributive and rehabilitative theories of punishment. Yet courts and scholars have hotly debated these and related questions.[81]

Even as scholars are debating issues related to personality conditions and the criminal system in numerous directions, none of these works address the central problem that motivates this Article—the ethical quandary defense

disorder, but are not mental diseases"); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1044–48 (2002); Slobogin, *supra* note 24, at 3, 9, 10; Winick, *Ambiguities*, *supra* note 24, at 538–40. Often, the debate about whether personality conditions should *not* be considered mental "illnesses" arises in the context of whether the condition can negate criminal culpability. *See infra* note 89 and accompanying text.

77. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005) (detailing the various factors that under a retributive theory of punishment mitigate punishment, including when a mental health condition limits the defendant's capacity to obey the law); Kinscherff, *supra* note 5, at 746 nn. 4–5. Deterrence theory also counsels that individuals with significant mental disabilities do not perform a cost-benefit analysis to conform their own conduct based on potential or actual punishment. Beatrice R. Maidman, Book Note, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1842 (2016).

78. Frase, *supra* note 77, at 70–76; *see also* Kinscherff, *supra* note 5, at 746 nn. 4–5.

79. Frase, *supra* note 77, at 70, 73; *see also* Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 9 (2018) (describing the potential challenge of reconciling the retributive and rehabilitative purposes of punishment in the context of trauma-informed sentencing).

80. *See infra* notes 95–109 and accompanying text.

81. While scholars debate these questions, courts overwhelmingly treat personality conditions as aggravating. *See infra* Section II.A; *see also* United States v. Bailey, 438 F. App'x 467, 47071 (6th Cir. 2011) (finding that a sentence above the recommended range in the federal system was appropriate in part due to presence of ASPD which had no treatment available). *But see* State v. Knuff, 2024-Ohio-902, ¶ 356, __ N.E. 3d __ (finding that, along with other mental disabilities, ASPD was mitigating but concluding that mitigating factors were "unimpressive").

lawyers face at the intersection of the widespread prevalence of personality conditions, decarceral innovation,[82] and the adversary adjudicatory system.[83]

II. THE TREATMENT PARADIGM AND PERSONALITY CONDITIONS

Before delving into the lawyer's quandary in Part III, this part describes the relatively new and growing treatment paradigm in punishment. It argues that in the wake of the treatment boom, the criminal system now imposes mental health treatment through a one-size-fits-all approach, where criminal system stakeholders turn to mental health treatment whenever mental health conditions are present. This turn to treatment often has stated aims of helping defendants—or even decarceration.[84] However, though the approach is well-intentioned and occasionally produces positive individual-level results, it is a mismatch between what we know—that effective treatment modalities for personality conditions are currently lacking in the criminal system—and what we do—mandate mental health treatment for defendants with such conditions.

This part proceeds, first, by analyzing how courts have handled the medical and psychological literature regarding the treatability of personality conditions and argues in favor of a more nuanced view than courts currently provide. It then lays out the numerous inflection points in the criminal system where mandated treatment arises. These two concepts set up the lawyering

82. A growing number of scholars have critiqued "decarceration" efforts through approaches like diversion and technology, which subject defendants to the threat of extended punishment or longer periods of carceral supervision than might arise in a traditional sentencing arrangement. The treatment paradigm and the expanded use of carceral surveillance tools outside of formal incarceration raise numerous ethical and political concerns for scholars and practitioners who aim to reduce both the pains of criminal punishment and its prevalence. *See, e.g.*, Arnett, *supra* note 4, at 641, 642, 653; E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 524–27 (2012) [hereinafter Johnston, *Mental Health Courts*]; Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1317–21, 1325, 1329 (2023).

83. To be sure, the criminal system is not always meaningfully adjudicative. *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (providing a rich critique of managerial criminal courts in the world of misdemeanor justice, a set of processes by which criminal courts oversee and manage defendants rather than dispose of cases). Moreover, the challenges defense lawyers face are exacerbated in a context where the overwhelming majority of criminal cases are resolved through plea bargaining, where treatment is used as a risky bargaining chip. On the ways in which plea bargaining undermines a meaningful adversary adjudicatory process, see Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224 (2006). *See also* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2568 (2004); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121 (1998); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306–09 (2018).

84. *See, e.g.*, Katherine Beckett, *Diversion and/as Decarceration*, 86 LAW & CONTEMP. PROBS. 103, 112–15 (2023) (arguing that the controversial Seattle Law Enforcement Assisted Diversion (LEAD) program, which provides people who accrue low-level substance or behavioral health offenses with treatment, is a valuable tool for decarceration).

quandary: where criminal defense attorneys must advise their clients with personality conditions while navigating the treatment paradigm.

A. *Personality Conditions and Treatment in the Criminal System*

How should we understand the relationship between personality conditions and mental health treatment[85] in the criminal system? This section challenges the premise that personality conditions are untreatable, a view that dominates in the courts, but concludes that no effective treatment is currently provided through the criminal system despite emergent effective treatment modalities. In other words, courts are wrong to view personality conditions as untreatable per se, but we should assume no effective treatment is available for personality conditions in the criminal system in light of the lack of available treatment in the system.

Courts have long described personality conditions as not amenable to treatment. In *Foucha v. Louisiana*,[86] the Supreme Court, in addressing states' civil commitment authority, forbid Foucha's civil detention as unconstitutional. Foucha had a personality disorder, and the statute at issue authorized detention for certain insanity acquittees[87] for the purpose of treating those detained. The Court concluded that both the Due Process and the Equal Protection Clauses forbid involuntary commitment where Foucha had, according to psychiatric testimony, an "antisocial personality, a condition that is not a mental disease and that is untreatable."[88] The interplay between Foucha's mental disability and its treatability resulted in Foucha's release from civil detention.[89]

85. When I refer to "treatment" here, I am referring largely to two types of medical responses to mental health conditions: medication and therapy. Medication is utilized as a method for symptom management. Forms of therapy aim to assist individuals in gaining the ability to limit the negative effects of mental impairments.

86. 504 U.S. 71 (1992).

87. I use the term "insanity" here to refer to the legal term that absolves criminal culpability, but note its colloquial ableist use. *See* Lydia X.Z. Brown, *Ableism/Language*, AUTISTIC HOYA (Sept. 14, 2022), https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html [https://perma.cc/ZD7F-VCAZ].

88. *Foucha*, 504 U.S. at 75.

89. The fact that *Foucha* arose in the context of commitment due to an acquittal on the basis of "insanity" is important, as state criminal statutes tie the availability of mental health defenses to legal definitions of the terms "mental disease" or "mental illness." *See, e.g.*, CONN. GEN. STAT. § 53a-13(c) (2023) (excluding from the definition of mental disease or defect "an abnormality manifested only by repeated criminal or otherwise antisocial conduct"); OKLA. STAT. tit. 22 § 1161(H)(7) (2022) ("Not guilty by reason of mental illness" requires, among other things, that the person has not been diagnosed with ASPD.). More broadly, courts and scholars grapple with the contours of excusing criminal culpability based on a mental health condition. *See* Kahler v. Kansas, 140 S. Ct. 1021, 1023–24 (2020) (upholding a Kansas statute that limited defenses based on mental illness to where the defendant lacked the culpable mental state required); Kinscherff, *supra* note 5, at 747 (arguing that personality conditions may nullify criminal culpability in certain circumstances); Joseph Langerman, Note, *The Montwheeler Effect: Examining the Personality Disorder Exclusion in Oregon's Insanity Defense*, 22 LEWIS & CLARK L.

The relationship between personality conditions and treatment often arises in the death penalty sentencing context, where a potential death sentence depends on aggravating factors such as future dangerousness. The Tenth Circuit, in rejecting the claim that failure to present mental health evidence constituted ineffective assistance of counsel, concluded that an ASPD diagnosis was "the prosecution's strongest possible evidence" in a death penalty sentencing where there was a lack of evidence that the defendant's mental health condition could be treated.[90] The Eleventh Circuit has gone even further, holding unequivocally that there is no mitigating value in a diagnosis of ASPD. In *Reed v. Secretary*,[91] the court rejected the claim that the defense counsel was inadequate for failing to present mitigation where, according to the court, that evidence of ASPD was more harmful than helpful.[92] *Reed* follows a long line of cases in which the Eleventh Circuit has discussed ASPD as aggravating, including describing ASPD as not mitigating "as a matter of law."[93] And as recently as 2010, some justices on the Supreme Court opined, premised on their view of the condition as resistant to treatment, that ASPD signals a lifelong pattern of criminal behavior.[94]

REV. 1027, 1028 (2018) (advocating for elimination of the personality condition exclusion in Oregon); Rachel Tollefsrud, *Saving the Insanity Defense: Insight into Personality Disorders and the Necessary Elements of the Test*, 48 MITCHELL HAMLINE L. REV. 372, 374 (2022) (arguing that current insanity defense jurisprudence is based on a misconception—that individuals with mental illnesses are dangerous—and needs to be profoundly adjusted); J. Thomas Sullivan, *The Culpability, or Mens Rea, "Defense" in Arkansas*, 53 ARK. L. REV. 805, 843 (2000) (arguing that expert testimony on the issue of culpability is critical in establishing the lack of capacity defense); Anne S. Emanuel, *Guilty but Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. REV. 37, 37 (1989) (arguing that imposing the death penalty on defendants who are mentally ill violates the Eighth Amendment requirement for proportionality). For a review of the evolution of approaches to mental health defenses to criminal culpability in different jurisdictions, see generally Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7 (2007) (discussing the evolution of approaches to mental health defenses). For a critique of Supreme Court jurisprudence on excusing criminal culpability based on a mental health condition, see generally David DeMatteo, Daniel A. Krauss, Sarah Fishel & Kellie Wiltsie, *The United States Supreme Court's Enduring Misunderstanding of Insanity*, 52 N.M. L. REV. 34 (2022) (arguing that jurisprudence on excusing criminal liability on mental health grounds is confusing).

90. Harmon v. Sharp, 936 F.3d 1044, 1070–71, 1073 (10th Cir. 2019).

91. 593 F.3d 1217 (11th Cir. 2010).

92. *Id.* at 1245–46, 1248.

93. *Id.* at 1245 (quoting Weeks v. Jones, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994)); *see also* Willacy v. Sec'y, Fla. Dep't Corr., 703 F. App'x. 744, 753 (2017) ("We have said—just as the Florida Supreme Court [has] said . . . —that Antisocial Personality Disorder is a trait most jurors tend to look disfavorably upon . . . [and that] evidence of Antisocial Personality Disorder is not mitigating but damaging.").

94. *See* Graham v. Florida, 560 U.S. 48, 117–18 (2010) (Thomas, J., dissenting). The Supreme Court of Washington has also noted, in the context of the detention scheme for individuals found to be "sexually violent predators," that among the legislature's findings was that "sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior." *In re* Young, 857 P.2d 989, 993 (Wash. 1993).

Research from psychiatric and psychological fields offers a more nuanced understanding of the relationship between these conditions and mental health treatment. To date, no medication has been developed that manages symptoms of personality conditions,[95] in the way that medication provides symptom management for other mental health conditions including depression, bipolar, and schizophrenia. And broadly speaking, but for BPD, psychological treatment has yet to show clinical efficacy for personality conditions.[96]

But, unlike some of the judicial discussion concluding that personality conditions are not amenable to treatment, psychological research points toward potential available treatments.[97] For example, researchers are focusing on specific impairments brought by certain personality conditions, and substance use disorder, to offer recommendations on effective treatment.[98] Among other tools, they posit that contingency management, a form of therapy that offers an incentive for targeted behaviors, may be effective to address the executive functioning impairments brought by ASPD and SUD.[99] Although some of this research is emerging, the idea of personality conditions being treatable is not

---

95. Linda Gask, Mark Evans & David Kessler, *Personality Disorder*, 347 BMJ 1, 2 (2013) (stating that except for BPD, "there is still little evidence for what treatments are helpful" for personality conditions); ALLEN FRANCES & RUTH ROSS, DSM-IV-TR CASE STUDIES: A CLINICAL GUIDE TO DIFFERENTIAL DIAGNOSIS 294 (2001) (concluding passage of time is the only "effective treatment" for ASPD); Anthony W. Bateman, John Gunderson & Roger Mulder, *Treatment of Personality Disorder*, 385 LANCET 735, 735 (2015) (noting the lack of sound evidence for the treatment of personality disorders); Elizabeth Newlin & Benjamin Weinstein, *Personality Disorders*, 21 BEHAV. NEUROLOGY & NEUROPSYCHIATRY 806, 814 (2015) (noting the lack of "outcome-supported treatment interventions"); Hall et al., *supra* note 75, at 1292 ("Although today's correctional treatment programs are significantly more promising than in past decades, proven, effective treatment for severe antisocial personality disorder remains largely illusive.").

96. Hall et al., *supra* note 75, at 1292.

97. Gask et al., *supra* note 95, at 2 (discussing Britain's National Institute for Health and Care Excellence guidelines for BPD). *See generally* L.M.C. van den Bosch, M.J.N. Rijckmans, S. Decoene & A.L. Chapman, *Treatment of Antisocial Personality Disorder: Development of a Practice Focused Framework*, 58 INT'L J.L. & PSYCHIATRY 72 (2018) (reviewing treatment methods for patients with ASPD, including guidelines set by the National Institute for Health and Care Excellence, and concluding that effective treatment and management is possible). In the context of psychopathy, a condition closely associated with ASPD but not currently included in the DSM-5, Arielle-Baskin Sommers and Jorge Camacho argue that its impairments are both treatable and critique the criminal system for treating the condition as "an irredeemable moral failure." Arielle Baskin-Sommers & Jorge Camacho, *The Criminal System Is Full of People with Psychopathy*, APPEAL (Feb. 17, 2023), https://theappeal.org/us-prison-system-doesnt-treath-psychopathy/ [https://perma.cc/BBJ9-M8T9].

98. Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 11–12. Baskin-Sommers, along with other researchers, also focus recommendations on providing treatment to young people involved in law-violating conduct. Arielle Baskin-Sommers, Shou-An Chang, Suzanne Estrada & Lena Chan, *Toward Targeted Interventions: Examining the Science Behind Interventions for Youth Who Offend*, 5 ANN. REV. CRIMINOLOGY 345, 362 (2022) (advocating for an individualized approach to "conduct disorder" and "antisocial behavior" that, "[i]n contrast to generic and static interventions, . . . promotes the initiation, personalization, and maintenance of behavior change by integrating theory and methods across domains").

99. Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 11.

new,[100] and the courts' categorical treatment of these conditions lags behind the available science.[101]

The emergence of treatment for BPD illustrates the overarching argument of this section.[102] Similar to other personality disorders, BPD was long thought to be unamenable to mental health treatment.[103] Courts thus relied on BPD diagnoses in terminating parental rights and adjudicating insanity and other civil commitment proceedings.[104] But now, due to advances by the mental health professions, BPD is best seen as amenable to at least one form of treatment, cognitive behavioral therapy ("CBT").[105]

100. *See, e.g.*, HOWARD WISHNIE, THE IMPULSIVE PERSONALITY, vxii, 181–200 (1977) (laying out "a logical approach to treatment design" for impulsive personalities, including personality conditions).

101. *See* Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 154–55. Some public health researchers, based on a view that these conditions can be treated, have even critiqued mental health courts' common exclusion of people with personality conditions. *See* Emily R. Edwards, D.R. Gina Sissoko, Dylan Abrams, Daniel Samost, Stephanie La Gamma & Joseph Geraci, *Connecting Mental Health Court Participants with Services: Process, Challenges, and Recommendations*, 26 PSYCH. PUB. POL'Y & L. 463, 467–68 (2020).

102. *See* Dingfelder, *supra* note 69, at 46 (discussing the development of treatment modalities for BPD and opining that the view of personality disorders being untreatable is likely to change with new research).

103. John G. Gunderson, *Borderline Personality Disorder: Ontogeny of a Diagnosis*, 116 AM. J. PSYCH. 530, 530 (2009) (accounting how BPD morphed from being seen as an untreatable condition to one with "specific and effective psychotherapeutic treatments").

104. *See, e.g.*, *In re* Gang, 12th Dist. Clermont No. CA2002-04-032, 2003-Ohio-197, ¶¶ 1, 13, 31–34 (adjudicating a termination of parental rights proceeding where psychiatrist opined that parent had a "low-level, borderline psychotic personality disorder that is not treatable"); People v. Washington, No. A122299, 2009 WL 2875363, at *1, *3, *16 (Cal. Ct. App. Sept. 9, 2009) (reviewing an insanity commitment proceeding where court heard testimony of a mental health professional who diagnosed acquitted with ASPD, psychopathy, BPD, and borderline intellectual functioning, and where court found that personality disorders "are not treatable by medication"); *In re* Noah R., No. H12CP09012877A, 2010 WL 4609409, at *1, *4, *9 (Conn. Super. Ct. Oct. 22, 2010) (adjudicating a termination of parental rights proceeding where mother's BPD diagnosis was described as "not treatable with medication"). However, in one civil commitment proceeding that required treatability to continue detention, the court affirmed further detention where psychologist opined that detainee suffered from BPD but "he did not believe that persons with personality disorders were not treatable." County of Milwaukee v. Elizabeth M., 1993 WL 535065, at *1 (Wis. Ct. App. 1993) (unpublished table decision).

105. Jutta M. Stoffers-Winterling, Birgit A. Völlm, Gerta Rücker, Antje Timmer, Nick Huband & Klaus Lieb, *Psychological Therapies for People with Borderline Personality Disorder*, COCHRANE DATABASE SYSTEMATIC REVS., no. 8, 2012, at 1, 1–2 (finding that dialectical behavioral therapy, a type of CBT, may be effective in treating BPD); Conn et al., *supra* note 52, at 10 (recommending that dialectical behavioral therapy be provided to persons with BPD that are incarcerated to help prepare them for reintegrating into the community); Gunderson, *supra* note 103, at 234 (describing emergence of dialectical behavior therapy and mentalization-based treatment as effective treatments for BPD); Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 155 ("For individuals with BPD, dialectical behaviour therapy, which includes modules on learning to tolerate distress and regulating emotions, is effective."); J. Christopher Perry, Elisabeth Banon & Floriana Ianni, *Effectiveness of Psychotherapy for Personality Disorders*, 156 AM. J. PSYCHIATRY 1312, 1320 (1999).

As the mental health fields shift in their understanding of personality conditions, the impact on criminal cases can be significant. The medical shift over the amenability of BPD to treatment played out critically in Billy Ray Nelson's death penalty sentencing.[106] An en banc court in the Fifth Circuit concluded that evidence of Nelson's BPD diagnosis could have affected the jury's consideration of mitigation in determining his sentence.[107] Discussing the relationship of Nelson's mental health condition and his likelihood to commit future acts of danger, the court noted the debate over the treatability of BPD.[108] The Fifth Circuit ultimately held that the jury was prevented from giving meaningful consideration to Nelson's mitigation evidence relative to his moral culpability when they were not informed of his BPD diagnosis.[109]

However, the availability of an effective treatment modality in the community does not mean it will be available through the criminal system. For example, treatment for BPD is still not readily available for people in prison and those reintegrating into the community, leading to repeated cycles of incarceration for defendants with this condition despite effective treatment being available in some places in the community.[110] Correctional facilities often are unable to, or do not, provide evidence-based treatment to incarcerated people,[111] meaning people in the criminal system who serve prison sentences are unlikely to access treatment even if effective modalities exist outside of prison. In other words, administering effective treatment is far from simple, and what may be available as a scientific matter—a treatment modality shown to have clinical efficacy—may not be practically available to people charged with criminal offenses.

Even as the mental health fields work on developing treatment, offering hope for effective therapeutic services for people with personality conditions, pervasive stigma surrounding mental disability is a deterrent to people

106. Nelson v. Quarterman, 472 F.3d 287, 307–09 (5th Cir. 2006).

107. *Id.*

108. *Id.* at 311.

109. *Id.* at 309.

110. Conn et al., *supra* note 52, at 9; *see also* G. Hopkin, S. Evans-Lacko, A. Forrester, J. Shaw & G. Thornicroft, *Interventions and the Transition from Prison to the Community for Prisoners with Mental Illness: A Systematic Review*, 45 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVS. RSCH. 623, 631 (2018) (discussing barriers to accessing mental health care post-incarceration, including lack of active health insurance and lack of primary care provider).

111. Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 155; Alexi Jones, *The "Services" Offered by Jails Don't Make Them Safe Places for Vulnerable People*, PRISON POL'Y INITIATIVE (Mar. 19, 2020), https://www.prisonpolicy.org/blog/2020/03/19/covid19-jailservices/ [https://perma.cc/58SE-MXM5]; *see* HUM. RTS. WATCH & ACLU, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 6–7 (2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states [https://perma.cc/4DTQ-WL4P]; *Mental Health Treatment While Incarcerated*, NAMI, https://www.nami.org/Advocacy/Policy-Priorities/Improving-Health/Mental-Health-Treatment-While-Incarcerated [https://perma.cc/V2MG-DG3L].

participating in treatment for at least two reasons. First, people may have difficulty identifying as having a disability.[112] They may want to avoid being considered "deviant" or "disproportionately dangerous."[113] Second, and relatedly, even if someone does identify as having a disability, they may equate participating in treatment with having a severe disability that requires help and may not want to engage with treatment for that reason.[114] Studies confirm that, at least in community settings, stigma presents a barrier to accessing mental health treatment.[115] And a defendant may fear that the stigma associated with mental disability might lead to a poor outcome in their criminal proceeding.[116]

Compounding the effect of stigma is the concept of self-stigma, the idea that the negative beliefs people fear that others hold against them are actually true.[117] As defendants face mandated treatment, people may feel that there is no

112. *See* Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 985 (2019) (noting that marginalized groups may have difficulty in identifying as having a disability); BETH RIBET, REPAIR, INCARCERATION AND PERSONS WITH DISABILITY: A GUIDE TO LEGAL ADVOCACY IN LAW AND SOCIAL SERVICES 15 (2017), http://repairconnect.org/docs/2017-Ribet-Incarceration-Persons-Disabilities.pdf [https://perma.cc/2EHM-QR8H].

113. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 27 (1994) ("A series of behavioral myths has emerged suggesting that persons with mental disabilities are deviant, worth less than 'normal' individuals, disproportionately dangerous, and presumptively incompetent."); Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 587 (2003).

114. Nicholas C. Coombs, Wyatt E. Meriwether, James Caringi & Sophia R. Newcomer, *Barriers to Healthcare Access Among U.S. Adults with Mental Health Challenges: A Population-Based Study*, 15 SSM POPULATION HEALTH, June 15, 2021, at 1, 1 (describing lack of availability and social stigma as barriers to mental health treatment). The Supreme Court has even recognized stigma as an important consequence of involuntary commitment of individuals who have a serious mental disability. *See* Vitek v. Jones, 445 U.S. 480, 492 (1980).

115. Coombs et al., *supra* note 114, at 1. One study found that "nearly half of those who had difficulty accessing medical care believed it was because they are a mental health consumer." Laysha Ostrow, Ron Manderscheid & Ramin Mojtabai, *Stigma and Difficulty Accessing Medical Care in a Sample of Adults with Serious Mental Illness*, 25 J. HEALTH CARE FOR POOR & UNDERSERVED 1956, 1961 (2014).

116. *See* Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 LAW & SOC'Y REV. 202, 206 (2019) (citing studies finding that where mental disorders are "perceived as less treatable and more dangerous compared to offenders without diagnoses, . . . judges . . . choose more restrictive sentences based on fears related to dangerousness or lack of rehabilitation"). Whether or not those fears are substantiated is not the focus of this Article, although at least some studies suggest the case may be so. *See, e.g.*, *id.*; Ashley B. Batastini, Michael E. Lester & R. Alan Thompson, *Mental Illness in the Eyes of the Law: Examining Perceptions of Stigma Among Judges and Attorneys*, 24 PSYCH. CRIME & L. 673, 673 (2018). And the Center for American Progress has reported that even some public defenders refuse to accept cases involving defendants with disabilities. REBECCA VALLAS, CTR. AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS 9 (2016).

117. Michelle L. West, Beth Vayshenker, Merrill Rotter & Philip T. Yanos, *The Influence of Mental Illness and Criminality Self-Stigmas and Racial Self-Concept on Outcomes in a Forensic Psychiatric Sample*, 38

reason to engage with mental health treatment, as the negative stereotypes associated with mental disability may keep them from trying at a treatment program.[118]

Social science evidence challenges the courts' conclusions that personality conditions are not treatable. However, an effective treatment modality exists currently only for BPD. Although promising research suggests treatment modalities for other personality conditions are currently being developed, treatment in the criminal system is not available and even if it were factors such as stigma further stymie its use.

B. *Mandated Treatment for People with Personality Conditions*

Despite effective treatment for personality conditions not being available in the criminal system, treatment as a condition for reduced sentencing or other benefits is still commonplace when defendants have personality conditions. There are multiple places where mental health treatment shows up in the criminal system: specialized courts like mental health or drug courts, plea agreements, sentencing, and community supervision programs.[119] While some defendants with personality conditions participate in mental health courts, many face required treatment programs through either plea agreements or imposed community supervision programs.[120]

PSYCHIATRIC REHAB. J. 150, 150 (2015) (finding that self-stigma surrounding mental illness was associated with not adhering to medication, making treatment less effective); *see also* Nathalie Oexle, Mario Müller, Wolfram Kawohl, Ziyan Xu, Sandra Viering, Christine Wyss, Stefan Vetter & Nicolas Rüsch, *Self-Stigma as a Barrier to Recovery: A Longitudinal Study*, 268 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 209, 210–11 (2018).

118. Patrick W. Corrigan, Jonathon E. Larson & Nicolas Rüsch, *Self-Stigma and the "Why Try" Effect: Impact on Life Goals and Evidence-Based Practices*, 8 WORLD PSYCHIATRY 75, 79 (2009); Amy C. Watson & Beth Angell, *The Role of Stigma and Uncertainty in Moderating the Effect of Procedural Justice on Cooperation and Resistance in Police Encounters with Persons with Mental Illnesses*, 19 PSYCH. PUB. POL'Y, & L. 30, 32 (2013).

119. Because of the prevalence of co-occurring mental health conditions, see *supra* notes 55–58 and accompanying text (noting that approximately half of individuals diagnosed with personality conditions have a co-occurring mental health condition), defendants with personality conditions are likely to participate in treatment programs for substance use disorder or other mental health conditions.

120. *See, e.g.*, Edrington v. State, 2008 WY 70, ¶¶ 3, 13–14, 185 P.3d 1264, 1266, 1268 (Wyo. 2008) (noting plea agreement for defendant with psychopathy to participate in mental health treatment); United States v. Lopez, 258 F.3d 1053, 1056 (9th Cir. 2001) ("[A] condition requiring participation in a mental health program is a routine (albeit 'special') condition of supervised release."); United States v. Hardy, 101 F.3d 1210, 1212–13 (7th Cir. 1996) (affirming maximum term of supervised release and rejecting claim that it was error for sentencing court to consider need for psychiatric treatment where defendant had personality disorders and therefore needed "counseling and therapy"); United States v. Johnson, 998 F.2d 696, 699 (9th Cir. 1993) (affirming supervised release condition imposing mental health treatment where defendant "was diagnosed as having a personality disorder for which he never sought and, in fact, actively refused treatment"); United States v. Ivory, No. 2:11-CR-201080-JWL-2, 2022 WL 2301640, at *1 (10th Cir. June 27, 2022) (affirming custodial sentence and imposition of condition requiring defendant to take prescribed medication where individual was diagnosed with

Mental health courts have grown expansively in the criminal system as a method of adjudication alternative to the traditional criminal process of plea negotiation or trial and, if necessary, sentencing.[121] Generally, the potential benefit for defendants to participate in mental health court is avoiding incarceration if they successfully complete the specialized court program.[122] Mental health court programs vary widely in how they are organized, but they generally consist of "a combination of treatment, monitoring, social services, and community service."[123] Eligibility for participation in mental health courts varies across jurisdictions. In a number of jurisdictions, the presence of a personality condition will render a defendant ineligible to participate in mental health court if the personality condition is a "primary" diagnosis.[124] But some mental health courts will accept participants diagnosed with BPD when treatment for BPD is available.[125] A growing number of observers are skeptical of these kinds of specialized treatment-delivery courts for numerous reasons. Some are skeptical of specialized treatment-delivery courts because of their coercive nature,[126] locking defendants into arrangements not sufficiently

schizophrenia and antisocial personality disorder); McKenzie v. State, 961 S.W.2d 775, 776–77 (Ark. Ct. App. 1998) (affirming revocation of probation where an individual was placed on probation for possession of a controlled substance and for possession with intent to deliver cocaine and later tested positive for use of drugs and self-reported having a personality disorder); United States v. Alexio, 739 Fed. App'x. 466, 467 (9th Cir. 2018) (unpublished) (affirming mental health treatment condition on supervised release for defendant who was "erratic" and acted "disruptive" during trial and was diagnosed with a personality disorder); United States v. Guerra, 856 F.3d 368, 369–70 (5th Cir. 2017) (mandating mental health treatment as condition of supervised release where defendant had PTSD and indicated prior diagnoses of anxiety, depression, PTSD, and ASPD).

121. *See* Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 93–94 (2007) (describing, fifteen years ago, treatment courts as "[t]he most significant development in mental health law in the past decade" and explaining how they expand the judicial role). There are approximately 450 mental health courts, which exist in almost every state in the country. Sarah Martinson, *Alternative Courts Not a Catch-All Fix for Mental Illness Crisis*, LAW360 (Mar. 7, 2021), https://www.law360.com/articles/1356267/alternative-courts-not-a-catch-all-fix-for-mental-illness-crisis [https://perma.cc/XFV8-RUH7].

122. Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2266 (2022).

123. *Id.*

124. Nancy Wolff, Nicole Fabrikant & Steven Belenko, *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, 35 LAW & HUM. BEHAV. 402, 406 (2011); *see also* Johnston, *Mental Health Courts*, *supra* note 82, at 569 n.280 (noting that many jurisdictions require the presence of a mental health condition other than a personality condition but will accept individuals with dual diagnosis that includes a personality condition).

125. Wolff et al., *supra* note 124, at 408.

126. *See, e.g.*, Jason Matejkowski, Woojae Han & Aaron Conrad, *Voluntariness of Treatment, Mental Health Service Utilization, and Quality of Life Among Mental Health Court Participants*, 26 PSYCH. PUB. POL'Y & L. 185, 185 (2020) (arguing that the coercive nature of mental health courts raises concerns about participants' quality of life). Concerns about coercion also animate critiques of increasingly popular programs mandating outpatient treatment. *See, e.g.*, Victoria M. Rodríguez-Roldán, *The Racially Disparate Impacts of Coercive Outpatient Mental Health Treatment: The Case of Assisted Outpatient Treatment in New York State*, 13 DREXEL L. REV. 945, 947–48 (2021).

different from traditional punishment.[127] Others are skeptical because the length of state supervision in a mental health court may be longer than the sentence the defendant would otherwise receive from a traditional court.[128] Some scholars have questioned the normative underpinnings of mental health courts altogether.[129] Yet, when faced with practical choices on the ground, in individual cases, mental health and other specialized courts can seem like valuable options.

Plea agreements may also require people with personality conditions to undergo mental health treatment in exchange for a sentencing benefit. The substance of plea agreements is difficult to study, because they are often not recorded,[130] and absent further related proceedings, may not be discussed in court opinions. But, to illustrate, in one case, a defendant with dual diagnoses—substance use disorder and psychopathy[131]—agreed to participate in a mental health treatment in his negotiated plea agreement.[132] He entered an inpatient treatment program designed to treat substance use disorder, but not dual conditions, let alone psychopathy.[133] He failed to complete the program, and subsequently faced imprisonment for that failure.[134]

Even absent defendants agreeing to participate in treatment in order to obtain a benefit like participation in a specialized court or particular sentence, tribunals regularly impose mental health treatment as a condition of community supervision programs like probation, parole, or federal supervised release.[135] In

127. *See, e.g.*, KERWIN KAYE, ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE 47–55 (2019).

128. *See, e.g.*, E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 687–89, 693 (2017).

129. *See, e.g.*, Johnston, *Mental Health Courts*, *supra* note 82, at 525–29 (finding that neither utilitarian justification for mental health courts, therapeutic justice and therapeutic rehabilitation, is sufficient); Eaglin, *supra* note 3, at 597–98 ("Though facially benign, such reforms expand the scope of state control over the lives of those entangled in the justice system. Increasing opportunities to intervene in private lives through the justice system may actually increase the number of people touched by the system, thereby undercutting efforts to reduce the negative effects of mass incarceration."); Collins, *The Problem*, *supra* note 3, at 1575–81 (pointing out the discrepancy between claims of problem-solving courts as evidence-based with the lack of evidence supporting their efficacy).

130. Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 935 (2017). One exception is federal plea agreements. *See* FED. R. CRIM. P. 11(c)(2).

131. ASPD and psychopathy are distinct (with some overlapping impairments), although they are at times (wrongfully) referred to interchangeably. Alison J. Lynch & Michael L. Perlin, *"I See What Is Right and Approve, but I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. 453, 459 (2021). Psychopathy is not a listed condition in the DSM-5, but it is studied and discussed in the law as a mental health condition. *See, e.g.*, Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 NEUROETHICS 205, 205–06 (2008).

132. Edrington v. State, 2008 WY 70, ¶¶ 3, 13–14, 185 P.3d 1264, 1266, 1268 (Wyo. 2008).

133. *Id.* at ¶ 3, 185 P.3d at 1266.

134. *Id.* at ¶¶ 5, 14, 185 P.3d at 1266, 1268 (noting it would be preferable for the defendant to have received treatment "in a program designed specifically to treat such people").

135. *See, e.g.*, United States v. Lopez, 258 F.3d 1053, 1056 (9th Cir. 2001) ("[A] condition requiring participation in a mental health program is a routine (albeit 'special') condition of supervised release.");

some cases involving personality conditions, courts rely on defendants' behavior or a past diagnoses to find a basis for the imposition of mental health treatment.[136] A sizeable population of people with personality conditions face requirements for mental health treatment, substance use treatment, or medication compliance through community supervision programs like parole, probation, and federal supervised release.[137] When defendants then fail to complete mandated treatment, they are subject to incarceration for violating the conditions of the community supervision program.[138]

III. THE LAWYER'S QUANDARY

By making imprisonment exposure dependent on successful treatment participation, the treatment paradigm puts defense attorneys representing clients with personality conditions in a quandary. Defense attorneys struggle in their counseling function, attempting to balance the risk a client with a personality condition takes in participating in treatment, with the potential for a lower term of incarceration and access to care. The current landscape of

---

United States v. Hardy, 101 F.3d 1210, 1212–13 (7th Cir. 1996) (affirming maximum term of supervised release and rejecting claim that it was error for sentencing court to consider need for psychiatric treatment where defendant had personality disorders and therefore needed "counseling and therapy"); United States v. Johnson, 998 F.2d 696, 699 (9th Cir. 1993) (affirming supervised release condition imposing mental health treatment where defendant "was diagnosed as having a personality disorder for which he never sought and, in fact, actively refused treatment"); United States v. Ivory, No. 2:11-CR-201080-JWL-2, 2022 WL 2301640, at *1 (10th Cir. June 27, 2022) (affirming custodial sentence and imposition of condition requiring defendant to take prescribed medication where individual was diagnosed with schizophrenia and antisocial personality disorder); McKenzie v. State, 961 S.W.2d 775, 776–77 (Ark. Ct. App. 1998) (affirming revocation of probation where an individual was placed on probation for possession of a controlled substance and for possession with intent to deliver cocaine and later tested positive for use of drugs and self-reported having a personality disorder).

136. *See*, *e.g.*, United States v. Alexio, 739 Fed. App'x. 466, 467 (9th Cir. 2018) (unpublished) (affirming mental health treatment condition on supervised release for defendant who was "erratic" and acted "disruptive" during trial and was diagnosed with a personality disorder); United States v. Guerra, 856 F.3d 368, 369–70 (5th Cir. 2017) (mandating mental health treatment as condition of supervised release where defendant had PTSD and indicated prior diagnoses of anxiety, depression, PTSD, and ASPD).

137. *See supra* note 135 and accompanying text; Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 326 (2016) (noting that Georgia's graduated sanction program included treatment program provisions); Skeem et al., *supra* note 54, at 110; HUM. RTS. WATCH & ACLU, *supra* note 111, at 46–47 (noting various programs leading to revocation for failing to participate in designated treatment, including at times "homework assignments"); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1059 (2013).

138. United States v. Swalwell, No. CR95-380-MJP, at *1 (W.D. Wash. Nov. 30, 2012) (recommending violation of supervised release based on failure to participate in "Moral Reconation Therapy"); United States v. Bonko, No. CR–05–17–BLG–SPW, 2017 WL 4019463, at *1 (D. Mont. Aug. 17, 2017), *report and recommendation adopted*, 2017 WL 4012667 (D. Mont. Sept. 12, 2017) (failure to report for treatment and failure to report for substance use testing); United States v. Gallow, No. 1:19-CR-76, 2022 WL 2045760, at *1 (E.D. Tex. June 3, 2022), *report and recommendation adopted*, 2022 WL 2057732 (E.D. Tex. June 7, 2022) (failure to participate in substance abuse counseling as directed).

indigent defense, with tight time constraints and sorely lacking in resources,[139] limits the capacity of defense attorneys to better understand their clients' personality conditions. At the same time, knowing more about their clients' conditions restrains how attorneys can advocate with other criminal system stakeholders. Further, the impairments people with personality conditions have affect their own decision-making processes, raising concerns about how attorneys promote client empowerment. In other words, in the context of personality conditions, the treatment paradigm threatens virtually every aspect of client-centered lawyering.

The lawyering quandary in the treatment paradigm raises questions about whether the criminal system is working fairly for people with personality conditions.[140] Defense counsel play a fundamental role in the criminal system's claims of fairness and justice.[141] The crucial functions of the defense attorney—such as advising and negotiating[142]—impact the views of other criminal system stakeholders, namely judges and parole boards, prosecutors, and probation and parole officers.[143] The criminal system relies on defense attorneys to protect

139. *See* Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391 (2016) [hereinafter Joe, *Systematizing Public Defender*] (describing the insufficient funding of indigent defense and critiquing rationing of defense services); Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 238 (2023) ("[P]ublic defender offices are notoriously underfunded and overworked.").

140. Other scholars have explored the ethical implications of defense lawyering in specialty courts, primarily in drug treatment courts. *See, e.g.*, Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 37–38 (2001); Tamer M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 94 (2007) [hereinafter Meekins, *Risky Business*].

141. Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 8–10 (2006) [hereinafter Meekins, *Specialized Justice*] (arguing that the criminal system cannot "function" without defense attorneys and that defense attorneys "keep the [criminal] system honest and protect the interests and rights of the accused"). The American Bar Association ("ABA") describes defense counsel as "essential to the administration of criminal justice." AM. BAR. ASS'N, *Standard 4-1.2 Functions and Duties of Defense Counsel*, *in* CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION (4th ed. 2017).

142. Meekins, *Specialized Justice*, *supra* note 141, at 12 (noting how defense attorneys "take on various roles, including counsel, advisor, social worker, educator, and contract negotiator"). Some scholarship produced before the treatment boom has presented more sanguine views on the threats treatment through specialty courts have on criminal defense. *See* Christin E. Keele, Note, *Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System*, 71 UMKC L. REV. 193, 193 (2002).

143. Some criminal system stakeholders interact directly with defense attorneys, rather than individual defendants, thus providing immense control to defense attorneys over how individual defendants are presented to these stakeholders. Alma Magaña elucidates the impact defense attorneys have vis-à-vis other criminal system stakeholders in bail determinations. Alma Magaña, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. 978, 1007–10 (2023). Other stakeholders, such as probation and parole officers, interact directly with defendants; nonetheless, how defense attorneys advise and advocate for defendants can impact the view of the stakeholders. For example, how an attorney advises on a revocation of community supervision may impact whether a probation officer sees lack of

defendants' rights. The struggles of the defense attorney, therefore, are struggles of the criminal system more broadly.

This part begins with a primer on client-centered lawyering in criminal defense and its relationship to legal ethics, demonstrating how client-centered lawyering is the primary model of lawyering employed in criminal defense practice. It follows with the central argument of this Article, that the criminal defense attorney faces a quandary in carrying out a client-centered vision of lawyering. Because client-centered lawyering is intertwined with the ethical rules, this part engages with applicable professional obligations issued by the American Bar Association ("ABA") through its Model Rules of Professional Conduct.[144] I note, where appropriate, when the lawyering quandary of the client-centered lawyer might lead to a violation of the rules of professional conduct or the Constitution.[145]

A. *Client-Centered Lawyering and Legal Ethics in Criminal Defense*

This Article uses the client-centered lawyering model to explore the ethical challenges criminal defense attorneys face in their practice. In simple terms, client-centered lawyers aim to empower their clients, and this goal informs how lawyers carry out their various functions.[146] The client-centered model of lawyering developed to enhance the autonomy of a client and limit the power imbalance inherent in the attorney-client relationship.[147] Client-

compliance with a community supervision program as a character flaw or a barrier based on the complexity of the rules of community supervision. *See generally* ACLU, REDUCING BARRIERS: A GUIDE TO OBTAINING REASONABLE ACCOMMODATIONS FOR PEOPLE WITH DISABILITIES ON SUPERVISION (2024) (detailing the difficulty of navigating community supervision programs for individuals with disabilities).

144. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983). Attorneys' ethical obligations are governed by state licensing associations, most of which have adopted the ABA's Model Rules of Professional Conduct ("Model Rules").

145. Although the Model Rules inform what constitutes effective representation under the Sixth Amendment, see Padilla v. Kentucky, 559 U.S. 356, 366 (2010), a violation of an ethical standard does not constitute a per se violation of the Sixth Amendment, see Nix v. Whiteside, 475 U.S. 157, 165 (1986). *See also* Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1610 (2000) ("Constitutional minima generally impose fewer and lesser obligations on lawyers than ethical norms and rules.").

146. Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) ("Broadly we can say that client-centered practice takes the principle of client decision-making seriously, and derives from this premise the prescription that a central responsibility of the lawyer is to enable the client to exercise his right to choose.").

147. Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1110 (2016) (describing the client-centered approach as "provid[ing] that the defendant should exercise ultimate control over all decisions that are likely to have a substantial legal or non-legal impact on the client's life"); Maeve Sullivan, Comment, McCoy v. Louisiana *and the Perils of Client Control of the Defense*, 96 DENV. L. REV. 733, 746 (2019) [hereinafter Sullivan, McCoy] ("Some proponents of the client-centered model have gone so far as to say that defendant autonomy is so vital

centered lawyering prioritizes client authority and views the client as the best situated person to make decisions.[148] At its beginning, client-centered lawyering viewed the appropriate role of the lawyer as neutral,[149] with a focus on providing information to the client. More recently, the model has been—and should be understood—as embracing a collaborative decision-making process between attorney and client.[150]

Client-centered lawyering sets forth a normative vision of the ethical lawyer that, while overlapping with the ethical rules, is not bound by a strict application of them.[151] Monroe Freedman explains the client-centered lawyering model as "ventur[ing] beyond the words of the ethical rules themselves, into the larger legal context of the lawyers' role, into understanding inconsistent ethical rules in the light of reason, into the purposes of legal

that the mere presence of a lawyer impedes access to justice by creating yet another barrier for the client's defense."); Ogletree, *supra* note 15, at 1281 (describing the client-centered lawyer as "bring[ing] the client into decision-making and . . . respect[ing] the client's decisions, even on strategic matters that have been traditionally allocated to the lawyer"). In many ways, the client-centered lawyering model offers a definitive modern response to a key legal ethics issue raised by leading critical race scholar Derrick Bell nearly 50 years ago in the context of civil rights law, pointing out the ethical flaws of lawyers representing their own ideals—or those of funders—rather than centering their clients. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (pointing out the ethical flaws of a lawyer representing their own ideals).

148. John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 210 (2008) ("A criminal defense lawyer who believes in a client-centered model of representation must necessarily accept that she will at times take actions that will be harmful to her client.").

149. The neutral lawyer vision of a client-centered lawyer can be attributed to David Binder, Paul Bergman, and Susan Price. *See generally* David Binder, Paul Bergman & Susan Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y.L. SCH. L. Rev. 29 (1990) (articulating a neutral vision of client-centered lawyering).

150. Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 586–87 (2011) [hereinafter Kruse, *Engaged Client-Centered Representation*] (arguing that the neutral lawyer vision of early client-centered lawyering theorists was "unworkable" and "undesirable," and advocating an "engaged" form of representation where client objectives are treated as subject to change through the attorney-client relationship); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 348 (1997) (critiquing the neutral vision of client-centered lawyering for its marginalization of clients of color).

151. Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 130 (2006) ("Client-centeredness encompasses but does not stop at zealous advocacy; lawyers must also strive to understand their clients' self-perceived interests, rather than impose stock legalist viewpoints about what clients' interests in the representation should be."); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 772 (2006) [hereinafter Freedman, *Overzealous Representation*] (arguing that ethical lawyering should put zealous advocacy as the primary ethical obligation, even when that obligation would conflict with other ethical rules); *see also* Rayza B. Goldsmith, *Is It Possible To Be an Ethical Public Defender?*, 44 N.Y.U. REV. L. & SOC. CHANGE 13, 15 (2019) (critiquing the ethical rules for being inconsistent or inapplicable to the "realities" of indigent criminal defense).

representation, and into moral philosophy."[152] Thus, for example, client-centered lawyering holds that clients should make key decisions in the representation, even if such decisions are not explicitly allocated to the client under the ethical rules or as a constitutional matter.[153] Yet, in part precisely because of the roles reason and context play in the client-centered lawyering model, questions of how a client-centered lawyer comports herself have changed over time and have been a hot topic of debate across the lawyering literature.[154]

I use client-centered lawyering as the lens through which to analyze how the treatment paradigm affects defendants with personality conditions for a few reasons. Client-centered lawyering is the model that legal ethicists and lawyering scholars largely agree should apply in criminal defense.[155] Aspiring lawyers are trained in the client-centered lawyering model in law school.[156] Moreover, exploration of the ethical challenges in representing clients with mental disabilities is responsive to the needs of criminal defense attorneys and a gap in scholarship. Criminal defense attorneys report difficulty in representing clients with mental disabilities.[157] Scholars have lamented the lack of guidance ethical rules provide to attorneys representing individuals with

152. Freedman, *Overzealous Representation*, *supra* note 151, at 781.

153. *See* Berger, *supra* note 147, at 1112–14; Ogletree, *supra* note 15, at 1250–54; King, *supra* note 148, at 210–11.

154. *See, e.g.*, Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 371 (2006) [hereinafter Kruse, *Fortress in the Sand*] ("[T]here is a growing lack of consensus about what it means to be a client-centered lawyer."). Kruse argues that client-centered lawyering has plural values, and depending on specific goals in the representation, a lawyer may adopt different approaches, all within a client-centered lawyering framework. *Id.*; *see also* Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 597 (2017) (foregrounding "the ambiguous nature of client-centered lawyering"); Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 352 (2011) [hereinafter Freedman, *Client-Centered Lawyering*] (engaging in a debate over the meanings of client-centered lawyering and "collaborative lawyering"); Julie D. Lawton, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 156 (2015) ("The ideals of client-centered lawyering are utopic in theory, but the practical application of these ideals, particularly for lawyers who work with low- and moderate-income clients, are wrought with complexity.").

155. Carle, *supra* note 151, at 129 ("[C]ontemporary ethicists . . . agree that arguments for zealous client advocacy are most persuasive in the criminal defense context.").

156. Kruse, *Fortress in the Sand*, *supra* note 154, at 371 (calling client-centered lawyering "the leading model of client counseling taught in American law schools" and "one of the most influential doctrines in legal education today"). Collaborative lawyering models, such as community and movement lawyering, are increasingly popular in clinical legal education today. In previous scholarship, I discuss the overlap between these models of lawyering. *See generally* Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613 (2020) [hereinafter Orihuela, *Crim-Imm*] (discussing the overlap between community and movement lawyering models).

157. *See generally* Chelsea Davis, Ayesha Delany-Brumsey & Jim Parsons, *"It's the Hardest Decision I Have": Clients and Defenders on the Role of Mental Health in Case Strategy*, 14 OHIO ST. J. CRIM. L. 463 (2017) (presenting study results of public defenders representing people with mental health conditions).

mental disabilities.[158] Most scholarly attention on criminal proceedings involving defendants with mental disabilities focuses on extreme circumstances, such as when a client's disability may render them not competent to stand trial or excuses criminal liability, or cases involving the death penalty.[159] Here, I engage with the challenges that defense attorneys encounter in everyday cases. While this discussion does not fill the large existing gap, it begins exploring a necessary space in lawyering and legal ethics scholarship.

B. *The Lawyering Quandary in the Treatment Paradigm*

The client-centered defense attorney's job is to empower her client as best she can in navigating criminal proceedings. At the core of the defense attorney's quandary is how to advise their clients with personality conditions. Appearing straightforward at first blush, the attorney's counseling role in the treatment paradigm is actually complex. The path set for lowering imprisonment exposure and accessing care—court-mandated treatment—is a risky path for defendants with personality conditions.[160]

Two other attorney functions pose ethical challenges within the treatment paradigm. First, to counsel their clients regarding the risks of participating in treatment for a sentencing benefit, defense attorneys need greater mental health expertise, but that expertise can limit the arguments defense attorneys make on behalf of their clients. And second, ensuring a client's autonomy is not frustrated by the type of impairments people with personality conditions have. Exploring each of these interrelated attorney functions in turn reveals how the treatment paradigm leads to a quandary for the defense, raising concerns about the fairness of criminal proceedings for defendants with personality conditions.

158. Slobogin & Mashburn, *supra* note 145, at 1610–11.

159. Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence To Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 BEHAV. SCI. & L. 369, 369 (2003); Samuel Adjorlolo, Heng Choon Chan & Matt Delisi, *Mentally Disordered Offenders and the Law: Research Update on the Insanity Defense, 2004–2019*, 67 INT'L J.L. & PSYCHIATRY 1, 2 (2019); Jean Mattimoe, *The Death Penalty and the Mentally Ill: A Selected and Annotated Bibliography*, 5 THE CRIT: CRITICAL STUD. J. 1, 3 (2012).

160. This scenario assumes a client either resolves the case or will proceed to sentencing, as is the case in a significant number of prosecutions or community supervision revocations. *See* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1010–11 (2019) (noting the federal conviction rate via plea was at 97.5% in 2015 and in D.C. Superior Court was at 42%); HUM. RTS. WATCH & ACLU, *supra* note 111, at 132–38 (describing the rise of jail and prison admissions based on violations of community supervision programs).

1. The Conundrum of Counseling Defendants with Personality Conditions

The attorney's counseling role requires a candid and honest assessment of how best a client may achieve the client's goals in their legal matter.[161] In client-centered counseling, as articulated by Katherine Kruse, the attorney and client engage in meaningful collaboration to explore the options available and empower the client to make a fully informed decision.[162]

Advocates and scholars predominantly conceptualize the criminal defendant's goal as avoiding conviction or reducing custodial exposure.[163] When mental health treatment would be effective for the defendant, the attorney should advise the client to participate in treatment, as treatment would likely have a beneficial effect on the ultimate resolution of a criminal case.[164] The converse should be true as well: where treatment can pose serious risks of additional future incarceration, it would appear that a defense attorney should advise such a client against participating in treatment.[165] Because individuals with personality conditions are likely to struggle completing treatment programs, it seems, their attorneys should advise them against treatment.

Advising a client with a personality disorder against treatment is not as simple as it initially appears. Although the available evidence suggests that, in

161. Under the Model Rules, an attorney's counseling function requires the lawyer to "exercise independent professional judgment and render candid advice." MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983). The rule contemplates that an attorney's advice will be "straightforward[,] . . . expressing the lawyer's honest assessment." *Id.* at r. 2.1 cmt. 1.

162. Kruse, *Engaged Client-Centered Representation*, *supra* note 150, at 585.

163. *See, e.g.*, Manuel Berrélez, Jamal Greene & Bryan Leach, Note, *Disappearing Dilemmas: Judicial Construction of Ethical Choice as Strategic Behavior in the Criminal Defense Context*, 23 YALE L. & POL'Y REV. 225, 228 (2005) (describing a criminal defense client's interest as "receiving the lightest possible punishment"); Slobogin & Mashburn, *supra* note 145, at 1584 (exploring the role of defense lawyers to act over mentally disabled but legally competent defendant's objection to avoid a death sentence); Johnson, *supra* note 130, at 935 (acknowledging attorneys' interest in lowering custodial exposure but addressing study that indicates that criminal defense practitioners are increasingly incorporating collateral consequences, on par with or over length of sentence, into how they advise their clients); Angela Wilson, *JUST a Misdemeanor: Seeking Justice in All Cases*, 37 CRIM. JUST. 30, 33 (2022) ("The defense attorney does not have the ability to step away from the ethical obligations in a criminal case to act in the client's 'best interests' or the best interests as interpreted by the attorney, the judge, or the prosecutor. This is most starkly seen when a defense attorney is placed in a position where the client refuses to allow a defense that implicates a mental disorder defense, even where defense counsel strongly believes that such a defense could be successful in reducing the penalty or avoiding conviction.").

164. Attorneys may face a similar duty in the civil legal context. *See generally* Carol M. Suzuki, *When Something Is Not Quite Right: Considerations for Advising a Client To Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 209 (2009) (arguing that ethics rules may require advising a client to participate in treatment in certain instances and support it in many others).

165. *See supra* Section II.A (discussing the lack of available effective treatment for personality conditions). Specifically, attorneys advising against treatment would advise a client against a plea resolution that involves treatment as a required condition, and to object in the event a tribunal—a sentencing court or a parole board—might impose mandated treatment as a condition of community supervision.

general, defendants with a personality condition who are subject to mandated treatment face a serious risk of additional incarceration, that does not mean that a specific person will not be able to complete a particular treatment program.[166] To return to the hypothetical, if Ms. Boughton's attorney knew that her personal likelihood of completing the treatment program was only 10%, advising against it would be sound. But taking risks applicable to the larger group of people with BPD does not inform Ms. Boughton's attorney of how Ms. Boughton specifically will do on the treatment program.

At the same time, Ms. Boughton's attorney, like defense attorneys more broadly, wants to and is obligated to act in the interests of the client.[167] Attorneys will feel pulled to advise clients with personality conditions to take the risk of treatment *because* treatment offers the lowest term of imprisonment, at least initially. And defense attorneys may also be inclined to advise clients to participate in treatment with the goal of providing access to mental health care, with the hope it is helpful to the client.[168]

166. A generally applicable fact, such as people with ASPD being less likely to meet obligations of probation, does not mean that a specific person who has ASPD will be unable to meet those obligations. Carl E. Fisher, David L. Faigman & Paul S. Applebaum, *Toward a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, 69 U. MIAMI L. REV. 685, 708 (2015) ("[W]hat is true in the aggregate for members of a large group may not be equally valid for a single person."); *cf*. David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 420 (2014) ("In terms of scientific inference, reasoning from the group to an individual case presents considerable challenges.").

167. There are a few potential sources for the professional obligation to act in the interest of the client. One source is the duty of loyalty. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). The Rules also contain multiple references to the "interests" of the client, without being tied to a specific ethical rule. *See generally* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 1983) (noting "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law"). The ABA's Criminal Justice Standards use the language of "best interests," which typically arises in the context of lawyers representing individuals without the capacity to determine the direction of the representation, as the guiding principle for attorneys to utilize in advising a client and in pursuing actions on behalf of a client. *See* AM. BAR. ASS'N, *supra* note 141 at *Standard 4-1.1(a)* ("The Standards are intended to serve the best interests of clients, and should not be relied upon to justify any decision that is counter to the client's best interests."); *id.* at *Standard 4-3.2(g)* ("Counsel should request reconsideration of detention or modification of conditions whenever it is in the client's best interests."); *id.* at *Standard 4-3.7(d)* ("If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client's best interest, and if so, when and how."); *id.* at *Standard 4-4.1(c)* ("Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client."). Another potential source is the Sixth Amendment's requirement of effective representation, which Thea Johnson describes as informing what a "good lawyer" is and does vis-à-vis, among others, their advising of clients. Johnson, *supra* note 130, at 939–41.

168. Model Rule 2.1 permits attorneys to advise the clients by considering not only legal factors but also "moral, economic, social and political factors." MODEL RULES OF PRO. CONDUCT r. 2.1 (AM.

The challenge of advising clients with personality conditions regarding treatment is further complicated by three factors: (1) doubts about the quality of treatment in the criminal system, (2) concerns about the lack of confidentiality in system-involved treatment, and (3) the risk of characterological judgment from criminal system actors if the client declines treatment. First, the quality of mental health treatment depends, in part, on the often-challenging task of getting a treatment protocol that is appropriate for an individual.[169] In the criminal system, once a treatment need is identified, individuals get referred to service providers that contract with the court or community supervision agency. Institutions often only have a limited number of service providers,[170] and a service provider may not provide a treatment modality that would best serve a particular individual.[171] Indeed, some researchers have raised questions as to whether system-involved treatment actually lowers recidivism rates and whether it provides any therapeutic benefits to participants.[172] Moreover, the underfunded mental health system makes

BAR ASS'N 1983). Scholars have described this attorney function as a problem-solver who "moral[ly] engage[s]" with the client, having a potentially "healing" impact on the client. *See* Michael S. McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEX. A&M L. REV. 1, 3 (2013) (quoting ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE 11–12 (2013)); Matt Christensen, *Counselors and Healers at Law*, 52 ADVOC. 20, 21 (2009). A defense attorney may herself want her client to access mental health treatment, for the potential therapeutic benefits treatment can provide. *See, e.g.*, Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek To Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1372–73 (1998).

169. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., TREATMENT CONSIDERATIONS FOR YOUTH AND YOUNG ADULTS WITH SERIOUS EMOTIONAL DISTURBANCES AND SERIOUS MENTAL ILLNESSES AND CO-OCCURRING SUBSTANCE USE 7 (2021), https://store.samhsa.gov/sites/default/files/pep20-06-02-001.pdf [https://perma.cc/K9WP-PZ5Z] [hereinafter SUBSTANCE ABUSE, TREATMENT CONSIDERATIONS] ("For maximum benefit, each individual's treatment plan must be specific to their circumstances and person-centered. For example, multiple individuals with the same disorder profile may require different treatment depending on contributing factors, order of onset, and relative severity of their symptoms—all of which can complicate treatment.").

170. Meekins, *Specialized Justice*, *supra* note 141, at 17 n.73.

171. *Id.* As Meekins notes, this challenge is particularly salient for defendants with multiple mental health conditions. *Id.*

172. More broadly, in some studies of diversionary programs, researchers found that evidence-based mental health services did not necessarily lead to lower rates of recidivism, raising questions about the premise underlying the treatment paradigm. Skeem et al., *supra* note 54, at 114; Collins, *The Problem*, *supra* note 3, at 1575–81. Finally, some studies suggest that treatment provided through the criminal legal system may not improve participants' quality of life. Matejkowski et al., *supra* note 126, at 192. Researchers have also found a persistent sense of stigmatization, affecting emotional well-being, in individuals who engaged in dual diagnosis treatment. *See generally* Bruce G. Link, Elmer L. Struening, Michael Rahav, Jo C. Phelan & Larry Nuttbrock, *On Stigma and Its Consequences: Evidence from a Longitudinal Study of Men with Dual Diagnoses of Mental Illness and Substance Abuse*, 38 J. HEALTH & SOC. BEHAV. 177 (1997) (reporting study results of enduring effect of stigma).

obtaining mental health treatment outside of the contractors available through the criminal system near impossible.[173]

Second, counseling a client regarding treatment requires careful consideration of how information a client shares with a mental health professional could impact criminal outcomes in the future. Because treatment is imposed through community supervision programs, the supervising agency—for example, probation or parole—has access to treatment records and may be able to speak with treatment providers.[174] A few federal circuits have rejected challenges to the limitations on patient-therapist confidentiality imposed by criminal system treatment.[175] These limitations reasonably stoke defendants' fears that treatment is punitive or might place them at risk of longer custodial exposure.[176] The lack of confidentiality in system-involved psychotherapy also raises concerns about its effectiveness.[177]

Third, the high value treatment carries in the criminal system complicates how an attorney counsels a client on system-imposed treatment. Because the criminal system views treatment as inherently good and therapeutic,[178] declining

173. Kristin Harlow, Note, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733, 1754 (2007) (describing "an underfunded and underperforming mental health system"); *see also* NAT. ALLIANCE ON MENTAL ILLNESS, THE DOCTOR IS OUT: CONTINUING DISPARITIES IN ACCESS TO MENTAL AND PHYSICAL HEALTH CARE 2 (2017) (reporting that nearly 30 million people living with mental health conditions go without any treatment, in part due to the "fragmented and costly system"). *See generally* Coombs et al., *supra* note 114 (describing lack of availability and social stigma as barriers to mental health treatment).

174. For example, in Connecticut, individuals sentenced to terms of probation are required to waive confidentiality protection for mental health treatment. *See* GEORGE COPPOLO, OFF. OF LEGIS. RSCH., 2005-R-0021, PROBATIONER-THERAPIST CONFIDENTIALITY (2005), https://www.cga.ct.gov/2005/rpt/2005-R-0021.htm [https://perma.cc/CQ3A-7HHK]; *see also* Jeslyn A. Miller, Comment, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2095 (2010) [hereinafter Miller, *Sex Offender*] (showing how treatment notes are used against detainees to justify further detention in the context of civil commitment schemes for individuals convicted of sex offenses).

175. *See* United States v. Dupes, 513 F.3d 338, 344–45 (2d Cir. 2008) (affirming condition that defendant waive therapeutic confidentiality so that probation officer could review defendant's course of treatment); United States v. McGraw, 629 F. App'x 668, 672 (6th Cir. 2015) (unpublished) (holding no abuse of discretion to impose counseling program where probation officer would have access to treatment information).

176. Davis et al., *supra* note 157, at 490.

177. *Dupes*, 513 F.3d at 344 (acknowledging that psychotherapy depends on confidentiality to be effective).

178. Josephine Ross, writing about representing a woman with a serious mental health condition, illustrates how legal actors view treatment. She writes,

> I label my lawyering . . . as an ethic of care approach because I was concerned about her life and not just concerned with minimizing the harm caused by the criminal charge pending against her. I felt, in some way, responsible for doing something to tend the downward spiral her mental illness was causing.

Ross, *supra* note 168, at 1372–73.

treatment in the criminal system carries additional risks. Judges may see a rejection of treatment as a character flaw rather than a reasonable medical decision made after considering risks and benefits.[179]

Whether this conundrum can be easily solved by defense attorneys informing the client of the risks associated with treatment but failing to advise a client one way or the other illustrates how client-centered lawyering has evolved since its inception. Under a neutral lawyer vision of client-centered lawyering, as the model of lawyering was once understood,[180] a defense attorney maximizes client autonomy by giving information of the risks and benefits but *not* providing advice on what the client should do. Client-centered lawyering today is understood differently, and when a client asks what she should do, the client-centered defense attorney responds.[181] While providing information about the risks without giving advice may meet the attorney's professional obligations under the Model Rules,[182] the client-centered lawyer aims to do more. In client-centered lawyering, meaningful engagement in counseling

179. *See, e.g.*, People v. Washington, 2009 WL 2875363, at *15 ("In contrast, Washington repeatedly engaged in physically aggressive and 'flatly disgusting' behavior. . . . Unlike the defendant in *In re Anthony C.*, who 'understood he had a mental illness, . . . was participating in the program, and was serious about his treatment,' Washington 'did not have a comprehensive relapse prevention plan that would allow him to appreciate antecedents to his violence, nor did he have appropriate coping [mechanisms].'" (quoting *In re* Anthony C., 138 Cal. App. 4th 1493, 1508 (2006)); *cf. In re* Noah R., 2010 WL 4609409, at *22 (concluding a termination of parental rights matter) ("[The parent] will not be able to assume a responsible position in the life of her child within a reasonable time period. . . . For the last ten years she has failed to consistently address her mental health issues, maintain stable and appropriate housing, or demonstrate an ability to care for her children. Since 2003 she has been involved with her current mental health provider to address her diagnosis of Borderline Personality Disorder and does not attend regularly unless brought in by a community case manager. . . . She has demonstrated that she is unable to care for her children."); *In re* Young, 857 P.2d 989, 1014 (Wash. 1993) (discussing policy reasons for refusing to find that "sexually violent predators" ordered to speak to state psychologists have the right to remain silent); *id.* at 1018 (stating that defendants' refusal to cooperate with evaluators necessitated that they base their evaluations on psychological reports and criminal history).

180. *See supra* notes 149–50 and accompanying text.

181. This view of client-centered counseling diverges from the neutral lawyer view of client-centered lawyering, in line with Katherine Kruse's engaged client-centered lawyer. It also comports with Monroe Freedman's view of client-centered counseling. Freedman, *Client-Centered Lawyering*, *supra* note 154, at 351 ("[T]here are some circumstances in which client-centered lawyering does include pressing the client forcefully to adopt a particular course of conduct.").

182. Model Rule 2.1 requires honest and candid advice, and contemplates that attorneys will utilize professional judgment. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983); McGinniss, *supra* note 168, at 12. The attorney's basic professional obligation is therefore met once an attorney gives their honest assessment of the risks and benefits of the options available to the client. This obligation, however, intersects with the attorney's expertise in mental health, as an assessment of the options should follow becoming informed about how a client's mental health needs might impact the benefits and risks of the options available. *See* AM. BAR. ASS'N, *supra* note 141, at *Standard 4-5.1(b)* (calling for attorneys to "advise[] . . . after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law"); Alvord v. Wainwright, 469 U.S. 956, 959 n.4 (1984) (Marshall, J., dissenting) (opining that in order to adequately execute the "vital function" of advising a client, a defense attorney must investigate plausible defense strategies).

contemplates helping a client navigate decision-making between difficult choices.[183] When a client asks the reasonable question of their attorney—what should I do?—declining to advise a client regarding treatment, when treatment decisions affect case outcomes, falls short of *client-centered* counseling.[184]

2. The Double-Edged Sword of Expertise

To counsel a client in the treatment paradigm, the client-centered defense attorney must have significant knowledge about the mental health status of defendants and how available treatment options interact with the mental health needs of the client[185]—areas outside of legal expertise. The chronic underfunding of public defense, time constraints, and the lack of mental health resources render gaining this expertise an illusory goal in many jurisdictions. At the same time, increased knowledge about a client's mental health, when that knowledge involves personality condition diagnoses, limits the defense attorney's ability to advocate with other criminal system stakeholders. Defense attorneys both need mental health expertise and are hampered in their advocacy when they have it.

Courts and the ABA have already acknowledged that competent representation in criminal proceedings can require mental health expertise in certain circumstances.[186] Courts have recognized that the constitutional

183. Katherine Kruse describes the counseling role as "a process of bringing coherence to conflicting values within the framework of general rules and with sensitivity to highly contextualized facts and circumstances." Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 250 (2011); *see also* Kruse, *Engaged Client-Centered Representation*, *supra* note 150, at 587 ("Engaged client-centered representation recognizes that clients do not arrive with static and pre-determined objectives to which lawyers can simply defer. Clients' objectives . . . often change over the course of representation; and their objectives are shaped in part by the information about the law and available legal options that their lawyers explain to them.").

184. An important consideration here is how defense attorneys feel in carrying out their professional obligations. In this respect, it is notable that defense attorneys report great difficulty in representing individuals with mental disabilities. *See* Davis et al., *supra* note 157, at 465–66.

185. SUBSTANCE ABUSE, TREATMENT CONSIDERATIONS, *supra* note 169, at 7.

186. The ethical rules require attorneys to have the expertise "reasonably necessary for the representation." MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983). Mental health issues—e.g., mandated mental health treatment—are now salient at all stages of criminal proceedings, including plea negotiation, eligibility for diversionary courts, trial, sentencing, and post-release community supervision proceedings. Where attorneys' counseling, strategy, and advocacy are likely to be different if they had mental health expertise, it follows that such expertise is "reasonably necessary for the representation" and thus required by the Model Rules. *Id.* As a constitutional matter, deficient representation occurs only when the representation falls "below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 668 (1984). That standard is measured by comparing the conduct at issue to "prevailing professional norms." Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010). Prevailing professional norms include consideration of indigent defense guidance and practice. Notably, the ABA's Criminal Justice Standards indicate that "attorneys who represent defendants with mental disorders should provide client-centered representation that is inter-disciplinary in nature." AM. BAR. ASS'N, *supra* note 141, at *Standard 7-1.4(a)*. At least one scholar has

guarantee of effective representation[187] can sometimes require defense counsel to seek mental health expertise like a consulting or testifying psychiatrist or psychologist, in the course of legal representation.[188] In addition, courts have held that defendants have the right to a government-funded mental health professional and the presentation of psychiatric evidence when defendants' mental health status raises questions of criminal responsibility, or in some cases when the offense is eligible for a sentence of death.[189] In its Criminal Justice Standards, which provide guidance to practitioners but are not enforceable professional obligations, the ABA acknowledges the prevalence of mental disability in the criminal system and the corresponding need for mental health expertise in many cases.[190]

For the client-centered lawyer, effective advocacy in the treatment paradigm calls for mental health expertise in cases involving clients with personality conditions. In the treatment paradigm, a criminal defense attorney may negotiate a plea that includes participation in treatment or may need to respond to the possibility of imposed treatment at sentencing. To be able to assess how a particular defendant may fare in system-involved treatment, and therefore be able to advise a client on the risks and benefits of different courses of action, attorneys must have sufficient expertise to answer multiple key

suggested that in some cases involving clients with mental disabilities, defense attorneys should have access to mental health professionals for evaluation outside of the court-recognized circumstances of competency and insanity proceedings. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 565 (1993). And in the death penalty context, "[i]t is difficult to conceive of a case, for example, where a mental health expert would not be utilized at least for evaluation." Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1948 (2006). Still, however, determining the prevailing professional norms is "thorny." Johnson, *supra* note 130, at 940.

187. The Sixth Amendment prohibits "ineffective" representation, defined as representation that falls "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. However, prevailing on this type of claim is rare; *see* Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 609 (2011) (noting the difficulty in prevailing on a Sixth Amendment claim of ineffective representation and citing the "repeated[] critici[sm] for providing too little protection to criminal defendants"). *See generally* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277 (2020) (critiquing the prejudice requirement of ineffective representation claims).

188. *See, e.g.*, Williamson v. Ward, 110 F.3d 1508, 1523 (10th Cir. 1997) (holding that defense counsel was ineffective for failing to investigate defendant's mental health condition and to seek a competency hearing).

189. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (establishing due process right to government-funded psychiatrist when a defendant makes a showing that "sanity" at the time of the offense will be an issue at trial or sentencing); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (recognizing due process right to offer psychiatric evidence regarding competency to be executed).

190. *See generally* AM. BAR. ASS'N, *supra* note 141 (acknowledging prevalence of mental disability and need for mental health expertise in the criminal justice system). However, the ABA does not consider these standards ethical obligations; they are standards that go above what the Model Rules require. Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1100–05 (2011).

questions, including: (1) does the defendant have a mental health condition for which mental health treatment could be helpful; (2) are the treatment opportunities in the jurisdiction where the defendant is being prosecuted appropriate for the mental health needs of the client; and (3) does the mental health condition render the client less likely be to be able to successfully participate in the treatment opportunities available in the jurisdiction? These determinations all call for mental health expertise, which criminal defense attorneys often lack.[191]

An attorney can gain expertise in order to properly represent their clients with personality conditions,[192] but, under the structure of indigent defense today, attaining mental health expertise to engage in meaningful client counseling is hardly possible. Attorneys seeking mental health expertise could retain a mental health professional as an expert to consult on the mental health needs of the client and whether treatment modalities in the jurisdiction meet such needs. But time constraints in the criminal system render this work nearly impossible to complete in many cases. A thorough evaluation process also entails record collection, which could include school records, hospitalization records, prior treatment records, and others. The majority of pretrial cases resolve within two months for misdemeanors and three months for felonies,[193] and revocation proceedings from community supervision move quickly.[194] The speed of the criminal process prevents defense attorneys in many cases from pursing the mental health expertise, via a consulting mental health professional, necessary for meaningful representation.[195]

Beyond time constraints, resource constraints prevent defense practitioners from regularly employing mental health professionals to provide

191. Davis et al., *supra* note 157, at 465 ("In our current court system, defenders are often expected to be able to make informed decisions about their clients' mental health needs, a skill that is traditionally the purview of medical and mental health providers."). Not only are health issues outside the legal field, "[t]raining in legal advocacy for people with disabilities is not a standard aspect of socialization in legal education." RIBET, *supra* note 112, at 5.

192. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 1983) ("A lawyer can provide adequate representation in a wholly novel field through necessary study."). Although a lawyer can conceivably study a novel field to become competent in it under the ethical rules, given the complexity of the mental health fields, obtaining mental health expertise in criminal representation likely requires seeking assistance from a trained mental health professional.

193. NAT'L CTR. FOR STATE CTS., TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 1, 4, https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf [https://perma.cc/KR3S-3UHY].

194. *See, e.g.*, CONN. GEN. STAT. § 53a-32 (2023) (setting forth maximum time for final revocation hearing to be no later than 120 days after arraignment).

195. In the context of drug courts, some have argued that the speed of the criminal process prevents ethical advising and therefore representation. Steven N. Yermish, *An Overview of the Ethical Issues Created by Problem-Solving Courts and the Mentally Ill Client*, 33 CHAMPION 14, 15 (2009) ("[A]pplication for entry into [drug courts] is required too quickly after arrest. The decision to enter the plea is made without the benefit of discovery or ample opportunity to discuss the pros and cons of the program with the client.").

expertise in cases involving defendants with mental health conditions. Many jurisdictions lack a mental health infrastructure that would permit obtaining expertise for competent representation of clients with personality conditions. A 2018 study found that most non-metropolitan jurisdictions have zero psychiatrists and that just under half do not have a psychologist.[196] And indigent defense systems are chronically underfunded,[197] limiting their ability to provide financial resources toward mental health professionals. Without mental health professionals to serve as experts and advisors for criminal defense teams, the door to gaining mental health expertise to handle cases involving personality conditions closes.[198]

Gaining expertise in cases involving personality conditions, while necessary, also comes at a cost to the client's representation. The professional responsibility rules impose a set of obligations on attorneys vis-à-vis other legal system actors; increased information in the hands of the defense attorney, in turn, limits what the defense attorney can say to opposing counsel or to the adjudicator.[199] Thus, for example, an attorney that is aware of a personality condition cannot claim lack of awareness of a mental health condition to the court, opposing counsel, or a probation officer.[200] It could be detrimental to the

196. C. Holly A. Andrilla, Davis G. Patterson, Lisa A. Garberson, Cynthia Coulthard & Eric H. Larson, *Geographic Variation in the Supply of Selected Behavioral Health Providers*, 54 AM. J. PREVENTIVE MED. 199, 200 (2018).

197. *See generally* Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003) (arguing that the underfunding of indigent defense systems translates into institutional neglect of professional obligations by defense attorneys).

198. Telemedicine and telehealth offer a potential path for access to mental health professionals in remote jurisdictions. *See generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., TELEHEALTH FOR THE TREATMENT OF SERIOUS MENTAL ILLNESS AND SUBSTANCE USE DISORDERS (2021), https://store.samhsa.gov/sites/default/files/pep21-06-02-001.pdf [https://perma.cc/9KSX-7QPE] (discussing telemedicine and telehealth as an alternative for access to mental health resources). However, apart from the regulatory challenges providers face, "telehealth should be considered as an adjunct and best used to supplement in-person visits." Shilpa N. Gajarawala & Jessica N. Pelkowski, *Telehealth Benefits and Barriers*, 17 J NURSE PRACT. 218, 219 (2021).

199. Model Rule of Professional Conduct 3.1 cabins the set of issues an attorney can present to the court, requiring a basis in law and fact that is not frivolous for advancing an issue, and under Rule 3.3 an attorney cannot make a false statement of fact or law to the tribunal and must correct any prior false statement made. MODEL RULES OF PRO. CONDUCT r. 3.1, 3.3 (AM. BAR ASS'N 1983). The ABA's Criminal Justice Standards also provide for a duty of candor "toward the court and others," thereby extending the duty of candor imposed by the Model Rules to other actors like prosecutors and probation or community supervision officers. AM. BAR. ASS'N, *supra* note 141, at *Standard 4-1.3*; *see also id.* at *Standard 4-1.4(b)* ("Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party.").

200. Attorneys have an obligation to keep privileged information confidential and must have at least implicit authorization to disclose information absent limited circumstances. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983). Where the information would work to the detriment of the client, no such grounds exist for disclosure of information, leading to the discovery process in criminal law practice as a "game of hide and seek." Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237, 271 (2019).

client for other criminal system actors to learn of the client's personality condition diagnosis. A court may sentence more harshly, treating the personality condition as an aggravating factor at sentencing.[201] Stigma around mental disability, and personality conditions in particular, could affect how criminal system actors—including the prosecutor or community supervision officials—view that defendant, impacting plea negotiations or the experience on probation, parole, or supervised release.

Let's illustrate the expertise conundrum through Ms. Boughton's case. Assume Ms. Boughton has not disclosed any mental health condition to her attorney, but he suspects based on their interactions that she has one. Her defense attorney receives a plea offer from the prosecutor for a year, and the prosecutor gives Ms. Boughton one week to consider the plea offer. To obtain a mental health evaluation, her attorney would need to justify to the prosecutor an extension of the plea offer's deadline, but doing so by disclosing the need for a mental health evaluation is risky. If Ms. Boughton has a personality condition, the prosecutor may treat it as aggravating (and the judge may agree), leading to a potentially worse case outcome. At the same time, the mental health evaluation may indicate a condition that warrants an even more favorable disposition to the case, such as a non-custodial sentence.

Even if Ms. Boughton's attorney could obtain a mental health evaluation without the prosecutor knowing, the additional knowledge obtained about his client could hinder his advocacy. After an evaluation revealed a BPD diagnosis, Ms. Boughton and her attorney attended her sentencing. The judge, in considering conditions of community supervision, asked Ms. Boughton's attorney whether any mental health issues were present that warranted treatment. The professional rules forbid misrepresentations to the court, but they also mandate confidentiality to the client. Strategically, Ms. Boughton's attorney may be stuck: declining to answer the judge's question may upset the court, and he fears the judge will not look favorably on Ms. Boughton's diagnosis. Her defense attorney wishes he simply did not have information about her diagnosis.

Expertise in criminal cases involving clients with personality conditions is a double-edged sword. As a structural matter, gaining the necessary expertise for meaningful client counseling is not possible, due to both resource and time limitations. And the same mental health information that is necessary to properly advise a client is information that could harm a client if learned by others.

201. *See supra* Section II.A; *see also* Berryessa, *supra* note 116, at 206 ("[R]esearch has shown that offenders with mental disorders are often perceived as less treatable and more dangerous compared to offenders without diagnoses, leading judges to choose more restrictive sentences based on fears related to dangerousness or lack of rehabilitation.").

3. The Challenge of Client Autonomy

Empowering the client is the ultimate goal of client-centered lawyering. Indeed, directing the course of representation is heralded as one of the most important rights defendants have in criminal proceedings.[202] Both the Model Rules and the Sixth Amendment explicitly provide for client authority over certain critical decisions in criminal proceedings.[203] Legal scholarship is replete with debates about criminal defendants' autonomy.[204] Two obstacles to ensuring the autonomy of a client with a personality condition in the treatment paradigm are worth discussing here. The first is about the specific impairments that people with personality conditions experience, and how these impairments, within the structure of the criminal system, pose significant challenges for ensuring a client's autonomy. The second is the difficulty of ensuring client

202. Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017) (stating the Sixth Amendment right to self-representation reflects the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); Slobogin & Mashburn, *supra* note 145, at 1586 ("Society values autonomy because we assume people are ordinarily the best judges of their own interests and because, even if they are not, taking away their opportunity to decide would show insufficient respect for the person."); *cf.* Sara R. Faber, Note, *Competency, Counsel, and Criminal Defendants' Inability to Participate*, 67 DUKE L.J. 1219, 1221 (2018) ("The competency standard and, to a lesser extent, the Sixth Amendment right to counsel demonstrate the American criminal justice system's longstanding commitment to ensuring that criminal defendants who stand trial are capable of participating in those trials.").

203. A client facing criminal proceedings decides the objective of the representation, while attorneys have authority over the means of representation. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983). Attorneys can, under the Model Rules, take actions on behalf of their clients that align with the client's objective in the representation. *Id.* Under the Sixth Amendment, defendants also have the right to represent themselves without the assistance of counsel. McCoy v. Louisiana, 138 S. Ct. 1500, 1505 (2018) (recognizing a defendant's Sixth Amendment right to have his counsel refrain from conceding guilt when defendant expressed directive to assert not guilty plea); Faretta v. California, 422 U.S. 806, 832 (1975) (recognizing a right under the Sixth Amendment to reject the assistance of counsel).

204. For example, although autonomy is generally accepted as an important goal, scholars do not universally agree that the individual rights defendants possess effectuate the aim of ensuring a defendant's autonomy. *See, e.g.*, Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 376–77 (2021) [hereinafter Miller, *The Myth*]; Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 623 (2005); Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 451 (2022). In particular to individuals with mental disabilities, the Supreme Court's most recent ruling on a defendant's autonomy when that defendant's competency is at issue, in *McCoy v. Louisiana*, has generated debate about whether the autonomy jurisprudence actually serves to benefit individuals charged with criminal offenses. *See* Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on* McCoy v. Louisiana, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 92, 92 (2018); Sullivan, McCoy, *supra* note 147, at 746; Elizabeth M. Klein, McCoy v. Louisiana*'s Unintended Consequences for Capital Sentencing*, 71 STAN. L. REV. 1067, 1067 (2019); Nina Varsava, Judith Foo, Elizabeth Villarreal & David Walchak, *Allocating Authority Between Lawyers and Their Clients After* McCoy v. Louisiana, 23 NEW CRIM. L. REV. 170, 170 (2020).

autonomy when a client has multiple and competing goals in the representation.[205]

Discerning a client's priority in the representation, when the client has a personality condition, can prove elusive. This is because personality conditions can cause significant impairments relating to decision-making, directly affecting the process by which clients exercise autonomy in the attorney-client relationship. The two most prevalent mental health conditions identified in the prison population, BPD and ASPD, involve impairment in inhibitory control and reward processing.[206] Neuropsychological studies indicate that people with ASPD have impairments related to executive functions, including in memory, the ability to plan, and holding attention.[207] In simple terms, people with these conditions have difficulty weighing risks and benefits of different options, and in particular have difficulty in waiting for a bigger reward when a smaller reward is initially offered.[208] Layer the structure of criminal proceedings over these impairments: in a short time span, under stressful conditions, and possibly while incarcerated, individuals must choose between the two difficult options the treatment paradigm makes available. In other words, the stressors inherent in criminal proceedings further encumber decision-making, adding to the attorney's conflict.

To illustrate, take again the example of Ms. Boughton. Ms. Boughton is currently residing at a halfway house as a condition of being on probation (avoiding an initial custodial sentence). She now faces probation revocation proceedings after failing to complete a treatment program and follow other rules of the halfway house. The court, noting the behavior that led to the probation violations—defiance toward halfway house officials, emotional outbursts, and leaving the halfway house—thinks she needs *more* treatment, so it intends to mandate inpatient treatment rather than re-imprison her. The proceedings take a month, and during this time her defense attorney will meet with Ms. Boughton, counsel her, and advocate for an outcome in the final revocation hearing. Ms. Boughton initially wants to object to inpatient treatment because of the risk of additional incarceration if she doesn't complete the inpatient

205. This is not to imply that absent a personality condition, the decision-making process is straightforward. Many people involved in the criminal system may have multiple goals for the representation or face difficulty in prioritizing a goal for the representation, and the decision-making process to determine priorities could be difficult for many absent a diagnosable mental health condition.

206. *See* Dingfelder, *supra* note 69, at 46; Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 150–51.

207. Michael Baliousis, Conor Duggan, Lucy McCarthy, Nick Huband & Birgit Völlm, *Executive Function, Attention, and Memory Deficits in Antisocial Personality Disorder and Psychopathy*, 278 PSYCHIATRY RSCH. 151, 151 (2019).

208. Alan C. Swann, Marijn Lijffijt, Scott D. Lane, Joel L. Steinberg & F. Gerard Moeller, *Trait Impulsivity and Response Inhibition in Antisocial Personality Disorder*, 43 J. PSYCHIATRY RES. 1057, 1057 (2009); Baskin-Sommers et al., *Cognitive-Affective Factors*, *supra* note 70, at 150–51.

program, but then changes her mind when she learns the alternative is prison. She regularly alternates between the two during the proceedings. As the day of the probation revocation hearing nears, Ms. Boughton continues to alternate between objecting to or asking for inpatient treatment. Ms. Boughton's attorney fears that Ms. Boughton has not been able to adequately process the risks associated with agreeing to inpatient treatment due to impairments associated with BPD. How does her attorney know which articulated goal—declining treatment, or avoiding prison—is the one that ensures Ms. Boughton's autonomy? How does her attorney work toward client empowerment in this situation?

In this scenario, the ethical rules provide little in terms of guidance in resolving these questions. No ethical rule guides attorneys in how to practically discern a client's objective or goal in the representation. A sole rule exists that provides guidance for when a client has mental impairments that "diminish" her "capacity to make adequately considered decisions in connection with a representation."[209] Model Rule 1.14 typically evokes cognitive impairments, like those that can arise in elder law,[210] or when a defendant lacks the competency to stand trial, and not cases involving personality conditions.[211] But, as Rule 1.14 recognizes, decision-making capacity lies on a continuum.[212] Thus, even if a personality condition does not render someone incompetent to stand trial, the rule would apply to someone like Ms. Boughton, if the mental impairments she has affect her ability to make a considered decision in the representation.

Still, even assuming Ms. Boughton's impairments diminish her capacity to make an adequately considered decision in the representation, Rule 1.14 leaves much to be desired in terms of substantive guidance for her attorney.[213] Rule 1.14's main purpose is to affirm the autonomy of clients with diminished capacity by mandating a lawyer treat her client with diminished capacity as the

209. MODEL RULES OF PRO. CONDUCT r. 1.14(a) (AM. BAR ASS'N 1983).

210. Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 324 (2003).

211. Emily Stork, Note, *A Competent Competency Standard: Should It Require a Mental Disease or Defect? A Debate Sparked by the Circuit Split over Axis II Personality Disorders and Competency To Stand Trial*, 44 COLUM. HUM. RTS. L. REV. 927, 954–56 (2013) (noting the view that personality conditions do not give rise to competency concerns and arguing that this view minimizes the significant impairments such conditions can cause).

212. Knauer, *supra* note 210, at 338.

213. King, *supra* note 148, at 233–34 ("The Model Rules of Professional Conduct are not helpful in guiding a criminal defense lawyer representing a client with mental impairment."); *see also* Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 242 (1998); Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEG. ETHICS 313, 315 (2004).

lawyer would treat other clients (without diminished capacity).[214] The rule appropriately recognizes that people with impairments affecting the decision-making process should still have the authority to determine matters regarding their own well-being.[215] It authorizes attorneys to take "protective action," such as consulting with family members, support groups, or seek surrogate decision-making, but only when, in addition to a client having diminished capacity, the client is at risk of harm and cannot act in her own interest.[216] Absent a conclusion by an attorney that a client will suffer harm and cannot act in her own interest, the rule does not provide any further guidance on how to ensure a client's autonomy is served in the representation.

The lawyering literature provides some additional guidance and highlights the difficulty a defense attorney faces in ensuring the autonomy of a client with personality conditions in the treatment paradigm. Recommendations in the lawyering literature for cases involving diminished capacity include spending more time and attention with the client, increasing the level of detail in explanations, consulting with other individuals in the client's life (if authorized by the client), consulting with professionals, using different interviewing techniques, and making the space where attorneys and clients meet as accommodating as possible for the client.[217] Many of these recommendations are difficult to implement in the criminal context and are not tailored toward clients with personality conditions.[218] Some, such as making a space accommodating for the client, are impossible to implement for clients who are incarcerated during proceedings. These challenges illustrate some of the

214. Model Rule 1.14 states that in cases where "a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." MODEL RULES OF PRO. CONDUCT r. 1.14(a) (AM. BAR ASS'N 1983). The rule aims to enshrine a client's right to receive "attention and respect" from their attorney regardless of diminished capacity. *Id.* at r. 1.14 cmt. 2.

215. *Id.* at r. 1.14 cmt. 1. Even when people have impairments that significantly impede their ability to make decisions, tools such as supported decision-making can help preserve client autonomy. Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 98 (2012); Emily Largent, Andrew Peterson & Jason Karlawish, *Britney Spears Didn't Feel Like She Could Live 'a Full Life.' There's Another Way*, N.Y. TIMES (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/opinion/guardianship-britney-spears-decision-making.html [https://perma.cc/B3U8-PRLW (staff-uploaded, dark archive)].

216. MODEL RULES OF PRO. CONDUCT r. 1.14(b), r. 1.14 cmt. 5. Even if these tools were authorized under the rule to help lawyers discern a client's goal, they may not be available within the time and resource constraints that defense lawyers face in representing indigent clients in criminal proceedings.

217. Barry Kozak, *The Forgotten Rule of Professional Conduct—Representing A Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827, 849 (2016); Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 214 (2010); Laura J. Whipple, *Navigating Mental Capacity Assessment*, 29 TEMP. J. SCI. TECH. & ENV'T. L. 369, 395 (2010).

218. For example, recommendations include detailed and repeated explanations are targeted toward representation of the elderly. *See* Sisk & Abbate, *supra* note 217, at 214.

assumptions the criminal system holds about the decision-making process, namely, that the conditions under which people make decisions permit people to exercise their fully considered judgment.[219]

Attorneys face a second obstacle to ensuring their client's autonomy, which is how to balance potentially competing goals of the representation. Take Ms. Boughton for example again. She tells her attorney two things—that she does not want to participate in treatment, and that she wants to do whatever possible to get the lowest term of incarceration possible. From the attorney's point of view, both goals are reasonable but conflicting: to obtain the lowest term of incarceration possible, Ms. Boughton would need to successfully participate in treatment. The attorney therefore struggles to figure out what path of representation best ensures client autonomy.

One other limitation in the ethical rules, for the client-centered lawyer, is the minimal requirement of what constitutes "objectives of the representation." Under Model Rule 1.2, the client has the authority to determine the objectives of the representation, while other decisions, called the "means" of the representation, are subject to the discretion of the attorney.[220] A client-centered lawyer understands the "objectives" of the representation to be broadly defined. But the Model Rule itself defines what constitutes an "objective" of the representation. It expressly provides that the "objectives of representation" over which clients have ultimate authority are decisions about whether to go to trial, whether to enter a guilty plea, and whether to testify.[221] Thus, in cases where a decision to participate in treatment is part of a plea, the ethical rules will require that the client make a decision about it. But mandated treatment in the criminal system can often arise without any connection to a plea, such as in sentencing proceedings and community revocation proceedings, like federal supervised release or state parole hearings. In these instances, the definition of "objectives" in Rule 1.2 would leave what position to take regarding treatment to the attorney's discretion.[222] In contrast, a client-centered lawyer would view

219. Similarly, the legal system makes normative assumptions about capacity that can result in the exclusion of people with mental disabilities from participation in decision-making. Knauer, *supra* note 210, at 341.

220. King, *supra* note 148, at 210.

221. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983); King, *supra* note 148, at 209–10.

222. For example, when a sentencing court imposes treatment without agreement by the defendant, a defense attorney may choose to not object without consulting her client, because whether to object to treatment is treated as a "means" of the representation. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 477 (2004) (noting that among the decisions left to lawyers are "what legal arguments to make at sentencing").

treatment decisions as critical and subject to client authority,[223] not only because treatment is consequential to the ultimate ramifications the client faces, but also because decisions around medical treatment are essential to a person's autonomy.[224]

Maximizing a client's autonomy is the goal of client-centered lawyering, but in the treatment paradigm, it proves elusive. When representing defendants with personality conditions, impairments related to decision-making can render assessment of a client's object of the representation difficult. Compounding this obstacle is the fact that people facing criminal charges can have multiple goals, and when those goals are competing, a lawyer's job in protecting and enhancing a client's autonomy is hard to accomplish.

IV. DEVELOPMENTS IN INDIGENT DEFENSE: EASING THE LAWYERING QUANDARY?

Client-centered lawyering developed as a response to concerns about subordinated clients within the attorney-client relationship, with the goal of creating conditions that actually enable clients to have their objectives pursued.[225] When defense attorneys cannot effectuate the goals of client-centered representation to an identifiable, subordinated population of clients, practitioners, scholars, and criminal system stakeholders should be alarmed. Because the criminal system relies on defense attorneys to carry out their

223. Carle, *supra* note 151, at 131 (describing as "key" to the process of client-centered lawyering "is the ultimate right of the client to decide on both the goals and the means used in the legal representation").

224. *See* Cruzan by Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."); Washington v. Harper, 494 U.S. 210, 243 (1990) (holding that the substantive protections of due process limit the forced administration of psychotropic drugs to all but those inmates whose medical interests would be advanced by such treatment). Mandated psychotherapy does not receive the same level of constitutional protection, but constitutional protection does not always align with commonly understood notions of autonomy. *See* Richard J. Bonnie, *Competence for Criminal Adjudication: Client Autonomy and the Significance of Decisional Competence*, 20 OHIO ST. J. CRIM. L. 231, 237–38 (2023) (discussing the relationship between client autonomy and adjudicative competence in criminal proceedings, and noting the uncertain terrain of autonomy left by constitutional obligations and ethical rules); Titus Levy, Comment, *The Illusion of Defendant Autonomy and the Moral Harm of Self-Incrimination in* Mccoy v. Louisiana, 51 FORDHAM URB. L.J. 949, 963–67 (2024) (critiquing autonomy-based constitutional holdings for failure to in fact advance autonomous behavior). *See generally* Miller, *The Myth*, *supra* note 204 (critiquing autonomy jurisprudence and arguing it fails to secure meaningful exercise of autonomy by defendants).

225. Jacobs, *supra* note 150, at 345–46; Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving the Client Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 862 (1987).

clients' objectives, the defense attorneys' impediments become the system's shortcomings.[226]

Two recent developments, both of which developed to address critiques of traditional indigent defense, appear to offer a path out of the lawyering quandary in criminal defense of clients with personality conditions. This part discusses these developments, illustrating the areas where these developments ease the defense attorney's quandary but acknowledging the limitations of these trends in the treatment paradigm. The part concludes by situating this Article's discussion within broader critiques of the exercise of defendants' autonomy in the criminal system.

A. *Multidisciplinary Defense*

Multidisciplinary defense is increasingly popular as a model for providing indigent criminal defense services. Holistic defense offices and specialized defense units, both of which incorporate mental health professionals *as staff* into defense practice, promise increased mental health expertise and thus a more robust way to address the legal needs of clients with mental disabilities. While appearing attractive, these criminal defense lawyering models do not resolve the treatment paradigm's lawyering quandary. Recognizing and discussing their limitations is necessary to determine which reforms within the criminal system can enhance fairness for defendants with mental disabilities.

Holistic defense is the most prevalent model of multidisciplinary defense practice today.[227] Holistic defense offices incorporate mental health professionals as part of their goal to aid clients beyond strictly criminal legal needs.[228] Holistic defense focuses on connecting defendants with services, such

226. As Zohra Ahmed aptly describes, it is a fallacy to view defendants, their lawyers, and the criminal system as independent entities, as their interrelatedness functions to subordinate defendants' autonomy. Ahmed, *supra* note 204, at 507–17.

227. For a discussion of the holistic defense model, see Robin Steinberg & Skylar Albertson, *Broken Windows Policing and Community Courts: An Unholy Alliance*, 37 CARDOZO L. REV. 995, 996 (2016). Steinberg and Albertson, both of whom worked at one of the first defense offices practicing holistic defense, describe the "interdisciplinary training that staff members at holistic defender offices must undergo in order to provide clients with the best representation possible. Advocates with interdisciplinary training are able to anticipate and identify the enmeshed penalties that their clients may face, making timely and informed referrals possible." *Id.* at 1006; *see also The Bronx Defenders' Skylar Albertson Delivers Testimony at Solitary Confinement Hearing*, THE BRONX DEFENDERS (June 18, 2024), https://www.bronxdefenders.org/the-bronx-defenders-skylar-alberton-gives-testimony-at-solitary-confinement-hearing/ [https://perma.cc/4E8U-99A7] (describing some of Skylar Albertson's work at the Bronx Defenders).

228. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821 (2019); *see also* Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1216 (2015) (describing holistic defense as a component of the "larger problem-solving movement" within criminal legal system reform and developing as a response to criticism of indigent defense systems).

as drug or mental health treatment or housing and immigration services.[229] This model of criminal defense has grown increasingly popular among defense practitioners and scholars who believe that it may both improve outcomes in criminal proceedings[230] and enhance the client experience of defendants.[231]

Outside of the holistic defense model, some jurisdictions are also experimenting with a multidisciplinary approach, such as specialized training for public defenders and designated social workers that locate social services for certain clients with mental disabilities.[232] These specialized public defense offices illustrate how limited multidisciplinary practice is, even where it exists. One specialized mental health office consisted of "specialized" legal counsel who receive six hours of training a year on mental health issues from program social work staff.[233] The case management services provided at that office were offered only to people having just one of three diagnoses in the DSM-5, none of which are a personality condition.[234] Chronic underfunding of indigent defense systems[235] likely prevents greater resources toward multidisciplinary training or hiring of mental health professionals as staff at indigent defense offices.[236]

229. *See* Robin Steinberg, *Heeding* Gideon*'s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 981–82 (2013) (discussing holistic defense practice as "enabl[ing defenders] to make appropriate referrals for clients to get mental health counseling, housing, and employment assistance"); Anderson et al., *supra* note 228, at 825 ("A holistic defender might help clients enroll in drug treatment, access mental health services, maintain employment, preserve housing, or file immigration applications."); Orihuela, *Crim-Imm*, *supra* note 156, at 631.

230. Anderson et al., *supra* note 228, at 820–21 (using case study to argue that holistic defense reduces likelihood of custodial sentence and expected sentence length).

231. *See generally* Kimberly M. Davison, Brian J. Ostrom & Matthew Keiman, *Client Perspectives of Holistic Defense: Strengthening Procedural Justice Through Enhanced Client Trust*, 43 JUST. SYS. J. 1 (2022) (concluding that holistic defense can increase client trust and perceptions of fairness in criminal proceedings).

232. One study cites Pima County, Arizona, and Los Angeles County as jurisdictions that provide specialized training for public defenders, and the study itself analyzed case management and specialized training in an unidentified jurisdiction. Jeff Bouffard, Elizabeth Berger & Gaylene S. Armstrong, *The Effectiveness of Specialized Legal Counsel and Case Management Services for Indigent Offenders with Mental Illness*, 4 HEALTH JUST. 7, 8 (2016). Various counties in Texas have experimented with specialized training and concentration of cases involving clients with mental health conditions. James D. Bethke & Morgan Shell, *Public Defense Innovation in Texas*, 51 IND. L. REV. 111, 111 (2018).

233. Bouffard et al., *supra* note 232, at 6.

234. *Id.*

235. Joe, *Systematizing Public Defender*, *supra* note 139, at 428–29 (describing the insufficient funding of indigent defense and critiquing rationing of defense services); Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 138 (2020) (noting the "systemic underfunding of public defender systems" and analyzing the effect of structural design of public defender systems on funding).

236. Compare the lack of mental health expertise in indigent defense to the relatively recent incorporation of immigration practitioners into public defender offices. Criminal defense practice has long needed immigration expertise, but it took until the Supreme Court recognized a Sixth

Multidisciplinary defense's benefits, as they relate to the lawyering quandary this Article discusses, lie in increased mental health expertise within criminal defense legal teams. Traditionally, a criminal defense attorney seeking to work with a mental health professional will consult with one as an expert, who will evaluate a defendant and produce a report for use in criminal proceedings.[237] Mental health professionals who are part of a criminal defense office in multidisciplinary criminal defense work as part of the legal defense team. In theory, they can help advise on the critical questions a lawyer must answer to meaningfully counsel a client.[238] Incorporating mental health professionals directly into a criminal defense legal team can enhance the legal team's ability to counsel a client with personality conditions. Individuals with the same mental health condition will have various levels of impairment in specific functions.[239] The level and type of impairment can influence how a treatment modality may serve them,[240] and, thus, increased expertise on a client's impairments improves defense counsel's ability to advise on the likelihood of successfully pursuing a treatment program through the criminal system. In other words, mental health professionals can better assess whether a court-mandated treatment program is risky for a particular defendant in light of that defendant's specific impairments and level of impairment.

Incorporating mental health professionals into indigent defense offices also has other benefits for the representation of clients with personality conditions. Mental health professionals have the training to be keen observers of how a condition like incarceration is impacting a client. Legal teams with mental health professionals are thus better capable of identifying new needs

---

Amendment right to be advised of a conviction's immigration consequences for indigent defense systems to incorporate such expertise into its offices. *See* Ingrid Eagly, Tali Gires, Rebecca Kutlow & Elaina Navarro Gracian, *Restructuring Public Defense After* Padilla, 74 STAN. L. REV. 1, 41 (2022).

237. One longstanding practice in criminal defense advocacy is to retain a mental health professional as an expert to conduct an evaluation of a client. Typically, experts are retained to advise on issues of competence, when the mental status of a client may excuse criminal culpability, or for mitigation purposes. *See supra* Section III.B.

238. *See supra* Section III.B (explaining critical questions to include "(1) does the defendant have a mental health condition for which mental health treatment could be helpful; (2) are the treatment opportunities in the jurisdiction where the defendant is being prosecuted appropriate for the mental health needs of the client; and (3) does the mental health condition render the client less likely be to be able to successfully participate in the treatment opportunities available in the jurisdiction").

239. Michael J. Crawford, Nestor Koldobsky, Roger Mulder & Peter Tyrer, *Classifying Personality Disorder According to Severity*, 25 J. PERSONALITY DISORDERS 321, 321 (2011); Anthony F. Jorm, Kathleen M. Griffiths, Helen Christensen, Ruth A. Parslow & B. Rogers, *Actions Taken To Cope with Depression at Different Levels of Severity: A Community Survey*, 34 PSYCH. MED. 293, 293 (2004); M. ten Have, J. Nuyen, A. Beekman & R. de Graaf, *Common Mental Disorder Severity and Its Association with Treatment Contact and Treatment Intensity for Mental Health Problems*, 43 PSYCH. MED. 2203, 2203 (2013).

240. SUBSTANCE ABUSE, TREATMENT CONSIDERATIONS, *supra* note 169, at 7.

individuals develop throughout the course of representation.[241] Criminal defense attorneys' interviewing and counseling skills, and therefore the building of the attorney-client relationship, would also benefit from close collaboration with mental health professionals.[242] For clients with personality conditions, this benefit could be significant, as one of the challenges people with personality conditions often have is difficulty in relationship building.[243]

Lastly, legal teams' advocacy with tribunals could utilize enhanced mental health expertise. Mental health professionals could help educate decision-makers about the ill fit between treatment programs available in that jurisdiction and clients with personality conditions for whom treatment programs would be ineffective or harmful.[244] And to the extent new, emerging treatment become available, multidisciplinary practice could quickly disseminate such evidence to criminal system stakeholders.[245]

Although multidisciplinary defense should supply crucial mental health expertise unto criminal defense teams, it has significant limitations to resolving the defense lawyer's quandary in the treatment paradigm. It is notable that holistic defense, the most popular and prevalent form of multidisciplinary defense, focuses on connecting defendants to services.[246] For lawyers serving

241. As scholar and advocate Beth Ribet writes,

> [T]he frequent possibility of emerging and undiagnosed disabilities is one key reason why partnership between legal practitioners and non-legal practitioners (including social workers, case managers, mental health clinicians, or other healthcare providers) can be vital in preparing to recognize the presence and needs of incarcerated persons with disabilities, and to fully explore the legal options.

RIBET, *supra* note 112, at 14; *see also* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 561 (2022).

242. Mental health professionals with counseling training and experience can enhance defense attorneys' interviewing skills, helping attorneys employing client-centered practices and seeking to incorporate trauma-informed techniques in their lawyering. Sabrineh Ardalan, *Constructive or Counterproductive? Benefits and Challenges of Integrating Mental Health Professionals into Asylum Representation*, 30 GEO. IMMIGR. L.J. 1, 18 (2015). And directly incorporating mental health clinicians or professionals into legal representation has other additional benefits. It serves to promote confidentiality between the mental health professional and the client, due to the greater confidentiality protections afforded in the legal system. Annery Miranda, Note, *Making Interdisciplinary Collaboration Between Social Workers and Lawyers Possible*, 14 NE. U. L. REV. 715, 723 (2022).

243. *See supra* Section I.B.

244. Mental health professionals might help educate tribunals about some of the growing concerns with court-mandated treatment more generally. *See* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1467 (2021) (noting the "growing consensus that healthcare workers and mental-health providers should not be deployed to perform punitive functions or pursue public-health approaches in a coercive manner"); Jennifer S. Bard, *Diagnosis Dangerous: Why State Licensing Boards Should Step in To Prevent Mental Health Practitioners from Speculating Beyond the Scope of Professional Standards*, 2015 UTAH L. REV. 929, 933 (2015).

245. For example, integrating mental health professionals into legal defense teams could help educate courts that still hold the view that a personality condition like ASPD is untreatable.

246. *See supra* notes 227–31 and accompanying text.

clients with personality conditions, connection to services that are not currently effective does not relieve the lawyer's quandary. It is the absence of effective services in the criminal system that underlies the lawyering challenges discussed in this Article.

Further, as discussed in Part III,[247] although increased expertise would improve advising on specific cases, uncertainty over how a particular client would fare in a treatment program would still exist.[248] That uncertainty is inescapable. Finally, multidisciplinary defense does not avoid the ethical pitfalls that come with greater knowledge about a client's mental health condition.[249] Thus while multidisciplinary defense better equips criminal defense attorneys to provide informed and honest assessments about the options available to the client, thereby helping clients make decisions regarding their legal options, it does not relieve all the tensions discussed in this Article.[250]

B. *Declining Treatment as the Client's Interest*

Just as multidisciplinary defense is growing as a lawyering model in criminal defense, criminal defense lawyers are increasingly taking an expansive view of the interests that should drive the aims of the representation. The traditional view of a client's interest in criminal proceedings—solely minimizing the period of incarceration—contributes to the defense lawyer's quandary.[251] It does so by centering the goal of lowering custodial exposure as

247. *See supra* Section III.B.

248. *See* Fisher et al., *supra* note 166, at 708.

249. *See supra* Section III.B.2.

250. One other consequence of multidisciplinary defense, beyond the scope of this Article but worthy of further exploration, is reinforcing a heightened role of the mental health professions in the legal arena. The mental health professions can serve as tools for isolation, control, and ultimately oppression of people with disabilities or other marginalized groups. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/J5PP-ESTF] (discussing how social workers work to enforce a child welfare system which regulates and punishes Black families); Emily Cooke, *Defund Social Workers*, NEW REPUBLIC (Sept. 23, 2022), https://newrepublic.com/article/167627/defund-social-workers [https://perma.cc/F4B7-29RK (staff-uploaded, dark archive)]. The history of psychiatry in pathologizing behavior that corresponds with marginalized groups is one example of the risks posed by centering psychiatry, including diagnoses and medical "treatment" for such diagnoses, as a solution for problems in the legal system. *See* Laura R. Conboy, Comment, *You Need to Calm Down: Examining the Origin and Eliminating the Future of the "Gay Panic" Defense*, 70 BUFF. L. REV. 955, 960 (2022).

251. *See supra* note 163 and accompanying text. In cases involving the death penalty, avoiding such extreme punishment is often thought of as the interest of the client, de-prioritizing other punishment like life imprisonment or an interest in avoiding conviction. Sabelli & Leyton, *supra* note 13, at 184, 196–97; Herman J.F. Hoyng, *To File or Not To File: The Practical and Ethical Implications of Motions Practice on Sentence Negotiations in Capital Cases*, 15 CAP. DEF. J. 49, 52 (2002). In representation of children, attorneys consider what would in the client's "best interest," a concept that scholars have aptly pointed out is difficult to assess. *See* David R. Katner, *The Ethical Struggle of Usurping Juvenile Client*

the primary driver of counseling and legal strategy. Would a broader conceptualization of what is the client's interest in the representation, one that includes the interest a client may have in declining treatment, provide some clarity for the defense attorney representing clients with personality conditions?[252]

Recent practice and caselaw developments point toward a broader view of what constitutes a client's interest is in criminal proceedings. Thea Johnson, through in-depth interviews with public defenders, has detailed the recent trend in criminal defense practice of incorporating collateral consequences in counseling clients.[253] Johnson demonstrates how factors such as immigration consequences, the loss of housing, or community supervision terms are increasingly viewed by public defenders as important considerations for advising a client and negotiating a plea.[254] Relatedly, the Supreme Court's decision in *Padilla v. Kentucky*[255] recognizes that for noncitizens who are charged with criminal offenses, their interest in criminal proceedings will necessarily include a consideration of the immigration consequences of a criminal charge.[256] Still, even as criminal defense attorneys are considering collateral consequences, none of the public defenders Johnson interviewed viewed required mental health treatment as one of the consequences important to what makes a plea deal good or bad.[257] And, a case establishing a Sixth Amendment right to be advised on immigration consequences, as *Padilla* did, is far from recognizing mental health treatment as an interest protected under the guarantee of effective counsel in criminal proceedings.

Under the client-centered lawyering model, there is good reason to reject a view of the client's legal interests that is limited to custodial term or custodial exposure in favor of one that encompasses an interest one may have in rejecting treatment. As I have argued elsewhere, client-centered lawyering challenges the traditional notion that a criminal defense client's primary interest is always lowering custodial exposure.[258] This model of lawyering doubts that lawyers are

Autonomy by Raising Competency in Delinquency and Criminal Cases, 16 S. CAL. INTERDISC. L.J. 293, 293 (2007); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1513 (1996).

252. How broadly a defense attorney interprets a client's potential interests in the representation to be impacts various lawyering functions: what the defense attorney investigates, what information the defense attorney provides to the client, how the defense attorney counsels, and ultimately how the defense attorney advocates with other criminal system stakeholders.

253. Johnson, *supra* note 130, at 935.

254. *Id.* at 905–11.

255. 559 U.S. 356 (2010).

256. *See id.* at 366.

257. Johnson, *supra* note 130, at 935.

258. Marisol Orihuela, *The Ethics of Collective Action in 'Zero Tolerance' Prosecutions*, 16 OHIO ST. J. CRIM. L. AMICI BRIEFS 1, 5–6 (2019), https://ssrn.com/abstract=4136540 [https://perma.cc/74PQ-G6WC].

in the best position to know what a client's interests are, and demands that lawyers question their own assumptions about what a client's goals may be.[259] The model of client-centered lawyering calls for defense attorneys to engage with clients regarding the client's view of mental health treatment, and advise based on the priority as expressed by the client.[260]

In the civil commitment context, scholars have argued for client-centered lawyers to prioritize a client's treatment wishes over other factors. Civil commitment proceedings determine whether a person with a psychiatric disability will be detained in a hospital because that person poses a danger to themselves or others.[261] Those proceedings tie release from detention with an individual's willingness to comply with mandated psychiatric treatment, as they require psychiatric stability for release from confinement.[262] Writing about these proceedings, Michael Perlin and Naomi Weinstein critique a lawyer-centered analysis of determining the interests of a client, arguing that lawyers are ethically required to abide by client wishes regarding treatment.[263] According to Perlin and Weinstein, an ethical lawyer in civil commitment does not seek to determine what they believe is best for the client, but rather seek to "discern what the client's wishes would be absent the mental impairment that prevents the client from making a rational decision."[264]

A broader conceptualization of what encompasses a client's interests in the representation allows for greater client autonomy and has the potential of easing the lawyer's quandary for *some* defendants with personality conditions.[265]

259. *Id.*; Meekins, *Risky Business*, *supra* note 140, at 94 (2007); Carle, *supra* note 151, at 131.

260. Defining a client's interests in a broad manner may also serve other goals clients have that attorneys focused on lowering custodial exposure might fail to appreciate. For example, a client may decide to prioritize advocating for changes in the way personality conditions are viewed by courts or other criminal system stakeholders. *See* Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 279 (2000) ("The personality disorders, especially borderline personality disorder, often reflect little more than the diagnoser's intense dislike of the person diagnosed. Some clinicians have even suggested doing away with the diagnosis of borderline personality disorder because its connotations are so pejorative."); Davis et al., *supra* note 157, at 464. A client-centered approach would permit consideration of such a goal.

261. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 565–66 (1975).

262. United States v. Perkins, 67 F.4th 583, 646 (4th Cir. 2023) (stating that the revocation of conditional discharge from civil commitment is based on whether there was a failure to comply with mandated treatment that led to a risk of injury to others or to property).

263. Michael L. Perlin & Naomi M. Weinstein, *Said I, 'But You Have No Choice': Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 94–95 (2017).

264. *Id.* at 94. To do so, Perlin and Weinstein advocate for conversations with not just the client but also family members or others as a method to limit the potential of substituting the lawyer's views for the client's. *Id.*

265. Although the Model Rules require that clients exercise autonomy over decisions such as whether to enter a guilty plea or testify, nothing in the Model Rules prohibits attorneys from deferring

Namely, those defendants who express they want to prioritize not engaging with treatment can be advised without ethical complication. The pull toward advising a client to participate in treatment should be set aside by the client's expressed priority in the representation.

But, realistically, not all cases will involve a clear alignment of priorities that easily resolve the defense lawyer's quandary. Even when a defense attorney embraces a broad definition of a client's interest, a client may choose to prioritize the lowest term of custodial exposure and be willing to participate in any program necessary to obtain her goal. Her criminal defense attorney still faces the difficult task of how to advise in light of the risks posed by treatment for her client. Or a client may express strong hesitation to treatment while articulating a desire to limit their sentence exposure. In these circumstances, even a broad conceptualization of what constitutes a client's interests does not ease the lawyer's conundrum.

C. *Client-Centered Lawyering and Disturbing the Treatment Paradigm*

The limitations of the defense lawyering proposals described above bring into focus an underlying problem they leave undisturbed: that the options available in the treatment paradigm are narrow. Even if successful, these reforms are modest when viewed in context of their ultimate goal: a just criminal system. Deciding between system-mandated treatment and incarceration (where the harmful effects on mental health are well-established) leaves limited opportunity to carry out meaningfully autonomous decision-making.[266] Increased mental health expertise and defense practices that value the importance of decision-making around mandated treatment may increase autonomy within the existing criminal system. But, what remains is a set of bad choices offered to defendants who hardly can exercise meaningful autonomy within the constraints the criminal system imposes. I highlight these limitations to not overstate the impact of the reforms discussed in this Article, and to situate this Article within a broader critique of how courts and the criminal system view the exercise of autonomy by individuals charged with crimes.

The lawyering proposals discussed above, while offering promise to improve how lawyers ascertain and carry out their clients' objectives, do not ensure a fair and just criminal system. Advocates, scholars, and policymakers should not confuse lawyering problems, and any benefits from lawyering reform, with criminal system problems rooted in systemic design and functioning. While it may enhance a defendant's autonomy for her lawyer to

to client decision-making over other aspects of the representation. As such, a broader interpretation of the client's interests could be adopted by defense attorneys without any change to the ethical rules.

266. Miller, *The Myth*, *supra* note 204, at 438 ("The myth of autonomy rights both legitimizes a flawed system and perpetuates the notion that such a system is redeemable if only we can find the right combination of procedural mechanisms to actualize these rights.").

recognize treatment as an important decision in the representation over which the client should have control, defendants' autonomy is hardly permitted within the treatment paradigm. It would be foolish to believe a client is empowered in the criminal proceedings simply by elevating treatment decisions to how defense attorneys handled plea decisions.[267] Similarly, the expertise gains multidisciplinary defense provides do not equate with criminal proceedings that ensure fairness for defendants with personality conditions. These limitations, if not acknowledged and contextualized, can result in criminal system actors, including the defense bar, mistakenly believing they are meaningfully improving the criminal system and solving problems they are actually leaving intact.

Because client-centered lawyering aims to maximize defendants' autonomy, we should recognize that lawyering reforms aimed at improving lawyering practice risks creating this confusion. Recent scholarship on those rights that purports to enhance client autonomy in criminal proceedings illustrates how criminal defense practice reform aimed at enhancing client autonomy can obfuscate broader systemic problems in the system that do just the opposite. Kathryn Miller challenges the premise that adhering to legal rules in criminal proceedings, such as the client's right to testify, in fact effectuates a defendant's autonomy.[268] Perpetuating this myth, according to Miller, are the defense bar and clinical legal educators, by "uphold[ing] the illusion that [defendants] have meaningful choices for [lawyers] to empower."[269]

A different argument regarding criminal defense lawyering and client autonomy is presented by Zohra Ahmed, who focuses on how the Supreme Court has, in the name of client autonomy, reached decisions that can have harmful impact on defendants. She argues that the Supreme Court's right to counsel jurisprudence in the last few decades, with its "focus on autonomy and choice[,] often functions to merely increase the likelihood of defendants undermining their own chances in their criminal prosecution."[270] Tying the focus in right to counsel cases on individual choice to the United States' neoliberal policy development, Ahmed argues that the Court's adherence to individual autonomy obfuscates problems including legal system underfunding of indigent defense and ableism.[271]

267. *See* Ahmed, *supra* note 204, at 451 (arguing that the Supreme Court "conflates the limited range of choice it offers defendants with power").

268. Miller, *The Myth*, *supra* note 204, at 392 ("The current debate within the criminal defense bar about the ideal model of representation takes for granted that the autonomy of criminal defendants may be facilitated by the creation of and adherence to legal rules . . . .").

269. *Id.* at 440.

270. Ahmed, *supra* note 204, at 448.

271. *Id.* at 504–17.

The critiques Ahmed and Miller expound crystalize how criminal defense practice can improve client autonomy but cannot fully guarantee client empowerment in criminal proceedings. According to Miller, meaningful expressions of defendant autonomy are evidenced by resistance to the criminal system.[272] Ahmed takes a slightly different position. She helpfully points out that the defense bar must sort between practices that actually empower clients and those that claim to enhance autonomy but in fact fail to meaningfully do so.[273] In this Article, I show how certain changes in criminal defense practice can benefit client empowerment, but acknowledge their limitations so as not fall prey to what Ahmed cautions against, distracting advocates and scholars from naming systemic injustices by focusing too much on criminal defense attorneys.[274]

Despite the limitations of lawyering reform, I maintain, however, that the criminal defense bar and scholars of criminal law should continuously engage with questions about how to lawyer in ways that further client empowerment,[275] for at least three reasons. First, and most importantly, by improving defense practice, scholars and advocates can better point out where the system's flaws exist, as those flaws cannot so easily be blamed upon defense attorneys. Second, despite not fundamentally altering systemic inequities, improving lawyering can have smaller but nevertheless actual benefits to individuals. And given the wide acceptance of client-centered lawyering in legal education, identifying where the goals of client-centered lawyering go unmet helps refine, and therefore improve legal education. Finally, as the late and revered Charles Ogletree argued, invigorating criminal defense is a worthwhile goal,[276] and bringing to light the challenges criminal defense lawyers face has an energizing quality even if it does not solve for the system's deeper problems.

CONCLUSION

Criminal defense attorneys, and specifically client-centered defenders, navigate the nearly impossible role of trying to maximize client empowerment in a system that offers narrow, and often poor, choices to defendants. I have shown how the treatment paradigm leaves criminal defense attorneys stuck, and in doing so exposed the false promise of the treatment paradigm to address the revolving door of individuals with mental health conditions in the criminal

272. Miller, *The Myth*, *supra* note 204, at 431.

273. Ahmed, *supra* note 204, at 451.

274. *Id.* at 516 ("In response to the structural strains on attorney-client relations and the absence of political will to solve the crisis, public defenders have looked inward.").

275. On this point, I deviate from Miller, who argues that client-centered defense serves to perpetuate the myth that the choices available in the criminal system can effectuate autonomy. Rather, this Article aims to show, client-centered defense can enhance or further limit client autonomy, but it cannot overcome systemic constrains on defendant autonomy.

276. Ogletree, *supra* note 15, at 1239.

system. It would be naïve to believe that client-centered lawyering can and will resolve this systemic failure in criminal proceedings. Nevertheless, it is still worthwhile for client-centered lawyers to implement practices designed to maximize client autonomy. It is through those practices, and where those practices fail to effectuate client empowerment goals, that the system's failures come into clear view.

I conclude with a note about how we should view personality conditions and mandated treatment within the broader landscape of mental health in the criminal and other legal systems with similar dynamics. Personality conditions are not exceptional in the criminal system. A discussion about them is one way of exploring how the criminal system's design impacts defendants' day-to-day. I have used personality conditions for a variety of reasons—their prevalence in the criminal system, the lack of attention paid to them by policymakers, and the aggravating treatment they receive once identified by criminal system actors. The discussion here, however, and the lessons thereof are applicable outside the context of defendants with personality conditions. The punitive response to failed treatment pervades the criminal system. It affects not just those with personality conditions, but others with mental disabilities, such as those with substance use disorder.[277] The constraints of treatment offered through the criminal system, including the lack of confidentiality, limited options, and questions about its quality also apply broadly.

Similarly, the tensions arising from mandated treatment in the criminal system are present in other legal systems where treatment is employed as a tool that purports to help those impacted but can also intensify negative consequences. Parents in the family regulation system regularly must navigate mandated treatment in order to keep their children.[278] Individuals civilly

277. Indeed, the literature on substance has significant overlap with the discussion in this Article. *See* Eaglin, *supra* note 3, at 597–98; Quinn, *supra* note 140, at 37–38. *See generally* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008) (arguing that the drug court model fails for those with the greatest need in treatment).

278. Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1149 (1997) ("[C]ourt-ordered treatment may be imposed in a variety of criminal and family court contexts."); Richard Famularo, Robert Kinscherff, Doris Bunschaft, Gayl Spivak & Terrence Fenton, *Parental Compliance to Court-Ordered Treatment Interventions in Cases of Child Maltreatment*, 13 CHILD ABUSE & NEGLECT 507, 510 (1989) (finding that substance abuse treatment, individual therapy, and family therapy were the most common types of court-ordered treatment in a sample of parents whose children had been removed); Barbara Rittner & Cheryl Davenport Dozier, *Effect of Court-Ordered Substance Abuse Treatment in Child Protective Services Cases*, 45 SOC. WORK 131, 136 (2000) (discussing that 63.3% of child protective cases in the sample were subject to court orders) ("[M]ost judges issued multiple orders, including substance abuse treatment, mental health counseling, parenting classes, or placement of children with relatives."); State *ex rel.* Children, Youth & Families Dep't v. Athena H., 142 P.3d 978, 981 (N.M. Ct. App. 2006) (upholding termination of parental rights order despite the mother's best efforts to comply with the treatment plan due to the mother's psychological infirmities, and the history of "psychological and emotional damage" inflicted upon the children under the mother's care);

committed must comply with court-imposed treatment to be released from confinement.[279] In these, and potentially other settings, lawyering on behalf of clients who have personality and other mental health conditions is complex and can be ethically challenging, raising doubt about the fairness of a legal system that puts so much stake on defense counsel to ensure clients' rights.

In re Virginia T.F., 49 N.Y.S.3d 830, 831 (Family Ct. Queens Cty. 2017) ("[T]he dispositional order directed the parents, inter alia, to comply with mental health treatment . . . .").

279. Gilliard v. Sanchez, 631 N.Y.S.2d 330, 331 (App. Div. 1995) (upholding release from civil commitment in part on grounds of compliance with treatment); Commitment of B.K. v. State, 938 N.E.2d 864 (table), 2010 WL 4883880, at *3 (Ind. Ct. App. Nov. 30, 2010) (upholding trial court's finding that committee continues to be gravely disabled by his mental illness based in part on his refusal of medication treatment, noting that "if he balks at his treatments now, the chances are slim that he would become amenable to such treatments when released into the community"); *In re* Commitment of May, 500 S.W.3d 515, 522 (Tex. Ct. App. 2016) ("May can obtain his release from the restrictions placed upon him if his behavioral abnormality changes . . . . [There is] the possible transition to less restrictive housing and eventually to release from civil commitment entirely, based on the person's behavior and progress in treatment."); *cf.* Miller, *Sex Offender*, *supra* note 174, at 2117 (noting that poor performance in treatment can harm a civilly-committed sex offender's chances at release, but good performance in treatment often does not increase one's chances).