INTRODUCTION

Collective action by criminal defendants is an oft wished for daydream of criminal defense attorneys driven to lawyer by a desire for social change, but it is hard to execute. Ethical rules require defense attorneys to act in the individual client’s best interests, which often leads to advising clients to enter guilty pleas in order to secure a sentencing benefit for that client. The absence of motion litigation and demands for trial, in turn, limits the opportunities for systemic change that collective action provides. The Trump Administration’s “Zero Tolerance” policy, which instructs federal prosecutors to prosecute with misdemeanor entry or attempted entry charges all individuals apprehended entering the country through the Southwest Border— even those who fear persecution— renders this tension acute, as it places criminal defense attorneys at the forefront of social justice battles in the immigrants’ rights arena. In this era, resolving questions around tensions raised by ethical obligations and lawyering for systemic change is critical.

I am sure it is no surprise to readers that the criminal justice system holds few opportunities for systemic-change litigation, as the vast majority of prosecutions result in guilty pleas through which defendants waive any rights to pursue legal challenges to prosecution. But the criminal justice system simply does not have the resources to try all or even most criminal defendants
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if defendants chose to proceed to trial collectively. If defendants took such collective action, deciding to go to trial and asserting the right to a speedy trial, they would halt the system as it operates today, and could exercise the power to create social change within the system. Mass numbers of prosecutions have been held pursuant to the Zero Tolerance policy in Southern Border states, such as Texas and California. Collective action in Zero Tolerance prosecutions would have a significant impact on the criminal justice system, in light of the policy’s directive to prosecute all individuals who enter between ports of entry and the number of apprehensions. Motion practice could also cause a meaningful disruption to these prosecutions, and bail and motion practice is certainly viable. The Trump Administration’s continued anti-immigrant stances indicate there is reason to suspect that it will continue to use the criminal justice system to advance its anti-immigrant agenda.

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5 John H. Blume, supra note 1, at 27-28 (“mass refusal of defense lawyers to negotiate guilty pleas would result in a much needed paradigm shift in criminal sentencing”); Jenny Roberts, Crashing the Misdemeanor System, 70 WASH. & LEE L. REV. 1089, 1099–100 (2013) (discussing how an increase in trials would significantly strain resources, thereby forcing prosecutors to decline prosecution of cases).

6 Blume, supra note 1, at 29-30 (arguing that collective action by defendants and defense attorneys “could create a paradigm shift in charging and sentencing practices”); Roberts, supra note 5, at 1099–100.

7 In Fiscal Year 2018, the U.S. Customs and Border Protection reported over 100,000 apprehensions of family units, presumably including an adult that could be subject to the Zero Tolerance policy). In one federal district, there were merely 50 trials in the year 2015. Benjamin Wiser, Trial By Jury, a Hallowed Federal Right, Is Vanishing, NEW YORK TIMES, Aug. 7, 2016.

8 By viable, I mean that such motion practice would have legal footing, or at very least be far from frivolous. For example, defendants subject to the Zero Tolerance policy could bring motions to dismiss based on an improper purpose of prosecution, based on the policy’s proven goal of deterring migration between ports of entry and the case law holding that using detention for the same purpose is likely to violate the Constitution. See Cora Currier, Prosecuting Parents – and Separating Families – Was Meant to Deter Migration, Signed Memo Confirms, THE INTERCEPT, Sept. 25, 2018 (noting that Zero Tolerance policy had the purpose of deterring migration between ports of entry); U.S. Dep’t of Homeland Sec., Increasing Prosecutions of Immigration Violations (April 23, 2018), https://www.documentcloud.org/documents/4936850-Part3-From-CBP-2018-070727-Redacted.html#document/p14/a456180; See R.I.L.R. v. Johnson, 80 F. Supp. 3d 164, (D.D.C. 2015) (halting Obama Administration policy of automatically detaining migrants in order to deter migration).

9 For example, President Trump supported a bill, touted as a way to end the January 2019 federal government shutdown, that sought to extend the statute of limitations for criminal prosecutions of visa fraud. See End the Shutdown and Secure the Border Act, Section 110, 115th Cong. (2nd Sess. 2019). In addition, although the number of illegal entry prosecutions decreased after a federal court struck down the government’s family separation practice, data indicates that prosecutions have continued even after that court order. Greg Moran, Low-Level Illegal Entry Cases in San Diego Federal Court Soar from 22 in 2017 to 6,461 Last Year, SAN DIEGO TRIBUNE, Jan. 22, 2019.
To be sure, defense attorneys representing individuals prosecuted under the Zero Tolerance policy have raised litigated bail motions and some have even proceeded to trial.\(^\text{10}\) In fact, prosecutors were forced to dismiss a criminal prosecution when a defendant plead not guilty, asked for bond, and posted bond with community assistance.\(^\text{11}\) But, unlike its civil parallel policy, which generated massive public outcry,\(^\text{12}\) emergency litigation,\(^\text{13}\) and coordinated legal efforts on the ground,\(^\text{14}\) we have yet to see significant numbers of illegal entry trials under Zero Tolerance or other forms of mass collective action pertaining to criminal prosecutions.

The opportunity for more systemic impact through collective action in criminal proceedings squarely presents the question of how legal ethics impacts such a decision. One view of legal ethics is that the rules directly prohibit collective action by defendants, warranting a change or flexibility in the current ethical norms.\(^\text{15}\) Margareth Etienne and John Blume take this position. Etienne argues that the rules of ethics warn against non-client centered goals, and concludes that the rules are not well-equipped to address the ethical challenges raised by cause, or social change, lawyering in criminal defense.\(^\text{16}\) Nevertheless, according to Etienne, defendants in the criminal justice system are sometimes better represented by cause lawyers, and thus ethical obligations should be flexible and compatible with cause lawyering.\(^\text{17}\) Blume argues that the tension between current ethical norms and collective action is irreconcilable, and the appropriate remedy is for a different ethical norm that permits a course of action that serves the good of criminal

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\(^{10}\) Maya Srikrishnan, *The First ‘Zero Tolerance’ Case to Go to Trial Didn’t Go Well for the Government*, VOICE OF SAN DIEGO, June 25, 2018.


\(^{13}\) See, e.g., *Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”),* 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (prohibiting separation of families detained in immigration custody absent a finding that parent is unfit or presents a danger to the child).

\(^{14}\) Alex Samuels, *Here’s a List of Organizations That Are Mobilizing to Help Immigrant Children Separated from Their Families*, THE TEXAS TRIBUNE, Jun. 18, 2018.

\(^{15}\) See, e.g., Blume, supra note 1.


\(^{17}\) *Id.*, at 1197-98. Etienne does not object to the primacy of a client’s goal in professional responsibility. Rather, Etienne posits that the accurate conflict-of-interest problem for a criminal defense attorney is between a client at any single moment and other clients, whether current, past, or future, who, when considered, are aligned with the cause the criminal defense attorney strives to serve. *Id.*
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defendants generally.18

This view has some appeal. After all, it is clear cut in the ethical rules clients determine the direction of the case,19 attorneys must consult with their clients over the means of reaching the objectives of the representation,20 and attorneys “must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”21 It follows that the interest of one individual client in avoiding or limiting the term of incarceration for a charged offense is at odds with the collective interest of defendants, as an individual client acting in the interest of the group risks subjecting themselves to lengthier incarceration than would otherwise result.22 Scholars like Blume and Etienne maintain that ethical norms should be changed or rendered flexible to permit attorneys to advance social change goals in criminal defense.23

In this essay, I offer that there may be space for collective action in the criminal defense arena under the current ethical rules. However, I do not view collective action as being driven by the attorneys and defense attorneys’ desire for systemic social change.24 Rather, defense attorneys, consistent with current ethical norms, appropriately could advise and counsel their clients regarding collective action. The ethical rules, while clearly demarcating an obligation to act in the interest of the client, do not mandate that the client decide their interest upon individualistic terms. The literature seeing an unresolvable tension between the ethical rules and collective action in criminal defense assumes that a client choosing between going to trial for the good of defendants as a whole versus negotiating a plea deal to reduce their own sentence cannot have, as their interest, the good of defendants as a whole.25

18 Blume, supra note 1, at 33.
19 MODEL RULE OF PROFESSIONAL CONDUCT 1.2 (“A lawyer shall abide by a client’s decisions concerning the objectives of representation”).
20 MODEL RULE OF PROFESSIONAL CONDUCT 1.4 (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”).
21 MODEL RULE OF PROFESSIONAL CONDUCT 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client”).
22 Blume, supra note 1, at 29-30. Blume notes that, admittedly, some set of defendants would be tried and likely receive a much higher sentence than if they pled guilty. Id.
23 Blume, supra note 1; Etienne, supra note 16.
24 Etienne focuses significantly on the criminal defense bar’s motivations for being lawyers, and her argument for a change in ethical norms is so that the attorneys may pursue their own social change goals. Etienne, supra note 16, at 1196 (“For … many [defense attorneys, the practice of criminal defense is about much more than helping individual clients achieve their individual goals”).
25 Blume, for example, does not address why, in his view, a defendant could not decide on the course of a manner to be systemic as opposed to have as the overriding interest the lowest term of incarceration.
Developments in lawyering literature support the view that current ethical norms permit defense attorneys to counsel clients about and potentially in favor of collective action. Client-centered lawyering challenges the assumption that lawyers “know best,” and places a priority on the choices made by clients without mandating what those choices should be. This type of lawyering recognizes that individuals may have a variety of interests and goals, which lawyers are not always or even often great at ascertaining.

Applying a client-centered model to this issue, individual defendants should be able to prioritize social change or collective goals over one’s own term of incarceration. Whether any defendants choose that course of action is a separate question, but client-centered lawyering guides lawyers away from assuming that they know what a client’s interests are. And while client-centered lawyering, consistent with the ethical rules, requires attorneys to faithfully abide by their clients’ choices, it calls for an engaging process between attorney and client, one which would permit or even call for counseling on the benefits of collective action.

Community and social movement lawyering literature may also provide some guidance for criminal defense lawyers. Taking from this strand of lawyering literature may seem odd at first glance. Criminal defense cannot, by definition, employ critical methods developed in this area of lawyering in the past number of decades. Lawyering scholars have moved in the past few decades toward emphasizing working to support community organizing and employing non-litigation strategies for social change. Criminal defense cannot de-emphasize litigation, as litigation is not the choice of the defendant. And indeed, social movement lawyering literature has largely focused on issues outside the criminal justice system.

But while social movement lawyering has de-emphasized litigation, there are still lessons to apply to criminal defense from this model of lawyering. One is about mitigating power imbalances between attorneys and their

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27 Carle, supra note 26, at 130 (2006) (“client-centered lawyering literature seeks to deconstruct traditional assumptions about the ease with which lawyers can ascertain and advocate for their clients’ interests”).

28 Id.

29 Scott L. Cummings & Ingrid V. Eagly, A Critical Reflection on Law and Organizing, 48 UCLA L. Rev. 443, 456 (2001) (“As a result of these critiques of conventional law reform models, scholars and activists began to seek alternative methods of social change practice that de-emphasized litigation and promoted community-based political action.”).

30 See, e.g., Cummings and Eagly, supra note 29.
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clients. This strand of lawyering developed from a recognition that power imbalances between attorneys and clients, where clients were poor, kept clients subjected to subordination. Practitioners and scholars have called for and implemented models of lawyering that intentionally involve community organizations as a way to account for this power imbalance, and involvement of community members in criminal cases offers one way to avoid a lawyer-centric direction of a person’s criminal case.

Indeed, there are some instances of such types of movements in the criminal justice arena. One example is the participatory defense movement, where family and community members are actively involved in the representation of an individual facing criminal charges. Family members meet with defense attorneys, learn about the criminal process, and take role in, for example, developing mitigation. This movement has grown over the past decade, and expanded from San Jose, California to about 10 cities, although those in the movement have noted some resistance within defense offenses to this model.

This is not to say that counseling about and potentially in favor of collective action is easy. Power dynamics, particularly when a client is detained, can be incredibly difficult to manage. Community lawyering, to function well, relies on the existence and leadership of organized community

31 Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLIN. L. REV. 5, 14 (2016) (discussing rebellious lawyering and noting that under rebellious lawyering “the client is neither a powerful subordinate object controlled by the disciplining discourse and gaze of a dominant lawyer nor a sovereign subject controlling the means and ends of a purely instrumental lawyer agent. Instead[,] clients are complex, multi-dimensional, and ever-changing, inhabiting a range of subject-object roles and negotiating a variety of dominant-subordinate relationships while situated in local networks of family, school, work, religion, and community.”)


members,\textsuperscript{37} which may not exist in all areas where Zero Tolerance prosecutions take place. Implementing a client-centered model in counseling about collective action also has logistical challenges. The high volume of prosecutions, and the speed with which many courts are handling these matters, renders it difficult to engage in the deliberate process that client-centered lawyering calls for.\textsuperscript{38} Zero tolerance prosecutions were often resolved the same day the defendant appeared in court for their initial appearance, most likely receiving a time served sentence.\textsuperscript{39} An interactive process meant for deliberate decision-making is not easy to implement when a choice about pleading guilty to a federal offense must be made in one day.

I don’t claim here to solve the important issues raised by legal ethics scholars pertaining to collective action in criminal defense issues. The goal of this essay is to offer potential further areas of exploration for how criminal defense attorneys may seek systemic change under current ethical norms. And, in an era where the federal government is expanding the use of prosecutions to advance policies such as anti-immigrant ones, it is important to not hastily conclude that there is no space for collective action in criminal defense.

\textsuperscript{37} Veryl Pow, Comment, \textit{Rebellious Social Movement Lawyering Against Traffic Court Debt}, 64 UCLA L. REV. 1770 (2017) (advocating a theory of social movement lawyering that is based on reliance on a social movement and leadership of grassroots community members).

\textsuperscript{38} As described by Carle, the client-centered model of representation “at its best involves an exchange of information, knowledge and perspectives between client and lawyer, from which both parties and the quality of the legal representation gain.” Carle, supra note 26, at 131.

\textsuperscript{39} Srikrishnan, supra note 10.