ARTICLE

THE SIXTH AMENDMENT FAÇADE: THE RACIAL EVOLUTION OF THE RIGHT TO COUNSEL

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ABSTRACT

One of the most perilous pitfalls of constitutional criminal procedure scholarship is the inexact treatment of race vis-à-vis the Sixth Amendment right to counsel. This imprecision exists because of historical and theoretical blind spots. In right to counsel literature, race is either neglected, subsumed under poverty, or understood in the simple terms of disproportionality (e.g., how indigent defense's failures acutely impact racial minorities). A historical examination of early legal aid institutions and jurisprudence reveals the centrality of race in modern indigent defense schemes. Throughout the twentieth century, the politics of race informed right to counsel decisions and policies in ways that shape the current landscape but have been

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unrealized by scholars. Inattention to the role of race ultimately limits intellectual discussions on the right to counsel as well as indigent defense reform efforts.

This Article supplies a distinct way of thinking about the right to counsel and, in doing so, extends a different set of analytical possibilities. It argues that race has shaped the scope and trajectory of indigent defense. The Article uses a diverse array of untapped historical sources to radically reinterpret the legal landscape before Gideon v. Wainwright—a period that is often insufficiently attended to—and shows how race operated in the background of constitutional interpretations of the right to counsel and governmental commitment to this provision. The Article then revisits the post-Gideon world. It demonstrates how unacknowledged anxieties about race, along with recoded ideas about indigent defense as a social welfare policy, influenced the Court’s clarification of Gideon. The Article concludes with a discussion on how this history can inform contemporary criminal justice reform.

INTRODUCTION ................................ ................................ ............ 1163
I. THE PRE-POWELL RIGHT TO COUNSEL ................................ ................................ 1168
   A. Race, Americanization, and Legal Aid ................................ ................................ 1169
      1. The Public Defender Model ................................ ................................ 1172
      2. The Legal Aid Movement ................................ ................................ 1178
   B. Race and Civil Society ................................ ................................ 1182
II. FROM POWELL TO GIDEON: A STUNTED RIGHT TO COUNSEL ................. 1190
   A. Race and the Judicial Enshrinement of the Right to Counsel ................. 1190
   B. Race, Pathology, and the “Special Circumstances Test” ................. 1196
III. GIDEON AND THE EXPANSION OF THE RIGHT TO COUNSEL ............... 1202
   A. The Racial Selection and Reception of Gideon ......................... 1202
IV. THE POST-1970S RIGHT TO COUNSEL AND MASS INCARCERATION ............... 1211
   A. Post-Argersinger Austerity: Race, Social Welfare, and Indigent Defense ......................... 1214
   B. Ineffective Assistance of Counsel, Punishment, and Race ........... 1221
CONCLUSION ................................ ................................ .............. 1230
   A. Life Since Strickland ................................ ................................ 1230
   B. Making Race Important in Contemporary Indigent Defense ........ 1234
      1. Theoretical Lessons ................................ ................................ 1235
      2. Institutional Takeaways ................................ ................................ 1237
INTRODUCTION

The Sixth Amendment right to counsel that is taught in law schools and mechanized in legal practice is unmoored from the racial politics that gave birth to its modern form. Rich treatments of race and the criminal justice system exist, but current scholarship overlooks the instrumental role race played in the development of right to counsel jurisprudence. The right to counsel’s relationship to race is typically understood in one of two ways. First, the right to counsel is often bundled with other criminal procedure provisions and considered in the context of larger judicial attempts to address racial inequality in the early and mid-twentieth century.\(^1\) This approach is informative but does not fully explain a constitutional provision that helped erect bureaucratic systems that many claim fail criminal defendants, and minorities in particular. A second line of interrogation uses the flaws and failures of indigent defense as one explanation for racialized mass incarceration.\(^2\) The idea here is that minority defendants are disproportionately impacted by under resourced indigent defense providers. This rendering has merit but is susceptible to a response of indistinctiveness (i.e., many aspects of the criminal justice system have racially disproportionate effects); it can also be ungenerously dismissed as another racial complaint. History demonstrates that indigent defense is not a part of the criminal justice system that simply produces racially disparate outcomes. Instead, the politics of race fundamentally shaped indigent defense jurisprudence and policy. Inattention to this fact limits understandings of the right to counsel and ultimately of the criminal justice system itself. Indigent defense providers are tasked with protecting the rights of poor defendants in a criminal justice system that is widely understood as being infected by racial discrimination. They are uniquely situated to challenge such bias in specific proceedings or in the context of larger criminal justice reform. But race-oblivious understandings of indigent defense—in the practitioner and scholarly contexts—limits these communities’ ability to combat racial bias in the criminal justice system. Sensitivity to the racial character and history of indigent defense invites distinct ways of thinking about how legal services might shape criminal justice reform efforts.

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This Article unearths a lost history of race and indigent defense. It argues that race played a significant role in the creation, maturation, and curtailment of the modern right to counsel. Before the Court recognized the right to counsel as an affirmative right, Progressive Era elites developed legal aid organizations. These reformers developed a racial framework that emphasized the race, poverty, and incompetence of southern and eastern Europeans in their institutionalization of legal aid. Once the Court recognized the right to counsel as an affirmative obligation in *Powell v. Alabama*, it would deploy this same framework for decades, but in service of black defendants. The Warren Court would eventually reject this framework in *Gideon v. Wainwright* and develop a more expansive right to counsel doctrine that was not as express but conscious about the ways indigent defense could curb racial discrimination in the criminal justice system. The advent of racialized law and order politics in the late 1960s led the Court to slowly abandon race-sensitive approaches to the right to counsel and curtail that right in ways that would shape the current indigent defense landscape. The Article draws on a range of historical sources to make this argument. These materials include archival documents, primary sources, oral histories, case law, and secondary literature.

The Article focuses on four different points in twentieth-century American indigent defense history. The first two—the pre-*Powell v. Alabama* era (1890–1931) and the period between *Powell* and *Gideon v. Wainwright* (1931–1963)—are often given short shrift in scholarly renderings of the right to counsel's development. The first period is sometimes neglected because the Court had no substantive jurisprudence on the right to counsel before *Powell*. The second period, that between *Powell* and *Gideon*, is also given scant attention because of the Court’s erratic and noncommittal indigent defense holdings. Notwithstanding the brief treatment these moments receive in indigent defense literature, this Article contends that these periods were rife with bureaucratic and jurisprudential happenings that hinged in part on race and would lay the foundation for the right to counsel’s development during the Warren Court era.

The remaining Parts of the Article travel down the supposedly well-trodden territory of post-*Gideon* developments. Part IV focuses primarily on the period between *Gideon* and *Argersinger v. Hamlin* (1963–1972). During this decade, which saw larger criminal procedure reforms, the Court had the most generous approach toward indigent defense. Part V discusses the period

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3 287 U.S. 45, 59 (1932).
5 1890 is when the Legal Aid Society of New York expanded its services beyond its initial focus on German immigrants. See infra note 66. Although the Legal Aid Society is understood as the first legal aid institution, this is incorrect. See infra note 12.
The Sixth Amendment Facade 1165

after Argersinger and the lead up to Strickland v. Washington (1972-1984). There is no shortage of scholarship on the cases described in Parts IV and V. Yet these Parts of the Article deploy historical sources to make sense of and outstrip the common narratives of indigent defense failure as byproducts of judicial abandonment of Warren Court principles, legislative stinginess, and/or the punitive turn. No doubt, these factors are in play, but they tell an incomplete story. Race figured meaningfully into indigent defense policy in the 1960s. During that period, which Part IV details, the Warren Court moved beyond the racial framework legal aid reformers developed before Powell and used by Courts afterward. Instead, it developed an ostensibly race-neutral prophylactic right to counsel rule in Gideon that coincided with the larger trend of using criminal procedure to address social inequality. Thereafter, a racially clever law and order campaign, propagated by a president who nominated four Supreme Court Justices in part on that crusade, played a role in the clarification and curtailment of Gideon and its progeny.

Accordingly, the paper’s normative contentions comprise the substance of Part VI. I argue that this underexplored history of the right to counsel can inform our legal present. I suggest that this traversal into history can offer insight into the racial politics of indigent defense, which are often effaced from indigent defense discourse or subsumed within the proxy category of class. I contend that, in the absence of this history, scholars miss an important element of indigent defense. There is a methodologically diverse and voluminous body of scholarship that explores how race has influenced and continues to shape policing, prosecutorial decisionmaking, jury composition and deliberation, and judging. Yet indigent defense and its relationship to

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8 As described in Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure:

[T]he Court seemed to see the criminal trial as a kind of morality play in which large-scale social forces, having little or nothing to do with criminal law, were joined in combat . . . . [T]he Warren Court turned to the special magic of the criminal courtroom to demonstrate its commitment to racial justice . . . . [but] there is an obvious tension between the trial as a method of making individualized factual judgments concerning guilt and innocence and the trial as a method of fighting proxy battles over issues of social policy.

Louis Michael Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 442 (1980).

race have received less sustained analysis. This scholarly gap exists despite the reality that the Sixth Amendment’s right to counsel is, in the words of Chief Justice Roberts, “the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys.” The takeaway from this part of the argument is that indigent defense scholars and practitioners will be hampered if they fail to seriously engage the role of race independent of indigence.

Individuals with different beliefs about race’s salience in society may need different kinds of convincing. Race skeptics may be unpersuaded by statistics that demonstrate racial motivations and disparities in the criminal justice system and therefore may not accept the specific claim that race has shaped the development of indigent defense. On the other hand, people who believe that race affects criminal justice administration may find my claim about race’s influence on indigent defense to be unsurprising. This Article addresses both audiences. It attends to race skeptics by providing the unfiltered racial language of legal reformers who created indigent defense organizations and the courts that formulated the early right to counsel jurisprudence. In many places the evidence is unambiguous. For race-conscious individuals, this Article demonstrates how race has influenced indigent defense. It may be unsurprising to these people that race operates in a wing of the criminal justice system. But the unavailability of rigorous analytical or historical accounts of the race–indigent defense interface belies such predictability. Besides the historical reveal, the Article takes a further step by demonstrating the sophisticated ways that race has operated in indigent defense. Outright racial discrimination looms large in the story, but so do other dynamics, which include, but are not limited to, forms of racial neglect that do not hinge on animus, strategic deployments of race across racial groups, racial egalitarianism, racial fear, and imprecise understandings of race through the lens of poverty. Overall, the Article provides a dynamic description of how race shaped an important aspect of our legal system.

(historicizing and theorizing racial discrimination in grand jury selection and judicial decisionmaking); Mona Lynch & Craig Haney, Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury, 2011 MICH. ST. L. REV. 573 (2011) (detailing social psychology experiments that found that jurors were more likely to sentence black defendants to death than white defendants); Darrell Steffensmeier & Chester L. Britt, Judges’ Race and Judicial Decision Making: Do Black Judges Sentence Differently?, 82 SOC. SCI. Q. 749 (2001) (using archival and quantitative analysis to demonstrate that black judges are more likely to sentence black and white offenders to prison). 10 Kaley v. United States, 571 U.S. 320, 344 (2014) (citing United States v. Cronic, 466 U.S. 648, 655-54 (1984)); see also David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 VA. L. REV. 1229, 1280 (2002) (arguing that since suppression motions are the principal enforcement mechanism for all criminal procedure rights, defense attorneys are crucial to the enforcement of constitutional criminal procedure and the regulation of police).
A few clarifications are necessary. First, it is important to note that race is not a static concept. As scholars across different disciplinary and topical fields have shown and as the Court has noted, race is a category of social division that morphs over time, which makes it difficult to tell a tidy, linear story where race operates similarly. Still, this Article focuses on how different concerns about race surfaced for the key protagonists in indigent defense history. Additionally, scholars are increasingly and helpfully historicizing legal aid. This Article is in conversation with, but distinct from, these contributions because it focuses on the role of race, which is a social category that has eluded thorough longitudinal analysis in regard to legal aid. Nevertheless, this Article is not a comprehensive history. It focuses on specific moments in time. Although some parts of the paper make causal arguments, this Article highlights recurrent but undertheorized themes in the development of indigent defense. My goal is to excavate the above-mentioned conflicts with a focus on criminal legal aid, but I inevitably touch on civil legal aid because, as a historical matter, some organizations did not make

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distinctions. Relatedly, I use legal aid and indigent defense interchangeably. To the extent that I focus specifically on civil legal aid, I use that term. Finally, by “legal aid” I am referring to the institutional provision of representation, advice, education, and/or counseling on a legal matter.

I. THE PRE-POWELL RIGHT TO COUNSEL

This Part of the Article examines what the right to counsel looked like before Powell. In order to understand the evolution of indigent defense, it is important to foreground this period because it entails almost half a century of organized legal assistance in which race played a crucial role. This era preceded the Court’s first substantive and affirmative statements on the right to counsel and helped shape the contours of indigent defense discourse after the Court enshrined the right to counsel in Powell.

The jurisprudential roots of the right to counsel often begin with Powell because this case was the first moment in which the Court explicitly outlined a version of the indigent defense that is recognizable today. Until Powell, which was limited to capital cases, the Court took a minimalist approach toward the right to counsel, and understood the provision in terms of negative liberties. Essentially, the government could not prevent defendants from obtaining an attorney but did not have an affirmative obligation to provide a lawyer. In 1891, the Court made this point unanimously and unequivocally, when Justice Brown held that there is “no general obligation on the part of the government either to . . . retain counsel for defendants or prisoners.”

“The object of the constitutional provision,” he continued, “was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government.”

Although this pronouncement occurred in the context of a right to counsel that was not yet incorporated by the Fourteenth Amendment, it mirrored state statutory and constitutional provisions; more affirmative conceptions of the right would not appear for decades.

The absence of an affirmative right to counsel did not mean the absence of administrative structures that provided counsel to indigents. One could, as many do, tell a story that begins after this period. But such an account would omit decades of civic and municipal administration of criminal legal aid. A rendition of the right to counsel that begins after this period would miss the administrative bedrock that Courts would rely upon—explicitly and tacitly—when they finally recognized an affirmative right to counsel. Similarly, an

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15 Id.
account that begins with Powell would miss the ways that conceptions of race undergirded the legal aid structures that would serve as the foundation for the incipient right to counsel. For these reasons, courts are not the appropriate site of analysis for this period. Instead, legal aid societies and a few public defender offices provide a more dynamic story. This Part highlights how both recognized a more robust right to counsel when courts would not.

A. Race, Americanization, and Legal Aid

Before an affirmative right to counsel was enshrined by courts, it was fulfilled by legal aid societies that provided assistance in criminal cases as well as municipally funded public defender offices that were modeled in part after legal aid societies. Scholars typically trace the origins of institutionalized legal aid to the 1890s. Recent scholarship on women's organizations, in addition to a well-established, albeit underutilized, literature on early-nineteenth-century abolitionist societies and the Freedmen's Bureau, complicate such claims. Nevertheless, an analysis that begins where traditional legal aid histories start would select the Progressive Era as its starting point. The beginning of this period overlaps with the international “decade of regicide,” a period between 1892 and 1901 when many political leaders were assassinated across the world. At the turn of the century, the world witnessed the attempted assassination of Prince Edward of Wales by a Belgian anarchist, the assassination of King Umberto of Italy by an Italian-American anarchist, and the assassination of President William McKinley by a Polish-American

17 Id.; see also BARBARA BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLITZ, 132-33 (2011) (describing Clara Foltz’s work in the early 1890s fighting for disadvantaged people as an attorney); CHEN & CUMMINGS, supra note 13, at 57 (“The provision of basic civil legal service to those who could not afford them was an issue that concerned the legal profession as early as the late 1800s.”); RHODE, supra note 13, at 58 (“The nation’s first legal aid organization began in 1876 as part of an effort by New York German-American merchants to assist German immigrants.”).

18 See BATLAN, supra note 12, at 47 (describing the founding of the Chicago Protective Agency for Women and Children in 1885 as an important moment for women attorneys involved in legal aid); Gwen Hoerr Jordan, ‘Them Law Wimmin:’ The Protective Agency for Women and Children and the Gendered Origins of Legal Aid, in FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW 156 (Tracy A. Thomas & Tracy Jean Boisseau eds., 2011) (noting that, after its founding in 1886, the Protective Agency for Women and Children “began offering free legal assistance to women and children who had been the victims of every type of financial, physical, and sexual crime”).


anarchist.\textsuperscript{21} Subsequently, anti-anarchist attitudes festered and influenced the passage of the Immigration Act of 1903.\textsuperscript{22} This law failed to curb the political disruption that produced the dynamiting of the \textit{Los Angeles Times} building in 1910, the devastating bombing of Wall Street in 1920, and the spate of successful and unsuccessful bombings in between.\textsuperscript{23}

Anarchism terrified American reformers. Of course, political violence was not new. The key difference, as historian Richard Jensen observes, is that “at the time terrorism on this scale was still unheard of and made all the more frightening by its successful assault on powerful symbols of authority and stability.”\textsuperscript{24} World War I and the Bolshevik Revolution of 1917 that prompted the First Red Scare certainly did not ease American political anxieties. Anarchism and socialism gnawed away at public confidence in American exceptionalism as well as the presumed immunity of the United States to European political unrest. Importantly, political violence became synonymous with southern and eastern European immigrants, who were not yet considered white in American society.\textsuperscript{25} Legal reformers acted in response to these global developments, as well as the typical Progressive Era mélange of immigration, industrialization, urbanization, and professionalization.\textsuperscript{26} Legal reformers believed that southern and eastern European immigrants’ inability to receive a “fair day in court” stoked political dissidence. Concern about injustice led reformers to advocate for organized legal assistance schemes.\textsuperscript{27}

Race animated the development of indigent defense before the Sixth Amendment right to counsel jurisprudence helped spur legal aid apparatuses across the country. Conceptually, it is imperative to note that understandings

\begin{itemize}
\item\textsuperscript{21} Id. at 185-87; 237.
\item\textsuperscript{22} Immigration Act of 1903, ch. 1012, § 2, Pub. L. No. 162, 32 Stat. 1213, 1214 (1903); see also WILLIAM PRESTON, ALIENS AND DISSIDENTS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 31-32 (rev. ed. 1995).
\item\textsuperscript{23} See generally Beverly Gage, \textit{The Day Wall Street Exploded: A Story of America in Its First Age of Terror} (2009); Lew Irwin, \textit{Deadly Times: The 1910 Bombing of the Los Angeles Times and America’s Forgotten Decade of Terror} (2013).
\item\textsuperscript{24} Id.
\item\textsuperscript{25} See David B. Oppenheimer, Swati Prakash & Rachel Burns, \textit{Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law}, 26 BERKELEY LA RASA L.J. 1, 16 (2016) (overviewing fears about the potential “Bolshevik” threat represented by European and Russian Jewish immigrants that coalesced with parallel fears of anarchists).
\item\textsuperscript{26} See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 102-03 (2002) (describing a legal organization devoted solely to convincing municipalities to adopt a literacy Test to Exclude Immigrants from Many Aspects of Public Life); ROBERT H. WIEBE, \textit{The Search for Order, 1877–1920}, at 117 (1967) (“Yet by the [eighteen] nineties a sense of professionalism had undoubtedly captured a significant number of relatively young lawyers . . . far more aware than their predecessors of the social implications of the law.”); Daniel T. Rodgers, \textit{In Search Of Progressivism}, 10 REV. AM. HIST., Dec. 1983, at 113, 118 (describing the “dreams of social efficiency, systematization, and scientifically adjusted harmony” that drove professionally conscious lawyers).
\item\textsuperscript{27} See generally REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919).\
\end{itemize}
of race at the end of the nineteenth century and early twentieth century are different from today because race is not a static concept. The malleability of race is easily demonstrated by the arbitrary race jurisprudence of this period.\(^{28}\) Outside of categorizations for “negroes” and “Indians,” race was often, although not exclusively, understood as something akin to nationality (i.e., “the German race” or “the Irish race”).\(^{29}\) A variant of race as nationality corresponded with pan-nationality (i.e., groups clustered by territorial proximity such as the “Slavic” or “Nordic” races). Race as nationality was endorsed by courts and has been interrogated in the work of historians, scholars of race and ethnicity, and social scientists.\(^{30}\) Accordingly, this Part’s discussion of the role of race in the expansion of legal aid takes up reformers’ understanding of race as nationality.

Despite reformers’ descriptions of legal assistance in racial terms and their racialized normative commitments—both of which are described below—the conceptual distinction between contemporary notions of race and the more timeworn understanding of race as nationality is precisely what obscures this untold story of legal aid. Today, southern and eastern Europeans are classified simply as “white” in ways that flatten the unstable racial position they occupied in the early twentieth century. Legal reformers clung specifically to the precarious racial position of ethnic whites by focusing on nationalism and Americanization in their institutional efforts. During the pre-\textit{Powell} era, two dominant visions of legal aid existed. The first was the public defender model advocated by Clara Foltz, which focused on legal aid as a government-funded responsibility. The second approach was the legal aid model championed by Arthur von Briesen, which hewed to Progressive Era notions of private philanthropy. Race figured into each model.

\(^{28}\) See \textsc{Ian Haney López, \textit{White by Law: The Legal Construction of Race}} 2 (2006) (“[T]he courts were responsible for deciding not only who was White, but \textit{why} someone was White.”).

\(^{29}\) See supra note 30 and accompanying text.

\(^{30}\) See also \textsc{U.S. Immigration Comm’n, Dictionary of Races of Peoples, S. Doc. No. 61-662 (1911)} (providing a classification scheme of races based in part on country of origin). See generally \textsc{W. Paul Reeve, Religion of a Different Color: Race and the Mormon Struggle for Whiteness} 4 (2015) (“\textit{R}ace was a loosely used word that sometimes referred to nationality more than skin color . . . .” (internal quotation marks omitted)); \textsc{George W. Stocking, Jr., Delimiting Anthropology: Occasional Essays and Reflections} 8 (2001) (arguing that, by the turn of the century, “the idea of race was in many ways and for many people not very different from what we would call today ‘national character’”); \textsc{Emma Jinhua Teng, Eurasian: Mixed Identities in the United States, China, and Hong Kong, 1843–1943, at 63 (2011)} (noting that “race has always been about much more than phenotype” and arguing that “the conceptual slippage between ‘nationality’ as citizenship and ‘nationality’ as race” was “particularly pronounced in the nineteenth and early twentieth centuries”).
1. The Public Defender Model

Clara Foltz was a pioneering attorney who is sometimes referred to as the “mother” of legal aid.\(^{31}\) She successfully challenged the gendered exclusion of women from the legal profession in California immediately after the Court’s decision in *Bradwell v. Illinois*\(^{32}\) but was unable to secure stable employment. She eked out a living by lecturing and by handling divorce and criminal law cases.\(^{33}\) In 1893, she gave a speech at the World’s Columbian Exposition in Chicago before the Congress of Jurisprudence and Law Reform, that was based partly on her experience as a criminal lawyer. Her remarks detailed the shortcomings of the legal system in ways that are eerily similar to contemporary complaints about criminal adjudication. It is worth excerpting at length:

> Connected with the court is a public prosecutor, selected for his skill in securing convictions . . . . Around and behind him is an army of police officers and detectives ready to do his bidding, and before him sits a plastic judge with a large discretion often affected by newspapers and police officers to the injury of the prisoner . . . .

For the conviction of the accused every weapon is provided and used, even those poisoned by wrong and injustice. But what machinery is provided for the defense of the innocent? None. Absolutely none. . . .

> [T]he rule is that court appointees are wholly unequal to the public officers with whom they are to cope . . . . The appointees come from failures in the profession, who hang about courts hoping [for] a stray dollar or two from the unfortunate, or from the kindergartens of the profession just let loose from college and anxious to learn the practice. . . . [They] come to trial wholly unequipped either in ability, skill or preparation . . . . The defense is at most a sort of perfunctory one. . . . The prisoner has asked for bread and received a stone. . . .

The accused, even if acquitted, comes from the court-house a changed man. He remembers a malicious arrest, an unjust incarceration, an expense that has impoverished him . . . . Henceforth his hand is against government and against man. Disgrace has crushed his manhood and injustice has murdered his patriotism.\(^{34}\)

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\(^{32}\) 83 U.S. 130 (1872).

\(^{33}\) See BABCOCK, supra note 17, at 65 (outlining the ways in which Foltz supplemented her income from her legal practice with political, lecturing, and editing work).

To address the institutional maladies identified in her speech, Foltz proposed that, for every prosecutor, the state should have a public defender; the two would be treated as equals, paid from the same treasury, and both should have authority over police officers and sheriffs. Foltz translated her speech into a statutory proposal and introduced it in several states.35 In 1914, Los Angeles would become the first city to implement the idea. This vision, however, remained in the minority, existing in a random assortment of cities such as Portland and Columbus.

Two salient themes about the intended purposes of public defender institutionalization emerge from Foltz’s speech: the production of fairer legal outcomes and the purification of the bar’s haphazard assigned counsel system (where it existed). Both would become popular subjects during the Progressive Era. These themes are noteworthy because they signify principles that were important to reformers outside of the legal assistance context but were still very much marshalled in support of legal aid bureaucratization. Foltz’s disquiet about injustice radiated throughout her speech and corresponded with the legal profession’s general concern about professionalism, fairness, and heightened ethical standards during that period and thereafter.36 The other theme—purging the bar of unscrupulous attorneys—appears to be race-neutral in Foltz’s formulation. The historical record and biographical literature on her life support this proposition.37 Nevertheless, speculation about race-neutrality is not necessary to support this Article’s argument about the role of race in legal aid’s development. Supporters of the public defender idea deployed the rhetoric of bar purification and patriotism in race-specific ways to advance the development of legal aid.

The excision of “shyster” lawyers from the legal profession and purification of the bar was decidedly racial. Reformers made unscrupulous “shyster” lawyers their primary targets and invariably depicted immigrant and Jewish attorneys as the epitome of this group of lawyers.38 Importantly,

35 See, e.g., Public Defender: Clara Foltz, the Attorney, Wants One Provided for, SACRAMENTO DAILY UNION, Feb. 1, 1897, at 4.
36 See ROBERT L. NELSON, DAVID M. TRUBEK & RAYMAN L. SOLOMON, LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 100 (1992) (describing, as one impetus for applying ethical codes to lawyers, the desire to “protect clients from experts who could manipulate the demand for their services and who alone could judge the quality of those services”); Benjamin H. Barton, The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons, 83 N.C. L. REV. 411, 411 (2005); Susan D. Carle, Race, Class, and Legal Ethics in the Early NAACP (1910–1920), 20 L. & HIST. REV. 97, 100 (2002).
37 Foltz, supra note 34, at 248.
38 See supra notes 41–42, 44–46 and accompanying text; see also Felice Batlan, The “Rabbi’s Daughter” and the “Jewish Jane Addams”: Jewish Women, Legal Aid, and the Fluidity of Identity, 1890–1930, 4 IND. J. L. & SOC. EQUALITY 135, 142 (2016) (“From the perspective of the elite bar, most Jewish immigrant lawyers—and especially those from Eastern Europe—stood on the cusp of being ‘shysters.’”).
southern and eastern Europeans, along with Jewish people, occupied a unique space in the racial hierarchy: not fully white. The influx of immigrant attorneys who sought to address legal aid needs that nonexistent or budding legal aid organizations were unequipped to meet—and that corporate lawyers were uninterested in providing—buoyed the anti-shyster campaign. The American Bar Association's (ABA) newly minted 1908 Canons of Professional Responsibility mattered too. The xenophobic and anti-Semitic attempt to “purify” the bar was similar to the Progressive Era campaign to rid the medical profession of quack doctors and received attention inside and outside of the practice of law. Some lawyers and reformers articulated visions of improving indigent defense that were more concerned with ethics than race, but many did not.

In addition to serving as a justification for discrimination against ethnic white lawyers, the trope of the shyster emphasized the vulnerability of

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41 See W. A. Evans, A Campaign Against Quacks 5 AM. J. PUB. HEALTH 30, 35 (1915) (discussing publicity campaigns against ill-qualified medical professionals during the Progressive Era).

42 Criminologist Maurice Parmelee noted,

Furthermore, public defense would almost entirely eliminate the disreputable lawyers so frequently found in criminal practice. The existence of these so-called “shyster” lawyers is favored on the one hand by professional criminals, who need the services of unscrupulous counsel, and on the other hand by poor and ignorant defendants, whose precarious situation makes them the easy prey of such lawyers. With public defense, however, all the cases of professional criminals and of these poor and ignorant defendants would be in the hands of the public defender, so that the field of action of the disreputable lawyer would be destroyed. This public defense would tend to purify the legal profession.


One of the greatest achievements that I look back to is the effect of the Public Defender upon the shyster lawyer who infests the police court and preys upon the victims enmeshed in the toils of the law. After I had been on the job awhile these gentlemen found ‘slim pickings.’ They were banned from the jail, were not allowed to solicit business, and our court was free from their presence.

Thomas A. Larremore, Portland and Legal Aid, 1 OR. L. REV. 1, 21 n.70 (1921) (internal quotation marks omitted).
European immigrants. Crucially, public defenders were imagined as necessary to attend to the vulnerability that this immigrant group faced in legal proceedings. In their advocacy for public defenders and legal aid organizations, legal elites focused on three features that would be integral to the development of institutionalized indigent defense: the racial vulnerability of European immigrants, their poverty, and their intellectual incompetence—the latter of which typically focused on their unfamiliarity with American culture, language barriers, and/or law’s innate sophistication. This congealment of race, poverty, and incompetence would be central to indigent defense’s development for decades.

The shyster trope and the race-poverty-incompetence framework appeared in the writings of lawyers as well as reformers who were law adjacent (e.g., social workers). Robert Ferrari was a New York attorney who served as an Associate Editor for The Journal of the American Institute of Criminal Law and Criminology. The publication was one of the premier sources of information for cutting-edge scholarship on criminal law and criminology and is one of the oldest journals in those fields today.43 A booster of the public defender concept, Ferrari wrote extensively about indigent defense in the journal. He made shysters and immigrant defendants particular points of concern.44 In one article, Ferrari walks the reader through the typical immigrant experience in New York criminal courts. For the author, the foreign defendant in the adjudicative process is “a football” who is “kicked hither and thither by individuals, by institutions, by society.”45 Police, judges, and grand juries are objects of criticism for Ferrari, but he reserves particular disdain for shysters and their exploitation of the vulnerable European immigrant defendant who is “a stranger in a strange land . . . has no friends, no one to aid him” and is “not yet enough acquainted with us to be capable of making use of his intelligence . . . .”46 Ferrari insists that these lawyers are,

43 The journal, which is now the Journal of Criminal Law and Criminology, was the arm of the American Institute of Criminal Law and Criminology and its first president was evidence luminary John H. Wigmore. The goal of the organization was to “foster cooperation between lawyers and scientists to improve criminal laws and the administration of criminal justice.” Jennifer Devroye, The Rise and Fall of the American Institute of Criminal Law and Criminology, 100 J. CRIM. L. & CRIMINOLOGY 7, 7-8 (2010); see also AM. INST. CRIMINAL LAW & CRIMINOLOGY, BULLETIN NUMBER EIGHT: GENERAL INFORMATION CONCERNING THE INSTITUTE, ITS PURPOSES, HISTORY, WORK, COMMITTEES, AND MEMBERSHIP, AND THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 4 (1912).


46 Id.
“as a rule, incompetent to the last degree. The unfortunate situation of the client is enhanced to extremely perilous proportions when, as often happens, an Irishman is called upon to defend a Russian, an Austrian, a Bohemian, a Jew, or a Jew is called upon to defend an Italian.” Other legal elites offered similar accounts in their support for public defender institutionalization. In a speech turned article that advocated for public defender institutionalization, legal leader Samuel Untermyer complained that “[u]njust convictions among the poor and helpless, and especially among our ignorant foreign population, are far more frequent than we fortunates care to admit.” Untermyer may have been sensitive to the shyster stereotype by way of his own advocacy for Jewish causes and used less flagrant language in his depiction of the attorneys who provided counsel to these defendants. He described these attorneys as invariably “young and inexperienced men or lawyers without standing or ability.”

Governmental institutions similarly described shyster lawyers as threats to poor and ignorant ethnic whites. In 1909, Governor Charles Evans Hughes, who would go on to become president of the New York Legal Aid Society a few years later, created the New York Commission of Immigration.

Hughes appointed Louis Marshall, founder of the American Jewish Committee and director of National Association for the Advancement of Colored People, as chair of this commission. In its discussion of “unscrupulous shyster lawyers” and the assigned counsel system, the Commission found that although abuses were not confined to just immigrants, “there are so many of them who are so easily victims of what appears to be an organized system of graft, that it is highly important to call attention to the situation.” The Commission found that “the ignorance of the alien subjects him to the cupidity of this class of exploiters” and came to the conclusion that foreigners’ inability to communicate with magistrates during arraignment “undoubtedly causes undue hardships, and places him in the power of the ‘shyster’ lawyer who . . . practically deprives him of his constitutional rights.” In 1915, the Massachusetts Committee on

47 Id. at 195.
49 Id.
52 REPORT, supra note 50, at 54.
53 Id. at 55, 58.
Immigration similarly found that “hundreds of misunderstanding and misunderstood poor persons yearly suffer through the entrusting of their cases to men lacking in ability, honesty, or energy.”\textsuperscript{54} That commission would recommend the creation of a public defender office.

In their advocacy for public defender institutionalization, the broader Progressive Era reform community also emphasized shysters’ exploitation of poor, uneducated, ethnic white immigrants. Progressive Era reformer and National Americanization Committee Director Frances Kellor noted, “[w]hen the immigrant is brought into court [and] charged with the commission of crime or with the infraction of one of the hundreds of city ordinances, of which in many instances he has never heard, his medium of justice is frequently the ‘shyster’ lawyer who speaks his language.”\textsuperscript{55} Grace Abbott, the notable social worker who was Kellor’s contemporary and spent much of her career addressing the plight of immigrants, agreed. In a 1915 report that was unambiguously titled “Immigration and Crime” and was reproduced in The American Bar Association Journal, Abbott drew links between race and indigent defense. She complained that “[t]he immigrant is peculiarly at the mercy of the unscrupulous lawyer because of his complete ignorance of American customs and criminal procedure” and insisted that “because of his peculiar helplessness a public defender is especially needed for the non-English speaking immigrant who is accused of crime.”\textsuperscript{56} The Young Men’s Christian Association (YMCA) has been described as “the most extensively-based Americanizing agency” during the Progressive Era because of its outreach to European immigrants and its assimilation initiatives.\textsuperscript{57} Peter Roberts was a national officer for the YMCA. In his 1920 book The Problem of Americanization, which focused primarily on European immigrants, Roberts noted that “[m]any shyster lawyers prey upon” these immigrants, and claimed that these supposed deceivers were able to get away with fraud that “could not be practiced on the English-speaking peoples.”\textsuperscript{58} Roberts, like many

\textsuperscript{54} S.S. Gluck, The Public Defender (Feb. 3, 1922), in A STUDY OF THE OFFICE OF PUBLIC DEFENDER IN THEORY AND PRACTICE, IN THE UNITED STATES 7-8 (Harv. L. Sch. Libr., Hist. & Special Collections).
\textsuperscript{55} FRANCES KELLOR, NOTARIES PUBLIC AND IMMIGRANTS 11 (1909).
\textsuperscript{56} Grace Abbott, Immigration and Crime, 6 J. Am. Inst. Crim. L. & Criminology 522, 531, 532 (1916). A few years later, in her important book THE IMMIGRANT AND THE COMMUNITY, she pushed further on this point. In a few short pages Abbott utilized a common move of reformers of the period: tying immigrant defendants’ vulnerability with shyster lawyers. In her description of shysters, she noted, “After the acceptance of a fee, the lawyer fails to appear at the trial. In one quite typical case a lawyer received $90 from the sister of a German who was held in jail awaiting trial. The sister understood that the lawyer was to secure bail and to defend the man. He did neither, and the man was convicted.” GRACE ABBOTT, THE IMMIGRANT AND THE COMMUNITY 132 (1917).
\textsuperscript{58} PETER ROBERTS, THE PROBLEM OF AMERICANIZATION 87 (1920).
reformers, believed that immigrants needed a legal advocate or “an advisor—one who will tell him what his rights are and how he can meet the cunning of the fellow who will sit up night after night laying nets to catch the unwary.”

Race-salient concerns about ethnic immigrant defendants and unscrupulous attorneys influenced advocacy for public defender institutionalization in the early twentieth century. Reformers’ concern about shysters might be read in two possible ways. An unfavorable interpretation would suggest that this stereotyping is just one point in the bar’s sordid history of racial stereotyping and exclusion. A sympathetic reading might concede that the bar was genuinely trying to improve its standards and ethical terrain. In any event, either interpretation suggests that the early development of government-funded public defender offices was influenced by racial politics. Although the public defender model was rare during this time period, its philanthropic counterpart—the legal aid model—relies on similar racial rhetoric and considerations.

2. The Legal Aid Movement

The legal aid society was the preferred model for elite legal reformers on the East Coast and in the Midwest. The legal aid society model took shape through privately funded volunteer organizations, with a varying range of assistance coming from local bar associations and philanthropists. New York developed what is recognized as the first office. The Deutscher Rechtsschutz Verein (German Legal Protection Society) was created on March 8, 1876, in New York City under the supervision of Edward Salmon, a Prussian lawyer who subsequently became the governor of Wisconsin. In the rhetoric and logic of the time, the organization had a mission that was explicitly racial. That mission was to render “legal aid and assistance, gratuitously, to those of German birth, who may appear worthy thereof, but who from poverty are

59 Id.
61 See, e.g., Julius Henry Cohen, Unlawful Practice of the Law Must Be Prevented, 101 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 48 (1922) (arguing that higher standards of ethics are needed within the legal profession).
62 See BABCOCK, supra note 20; Mayeux, supra note 12, at 30 (“[T]he public defender remained primarily a West Coast and Midwestern innovation because in East Coast cities, the private bar opposed it.”).
63 But see generally BATLAN, supra note 12 (providing a different historical starting point).
unable to procure it.” Donations from the bar and elite philanthropists funded the organization. It initially handled only civil cases. Under the leadership of Arthur von Briesen, whom President and Chief Justice Taft aptly referred to as “the philanthropic leader of the Bar,” the organization changed its name to the Legal Aid Society in 1890 and also eliminated its German focus and diversified its clientele. This change was part-cosmetic, part-strategic. It was cosmetic because up until this point, the society was already assisting non-Germans. For example, in 1889, of the 3,500 clients the Society served, approximately 2,400 were German natives, and the remainder included Russian Poles, Hungarians, Austrians, Frenchmen, Dutch, and Americans. The change was strategic and racially purposeful. In his full-length analysis of the organization, Harvard Law professor John MacArthur Maguire noted that there was a suspicion clouding the organization:

Judges could scarcely believe that the Society was entirely disinterested and without bias. Had it purported to act for all poor men with just claims or defences, impartiality might have been convincingly asserted. But when the Attorney acted only for poor clients of German birth, there was probably a tinge of suspicion that he must unduly favor the chosen racial group in opposition to other racial groups. And of course the Germans’ opponents in litigation were often or usually non-Germans. This situation was unavoidable at the beginning, because of the Society’s origin. It cramped the development of the legal aid idea.

The idea that the Society favored the German “race” to the disadvantage of other racial groups led to a change in the organization’s mission and delivery of legal services. This change would have consequences once the organization developed its criminal justice practice in 1919, a few years before Congress passed restrictionist anti-immigration legislation. In the meantime, the New York organization provided a template for other cities. Legal aid societies sprouted up elsewhere, as Boston (1900), Philadelphia (1902), Cleveland (1905), Cincinnati (1907), and Detroit (1909) followed suit. Some legal aid organizations did both civil and criminal work, while

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65 HEBER SMITH, supra note 27, at 135.
67 Id. at 45; see also id. at xi.
68 Id. at 23 (emphasis added).
70 HEBER SMITH, supra note 27, at 140-44.
others focused exclusively on civil matters. Legal aid societies in the South were rarities, with Atlanta serving as a notable exception.71

Like supporters of the public defender model, legal aid reformers also emphasized how unscrupulous attorneys could take advantage of the racial marginalization, poverty, and incompetence of European immigrant defendants. But legal aid advocates also focused on Americanization. Like many Progressive Era reformers who touted schools, recreational facilities, and social welfare programs as Americanization devices, these legal leaders believed that legal aid would help immigrants from southern and eastern Europe adjust to American life and institutions. To say they were obsessed with preventing subversive political activity would be an understatement.

Reginald Heber Smith was a Boston-based lawyer who helped spearhead the first national legal aid study, the Carnegie Foundation-funded *Justice and the Poor*. Smith often warned the public that

[D]elay, inability to pay costs, and inability to engage counsel . . . brings [immigrants] to the conviction that . . . America has only laws that punish and never laws that help. From this it is only a short step to open opposition to all law. Wherever we deny justice to an immigrant we prepare a fertile land in which the seeds of anarchy, sedition, and disorder quickly take root.72

During the 1920 annual ABA meeting in St. Louis, Edward Tustin, who helped create the Legal Aid Bureau in Philadelphia the year prior, complained to the audience that “[t]he poor and [especially] the ignorant foreigner” accused of a crime “is bewildered and dazed by unaccustomed surroundings and proceedings, which he does not understand.”73 Like other reformers, Tustin argued that legal aid organizations were the solution to immigrants’ vulnerability and potential political dissidence. Such institutions were “one of the greatest organized influences ever presented to our people for the Americanization of the ignorant and the foreigner.”74 In Tustin’s view, “there is no department of our great municipalities which will so work for the Americanization of the foreigner, the alleviation and quieting of the unrest among the poor and the ignorant, as a well-established municipal legal aid bureau.”75

Charles Evans Hughes was arguably the most notable leader to articulate the race-poverty-incompetence framework in service of Americanization

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71 Id. at 187; see also KRIS SHEPHARD, RATIONING JUSTICE: POVERTY LAWYERS AND POOR PEOPLE IN THE DEEP SOUTH 5 (2007).
73 Ernest L. Tustin, The Relation of Legal Aid to the Municipality, 6 VA. L. REG. 891, 899 (1921).
74 Id. at 896.
75 Id. at 902.
goals. Hughes did so with surprising consistency. As governor of New York in 1909 he spearheaded the Commission that found that "[j]ustice is a costly privilege to the mute and illiterate alien" and recommended legal aid reform to the New York State Legislature. During his time as President of the New York Legal Aid Society from 1916 to 1921 he noted famously that "[t]here is no more serious menace than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty. To spread that notion is to open a broad road to Bolshevism." As described in more detail below, Hughes' advocacy for institutionalized legal aid, particularly for the marginalized racial other, would reappear in subtle ways once he returned to the Court as Chief Justice and once the Court began to recognize the right to counsel as a limited but an affirmative obligation.

The race-poverty-incompetence framework was not reserved exclusively for ethnic whites. For example, Lewis Meriam was the author of *The Problem of Indian Administration*, a 1928 Rockefeller Foundation-funded report that inspired American Indian policy reform. In the report, Merriam deployed this same logic to recommend government-funded legal aid for Native Americans. Nevertheless, legal aid reformers' concern about socialism and anarchism caused them to cater their services primarily to southern and eastern Europeans to the neglect of other racial minorities. For example, in volumes 1–27 of the *Legal Aid Review*—which served as an annual report for the New York Legal Aid Society and spanned the years of 1903 to 1924—sixteen cases involving African-Americans and three cases involving Chinese individuals are discussed. Discussions about Hungarian, Italian, Irish, Norwegian, Russian, Polish, and other European clients dominate the reports. Each volume typically contains a discussion of fifteen to eighteen cases, for a total of more than 300 cases. The legal aid societies of Philadelphia, Chicago, and Boston also make sparing references to nonwhites. Yet primary source texts from this period suggest that racial

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76 REPORT, supra note 50, at 7.
78 See infra notes 157–158 and accompanying text.
79 LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION 778 (1928) ("In order that the extension of the normal processes of government over the Indians may not lead to misunderstanding, abuses, and oppressions, some organized system of legal aid should be provided for the ignorant and needy among them . . .there are many who are unacquainted with the white man’s laws and methods of business, and have not sufficient means to hire competent help . . .no Indian should be brought before a court for a criminal offense without capable and honest counsel to defend him"). Importantly, the Indian Reorganization Act of 1934, which was informed by the report, not only declined Meriam’s recommendation, but actively prohibited the participation of attorneys in tribal proceedings.
80 The annual reports for the Boston Legal Aid Society are available online through Harvard University’s library. The annual reports for the Legal Aid Society of Philadelphia are available at
minorities had significant unmet legal aid needs. Thus, while many legal aid societies did not preclude nonwhites from receiving legal service, they certainly did not offer rhetorical or administrative attention to these groups. The archival evidence of purposeful outreach to nonwhites is thin when compared to the actual legal aid needs of these groups. Ultimately, the focus of legal aid reformers on southern and eastern Europeans helped contribute to a culture of self-help within African-American, Latinx, and Asian-American communities.

B. Race and Civil Society

What did racial minorities do amidst racial neglect, and how should we understand mainstream legal reformers' relative inattention to their needs? On the former, this section details how racial minorities developed their own legal aid schemes that also hinged on race. On the latter, it would be tempting to interpret legal aid reformers' neglect of racial minorities as a manifestation of outright bigotry, but the historical record tells a more complex story. In 1902 Arthur von Briesen, who served as the first president of the Legal Aid Society of New York, wrote a letter to President Theodore Roosevelt that is instructive. They were friends from Roosevelt's political days in New York when Roosevelt supported legal aid's development. Von Briesen mentioned that his son Fritz, who worked in Washington, D.C., had alerted him to the need of a legal aid society for African-Americans in the capital. Von Briesen insisted:

Washington needs a Legal Aid Society much more than New York. Especially the colored people in Washington, who have no vote, no political power, no means of making themselves heard, are so completely subdued and at the mercy of the ill-will of neighbors, police officers and the like, that they are very frequently deprived of liberty and property without an opportunity of being heard.82

Such comments, expressed through private correspondence, demonstrate the absence of race-based animus but also highlight the lack of attention given to African-American and Chinese indigents in von Briesen's own backyard of

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81 For discussions on race in Philadelphia, Boston, and Chicago see CHI. COMM’N ON RACE RELATIONS, THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT (1922); JOHN DANIELS, IN FREEDOM’S BIRTHPLACE: A STUDY OF THE BOSTON NEGROES (1914); W.E.B. DU BOIS, THE PHILADELPHIA NEGRO (1899).

82 Letter from Arthur von Briesen to Theodore Roosevelt, United States President (June 9, 1902) (on file with the Library of Congress, Theodore Roosevelt Papers, Manuscripts Division).
New York City (especially considering their ensnarement with the New York criminal justice system during the same time).  

Other legal aid figures were also attuned to the issues facing nonwhites and worked in service of addressing those needs. Richard W. Hale (of WilmerHale fame) served in various leadership capacities in the Boston Legal Aid Society and linked lynching to problems in criminal procedure and legal aid. Hales’s colleague Moorfield Storey, who served as the first president of the NAACP, was a Boston attorney who fought vigorously for the Dyer Anti-Lynching Bill that would have made lynching a federal felony. Appointed to the National Committee on Legal Aid Work in 1921, Storey convinced Charles Evans Hughes to offer financial and symbolic support to his anti-lynching efforts. Nevertheless, the mainstream legal aid movement fell short of addressing the legal aid needs of racial minorities. The absence of outright bigotry and exclusion as well as the willingness of some legal aid reformers to demonstrate a commitment to racial justice issues involving blacks belie an easy story about monolithic racial discrimination. But these themes do show that parts of the legal reform world prioritized the needs of ethnic whites in their creation of a system of legal aid that had consequences in the criminal and civil systems. 

In a pre-Powell era that failed to establish an affirmative right to an attorney and in the midst of bureaucratic development of legal aid and public defender offices that tepidly addressed the needs of nonethnic whites, mutual aid societies stepped in to fill the gap. Often deprived of human capital, saddled by financial limitations, and constrained by the ubiquitous nature of racial discrimination, these groups had to run multipurpose organizations that provided civil and criminal legal aid as well as a host of other social services. During the Chinese Exclusion Era, one notable organization that provided legal aid was the St. Bartholomew’s Chinese Guild (Bao Niang Hui), which was established by the St. Bartholomew’s Episcopalian Church in 1889 in New York City. The Guild’s primary projects included missionary work, social welfare services, and legal advocacy for the Chinese community in New York, which comprised approximately 2,000 people. Several of the New

85 Letter from Moorfield Storey to Charles Evans Hughes (1918) (on file with author).
York City social service directories listed the organization in their “Legal Aid and Advice” sections. In fact, in the 1903 edition of The New York Charities Directory, the Guild is described as an organization that “renders legal aid and advice to Chinamen.”

In its first year, the Guild maintained a membership of 466 people. The annual dues were two dollars, which covered a third of the organization’s expenses, while the church covered the balance. Notably, Guy Maine (Yee Kai Man), who led the Guild but did not have a law degree, was crucial to its legal operations. Maine served mainly as an interpreter, legal advocate, and liaison between the Chinese community and bureaucrats in the New York City legal system. In 1891, under the aegis of the Guild, Maine sought “justice in the courts in 217 cases of crimes against Chinese—everything from thirty-six assaults-and-batteries, to eighty-seven laundry windows smashed, to eighty-five instances of boy annoyance in various ways.” Considering Maine’s lack of formal credentials, such a caseload is quite impressive. In 1897, Maine documented what his typical day looked like:

7:10 A.M. To Brooklyn to settle business dispute between two members.
9:30 A.M. Got transcript of judgment of $105 for member.
10:15 A.M. Filed transcript in court and placed in hands of sheriff.
11:30 A.M. Took member to Gouverneur Hospital for dressing of wound.
12:45 P.M. Took two wounded men to Police Station to have assailant apprehended.
1:30 P.M. Went to Delancy Street [sic] to see landlord about lease.
2:40 P.M. Went to corner of 44th Street and 2nd Avenue about alteration of store.
3:30 P.M. Went to 57th Street police court for warrant of arrest of man who broke window of member.
4:40 P.M. Went to West 48th Street to see landlord about having water meter installed.

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88 See e.g., Charity Organization Society, New York Charities Directory 225 (1890); Charity Organization Society, New York Charities Directory 281 (1906); Charity Organization Society, New York Charities Directory 101 (1914).
89 Charity Organization Society, New York Charities Directory 86 (1903).
90 Id.
5:15 P.M. Went to 43rd Street and 8th Avenue to see member ordered by Health Department to have trap connections in store.93

This timetable also highlights an important thematic thread that runs throughout this Article. Marginalized groups like the descendants of Chinese and Mexicans, along with African-Americans, did not have the privilege of running strictly legal aid organizations but operated institutions that provided a variety of social services. Moreover, the timetable allows for more expansive ways of thinking about legal aid that are not only tied to legal representation.94

African Americans also participated in their own forms of self-help and legal innovation. In African-American legal history, the common objects of analysis are mainstream organizations such as the National Association for the Advancement of Colored People, local movements, and pioneering attorneys.95 But African-American newspapers also served as a source of legal advice; such publications provide interesting insights into the legal landscape of the early twentieth century, especially since many of them were founded by lawyers.96 The Chicago Defender was one of the most widely circulated black newspapers in the first half of the twentieth century.97 It ran a legal advice column called “Legal Helps” between 1914 and 1917 during the First Great Migration.98 Richard E. Westbrook, an African-American attorney who helped create the Cook County Bar Association in 1914 as an alternative to the exclusionary Chicago Bar Association, penned the column.99 The wide range of cases listed in the newspaper involved criminal justice matters, labor, housing, real estate, child support, tort claims, consumer debt, and

93 BONNER, supra note 91, at 124.
94 See BATLAN, supra note 12, at 20–24 (illustrating how working women's protective unions provided quasi-legal services).
96 In addition to Robert Abbott, who founded and edited the Chicago Defender and graduated from Kent College of Law, there was Robert Lee Vann, who ran the Pittsburgh Courier and graduated from law school at the University of Pittsburgh. Ferdinand Lee Barnett founded the Chicago Conservator (Chicago’s first black newspaper) and was a graduate of Chicago’s College of Law. William Calvin Chase, who was the editor of the Washington Bee throughout its existence (1882-1922), attended Howard University School of Law.
99 See id. (“By organizing the Cook County Bar Association in 1914 'to promote good fellowship' among the Black lawyers who were racially ineligible for membership in the white Chicago Bar Foundation, [Westbrook] signaled his intent to make law a mechanism of Black equality, and to combat racial discrimination.”).
employment issues. In his pioneering study, *The Negro Press in the United States*, University of Chicago sociologist Frederick Detweiler noted that the Chicago Defender

[S]eeks to live up to its title of Defender. Colored people from all over the country turn to it when in trouble; the staff interests itself in securing legal aid and justice for individual Negroes . . . . When Negroes have trouble of any sort they write to the paper, sometimes, merely to utter their cry for justice.

Much of the advice offered in the newspaper centered on Chicago’s notorious court system. Consider the following column:

[Question]: I was arrested, charged with disorderly conduct, and the trial in the Municipal Court, at 35th street. Now before my case was reached or the court had opened, a policeman brought me a paper and stated that if I wished to have my trial at once I should sign the paper: I signed the paper, and when court opened and my case was called, I demanded a jury, but the judge said that I had made the demand too late as I had waived my right to a jury trial. Now please explain the law concerning jury trials in the state of Illinois.

[Response]: We have noticed the actions of the police and others connected with the Municipal Court, at the place you mention and other places where said Municipal Courts are held, and such practice is very common and our readers are warned not to sign any paper presented unless you fully understand the contents of same. The paper no doubt was a formal waiver of a jury trial, but you should have then and there explained to the judge why you signed the paper and the circumstances connected therewith. No person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi criminal or quit tam action except upon conviction by a jury; provided, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing; and when such waiver of jury is made, imprisonment may follow the judgment of the court without conviction by the jury. This section shall not apply to fines inflicted for contempt of court. Ch. 79, Sec. 175, Hurds Revised Statues of Illinois.

A cursory glance at this section might lead one to understand it simply as a legal advice column. A more complicated reading would consider the column not only as a contributor to legal consciousness, or how people

100 Id. at 900, 902, 903, 904, 905.
102 For a useful discussion on Chicago courts during this period, see MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO (2003).
103 Defender’s Legal Helps, CHICAGO DEFENDER, Mar. 7, 1914, at 8.
understand the law, but also as a venue for blacks seeking legal assistance. As K. Nousiainen notes in a study of the Finnish press and indigent clients, if a person can clearly present her problem in a legal advice column, then it can operate as an easy and cheap method of obtaining legal advice.104 In his analysis of Chinese legal advice columns in the 1990s, sociologist Ethan Michelson argues that “by virtue of its greater popular exposure through newspapers and other mass media, public legal advice has a wider and more politically significant impact than private legal advice.”105 Isaac Metzker has offered a similar argument about the importance of advice columns in his book on the Jewish Daily Forward. Established in 1897 as a Yiddish-language daily, this newspaper maintained a column that provided social, economic, and legal advice to Eastern European immigrants attempting to adjust to American life.106 At stake in considering such legal advice columns such as the Defender’s is not only the actual provision of legal information but also educative efforts used by black elites to demystify law. These legal consciousness-raising techniques were similar to legal aid reformers’ attempts to Americanize and politicize European immigrants.

Mexican-American civil society also bubbled with legal aid activity. The career of Manuel C. Gonzales intersected with various permutations of legal aid for Mexicans and Mexican-Americans during the pre-Powell era. Born in San Antonio, Texas, Gonzales worked as a secretary at the law firm of A.M. Love and B.F. Patterson in 1917.107 The bilingual Gonzales sought to leverage the capital he had to benefit the Mexican-American community; in 1917 he convinced his employers to provide organized legal assistance for Mexican-Americans.108 This resulted in La Liga Protectora Mexicana (the Mexican Protective League), which provided legal assistance between 1917 and 1921.109 While working for the League, Gonzales and the attorneys “advised members of Texas’s tenant laws, labor contracts, interest rates for loans, constitutional rights of assembly and free speech, workers’ compensation, and due

104 See generally K. NOUSIAINEN, LEGAL AID AND THE PRESS (1980).
107 See Maggie Rivas-Rodriguez, Texas Mexican Americans and Postwar Civil Rights 3 (2015).
109 Pycior, supra note 108, at 150.
process.” Membership in La Liga increased from 73 in 1917 to 500 in 1920, with “[m]embers p[aying] one dollar their first year and five dollars annually thereafter.” The nature of the legal assistance offered by the League was advisory and informational, but it occasionally provided legal representation and lobbied for legislative changes in laws that would benefit land tenants. Mutualistas like La Liga, which were buoyed by the often unrecognized day-to-day labor of women, helped buffer Mexicans and Mexican-Americans from a hostile labor market with exploitative employment practices. The importance of these organizations increased with the development of The United States Border Patrol in 1924. La Liga also melded legal advice and education. Throughout the organization’s existence, it maintained a legal advice column in the newspaper El Imparcial de Texas. Like the Chicago Defender’s legal advice column, this outlet was particularly important considering the occupational exclusion of Latinos and Latinas from the legal profession, their lack of access to the legal process, and the unique literacy, civic, and linguistic issues that they encountered.

The league also published a small compendium titled Leyes de Texas, Civiles y Criminales, Traducidas al Español (Texas Law, Civil and Criminal, Translated into Spanish), which offered a wealth of legal information on issues that included divorce, fraud, suffrage, vagrancy, labor, and naturalization. In Spanish, the authors indicated that their many years of experience “convinced them that there is an urgent need for such a compilation, as a guide to Mexicans living in Texas for easy knowledge and understanding of their legal rights.”

In 1926, Gonzales took his talents to the Mexican Consul in San Antonio, which “often asked him to serve as a friend of the court in trials of policemen.

112 See id. at 152 (“Nevertheless the Liga did lobby in Austin for some specific reforms . . . . This legislation would have helped to eliminate landholders’ use of local law enforcement officers to harass Mexican-Texan and other tenants.”).
113 See VICKI RUIZ, FROM OUT OF THE SHADOWS: MEXICAN WOMEN IN TWENTIETH-CENTURY AMERICA 72-98 (1998) (describing Mexican women’s contributions to political organizing).
114 Id.
115 RIVAS-RODRIGUEZ, supra note 107, at 3.
116 Berkeley sociologist Paul Taylor studied Mexican crime and wrote, “Mexicans get little protection in the courts. The Mexicans are now learning that you must buy justice . . . . The Mexican is in the same position as the Negro in the South. He is always wrong unless there is a white man to speak for him.” Paul S. Taylor, Crime and the Foreign Born: The Problem of the Mexican, in National Commission on Law Observance and Enforcement: Report on Crime and the Foreign Born 199, 230-32 (1933).
117 B. PATTERTSON & T. MONROE, LEYES DE TEXAS, CIVILES Y CRIMINALES, TRADUCIDAS AL ESPAÑOL 5 (1920).
who killed Mexicans.”118 Gonzales would work for the consulate until 1958.119 The role of the consulate in the provision of legal services cannot be understated. As early as 1903, the Mexican Consulate in Los Angeles had “a special fund that, according to the [L.A.] Times, was ‘to be used in assisting Mexican subjects, who became involved in difficulty, either through ignorance of the laws of this country or through mistaken arrest or accusation of crimes’”120 and by 1928 there were more than 60 consuls in cities across the country.121 Across the Southwest, consuls in major cities such as San Antonio, Tucson, and Los Angeles “prepared legal briefs, assessed the impact of American laws or proposed legislation . . . defended Mexican nationals who lacked funds, submitted petitions for pardons or paroles for mexicanos serving jail sentences, reviewed requests of victims or criminal offenses, and presented claims from industrial accidents to appropriate authorities.”122 These consuls often worked in tandem with local mutualistas.123 Consulates obtained legal aid from individual attorneys or firms “for Mexican nationals who were unable to afford their own attorney or did not speak English well enough to navigate the US legal system.”124 Consular legal aid was not restricted to the southwest either. Zaragosa Vargas similarly notes, “In one year, Detroit lawyer Charles Benjamin (a Panamanian) helped the Mexican consul with over 400 cases involving work-related accidents.”125 What is important here is the seemingly circuitous routes Mexicans and Mexican-Americans had to take to receive legal services. While legal aid reformers catered their services to ethnic whites in the Northeast and the Midwest, some Mexicans and Mexican-Americans essentially had to rely on another country to receive legal aid.

123 Ruiz, supra note 113.
These brief examples demonstrate that legal aid is not divorced from race in ways that previous histories suggest. Additionally, this Section demonstrates that, for some organizations, the distinction between civil and criminal legal aid was quite durable; for others, the delineation was less salient. Finally, this subsection illustrates how, in the absence of the Court’s and mainstream civil society’s serious engagement with minorities’ legal problems, these communities relied on self-help strategies.

II. FROM POWELL TO GIDEON: A STUNTED RIGHT TO COUNSEL

A. Race and the Judicial Enshrinement of the Right to Counsel

This section details the relationship between race and indigent defense in the years before the Court decided Powell in 1931, and in the three decades after the case was decided. The typical explanation for the Court’s silence on the right to counsel before Powell is usually interpreted as a byproduct of its shift from negative liberties to positive liberties. This is correct, but despite the Court’s minimalist approach, it also faced questions about the right to counsel before Powell. This Part first describes the Court’s continued inattention to the right to counsel before Powell. It then describes Powell and how that decision created a template for future right to counsel cases that emphasized the race, indigence, and illiteracy of defendants for almost three decades. The Court’s intervention in cases involving uncounseled minority defendants came by way of the Fourteenth Amendment and mirrored its growing concern about racial discrimination in criminal justice and in society. Although its treatment of the right to counsel was pioneering at the time, its use of the Powell template—which focused on racial pathology—stunted the development of indigent defense and caused it to make case-by-case determinations as opposed to prophylactic rules.

Moore v. Dempsey, which emerged out of the 1919 race riots in Elaine, Arkansas, was one of the first cases to involve a constructive ineffective assistance of counsel claim. The case concerned unionization efforts undertaken by black farmers in Elaine. In the words of one paper, farmers sought to develop “a legal aid society through which they planned to take action through the courts to end vicious economic exploitation.”

126 This is particularly true of the Vinson Court and its treatment of restrictive covenants and segregation in higher education. See Whittington B. Johnson, The Vinson Court and Racial Segregation, 1946–1953, 63 J. NEGRO HIST. 220, 223 (1978) (describing the “crippling blow to restrictive covenants” that Chief Justice Vinson dealt by “wedding their legal enforcement with state action”).

127 261 U.S. 86 (1923).

128 Arkansas Court Frees Six Peons: Have Been Awaiting Retrial for More Than Two Years; Decision Is Reversed by U.S. Supreme Court, N.Y. AMSTERDAM NEWS, June 27, 1923, at 3.
officers who came to investigate the meeting were denied entry.129 Shooting commenced after “words were exchanged” between the white officers and the black occupants, but “the question of who fired first will likely never be answered.”130 Mass arrests of blacks, tortures, and a full-scale riot ensued.131 African-American activist Ida B. Wells-Barnett, who operated a mutual aid society that provided legal aid in Chicago, met with the wives and mothers of the detainees and was able to sneak into the jail.132 The mother of Frank Moore, the lead defendant in the case, claimed that Wells-Barnett was her “cousin” from St. Louis.133 With the company of “a group of insignificant looking colored women who had been there many times before,”134 Wells-Barnett was able to obtain their accounts of torture and publish her findings nationally in a pamphlet titled The Arkansas Race Riot. One of the black defendants in the case discussed his abduction from his home and said,

I was taken to Elaine and put in the schoolhouse and I was there about six days. I was brought to Helena jail and whipped near to death to make me lie on myself and the others . . . . [I] was put in an electric chair in Helena jail and shocked. I have the scars on my body to show now.135

After tortured confessions and a hasty trial, the defendants were convicted.136 They appealed the mob-dominated trial and, for our purposes, the failure of counsel to demand a delay, change of venue, or separate trials.137 The Court focused solely on the mob-oriented nature of the proceedings.138 The case is typically understood for the proposition that mob-dominated trials are unconstitutional.139 At this point in history, it was one of the few moments where the Supreme Court overturned a southern state’s criminal conviction of an African-American.140 But the Court’s short treatment of representation would be a common theme in the decade before and after Powell; claims brought by defendants challenging the appointment or

130 Id.
131 Id. at 171-75, 271.
133 Id.
134 Id.
137 Id.
138 Id. at 29-91.
140 Klarman, supra note 1, at 48.
effectiveness of counsel would be overshadowed by more shocking legal infractions such as mob-dominated trials and coerced confessions.

The Court’s pre-Powell minimalism and failure to address right to counsel issues may have been a byproduct of its misguided understanding of how indigent defense actually worked at that time. This misunderstanding is best exemplified in the Court’s decision in *Patton v. United States*.141 This case dealt with the constitutionality of an eleven-person jury.142 Toward the end of the decision the Court spoke more broadly about the “humane policy of modern criminal law” and boasted that “[t]he man now charged with crime is furnished the most complete opportunity for making his defense . . . if he be poor, he may have counsel furnished him by the state . . . not infrequently he is thus furnished counsel more able than the attorney for the state.” Such claims conflicted with the professional debates on indigent defense at the time as well as the Court’s own conclusions a year later in *Powell*. Notably, the liberal faction of the Court—Justices Brandeis, Cardozo, and Stone—concurred only in judgment whereas Chief Justice Taft, who was well versed in the legal aid landscape, took no part in the decision.144 As Judge A. Leon Higginbotham Jr. has noted, “[t]he Supreme Court’s new direction in criminal justice matters became apparent shortly after [Charles Evans] Hughes became Chief Justice in 1930.” This shift is most notable in *Powell*, where the Court adopted the framework developed by Progressive Era legal aid reformers who emphasized racial marginalization, poverty, and incompetence in their push for institutionalization.

The facts of *Powell v. Alabama*146 entailed more issues than a criminal procedure final exam. Nine black boys in the Depression-era South were accused of raping two white girls on a train and arrested in Scottsboro, Alabama.147 The defendants—who are commonly referred to as the “Scottsboro Boys”—were rushed through trials that were dominated by mobs, entailed minimal counsel, and were decided by all-white juries.148 The Supreme Court overturned their convictions and, for the first time, required

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141 281 U.S. 276 (1930).
142 Id. at 276.
143 Id. at 308.
144 See WILLIAM HOWARD TAFT, Preface to REGINALD HEBER SMITH & JOHN S. BRADWAY, GROWTH OF LEGAL AID WORK IN THE UNITED STATES iv (1926) (“The growth of these legal aid organizations is the most satisfactory proof of their necessity.”).
146 287 U.S. 45 (1932).
147 Id. at 51.
148 Id.; see also Norris v. Alabama, 294 U.S. 587, 591 (1935) (holding that exclusion of blacks from juries violates the Equal Protection Clause).
states to appoint counsel for indigent capital defendants.\textsuperscript{149} It ruled that the Due Process Clause of the Fourteenth Amendment required such appointments.\textsuperscript{150} \textit{Powell} is important not only for its doctrinal significance, but also because of the socio-political context in which it emerged. Some diplomatic historians and legal scholars rightly point to post–World War II developments and Cold War posturing as integral to civil rights victories in the United States,\textsuperscript{151} but the Scottsboro incident should be situated more firmly in this history. The boys were represented in the appeals stage by the International Labor Defense (ILD), the legal arm of the Communist Party USA. The ILD cut its teeth by providing legal assistance in high-profile cases involving labor leaders, political activists, and anarchists in the late 1920s.\textsuperscript{152} At this point in history, only the cases of Nicola Sacco and Bartolomeo Vanzetti equaled the Scottsboro Boys in international scrutiny.\textsuperscript{153} Moreover, the Soviet Union pummeled the U.S. in the international media for its failure to address lynching, which was seen as the “close cousin [of] mob-dominated trials.”\textsuperscript{154}

Causal links between this international attention and the Court’s decision are unavailable, but it is safe to say that these currents did not exist in a silo. Thomas Emerson, who served on the Scottsboro Boys’ defense team and subsequently taught at Yale Law School, commented on how international scrutiny influenced American racial egalitarianism. He stated,

We profess to believe in racial equality and in recent years, contrary to the general trend, we have made some progress in achieving this goal. This is due in part, no doubt, to the fact that the attention of the outside world has been focused upon our conduct in this area.\textsuperscript{155}

In line with this Article’s core argument, it is important to note that the defining case that carved out a limited right to counsel was infected by racial politics. Moreover, the \textit{Powell} Court’s decision made repeated references to the defendants inability to obtain meaningful counsel and their illiteracy in

\textsuperscript{149} \textit{Powell}, 287 U.S. at 73.
\textsuperscript{150} Id.
\textsuperscript{151} See, e.g., Derrick A. Bell, Jr., \textit{Brown v. Board of Education and the Interest-Convergence Dilemma}, 93 HARV. L. REV. 518 (1980) (suggesting that post–World War II black disillusionment influenced the Court’s race cases); Mary L. Dudziak, \textit{Desegregation as a Cold War Imperative}, 41 STAN. L. REV. 61, 64 (1988) (noting the connection between “civil rights and anticommunism” during the Cold War).
\textsuperscript{153} See generally MOSHIK TEMKIN, \textit{THE SACCO-VANZETTI AFFAIR: AMERICA ON TRIAL} (2009).
\textsuperscript{155} Thomas I. Emerson, \textit{The Trend of American Democracy} 11 LAW. GUILD REV. 194, 195 (1951).
ways that correspond with early legal aid reformers’ discourse around poverty and incompetence.\footnote{Powell v. Alabama, 287 U.S. 45, 52, 57-58, 71 (1932).}

Chief Justice Hughes’ role in this decision and the shift in the Court’s right to counsel jurisprudence is undertheorized but noteworthy. Recall that Hughes was one of the primary advocates of organized legal aid and, like other reformers, deployed the aforementioned framework. Hughes’ African-American-friendly rulings during his first stint as an Associate Justice between 1910–1916\footnote{See, e.g., McCabe v. Atchison, Topeka, & Santa Fe Ry. Co., 235 U.S. 151, 161-62 (1914) (noting, in dicta, that an Oklahoma statute that allowed railroads to offer luxury accommodations for whites and not blacks was unconstitutional irrespective of differential racial demand); Bailey v. Alabama, 219 U.S. 219, 245 (1911) (ruling that a debt peonage statute was unconstitutional); A. Leon Higginbotham, Jr. & William C. Smith, The Hughes Court and the Beginning of the End of the “Separate but Equal” Doctrine, 76 MINN. L. REV. 1099, 1108 (1992) (acknowledging that although Hughes downplayed the racial aspects of the case, he “undoubtedly held together a majority of a court that was decidedly unsympathetic to legal claims by blacks”); Note, Governor on the Bench: Charles Evans Hughes as Associate Justice, 89 HARV. L. REV. 961, 993 (1976) (arguing that although the McCabe decision upheld Plessy v. Ferguson, 163 U.S. 537 (1896) and barred injunctive relief, the concurrence of the three Southern members of the Court and Justice Holmes suggests that Hughes was able to incorporate that dicta by yielding to the result of the case and noting that the holding was transformed years later in the landmark case of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)).} and when he returned as Chief Justice from 1930–1941,\footnote{See, e.g., Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349-50 (1938) (ruling that states that provide in-state education to whites must also provide in-state education to blacks); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (ruling that the use of confessions attained through coercion violates the Due Process Clause of the Fourteenth Amendment); Norris v. Alabama, 294 U.S. 587, 596 (1935) (holding that exclusion of blacks from juries violates the Equal Protection Clause).} make the Powell decision somewhat unsurprising. Edwin McElwain, who clerked for the Chief Justice for three years, documented how Hughes treated in forma pauperis cases involving “civil rights or racial minorities” with “the most care” and noted how Hughes would often “slight the rule that the Court will not consider cases which turn upon their individual facts” to “smell out possible prejudice by the prosecuting authorities or the lower courts.”\footnote{Edwin McElwain, The Business of the Supreme Court As Conducted by Chief Justice Hughes, 63 HARV. L. REV. 5, 24 (1949).}

Curiously, Hughes did not pen Powell. This could have been a byproduct of the general division of labor on the Court or a result of the seemingly self-serving optics of a legal aid leader authoring a decision that mandates the limited provision of counsel to indigent defendants. The historical and scholarly record suggests that Hughes’ decision to give authorship duty to Justice Sutherland was a pragmatic one. Harvard Law professor Paul Freund, who clerked for Justice Brandeis a term after Powell, noted how the former politician-turned-Chief Justice “regarded the assignment of opinions as the most delicate” and was “inclined, in cases of sharp division, to assign the opinion . . . to a Justice who was not likely to take the most extreme
position.” Justice Sutherland, a member of the conservative bloc of the Court often referred to as the Four Horsemen and the Justice who penned decisions that sharply defined the boundaries of whiteness, was given the job. Despite his conservatism, Sutherland’s opinion used the same racial framework that was utilized by reformers like Hughes and expressed in the legal profession. The race-poverty-incompetence framework would persist for decades after Powell but in service of black defendants.

Presumably, the Court’s recognition in Powell of how important lawyers were to procedural fairness would portend a continued extension of the right to counsel. Although the Court would extend the right to counsel to federal courts in 1938, this expansion only applied to what was a relatively small federal docket. What was more consequential was the Court’s refusal to require appointment of counsel in state cases. In Betts v. Brady, Maryland charged Smith Betts with robbery. He could not afford a lawyer, and the state did not provide him with one. This was constitutionally permissible because the right only extended to federal cases and capital cases. Betts appealed and lost. The case could be understood as a battle about federalism and the incorporation of the Sixth Amendment right to counsel to states. Throughout the 1940s and 1950s this battle was waged between Justice Black, who believed in total incorporation, and Justice Frankfurter, who opposed...

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160 Paul A. Freund, Charles Evans Hughes as Chief Justice, 81 HARV. L. REV. 4, 40 (1967); see also McElwain, supra note 159, at 18 (noting how Hughes would “assign ‘liberal’ opinions to ‘conservative’ judges, and vice versa” and describing how in the Powell case, Hughes assigned the decision to Justice Sutherland “probably in the hope that he could bring over Justices Butler and McReynolds while some of the more ‘liberal’ Justices could not”).


162 Sara Mayeux helpfully points out that Walter Pollack, the attorney who argued Powell, utilized similar language and repeatedly cited an Illinois Supreme Court opinion in his brief “to support his argument that nine illiterate black teenagers had been denied the effective assistance of counsel in rural Alabama” by pointing “to precedents in which illiterate immigrants had been denied that assistance in the urban Midwest.” Sara Mayeux, Ineffective Assistance of Counsel before Powell v. Alabama: Lessons from History for the Future of the Right to Counsel, 99 IOWA L. REV. 2165, 2181 (2014).

163 See Johnson v. Zerbst, 304 U.S. 458, 467 (1938) (holding that the Sixth Amendment “entitles one charged with crime to the assistance of counsel”).

164 316 U.S. 455, 456 (1942).

165 Id. at 457.

166 Id.

167 See Jerold H. Israel, Selective Incorporation: Revisited, 71 GEO. L.J. 253, 294 (1983) (noting that Gideon v. Wainwright overruled Betts v. Brady in holding that the Fourteenth Amendment “requires appointment of counsel in state courts under the same standard that the [Sixth Amendment imposes on federal courts”).
But the case could also be seen as a statement about race. Louis Lusky, a Columbia law professor who drafted the famous "Footnote 4" as a law clerk for Justice Stone, complained that the Court offered no serious distinction between Powell and Betts. Unsatisfied with the capital/noncapital distinction, he argued that Betts could be explained as "a muffled and possibly unconscious ruling against Federal intervention in the absence of a showing that the case involves some national interest, such as that in the minorities problem." He added "Betts was not shown to be a member of any minority group, whereas . . . Powell . . . involved 'ignorant and friendless negro youths.'" Lusky also noted that "it must be admitted that there is a special reason for Federal intervention where the minorities problem has impinged upon the State's machinery of criminal justice." Lusky's observations were prescient; the Court's subsequent decisions, and the rhetoric behind them, lent considerable credence to his suspicions. Betts produced the "fundamental fairness" doctrine. That doctrine, which was sometimes referred to as the "special circumstances" test, required courts to examine the appointment of counsel on a case-by-case nature. The test, which proved unworkable and yielded inconsistent results, also hinged heavily on race.

B. Race, Pathology, and the "Special Circumstances Test"

Throughout the 1940s and the 1950s, the period between Powell and Gideon, the Court decided a series of right to counsel cases that were partially informed by racial concerns. These decisions were a result of Betts' unwieldy special circumstances test. The test was a byproduct of the formula developed by legal aid reformers and emphasized in Powell. A perceived constitutional violation—in this case, a Due Process failure to appoint counsel—along with

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168 This has been a topic of interest for constitutional scholars and judges for decades. See Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1196 (1992) (recounting Justice Black's arguments for incorporation); William J. Brennan, Jr., The Bill of Rights and the States, 36 N.Y.U. L. REV. 761, 768-69 (1961) (highlighting Justice Black's support for full incorporation of the Bill of Rights); Felix Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746, 748 (1965) (arguing that incorporation "is not warranted by the Court's careful choice of language" in earlier cases); Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74, 76 (1963) (discussing Justice Black's support of incorporation, as compared with "selective incorporation"). See generally RAOUl BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989).

169 Louis Lusky, Minority Rights and the Public Interest, 52 YALE L.J. 1, 28 (1942).

170 Id. at 28-29.

171 Id. at 30. But see Victoria Nourse, Gideon's Muted Trumpet, 58 MD. L. REV. 1417, 1421 (1999) ("[T]he Court in Powell used the right to counsel to avoid the real question: the question of race—the question of how and whether a state could convict someone when it was committed to seeing them guilty-by-race.").

some combination of indigence, status as a racial minority, illiteracy, poverty, and often youth was not necessarily enough to be granted certiorari since such grants are statistically rare events; but that combination was an undeniable feature of the Court’s constitutional criminal procedure docket during this period. The decisions described below explicate this point. Regrettably, criminal procedure scholars have largely ignored these cases and with good reason; the decisions simply did not and do not have the doctrinal luster or significance of the subsequent landmark Warren Court interventions. But in addition to comprising part of what Michael Klarman defines (but does not necessarily include) as part of “racial origins of criminal procedure,” these decisions map onto the Court’s civil rights race jurisprudence at the time, which was quite incremental due to its composition and its relatively new racial vocabulary in regard to criminal procedure. Still, these decisions offer a window into how race figured into law after that category helped sustain the creation of legal aid and public defender offices. The decisions also show how race helped create an edifice of decisions that the Gideon line of cases could draw upon.

Between Powell and Gideon, the Court’s decisions invariably involved indigent black defendants who were young, poor, illiterate, or some combination of the three. Gabriel Chin makes this observation in one of the few meaningful articles on race and the right to counsel when he states, “[c]ourts granting relief, including the Supreme Court, often described defendants as ‘ignorant negroes.’” He discusses a few Supreme Court decisions but focuses particularly on state cases. Professor Chin’s important discovery is understated and can be taken significantly further. Throughout the 1940s and 1950s illiterate black defendants were the most common parties in Supreme Court right to counsel cases. The frequency of such cases is a sign of race’s importance in influencing the Court’s jurisprudence during this period as well as of the incremental but limited ways the Court considered indigent defense.

In a two-decade span, the Court decided ten cases involving poor, black, illiterate, and uncounseled defendants and was quite explicit about its approach; those were the “special circumstances” that the Betts decision seems to demand for judicial scrutiny. The Court recognized that the special circumstances test was inelegant and idiosyncratic but did not fashion a prophylactic rule, which allowed many cases—invariably by black defendants—to come to the Court. NAACP attorneys William Robert

173 See generally Klarman, supra note 1.
175 As the Court stated in Gibbs v. Burke.
Ming and Leon Ransom (the latter of whom served as dean of Howard University School of Law) argued *Ward v. Texas* in 1942. That case involved an uncounseled confession in which the police moved “an ignorant negro by night and day to strange towns.” Two years later, *Pollock v. Williams* overturned the conviction of an “illiterate Negro laborer” who was indigent, and “not told that he was entitled to counsel, and that counsel would be provided for him if he wished.” At the end of the 1940s, the Court decided *Harris v. South Carolina*, which overturned the conviction of “a slightly built Negro” who was “an illiterate” and not informed of his right to secure a lawyer. *Chandler v. Fretag*, decided in 1954, overturned the uncounseled conviction of “a middle-aged Negro of little education” who waived the right of counsel on a housebreaking and larceny charge but promptly requested a continuance to obtain an attorney after finding out that he would be tried as a habitual criminal. A year later the court heard *Reece v. Georgia*, which was successfully argued by Daniel Duke, a former Atlanta prosecutor who had previously engaged in social and political battles against the Ku Klux Klan and an anti-Jewish Klan offshoot. *Reece* reversed the conviction of a “semi-illiterate Negro of low mentality” who had not been provided counsel.

By 1957, defendants were beginning to rely more heavily on two-decade-old formulaic jurisprudence that focused on the unique due process concerns facing young illiterate defendants. That year the Court decided two cases that implicated indigent defense. *Moore v. Michigan* overturned the uncounseled conviction of a seventeen-year-old “Negro with a seventh-grade education.” Counsel for the defendant emphasized his client’s race, ignorance, and intellect in his brief and juxtaposed the facts of the case with some of the

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Respondent argues that to hold to such precedents leaves the state prosecuting authorities uncertain as to whether to offer counsel to all accused who are without adequate funds and under serious charges in state courts. We cannot offer a panacea for the difficulty. Such an interpretation of the Fourteenth Amendment would be an unwarranted federal intrusion into state control of its criminal procedure. The due process clause is not susceptible to reduction to a mathematical formula.

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176 316 U.S. 547, 547 (1942).
177 Id. at 555.
178 322 U.S. 4, 6, 15 (1944).
183 *Reece*, 350 U.S. at 89.
184 355 U.S. 155, 156 (1957).
cases described above. The same year, in *Fikes v. Alabama*, NAACP attorney Jack Greenberg similarly marshalled his client's race, poverty, and intelligence. *Fikes* involved “an uneducated Negro, certainly of low mentality, if not mentally ill” who was kept in isolation and prevented from seeing his father and lawyer. Greenberg and his co-counsel emphasized that the petitioner was a “27 year old Negro who left school at the end of the third grade when he was 16 years of age.” He deployed the testimony of two psychiatrists who found that the defendant was “seriously mentally ill” and added that the defendant’s mother testified that he had always been “thick-headed.” Greenberg won. Wiley A. Branton was up next in *Payne v. Arkansas*, which was decided the following year in 1958. Branton, who played a role in the desegregation of the University of Arkansas and also served as dean of Howard University School of Law, helped overturn the uncounseled conviction of a “19-year-old Negro with a fifth-grade education.” In his brief—from the question presented to the conclusion—Branton emphasized his client’s race and mental capacity. After describing a series of other constitutionally questionable behavior that included the systematic exclusion of blacks, food deprivation, and threats to the defendant’s mother while Payne was held incommunicado, Branton argued that “[t]he totality of the circumstances that preceded this confession by the nineteen year old mentally retarded petitioner was a denial of due process.” He prevailed.

By 1961, the Court was still hearing cases involving poor, black, and illiterate defendants. *McNeal v. Culver*, decided that same year, involved “an indigent, ignorant and mentally ill Negro” named Elijah McNeal, Jr. who “advised the court that he was without, and unable to obtain, counsel to conduct his defense and asked that counsel be appointed to represent him.” While the race of the petitioner was incontestable, the parties clashed on the other features of the special circumstances test—namely his poverty, intelligence, and youth. In its brief, Florida referred to the petitioner as a

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185 See *id.* at 159 (holding that “petitioner’s case falls within that class” of cases discussed in the Petitioner’s Brief—cases where “the intervention of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing”); see also *Brief for Petitioner at 12-13, Moore v. Michigan*, 355 U.S. 155 (1957) (No. 42), 1957 WL 87710, at *12-13 (highlighting the similarities between the defendant in *Moore* and the defendants in *Powell and Fikes v. Alabama*).

186 See 352 U.S. 191, 193 (1957) (describing the defendant as being a minority of low wealth and education).

187 *Id.* at 196.


189 *Id.*


191 *Id.* at 562.


194 *Id.* at 110.
“29-year-old Negro man, a veteran of almost six years in the army; a G.I. student and employee at a nursery.”

In the first section of petitioner’s brief, titled, *Youth, Ignorance, and Mental Illness*, counsel wrote that McNeal “was a twenty-nine year old Negro, in court for the first time in his life” and noted that in 1952, the petitioner “suffered head injuries which left him subject to ‘blackout spells.’ Four years later, the pathetic creature spent four months locked up in the ‘psycho’ ward of a veterans’ hospital.” Although the petitioner prevailed, it became increasingly clear that the Court recognized the unworkability of a special circumstances test that repeatedly brought the same kind of defendants before it. A concurrence by Justices Douglas and Brennan maligned the *Betts* decision and the test that it produced. They emphasized that *Betts* was decided by a divided Court, noted how “six Justices now sit on the Court who had no hand in fashioning the rule,” and suggested that the Court would not support the decision if it reappeared de novo. The two Justices ended their opinion by asking: “Are we to wait to overrule [*Betts*] until a case arises where the indigent is unable to make a convincing demonstration that the absence of counsel prejudiced him?” Fatigue around seeing similar cases was evident; momentum to overturn *Betts* was growing.

The 1961 decision *Hamilton v. Alabama* concluded the indigent defense line of cases that emphasized race and ignorance but would not overturn *Betts*. *Hamilton* involved a death sentence of a 30-year-old black man who was accused of breaking into the home of an 80-year-old white woman “with the intent to ravish.” The case was successfully argued by Constance Baker Motley for the NAACP Legal Defense and Educational Fund; it was the first time that a black woman argued before the Court. By this time the NAACP had a good sense of how to prevail. One of the two questions it put forth to the Court was:

> Whether petitioner, an indigent, ignorant, unstable Negro, completely untutored in the ways of the law, charged with a capital sex crime against a white woman in Alabama, in open conflict with his court appointed attorney during trial which otherwise was marked by petitioner’s bungling efforts to defend himself at

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198 Id. at 119.


the Court’s invitation, was deprived of due process secured by the Fourteenth Amendment by lack of court appointed counsel at arraignment, the appropriate time under Alabama law to raise certain defenses, and the only time prior to trial that the Court practicably could have made provision to reconcile counsel and client or appoint another attorney.202

Curiously, this was the one case where the Court, while siding with the defendant, avoided the language of race. The full context of Gideon, as explained in the next section, makes it clear why.

The Court’s post-Powell and pre-Gideon right to counsel cases illustrate the importance of race in ways that might not be easily gleaned from the typical indigent defense overview. Causal explanations are often elusive, so it is difficult and even unproductive to argue that race was a decisive factor in the Court’s decisions. But its cases do demonstrate that race had a seat at the table by way of the "special circumstances" test. In fact, its decisions often considered some of the most spectacular versions of race, namely ignorance, poverty, and illiteracy. It is worth noting that African-Americans did not have a monopoly on pathological representation of defendants. The Court issued decisions involving several indigent whites, a Winnebago Indian who pled that he “was ignorant of the law” and did not receive counsel after being charged with burglary in Nebraska,203 and an undocumented farm worker who did not speak or write English, was held incommunicado, and was not provided counsel.204

The emphasis on black defendants, however, is unmistakable. This emphasis was clear in cases involving white defendants, where either the Court or the prosecution used the trope of the poor illiterate Negro to keep the defendants outside the purview of the special circumstances test.205 Race haunted much of this jurisprudence. In their arguments, defendants and advocates were not shy about harnessing the power of race. Their intentions and motives are similarly difficult to suss out. The deployment of race could have been a matter of garden-variety zealous advocacy, manipulation, or factual relevance. Irrespective of the motivational source—and in line with this Article’s argument—defendants and attorneys of the 1940s and 1950s emphasized race in indigent defense cases, especially after the Court decided

203 Rice v. Olson, 324 U.S. 786, 787 (1945).
205 See, e.g., Ashcraft v. Tennessee, 322 U.S. 143, 173-74 (1944) (Jackson, J., dissenting) (“This is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice. Ashcraft was a white man of good reputation, good position, and substantial property . . . . [H]e was not detained, although his stories to the officers did not hang together, but was at large, free to consult his friends and counsel. There was no indecent haste, but on the contrary evident deliberation, in suspecting and accusing him.”).
cases that essentially offered a blueprint to overturning uncounseled convictions. While the Court’s interventions were welcome developments from its previously lax approach to legal aid and racial inequality, its narrow focus on defendants with exceptional qualities stagnated its jurisprudence in ways that made indigent defense less commensurate with the general modernization of criminal justice administration. Put another way, the Court’s primary concern with a particular and unrepresentative group of racial minorities impeded the development of indigent defense. Post-Gideon developments would accelerate indigent defense bureaucratization in ways that were also racial but far less familiar.

III. GIDEON AND THE EXPANSION OF THE RIGHT TO COUNSEL

A. The Racial Selection and Reception of Gideon

The 1960s ushered in a new era of right to counsel expansion that coincided with racial progress. In the 1960s, and shortly thereafter, the Court impelled states to provide counsel for different kinds of crimes and at different stages of criminal adjudication. This expansion of the right to counsel occurred during a moment in which the federal government and philanthropic organizations such as the Ford Foundation helped prop up public defender and criminal legal aid organizations, and at the same time that populist concerns were creeping into law and order.206 This period also mapped on neatly to the Court’s attempts to address racial injustice in a myriad of domains (e.g., education, voting, marriage). This Part of the Article does two things. First, it shows how Gideon, a case that is typically understood as race neutral, was actually influenced by racial considerations. The Court purposefully selected Gideon as its vehicle to expand the right to counsel in an attempt to move far away from a decidedly racialized special circumstance test. Second, this Part shows how the popular reception to Gideon, and its progeny—the latter of which occurred amidst a racialized law and order campaign—would portend how the Court would treat the right to counsel in the last quarter of the twentieth century.

206 See, e.g., Sam D. Johnson, The Houston Legal Foundation: Advocate for the Indigent, 9 S. TEX. L.J. 1, 4-5 (1967) (describing how funds from the Ford Foundation and the Houston Endowment, among others, were used to fund the Houston Legal Foundation, which provided legal services to indigents); Robert E. Oliphant, Reflections on the Lower Court System; The Development of a Unique Clinical Misdemeanor and a Public Defender Program, 57 MINN. L. REV. 545, 549 (1972) (noting that “funds from a Ford Foundation grant” were used by Minnesota’s Public Defender office to hire additional criminal defense lawyers); Owen E. Woodruff, Jr. & Robert A. Falco, The Defender Workshop: A Clinical Experiment in Criminal Law, 52 A.B.A.J. 233, 234 (1966) (“The Ford Foundation . . . allocated approximately $4 million to the National Legal Aid and Defender Association to create the National Defender Project.”).
Improvements in indigent defense reflected external and internal developments. Externally, the weakening of McCarthyism helped create an environment in which new intellectual considerations of poverty could flourish without stigma. The related War on Poverty and the Civil Rights Movement spurred old and new questions about government’s responsibilities to vulnerable populations, particularly poor people and racial minorities. The Court increasingly chimed in too. Beginning in the middle of the 1950s, it issued criminal procedure decisions that unmistakably demanded an equal playing field for all defendants, both indigent and rich. The most notable exemplification of this commitment is *Griffin v. Illinois*, which overturned a state’s refusal to provide transcripts to indigent defendants. Thereafter, in a series of less notable cases, the Court ruled in favor of poor parties who lost their cases because of an inability to pay court fees; in essence, the Court emphasized equal treatment by requiring waivers of fees and making states internalize the costs of defendants’ indigence. *Gideon* would weave concerns about race and poverty, but in counterintuitive ways.

The Court’s right to counsel decision in *Carnley v. Cochran*, a 1962 case decided a year before *Gideon*, offers instructive insights on the *Gideon* case itself and the racial politics of indigent defense. By the early 1960s, the Court, through a combination of strong language in majority opinions and concurrences, appeared ready to overturn *Betts* and enshrine a national right to counsel. *Carnley* provided an opportunity. The case involved an illiterate defendant who claimed that he had been wrongfully denied counsel and that his conviction was unconstitutional. The Court agreed, but ruled narrowly. While it had the votes, the case was not the best vehicle. *Carnley* involved a defendant who was accused of molesting and having “incestuous sexual intercourse with his 13-year-old daughter.” Justice Whittaker, who previously suffered from depression, had a nervous breakdown that term and

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208 351 U.S. 12 (1956).

209 Id. at 13-14, 19.


212 See infra Section IV.

213 *Carnley*, 369 U.S. at 506, 511.

214 See id. at 517 (“Where, as in this case, the constitutional infirmity of trial without counsel is manifest, and there is not even an allegation, much less a showing, of affirmative waiver, the accused is entitled to relief from his unconstitutional conviction.”).

215 Id. at 507.
retired from the Court.216 His replacement, Justice White, did not take part in the case. Justice Frankfurter, the lone member of the Betts Court and a fierce defender of its special circumstances test, was recovering from a stroke that would ultimately force him to retire.217 Chief Justice Warren, in the words of one his biographers, thought that “it would be unwise to overrule an important precedent by a bare majority of only a seven-man Court.”218 Afterwards he instructed his clerks to search through *in forma pauperis* applications for an appropriate case to reconsider Betts.219 One of Chief Justice Warren’s former clerks was instructed by another clerk to “[k]eep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer.”220 The clerks discovered *Gideon*.

The facts of *Gideon* require little rehearsal. Clarence Earl Gideon was a white man in his early fifties who drifted between prison and poverty.221 He was accused of robbery, was not appointed an attorney despite his indigence, and was subsequently convicted.222 After his handwritten petition to the Supreme Court was granted, *Gideon* became the vehicle for a national and incorporated right to counsel. Three factors highlight how racial politics influenced what is arguably the most defining right to counsel decision: the comments of parties involved with the case, popular reception to the decision, and how the opinion is situated relative to other criminal procedure decisions of the period.

Oral histories featuring the lead counsel for both parties in *Gideon*, as well as Anthony Lewis, who covered the case in his award-winning book, confirm that the Court was quite purposeful in picking this case as its vehicle to expand the right to counsel, in part because of race.223 Abe Krash, who served as co-counsel for Gideon, said that when the Court granted certiorari:

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217 See L.A. Powe, Jr., Situating Schauer, 72 NOTRE DAME L. REV. 1519, 1521 (1997) (“The NAACP victory—or Frankfurter’s stroke, take your choice—signaled the beginnings of the true Warren Court, a grouping of five to six or seven votes for civil liberties or civil rights claimants that would last for a decade.”).


219 Id.

220 Id.

221 See generally ANTHONY LEWIS, GIDEON’S TRUMPET (1989).
The Sixth Amendment Facade

[T]hey did two very important things. First, was they issued an order at the time they agreed to review it saying counsel are requested to brief the question of whether or not Bet[ts] against Brady should be overruled. That was a clear cut signal that something very significant was about to happen. Secondly, they appointed Fortas . . . they did not appoint an unknown, they appointed a very distinguished lawyer. It was a very strong signal that important events were in the course of taking place.224

Bruce Jacob, who represented Florida in Gideon, emphasized the Court’s intentions in selecting Gideon as its vehicle to overturn Betts. He noted that in the pre-Gideon world:

[Y]ou were only entitled to have counsel appointed for you if there was some special circumstance present such as the fact that the defendant was illiterate, was extremely ignorant, extremely young, if the defendant had mental problems or something of that nature . . . . [Gideon’s petition] did not allege any special circumstances . . . . [W]e knew immediately that this would probably be the case that would be used to overturn Betts v. Brady because, as I said, Gideon did not allege any special circumstances . . . . [B]y doing this he put the Supreme Court in the position in order to rule with him . . . so we knew that this was probably the case that the Supreme Court would use to reverse overrule Betts v. Brady.225

Jacob did not explicitly name race as a decisive feature in the Court’s certiorari decision, but his discussion of special circumstances, which the previous section demonstrated was inextricably racial, is telling. In any event, Anthony Lewis, who is the defining source on the case, noted that Abe Fortas, who served as co-counsel for Gideon:

knew that the very fact that the Court had asked the question “Should we overrule Betts against Brady?” meant in all likelihood that it was going to—you don’t ask that question unless there’s a pretty clear indication that you are going to overrule it. And in fact we now know that there had been one or two previous times when the Court was about ready to overrule it, and then something happened and they didn’t. And they finally picked on this case as the case that would be the appropriate one to overrule it. Why did they do so? Probably

224 Interview by Victor Geminiani with Abe Krash, NAT’L EQUAL JUST. LIBRARY ORAL HIST. COLLECTION (Mar. 17, 1993).

225 Interview by Victor Geminiani with Bruce Jacob, NAT’L EQUAL JUST. LIBRARY ORAL HIST. COLLECTION (July 9, 1993).
because there was nothing special about Gideon. He wasn’t mentally defective. He wasn’t a black person overwhelmed by racial prejudice in a community.226

Others have underlined the racial specificity of Gideon.227 The point here is that the Court’s utilization of Gideon to put forth a prophylactic rule, along with its ostensibly race-neutral attempt to bury the special circumstances test, were racial considerations themselves. The Court’s abandonment of the test and the related logic put forth by early legal reformers represented a new approach to a longstanding tradition of considering race in right to counsel jurisprudence.

The reception of Gideon also highlights how race influenced the development of indigent defense. Gideon is an outlier in the Warren Court’s reformist jurisprudence. Although people lament the lack of commitment to the decision, it arguably received much less criticism as a doctrinal matter. This could be a byproduct of the penal bureaucrats involved. Other notable Warren Court criminal procedure cases like Mapp v. Ohio,228 Escobedo v. Illinois,229 Miranda v. Arizona,230 and Terry v. Ohio231 primarily involved curtailments on police officers,232 while Brady v. Maryland233 limited prosecutors. Such limitations would not bode well given the rising crime rates of the era and impending law and order campaigns.234 This perspective is persuasive, although conservative concerns that public defenders would help free guilty people—which existed before and after Gideon—would suggest that this decision and its progeny might also be similarly controversial.235


227 In addition to being a former Director of the Public Defender Service (PDS) for the District of Columbia and a scholar of indigent defense, Professor Barbara Babcock was a contemporary and colleague of, and 1963 Yale Law graduate with, John Hart Ely, who helped brief Gideon. Babcock has noted that Gideon involved “no violence, no weapons, no personal confrontation, and—because Gideon was a white man—no issues of racial unfairness.” Barbara Allen Babcock, The Duty to Defend, 114 YALE L.J. 1489, 1495 (2005).


231 392 U.S. 1, 30–31 (1968).

232 Escobedo and Miranda did bring counsel into the space of police interrogation. Miranda, 384 U.S. at 498–99; Escobedo, 378 U.S. at 490–91.


234 See Darryl K. Brown, The Warren Court, Criminal Procedure Reform, and Retributive Punishment, 59 WASH. & LEE L. REV. 1411, 1418 (2002) (“It is easy enough to characterize Warren Court decisions as hindering the government’s ability to fight crime at precisely the moment that we needed to fight crime more effectively.”). For a discussion of the conservative backlash to Warren court decisions like Miranda, which were largely seen as having “handcuffed” the police, see MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S (2007).

235 See RICHARD NIXON, TOWARD FREEDOM FROM FEAR 11–12 (1968) (explaining how Miranda and Escobedo prevented effective prosecution and punishment of crime, which strengthened criminal forces).
Gabriel Chin helps clarify the racial contours of *Gideon* when he argues that, although the case involved a white petitioner and was not decided on those terms, it was a race case that was nestled among several decisions also concerned with racism. I would add to Professor Chin’s suggestion that race and notions of “deservingness” simmered underneath the surface of the reasonable reception to *Gideon*. The decision represented the American story of “rugged individualism” and the “David-and-Goliath plot that we Americans love, [where] the under-educated common man takes on the fancy-pants bigwigs at the Supreme Court.” In a comment that was typical of the period, Texas judge John F. Onion Jr. spoke gushingly about Clarence Gideon when he effused, “[h]e huffed and he puffed and he blew a forceful sound, and down came tumbling the walls of the penitentiary for Gideon and many, many more.” Onion predicted that *Gideon* would “take its place in the Hall of Fame with Madison v. Marbury, the Dred Scott decision, [and] Brown v. the Board of Education.”

Gideon was seen as sympathetic figure; he was a poor white man who cycled in and out of prison and was denied justice. But it is difficult to think of any convicted felon—irrespective of race—who has received such sympathy in the popular imagination and in legal lore. As one commentator notes, “[t]hough he is now a folk-hero for indigent defense, Clarence Gideon was no choir boy. In one case he admitted to stealing guns, robbing stores and planning a bank heist.” Yet, Gideon’s triumphant narrative, along with the Court’s actual ruling in the case, resonated with many Americans’ ideas of fairness and equality. The story was documented in the award-winning book and movie *Gideon’s Trumpet*, which invoked the Judeo-Christian narrative of Gideon and entailed a similarly unlikely victory by an overmatched opponent. Kim Taylor-Thompson astutely observes that the American public may have warmly embraced the outcome, “[b]ut it is unlikely that most Americans viewed the average accused criminal quite so sympathetically.” Suffice to say, barring an unforeseen commercial intervention, there will probably be no award-winning books or movies about Dollree Mapp, Danny Escobedo, or Ernesto Miranda. In fact, the one piece of mail in Justice Black’s *Gideon* folder in the Library of Congress perfectly illustrates the racialized

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236 Chin, *ibid* at 2239 n.5.
239 *Id.*
241 See generally ROBERT L. COLLINS, *GIDEON’S TRUMPET* (1980); LEWIS, *ibid* at 223.
reception of the decision. Someone made sure to send Justice Black, the author of *Gideon*, a report that denounced the release of Wallace Pless, “[a] Negro who pleaded guilty to two murders but went free because of the U.S. Supreme Court’s Gideon decision, [and was] charged with killing two more persons.” To be sure, to indicate that *Gideon* is about race is not to imply that all right to counsel cases are about race; rather, I want to suggest that the reception of the case was not insulated from the progressive but contentious racial politics of the time.

The racial sympathy surrounding *Gideon* dissipated a year later in *Escobedo v. Illinois*. While *Escobedo* is often considered in the context of the Fifth Amendment and is imagined as a case that necessitated clarification in *Miranda*, it is also a Sixth Amendment right to counsel case that emerged out of *Gideon*. No doubt it implicated police officers in a way that *Gideon* did not, but it also broadcasted the racialized law and order politics during this period of right to counsel expansion. It was the first case Richard Nixon identified in his calls for law and order. *Escobedo* involved the Chicago Police Department’s 1960 arrest of Danny Escobedo, a “22-year-old of Mexican extraction,” for the murder of his brother-in-law. Escobedo, who was not formally charged, refused to confess and repeatedly asked to see his attorney, but his request was not honored. Simultaneously, Escobedo’s attorney was at the police precinct and demanded to see his client, but he was also denied and was told that he could not see Escobedo until the police were done with their questioning. During the interrogation, Officer Montejano, who was also Latino and grew up in Escobedo’s neighborhood, conferred with Escobedo alone for about fifteen minutes in Spanish and told him that his sister, who had also been arrested, would be released if he made a statement. Escobedo made a statement, was convicted of murder, and appealed.

The Court reversed his conviction and ruled that the Sixth Amendment right to counsel extends to police interrogations. In a terse dissent, Justice Harlan wrote, “I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement.”

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243 *Negro Released in Slayings Held in More Killings*, BLACK PAPERS (copy on file with author).
244 378 U.S. 478 (1964).
245 *Id.* at 482.
246 *Id.* at 482-83.
247 *Id.* at 481-82.
248 *Id.* at 482.
249 *Id.* at 483.
250 *Id.*
251 *Id.* at 490-91.
252 *Id.* at 493 (Harlan, J., dissenting).
Police Department that had a half-century long history of police corruption that resulted in the creation of a reparations program for victims of police torture, public opinion was on his side. One writer penned, “[t]he public, the police, and the press viewed [Escobedo] simply as a convicted killer released by a meddling Supreme Court on a ‘mere technicality’” and contended that “[f]ive justices on the nation’s highest court simultaneously slipped on a stray banana peel.”

Previous criminal procedure cases until this point were feel-good stories for the median American: overturned cases involving black Southerners made to scurry through kangaroo courts; an older white man who obtained justice after receiving counsel; even Mapp, with its black woman protagonist, involved a libertarian-friendly rule against unreasonable searches and seizures that some in the mainstream could find palatable. But Escobedo was different. During this period, African-Americans were not the only ones tethered to popular assumptions about criminality; they shared that spotlight with Latinx people in Chicago and in big cities across the country. As historian Lilia Fernández notes, “By the 1960s, police declared war not only on African-Americans on the South and West Sides [of Chicago]; they also did battle with Puerto Ricans, suspected ‘illegal’ Mexican immigrants, and Latino youth gangs.” Escobedo’s case broadcasted the anti-Latinx animus of the time. A 1966 cover of Time, which prominently displayed Escobedo’s mug shot and the caption “Moving the Constitution into the Police Station,” did not help matters. The fact that Escobedo brought defense attorneys into the police station for the benefit of a Latino criminal who may have been factually guilty was unpopular.

On the campaign trail Richard Nixon singled out both Escobedo and Miranda. He claimed that the two decisions helped “set free patents

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254 Robert Kroll, Danny Escobedo: The Law Seen on Two Levels, 3 STUDENT LAW. 7, 10 (1974).


256 TIME, Apr. 29, 1966.

257 JOHN MORTON BLUM, YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961–1974 209-10 (1991); see also J. Edward Lumbard, New Standards for Criminal Justice, 52 A.B.A.J. 431, 432 (1966) (noting the “debate [that] has ranged in the law reviews, the press and in the court opinions of almost every state as to the extent to which confessions may be used” post-Escobedo).
guilty individuals on the basis of legal technicalities.\textsuperscript{258} What has gone unnoticed by historians and criminal procedure scholars is this: Escobedo was the first Warren Court case that Nixon would argue \textit{necessitated} his racialized law and order campaign because of “legal technicalities.” That case helped produce the trope of black and Latino/a criminals who were factually guilty but secured freedom because of Warren Court liberalism. That trope, along with a broader set of Warren Court decisions, led to Nixon’s promise that he would nominate law and order judges to the Court. Three of the four Justices he appointed espoused “law and order” skepticism towards Warren Court expansions before joining the Court.\textsuperscript{259} Moreover, as described in the next section, these Justices voted in right to counsel cases in ways that aligned with law and order politics.

Racialized calls for law and order would gain momentum, but the Warren Court continued to expand the right to counsel, much to the chagrin of law and order advocates. These decisions were partially influenced by racial concerns. Burt Neuborne notes that “the right to counsel cases from \textit{Gideon} to \textit{Argersinger} were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.”\textsuperscript{260} Barry Feld similarly contends that “[t]he Court’s criminal

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\item \textsuperscript{258} Nixon, supra note 235, at 12. He also claimed that such proceduralism did not help deterrence efforts and noted, “[t]he tragic lesson of guilty men walking free from hundreds of courtrooms across this country has not been lost on the criminal community.” Id.
\item \textsuperscript{259} As President of the American Bar Association, Lewis F. Powell, Jr. claimed that society was being confronted with a “present and accelerating crisis” that contributed to “a partial breakdown in the processes of law and order.” Lewis F. Jr. Powell, \textit{An Urgent Need: More Effective Criminal Justice,} 51 A.B.A.J. 437, 438 (1965). Powell recognized that Warren Court criminal procedure decisions would be viewed as “significant milestones” in history. Id. at 439. But, he claimed that there was imbalance between procedural safeguards for the accused and the “rights of law-abiding citizens,” and suggested that the “pendulum may indeed have swung too far.” Id. In a speech before joining the Court, Rehnquist noted that “law and order will be preserved at whatever cost in individual liberties and rights.” \textit{Law-Order Man: Rehnquist Conservative,} ATL. J. Oct. 22, 1971, at 19-A (copy on file with author). Chief Justice Warren Burger was heralded the most as a “law and order” judge after his appointment. See generally Chief Justice Choice ‘Law-and-Order’ Man, MINN. STAR, May 22, 1969 at 27B (copy on file with author). While on the Court, Justice Burger warned the legal profession that the “search for true justice must not be twisted into an endless quest for technical errors unrelated to guilt or innocence” and questioned whether “a society [is] redeemed if it provides massive safeguards for accused persons . . . defense lawyers at public expense, trials and appeals-almost without end-and yet fails to provide elementary protection for its law-abiding citizens?” Warren E. Burger, \textit{Report of the Chief Justice to the A.B.A.,} 67 A.B.A.J. 290, 291-92 (1981).
\item \textsuperscript{260} Burt Neuborne, \textit{The Gravitational Pull of Race on the Warren Court,} in \textit{SUPREME COURT REVIEW} 59, 86 (Dennis J. Hutchinson et al. eds., 2011). There was a longstanding critique about the lack of legal aid offered to Native Americans accused of crime inside and outside of tribal courts. See, e.g., Ray A. Brown, \textit{The Indian Problem and the Law,} 39 YALE L.J. 307, 318 (1930) (“[W]hen the Indian is placed under the laws of the white man, there should be a vast strengthening in the forces of legal aid for the Indians, for many of these inexperienced and impecunious people will suffer, as do the same class of people everywhere, where they are unaided in the courts of law.”); Felix S. Cohen, \textit{The Enrossment of Indian Rights,} 1950-1953: A Case Study in Bureaucracy, 62 YALE L.J. 348, 355
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procedure decisions followed closely upon its civil rights opinions because those accused of crimes consisted disproportionately of the poor, minorities, and the young.”

The Warren Court’s expansion of the right to counsel helped erect a national, albeit scattered, indigent defense apparatus. But its lack of clarity on the scope of indigent defense—due in part to the relative novelty of post-Gideon jurisprudence as well as its inattention to issues of administrability—created doctrinal infirmities. The Burger Court would delineate the boundaries of indigent defense, but in ways that were not as expansive and, on some occasions, were quite restrictive.

IV. THE POST-1970S RIGHT TO COUNSEL AND MASS INCARCERATION

This Part details the post-Gideon curtailment of indigent defense jurisprudence, which began after Argersinger v. Hamlin, the 1972 case that expanded the right to counsel to misdemeanors. Curtailment typically refers to reductions or restrictions. The curtailment that occurred in the Court’s right to counsel jurisprudence has different ideological registers. It coincides with the typical “liberal” critique of how the Court—particularly during the Burger era—scaled back the rights of the criminally accused and racial minorities while limiting lower courts’ ability to redress rights violations.

(1953) (“For Indians, as for other underprivileged groups, denial of the right to independent counsel means undermining of all the rights which require independent counsel for enforcement.”). But this need was not attended to by the Court. Congress would ultimately pass the Indian Civil Rights Act of 1968, which provided various procedural rights to tribal-court defendants that were similar to those in the Bill of Rights, but it did not include the right to appointment of counsel.


[144x658]See Mempa v. Rhay, 389 U.S. 128, 137 (1967) (holding that right to counsel applied to post-trial proceeding for revocation of probation and deferred sentencing); United States v. Wade, 388 U.S. 218, 237 (1967) (applying right to counsel to post-indictment lineup); In re Gault, 387 U.S. 1, 41 (1967) (guaranteeing right to counsel in juvenile delinquency proceedings); Massiah v. United States, 377 U.S. 191, 205-06 (1964) (holding that incriminating statements deliberately elicited by law enforcement in the absence of counsel after the proceeding has begun violate the Sixth Amendment); White v. Maryland, 373 U.S. 59, 59 (1963) (reversing a conviction because there was no appointment of counsel at preliminary hearing).

[144x179]But political liberals are not the only ones who are skeptical about the reduced potency of the right to counsel. For example, Republican state representative Christy Perry has been a leader in reforming indigent defense in Idaho, successfully passing a bill that allocated $5.5 million for public defense.
But this curtailment also corresponds with the common “conservative” criticisms about the Warren Court’s allegedly unprincipled decisions and permissiveness toward criminal defendants.266 Finally, the post-1970s curtailment of the right to counsel also accords with “liberal” critiques of the Warren Court’s inadequate diagnosis of and prescriptions for indigent defense.267 All of these views have some merit. For our purposes, the judicial curtailment here points to how the post-Argersinger Court simultaneously filled in Gideon’s gaps while also limiting its scope. No doubt, the interpretive responsibilities of the Court and its lower counterparts require molding and modifying law. What is unique in the right to counsel context is that this curtailment occurred amidst a historically and geographically unprecedented rise in incarceration.268 The right to counsel was not a nominal part of the mass incarceration story, but rather a significant feature of it. Accordingly, the post-Argersinger Court, through its decisions, helped institutionalize indigent defense as we know it.

The Court’s curtailing of the right to counsel was part of a larger shift in its understanding of criminal procedure that was in part caused by President Nixon’s purposeful nomination of law and order judges—three out of four of whom fulfilled that agenda.269 Instead of propping up a due process model,

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266 NIXON, supra note 235, at 11-13 (“The Miranda and Escobedo decisions of the high court have had the effect of seriously ham stringing the peace forces in our society and strengthening the criminal forces . . . . [T]he barbed wire of legalisms that a majority of one of the Supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment as provided in the prior laws.”). Again, the “conservative” label cannot be used so easily. Scholars have recently begun to examine the ways in which African Americans, a group that often identifies as liberal and Democratic, had their own versions of law and order. See generally JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015).

267 For example, Tracey Meares maintains that Gideon’s emphases on incorporation and the Bill of Rights led the Court to move away from Due Process and notions of “fundamental fairness” that, notwithstanding their flaws, inhibits courts’ ability to flexibly deal with current criminal justice disparities. See Meares, supra note 172, at 215; see also Emily Buss, The Missed Opportunity in Gault, 70 U. CHI. L. REV. 39, 42 (2003) (making a similar argument about Gault’s narrow ideas about fairness and its continuing impact on children’s constitutional rights).


269 These four judges were Justices Burger, Rehnquist, Blackmun, and Powell. LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT (2017). Justice Blackmun was perhaps the exception. See Kit
the Court emphasized a crime control model. The due process model is associated with the Warren Court and, as Herbert Packer famously explained, emphasized adversarialism, equality, dignity, and error reduction by imposing prophylactic rules. This vision of criminal justice was admirable but imperfect: it occasionally and incompatibly utilized criminal procedure as a social justice tool in ways that privileged legal guilt over factual guilt. The late 1960s cocktail of urban riots, increased street crime, anti-Vietnam activism, and black-brown militancy—much of which were interconnected—made such über-proceduralism unacceptable. Zealous advocacy on behalf of factually innocent people was tolerable, but effective counsel for factually guilty people was unpalatable. Poor people and racial minorities—the perceived beneficiaries of the due process model—would not fare so well when this approach was partially abandoned by subsequent courts.

In contrast, the crime control model adopted by the Burger Court and adhered to by subsequent courts was principally concerned with the valid goal of punishing criminal conduct. The means to that end, however, were similarly problematic. This vision curtailed procedural obstacles to crime enforcement, including a robust right to counsel; promoted speed and informality at the occasional expense of accuracy; and emphasized finality in ways that minimized defendants’ ability to lodge challenges to their convictions. The due process model and the crime control model do not neatly correspond with the Warren and Burger Courts, as there are cases that refute these categorizations. Packer’s model has also been subject to critique over the past few decades, but his general sketches still have analytical purchase and historical support, particularly in the area of indigent defense. The Court’s embrace of crime control, which was in part inspired by the racial politics of law and order, informed the Court’s right to counsel jurisprudence.

It is important to note that race operates differently during this period because of the unavailability of strategic deployments of race, the post-1960s social impermissibility of bigoted language, and the simultaneous emergence of dog-whistle politics. The Court was not as explicit about race as it was in

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271 See Seidman, supra note 8, at 442.
273 Packer, supra note 270, at 10, 14, 53.
its early right to counsel jurisprudence, and there is no smoking gun evidence that its decisions hinged on race. Still, the lack of incontrovertible evidence as it relates to the Court’s racial motivations is not necessary to advance this Part of the Article or the Article’s larger argument about race influencing indigent defense jurisprudence and policy. In the post-1970s, welfare and law and order increasingly became metonyms for race. In fact, there is a well-established, cross-disciplinary body of scholarship that illustrates how politicians smuggled ideas about race by using both terms. 275 Ultimately, the rhetorical proxies of welfare and law and order filtered into the advocacy of attorneys in landmark right to counsel cases in ways that proved consequential for indigent defense administration. The following subsections describe both, respectively.

A. Post–Argersinger Austerity: Race, Social Welfare, and Indigent Defense

Scholars have argued that, in addition to serving a variety of penological purposes, mass incarceration is a de facto poverty management program that is disproportionately racial in its operation. 276 If they are right, and the economic profiles of the imprisoned seem to suggest that they are, 277 then indigent defense lawyers would be noteworthy figures in such a regime. These

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277 See, e.g., Bernadette Rabuy & Daniel Kopf, Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned (2015), Prison Policy Initiative (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/E6QT-HL9U] (finding that, in 2014 dollars, the median income for people before incarceration is $19,185, or forty-one percent less than nonincarcerated people of comparable ages and noting that this gap in income existed regardless of race, gender, and ethnicity).
attorneys would be important whether they are understood as idealized zealous defenders, as plea bargain-compliant bureaucrats, or as resource-deprived attorneys. In any event, this section illustrates how the Court cautiously embraced the idea of indigent defense but curtailed the right to counsel in ways that have resonance with this idea of racialized poverty management. The Burger Court accepted the fundamental premise of state support for indigent defendants, but its curtailment of the right to counsel also coincided with its repeated rejections of claims brought by parties in the field of poverty law and its budding skepticism of claims brought by racial minorities.278 During this period, the Court shaped how indigent defendants would get assistance from the state and interface with the criminal justice system after arrest.

*Argersinger* marked the beginning of a right to counsel jurisprudence that emphasized austerity. That case involved the reversal of a misdemeanor conviction and held that a defendant may not be imprisoned unless provided with counsel.279 Although this case was decided unanimously, Justices Powell and Rehnquist, who were central to the Court’s law and order holdings, conveyed serious concerns in a thoughtful concurrence.280 They worried that the opinion was “disquietingly barren of details as to how this rule will be implemented.”281 During the same year that mass incarceration is understood to have begun, they reasonably worried that the extension of the right to counsel to thousands of statutes, “ranging from spitting on the sidewalk to certain traffic offenses,” would flood lower courts.282 Their concerns about reduced criminal justice efficiency and government largesse by way of indigent defense bureaucratization blossomed in subsequent majority opinions that curtailed the right to counsel. Such limitations were not uniform; both Justices helped push the ball forward in cases that involved

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278 See generally *Harris v. McRae*, 448 U.S. 297 (1980) (upholding an amendment limiting funding for certain medically necessary abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (validating the constitutionality of a state regulation that imposed conditions on payment for abortion services by indigent women); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding that the Texas school finance system was constitutional and absolute equality or precisely equal advantages is not required); *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a state maximum grant provision thereby limiting private welfare funds). But see generally *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that certain state limitations on obtaining a marriage license were unconstitutional); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating a classification which limited certain individuals from receiving aid under the Food and Stamp Act); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (allowing the state denial, because of inability to pay, of access to its courts to individuals who seek judicial dissolution of their marriages).


280 Id. at 44 (Powell, J., concurring).

281 Id. at 52.

282 Id.
counsel during probation proceedings, regulation of defendants’ communication with their attorneys, and prisoners’ access to legal assistance. In other instances, Justice Powell joined the Court when it required the appointment of mental health experts for indigent defendants and facilitated prisoners’ right of access to courts. Justice Powell also joined the majority in decisions that held that a state violates the Sixth Amendment when it prevents defense counsel from giving a closing argument or requires defendants to testify prior to other defense witnesses. Despite these advancements, the Burger Court and its successors, on balance, engaged the right to counsel in ways that are eerily similar to social welfare programs for the poor, which have their own well-documented historical and empirical relationship to racial discrimination. This approach involved a precarious preservation of rights and entitlements. But it also involved the establishment of sharp eligibility restrictions and minimum thresholds that are generally considered to be insufficient for adequate support and, in the view of some, an actual deterrent in itself.

283 See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that although the Constitution does not require representation for probation hearings, court appointment should be applied on a case-by-case basis).

284 See Geders v. United States, 425 U.S. 80, 91 (1976) (holding that an order preventing a defendant from consulting with his attorney during an overnight recess violates the defendant’s Sixth Amendment right to counsel).


286 See Ake v. Oklahoma, 470 U.S. 68, 76, 83-84 (1985) (holding, albeit on Due Process principles as opposed to Sixth Amendment grounds, that when a defendant’s sanity is a significant factor at the time of the offense, the State must assure access to a competent psychiatrist).

287 See Bounds v. Smith, 430 US 817, 833 (1977) (Powell, J., concurring) (recognizing that a “prison inmate has a constitutional right of access to the courts . . . as may be available to him under state and federal law”).

288 See Herring v. New York, 442 U.S. 853, 856-65 (1975) (holding that a denial of the opportunity for final summation deprives the accused of basic Sixth Amendment rights).

289 See Brooks v. Tennessee, 406 U.S. 605, 610-13 (1972) (declaring it unconstitutional for a court to exclude a defendant from the stand for failing to testify first).

290 MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 67-68 (1999); see, e.g., HANCOCK, supra note 275, at 23; HANEY LÓPEZ, supra note 275, at 69-75; ELLEN REESE, BACKLASH AGAINST WELFARE MOTHERS PAST AND PRESENT 63 (2005).

291 For a discussion on indigent defense as a form of entitlement, see Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument from Institutional Design, 104 COLUM. L. REV. 801, 810-12 (2004). The closest means-test analog in the right to counsel context is the Courts’ endorsement of a recoupment statute that allowed states to recover fees from defendants who became able to pay. See Fuller v. Oregon, 417 U.S. 40, 54 (1974) ("Oregon’s legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.").

292 Frances Piven and Richard Cloward famously argued that governments provide meager welfare benefits to ensure that poor people would not be incentivized into avoiding the most undesirable jobs. See FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR:
The 1979 case *Scott v. Illinois* returned to the *Argersinger* issue of what kinds of offenses the right to counsel covers, and it did so in ways that were tied to the racial and social welfare politics of crime. Aubrey Scott was a fifty-two-year-old black man who was arrested for theft of a briefcase and an address book from a Woolworth's in downtown Chicago. Unrepresented during his bench trial, Scott was convicted. The punishment for the crime was a fine. He appealed and argued that he should have been appointed an attorney. The Court ruled that the appointment of counsel is limited to cases in which defendants are actually imprisoned; appointment was not constitutionally required in cases involving a fine. Justice Rehnquist wrote for the majority. He maintained that interpreting *Argersinger* as a mandate to provide counsel in misdemeanor cases not involving incarceration, as the petitioner requested, “would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.” This suggestion, read alone or in the context of the whole opinion, could be reasonably understood in a variety of ways: as a federalist’s unwillingness to impose, by judicial fiat, a new national rule on states; as a separation of powers statement that invited local legislatures to determine the boundaries of the right to counsel; or as a rational policy difference. But *Scott* was about more than appropriate linedrawing. *Scott* was also about judicial efficiency and curtailing the right to counsel during a moment in which the defendant population was growing and was almost invariably represented in the government reports, scholarship, and media as black or brown. To be sure, such racialization was a byproduct of actual increases in minority crime as well as caricatured representations of it. But what remains unstated about *Scott* is that the case was decided during a moment of stagflation in the American economy. During this period, some people believed that the welfare state was bloated and scholars increasingly characterized municipal courts as worlds of pandemonium. Perhaps more...
importantly, local tax revolts—inspired in part by defenses of property and the new geography of white flight—were a feature of the landscape as well. Historian Robin Kelley describes the racial mood of this period and its relationship to taxation in ways that make *Scott* intelligible beyond its doctrinal confines. He notes that Ronald Reagan, who was on the campaign trail during the *Scott* litigation, “rode into office backed by a largely white middle-class tax revolt, resentful of what it perceived as state largesse for undeserving, lazy, and crime-prone Black and Brown people.” Taxpayers were uninterested in funding more innocuous social welfare provisions such as health care and education (the latter of which was endorsed by the Court); legal aid for poor people accused of petty crimes was not a priority. Importantly, the anger of some taxpayers “was not entirely invented, it was misplaced... the commensurate rise in property taxes alongside the economic downturn of the 1970s created a genuine economic crisis for a large segment of the white middle class.” Thomas and Mary Edsall have taken this one step further and shown how conservative politicians harnessed this anxiety and through the less odious language of welfare, divided citizens along the lines of taxpayers and tax recipients. This distinction, at least in the eyes of the general public, coincided with racial divisions: whites were taxpayers and racial minorities were not only tax recipients, but unmerited beneficiaries of poverty programs and government attempts to create rights. Indigent defense—which is both a poverty program for the poor and the byproduct of judicial rights creation—would not be immune to the racially infected tax rhetoric.

The national tax revolt and its attendant racial undertones touched Illinois the same year *Scott* was litigated. In an investigative story that questioned the integrity of indigent defense and was the criminal justice analog to the “welfare are terrible. Courtrooms are crowded, chambers are dingy, and libraries are virtually nonexistent.” For an earlier take, see Michele Washington, *Black Judges in White America*, 1 BLACK L.J. 241, 243 (1971), which describes a New York judge who likened his job to being "a keeper in the Black and Hispanic zoo where those crippled by America's sabre-toothed racism have given themselves over to narcotics, hard liquor and hopeless[ness]".


304 See, e.g., Beverlee A. Myers & Rigby Leighton, *Medicaid and the Mainstream: Reassessment in the Context of the Taxpayer Revolt*, 132 WESTERN J. MED. 550, 559-60 (1980) (implying that the taxpayer revolt was connected to opposition to publicly funded healthcare); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (rejecting the lower court’s finding that education was a fundamental right or liberty).

305 Kelley, supra note 303, at 211.

306 EDSALL & EDSALL, supra note 272, at 131.
queen” (which was also a Chicago figure), the Chicago Tribune found that, contrary to Illinois law, many criminal defendants represented by the Cook County Public Defender’s Office failed to provide sworn statements of indigency. In the 40% of cases where defendants did provide statements, many listed “well-paying occupations” such as “plumber, machinist, and drill press operator.” The periodical was not coy about what it perceived to be bureaucratic excess and borderline-malfeasance. It noted the Cook County Public Defender Office’s 169% increase in expenditures from 1974–1978 (from $3 million to $8 million a year) as well as the staff’s 90% growth during that same period (from 211 employees to 400 employees). Finally, the Tribune intimated that since positions in the Public Defender’s Office were political patronage jobs, more clients, irrespective of their actual indigency, provided justification for those jobs. This growth occurred in an office where ninety percent of the clients served were black or brown.

Unsurprisingly, the state of Illinois repeatedly used cost concerns and the tax revolt as cudgels in its briefing. Illinois Attorney General William J. Scott, who would ironically be convicted for tax evasion a year after Scott was decided, argued that

this Court must consider the economic burdens which will be imposed upon the courts by any extension of the right to counsel beyond Argersinger… [Commentators] have agreed that such an extension will tremendously over-tax the system… Legislatures are in the best position to decide what allocation should be made of their own dwindling resources in this era of tax revolt.

Illinois used the specter of publicly funded indigent defense gone wild in its briefing and was successful. Justice Brennan’s dissent identified the majority’s reception to the taxpayer argument. He complained, “This Court’s role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments.” Nevertheless, indigent defense would become dependent on state and local coffers. At a moment when crime was highly racialized and the federal government infused local governments with unprecedented levels of criminal

308 Id.
309 Id.
310 Id.
justice funds by way of the Law Enforcement Assistance Administration, the media, the public, and the Court would look askance at indigent defense.

The Scott decision was an understandable outcome at the time, but its racial ramifications have, until recently, eluded scholars. Beth Colgan offers a valuable and contemporary analysis of Scott and the punitive fees and fines that were at the center of the Ferguson Report. In addition to pointing out the Scott Court’s possibly anarchistic distinction between incarceration and financial penalties, Colgan suggests that lack of access to counsel may have helped produce some of Ferguson’s problems. “Had people subjected to Ferguson’s municipal court scheme been afforded indigent defense representation,” she argues, “they would have been better able to challenge violations of numerous procedural and substantive constitutional rights, making many of the abuses that occurred illegal and fiscally impossible.”

Scott’s conclusion, that counsel is only constitutionally necessary in cases involving incarceration, helps make better sense of the Ferguson debacle. Taken as a whole, we can understand Scott as accomplishing several things. Most simply, the decision limited the kinds of offenses that required states to provide counsel. As scholars have noted, this is particularly important considering the havoc that misdemeanors can wreak on people’s lives, particularly racial minorities.

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315 See Beth A. Colgan, Fines, Fees, and Forfeitures, Reforming Crim. Just., 205, 225 (2017) (hereinafter Colgan, Fines, Fees, and Forfeitures) (“[T]he Scott decision suffers from a failure to consider whether cases for which financial sanctions are imposed raise difficult factual or constitutional questions necessitating the need for counsel to ensure that the outcome of the trial is reliable.”); Beth A. Colgan, Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform, 58 WM. & MARY L. REV. 1171, 1178 (2017) (hereinafter Colgan, Lessons from Ferguson) (“Ferguson’s political system failed its poor and black citizens in significant part because they were unrepresented by counsel.”); see also Neil L. Sobol, Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons, 75 MD. L. REV. 486 (2016) (focusing on the growth in criminal justice debt, which includes “fines, restitution charges, and fees”). See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016).

316 Colgan, Fines, Fees, and Forfeitures, supra note 315, at 225.

317 Colgan, Lessons from Ferguson, supra note 315, at 1178.

318 See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) 25-60; Eisha Jain, Proportionality and Other Misdemeanor Myths, 98 B.U. L. REV. 953, 957-58 (2018) (“Misdemeanor arrests and convictions trigger a patchwork of penalties. Minor offenses may lead to hefty civil penalties, such as deportation.”); Irene Oritseweyinmi Joe, Rethinking Misdemeanor Neglect, 64 UCLA L. REV. 738, 758-63 (2017) (suggesting that public defender prioritization of felony defendants is misguided, considering the volume of misdemeanor convictions); Alexandra Natapoff, Misdemeanors, 85 S. CAL. L. REV. 1313, 1319 (2012) (“As the misdemeanor world makes clear, the system does not ‘care’ that poor, black, brown, young, illiterate or addicted suspects are arrested, charged, and convicted of minor offenses on the thinnest possible bases.”); Jenny Roberts, Crashing the Misdemeanor System, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (noting that individuals who are prosecuted for minor charges have a “permanent, easily accessible electronic record of that contact that can affect future employment, housing, and many other basic facets of daily life”).
concerns about crime, along with a social welfare austerity that was partially imbued by race, influenced the Court’s attempts to define the boundaries of Gideon. With the kinds of cases that Gideon required states to provide counsel for defined, the Court would turn its attention to quality, an issue that would also be influenced by racial politics.

B. Ineffective Assistance of Counsel, Punishment, and Race

In the 1980s, the populist desire for law and order was expressed through punishment and attempts to close perceived legal loopholes that exonerated defendants. Recall that President Nixon promised to nominate law and order judges that would attend to such technicalities. He fulfilled that promise by appointing judges who generally hewed to the retributivist aspects of that principle and often emphasized finality in criminal adjudication.319 In 1981 President Reagan carried on the tradition by nominating Justice Sandra Day O’Connor, who ran as a “law and order” state judge in Arizona and authored opinions in that vein immediately after her appointment to the Court.320 These are descriptive points, rather than evaluative ones. During a period where the penal system experienced exceptional expansion, there are salutary aspects of the Court’s stringency. Nevertheless, the Burger Court’s law and order posture produced a right to counsel jurisprudence that was more specific than that of its predecessor but also emphasized the retributive features of criminal law in ways that arguably compromised procedure. This subsection shows how Strickland v. Washington, the paradigmatic ineffective assistance of counsel case, was not just about effectiveness. Instead, Strickland was a fulfillment of law and order’s goal of closing procedural escape mechanisms, particularly for the racialized defendant who was understood as factually guilty.

It goes without saying that race is an operative aspect of the criminal justice system, particularly since the 1970s,321 and this holds true for the

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321 See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2016) 98–99 (“In the drug war, the enemy is racially defined.”); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016) 174 (“[I]n cities like Philadelphia . . . the percentage of
criminal legal aid to the poor as well. Conventional wisdom might hold that indigent defense is just about class, but race oftentimes—though not inevitably—has a seat at the table as well. The most striking example relates to the disproportionate number of racial minorities who constitute the carceral population, many of whom relied on some form of appointed counsel. But this is not a story that is exclusively about minorities. A substantial number of incarcerated people are poor and white and relied on appointed counsel for their defense. Lest it be forgotten, poor whites are racialized too, as demonstrated in the beginning of this paper, throughout history, and in the recent debate about how the opioid crisis has been treated.

black prisoners in the county jail increased from 50 percent in 1970 to 95 percent in 1974."; Roberts, supra note 276, at 1272-73 ("The extraordinary prison expansion involved young black men in grossly disproportionate numbers.").

322 See Miriam S. Gohara, James S. Hardy & Damon Todd Hewitt, The Disparate Impact of an Under-funded, Patchwork Indigent Defense System on Mississippi’s African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System, 49 HOWARD L. J. 81, 84 (2005) ("African Americans in Mississippi, as throughout the nation, are disproportionately among the poor and the criminally accused. Therefore, the state’s failure to fund attorneys for the indigent accused acutely affects African Americans."); Katayoon Majd & Patricia Puritz, The Cost of Justice: How Low-Income Youth Continuing To Pay the Price of Failing Indigent Defense Systems, 16 GEO. J. ON POVERTY L. & POL’Y 543, 569 (2009) ("The impact of these broken indigent defense systems falls disproportionately on youth of color."); Rebecca Marcus, Note, Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities, 22 HASTINGS CONST. L.Q. 219, 219 (1994) ("[C]riminal defendants’ right to equal protection under the Fourteenth Amendment is also being denied because the ineffective assistance of counsel provided by public defenders has a disproportionate impact upon racial minorities.").

323 A snapshot of state prisons, which hold 1.3 of the 2.35 million people confined in the criminal justice system, is helpful. In 2014, 38% of state prisoners were black and 21% were Hispanic, despite comprising approximately 13% and 17% of the national population, respectively. This does not account for states which include Hispanics as white or states like Alabama and Maryland that do not report ethnicity data to the Bureau of Justice Statistics. See generally ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS (2016); PETER WAGNER & BERNADETTE RAUBY, MASS INCARCERATION: THE WHOLE PIE (2017).

BESIKI KUTATELADZE ET. AL., RACE AND PROSECUTION IN MANHATTAN 7 (2014) (finding that blacks and Latino/as were less likely to be represented by private counsel and more likely to be represented by court-assigned defense attorneys). The Bureau of Justice Statistics (BJS) has not updated its racial data on indigent defense since 2014, but its last report indicated that 69% of white inmates reported having lawyers appointed by the court, whereas 77% of blacks and 73% of Hispanics had public defenders or assigned counsel. See also CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES, 9 (2000).

325 John Gramlich, The Gap Between the Number of Blacks and Whites in Prison is Shrinking, PEW RES. CTR. (Apr. 30 2019), www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/ [https://perma.cc/VM8W-6WQP] (noting that approximately 436,600 of approximately 1.4 million sentenced state and federal prisoners are white); Rabuy & Kopf, supra note 277, at 2 (indicating that incarcerated white men and women had annual incomes of $21,975 and $15,480, in 2014, respectively).

326 See Part II.A.

327 See Paul H. Buck, The Poor Whites of the Ante-Bellum South 31 AM. HIST. REV. 41, 42 (1925) (describing poor Whites in the South as the “very bottom of society”); James C. Klotter, The Black
differently than the crack epidemic. Still, it would be foolhardy to ignore the salience that black and brown criminality has had, both historically and culturally.

Against the background of mass incarceration, the Court made a series of decisions that would have implications for the racial minorities that comprise a disproportionate share of the defendant population. Guidance could be culled from *Morris v. Slappy*, where the Court underlined the limitations of the right to counsel by ruling that criminal defendants do not have a right to a meaningful relationship with their appointed attorneys. The decision validated the impersonal and sometimes aloof representation that some minority defendants receive. *U.S. v. Cronic* held that some contextual circumstances (e.g., an attorney’s youth, lack of expertise in criminal law, and unpreparedness for trial relative to the state) do not lead to an automatic inference of ineffective assistance of counsel. Save some exceptions, only specific errors can lead to ineffectiveness claims. That burden of proof is weighty for any defendant whose counsel had lapses in competence, but such requisite proof would be particularly burdensome for innocent minorities saddled with presumptions about race and guilt and almost insurmountable for factually guilty minority defendants who were punished because of their counsel’s ineffectiveness. The Court decided *Strickland v. Washington* on the same day as *Cronic*. *Strickland* is widely considered to be the sine qua non of any discussion about the failures of indigent defense. This case best illustrates

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328 Dahleen Glanton, *Race, the Crack Epidemic and the Effect on Today’s Opioid Crisis*, CHI. TRIB. (Aug. 21, 2017), www.chicagotribune.com/news/columnists/glanton/ct-opioid-epidemic-dahleen-glanton-met-20170815-column.html [https://perma.cc/9BAQ-VRM5] (highlighting the differences between the treatment of the crack epidemic in the 1980s when drug-users were termed “junkies” and jailed, as compared to today’s reaction to the opioid crisis); Eugene Scott, *Native Americans, Among the Most Harmed by the Opioid Epidemic, Are Often Left out of Conversation*, WASH. POST (Oct. 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/30/native-americans-among-the-most-harmed-by-the-opioid-epidemic-are-often-left-out-of-conversation/?noredirect=on&utm_term=.a0f409f91f86 [https://perma.cc/CCP6-Y8KS] (noting that Native Americans have been dying at double or triple the rates of Hispanics and blacks but their deaths have received much less attention).

330 Id. at 13–14.
331 In Florida misdemeanor courts, 82% of arraignments took less than three minutes. 66% of defendants did not have counsel during arraignments. 70% of cases were resolved at this stage. ALISA SMITH & SEAN MADDOON, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THREE-MINUTE JUSTICE: HAST AND WAST IN FLORIDA’S MISDEMEANOR COURTS 5 (2011).
how the racial politics of law and order interfaced with the Court's right to counsel jurisprudence.

If the remixed Oliver Wendell Holmes adage "bad facts make bad law" is true, then Strickland is a case in point.334 Lost in the doctrinal takeaways from the case is the social context within which Strickland arose and which is important to describe before delving into the decision itself. Before images of Willie Horton circulated on television screens in the late 1980s, David Leroy Washington zigzagged across state and federal tribunals while garnering attention in legal journals and in the mainstream media.335 He actually was a choirboy, and although one person in his community described him as "a non-violent young black man who did not use drugs or alcohol,"336 he committed a series of heinous crimes.337 He stabbed a minister, shot an old lady, and robbed and killed a University of Miami student who was in the act of reciting the Lord's Prayer.338 As the Fifth Circuit noted, "Washington's victims included black and white, young and old, male and female, all intentionally murdered in torturous ways."339 Washington epitomized the uncomfortable fact of black criminality. The case, as any reader with even a hazy recollection of criminal procedure might recall, involved Washington's claim that he received ineffective assistance of counsel because of his attorney's failure to seek out character witnesses or request a psychiatric evaluation.340 The Court, in an 8–1 decision that left Justice Marshall alone in dissent, disagreed.341 In its denial of Washington's claim, the Court resolved a circuit split on how to evaluate such claims and adopted a uniform test.342 For defendants to prevail in an ineffective assistance of counsel claim,

334 See Haig v. Agee, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting) ("I suspect that this case is a prime example of the adage that 'bad facts make bad law.'"); N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (White, J., dissenting) ("Great cases like hard cases make bad law.").
336 Respondent's Brief in Opposition at 5, Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554), 1983 WL 484731, at *5; see also id. (arguing that an adequate investigation would have produced "generally favorable information from [Mr. Washington's] family, friends, former employers, and medical experts" that should have been presented to the sentencing tribunal).
337 See Florida Inmate Executed; Second to Die in Two Days, L.A. TIMES, July 14, 1984, at A2 (noting that Mr. Washington "killed three Miami-area residents in three robberies over a 12-day span in 1976").
338 Strickland, 673 F.2d at 907-08.
339 Id. at 908.
340 Strickland, 466 U.S. at 668.
341 Id. at 668, 697, 701, 706.
342 See Richard L. Gabriel, The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process, 134 U. PA. L. REV. 1259, 1264 (1986) (noting the variety of standards used to evaluate ineffective assistance of counsel claims pre-Strickland); see also Brief for Amici Curiae of the States of Alabama et al., in Support of Petition for Writ of Certiorari at
they would have to show that (1) counsel’s representation fell below an objective standard of reasonableness, and (2) counsel’s performance prejudiced the defense and had an effect on the judgment.\footnote{Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554), 1983 WL 482732, at *3 (urging the Court to resolve the circuit split between the Eleventh Circuit, on the one hand, and the D.C. Circuit and the Florida Supreme Court, on the other).}

Scholars often focus on Strickland’s high threshold, but the law and order politics of Florida—a repeat player in the Court’s criminal procedure docket—help illuminate the racial substance of indigent defense in the 1980s in ways that provide new insights. To be sure, Washington’s actual guilt most likely animated Florida’s determination to ensure that he got his just deserts. But other developments provide context as to how this case fit into the larger crime control zeitgeist. Dade County, where Washington committed his crimes, had a criminal justice system that was precarious. In 1980, Miami, the largest city in Dade County, was the locale of a strikingly violent and under-studied race riot.\footnote{JAN NIJMAN, MIAMI: MISTRESS OF THE AMERICAS 63 (2011).} That year also witnessed Miami’s murder rate climb seventy-eight percent,\footnote{JAN NIJMAN, MIAMI: MISTRESS OF THE AMERICAS 63 (2011).} an increase so large that the Dade County medical examiner had to store corpses in a refrigerated meat truck previously used by Burger King.\footnote{EDNA BUCHANAN, THE CORPSE HAD A FAMILIAR FACE 105 (1987).} Such mayhem tarnished Miami’s national reputation, impacted tourism, and influenced the willingness of corporations to invest in the city.\footnote{Sherrill, supra note 344.}

Florida Attorney General James (Jim) Smith is a crucial player to this story. Smith’s self-identification as a tough, Democratic, law and order attorney general illustrates the ubiquitous and bipartisan nature of war on crime politics during this period and coincides neatly with Jonathan Simon’s argument about prosecutors’ increased influence over politics during this period.\footnote{SIMON, supra note 276, at 34-38.} In 1981, a year after the riot, and the same year Smith was challenging appeals filed by Washington, he complained about the Dade County Jail being “crammed” with Cuban and Haitian criminals and


4. See Robert Sherrill, \textit{Can Miami Save Itself?}, \textit{N.Y. TIMES MAG.} (July 19, 1987), https://www.nytimes.com/1987/07/19/magazine/can-miami-save-itself-a-city-beset-by-drugs-and-violence.html [https://perma.cc/G6WV-DS3F] (“Angered by the exoneration of four white policemen who had killed a black insurance man, the residents of Liberty City, a predominantly black section of Miami, launched what was arguably the worst race riot of this century. It wasn’t just a civil protest. Blacks went out specifically to get whites, to assault them, to kill them. Some whites were doused with gasoline and set on fire. Some were beaten senseless in the street and run over, repeatedly.”).


45. Sherrill, supra note 344.
suspects. A federal judge ordered the County to decrease its inmate population, which caused the federal government to take on some of the county’s inmates. Simultaneously, Smith lobbied for a statewide five percent increase in the state’s sales tax to help fund law enforcement. In 1982, Smith and the State of Florida lost a death penalty case in the Supreme Court involving a black man who was a getaway driver and unknowing accomplice in the killing of an elderly couple. Strickland, argued one year later in 1983, was an easier case with very few redeeming facts. It also took place at a time when the problem of multiple murder attracted more national attention. Strickland provided Florida—the state that lost Gideon and Argersinger—with an opportunity to prevail nationally while advancing an ineffective assistance doctrine that would coincide with crime control imperatives. There are some important observations that have gone unstated in indigent defense scholarship. First, the case that established the modern ineffective assistance of counsel doctrine involved a murderous black man who sought leniency because of putative procedural errors. This is precisely what law and order hawks assailed against a decade and a half before: actually guilty (minority) defendants walking scot free due to technicalities. Relatedly, the Strickland case was brought by a law and order attorney general and the opinion was written by a law and order Justice who sat on a Court led by a law and order Chief Justice. The case was decided during a war on crime that scholars have shown was inextricably tied to racial considerations. While Strickland is often and correctly understood as defanging Gideon, it was also an indirect response to Escobedo—the first right to counsel case that augurated Nixonian law and order critiques of indigent defense expansions. In its reversal of the appellate court, the Strickland Court sought to limit perceived procedural excesses that benefitted defendants.

Even though many commentators have glossed over this racial context in their discussions of Strickland, some have honed in on the surrounding jurisprudential setting. Anthony O’Rourke is most helpful in this regard, noting that the same year that the Court granted certiorari in Strickland, it rejected another Eleventh Circuit case involving an ineffective assistance of

350 Sharen Johnson, Budget This Year a Grim Guessing Game, PENSACOLA NEWS-JOURNAL, Apr. 5, 1981, at 2F (copy on file with author).
352 In the 1980s, “both the rate of growth and the actual scale of the multiple-murder problem became a hotly contested issue, and it was widely claimed that serial murders annually represented a fifth or a quarter of all homicides in the United States.” Philip Jenkins, Using Murder: The Social Construction of Serial Homicide 49 (1994). But see Alexia Cooper & Erica L. Smith, Homicide Trends in the United States 1980–2008, at 2 (2011) (showing how murder rates “peaked to 10.2 per 100,000 [in 1980] and subsequently fell to 7.9 per 100,000 in 1984”).
counsel claim. The Eleventh Circuit decision, *Goodwin v. Balkcom*, was replete with the ingredients of a high-profile criminal procedure case: a black criminal defendant accused of murder who had been diagnosed with borderline mental retardation; the failure of appointed counsel to challenge the racial composition of the grand and petit jury pool in a southern county that was sued in federal court for having racially unrepresentative juries; and aforementioned counsel’s errant references to his client in his closing as a “little old nigger boy . . . . [T]he kind of people that we have historically put to death here in Georgia.” Although the defendant won and Georgia appealed, the Court denied certiorari. O’Rourke captures the implications of this choice nicely: “[o]ne need not be a legal realist to conclude [that] the ineffective assistance standard might be different today if, in 1984, the Court had been considering Terry Lee Goodwin’s representation rather than David Leroy Washington’s.” The legal facts in *Strickland* lend themselves more easily to a restrictive right to counsel. *Strickland* allowed the Court to advance a highly circumscribed vision of effectiveness that was hardly pro-defendant, deferential in its assumptions about attorney competence, and would ultimately impact minority defendants. A recitation of the comically bad lawyering that the *Strickland* standard has permitted—by junkie, alcoholic, and narcoleptic attorneys—is unnecessary, as this has been capably enumerated elsewhere. I’m far more interested in the nexus between race and ineffective assistance of counsel, which I define more flexibly as the actual or constructive absence of legal representation (e.g., by way of underfunding, excessive workload, or inexperience).

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355 *Goodwin*, 684 F.2d at 805 n.13.

356 O’Rourke, supra note 353, at 766.

357 Id. at 764-765; see also Richard Klein, *Civil Rights in Crisis: The Racial Impact of the Denial of the Sixth Amendment Right to Counsel*, 14 U. MD. L.J. RACE, RELIG., GENDER & CLASS 163, 182 (2015) (“It is especially ironic that attorneys who actively litigate claims that other professionals failed to act appropriately, are somehow themselves provided with a presumption of competence.”).

358 See, e.g., Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996) (“Unfortunately, indigent criminal defendants are not always provided with competent appointed counsel.”); Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is It Possible to Keep Innocent People Off Death Row?*, 29 U. DAYTON L. REV. 319, 321 (2004) (“Courts and legislatures often try to reconcile their inconsistent beliefs about the administration of the death penalty by refusing to acknowledge that there is a serious problem with the adequacy of lawyers who represent people charged with death-eligible crimes.”).

Besides the racialized context from which *Strickland* emerged and the racial demography that the decision may have helped produce, there is a symbolic and symbiotic relationship between race and ineffective assistance of counsel. This Article has shown how racial politics influence indigent defense jurisprudence and administration, and this assertion applies to the *Strickland* regime. Ineffective assistance of counsel doctrine is interestingly similar to the Court’s treatment of racial discrimination claims. There are many similarities between the two. I can briefly conjure at least six, not counting the strong probability that some minority defendants are likely to experience or have already experienced both.  

First, racial discrimination and ineffective assistance claims have their own versions of definitional imprecision that are partly due to the range of activity they attempt to capture as well as narrow understandings of how both operate.  

Second, both claims involve parties—minorities and criminal defendants—who are immediately considered untrustworthy and are therefore not likely to be believed.  

Third, and relatedly, jurisprudence in both areas imposes what some scholars consider to be unreasonably high evidentiary burdens on these claimants.  

Fourth, racial discrimination and ineffective assistance of counsel claims commonly invite accusations of frivolity or instrumentalism.  

Fifth,  

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360 See, e.g., Peter A. Joy, Unequal Assistance of Counsel, 24 Kan. J. L. & Pub. Pol’y 518, 519 (2015) (“If one does not have the financial means to hire effective counsel, or is poor and not lucky enough to have a well-funded, effective public defender or appointed counsel, the defendant’s right to counsel is unequal. This disparity is driven largely by the wealth of the accused and falls most harshly on people of color, who are twice as likely as whites to live in poverty and are accused of crimes at rates much higher than their proportion of the population. As a result, class and race are largely determinative of the lawyer, and often the amount of justice one receives.”).  

361 Richard Thompson Ford, The Race Card: How Bluffing about Bias Makes Race Relations Worse 7 (2008) (maintaining that the social and legal meaning of racism has “no single clear and agreed-upon meaning” and, as a result, is used “to describe an increasingly wide range of disparate policies, attitudes, decisions, and social phenomena”); Haney López, supra note 9, at 1838 (critiquing the Supreme Court’s obsession with “purposeful racism” and noting that it “seems to be developing an equal protection jurisprudence that defines racism both too narrowly (race must be openly considered) and too broadly (any consideration of race constitutes racism).”).  

362 See, e.g., Shima Baradaran, Restoring the Presumption of Innocence, 72 Ohio St. L.J. 723, 728 (2011) (discussing how changes in state and federal pretrial practice have impacted the pretrial presumption of innocence for criminal defendants); Justin D. Levinson et al., Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test, 8 Ohio St. J. Crim. L. 187, 190 (2010) (finding that study participants held strong associations between black and guilty).  


364 Ellen Berrey et al., Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality 277 (2017) (describing how critics of antidiscrimination law suggest
appellate review of both does not easily lend itself to identifying or mitigating the subtle biases that may impact case disposition. Sixth, save for some extreme examples in what is already a quantitatively and qualitatively exceptional docket, the Supreme Court appears to be unfazed by the status quo in both areas.

My argument here is simple. If Powell embodies a shift from the Court’s minimalism to a more incremental, albeit stunted, approach to race and the right to counsel, and Gideon typifies the Court’s imprecise but optimistic vision on both, then Strickland represents a more restrictive vision. Whether one takes a critical view of Strickland as an unfettered attack on Gideon or a more generous view of the decision as an effort by the Court to elaborate on how effectiveness should fit in Gideon’s mandate, the result is the same: weaker post-conviction remedies for defendants. As Michael Graetz and Linda Greenhouse note, the Burger Court “made it difficult to win a claim of

that the field has become an “excuse factory” where “incompetent employees attempt to use the law to receive unwarranted monetary gains and job protection” whereas plaintiffs also believe that too many people sue without valid claims); Stephanos Bibas, The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, 2003 UTAH L. REV. 1, 4 (“[A]n ineffectiveness claim is one of the few claims that can be raised in almost every case, as almost every defendant has a lawyer. Courts of appeals, flooded with frivolous ineffectiveness claims, approach each one with a jaundiced eye.”); Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 CORNELL L. REV. 679, 681–82 (2007) (“[T]he issues that the defendant may raise on direct appeal are limited only to those matters that appear on the face of the trial court record. Accordingly, if an attorney fails to preserve issues at trial, appellate counsel is generally left without grounds for appeal. To a defendant who bears no cost for appealing, however, a groundless appeal is more attractive than no appeal at all. As a result, public defenders routinely spend their time arguing frivolous appeals . . . .”). In a survey of federal habeas litigation, the authors found that eighty-one percent of litigants raised ineffective assistance of counsel claims. NANCY J. KING ET. AL, NAT’L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 5 (2007).

365 See Ryan Patrick Alford, Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis, 11 MICH. J. RACE & L. 325, 326 (2006) (describing how prosecutors use indirect racist summations to obviate appellate review); Bibas, supra note 364, at 4 (“[G]uilty pleas dispense with trial records, so appellate courts have scant evidence to review . . . . With little evidence to go on, judges may fall back on their presumption of correctness or inevitability.”); Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1231 (2009) (“Existing forms of accountability, such as appellate review . . . primarily focus on a judge’s performance in a particular case, not on the systematic study of long-term patterns within a judge’s performance that might reveal implicit bias”).

366 See Russell K. Robinson, Unequal Protection, 68 STAN. L. REV. 151, 154 (2016) (noting that in the past thirty years, “the Supreme Court has steadily diminished the vigor of the Equal Protection Clause” and rejected claims brought by racial minorities as well as claims in the areas of gender discrimination and in abortion cases); Donald A. Dripps, Up from Gideon, 45 TEX. TECH L. REV. 123, 120, 123 (2012) (pointing out that Strickland’s standard is “widely regarded as practically toothless” and that the “Court is in general sympathy with mainstream political opinion. Typically, it will move on behalf of disempowered groups after they have established a political identity [and] achieved successes in the political realm” but noting that since indigent defense advocates have not done this, “we should not expect five Justices in gleaming armor to gallop up upon white steeds.”).
ineffective assistance of counsel, just as the stakes for having effective and competent counsel and costs of attorney incompetence ballooned.”

The difficulties of proving ineffectiveness have been and continue to be particularly acute for minorities. The deluge of wrongful convictions due to deficient lawyering are telling; they offer a glimpse of who bore the consequences of a right to counsel jurisprudence that enabled ineffectiveness. The National Registry of Exonerations documents cases in which innocent defendants were wrongfully convicted and later exonerated. Of the 1,900 defendants who were convicted but later exonerated because they were innocent, forty-six percent were African-Americans, three times their rate in the population. It is also important to note that these figures only capture identified exonerations. Ultimately, these racialized outcomes, among many others, bear some relationship to an indigent defense regime that has a constrained view of government’s responsibility to poor defendants and an intellectually dishonest characterization of the legal profession’s relationship to these same individuals.

CONCLUSION

A. Life Since Strickland

The post-Strickland indigent defense story is a familiar one. A large portion of the Court’s right to counsel cases have been idiosyncratic and fall in the “death is different” category. The Strickland standard animated these decisions. In most of these cases the Court simply determined whether the accused received ineffective assistance, a question typically answered in the negative. But this was not uniformly the case. As Stephen Smith has

369 See, e.g., Wood v. Allen, 558 U.S. 290, 299 (2010) (holding that a state court’s conclusion that a defense counsel’s decision to not “pursue or present evidence of [a defendant’s] mental deficiencies” was not unreasonable, and, therefore, refusing to address the appellee’s claim of ineffective counsel); Wong v. Belmontes, 558 U.S. 15, 28 (2010) (concluding that the “notion that the result could have been different if only [defense counsel] had [taken a different strategy] is fanciful”); Schriro v. Landrigan, 550 U.S. 465, 473 (2007) (reversing the Ninth Circuit’s grant of habeas relief from a finding that a defendant was prejudiced by ineffective counsel, and emphasizing that Strickland places the burden on defendants to demonstrate to a “reasonable probability” that they were prejudiced by ineffective counsel); Woodford v. Visciotti, 537 U.S. 19, 357, 357 (2002) (reversing the Ninth Circuit’s grant of habeas relief from a finding that a defendant was prejudiced by ineffective counsel, and holding that the state court’s denial of habeas relief was not based on an unreasonable application of the Strickland standard); Bell v. Cone, 535 U.S. 685, 702 (2002) (reaffirming Strickland’s “‘strong presumption’ that counsel’s conduct falls within the wide range of
argued,\textsuperscript{370} in a few of the cases decided at the turn of the century, the Court applied \textit{Strickland} in a way that closely scrutinized the performance of counsel and led to more favorable outcomes for capital defendants.\textsuperscript{371} But the Rehnquist Court left indigent defense supporters with much to desire.\textsuperscript{372} Interestingly, the Roberts Court has ruled more favorably for indigent capital defendants. These cases typically had scandalous facts that were easy to rule on but offered few doctrinal takeaways.\textsuperscript{373} Other decisions often entailed complicated procedural niceties that are unrepresentative of the typical criminal defendant’s trajectory.\textsuperscript{374}

reasonable professional assistance,” and providing deference to trial courts to determine an appropriate attorney-performance standard; Mickens v. Taylor, \textit{\textit{558 U.S. 362, 366 (2002)}} (holding that where a defense attorney does not protest his inability to represent multiple defendants, a defendant-petitioner must establish that a potential “conflict of interest adversely affected his counsel’s performance” to void a conviction); Roe v. Flores-Ortega, \textit{\textit{258 U.S. 470}}, \textit{\textit{487 (2000)}} (vacating an appellate ruling that suggested that a defense attorney must consult with a client on whether or not to file an appeal in order to provide effective counsel); Lockhart v. Fretwell, \textit{\textit{506 U.S. 364, 366 (1993)}} (holding that a defense attorney’s failure to make an objection during sentencing was not prejudicial within the \textit{Strickland} context).

\textsuperscript{370} See Stephen F. Smith, \textit{Taking Strickland Claims Seriously}, 93 MARQ. L. REV. 515, 517 (2009) (“Interestingly, the Supreme Court’s recent ineffectiveness decisions have finally begun to take the right to counsel as seriously as the access-to-counsel cases would require. In a line of recent cases, the Court has granted relief to several defendants whose death sentences likely resulted from attorney error.”).

\textsuperscript{371} See, \textit{e.g.}, Rompilla v. Beard, \textit{\textit{545 U.S. 374, 377 (2005)}} (holding that “even when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.”); Wiggins v. Smith, \textit{\textit{539 U.S. 510, 538 (2003)}} (holding that counsel’s failure to investigate and present mitigating evidence in capital sentencing proceedings was prejudicial to the defendant); Williams v. Taylor, \textit{\textit{529 U.S. 362, 399 (2000)}} (holding that a defendant’s right to effective assistance in a capital punishment case was violated when his attorney failed to “[present] and [explain] the significance of all the available evidence”).

\textsuperscript{372} See Halbert v. Michigan, \textit{\textit{545 U.S. 605, 607 (2005)}} (requiring appointment of counsel for indigent defendants who are convicted on their pleas and seek first-tier review in Michigan Court of Appeals); Alabama v. Shelton, \textit{\textit{535 U.S. 654, 656(2002)}} (holding that a suspended sentence that may end up in the actual deprivation of a person’s liberty cannot be imposed unless counsel is appointed).

\textsuperscript{373} See, \textit{e.g.}, Buck v. Davis, \textit{\textit{137 S. Ct. 759, 767, 780 (2017)}} (holding that defense counsel’s performance was deficient during the penalty phase of capital murder trial where counsel presented expert testimony that his client was statistically more likely to act violently because he was black); Hinton v. Alabama, \textit{\textit{571 U.S. 263, 267-69 (2014)}} (holding that defense counsel’s performance was deficient where counsel did not know that state law allowed him to request additional funding for expert witness, and where he relied upon a one-eyed civil-engineer who graduated more than a century before trial, had little experience with firearms, and needed help from state experts in operation of equipment to testify as an expert on firearm forensics).

\textsuperscript{374} See \textit{e.g.}, Jennings v. Stephens, \textit{\textit{135 S. Ct. 793, 798, 802 (2015)}} (allowing an appellee state prisoner who “was required neither to take a cross-appeal nor obtain a certificate of appealability” to argue that his counsel was ineffective to obtain habeas relief in a death penalty case); Trevino v. Thaler, \textit{\textit{569 U.S. 415, 417 (2013)}} (holding that ineffective assistance of counsel during state habeas proceeding excused defendant’s failure to properly claim ineffective assistance at trial level); Martinez v. Ryan, \textit{\textit{566 U.S. 1, 17 (2012)}} (holding that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding,” a federal habeas
But some recent cases have offered encouragement, especially where the Court has been more generous in its understanding of the plea-bargain stage. Nevertheless, the jury is still out on how these cases will develop. As I have shown, progressivism does not characterize the Court’s indigent defense jurisprudence. Moreover, the Court is aware of the problems of indigent defense. In 2016, it decided *Luis v. United States*, which involved the government’s attempt to freeze approximately $45 million in assets belonging to a defendant accused of Medicare fraud. The defendant argued that the pretrial restraint of his untainted assets, which he needed to retain his counsel of choice, violated the Sixth Amendment. The Court agreed.

Writing for a five-person majority, Justice Breyer discussed how ruling for the government and allowing such seizures would impoverish people who could afford their own counsel. “[T]hese defendants, rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. As the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to...
meet nationally recommended caseload standards.” Justice Breyer also noted that public defenders are underresourced and contended that allowing for such seizures would “render less effective the basic right the Sixth Amendment seeks to protect.”

John Rappaport incisively points out important contradictions and questions: “[i]f forcing the defendant in Luis to rely on a public defender would have been unfair, then what of all these other defendants?” Going further, he adds: [e]ither appointed counsel are presumptively effective notwithstanding the constraints under which they operate—in which case the fairness theory cannot explain the outcome in Luis—or they’re not, in which case Luis is correct but implicitly acknowledges a constitutional crisis.”

The same term, the Court upheld the use of uncounseled convictions in tribal court proceedings as predicate offenses under the Violence Against Women Act in ways that some argue detrimentally and disproportionately impact Indian defendants.

Considering the Court’s relative inaction on indigent defense, I do not look to it as a place of inspiration for normative possibilities. But court-

378 Id. at 1095 (citations omitted).
379 Id.
381 Id. at 24.
382 United States v. Bryant, 136 S. Ct. 1954, 1959 (2016). Although the Court’s decision was unanimous, there are debates about the soundness of the opinion in federal Indian law and in criminal justice scholarship. For example, the National Congress of American Indians wrote a brief in support of the United States and argued that not respecting tribal courts’ domestic assault convictions would encroach on tribal sovereignty and fail to achieve Congress’ statutory goal of addressing the unique violence Indian women encounter. See Brief for National Congress of American Indians as Amici Curiae, United States v. Bryant 136 S. Ct. 1954 (U.S. 2016) (No. 15-426), 2016 WL 1475645; Barbara Creel, a scholarly expert on Indian Country criminal defense, and a former tribal, state appellate, and federal public defender, co-authored a brief for the Tribal Defender Network in support of the respondent which argued that using uncounseled tribal convictions violates fundamental fairness and Equal Protection principles by creating a legal landscape where only American Indians appear in federal court with prior uncounseled convictions. See Brief for Professor Barbara L. Creel and the Tribal Defender Network as Amici Curiae, United States v. Bryant 136 S. Ct. 1954 (U.S. 2016) (No. 15-420), 2016 WL 535615; see also Greg Ablavsky, U.S. v. Bryant: Congress, Not Justice’s Interpretations of History, Better Arbiter of Tribal Sovereignty, STAN. L. SCH. BLOGS (June 19, 2016), https://law.stanford.edu/2016/06/19/u-s-v-bryant-congress-not-justices/ [https://perma.cc/86KU-WAN4] (arguing that Congress, not the Court, is the best institution to resolve the provision of counsel question); Bethany R. Berger, Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond, 2017 U. ILL. L. REV. 1901, 1931-32 (arguing that the Court could have used the doctrine of comity in its analysis of prior convictions, which would have retained the presumption of valid previous judgments while still subjecting them to fundamental fairness analysis). For further discussion of the lack of rights and due process protections afforded to Indian defendants in tribal court, see Barbara L. Creel, The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative, 18 MICH. J. RACE & L. 317 (2013); Angela R. Riley, Crime and Governance in Indian Country, 63 UCLA L. REV. 1564 (2016).
centered reform efforts are not worth abandoning, a premise confirmed by some of the successes of structural reform litigation.\footnote{See Cara H. Drinan, \textit{The Third Generation of Indigent Defense Litigation}, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 445 (2009) (discussing the success of recent structural reform litigation suits).} However, the history offered here suggests that some normative solutions to the problems of indigent defense lie outside of courts. Here is where the history offered in this paper becomes especially salient.

\textbf{B. Making Race Important in Contemporary Indigent Defense}

The history offered in this paper demonstrates how racial meanings and their influence on indigent defense ebbed and flowed in the last century. During this time period, prominent legal actors—specifically the Court and the bar—showed a special, if inconsistent, solicitude for the racial “other.” In an early twentieth century that harbored an ungenerous right to counsel jurisprudence, legal reformers innovated. They developed legal aid societies and municipally funded public defender offices that showed particular concern for the legal problems of ethnic whites. Other racial minorities—whose legal dilemmas were insufficiently attended to by mainstream legal institutions—engaged in their own innovation. They created institutions that attempted to address legal issues that were common and race-specific. In these ways, race helped undergird the development of mainstream legal aid organizations that attended to the needs of ethnic whites as well as unconventional institutions that tackled other racial minorities’ problems.

Three decades into the twentieth century, the Court would develop an obligatory right to counsel that was specifically concerned with penal inequalities faced by marginalized blacks. This establishment of a right to counsel, in hindsight, was a meaningful step in the racial justice and criminal justice arenas. But this enshrinement was also limited, case-specific, and invested in pathological forms of blackness. Illiterate and indigent African-American defendants successfully weaponized their status in their claims that they were unconstitutionally deprived of counsel. But this circumscribed way of thinking about indigent defense produced a stagnant doctrinal terrain until the 1960s. During that volatile decade, the Court’s signature right to counsel case addressed general and race-specific problems in indigent defense by counterintuitively avoiding race. Instead, it used a sympathetic white defendant to advance the administration of criminal legal aid. Increases in crime and a racially charged law and order campaign reduced sympathy for criminal defendants thereafter and, as a result, curbed the advancement of indigent defense. Unlike its predecessors, the Court of the late twentieth century would not have special solicitude for racial minorities and, in the case of indigent
defense, became less interested in racial justice. The products of that disinterest have, in part, produced the indigent defense landscape that we inherit today. But history can still inform our legal present. As a normative matter, I contend that the history in this paper offers some theoretical and institutional lessons.

1. Theoretical Lessons

The theoretical takeaways relate to how scholars, practitioners, and policymakers think and talk about race and help. First, the history of indigent defense provides a different way of analyzing race that does not hinge on animus. Of course, scholars of race have been theorizing non-animus-based understandings of race for decades.\(^3\) The account in this Article supplies a complementary alternative that focuses on racial neglect. Progressive Era reformers were aware of the legal challenges African-Americans, Mexican-Americans, and Asian-Americans faced and, in some instances, attended to those legal problems. But these reformers made ethnic white immigrants their primary objects of concern. This deliberateness produced a form of racial neglect that was far from innocent but, as the historical record shows, devoid of the kind of animus associated with that period and racial marginalization more generally. In our current world, government, rather than philanthropy, is the primary dispenser of indigent defense services, whether directly or indirectly. Yet neglect is still operative. The well-documented reality that criminal legal aid institutions are underfunded and underresourced could fit into an easy narrative of outright racism. The poor lawyering that such underfunding and understaffing produces could also fit into that account. But the impoverishment of indigent defense organizations also fits into a story of neglect that is not inspired by animus but is still racially consequential. A framing of racial neglect that looks beyond animus-based understandings of race can offer new ways of thinking about indigent defense.

Relatedly, this Article offers a different way of thinking about help and indigent defense. There are often unarticulated assumptions about the charitable nature of organized legal assistance and help more generally. Such assumptions have contributed to the lack of sustained analytical scrutiny of

public defenders. Tropes and archetypes have done much of the analytical work, with public defenders often understood either as plea bargain-compliant bureaucrats or underappreciated heroes. But help is complicated, and the brand of help that indigent defense lawyers are tasked with providing is rife with problems. The Progressive Era story highlights how help is sometimes structured by who is understood as vulnerable; such determinations of vulnerability can be racially exclusive. Like their Progressive Era predecessors, public defenders can harbor implicit biases and preferences that complicate their provision of help. The period between Powell and Gideon teaches us that help can have its limits, particularly when it is only concerned with the most egregious forms of injustice. Today, public defender offices are obliged to triage certain kinds of defendants and crimes, a dynamic that can potentially invite a similar kind of obsession with egregiousness that is laudable, even as it is not necessarily the most helpful approach for their client communities.385 Nonlegal commentators have usefully documented the challenges and racial dilemmas involved in “helping professions” such as education, social welfare, and child welfare.386 This Article provides content for more exacting analytical consideration of the constitutionally compelled “helping profession” of indigent defense.

Clearer understandings of race and indigent defense could help spawn more critical analyses of and closer empirical attention to biases in indigent defense. Taking the most critical view, Paul Butler argues that “Gideon bears some responsibility” for legitimating mass incarceration because it “diffuse[ed] political resistance” and “created the false consciousness that criminal justice would get better.”387 Other scholars have similar reservations about indigent defense. They have looked beyond police officers and prosecutors—the typical objects of critique in criminal justice scholarship—and pay closer attention to indigent defense attorneys.388 The history offered

385 See Joe, supra note 385, at 758-63.
in this Article provides context for this budding literature and can inform future projects.

2. Institutional Takeaways

The racial history of the right to counsel also offers some takeaways that may be useful for indigent defense providers. Three takeaways in particular stand out: racial equality as an organizing principle for legal aid institutions, the relationship between racial subjugation and legal innovation, and the importance of recognizing race.

In many jurisdictions, racial equality should be an important organizing principle for indigent defense organizations. Race played a central role in the development of legal aid schemes, and although its meaning changed over time, it continued to operate prominently in the Court’s decisionmaking from the 1930s to the 1960s. Thereafter, race receded into the background as an explicit matter but still informed the law and order politics. In a moment when racial disparities are a significant feature of the criminal justice system, it makes sense for providers to consider the role of race in their organizational missions and delivery of their services. In terms of priorities, organizations such as ArchCity Defenders in St. Louis (ACD) and the San Francisco Public Defender’s Office are explicit about the role of racial discrimination in the criminal justice system, take an expansive view of their clients’ specific socio-legal problems, and attempt to implement large-scale programming that addresses the social inequalities that emanate from indigence and racial bias. For example, ACD describes itself as a civil rights law firm that “uses direct services, impact litigation, and policy and media advocacy as its primary tools to promote justice, protect civil and human rights, and bring about systemic change on behalf of the poor and communities of color directly impacted by the abuses of the legal system.”389 The San Francisco Public Defender’s Office established a racial justice committee that seeks to address the racial biases that pervade the criminal justice system and disadvantage their clients.390 The account offered in this Article supplies historical context for indigent defense providers who understand the significance of race in indigent defense work


but do not have a complete picture of the depths of that significance, and for providers who find race to be irrelevant to their organizational efforts.

Although the circumstance of racial inequality is not the ideal setting for inventiveness, history shows that such a setting helps produce legal innovation. Progressive Era reformers developed legal aid institutions because of the specific legal dilemmas ethnic white immigrants encountered. African-Americans, Mexican-Americans, and Asian-Americans developed their own multi-purpose self-help legal mechanisms in part because of the neglect they received from mainstream institutions. Therefore, it is important to understand that the legal status quo rarely suffices; rather, it demands innovation. The Bronx Defenders in New York have pioneered a “holistic defense” approach to representation that uniquely addresses the race-specific ways a criminal charge can impact a defendant’s life outside the criminal context (e.g., deportation, eviction, and termination of parental rights). Several public defender’s offices in the San Francisco Bay area have teamed up to form a regional organization called Public Defenders for Justice. This organization has county-wide trainings that focus on litigating racial justice issues in the context of voir dire, police misconduct, and search and seizure. In addition to encouraging defenders to litigate race-related issues where relevant, the Minnesota Public Defender identified police practices that may be motivated by racial bias and created a searchable database that allows attorneys to access police reports and analyze patterns of misconduct. The innovative, race-specific programming of legal aid organizations is part of a larger historical continuum of lawyers’ prioritizing race in their delivery of legal services. The history offered here demonstrates that such creativeness is not a chore or extraneous task, but is integral to advanced versions of indigent defense practice.

Finally, and relatedly, the history offered here demonstrates that it is important for indigent defense attorneys to recognize how race operates in inconspicuous ways. The post-1970s curtailment of Gideon was achieved by law and order campaigns that referenced race without explicitly announcing it. This period is instructive. It shows how racial concerns and motivations can go unstated but still have appreciable effects on indigent defense. Police officers and prosecutors—the understood antagonists of criminal defendants—are typically described as the bearers of implicit bias. But indigent defense attorneys have their own prejudices that are slowly being

The Sixth Amendment Facade

jeff adachi, who headed the public defender’s office in san francisco—considered to be one of the most effective and most race-conscious public defender’s offices—has highlighted the unconscious biases present in his own organization. the office had partnered with social science researchers to measure racial disparities in plea bargaining and implemented biannual bias training sessions. adachi had also encouraged attorneys to use checklist tools that ask questions such as “how would i handle this case different if my client was another race or had a different social background?”

the historical precedent of subtle, race-based subjugation, along with experiential and empirically informed observations, has the potential to transform how indigent defense attorneys think about racial inequality.

to be sure, as gabriel chin contends, the ideal remedies for criminal justice inequality lie not in indigent defense, but in reduced arrests and prosecution. but, in the absence of such changes—or in conjunction with them—the history offered in this article encourages reformers to consider indigent defense shortcomings as an issue with racial ramifications while also pushing racial justice advocates to figure indigent defense more prominently in their reform efforts. with the revelations offered in this article, reformers, along with scholars and indigent defense providers, can reexamine how the right to counsel came to be as well as the limits and possibilities for administrative change.

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394 see, e.g., richardson & geff, supra note 388, at 2626 (“[t]he domain of [public defenders] and triage presents a rare confluence of factors ripe for the influence of implicit biases.”); see also theodore eisenberg & sheri lynn johnson, implicit racial attitudes of death penalty lawyers, 53 depaul l. rev. 1539, 1542 (2004) (noting the “troubling possibility that defense counsel, who are charged with undivided loyalty to their clients, and presumed to serve as a shield against racial bias on the part of other criminal justice system actors, may in fact experience both compromised loyalty and judgment when they serve african-american or latino clients”); vanessa a. edkins, defense attorney plea recommendations and client race: does zealous representation apply equally to all?, 35 law & hum. behav. 413, 416 (2011) (hypothesizing that “the deals that defense attorneys feel they can obtain with an african american client will include a longer sentence, and be more likely to include jail time, than the deals they feel they could obtain for a caucasian american client”); lyon, supra note 388, 757 (describing an interaction where a public defenders “unconscious bias” caused him to act in ways he would not have if his client was a “white eighteen- or nineteen-year-old young man”).

395 jeff adachi, public defenders can be biased, too, and it hurts their non-white clients, wash. post (june 7, 2016).

396 chin, supra note 174, 2240 (“the [critical] problem is a lack of fairness in deciding what to criminalize and how to enforce those prohibitions.”).