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GABRIEL J. CHIN

Race and the Disappointing Right to Counsel

ABSTRACT. Critics of the criminal justice system observe that the promise of *Gideon v. Wainwright* remains unfulfilled. They decry both the inadequate quality of representation available to indigent defendants and the racially disproportionate outcome of the criminal process. Some hope that better representation can help remedy the gross overrepresentation of minorities in the criminal justice system. This Essay is doubtful that better lawyers will significantly address that problem.

When the Supreme Court decided *Gideon*, it had two main purposes. First, it intended to protect the innocent from conviction. This goal, while imperfectly achieved at best, was explicit. Since *Gideon*, the Court has continued to recognize the importance of innocence claims at trial, issuing important, pro-defense decisions in the areas of confrontation, jury factfinding, the right to present a defense, and elsewhere.

The Court's second goal was to protect African Americans subject to the Jim Crow system of criminal justice. But, as it had in *Powell v. Alabama*, the Court pursued this end covertly and indirectly, attempting to deal with racial discrimination without explicitly addressing it. This timidity was portentous. *Gideon* did not mark the beginning of a judicial project to eliminate race from the criminal justice system root and branch. Since *Gideon*, the Court has made it practically impossible to invoke racial bias as a defense; so long as those charged are in fact guilty, discrimination in legislative criminalization, in enforcement, and in sentencing practices are essentially unchallengeable.

Since *Gideon*, racial disproportionality in the prison population has increased. Not only might *Gideon* not have solved the problem, it may have exacerbated it. To the extent that *Gideon* improved the quality of counsel available to the poor, defense lawyers may be able to obtain favorable exercises of discretion in investigation, prosecution, and sentencing for indigent white defendants that they cannot for clients of color. For these reasons, racial disparity likely cannot be remedied indirectly with more or better lawyers. Instead, the remedy lies in directly prohibiting discrimination and having fewer crimes, fewer arrests, and fewer prosecutions.

AUTHOR. Professor of Law, University of California, Davis School of Law. Thanks for helpful comments to Scott Bales, Stephen Bright, Abigail Graber, Abe Krash, Justin Marceau, Song Richardson, and other participants at the *Yale Law Journal* Symposium at which this Essay was presented, and to Dimple Patel for excellent research assistance.

ESSAY CONTENTS

INTRODUCTION

Two central features of the criminal justice system are its impact on minorities, both absolutely and compared to whites,[1] and the often inadequate quality of representation provided to those who cannot afford to retain counsel.[2] Many scholars suggest that these are connected and that African Americans and other people of color suffer disproportionately because they lack access to high-quality representation.[3] The story of Clarence Gideon, the victor in *Gideon v. Wainwright*,[4] supports this idea. Forced to go to trial for burglary with no attorney, he was convicted. After winning in the Supreme Court, with the assistance of experienced counsel, he was acquitted.

In individual cases, particular clients would be helped by better lawyers with lighter caseloads. Certainly, many wrongful convictions, injustices, and tragedies could be avoided with better trained and resourced counsel. But this is different from saying that all, most, or even much of the system's racial disproportionality could be remedied by competent defense lawyers.

This Essay proposes that the right to counsel as articulated by the Court has not been and likely cannot be a remedy for systematic racial disproportionality in the criminal justice system. Paradoxically, right-to-counsel jurisprudence may have made the predicament of African Americans and other racial minorities worse.

1. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

2. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004); Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47 (1997); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597 (2011); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004). However, recent case law may give more recourse to defendants with inadequate counsel than has previously been available. *See, e.g.*, Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (2012) (arguing that recent cases improved the substantive law of ineffective assistance of counsel).

3. ALEXANDER, *supra* note 1, at 83-85; COLE, *supra* note 1, at 63-95; Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994).

4. 372 U.S. 335 (1963).

Right-to-counsel jurisprudence in the era before *Gideon* is fairly understood as an outgrowth of Jim Crow ideology. The Supreme Court and other state and federal courts often recognized and remedied injustices faced by African-American defendants. But courts did not do so using the language of rights and justice; instead, they frequently rested their decisions on African-American ignorance and incompetence. Thus, the constitutional right to counsel was a double-edged sword. The very reason African Americans received appointed counsel in particular cases also justified special scrutiny of African Americans in general by the criminal justice system.

Gideon itself, a case involving a white petitioner, was not decided in those terms. The Court in that case recognized the importance of counsel for any layperson, regardless of intelligence and education. Yet, *Gideon* was a race case, in that *Gideon* and the Court's other criminal procedure cases of the era were concerned with institutional racism.[5] But it was also, quite clearly, an incremental case. Neither *Gideon* nor any of its contemporaries or successors was the *Brown v. Board of Education* of criminal justice, insisting that governments craft a criminal justice "system in which racial discrimination would be eliminated root and branch."[6]

Gideon, by its terms, was designed to remedy wrongful accusations against the innocent, and it was a constructive step in that direction. But it left in place several forms of racial discrimination in the criminal justice system. And it was

5. *See, e.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 8 n.56 (2011) ("[F]ailure to provide adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black." (quoting Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 83 (1995))); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998) ("Law enforcement was a key instrument of racial repression, in both the North and the South, before the 1960s civil rights revolution. Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid."); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 86 ("[T]he right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics."); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) ("[C]riminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

6. Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 438 (1968) (describing the duty of school boards to eliminate segregation).

decided in the context of a criminal justice system much smaller than the one which now exists.[7]

The critical problem of the criminal justice system now, and the one that particularly burdens African Americans, is not the wrongful conviction of the innocent, as important as it is to remedy that injustice.[8] The problem is a lack of fairness in deciding what to criminalize and how to enforce those prohibitions.[9] Most criminal defendants affected by the war on drugs, other forms of overcriminalization, and mandatory minimums and other harsh sentences are, as far as can be known, guilty, and thus cannot, at least systematically, be exonerated even by excellent counsel. But convictions of the guilty selected for punishment because of race are not the kinds of judgments *Gideon* was designed to prevent, and under the Court's decisions, they are not injustices which counsel can normally address.

Ironically, the wide availability of counsel may make racial disproportionality worse. Because whites are relatively more affluent than people of other races, and because they experience less intergenerational poverty and economic segregation, defense counsel may be able to get white defendants and their families to do things that encourage favorable exercises of discretion in the processing and disposition of criminal cases. In contrast, African-American defendants often lack family or community resources or demographic characteristics that engender sympathy from judges and prosecutors and which can be employed by energetic counsel. As a result, more widely available, high-quality counsel may exacerbate existing racial discrimination and disadvantage by operationalizing them in court.

7. There were 74,852 commitments to state or federal prison in 1960 and more than three times that by 1987. *Prisoners in 1988*, BUREAU OF JUST. STAT. 7 (1989), http://bjs.ojp.usdoj.gov/content/pub/pdf/p88.pdf.

8. *See, e.g.*, Andrew Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091 (2008) (suggesting that race sometimes contributes to the conviction of innocent defendants).

9. A critical premise of this Essay is that the racial disparity among people with convictions is, at least in part, based on invidious conscious and unconscious racial discrimination in social and individual decisions about who and what to criminalize, investigate, and prosecute, and how much to punish. Formally race-neutral decisions about these issues exacerbate the disparity and are made possible by the unfair distribution of political power, itself a product of, among other things, the historical and contemporary suppression of African-American votes.

I. THE RISE OF THE RIGHT TO COUNSEL

A. Help for the "Ignorant Negro"

In the pre-*Gideon* era, the price of due process was racial denigration. Courts granting relief, including the Supreme Court, often described defendants as "ignorant negroes."[10] In *Walton v. State*,[11] the Texas Court of Criminal Appeals set aside a defendant's guilty plea for unlawfully transporting liquor, noting that the defendant "was an ignorant, illiterate negro, not versed in the law, and did not know his legal rights."[12] In another case, *Griffin v.*

10. *E.g.*, Reece v. Georgia, 350 U.S. 85, 89 (1955) (describing the defendant as a "semi-illiterate negro of low mentality"); Ward v. Texas, 316 U.S. 547, 555 (1942) (recounting the interrogation of an "ignorant negro"); Chambers v. Florida, 309 U.S. 227, 238 (1940) (describing the interrogation of "ignorant young colored tenant farmers"); Brown v. Mississippi, 297 U.S. 278, 281 (1936) (describing involuntary confessions to "[t]he crime with which these defendants, all ignorant negroes," were charged (quoting Brown v. State, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting))); *see also* McIntire v. Pryor, 173 U.S. 38, 53 (1899) (finding no laches in part because "the plaintiff is an ignorant colored woman"). *But cf.* Moore v. Dempsey, 261 U.S. 86, 102 (1923) (McReynolds, J., dissenting) ("The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system."). While these cases often granted relief, the racist paternalism was part of a system of racial oppression that often simultaneously praised itself for evenhandedness while segregating society by law. *See, e.g.*, Henry v. State, 119 P. 278, 279 (Okla. Crim. App. 1911) ("[A]lthough it is true that appellant is only a poor, ignorant negro, and is dependent upon the charity of his attorneys for his defense, yet he is entitled to and will receive at the hands of this court the same consideration as though he were the wealthiest and most influential man in the state."); *cf.* Anthony V. Alfieri, Gideon *in White*/Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1468 (2005) (explaining "the meaning of 'Negro' color" in legal contexts).

11. 163 S.W.2d 203 (Tex. Crim. App. 1942).

12. *Id.* at 204; *see also* Daniels v. State, 140 So. 724, 724 (Miss. 1932) (setting aside a guilty plea based on the allegation that the defendant "is an ignorant colored girl, and did not then know the meaning of said plea"); Williams v. State, 245 S.W. 918, 919 (Tex. Crim. App. 1922) ("This is only a misdemeanor case, the accused is only an ignorant negro and the penalty only a $25 fine, but the gravity of an infringement of the guaranteed right by the Constitution to be represented by counsel . . . appeals to us very strongly upon more mature consideration of this record."). Lack of "ignorance" was sometimes a factor cutting the other way. *See* Shores v. United States, 80 F.2d 942, 946 (9th Cir. 1935) ("In the case at bar, we have the following distinctions: First, the appellant was not ignorant or illiterate."). A court's conclusion that a case involved the rights of "ignorant negroes" sometimes contributed to a finding in the defendant's favor. *See, e.g.*, Polk v. State, 94 S.W.2d 394, 396 (Tenn. 1936) ("It was of no aid whatever that the sheriff told his prisoners that they could make a statement which could be used against them. This probably caused these ignorant negroes to believe that they were being called upon by the sheriff to make a statement."); Fisher v. State, 110 So. 361, 363 (Miss. 1926) (noting the appropriateness of suppression

State,[13] the Mississippi Supreme Court granted a defendant relief because "[t]his ignorant negro boy had no counsel to represent him at the trial. He introduced no evidence, nor did he testify in his own behalf, but sat in silence throughout the trial."[14]

The self-congratulatory and patronizing implications of these cases were, first, that the problem was African-American ignorance and second, that the problem could be remedied with a lawyer.[15] Both implications were false. Walton and Griffin, for example, had potential defenses, but both defenses were quite technical and could have been missed by even a shrewd and well-educated nonlawyer. If Walton had been transporting liquor for his own use, there was no violation of the statute;[16] because the defendant in the Mississippi case worked where the larceny occurred, there was a question about the "breaking and entering" element of the crime.[17] Their need for lawyers did not stem from their supposed racial ignorance, for even knowledgeable defendants might have missed these fine points of law.

In addition, appointing lawyers would not necessarily have remedied the racism African-American defendants experienced in courtrooms north and south. In *State v. Floyd*,[18] a rape case, the South Carolina Supreme Court affirmed a capital sentence, noting the "horror at even the thought of a white woman being subjected to the embraces of a negro brute."[19] Not surprisingly, what a dissent suggested was "largely perfunctory"[20] representation by

where "an ignorant negro boy was arrested, brought to the scene of a horrible murder, and after he was released by the authorities fell into the hands of infuriated citizens, who took him into a store building where the bloody corpse lay and a crowd of armed men were assembled, to obtain a confession"); State v. Vaughan, 71 S.E. 1089, 1089 (N.C. 1911) (granting a new trial where the defendant was questioned by the judge without being warned of his right to remain silent, noting that "[t]he defendant is a young, ignorant negro, and was not represented by counsel before the justice."); Berry v. State, 125 S.W. 580, 581 (Tex. Crim. App. 1910) (holding that, where the defendant was "shown to be a very ignorant negro, half-witted and, as some of the witnesses say, was known under the nickname of 'Crazy John,'" the trial court should have instructed the jury to consider the validity of his statement).

13. 71 So. 572 (Miss. 1916).

14. *Id.* at 573.

15. Or, perhaps, that fair treatment of African Americans in particular was only possible when accompanied by explicit acknowledgment of the overall racial regime.

16. *Walton*, 163 S.W.2d at 204.

17. *Griffin*, 71 So. at 573.

18. 177 S.E. 375 (S.C. 1934).

19. *Id.* at 386.

20. *Id.* at 394 (Cothran, J., dissenting).

appointed counsel at trial failed to prevent conviction, even though several justices insisted, based on the evidence, that the defendant might be innocent.[21]

Even the best possible representation was likely to be insufficient to obtain fair treatment of people perceived as "brute[s]."[22] The major pre-*Gideon* development in right-to-counsel jurisprudence was *Powell v. Alabama*,[23] the 1932 case involving the Scottsboro Boys. The Court held that due process of law generally requires the assistance of counsel in capital cases.[24] Consistent with the decisions recounted above, the Court was concerned with the defendants' intelligence. Failure to appoint counsel was a denial of due process, the Court explained, because of "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, . . . the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives."[25]

And yet, the subsequent history of the Scottsboro defendants makes clear that counsel was no solution. After the victory in the Supreme Court, the defendants were retried while being represented by the celebrated Samuel Leibowitz, "one of the nation's leading criminal defense lawyers."[26] "The jury took just five minutes to convict,"[27] and the defendants were sentenced again to death. After the trial judge granted a new trial, two of the men were tried a third time and again condemned.[28] Although they avoided execution and were ultimately released—some after decades—their lives were saved as much by international notoriety as by the good works of counsel.

A number of obstacles blocked even the most capable and zealous counsel. Thurgood Marshall was arguably the greatest lawyer of the twentieth century,

21. *Id.* at 393 (Bonham, J., dissenting) ("The state has all the resources of the law, and the services of learned and able counsel. The defendant is an ignorant, illiterate, and apparently penniless negro; too poor to employ counsel, and who was defended by counsel appointed by the court. The failure to produce this evidence, if it existed, raises the presumption that it did not exist, and that presumption raises a very reasonable doubt of the guilt of the accused."); *see also id.* (finding "grave doubt of the guilt of the accused").

22. *Id.* at 386.

23. 287 U.S. 45 (1932).

24. *Id.* at 68-71; *see also* Hamilton v. Alabama, 368 U.S. 52 (1961) (interpreting and applying *Powell*).

25. *Powell*, 287 U.S. at 71. Although the *Powell* Court did not use the phrase "ignorant negro," in *Betts v. Brady*, the Court described *Powell* as involving "ignorant and friendless negro youths." 316 U.S. 455, 463 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

26. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 399 (2009).

27. *Id.* at 402.

28. *Id.* at 403-06.

yet "the legal and social setting" limited his ability and the ability of other NAACP attorneys to take advantage of the law.[29] One problem was the credibility given to white witnesses and denied to African Americans and other witnesses of color. When a white witness testified, "in Southern courtrooms, no matter how incredible the testimony was, juries and judges accepted it."[30] This phenomenon is reflected in the many statements in appellate cases offering special credit to white witnesses[31] or denying credibility to African Americans.[32] Again, individual litigants of color sometimes won, but often at the cost of reinforcing the rationale for racial discrimination in general.

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29. MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 56 (1994).

30. *Id.* at 66.

31. *See, e.g.*, Woods v. State, 44 So.2d 771, 772 (Ala. App. 1950) (reversing a conviction because "[t]he evidence disclosed that the defendant is a Negro man and over the age of 61 years, and had been living in that community for a long number of years," and a "large number of white witnesses who had known him for more than 30 years testified that he was a man of good character"); Ming v. State, 103 So. 618, 618 (Fla. 1925) (reversing the murder conviction of a "negro" in part based on "uncontradicted testimony by three witnesses, one a white man" that the decedent was the aggressor and by "Mr. Vickers, a white witness," that another prosecution witness lied); Duke v. State, 76 S.E. 599, 600 (Ga. App. 1912) (reversing a theft conviction where the defendant "proved by a white witness" the legitimate source of otherwise suspicious currency); Howard v. State, 199 P.2d 240, 242 (Okl. Crim. App. 1948) (reversing a manslaughter conviction where "[a]ll of the witnesses, [the defendant and two others], all colored, and Mr. Joe Kimpton, white . . . testified in substance" to facts showing that the fatal accident would have occurred despite the defendant's speeding); Williams v. State, 83 S.W.2d 337, 337 (Tex. Crim. App. 1935) (reversing a forgery conviction and stating that "[a]ppellant is an ignorant colored woman, who proved an unusually good reputation by white witnesses"); Teals v. State, 75 S.W.2d 678, 678-79 (Tex. Crim. App. 1934) (reversing the conviction of "[a]ppellant, who is a negro," for the murder of "J.N. Stallings, who was a white man," where "[t]he uncontroverted testimony of several white witnesses was to the effect that appellant's general reputation as a peaceable and law-abiding citizen was good"); Johnson v. Commonwealth, 101 S.E. 341, 343 (Va. 1919) ("In *State v. Townsend*, 7 Wash. 462, 35 Pac. 367, all of the witnesses at the trial were Indians; but after the trial a white witness to the same facts was discovered, and a new trial was awarded. A similar situation may at any time arise where all the witnesses to a material fact were ignorant and illiterate, and a witness of intelligence and character to the same fact is subsequently discovered.").

32. *See, e.g.*, Lee v. State, 94 So. 889, 889 (Miss. 1923) (reversing a murder conviction and noting that "[a]s to what happened at the scene of the shooting, the state offered the testimony of only one witness, a negro woman at whose house the killing occurred"). *But see* Baker v. Commonwealth, 254 S.W. 887, 887 (Ky. App. 1923) ("It is argued that the jury were necessarily influenced by prejudice or bias in accepting the testimony of a single negro rather than that of the three white witnesses for the defense, but to this we cannot agree. . . . [M]anifestly the color of the witnesses cannot alter the rule [that the jury is the finder of fact].").

Substantive criminal law presented another difficulty. As one example, vagrancy laws were an important tool of racial oppression and were not definitively limited until the late 1960s.[33] Justice Frankfurter explained that in their drafting, "[d]efiniteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[34] The Court considered, but found itself unable to invalidate, convictions for being "found in *or near* any structure, movable, vessel, or private grounds, without being able to account for their lawful presence therein";[35] being a "dissolute person";[36] and "leading an immoral or profligate life [with] no lawful employment and . . . no lawful means of support realized from a lawful occupation or source."[37] (The Court did reverse a conviction for "wandering or strolling around from place to place without any lawful purpose or object," because the record showed that the defendant was sitting.[38]) For many of these offenses, no bias on the part of judges or juries or inadequacy of counsel was necessary to convict, because any person charged could reasonably be found guilty of, say, being near a building or property without a satisfactory excuse. In many parts of the South, convicting African Americans on vague evidence of vague charges was a profit center for both local governments and local businesses.[39]

Although recourse could be had to the Supreme Court, successful review was often impossible because of the Court's deference to state court factfinding.[40] Once the Court's groundbreaking criminal procedure cases clarified the facts that would lead courts to invalidate jury-selection procedures

33. *See* T. Leigh Anenson, Note, *Another Casualty of the War . . . Vagrancy Laws Target the Fourth Amendment*, 26 AKRON L. REV. 493 (1993) (discussing the Supreme Court's restrictions on vagrancy statutes).

34. Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting); *see also* Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L. L. REV. 361, 375-77 (2009) (describing broad and vague vagrancy laws in Louisiana).

35. Arceneaux v. Louisiana, 376 U.S. 336, 336 n.1 (1964) (per curiam) (emphasis added) (dismissing certiorari for lack of jurisdiction).

36. Edelman v. California, 344 U.S. 357, 358 (1953) (dismissing certiorari as improvidently granted).

37. Hicks v. District of Columbia, 383 U.S. 252, 253-54 (1966) (Douglas, J., dissenting from dismissal of certiorari as improvidently granted).

38. Johnson v. Florida, 391 U.S. 596 (1968) (per curiam).

39. Chin, *supra* note 34, at 372-79.

40. *See* Claudine Friedman Siegel, Note, *Supreme Court Review of Fact Finding by State Courts*, 34 N.Y.U. L. REV. 1118 (1959).

or interrogation techniques,[41] judges, prosecutors, and police knew what would be helpful to have in the record.[42] In sum, as Michael J. Klarman explains, "even the most earnest advocacy rarely could influence case outcomes when the system was so pervasively stacked against fair adjudication of the legal claims of black defendants."[43]

B. Two Notes from Gideon*'s Trumpet*

Like many cases involving African-American rights, *Gideon* came out of the South. But Clarence Gideon was white.[44] The NAACP Legal Defense and Education Fund did not file an amicus brief;[45] the other briefs made relatively few references to race.[46] Thus, *Gideon* was not explicitly or obviously a case about race. Yet, scholars persuasively contend that *Gideon* was part of the Court's response to legal oppression faced by African Americans.[47] *Gideon*, then, did two things: it protected the right to counsel for the right's own sake,

41. *See* Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986); Brown v. Mississippi, 297 U.S. 278 (1936).

42. TUSHNET, *supra* note 29, at 57 ("The police did not stop using those tactics; instead, having been told that they could not use the third degree, the police began to deny that the confessions they obtained resulted from improper tactics.").

43. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 80 (2000).

44. Abe Fortas, his appointed Supreme Court counsel, wondered if Gideon was African American. Alfieri, *supra* note 10, at 1468.

45. It filed in two other cases that Term. Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, Fields v. City of Fairfield, 375 U.S. 248 (1963) (No. 1962-30) (a case in which the Court reversed a criminal contempt conviction for distributing leaflets); Brief of the American Jewish Congress, American Civil Liberties Union, and NAACP Legal Defense and Educational Fund, Inc., as Amici Curiae, Colo. Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714, 1963 WL 106161 (1963) (No. 1962-146) (a case in which the Court held that a state antidiscrimination statute was not invalid as applied to an interstate air carrier). Perhaps the Fund thought *Gideon* was a certain win which did not require their intervention.

46. *See* Brief for the State Government Amici Curiae at 6, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 1962-155), 1962 WL 115122 (mentioning race only when citing cases where the Supreme Court found denial of the right to counsel to an "ignorant Indian," Rice v. Olson, 324 U.S. 786 (1945), and an "ignorant, inexperienced Negro," McNeal v. Culver, 365 U.S. 109 (1961), among others); Brief of the American Civil Liberties Union and the Florida Civil Liberties Union, Amici Curiae at 9, *Gideon*, 372 U.S. 335, 1962 WL 115121 (mentioning a particular race only when discussing *Moore v. Michigan*, 355 U.S. 155 (1957), which involved "a 17 year old negro with a [seventh-]grade education and possible mental defects").

47. *See supra* note 5.

and it protected the right to counsel because the Court wanted to ameliorate discrimination faced by African Americans.

Gideon, quoting *Powell*, offered a fairly specific vision of the role of counsel. *Gideon* held that counsel was necessary in all felony cases for the following reasons:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[48]

The Court's vision, clearly, was that counsel would protect defendants who were innocent. The questions of evidence, identifying and advancing a "perfect" defense, and preventing someone who was "not guilty" from being convicted because "he does not know how to establish his innocence" all implied that counsel would stand in the way of wrongful conviction.

To the extent that this was *Gideon*'s goal, there is much positive to say about its legacy. *Gideon* is an early member of a long line of cases enhancing defendants' ability to prove innocence at trial, including cases granting the right to exculpatory evidence,[49] to expert witnesses,[50] and to a range of procedural protections at trial.[51] While efforts like those of the Warren and

48. 372 U.S. at 345 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)); *see also* Chandler v. Fretag, 348 U.S. 3, 9-10 (1954) (quoting the same passage from *Powell*); *cf.* Carnley v. Cochran, 369 U.S. 506, 521-24 (1962) (Douglas, J., concurring) (describing the necessity of counsel to assist with the intricacies of trial).

49. *See* Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

50. *See* Ake v. Oklahoma, 470 U.S. 68 (1985); *see also* Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert Assistance*, 60 OKLA. L. REV. 283 (2007).

51. Virtually every word of the Sixth Amendment has been held applicable to the states, mostly since *Gideon*. *See* Duncan v. Louisiana, 391 U.S. 145, 145 (1968) ("jury"); Washington v. Texas, 388 U.S. 14, 14 (1967) ("compulsory process to obtain witnesses in his favor"); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) ("speedy trial"); Pointer v. Texas, 380 U.S. 400, 405-06 (1965) ("confronted with witnesses against him"); Turner v. Louisiana, 379 U.S. 466, 466 (1965) ("impartial"); *In re* Oliver, 333 U.S. 257, 273 (1948) ("public trial");

Burger Courts to regulate the police have long since tapered off, the Court continues to enhance the formalities of the trial process in ways that advantage defendants.[52]

Access to counsel for the poor has improved since 1963. While many counsel are now overworked and underpaid, before *Gideon*, many defense counsel were not paid at all.[53] And if many public defenders and appointed counsel are inadequate, others provide excellent representation.[54]

While too many innocent people are convicted of crimes, the percentage of wrongful convictions is likely in the low single digits.[55] It is also probable that the system's overall accuracy is increasing over time. As part of the "Innocence Revolution,"[56] scholars, defense attorneys, progressive law enforcement officials, and legislatures have challenged and improved flawed investigation

Hodgson v. Vermont, 168 U.S. 262, 269 (1897) ("informed of the nature and cause of the accusation against him"). The Court has recognized the right to counter prosecution evidence, Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam) (reversing a conviction due to the lower court's refusal to allow the presentation of impeachment evidence), and to present evidence supporting a defense, Holmes v. South Carolina, 547 U.S. 319 (2006) (invalidating a rule limiting defense efforts to show that a third party committed the charged crime); Crane v. Kentucky, 476 U.S. 683 (1986) (finding unconstitutional a state rule prohibiting the defendant from challenging at trial the validity of a statement found voluntary at a pretrial hearing).

52. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005) (holding it unconstitutional to allow sentences to be enhanced based on facts not found by juries); Crawford v. Washington, 541 U.S. 36 (2004) (prohibiting the admission, without the opportunity for cross-examination, of out-of-court testimonial statements made to police by a hearsay declarant).

53. Charles S. Potts, *Right to Counsel in Criminal Cases: Legal Aid or Public Defender*, 28 TEX. L. REV. 491, 505 (1950) (noting that a 1936 survey "showed that nineteen states had made no provision whatever for paying assigned counsel" and that "[i]n most of the remaining states the pay provided by law was only nominal"); Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 579 (1963) (noting that federal indigent representation was then uncompensated).

54. *See infra* notes 74-75.

55. If it were possible to determine who was actually guilty, there would be no criminal justice system. Pleas and trials exist because truth cannot be discovered with certainty. Accordingly, hard numbers on wrongful convictions are difficult to come by. Nevertheless, there are some thoughtful estimates. *See, e.g.*, Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. LAW & CRIMINOLOGY 761, 780 (2007) (estimating a 3.3% to 5% error rate in 1980s capital murder prosecutions); Marvin Zalman, *Quantitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM L. BULL. 221, 245-46 (2012) (estimating the innocence rate at between 0.5% and 1%).

56. Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623, 623 (2007) (describing the "'Innocence Revolution,' in which hundreds of Americans imprisoned or on death row for serious crimes . . . have been conclusively proven innocent and released").

techniques[57] including problems with eyewitness identification procedures,[58] fingerprint analysis,[59] false confessions,[60] interviews of children,[61] and unsound expert testimony.[62] As Darryl K. Brown has written, police, prosecutors, courts, and legislatures now "supplement weak defense counsel in the task of improving evidence reliability" and in some ways "these reforms have advantages over adversarial lawyering," because even defendants with weak attorneys benefit from sound general policies.[63]

Charging procedures may also increase accuracy. Crime rates have increased substantially since *Gideon*, although there has been a decline in recent years.[64] Only a fraction of prosecutable cases coming to the attention of

57. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

58. Nancy K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 LAW & HUM. BEHAV. 262 (2011).

59. Jacqueline McMurtrie, *Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification After the NAS Report*, 2010 UTAH L. REV. 267; Elizabeth J. Reese, Comment, *Techniques for Mitigating Cognitive Biases in Fingerprint Identification*, 59 UCLA L. REV. 1252 (2012).

60. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479; Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL'Y 400 (2012).

61. Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways To Facilitate Child Testimony*, 16 WIDENER L. REV. 239 (2010); Orly Bertel, Note, *Let's Go to the Videotape: Why the Forensic Interviews of Children in Child Protective Cases Should Be Video Recorded*, 50 FAM. CT. REV. 344 (2012).

62. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009).

63. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1591 (2005). Similarly, legal principles established by excellent, well-resourced attorneys may redound to the benefit of future defendants with inadequate attorneys. *See* Nancy Leong, Gideon*'s Law-Protective Function*, 122 YALE L.J. 2460 (2013).

64. The Federal Bureau of Investigation offers an online tool that allows users to compare certain crime statistics published annually via its Uniform Crime Reporting Program. The violent crime rate in the United States was 168.2 per 100,000 people in 1963, and the property crime rate was 2,012.1 per 100,000. In 1991, the violent crime rate peaked at 758.2. The property crime rate peaked at 5,353.3 in 1980. *Reported Crime by Locality (City, County), State, and Nation*, FED. BUREAU OF INVESTIGATION, http://www.ucrdatatool.gov/Search/Crime/Crime.cfm (last visited Apr. 8, 2013) (follow "All States and U.S. Total" hyperlink; select table type "State by state and national estimates"; select "United States-Total" for Box A and "Violent crime rates" and "Property crime rates" for Box B; then follow "Get Table" hyperlink). In 2011, the violent crime rate had declined to 386.3 per 100,000 people and the property crime rate to 2,908.7. *Crime in the United States 2011: Table 1*, FED. BUREAU OF

prosecutors are charged.[65] To the extent that prosecutors prefer cases with solid evidence to those where there is doubt about guilt, they have more of the former to choose from. Thus, as the late William Stuntz argued,

> the likelihood that innocents are being convicted may be lower than it was in the days when there was much less crime—a high ratio of crimes to prosecutors is the best protection for innocent defendants because it allows for more selectivity; it tends to keep prosecutors from casting their net too broadly.[66]

The rise of plea bargaining complicates this story.[67] *Gideon* rests on a model of decision by trial, but almost all prosecutions are resolved through pleas.[68] An innocent defendant offered a substantial discount for pleading guilty faces a dilemma no matter how good counsel is.[69] Nevertheless, to the extent that the

INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1 (last visited Apr. 8, 2013).

65. For example, in May 2006, charges against thirty-one of 100 defendants arraigned for a felony in state court were dismissed, diverted, or deferred, terminating the prosecution without a conviction. Thomas H. Cohen & Tracey Kyckelhahn, *State Court Processing Statistics, 2006: Felony Defendants in Large Urban Counties, 2006*, BUREAU OF JUST. STAT. 11 tbl.11 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf; *see also, e.g.*, Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 79-80 nn.39-40 (2005) (citing a federal declination rate for regulatory crimes of at least 62%); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 152 (2008) (stating that the declination rate for battery in New Orleans is in the range of 42% to 54%, except for battery on police officer, for which the declination rate is 27%); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 71 fig.1 (2002) (showing that of 239,500 cases recommended for prosecution by police in New Orleans, 39% were declined and 15% diverted or referred, while the court or prosecution dismissed 13% of the cases that were filed).

66. Stuntz, *supra* note 5, at 45.

67. *See, e.g.*, George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

68. Cohen & Kyckelhahn, *supra* note 65, at 10 (noting that 95% of convictions resulted from pleas in 2006); *Overview of Federal Criminal Cases: Fiscal Year 2011*, U.S. SENT'G COMMISSION 3 (Sept. 2012), http://www.fpd-ohn.org/sites/default/files/files/2012October%20Overview%20of%20Federal%20Criminal%20Cases%20FY%202011.pdf (stating that 96% of convictions are obtained through guilty pleas).

69. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425 (2004); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 132 (2005) (noting that defense attorneys, judges, academics, and journalists have observed that possible penalties after trial can make a guilty plea irresistible); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (discussing the structural distortions and psychological pitfalls of plea bargaining). Similarly, an innocent defendant may fear that the risk of racial discrimination at trial cannot be avoided even with good counsel and therefore may be tempted to plead guilty. *See* Margaret Z. Johns, *Unsupportable and Unjustified: A*

Court intended *Gideon* to protect the innocent, it has proven at least partially successful in generating favorable constitutional law, increased access to counsel in many contexts, and improved operation and outcomes in the criminal justice system.

To the extent that *Gideon* was intended to promote racial equality, however, it has failed. Since *Gideon*, the racial disproportionality of the prison population has only increased. Thirty-two percent of those admitted to state or federal prison in 1960 were African American, 39% in 1970, 41% in 1980,[70] 44.5% in 1990, and 46.2% in 2000,[71] with a drop to 42.6% in 2009.[72] While *Gideon* is insufficiently honored,[73] the problem is not simply that the right to counsel is illusory in practice. Racial disproportionality results even with well-resourced counsel. For example, many informed observers suggest that as a group, federal public defenders are effective.[74] Their results are similar to those obtained by private counsel and counsel appointed under the Criminal Justice Act, suggesting that federal representation is generally solid.[75] Yet, the federal

Critique of Absolute Prosecutorial Immunity, 80 FORDHAM L. REV. 509, 516 n.65 (2011) (citing several sources suggesting that racial minorities may be particularly subject to wrongful conviction).

70. Patrick A. Langan, *Race of Prisoners Admitted to State and Federal Institutions, 1926-86*, BUREAU OF JUST. STAT. 5 (May 1991), https://www.ncjrs.gov/pdffiles1/nij/125618.pdf.

71. Allen J. Beck & Paige M. Harrison, *Prisoners in 2000*, BUREAU OF JUST. STAT. 11 (Aug. 2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/p00.pdf.

72. *See* Paul Guerino, Paige M. Harrison & William Sabol, *Prisoners in 2010*, BUREAU OF JUST. STAT. app. at 28, tbl.16B (rev. Feb. 2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (estimating 582,100 African-American inmates out of 1,365,800 total inmates).

73. *See supra* note 2.

74. *See, e.g.*, Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 685 n.11 (2010) ("Most federal public defenders have reasonable caseloads and provide their clients with good representation."); Inga L. Parsons, *"Making It a Federal Case": A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 839 n.7 (discussing a review committee's finding that "the overall level of representation provided by federal defender organizations—including federal public defenders and community defense organizations—was 'excellent'"); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 341-42 (2011) (discussing evidence suggesting that federal public defenders achieve better outcomes than other lawyers).

75. *See* Etienne, *supra* note 69, at 478 ("Federal courts routinely appoint attorneys for federal indigent defendants who are highly qualified and well trained."). In 2009, private (93.6%) and appointed counsel (93.8%) had marginally lower conviction rates than federal public defenders (FPDs) (94%), but higher sentences overall (52.1 months for FPDs, 59 months for private counsel, and 62.4 months for assigned counsel). Mark Motivans, *Federal Justice Statistics, 2009*, BUREAU OF JUST. STAT. 9 tbl.7 (Dec. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf. Private counsel (72.9%) had a lower rate of sentences of imprisonment than FPDs (79%), while assigned counsel had a marginally higher rate (79.7%). *Id.*

prison system, like that of the states, has substantial racial disproportionality—Native Americans are approximately 0.9 percent of the population, but 1.8% of federal prison inmates; people of Latino or Hispanic ethnicity are 16.3% of the population, but 34.9% of prisoners; and African Americans account for 37.2% of prisoners, even though they are only 12.6% of the general population.[76] Good counsel alone has not remedied the problem.

One reason for this is that the Court has not been as vigorous in attacking racial discrimination as it has been in protecting the innocent at trial. For example, after *Gideon*, a series of cases failed to curtail racial discrimination in jury selection.[77] Most troublingly, in the 1965 case of *Swain v. Alabama*,[78] the Court upheld the use of race-based preemptory challenges by the prosecution in criminal cases.[79] While *Swain* was overruled in 1986,[80] the Court has never made it an overriding priority to eliminate discrimination in the criminal justice system the way it has in other areas.[81] Thus, the Court does not prohibit

76. Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU 4 (Mar. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf; *Quick Facts*, FED. BUREAU OF PRISONS, http://www.bop.gov/news/quick.jsp#1 (last updated Feb. 23, 2013).

77. Carter v. Jury Comm'n of Greene Cnty., 396 U.S. 320 (1970) (finding constitutional a state statute that allowed jury commissioners to select for jury service based on vague standards, such as intelligence and good character, even though it arguably left "commissioners free to give effect to their belief that Negroes [we]re generally inferior to white people and so less likely to measure up to the statutory requirements"); *see also* Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976) ("Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required [on the facts of the case], the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."); Donaldson v. California, 404 U.S. 968 (1971) (Douglas, J., dissenting from denial of certiorari) ("The Court today denies certiorari to a black man who stands convicted by an all-white jury which had been selected through a process which petitioner alleges methodically excluded members of minority racial groups. The most pernicious of the practices used to exclude black and Chicano jurors was what purported to be an intelligence test which, because of its cultural bias and its blatant unreliability, excluded nearly 50% of the otherwise qualified prospective jurors from minority groups.").

78. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

79. *Id.* at 221 ("[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause.").

80. *Batson*, 476 U.S. 79.

81. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (stating in a school integration case that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437-38 (1968) (describing the duty of school boards to eliminate segregation and create a "unitary system in which racial discrimination would be eliminated root and branch").

under the Fourth Amendment the use of race as a factor in investigations, searches, and seizures[82] and makes it practically impossible for defendants to prove unconstitutional discrimination in legislative criminalization,[83] charging by prosecutors,[84] or sentencing by judges.[85]

The success of one branch of *Gideon* and the failure of the other can be reconciled if most of the racial minorities who are disproportionately caught up in the system are guilty. This conclusion requires no belief that one race is more inclined to commit crime than any other. Because of the breadth of modern criminal law, most people are guilty of something for which they can be prosecuted. As Louis Schwartz, coreporter of the Model Penal Code, put it:

> The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses. . . . 100% law enforcement would not leave enough people at large to build and man the prisons in which the rest of us would reside.[86]

Gideon, then, had flaws similar to *Powell*. Both offered assistance of counsel but without even in principle proposing the wholesale elimination of discrimination in the criminal justice system. Both focused on innocent defendants without addressing the reality that many people the constitutional

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82. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (noting that *Whren v. United States*, 517 U.S. 806 (1996), holds that race-based searches are not "unreasonable" under the Fourth Amendment and that *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), allows race to be used as a factor in investigations of immigration offenses); *see also* ALEXANDER, *supra* note 1, at 108-19 (tracing precedents on the use of race in investigation, prosecution, and sentencing); Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1181 (2012) ("*Whren* emblematizes the Court's refusal to use the Fourth Amendment to regulate race-based stops . . . ."); Stuntz, *supra* note 5, at 50 ("[T]he law of criminal procedure . . . cannot stop discrimination.").

83. *Cf.* United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (reversing the district court's invalidation of a one-hundred-to-one sentencing disparity between crack and powder cocaine, though the district court relied in part on the history of the racialized criminalization of drugs), *cert. denied*, 513 U.S. 1182 (1995).

84. United States v. Armstrong, 517 U.S. 456 (1996); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266-67, 271-72 (2002) (discussing the difficulty of proving unconstitutional selective prosecution).

85. McCleskey v. Kemp, 481 U.S. 279 (1987).

86. Louis B. Schwartz, *On Current Proposals To Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 157 (1954).

doctrines were designed to benefit were guilty because they had been targeted by broad criminal statutes that sometimes rested on racial bias. Both cases, in short, began with the disadvantage of being designed to mitigate pervasive racial discrimination but attempting to do so without directly attacking it. Accordingly, it is hardly surprising that they failed.

II. THE BURDEN OF *GIDEON*

The *Powell v. Alabama* version of the right to counsel was a mixed blessing for African Americans because of its foundation in racism. Although *Gideon* did not incorporate ideas of racial inferiority, it nevertheless may have contributed to the increase in racial disproportionality by facilitating discrimination in the discretionary disposition of criminal cases.

With respect to some objections to unfairness in the criminal justice system, there is little counsel can do. Ordinarily, it is impossible for a lawyer in a criminal case to attack the war on drugs or other broad government policies or priorities. It is difficult for counsel to remedy the conscious or unconscious racism that some judges, prosecutors, and jurors may possess.[87] And *Gideon* makes no sense unless defense lawyers can sometimes make a difference in the outcome of a case.

The position of African Americans deteriorates relative to whites during the period when they are entitled to be represented by appointed counsel, that is, after they are arrested and charged and before they are sent to prison or put on probation. Evaluation of data[88] from 1979,[89] 1991,[90] and 2000[91] shows that the percentage of African Americans imprisoned for drug crimes was substantially higher than their share of arrests. In 2006, 35.1% of those arrested for drug

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

88. The method was developed by Professor Alfred Blumstein. *See* Brett E. Garland, Cassia Spohn & Eric J. Wodahl, *Racial Disproportionality in the American Prison Population: Using the Blumstein Method To Address the Critical Race and Justice Issue of the 21st Century*, JUST. POL'Y J., Fall 2008, http://www.cjcj.org/uploads/cjcj/documents/racial_disproportionality.pdf.

89. Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1275 (1982).

90. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993).

91. Chin, *supra* note 84, at 266.

offenses in the states were African American,[92] but African Americans made up 44% of those convicted.[93] Sixty-one percent of whites convicted of drug offenses were sentenced to prison, compared to 70% of African Americans.[94] That is, stage by stage, in the transition from arrest to conviction and from conviction to a sentence of imprisonment, African Americans as a group fare worse than others.[95]

Something in the operation of the criminal justice system works to the disadvantage of African Americans. This is remarkable. It is reasonable to assume that police actions over time are based on knowledge of what prosecutors and judges are likely to do; thus, police should not make arrests that prosecutors or courts will determine are unwarranted in light of the circumstances or evidence. In addition, information about underlying rates of offending offers little to support the belief that whites are more likely than African Americans to be arrested for crimes based on weak evidence.[96] Yet, whites are less likely to be convicted. The favorable treatment they experience cries out for explanation.

One possibility, consistent with the idea that defense lawyers should advocate for their clients and that good advocacy makes a difference, is that lawyers, in good faith, can accomplish things for white clients that they cannot accomplish for minorities. They can do this by exploiting the general social and economic advantages of whites as a class—not exclusively by *sub rosa* appeals to racial or cultural solidarity (although such appeals are possible), but by invoking race-neutral principles largely regarded as legitimate.

Within any particular jurisdiction, *Gideon* offers more or less the same right to representation to all similarly situated defendants regardless of race; it would be unjustifiable to single out one group for preferred treatment.

92. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.4.10.2006 (Kathleen Maguire ed.), http://www.albany.edu/sourcebook/pdf/t4102006.pdf.

93. *Id.* tbl.5.45.2006, http://www.albany.edu/sourcebook/pdf/t5452006.pdf.

94. Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., *Felony Sentences in State Courts, 2006—Statistical Tables*, BUREAU OF JUST. STAT. 19 tbl.3.4 (Dec. 2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

95. A recent working paper attributes some of the racial disparity to prosecutorial charging decisions. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of* United States v. Booker 3, 17-20 (Univ. of Mich. Law Sch. Law & Econ. Research Paper Series, Paper No. 12-021, 2012), http://ssrn.com/abstract=2170148.

96. Chin, *supra* note 84, at 265 (showing that whites represent the largest group of drug offenders in absolute numbers and, for many drugs, by rate of use within a racial population).

Therefore, if one group is systematically better able to take advantage of representation, equal provision of counsel may lead to systematically unequal results.

A glory of the criminal justice system is the day in court—the potential, at least, for each case to be judged on its own merits. As a result, though, there is enormous room for discretion and choice. The National Prosecution Standards,[97] promulgated by the National District Attorneys Association, and the Principles of Federal Prosecution,[98] set forth by the Department of Justice, suggest the breadth of considerations prosecutors use when deciding to whether investigate, charge, plea bargain, or divert a case. Discretionary considerations come into play when a judge determines whether to grant bail,[99] sentence a defendant to probation instead of prison,[100] or impose a particular sentence of imprisonment.

One factor helpful to defendants in all of these contexts is family support. At a bail or sentencing hearing, defense counsel will want family members to appear; at a plea negotiation, it would be helpful for counsel to be able to say that the likelihood of recidivism is lower because there are family members who can help the client. That requires the defendant to have relatives with reliable phone service and transportation and who can afford to take time off from work to come to court.

When they show up, ideally the relatives should own their home or have lived at the same address for a long period of time. Family members willing to take the defendant in should not live in high-crime areas or have criminal records themselves. They should be respectably employed. If the defendant's immediate options are unfavorable, counsel might look for better relatives or friends.

Although the defendant herself is indigent in all cases where counsel has been appointed, it would be helpful if family members could raise even a relatively modest sum for bail or restitution. A defendant granted bail is less

97. NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS §§ 4-1.2 to -1.4 (3d ed. 2009) (factors to consider and not to consider in screening), http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf; *id.* § 4-2.4 (factors to consider in charging); *id.* § 4-3.5 (factors to consider in diversion).

98. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220(A) (1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220 (identifying grounds for commencing or declining prosecution).

99. *E.g.*, 18 U.S.C. § 3142(g) (2006).

100. *E.g.*, State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982).

likely to be sentenced to prison at the end of the case.[101] A defendant who can pay a victim may be able to pay a settlement in lieu of a conviction rather than pay restitution following a conviction.[102] Participation in therapy or drug or alcohol rehabilitation can be persuasive to a judge or prosecutor. A defendant's expressions of remorse or a defendant's parents' credible explanations of family circumstances which evoke empathy can make a difference in how a judge or prosecutor exercises discretion.

All of these considerations are independent of the merits of the case. To be sure, appeals to family support or to the prospects of rehabilitation or restitution are more likely to succeed in less serious cases than in major felony prosecutions. However, even in very serious cases there are often discretionary choices which can make a meaningful difference to a client. For example, for a young person, obtaining a sentence of thirty years instead of natural life is a major victory.

These considerations are formally race-neutral and are, of course, sometimes invoked successfully by African Americans. However, based on the demographic situation of poor African Americans, these factors will generally be less useful to them than to poor whites. Indeed, the factors incorporate and perpetuate past discrimination against African Americans. Poor whites are also poor, but they are less segregated residentially[103] and less likely to experience intergenerational poverty.[104] Whites, therefore, are more likely to have affluent relatives with less criminal history and are less likely to live in what law enforcement would regard as high-crime areas.

Entrepreneurial counsel can make good things happen for clients at several different stages: investigation, arrest, bail, charge, diversion, plea bargaining, trial, and sentencing. A lawyer may ultimately have three bites at the apple: the police, prosecutors, or courts can decide not to pursue a matter or to send it

101. Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1425-26 (2011).

102. *E.g.*, State v. Stalker, 219 P.3d 722 (Wash. Ct. App. 2009).

103. Karen J. Gibson, *Race, Class, and Space: An Examination of Underclass Notions in the Steel and Motor Cities*, *in* AFRICAN AMERICAN URBAN EXPERIENCE: PERSPECTIVES FROM THE COLONIAL PERIOD TO THE PRESENT 187, 204-05 (Joe W. Trotter et al. eds., 2004) (concluding that white poverty is integrated into white middle-class neighborhoods); David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1134 n.113 (2008) ("White poverty is simply not spatially comparable to black poverty in its character and concentrations.").

104. Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1929 n.1 (1990) ("But white poverty generally does not persist from one generation to the next—white people move in and out of poverty in a way that nonwhite poor do not.").

down a more lenient track. Accordingly, it is likely that some significant portion of the attrition of whites between offense and imprisonment is due to the good-faith efforts of counsel.

The resulting racial disproportionality does not merely affect individual clients. It has been said that "the best way to get rid of a bad law is to enforce it."[105] Because white offenders have been more leniently treated after arrest for decades, an evaluation of the full political costs of crime policies has not been necessary. Communities that might have been the most influential in moderating crime policies have been given an inaccurate picture of the criminal justice response and of the characteristics of offenders. At the same time, *Gideon* formally and perhaps more broadly legitimates these racially disparate results because convictions obtained against defendants who had counsel are presumptively valid.[106] In these ways, public defenders' effective advocacy for their clients, ironically, may have prolonged inequitable criminal justice policies, such as the war on drugs, by helping to ensure that "our tough-on-crime policies do not fall equally on the majority."[107]

CONCLUSION

In 1935, an anonymous Columbia Law School student predicted that the Supreme Court's decision condemning racial discrimination in jury selection at the Scottsboro trial would come to naught: "To expect from . . . the present decision any substantial alteration in the unofficial legal status of the negro would be to disregard social realities."[108] The author suggested "that the ultimate remedy of the negro race does not exist within the white dominated governmental institutions" and therefore invited "sober consideration of the efficacy of mere verbal rejection of incidental aspects of evils deep-rooted in a social organization."[109]

105. Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1290 (1961) (quoting State *ex rel.* Skilton v. Miller, 128 N.E.2d 47, 52 (Ohio 1955) (Stewart, J., dissenting)).

106. Daniels v. United States, 532 U.S. 374 (2001); Custis v. United States, 511 U.S. 485 (1994). *See generally* Justin Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482, 2484 (2013) (explaining that compliance with *Gideon* has tended "to dilute other rights, or at least justify limitations on them").

107. David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 466 (2001).

108. Note, *The Scottsboro Case*, 35 COLUM. L. REV. 776, 777 (1935).

109. *Id.* at 778 (citing Herbert Wechsler, Note, 44 YALE L.J. 191 (1934)).

African-American overincarceration results from centuries of discrimination and its concomitant effects on African Americans and whites alike, coupled with choices about enforcement priorities at every level of government. With greater and lesser degrees of enthusiasm, the Justices have suggested that ending discrimination in the criminal justice system would be a good thing, but the Court has never created rules or established principles effectively prohibiting statutes, investigations, prosecutions, or convictions tainted by any degree of racial bias. It is a tall order indeed to expect defense counsel, no matter how dedicated and capable, to combat these large social realities. Racial disparity likely cannot be remedied with more or better lawyers without also having fewer crimes on the books, fewer arrests, and fewer prosecutions.