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Gideon's Law-Protective Function

ABSTRACT. *Gideon v. Wainwright* dramatically affects the rights of indigent defendants by entitling them to representation. But *Gideon* has another systemic consequence as well. In addition to protecting the rights of individual defendants in particular trials, *Gideon* also protects the integrity of the development of the law by ensuring that the legal principles courts articulate are the product of a legitimate adversarial process. While law protection was not an explicit rationale for the outcome in *Gideon*, the decision's reasoning and the surrounding historical context resonate with a concern for the integrity of judicial lawmaking. And an examination of subsequent cases reveals the influence of appointed counsel on the shape of the law. The guarantee of counsel, then, has significant benefits for courts' lawmaking endeavor, and, indeed, these benefits serve as an independently sufficient rationale for the provision of counsel to indigent defendants. This alternative rationale for *Gideon* offers a justification for extending the entitlement to counsel to certain civil contexts that raise concerns similar to those present in the criminal context.

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ESSAY CONTENTS

Gideon v. Wainwright is widely and accurately hailed as a milestone in protecting the rights of individual defendants. Yet *Gideon*'s guarantee of appointed counsel for indigent defendants also serves another purpose. In addition to protecting the rights of individual defendants, it also protects the integrity of the development of the law.

This law-protection function is both conceptually simple and relatively unexamined. If an individual criminal defendant loses an issue within her trial, and the trial court's decision on the issue is appealed and affirmed, that loss of course affects the fate of the individual defendant—often profoundly so. But a loss on a particular issue can have consequences far beyond that individual defendant: appellate courts on direct and collateral review may articulate legal principles that will also govern subsequent defendants in the jurisdiction.

These potentially far-reaching implications of each decision reveal the importance of appointed counsel not only to individual defendants, but also to the development of the law. Law that emerges from a case pitting a pro se defendant against an experienced prosecutor lacks integrity. Such a process fails to provide us with the assurance that the soundness of the resulting legal principle has been tested by the adversarial system. By contrast, the presence of appointed defense counsel assures us that—at a minimum—the legal arguments on either side have been articulated by attorneys trained in the relevant substantive law and procedure, and that the legal principle the court ultimately articulates is informed by their efforts.[1] And appointed counsel also preserves confidence in the judicial system by assuring us that the law that emerges from that system has been subjected to adversarial testing.

Gideon itself does not speak explicitly to these concerns. But, as I will argue, the historical context surrounding the decision reflects a nascent concern not only for the rights of criminal defendants in particular proceedings, but also for the systemic development of the law. And subsequent decisions reveal the importance of *Gideon* not only for individual criminal defendants, but also for the articulation of law more generally. That is, the guarantee of representation in criminal cases significantly benefits the development of the law, and, indeed, these benefits serve as an independently sufficient rationale for providing counsel to indigent defendants. These considerations offer a justification for extending *Gideon* to certain civil contexts.

This Essay proceeds in three Parts. Part I summarizes the idea of law

1. Of course, appointed counsel vary in ability, and so the extent of law protection may be affected by the skill of the particular attorneys involved. *See infra* Section II.C.

protection as it relates to the process of rights-making, which has gained increasing scholarly attention in recent years. Part II examines this rights-making discourse as it relates to *Gideon*. Both the theory permeating *Gideon* and the concrete consequences of the decision indicate that the guarantee of appointed counsel has changed the course of rights-making, ultimately protecting and facilitating the rights-making endeavor. Part III considers the rights-making rationale for *Gideon* as a justification for extending *Gideon* to civil contexts that raise concerns similar to those present in the criminal context.

I. MAKING RIGHTS

In recent decades, both courts and commentators have given increasing attention to the process of law articulation—that is, to the way that law is made. The Supreme Court has stated plainly that adjudication "is the process for the law's elaboration from case to case."[2] Likewise, Owen Fiss has influentially argued that the most important role of courts "is not to resolve disputes, but to give the proper meaning to our public values."[3] And Henry Monaghan concurs that "the process of constitutional adjudication now operates as one in which courts discharge a special function: declaring and enforcing public norms."[4] Such public values and public norms quite naturally include the individual freedoms embodied in our Bill of Rights.

Moreover, both courts and commentators have at times acknowledged not only that courts *do* articulate constitutional rights[5] as they decide cases, but also that courts *should* articulate the scope of constitutional rights—even, in some instances, when doing so is not strictly necessary to resolve the immediate dispute.[6] Rights elaboration is an independent benefit—one sufficiently

2. Saucier v. Katz, 533 U.S. 194, 201 (2001).

3. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

4. Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 279-80 (1984).

5. Here and elsewhere, when I refer to "rights elaboration," "rights articulation," or the process of "making rights," my terminology is intended to refer to the relatively uncontroversial idea that rights are refined and developed through judicial decisions. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 408 n.2 (2012). The terminology is not intended to suggest that rights will necessarily be elaborated so as to favor any particular party. As I will explain, correcting systemic biases against defendants will often mean that the law will be elaborated in a way that is more favorable for defendants, but that result is distinct from the goal of articulating rights in a balanced and accurate fashion.

6. Some term this judicial work product "dicta." *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2005-09 (1994). For my purposes, I believe it unnecessary to parse the

important to justify a doctrinal structure that facilitates it.[7]

In a range of situations, the Court has promoted law articulation by intentionally structuring doctrine to facilitate the development of the law.[8] In dictating the framework under which courts should analyze a defense of qualified immunity, for instance, it has experimented with both requiring and allowing courts to resolve the constitutional merits prior to the immunity question.[9] In delineating the good faith exception to the exclusionary rule, it has held that courts may determine whether a constitutional violation took place prior to the question of whether the officer was acting in good faith.[10] And in harmless-error analysis, it has indicated that courts should resolve the question of whether an error occurred before determining whether that error was harmless.[11] These doctrinal mechanisms reflect a belief in the importance of articulating constitutional rights.

Commentators share courts' preoccupation with rights articulation. A large literature has considered the relationship between rights and remedies, developing various theories of how we should classify, analyze, and critique the

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distinction between dictum and holding. Regardless of whether particular statements within opinions are categorized as holding or dicta, they undoubtedly guide future courts. *See, e.g.*, SEC v. Rocklage, 470 F.3d 1, 7 n.3 (1st Cir. 2006) ("Even dicta in Supreme Court opinions is looked on with great deference."). By issuing such statements, then, courts are "making" law in any functional sense of the word.

7. *See, e.g.*, John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 407 (1999) (explaining that rulings on novel constitutional questions serve "important notice-giving" functions); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 62-64 (2008) (advocating merits-first decisionmaking in qualified immunity adjudication).

8. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 936 (2005) (suggesting that "unnecessary constitutional rulings" could be seen "as an effort by the Court to preserve opportunities for the federal courts to engage in constitutional interpretation").

9. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 676-84 (2009) (outlining rationales for and criticisms of qualified immunity doctrine).

10. United States v. Leon, 468 U.S. 897, 925 (1984) ("If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.").

11. Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed."). Courts have not always read this statement as a mandate. *See* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 53-55 (2002). But the Supreme Court's framing has undoubtedly provoked more law articulation than would otherwise have occurred.

judicial work product that becomes the law.[12] Scholars have found the rights-making discourse relevant in many arenas. For example, Jennifer Laurin has focused specifically on the difficulties inherent in translating rights from one adjudicatory context to another, such as from a suppression hearing in a criminal trial to a civil rights action under 42 U.S.C. § 1983.[13] Orin Kerr has emphasized the value of rights-making in considering whether the good faith exception to the exclusionary rule should apply to overturned law.[14] And in other work I have emphasized the need for attention to the conditions necessary for courts to articulate well-considered formulations of constitutional rights.[15]

Although some commentators have questioned the proper *scope* of courts' rights-making activities,[16] most do not dispute the value of the basic rights-making function.[17] Rather, commentators generally agree that courts make rights and that this rights-making function is normatively desirable; to the extent they disagree, that disagreement generally concerns the range of situations in which courts may or should elaborate the structure of constitutional rights.[18] In sum, both courts and commentators have

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12. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Fiss, *supra* note 3; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655-57 (2005); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988).

13. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1007-08 (2010).

14. *See, e.g.*, Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1118 (2011) (arguing that the good faith exception should not apply to reliance on overturned case law because the suppression remedy creates incentives for defendants to challenge existing legal precedents and for courts to reexamine them).

15. Leong, *supra* note 5, at 406.

16. *See* Dorf, *supra* note 6, at 2040-49; Healy, *supra* note 8, at 936.

17. *See* Healy, *supra* note 8, at 934 (explaining that courts should sometimes make law even when nothing requires them to do so because "[t]his way, courts will continue to establish new rights").

18. I acknowledge that some commentators have questioned the value of articulating constitutional rights—for example, Mark Tushnet has argued that "nothing whatever follows from a court's adoption of some legal rule," and that "winning a legal victory can actually impede further progressive change." Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26, 32 (1993). In an essay prepared for this Symposium, Paul Butler argues that the same is true of *Gideon*. That is, *Gideon* obscures the plight of poor people and racial

acknowledged the systemic value of judicial rights-making.

II. THE PROTECTIVE EFFECT

Although law protection was not an explicit basis for the result in *Gideon*, the Court's contemporaneous jurisprudence hints at that rationale and harmonizes with the more recent discourse emphasizing the importance of lawmaking. Moreover, the critical role of adversarial process in ensuring sound legal principles reveals *Gideon*'s significance in protecting the law. These circumstances reveal the role of appointed counsel in systemically facilitating and improving the law.

A. Gideon *and Rights-Making*

Gideon itself does not explicitly address the effect of appointed counsel on rights-making. However, other *Gideon*-era criminal procedure opinions as well as contemporaneous thinking and subsequent scholarship evince a growing judicial concern for law protection.

The Warren Court emphasized that all criminal defendants, regardless of resources, should receive a fair trial, and believed that a fair trial inherently included a relatively level playing field.[19] The Court also emphasized the importance of the integrity of the legal system to judicial legitimacy, and, as a necessary condition of such integrity, the development of sound and reliable precedent.[20]

Indeed, several Warren Court cases hint at a specific preoccupation with the way that the law develops, particularly with regard to the relationship between legal representation and rights-making. In *Douglas v. California*, a companion case to *Gideon*, the Court declared a right to counsel for indigent

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minorities in America, and in so doing, "stands in the way of the political mobilization that will be required to transform criminal justice." Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013). While I am sympathetic to the argument that rights might serve as an abstract distraction from concrete problems, I continue to believe that the way courts define rights is important. The shortfall between the scope of a right as defined by the Supreme Court and the implementation of the right on the ground can bring into stark relief the injustices of the criminal justice system.

19. BERNARD SCHWARTZ WITH STEPHAN LESHER, INSIDE THE WARREN COURT 176 (1983); MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 157 (2001).

20. *Cf.* Victoria Nourse, *Gideon's Muted Trumpet*, 58 MD. L. REV. 1417, 1420-21 (1999) (arguing that the Court's criminal procedure doctrine "serves to ensure the reliability of the system (writ large)" and thus reflects "the Court's quest for legitimacy").

criminal appellants.[21] The Court's explicit concern was, of course, simply that the individual defendant should have adequate protection on appeal as well as at trial. But we might also read the extension of the right of counsel to appeals as an expression of the Court's nascent awareness that appellate courts make law with consequences that resonate beyond the fate of the specific defendant in the case. The Court could easily have cabined the right to counsel to trial—that is, to the scope of *Gideon* itself. Its decision to go further thus implies an understanding of the broader consequences of appellate decisions and the need for counsel on appeal to manage those broader consequences.

Douglas's concern with rights-making is implicit. Other contemporaneous cases, however, communicate that concern more overtly. The Court's seminal decision in *Mapp v. Ohio* reveals a general concern with the way in which precedent develops.[22] For example, the majority opinion references the "hazardous uncertainties" of separate exclusionary rules for the federal and state systems.[23] This language, combined with *Mapp*'s application of the exclusionary rule to the states, reveals the Warren Court's desire for stable and unified legal principles in the face of questionable and varied police tactics. Likewise, in *Miranda v. Arizona*, the Court displayed a full awareness of its lawmaking function.[24] It explained that it had granted certiorari in *Miranda* and its companion cases "in order further to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[25] The Court thus understood its role in *Miranda* as a law-giving one. Indeed, this self-perception may have influenced the actual substantive law that came out of *Miranda*. The Court's now-famed four-part test was almost legislative in character, revealing the Court's full awareness of the fact that its decisions did, in fact, articulate constitutional rights that would bind future courts as well as future law enforcement officers, prosecutors, and other actors within the criminal justice system.

Around the time of the *Gideon* decision, scholars recognized its consequences for law articulation. Writing shortly after *Gideon*, Edgar and Jean Cahn saw the decision as "providing a form of representation in another law-

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21. 372 U.S. 353, 357 (1963).
22. 367 U.S. 643 (1961).
23. *Id.* at 658.
24. Miranda v. Arizona, 384 U.S. 436 (1967).
25. *Id.* at 441-42.

making organ."[26] They believed that providing each criminal defendant with a lawyer gave those defendants "the power to change the law by objecting to and eliminating a body of improper practices by police officers, magistrates, and prosecuting attorneys."[27] *Gideon*, then, was seen as a decision that empowered criminal defendants not only in their own cases, but also to effectuate systemic change. Reflecting on *Gideon* decades later, Anthony O'Rourke agreed with the Cahns' assessment. He explained "the hope" many held "that *Gideon* had given rise to a new era in which poor and minority defendants could help 'change the law.'"[28]

While the Cahns' and O'Rourke's assessments focused on the ability of criminal defendants to shape the course of the law in a manner favorable to themselves and those similarly situated to them, their concerns are actually a subset of a broader concern for law articulation. That is, the power of criminal defendants to shape the law via competent representation contributes to the overarching goal of furthering balanced and accurate law articulation by correcting for systemic flaws. Thus, although law protection was not an explicit justification in *Gideon*, contemporaneous cases and related commentary suggest that the Warren Court's decisions were influenced by a nascent concern for the integrity of the law that would emerge from criminal cases.

B. Gideon*'s Adversarial Role*

The implicit law-protection concerns that informed *Gideon* and its contemporaries reflect the broader principles of adversarialism that permeate the American legal system. Our system glorifies the adversarial model, whose proponents contend that contested hearings are the best way of arriving at correct results in each case.[29] Some commentators have critiqued the adversarial model, suggesting that our legal system would be improved by a broad move toward an inquisitorial model,[30] while others have argued persuasively that in many circumstances a less adversarial process would better

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26. Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1333 n.22 (1964).

27. *Id.*

28. Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 723 (2011) (quoting Cahn & Cahn, *supra* note 26, at 1333 n.22).

29. *See, e.g.*, JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 94 (2d ed. 1923) (defending the "rule of Confrontation" on these terms).

30. *See, e.g.*, Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184-85 (2005).

serve ideals of fairness and justice.[31] For present purposes, however, the point is simply that adversarialism is an entrenched norm in the American legal system and that analysis of our system must acknowledge the adversarial default.

The proper functioning of the adversarial system requires—almost by definition—counsel on either side. Judges concern themselves more with resolving disputes based on the presentation of opposing viewpoints, and less with determining the objective truth for themselves.[32] As a result, vigorous presentation of these opposing viewpoints is critical, and trained counsel is critical to such a presentation. As Russell Engler puts it, adversarialism "presumes that both sides will be represented by counsel, and that cases involving unrepresented litigants are the exception, rather than the rule."[33] Or Raymond Brescia: "[A]n adversarial system that fails to have advocates on both sides of the dispute before it is hardly an adversarial system at all."[34] Representation, then, is necessary to ensure that both sides of an argument are raised and developed meaningfully for the benefit of the judge—and hence for the benefit of the law.

Courts readily acknowledge the asymmetry that results when one side is represented and the other is not. In many instances, they undertake measures short of actually providing counsel to attempt a leveling of the playing field. For example, courts construe all pro se filings generously—or at least say that they do—and judges are often more solicitous to the substantive arguments of pro se parties.[35] Likewise, courts have held that pro se parties are entitled to various procedural accommodations.[36] Appellate courts will sometimes reverse on the ground that a trial court failed to adequately scrutinize a party's decision

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31. *See, e.g.*, Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106 (2013); Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1 (2012).

32. *See* Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 462 (2005).

33. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2022 (1999).

34. Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 222 (2009).

35. *See, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972) (per curiam); Van Deelen v. Johnson, 497 F.3d 1151, 1153 n.1 (10th Cir. 2007); McEachin v. McGuinnis, 357 F.3d 197, 200-01 (2d Cir. 2004); Weixel v. Bd. of Educ., 287 F.3d 138, 146 (2d Cir. 2002).

36. *See, e.g.*, Wyatt v. Terhune, 280 F.3d 1238, 1240 (9th Cir. 2002) (holding that under fair notice doctrine a district court has the "responsibility of assuring that a pro se prisoner litigant receives meaningful notice of summary judgment procedures and requirements"); Puett v. Blandford, 912 F.2d 270 (9th Cir. 1990) (holding that a pro se plaintiff was entitled to rely on the U.S. Marshal for service of his summons and complaint).

to proceed pro se.[37] And courts will occasionally raise issues sua sponte, even when doing so is questionable as a jurisdictional matter, under circumstances that suggest an effort to redress an imbalance between the parties.[38] These judicial interventions represent a crude effort to compensate for the deficiency in adversarialism that results when one party is unrepresented.

Indeed, the pervasive glorification of adversarialism—and, by extension, the role of lawyers—means that the presence or absence of a lawyer is sometimes seen as a reflection of the merits of a case. Either consciously or unconsciously, courts use the presence of a lawyer as a proxy to determine how seriously to take a case.[39] And, to relate this situation to the function that lawyers play in law articulation, the extent to which a court takes a case seriously may affect the legal principles that result. Richard Lazarus and Kathryn Watts have each noted the emergence of an elite Supreme Court bar, whose cases are more likely to be granted certiorari and whose arguments are more likely to be taken seriously.[40] For better or for worse, a case litigated by an established and respected Supreme Court practitioner is likely to receive more careful judicial scrutiny and more thoughtful articulation of legal principles.

The pervasiveness of adversarialism in our legal system—and courts' reliance on that adversarialism in adjudicating cases—assuredly reveals the importance of appointed counsel to the outcomes of individual cases. More than that, though, the emphasis on adversarialism reveals the law-protective

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37. *See, e.g.*, United States v. Ruston, 565 F.3d 892 (5th Cir. 2009); *see also* Pruitt v. Mote, 503 F.3d 647, 660 (7th Cir. 2007) (en banc) (finding that the district court abused its discretion by failing to assess the plaintiff's competence in considering his request for pro bono counsel).

38. *See, e.g.*, Gramegna v. Johnson, 846 F.2d 675, 677-78 (11th Cir. 1988); *see also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity To Be Heard*, 39 SAN DIEGO L. REV 1253, 1285 (2002) (noting that "[a] few courts have raised an issue sua sponte to protect a pro se litigant").

39. To be clear, my point is that this situation arises frequently, not that it should. I think it is undesirable for courts to use the presence of a lawyer as a proxy for the merits of the case.

40. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1520-21 (2008) (noting the emergence of an elite Supreme Court bar comprised of repeat players before the Court) [hereinafter Lazarus, *Advocacy Matters*]; Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 89-90 (2010), http://www.yalelawjournal.org/2010/01/24/lazarus.html (noting the influence of "an elite group of expert Supreme Court advocates, dominated by those in the private bar," and voicing concern over the possibility of "undesirable skewing in the content of the Court's docket"); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 46-47 (2011) (discussing the powerful role of the "expert Supreme Court bar" and the capture risks it creates).

function of *Gideon*. That is, the concerns regarding nonadversarial proceedings apply not only in individual cases, but also with respect to the development of the law. If we are concerned that an unrepresented party cannot adequately forward her own interests in an individual proceeding, surely we should also be concerned about the legal principles that will emerge from that unrepresented proceeding. For those principles will not only affect the unrepresented party who facilitates them, but also bind future similarly situated parties, including both those who proceed pro se and those who are represented by counsel. The law that emerges from a proceeding where one party is unrepresented is thus fundamentally flawed—the product of a deficient process that inexorably skews the law not toward the better argument, but toward the better advocate.[41]

Gideon also implicates the development of the law in another way: by enhancing the public legitimacy of the legal system and the laws it enforces. As Stephan Landsman explains, adversarial theory posits that permitting parties to control the contours of their cases legitimizes the result, creating an impression of fairness that may lead to societal acceptance of court judgments.[42] By ensuring the proper testing of legal arguments, the adversary process instills confidence in the resulting principles. Commentators have linked indigent representation with adversarialism and, hence, with legitimacy: "When a comprehensive indigent defense system is established, not only will the state's indigent defendants be properly served; the true *adversarial system* of American jurisprudence will gain *legitimacy* in the eyes of the entire population."[43] From here it is a short step to a belief in the legitimacy not only of the result in an individual case, but also of the law itself.

C. Gideon*'s Protective Consequences*

The previous Section established the importance of representation to developing well-considered and socially legitimate law in an adversarial system. This Section explains more concretely how this process takes place.

Appointed counsel protect the law in several ways. At the trial level, courts do not actually articulate law in ways that bind future courts. Yet at this initial

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41. Of course, the skew toward the better advocate may occur even when both parties are represented. But when one party is represented and one is not, the skew is dramatic and all but assured.

42. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 33-34 (1988); *see also* George C. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1329-30 (1969).

43. David Allan Felice, Comment, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975, 1000 (2001) (emphasis added).

stage of a criminal proceeding, appointed defense counsel still play a critical role in protecting the law. Most obviously, trial counsel are responsible for identifying and preserving issues for appeal.

Trial counsel are also responsible for creating the factual record from which appellate counsel must work. Trial counsel elicit testimony, from both their own and the government's witnesses; introduce physical evidence; and present other exhibits that can either facilitate or foreclose legal arguments. This record is the material that determines the scope of the law that appellate counsel can press and that the appellate court can make. If trial counsel elicits clear testimony that a police officer had to move a stereo in order to see its serial number, that small fact can become the linchpin of an entire legal doctrine.[44] In contrast, if trial counsel fails, for example, to challenge the prosecutor's reasons for a peremptory strike, the omission might preclude consideration of a *Batson* claim on appeal;[45] likewise, her failure to challenge the voluntariness of a confession at trial may foreclose a *Miranda* claim on habeas.[46] Indeed, the Supreme Court has emphasized the importance of the details that emerge from the record-making role of trial counsel by holding that an indigent defendant is entitled either to a transcript of her trial or some equivalent protection.[47]

Perhaps most importantly, trial counsel make critical decisions regarding how to organize the facts presented at trial into a cohesive narrative. Scholars have explained how the narrative developed at trial can either help or harm the defendant's opportunities on appeal and in other postconviction proceedings.[48]

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44. Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (holding that moving the stereo constituted a "search" under the Fourth Amendment, and that probable cause is necessary to invoke the plain-view exception). The decision of the Arizona Court of Appeals and the merits and amicus briefs in the U.S. Supreme Court also made much of the small detail that the officer had moved the stereo in question. *See* Arizona v. Hicks, 707 P.2d 331, 332 (Ariz. App. 1985); Brief for Respondent, *Hicks*, 480 U.S. 321 (No. 85-1027), 1986 WL 728142, at *8; Brief Amicus Curiae of ACLU Foundation in Support of Respondent, *Hicks*, 480 U.S. 321, 1985 WL 669493, at *8.

45. *See, e.g.*, United States v. Brown, 634 F.3d 435, 440 (8th Cir. 2011) ("Because we find no evidence of Brown objecting during the voir dire process, with Brown's actual acceptance of the jury, we find Brown's untimely challenge waived.").

46. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 75, 87-91 (1977).

47. Griffin v. Illinois, 351 U.S. 12, 24 (1956).

48. *See, e.g.*, Todd A. Berger, *A Trial Attorney's Dilemma: How Storytelling as a Trial Strategy Can Impact a Criminal Defendant's Successful Appellate Review*, 4 DREXEL L. REV. 297, 301-02 (2012) (suggesting that excessive narrative development may prove disadvantageous on appeal); Gerald Reading Powell, *Opening Statements, The Art of Storytelling*, 31 STETSON L. REV. 89, 98 (2001) (offering advice for effective legal storytelling in opening statements); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) (discussing the merits of different forms of storytelling in

This factual narrative follows the case throughout the appeals process and shapes the way that the case is presented to the appellate judge.[49] Ultimately, these narratives—indeed, we might accurately call them stories—affect the way in which doctrine develops.[50]

Gideon's mandate of appointed counsel at trial is thus intimately linked with the provision of that same protection on appeal. As noted above, in *Douglas v. California*, decided the same day as *Gideon*, the Court held that criminal defendants must be afforded counsel on appeal.[51] Clearly, the roles of counsel at the trial and appellate stages of a criminal proceeding are closely connected: sometimes the appellate attorney is actually the same person as the trial lawyer; in many instances trial and appellate counsel work closely together; and in all instances trial counsel's actions, as described above, affect the strategic options available to appellate counsel. And at the appellate level counsel's law-protective function is more explicit. The law articulated by a federal appellate court will bind other federal and district courts in the jurisdiction, and will serve as persuasive authority for other circuits. Counsel's briefs and oral argument, therefore, provide the court with the raw material from which it constructs legal precedent. If a particular argument is not raised on appeal, the court generally will not incorporate that argument into its articulation of a legal principle. The presence of counsel, then, ensures a minimum level of argumentative development in appellate proceedings.

After *Gideon*, experience has borne out the importance of developing legal principles through truly adversarial proceedings made possible by the guarantee of counsel. Several important Supreme Court decisions regarding constitutional criminal procedure were tried by appointed counsel all the way from trial to the Supreme Court.[52] These decisions resulted in the articulation of the standard for when an officer can search a car recently occupied by an

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criminal trials); *see also* Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 738-39 (1997) (describing the role of "stories" in the legal process).

49. *See* Leong, *supra* note 5, at 433-36 (2012) (describing how facts influence law articulation); *cf.* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884-85 (2006) (arguing that a case's immediate facts control the legal principle the court articulates in deciding it).

50. *See* Erin Sheley, *The "Constable's Blunder" and Other Stories: Narrative Representations of the Police and the Criminal in the Development of the Fourth Amendment Exclusionary Rule*, 2010 MICH. ST. L. REV. 121 (relating literary narratives of criminality to doctrinal development).

51. 372 U.S. 353, 357 (1963).

52. Of course, not all of these decisions resulted in articulation of law favorable to the defendant. Those that did not might have resulted in a less favorable standard for defendants but for the involvement of counsel, but in all cases the presence of lawyers helped to further the clarification of the law.

arrestee;[53] a holding that the use of an electronic beeper to monitor drug-making supplies was unconstitutional;[54] a holding that an individual is not "seized" until he acquiesces to a show of authority;[55] a holding that law enforcement may not stop drivers without probable cause merely to check their license and registration;[56] a holding that the police may not search an individual's person merely because he is present in a business that they have a warrant to search;[57] and a clarification that a defendant must show a legitimate expectation of privacy in order to establish standing to raise a Fourth Amendment challenge.[58] And many more important cases were tried, appealed, or both by appointed counsel prior to Supreme Court review.[59] In each case, the fact that the defendant proceeded with appointed counsel rather than pro se influenced the resulting law by ensuring that arguments for the defendant's position were adequately raised and tested by the adversarial process.

Moreover, empirical data confirm that, in recent years, appointed counsel have remained heavily involved in many constitutional criminal procedure cases that reach the Supreme Court. During the past five Terms (2007 through 2011), the Court has issued opinions in a total of 411 cases.[60] Of these cases, 143, or 35%, were criminal cases.[61] A total of 41 cases (29% of the criminal cases, and 10% of cases overall) involved a state or federal public defender on the brief, and in 32 cases (22% of the criminal cases, and 8% overall) the public defender actually argued the case.[62]

These data indicate that appointed lawyers are intimately involved in the

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53. Thornton v. United States, 541 U.S. 615 (2004).

54. United States v. Karo, 468 U.S. 705 (1984).

55. California v. Hodari D., 499 U.S. 621 (1991).

56. Delaware v. Prouse, 440 U.S. 648 (1979).

57. Ybarra v. Illinois, 444 U.S. 85 (1979).

58. Rakas v. Illinois, 439 U.S. 128 (1978).

59. *See, e.g.*, Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177 (2004); Wyoming v. Houghton, 526 U.S. 295 (1999); Minnesota v. Carter, 525 U.S. 83 (1998); Minnesota v. Dickerson, 508 U.S. 366 (1993); California v. Greenwood, 486 U.S. 35 (1988); Arizona v. Hicks, 480 U.S. 321 (1987); Colorado v. Bertine, 479 U.S. 367 (1987); California v. Prysock, 453 U.S. 355 (1981); Oregon v. Mathiason, 429 U.S. 492 (1977); United States v. Robinson, 414 U.S. 218 (1973); Hill v. California, 401 U.S. 797 (1971); United States v. Wade, 388 U.S. 218 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964).

60. *See Opinions*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/opinions/opinions.aspx (last visited Apr. 2, 2013).

61. *Id.* These figures were obtained by simply counting the number of criminal cases.

62. These data were obtained by cross-checking the criminal cases listed on the Supreme Court's docket, *see supra* note 60, against Westlaw to determine who argued the case and whose names were included on the brief. A list of the cases is on file with the author.

adversarial process that results in Supreme Court lawmaking. This involvement is especially notable given the aforementioned emergence of an elite Supreme Court bar, which has effectively taken over the Supreme Court presentation of many cases that in years past would have been litigated from start to finish by the same attorney.[63] Despite the emergence of this elite bar, appointed counsel continue to facilitate law articulation in the context of criminal procedure. And it seems reasonable to conclude that the rate of appointed counsel's involvement in the lower appellate courts, and hence the amount of law development appointed counsel facilitate in those courts, is even higher.

One might argue that, had all the cases involving appointed counsel instead been tried pro se, they would never have advanced, as they did, to the Supreme Court. Instead, cases litigated by public interest organizations or private counsel would have presented similar issues to the Court. One might even argue that the law articulated would have been essentially the same—or, perhaps, that it would have been better.[64]

We cannot know the outcome of that counterfactual. And obviously not every case involving appointed counsel that reached the Supreme Court resulted in a ruling that created law favorable to those who find themselves accused of crimes. But the reality is that the volume of criminal defense matters is so great that public interest organizations and private attorneys working pro bono cannot possibly accommodate all those who need representation. It is impossible to tell in advance which cases will present a critical, undecided issue—and which, as a result, will ultimately make their way to the Supreme Court. Moreover, it is important to remember that not all law is made at the Supreme Court. Law is also made in appellate courts, and until the Supreme Court speaks, that law governs within the jurisdiction of the lawmaking entity and is persuasive elsewhere. In the aggregate, then, the involvement of appointed counsel surely sharpens the legal principles that emerge from those cases. Thus, appointed counsel are not only important to the result of a specific case. They are also critical to the forward-looking principles that emerge from judicial decisions.

Finally, I do not wish to imply that *Gideon* is cause for unqualified celebration as far as law protection is concerned. An immense literature has documented the grim practical realities of *Gideon* flowing from overburdened

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63. Lazarus, *Advocacy Matters*, *supra* note 40, at 1522.

64. *See* O'Rourke, *supra* note 28, at 745-67 (arguing that the involvement of appointed counsel resulted in decentralized and conflicting litigation strategies that produced criminal procedure doctrines less favorable to defendants than would have emerged without *Gideon*).

and understaffed public defenders' offices.[65] While it is beyond the scope of this Essay to examine the confounding effects of these practical realities, they unquestionably impair the ability of appointed counsel to execute the law-protective function. Yet despite the reality of these barriers, I hope to offer some optimism regarding appointed counsel's accomplishments with respect to law protection. Surely the law is better off for the involvement of appointed counsel, who can at least minimize the scope of adverse rulings by raising forceful counterarguments to the court. And measures to make good on the promise of *Gideon*—to make the protections that decision affords a meaningful reality—will have parallel consequences in further protecting the development of the law.

III. LAW PROTECTION AND CIVIL *GIDEON*

The benefits of *Gideon* in protecting the integrity of rights-making in criminal proceedings serve as an independent justification for what has become known as "civil *Gideon*."[66] I argue that where a category of civil litigation shares certain common features with the criminal trial, we should extend a guarantee of appointed counsel to a prospective pro se litigant as a means of protecting the development of the law in those areas, regardless of whether that provision of counsel is constitutionally mandated.[67]

Criminal trials have several characteristics that render appointed counsel appropriate.[68] First, the government is not only a litigant, but also the employer of many of the witnesses—for example, law enforcement officers—whom it calls at trial. Second, the government supplies the attorney to argue

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65. *See, e.g.*, Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316 (2013); Justin F. Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482 (2013).

66. Judge Robert W. Sweet apparently coined the term in 1998. *See* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998).

67. This Essay does not attempt to define the precise legal mechanism by which the right of counsel would be so extended. Scholars have argued that such a right might be extended on constitutional grounds. *See* Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21, 21-29 (2007) (describing various constitutional theories proposed to support civil *Gideon*). Alternatively, both state and federal governments could provide counsel in many circumstances where it is not currently constitutionally mandated. Thus, counsel might be provided by a statutory directive, by a conditional grant of funding, or by a regulatory decree, among other mechanisms.

68. These are, of course, in addition to the constitutional guarantee of counsel in criminal proceedings. My focus here is to identify the features of criminal trials that make that constitutional guarantee appropriate in the first place, and then to think about other situations that raise those same concerns.

for its position, which inherently means that the advantage in terms of resources, institutional knowledge, and credibility usually lies with the prosecution.[69] Third, the *subject* of litigation involves immense power disparities between the individual and the government—that is, the individual is simply no match for the government at any stage leading up to a criminal proceeding, ranging from the earliest stages of investigation to the moment of arrest. Fourth, in criminal cases, the government's position is inherently always represented. Fifth and finally, the evidence of abusive behavior by law enforcement officers throughout our criminal justice system renders counsel particularly appropriate when the circumstances leading to the litigation involve law enforcement.[70]

A common thread that runs through these distinctive features of criminal cases is the involvement of the government. Indeed, in my view government involvement is one of the chief factors that creates the need for appointed counsel. So while I do not rule out the possibility that a systemic power imbalance in a civil case to which the government is not a party might also militate in favor of appointed counsel, my focus for the remainder of the Essay lies with cases to which the government is a party.

Specifically, we should provide counsel in other situations that bear most or all of the characteristics enumerated above. Those characteristics are present in much civil rights litigation under 42 U.S.C. § 1983. As in criminal cases, the government is often both the litigant and the employer of key witnesses.[71] As in criminal cases, the government supplies its own attorney, who is either employed full-time by the relevant governmental entity or is a private attorney who contracts to represent that entity. As in criminal cases, the subject matter of litigation often involves substantial power disparities, such as the use of police force against unarmed citizens, the withholding of basic needs in a carceral setting, the infringement of a lone citizen's right to voice unpopular viewpoints, or the deprivation of due process rights of individuals deprived of Social Security benefits. In cases pitting an individual against the government or its official actors in a civil rights suit alleging official wrongdoing, the government's position will be represented by counsel. And finally, the

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69. In jurisdictions with strong public defender services, appointed counsel may also have access to considerable accumulated institutional knowledge, but in the aggregate, across jurisdictions, the advantage on this score lies with the government. This is particularly so given the judiciary's innate respect for coordinate branches of government.

70. *See, e.g.*, Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 42-43 (2001) (discussing the importance of zealous representation by defense counsel in cases involving police misconduct).

71. This is particularly true in cases involving violations of the Fourth and Eighth Amendments, in which the behavior of law enforcement officers or prison guards is often at issue.

involvement of law enforcement officers and the well-documented frequency of abusive uses of force[72]—particularly against members of vulnerable populations, such as racial minorities, recent immigrants, and the poor[73]—warrant the special solicitude that appointed counsel provides.

A range of cases filed under § 1983 bear the characteristics I have mentioned: cases brought under the Free Exercise or Establishment Clauses; cases alleging retaliation for constitutionally protected speech; Fourth Amendment cases alleging unconstitutional searches; and Eighth Amendment cases alleging unconstitutional prison conditions. Here, I will focus in particular on cases filed under § 1983 that involve allegations of excessive force under the Fourth Amendment—a litigation context that vividly presents many of the concerns I describe above. These considerations militate in favor of appointing counsel for indigent plaintiffs with colorable excessive force claims. But an even more compelling reason for appointing counsel in excessive force cases is the law-protective function that such counsel would serve.[74]

Scholars have repeatedly emphasized the morass presented by excessive force doctrine,[75] and in particular I have previously noted that excessive force doctrine highlights certain considerations at the expense of others.[76] Part of the reason for the deficiencies in excessive force doctrine is that only certain claims are brought, and that those claims are not representative of all the instances in which excessive force is used. Most victims of excessive force who litigate are wealthy enough to afford attorneys; a lucky few may be represented by public interest organizations. This leaves the vulnerable populations who are most frequently victims of excessive force underrepresented in courts.

That is, courts do not see the vast majority of excessive force claims that would be litigated by groups such as poor people, the mentally ill, and undocumented immigrants. Thus, they remain unaware of the frequency with which such groups suffer abuse, and construct excessive force doctrine without regard for the effect that it may have on the populations who encounter police

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72. *See, e.g.*, Levenson, *supra* note 70, at 4-10 (discussing several high-profile instances of abusive police behavior).

73. *See, e.g.*, Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999).

74. This Essay is the first to advocate appointed counsel for excessive force on law-protection grounds, although one commentator has previously advocated for an amendment to 42 U.S.C. § 1983 that would check police brutality by ensuring appointed counsel for indigent defendants who could show that they were subjected to "disproportionate police force." Andrew J. Mathern, Note, *Federal Civil Rights Lawsuits and Civil* Gideon*: A Solution to Disproportionate Police Force?*, 15 J. GENDER RACE & JUST. 353, 354-55 (2012).

75. *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1128-46 (2008).

76. Leong, *supra* note 5.

brutality most frequently. For instance, they do not explicitly include a suspect's demographic characteristics as factors in determining what level of force is reasonable and what is excessive in producing acquiescence. A suspect who is already likely to be targeted for suspicion and intimidated by the police as a result of demographic characteristics is both less likely to require and more likely to inspire the use of heightened force to produce compliance. Moreover, many of the claims from these populations that courts do see involve plaintiffs who must proceed pro se for want of a lawyer.

Appointed counsel for civil rights plaintiffs who demonstrate colorable excessive force claims would ameliorate these problems. First, appointed counsel would ensure that pro se litigants' claims did not distort the law for lack of legal acumen. Second, appointed counsel would make courts adequately aware of the special vulnerability to police brutality of the populations I have discussed. Courts could then craft excessive force doctrine with these populations in mind. Third, the availability of appointed counsel to previously underrepresented populations would broaden the array of factual scenarios that courts saw, allowing them to make more nuanced distinctions and to develop principles that better generalize across situations. And finally, knowledge of the availability of appointed counsel would increase public confidence that excessive force doctrine has been forged through the adversarial process.

It far exceeds the scope of this Essay to envision the logistics of how appointed counsel would be made available for excessive force claims. We can imagine a statutory or regulatory scheme that would either provide funding for such attorneys or create a public-defender-like entity that would provide attorneys to litigate such claims. Some differences from the criminal context would be advisable. Prospective plaintiffs would have to demonstrate that their claims were colorable to warrant the provision of a lawyer, for instance. The entitlement to counsel would thus be less absolute than the *Gideon* right. But given that under our current system many colorable claims never see the light of day, the right to appointed counsel for some excessive force claims would still substantially enlarge the existing entitlement to representation. Indeed, it would revolutionize both excessive force litigation and the law that emerges from it.

CONCLUSION

Gideon v. Wainwright functions systemically as a mechanism not only to protect the rights of individual defendants in particular trials, but also to protect the development of the law within an adversarial system. By ensuring that the legal principles courts articulate are the product of a legitimate

adversarial process, *Gideon* also preserves public confidence in the legitimacy of the law that emerges from criminal proceedings. Ultimately, these considerations warrant a close look at the possibility of providing appointed counsel in other contexts—particularly in civil contexts in which the government is a repeat player and the citizen who litigates against the government is especially vulnerable.