

# Defense Attorney Resistance

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## INTRODUCTION

As they considered Clarence Earl Gideon's petition, the justices of the United States Supreme Court likely had no idea what his race was.<sup>1</sup> Before the August 1963<sup>2</sup> release of the iconic picture of Mr. Gideon in a button-down shirt looking past the camera through owlsh glasses, and his portrayal by Henry Fonda in the 1980 film *Gideon's Trumpet*,<sup>3</sup> Mr. Gideon's race, entirely omitted from the record of the court proceedings, was unknown. But, operating as it was in the midst of the Civil Rights Movement, it is likely that the Court viewed Gideon's case through the prism of its deep and abiding concern about racial injustice.<sup>4</sup> Statute by statute, in civil and criminal cases, and in words and actions, the Court "disassembled the legal scaffolding of American apartheid, one indignity at a time."<sup>5</sup> The Warren

1. KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 65 (2013).

2. According to a recent article in *The Nation*, the photo is dated August 6, 1963, five months after the Gideon case had been decided. See Stephen B. Bright & Sia M. Sanneh, 'Gideon v. Wainwright', *Fifty Years Later*, NATION (Mar. 20, 2013), <http://www.thenation.com/article/173458/gideon-v-wainwright-fifty-years-later> (stating in a caption under the photo: "This Aug. 6, 1963, file photo shows Clarence Earl Gideon, 52, the mechanic who changed the course of legal history, after his release from a Panama City, Florida, jail.").

3. See ANTHONY LEWIS, GIDEON'S TRUMPET (1964). The book was made into a movie, also called *Gideon's Trumpet*, in 1980. *Gideon's Trumpet* (CBS television broadcast Apr. 30, 1980). The movie starred Henry Fonda as Clarence Earl Gideon, Jose Ferrer as Abe Fortas, and John Houseman as Chief Justice Earl Warren. *Id.* "Gideon's Trumpet" refers to the biblical story, in which Gideon won a battle over the larger army of the Midianites by having his small army carry trumpets and torches hidden in clay pots; the noise from the trumpets and the lights from the torches tricked the enemy into thinking that it was pitted against a much larger army, so that Gideon won the battle without much actual fighting. *Judges* 7:16–22.

4. See generally Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59 (2010) (observing that racial equality played a "dominant role" in the Warren Court's jurisprudence); see also Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1037 (1977); Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1484, 1494 (2003) (discussing the Warren Court's "perceived . . . need . . . to protect minority offenders" and desire to make its own contribution to the Civil Rights Movement by "focus[ing] on procedural rights" as an answer to the country's profound "concern about racial inequality").

5. Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 634 (2013) (citing *Lee v. Washington*, 390 U.S. 333, 334 (1968) (striking down racial segregation in prisons); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down laws banning interracial marriage); *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (integrating public libraries); *Anderson v. Martin*, 375 U.S. 399, 402–04 (1964) (outlawing racial designations on the ballot); *Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963) (prohibiting segregated courtrooms); *Turner v. City of Memphis*, 369 U.S. 350, 351–53 (1962) (invalidating segregation in airport restaurants); *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir. 1958), *aff'd*, 358 U.S. 54 (1958) (outlawing segregated parks and playgrounds); *Dawson v. Mayor of Baltimore City*, 220 F.2d 386, 377 (4th Cir. 1955), *aff'd*, *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (banning segregated public beaches); *Hamm v. Virginia State Bd. of Elections*, 230 F. Supp. 156, 157 (E.D. Va. 1964), *aff'd*, *Toncil v. Woolls*, 379 U.S. 19 (1964) (banning separate voting and property tax records were banned);

Court's concern about racial injustice was so broad "that it played a significant role in shaping many of the most important constitutional decisions of the Supreme Court in areas as diverse as federalism; separation of powers; criminal law and procedure; freedom of speech, association, and religion; procedural due process of law; and democracy."<sup>6</sup> The Court's decisions are full of language evincing its concern over racial injustice. For example, in *Miranda v. Arizona*,<sup>7</sup> "Chief Justice Warren stressed the impact of private interrogation on . . . 'an indigent Los Angeles Negro who had dropped out of school in the sixth grade.'"<sup>8</sup> And the Court remarked that the facts in *Duncan v. Louisiana* "bore hallmark indicia of Jim Crow injustice."<sup>9</sup> As the Court would proclaim in *Green v. County School Board of New Kent County*, the mission of the post-*Brown* cases was to eliminate race discrimination "root and branch."<sup>10</sup> So it was with the right-to-counsel cases, the most famous of which is *Gideon*, the Court sought to address its "concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics."<sup>11</sup>

When the *Gideon* decision was handed down in 1963, the nation was swept up in the zeitgeist of the Civil Rights Movement, and the demographics of the nation's criminal justice system crystallized the need for intervention. The FBI's crime index for arrest rates between 1965 and 1972 indicate that non-white adults were arrested at least five times the rate of white adults. With respect to juveniles, non-whites were arrested at least twice as often as white juveniles during the same period. When arrested for violent crimes, non-whites were arrested *at least nine times* as often as white people between 1963 and 1972.<sup>12</sup> Indeed, the Court had "two main

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Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 153 (E.D. La. 1958), *aff'd*, State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (striking down laws banning interracial boxing); Gayle v. Browder, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956) (ending racial segregation in public transportation in Montgomery, Alabama; banning laws that required blacks to ride in the back of public buses)).

6. Neuborne, *supra* note 4, at 60.

7. *Miranda v. Arizona*, 384 U.S. 436 (1966).

8. Cover & Aleinikoff, *supra* note 4, at 1037 (quoting *Miranda*, 384 U.S. at 457).

9. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1692 (2010).

10. *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 438 (1968).

11. Neuborne, *supra* note 4, at 86.

12. U.S. Census Bureau, National Estimates by Age, Sex, Race: 1900 – 1979, available at <http://www.census.gov/popest/data/national/asrh/pre-1980/PE-11.html> (noting that in 1963, 10.7 percent of the U.S. national population was considered black, less than one percent were considered other races, and 88 percent of the U.S. population was white); see also U.S. Census Bureau, Population Estimates Program, Population Division, at 1 (2000), available at, <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> (providing national population estimates from years 1900-1999); see U.S. Dep't of Justice, Federal Bureau of Investigation, "Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses," 1965-1992, 1, 181, available at, <https://ncjrs.gov/pdffiles/Digitization/148356NCJRS.pdf>.

purposes” when it decided *Gideon*: (1) protecting the innocent from conviction; and (2) protecting African Americans from Jim Crow injustice.<sup>13</sup> Although the first goal was explicit, and second goal was covert,<sup>14</sup> there is no mistaking that *Gideon* was a racial justice case.<sup>15</sup>

But if *Gideon*’s pronouncement was motivated by the pursuit of racial justice, its promise remains largely unfulfilled. Whether it represents a retrenchment of racial mores in response to the gains of the Civil Rights Movement, or results from innumerable other factors, the subsequent explosion in the population of the nation’s criminal justice system since 1972 has been well-documented. Beating out even China, the United States has the highest incarceration rate in the world.<sup>16</sup> The U.S. incarceration rate has increased roughly six-fold, from fewer than 350,000 people in state and federal prisons and jails nationwide in 1972,<sup>17</sup> to around 2.3 million people as of June 30, 2009.<sup>18</sup> This number translates to 748 inmates per 100,000 U.S. residents.<sup>19</sup> More than one in every 100 adult U.S. residents lives behind bars.<sup>20</sup>

As if the sheer numbers weren’t enough, the racial demographics behind these statistics lend them a distinctly troubling complexion. In 2009, black males comprised less than thirteen percent of the U.S. population,<sup>21</sup> but accounted for almost 40% of the male jail and prison population.<sup>22</sup> In

13. Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 Yale L.J. 2236, 2236 (2013).

14. The Court’s failure to explicitly acknowledge its race mission is not limited to *Gideon*. In an earlier article, I argued that the Court’s failure to address the disparate treatment of black children in the nation’s juvenile justice system in *In re Gault* has led to a host of juvenile court substantive and procedural ills that might have been otherwise avoided. See Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 634 (2013).

15. Chin, *supra* note 13, at 2236.

16. Pierre Thomas & Jason Ryan, *U.S. Prison Population Hits All-Time High: 2.3 Million Incarcerated*, ABC NEWS (June 6, 2008), <http://abcnews.go.com/TheLaw/story?id=5009270>. As of 2007, “China, with [its] much larger population, ha[d] the second largest incarcerated population, with 1.5 million imprisoned” and Russia has the second highest incarceration rate, at 581 per 100,000. JAMES AUSTIN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION 3 (2007), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

17. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (rev. ed. 2012).

18. HEATHER C. WEST, U.S. DEP’T OF JUSTICE, *PRISON INMATES AT MIDYEAR 2009 – STATISTICAL TABLES 2* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

19. *Id.*

20. THE PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf).

21. U.S. CENSUS BUREAU, POPULATION DIVISION. See Table 3, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2009 (NC-EST2009-03)*, available at [http://www.census.gov/popest/data/historical/2000s/vintage\\_2009/index.html](http://www.census.gov/popest/data/historical/2000s/vintage_2009/index.html).

22. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2009* app. at 17 (2010), available at <http://www.bjs.gov/content/pub/pdf/p09.pdf>.

that same year, Latino males also comprised less than seventeen percent of the U.S. population,<sup>23</sup> but accounted for twenty-one percent of the male jail and prison population.<sup>24</sup> In 2009, African American men, with an incarceration rate of 4749 inmates per 100,000 U.S. residents, were incarcerated at a rate more than six times higher than that of white men (708 inmates per 100,000), and Latino men (1822 inmates per 100,000) were incarcerated at a rate more than 2.5 times higher than white men.<sup>25</sup> Also in 2009, African American women, with an incarceration rate of 333 per 100,000, were 3.6 times more likely than white women (91 per 100,000) to be in prison or jail, and the incarceration rate for Latino women, at 142 per 100,000, was 1.5 times the incarceration rate for white women.<sup>26</sup> U.S. taxpayers spend upwards of \$35 billion each year to build and maintain prisons.<sup>27</sup> One in nine black men between the ages of twenty and thirty-four is behind bars, and one in 100 black women in their mid- to late-thirties is incarcerated.<sup>28</sup>

This trend extends to juvenile delinquency courts. For example, in 2007, juvenile arrest statistics showed that while African American youth accounted for only seventeen percent of the general population, they comprised fifty-one percent of arrests for juvenile violent arrests and thirty-two percent of arrests for juvenile property arrests.<sup>29</sup> It is well-documented that “youth of color enter and stay in the system with much greater frequency than White youth” in nearly all juvenile justice systems.<sup>30</sup>

In this way, the right to counsel and disproportionate minority contact have, in a sense, grown up together: both prominent parts of the same criminal justice system, each has assumed its own features while shaping the

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23. U.S. CENSUS BUREAU, POPULATION DIVISION. See Table 3. Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2009 (NC-EST2009-03), available at [http://www.census.gov/popest/data/historical/2000s/vintage\\_2009/index.html](http://www.census.gov/popest/data/historical/2000s/vintage_2009/index.html).

24. See HEATHER C. WEST, *supra* note 18, at 22.

25. See *id.* at 2, 22.

26. See *id.* at 22.

27. See Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC ONLINE (Dec. 1998), <http://www.theatlantic.com/past/issues/98dec/prisons.htm>.

28. PEW CTR. ON THE STATES, *supra* note 20, at 3.

29. Charles Puzzanchera, *Juvenile Arrests 2007*, JUV. JUST. BULL. (U.S. Dep't of Justice, Office of Justice Programs), Apr. 2009, at 1, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/22344.pdf>.

30. Ashley Nellis & Brad Richardson, *Getting Beyond Failure: Promising Approaches for Reducing DMC*, 8 YOUTH VIOLENCE & JUV. JUST. 266, 266 (2010). For the past twenty years, the federal Juvenile Justice Delinquency and Prevention Act has required federally funded state juvenile justice systems to adopt the Act's core principles concerning treatment of youth in the juvenile justice system. *Id.* Tracking and addressing disproportionate minority confinement (“DMC”) in the juvenile justice system was added to these core principles in 1992. *Id.* DMC came to stand for disproportionate minority contact in 2002, when this core requirement was broadened to encompass racial and ethnic disparity at all points of contact. *Id.* at 266–67.

other.<sup>31</sup> The right to counsel is largely defined by a defense attorney's action – or inaction – within the clearly delineated parameters of advocating for the client inside the courthouse doors. At the lower boundary, the minimum acceptable performance is defined by court decisions on ineffective assistance of counsel; at the upper boundary, the most vigorous acceptable representation is limited by decisions on the exercise of the contempt power.<sup>32</sup>

In contrast, while the right to counsel has been largely defined through case law, disproportionate minority contact is generally considered a problem that requires a more dynamic, interdisciplinary, extrajudicial approach. Legal scholars, social scientists, pundits, and even philosophers have turned their attention to the problem of disproportionate minority contact, as its tentacles reach far beyond the courthouse and the prison walls.<sup>33</sup> Scholars bemoan the mismatch between defense counsel's capabilities and defense counsel's ability to combat racial and other systemic injustices in the courtroom.<sup>34</sup> In other words, place lack of evidence or government misconduct in the crosshairs, and defense counsel can take aim with fact investigation, case law, and persuasive legal arguments. But when systemic issues like high caseloads and implicit invidious race bias are barriers to a fair outcome, thanks to the seemingly impenetrable latticework of Supreme Court case law foreclosing vindication of claims of racial bias in

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31. Chin, *supra* note 13, at 2238 (noting that many scholars argue that the criminal justice system's "impact on minorities, both absolutely and compared to whites, and the often inadequate quality of representation provided to those who cannot afford to retain counsel . . . are connected").

32. Louis S. Ravenson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power*, 65 WASH. L. REV. 477, 483 (1990) (stating "[j]ust as decisions on ineffective assistance of counsel set the lowest limits on the quality of advocacy required by the Constitution, exercise of the contempt power defines the boundaries of the most vigorous advocacy protected by the Constitution").

33. The criminal justice system has exploded outside of the prison walls, as well. As of 2009, the number of people under criminal justice supervision, including those who are in jail, in prison, on probation, and on parole, totaled 7.2 million people. See *Correctional Populations In The United States, 2010*, at 3, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAM, <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>. People of color are also overrepresented among arrestees, probationers, and parolees. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 700 (2010). "There are more African Americans under correctional control today . . . than were enslaved in 1850 . . . [and] [a]s of 2004, there are more African American men disenfranchised (due to felon disenfranchisement laws) than in 1870, the year the Fifteenth Amendment" outlawed measures that explicitly denied the right to vote on the basis of race. Michelle Alexander, *The New Jim Crow*, THE HUFFINGTON POST (Feb. 8, 2010, 9:29 PM), [http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow\\_b\\_454469.html](http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow_b_454469.html).

34. See, e.g., Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013).

criminal cases,<sup>35</sup> defense counsel's quiver is empty, because "classic adversarial defense weaponry matters less."<sup>36</sup>

Particularly in light of the Warren Court's deep concern with racial injustice, and the Court's offering of the right to counsel to combat it, the rise of disproportionate minority contact mocks *Gideon's* transcendent potential. The Court's hunch about deploying defense attorneys as a weapon against invidious race bias was a good one. Because of their access to criminal defendants and their ethical mandate to represent their clients' expressed interests, defense attorneys are uniquely positioned to be an incredibly powerful weapon in the fight against invidious race bias in the criminal justice system. In fact, social scientists have found that "[b]y a very wide margin, defense attorneys are most inclined to strongly agree or agree that minority overrepresentation is a problem, followed by probation officers and judges. Few prosecutors express any agreement with this statement."<sup>37</sup>

This Essay begins an examination of the relationship between the right to counsel and disproportionate minority contact, and of why the right to counsel as it is currently constructed seems unequal to the task of stemming disproportionate minority contact. This Essay argues that the right to counsel should be re-conceptualized to allow defense attorneys to take actions that will allow them to answer the systemic, facially race-neutral obstacles that contribute to disproportionate minority contact. Part I will briefly discuss theories naming the criminal justice system as a modern-day iteration of slavery, convict leasing, and Jim Crow, to offer context for the rise of the right to counsel. Part II will examine the case-law-based, systemic, and other barriers that give rise to disproportionate minority contact. Part III concludes by proposing steps public defense attorneys might take to address racial injustice.

## I. THE CRIMINAL JUSTICE SYSTEM AS STATUS REGIME MODERNIZATION

A number of scholars have described the modern-day criminal justice system as the latest recapitulation of a legally sanctioned racial caste system that dates back to United States chattel slavery. The underlying theory of this "status regime modernization" is that in the face of civil rights reform, social institutions undergo a protean "preservation through transformation"<sup>38</sup> such

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35. See *infra* note 53 (describing the holdings in *Whren*, *Armstrong*, and *McCleskey*).

36. Natapoff, *supra* note 34, at 1054.

37. Geoff Ward et al., *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, 1 RACE & JUST. 154, 179 (2011).

38. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119–20 (1996) (describing status regime modernization in the context of spousal abuse, and explaining that legal doctrines prohibiting spousal abuse, ostensibly jettisoned in the nineteenth century, were replaced by judicial concerns that purported to protect the sanctity of the home by refusing to intercede in domestic disputes). For examples of applications of

that “status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom.”<sup>39</sup> In the case of the criminal justice system, theorists see an unbroken thread extending back to Jim Crow,<sup>40</sup> on to convict leasing,<sup>41</sup> all the way back to United States chattel slavery.

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Professor Siegel’s status regime modernization theory, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–58 (reprt. 2012) (linking American chattel slavery, Jim Crow, and mass incarceration “to illustrate the ways in which systems of racialized social control have managed to morph, evolve, and adapt to changes in the political, social and legal context over time”); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 48–49, 55–59 (2007) (using Siegel’s theory of status regime modernization to link the rape of African American women slaves to the sexual abuse of women in prison); Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 185 (2007) (observing that America’s undocumented immigrant population “harkens back to the days of slavery and Jim Crow in the United States, with a racial caste of workers subject to exploitation and abuse in the secondary labor market”); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 338–39 (2009) (applying Siegel’s theory of status regime modernization to prison reform); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (arguing that the penal system is the latest form of racial subjugation in the United States after slavery, Jim Crow, and the urban ghetto, observing that each of these institutions subjugates and confines blacks in physical, social, and symbolic space); Loïc Wacquant, *From Slavery to Mass Incarceration*, NEW LEFT REV., Jan.–Feb. 2002, at 41, 41 (describing “slavery and mass imprisonment” as “genealogically linked”).

39. Siegel, *supra* note 38, at 2179.

40. The Jim Crow analogy, in particular, has gained a great deal of credence in the last decade. See, e.g., 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, 1076 (2010) (“Unfortunately, we currently see a criminal justice system that, in operation today, has disparate impacts on minority communities, much as in the days of Jim Crow, with that system in effect sanctioned by the U.S. Supreme Court.”); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 505–06 (2009) (observing mass incarceration “rivals Jim Crow and other, earlier forms of racial subordination long since recognized as unjust and unwise”); Audrey G. McFarlane, *Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163, 191 (2009) (“The oppression of slavery and Jim Crow is not gone; instead, it has been disaggregated and reassembled into more efficient components of oppression.”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) (arguing for an “abolish[ment] of the] criminal justice institutions with direct lineage to slavery and Jim Crow that are key components of the present regime of racial repression”).

41. I described convict leasing in more depth in an earlier piece, as follows:

Convict leasing quickly emerged to fill the labor void left by the abolition of the ‘peculiar institution. Until the late 1920s and the Great Migration, 80% of black Americans lived in the South. To satisfy the South’s acute labor need, the criminal justice system was ‘retooled to provide cheap forced labor to mines, farms, timber camps, turpentine makers, railroad builders and entrepreneurs large and small. Tens of thousands of men, the vast majority of them black, found themselves pulled back into slavery.’ A common arrangement might look like this: A business owner in need of labor might ‘ma[k]e up a list of some eighty negroes known to both [the sheriff and the business owner] as good husky fellows, capable of a fair day’s work,’ give that list to the local sheriff, and promise the sheriff five dollars



Although a comprehensive discussion of the shared salient characteristics of these institutions is beyond the scope of this Essay, the superficial similarities are inescapable. Each has a racial focus, disproportionately affecting people of color in general or African Americans in particular. Each has been extremely lucrative for United States whites. United States chattel slavery and convict leasing provided an exploitable source of free labor to work southern plantations and, to a lesser extent, northern establishments as well; Jim Crow allowed institutional discrimination, for example, in housing covenants, that increased the collective wealth of whites<sup>42</sup>; and, the modern-day criminal justice system subsidizes a booming prison industry. Each has relied on a vicious curtailment of civil rights. Each has incorporated an ever-present threat of violence. Incidents of plantation violence during slavery, lynchings well into the mid-twentieth century during Jim Crow, and rampant prison violence in our criminal justice system have been well documented. Each has thrived on race-based stereotypes concerning African American inferiority, suitability for servitude, and inclination for lawlessness and ungovernability. Finally, each, in its own time, has been legally sanctioned, and, except for the criminal justice system, legally dismantled.

But the point of status regime modernization is that the more things stay the same, the more they change. For example, in light of the prominence of Professor Michelle Alexander's work, there have been numerous critiques of analogizing the criminal justice system to Jim Crow.<sup>43</sup> And of course, there are obvious differences between, for example, slavery and the criminal justice system. Slavery was generational while ensnarement in the criminal justice system may not be. In addition, slavery was entirely

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plus expenses for each man he arrested. Charges ranged from vagrancy, defined as not being able to prove employment, to more serious crimes. Terms ranged from a year and a day for burglary to life imprisonment for murder.

Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 626 (2013) (alternation in original) (quoting DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* at 7 (2008); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 71 (1997)).

42. It took the Court's holding in *Shelley v. Kramer*, 334 U.S. 1 (1948), striking down racial covenants on real estate, to begin to end the common practice of placing restrictive covenants barring African Americans from occupying a certain property.

43. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 21 (2012) (arguing that "the Jim Crow analogy leads to a distorted view of mass incarceration" in that it "presents an incomplete account of mass incarceration's historical origins, fails to consider black attitudes toward crime and punishment, ignores violent crimes while focusing almost exclusively on drug crimes, obscures class distinctions within the African American community, and overlooks the effects of mass incarceration on other racial groups [and] . . . diminishes our collective memory of the Old Jim Crow's particular harms"). And, although theorists rely on Loïc Wacquant to support their claim that the criminal justice system is "the New Jim Crow," Wacquant himself rejects the Jim Crow analogy." *Id.* at 26 n.15.

race-based, while the criminal justice system purports to be guilt-based, such that it also includes non-blacks.. A third difference is that slaves did not have representatives appointed to defend their interests the way *Gideon* prescribes criminal defendants should.

The history is instructive for several reasons. First, the history provides some context for the evolution of the right to counsel. The fact that the Fourteenth Amendment precursor to *Gideon*, *Powell v. Alabama*, was handed down at the height of Jim Crow, puts the right to counsel in specific relief. In *Powell*, one of the Scottsboro Boys cases, three black men were charged with raping two white women.<sup>44</sup> The *Powell* Court reversed the men's capital convictions because the Court determined that they had not received effective assistance of counsel.<sup>45</sup> In *Gideon*, the right to counsel issue was presented when the trial court denied Gideon's request for a lawyer and Gideon proceeded pro se.<sup>46</sup> In *Powell*, the defendants had been assigned attorneys. In fact, the trial court had assigned every attorney in the courtroom.<sup>47</sup> The Court held that the defendants were entitled to effective assistance, and described effective assistance as counsel who would actually offer zealous representation; mere presence in the courtroom was not enough.<sup>48</sup> Although *Powell's* holding provided the defendant with effective assistance of counsel in a capital case, the Court was careful to note that "[t]he United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him," and that "[i]n most states the rule applies broadly to all criminal prosecutions."<sup>49</sup> *Powell* is important because the Court would later reverse itself<sup>50</sup> and extend the right to counsel as a fundamental right pursuant to the Sixth Amendment in *Gideon*, despite *Powell's* holding, which relied on Fourteenth Amendment fundamental fairness.<sup>51</sup>

The historical context of *Powell* also provides an opportunity for both retrospective and prospective examination.<sup>52</sup> Jim Crow was a direct

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44. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).

45. *Id.* at 58.

46. *Gideon v. Wainright*, 372 U.S. 335, 337 (1963).

47. *Powell*, 287 U.S. at 57.

48. *Id.* at 58.

49. *Id.* at 73.

50. *Betts v. Brady*, 316 U.S. 455, 473 (1942) ("We cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded to a defendant who is not represented by counsel.").

51. *Powell*, 287 U.S. at 71.

52. The idea of providing counsel to African-Americans accused of crime was not new. In fact, Texas had considered the question just before the start of the Civil War, in 1860 in *Calvin v. State*, 25 Tex. 789 (1860). In that case, in which a slave was charged with murder, the Texas Supreme Court ruled that "the state had a duty to provide counsel for blacks who could not

descendant of United States chattel slavery. Given the history and purpose of the Fourteenth Amendment, it is likely no mistake that the Court relied on Fourteenth Amendment due process, instead of the Sixth Amendment right to counsel, to redress the wrong done to Powell and his co-defendants. On the other hand, *Powell* effectively foreshadowed the role that defense attorneys can play in protecting the rights of a specifically targeted population. Not willing to offer defense counsel as explicit agents against racial discrimination, the Court offered them instead as general protectors of innocence.

## II. BARRIERS TO THE VINDICATION OF RACE-BASED CHALLENGES

Enter *Gideon*. The provision of lawyers to the accused was meant to provide criminal defendants with protection against “a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.”<sup>53</sup> Fifty years later, the overwhelming consensus is that the nation’s indigent defense system is in crisis.<sup>54</sup> Crime policies of the last two decades have cast an ever-widening net of over-criminalization and over-incarceration.<sup>55</sup> Funding for police and prosecutors has increased.<sup>56</sup> At the

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afford their own.” James L. Haley, *THE TEXAS SUPREME COURT: A NARRATIVE HISTORY* 1836–1986 at 65 (2013).

53. Neuborne, *supra* note 4, at 86.

54. See Stephen B. Bright et al., *Lawyers, Not Another Commission, for the Poor*, NAT’L L.J., Dec. 2, 2013, available at <http://m.law.com/module/alm/app/nlj.do#!article/1364643584> (stating “Reports, studies and articles have repeatedly documented a long-standing crisis”); see also Eric H. Holder Jr., *Gideon—A Watershed Moment*, CHAMPION, June 2012, at 56, available at <http://www.nacdl.org/Champion.aspx?id=24999> (stating “[D]espite the significant progress that’s been made in recent decades, in jurisdictions nationwide, the full promise of the rights guaranteed under *Gideon* has yet to be fully realized”). For reports on the subject of the nation’s broken indigent defense delivery system, see A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 41–45 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf); NAT’L RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (April 2009), available at [www.constitutionproject.org/pdf/139.pdf](http://www.constitutionproject.org/pdf/139.pdf). For law review articles describing the state of indigent defense, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) (“Poor people account for more than 80% of individuals prosecuted.”); Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 (2010).

55. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 342–43 (2006) (asserting that “[t]he huge increase in the number of people prosecuted, convicted, and sent to prison has had an enormous impact on courts and other institutional actors responsible for ensuring reliability and fairness”); see also JOEL M. SCHUMM, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A., *NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED* 9 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_national\\_indigent\\_defense\\_reform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf) (suggesting reclassification, defined as “the process of reconfiguring criminal statutes that otherwise result in stigmatizing criminal convictions and possible jail sentences into civil infractions that carry a fine,” as an antidote to the “[c]urrent

same time, public defense delivery systems across the country remain “chronically underfunded,”<sup>57</sup> such that many offices lack access to adequate office space and basic legal research tools. While some public defenders are able to provide exemplary representation to a handful of clients, most labor under caseloads so staggering<sup>58</sup> as to preclude individualized, zealous representation, no matter how well-trained or dedicated they may be. Each of these problems exacerbates the others. Over-criminalization and over-enforcement lead to crushing caseloads; crushing caseloads strain resources; strained resources mean cases are triaged instead of tried.<sup>59</sup> Flanked on one side by increasingly punitive crime control policies, and on the other by resource-strapped public defender systems, indigent criminal defendants are caught in a practically inescapable pincer maneuver.

Many of the obstacles to zealous representation are the same obstacles that keep public defenders from fulfilling their role as champions of racial justice. One of the most significant systemic barriers to defense representation able to redress invidious race discrimination is the lack of discretion that defense attorneys have compared to every other system stakeholder.<sup>60</sup> Discretion “is [so] essential to the efficient operation of the

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policing strategy that floods the criminal justice system with arrests and contributes to countless prosecutions for myriad petty, non-violent infractions”).

56. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 8 (1997) (“Over the course of the past couple of decades, legislatures have exercised this funding power to expand substantially the resources devoted to law enforcement, though the budget increases appear less substantial in light of parallel increases in crime. In constant dollars, total state and local expenditures for prosecution and other government legal services trebled between 1971 and 1990; expenditures for police rose 60%.” (footnote omitted)).

57. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631 (2013); see also Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972–77 (2012); Bright et al., *supra* note 54, (observing that “[t]he reports and studies have also identified over and over again the causes for these problems—the primary one being the unwillingness of state and local governments to carry out their constitutional obligation to pay to provide lawyers for people they are trying to convict, fine, imprison and execute.”).

58. Erica J. Hashimoto, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY ISSUE REPORT, ASSESSING THE INDIGENT DEFENSE SYSTEM, 10 (2010) available at <http://www.acslaw.org/files/Hashimoto%20Indigent%20Defense.pdf> (estimating that public defenders in the examined counties carried up to 50% more cases than the recommended ABA standards).

59. For a general description of public defender triage, see Richardson & Goff, *supra* note 57, at 2631–34.

60. See generally *Whren v. United States*, 517 U.S. 806, 818–19 (1996) (upholding police discretion to stop persons suspected of traffic violations); *United States v. Armstrong*, 517 U.S. 456, 460–62 (1996) (recognizing the substantial discretion prosecutors have to bring criminal charges); *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (recognizing the importance of granting prosecutors discretion to seek and impose the death penalty); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (permitting prosecutors wide latitude in exercising peremptory challenges); *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 339–40 (1970) (rejecting facial challenge to scheme that gave jury commissioners substantial discretion to select persons for jury service based on subjective criteria).

criminal justice system” that it “pervades the American criminal justice system.”<sup>61</sup> If the procedural and substantive due process rights of criminal defendants are the skeleton of the criminal justice system, then discretion is the muscle. Police decide whether and whom to stop and arrest. Prosecutors decide whether and whom to charge. “Abuse of discretion,” the standard of review on evidentiary and many other issues, accords a great deal of deference to trial judges. Nullification is a subset of that discretion.

Prosecutors can nullify cases by deciding not to prosecute for reasons other than the defendant’s guilt; judges balance the equities in their decisions as well; and of course, juries have the power to nullify cases, and have been publicly urged to do so specifically in non-violent drug offense trials as a measure to address disparate rates of enforcement against African Americans.<sup>62</sup>

But defense attorneys do not have similar discretion. In a system where discretion is the coin of the realm, defense attorneys are paupers. The sole area where defense attorneys can exercise a measure of discretion is in determining how they distribute their sweat equity: whether and which witnesses to interview, whether to investigate the crime scene, whether to canvass the neighborhood, how much legal research to do, what motions to file and when to file them, whether to engage in plea negotiations, and how to pursue the strategy that best meets the client’s expressed interests. And these are just the defense attorney’s responsibilities with respect to resolving the case. Defense attorneys also have to develop a rapport with clients, and do the administrative work required by ethical rules and by his or her office to maintain hundreds of case files.

Unfortunately, there are mechanisms in place to curtail the exercise of discretion even here. In jurisdictions across the country, defense attorneys are pressured to concentrate their resources on the most meritorious cases<sup>63</sup> and aid in the smooth operation of judicial efficiency. Story after story documents instances in which defense attorneys are discouraged from trying to provide a minimum of advocacy. Consider the case of Carol Huneke, who was a public defender in Spokane County when she was assigned to represent Sean Replogle, an eighteen-year-old high school senior who found himself charged with vehicular manslaughter.<sup>64</sup> After he got his license, Mr. Replogle saved \$1700 to purchase a thirteen-year-old red Mustang to drive

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61. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243–44 (2011).

62. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); see also Ed Burns et al., *The Wire’s War on the Drug War*, TIME, Mar. 5, 2008, <http://content.time.com/time/magazine/article/0,9171,1720240,00.html>.

63. Merit is in the eye of the beholder. Meritorious cases include cases that are likely to result in acquittal, cases with clients who seem best positioned to benefit from a zealous defense, or other cases that, for any reason, seem to stand out in the sea of case files.

64. HOUPPERT, *supra* note 1, at 10, 22.

to school and to his job at McDonald's.<sup>65</sup> On October 20, 2001, Sean was driving his car with a friend when he collided with another car at an intersection.<sup>66</sup> Sean and his friend were not hurt, but the driver of the other car, eighty-five-year-old Lowell Stack, died in the hospital seven days later.<sup>67</sup> On the trial date, Huneke, who, at the time was carrying 101 open cases,<sup>68</sup> and who had had five back-to-back trials in the days leading up to Replogle's trial call, asked for a continuance so that she could have time to investigate his case.<sup>69</sup> She had questions, for example, about whether the accident was the proximate cause of death when she got the autopsy report and learned that Mr. Stack had died from an infection after an operation done to fix his hernia.<sup>70</sup> She also wanted to investigate the witness accounts of Mr. Replogle's speed, Mr. Stack's driving record, reports from the paramedics, expert assessments of the skid marks at the site of the accident, and a long list of other things.<sup>71</sup> Ms. Huneke told the judge that it would be "ineffective assistance of counsel" for her to proceed.<sup>72</sup> The judge denied her request, telling her that the trial would start in three days, or Ms. Huneke would be held in contempt.<sup>73</sup>

This example highlights the interaction between the two streams of case law that converge to discourage defense attorneys from providing zealous advocacy. When Ms. Huneke tried to persuade the court to grant her request for a continuance, she said, on the record, that it would be "ineffective assistance of counsel" for her to proceed on the original trial date. In response, the trial judge threatened her with contempt for moving to continue. The jurisprudence concerning ineffective assistance of counsel

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65. *Id.* at 1.

66. *Id.* at 4, 6-7.

67. *Id.* at 5-7, 9.

68. *Id.* at 30.

69. *Id.* at 29.

70. *Id.* at 26.

71. *Id.* at 26-27.

72. *Id.* at 31.

73. Karen Houppert discusses Sean Replogle's story in Chapter 1 of *Chasing Gideon*. HOUPPERT, *supra* note 1, at 2-56. Fortunately for Mr. Replogle, Ms. Huneke made the risky choice to spend the weekend preparing to be held in contempt. *Id.* at 29-31, 35-36. She collected affidavits from her colleagues about the crushing caseloads in the public defender's office, and submitted her own as well, with her caseload attached; she pointed out that while she had 101 open cases, the prosecutor had twenty-eight; and she got legal advice on what to do if she were held in contempt. *Id.* at 29-31. When she showed up to court on Monday morning, along with a local reporter who had been tipped off about the impasse, the judge granted Ms. Huneke's continuance. *Id.* at 36. Those three weeks made all the difference. *See id.* at 36-39. Ms. Huneke hired a state trooper to investigate the accident and "help her re-create it for the jury." *Id.* at 37. The state trooper discovered that the state's investigator had doubled the length of the skid marks in the speed-distance calculations. *Id.* at 38. And, as for Mr. Stack's hernia, his family doctor testified that the doctor had refrained from operating on it because of Mr. Stack's fragile health, and that the doctor would have advised the emergency room staff against operating on it if they had asked him. *Id.* It took the jury twelve minutes to acquit. *Id.* at 39.

and the body of cases concerning contempt act in counterpoint to define the limits of criminal defense advocacy. In other words, “[j]ust as decisions on ineffective assistance of counsel set the lowest limits on the quality of advocacy *required* by the Constitution, exercise of the contempt power defines the boundaries of the most vigorous advocacy *protected* by the Constitution.”<sup>74</sup> Although each of these bodies of law is populated by a universe of individual cases, the transcendent issue for both “is not so much the fate of the particular litigants, but the effect of these decisions on the practice of law.”<sup>75</sup>

*Strickland v. Washington* announced a two-part test for assessing whether a defense attorney’s performance qualifies as minimally adequate representation, or as ineffective assistance such that the defendant was denied the constitutional right to be represented by counsel. Although in its rhetoric *Strickland v. Washington* casts defense counsel as “playing a role that is critical to the ability of the adversarial system to produce just results,”<sup>76</sup> the holding of the case relegates defense counsel to much more of a supporting role. It is not enough to prevail if the lawyer’s performance was simply terrible; the lawyer’s performance has to be so remiss as to amount to having had no lawyer at all.

The test to establish a claim of ineffective assistance of counsel has two prongs. Under this test, to establish that he is entitled to some kind of relief because his defense counsel was ineffective, a criminal defendant must show that (1) defense counsel’s performance was deficient, meaning counsel’s performance fell below an objective standard of reasonableness, and (2) defense counsel’s performance was actually prejudicial, meaning that counsel’s performance gives rise to a reasonable probability that, had counsel performed adequately, the result of the proceeding would have been different.<sup>77</sup> Although the test anticipates an objective standard of reasonableness, the test has generally been interpreted as requiring an alarmingly low level of competence. For example, in *Burger v. Kemp*, the Court found that counsel’s performance was not ineffective in a case where defense counsel neglected to present any mitigating evidence at the sentencing hearing of a defendant convicted of murder, even though at the time of the crime, the defendant was a seventeen-year-old army private with a below average I.Q. and a history of mental illness.<sup>78</sup> And Texas is infamous for having a long list of lawyers who continue to get appointments even

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74. Raveson, *supra* note 32, at 483.

75. *Id.*

76. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

77. *Id.* at 691–92.

78. See *Burger v. Kemp*, 483 U.S. 776 (1987).

though they sleep their way through capital trials,<sup>79</sup> or fail to do the most basic investigation.<sup>80</sup>

On the other hand, the upper boundary of zealous advocacy is policed by judges who threaten contempt at any sign of defense advocacy that slows the court's docket—and by judges who follow through on those threats. Generally, courts have an inherent power to punish misconduct that interferes with the judicial process as criminal contempt. And, although there are no studies on how often judges threaten contempt, the anecdotal data suggest that such threats are a frequent occurrence. One commentator estimates that “[p]robably no more than a few minutes go by in this country without an attorney being charged or threatened by a judge with contempt,” adding that “[i]n Los Angeles County alone, one public defender is held in contempt or threatened with contempt every week.”<sup>81</sup>

Unfortunately, the arbiter of what interferes with the judicial process is determined by “the personal sensibilities of [the] trial judge[] . . . [and] each court is free to enforce its own erratic rules.”<sup>82</sup> So one court's zealous advocacy might be another court's contempt. For example, in 2007, a public defender in Washington, D.C. was taken to a holding cell and strip searched in the middle of a status hearing after the judge disagreed with the lawyer about whether the defendant was homeless.<sup>83</sup> The judge ordered the attorney to be quiet and sit down. When the attorney continued to argue her case, the judge had her detained.<sup>84</sup> In another example, in 2008 a juvenile public defender in Georgia was convicted of two counts of contempt for comments she made during a suppression hearing. In response to the trial judge's ruling that she question witnesses in a different order, she stated, “[T]hat's a gross interference with the way that I can represent my client,

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79. Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 148 (2001) (“In Texas, defense attorney Joe Cannon was accused of sleeping at the trials of two indigent clients, prompting one commentator to note that ‘one judge after another has found that sleeping lawyers are no barrier to a fair death-penalty trial.’ While these examples are frightening in their implications about the representation capital defendants receive, they are even more horrifying when one realizes that none of these cases resulted in a new trial because of ineffective assistance of counsel.” (footnotes omitted)).

80. Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), [http://www.nytimes.com/2010/05/18/us/18bar.html?ref=adam\\_liptak&\\_r=0](http://www.nytimes.com/2010/05/18/us/18bar.html?ref=adam_liptak&_r=0) (describing Jerry Guerinot, a Texas lawyer who, with 20 clients on Texas's death row, “has perhaps the worst record of any capital lawyer in the United States” and has been characterized as “an undertaker for the State of Texas”).

81. Raveson, *supra* note 32, at 480.

82. *Id.* at 483.

83. See Complaint at 1–2, *Brown v. Short*, 729 F. Supp. 2d 125 (D.D.C. 2010) (No. 08-1509), available at <http://legaltimes.typepad.com/files/brown-amended-complaint.pdf>.

84. *Id.*



Your Honor.”<sup>85</sup> And, later in the hearing, when she revisited the point, the court stated that “[w]hat you’re doing now is making a closing argument,” and said that it ‘had heard enough on this issue.’<sup>86</sup> The attorney then responded: “I just find the Court is biased in its view. You say that you’re not prejudging the case but it seems to me like you’ve made up your mind and any and everything that I do to effectively defend my client I’m being rebutted.”<sup>87</sup> She was sentenced to ten and twenty days incarceration for each of the comments, respectively, to be served consecutively.<sup>88</sup>

Courts across the country have employed a comprehensive arsenal of creative punishments against defense attorneys in order to halt conduct by criminal defense attorneys that courts deem contemptuous. Most commonly, judges hold criminal defense attorneys in civil or criminal contempt, along with imposing fines or a jail sentences.<sup>89</sup> Another common tactic involves a judge threatening a criminal defense attorney with the specter of a contempt hearing, a fine, or a jail sentence to quash behavior during proceedings.<sup>90</sup> There are many examples of judges using their discretionary case-processing role to chill criminal defense attorney conduct during court hearings. For example, a judge may prevent an attorney from making an

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85. *In re Jefferson*, 645 S.E.2d 349, 351 (Ga. Ct. App. 2007), *vacated*, 645 S.E.2d 349 (Ga. 2008).

86. *Id.*

87. *Id.* (internal quotations marks omitted).

88. *In re Sherri Jefferson*, 657 S.E.2d 830, 831 (Ga. 2008).

89. *See, e.g.*, *Weidner v. State*, 764 P.2d 717, 719, 722 (Alaska Ct. App. 1988) (stating that defense counsel was held in contempt on at least eight different occasions during a three month trial for behavior such as failing to move on to a new area of questioning during cross examination and requesting to check the record which resulted in a fine for each separate violation, for a total of \$4650); *Ullmann v. State*, 647 A.2d 324, 337 (Conn. 1994) (stating that defense counsel was held in criminal contempt for refusing to testify against his client); *In re Healy*, 526 S.E.2d 616, 617 (Ga. Ct. App. 1999) (stating that defense counsel was held in criminal contempt, weeks after trial concluded, for a question intended to test the credibility of a witness but that the prosecution argued was aimed to trigger a mistrial); *State v. Williams*, 884 P.2d 755, 757 (Kan. Ct. App. 1994) (stating that defense counsel was held in contempt for refusing to disclose a psychiatric report after withdrawing plea and expressly advising the court that the report would not be used at trial); *In re Masinter*, 355 So. 2d 1288, 1289-90 (La. 1978) (stating that defense counsel was detained in jail for twelve hours for contempt after making statements to the court like “nobody seems to want to get to the truth here”).

90. *See, e.g.*, *Braisted v. State*, 614 So. 2d 639, 639 (Fla. Dist. Ct. App. 1993) (The judge commented to the defense attorney during a criminal trial that the court was tired of defense counsel’s facial expressions and “playing to the crowd.” Before defense counsel began closing argument, the Judge warned defense counsel, “If you would do something dramatic, I might be dramatic also, you know.” Defense counsel was eventually held in criminal contempt, at the urging of the prosecutor. (internal quotation marks omitted)); *State v. Campbell*, 497 A.2d 467, 469-70 (Me. 1985) (Defense attorney, upset at what he believed to be egregious constitutional violations toward his client, told the court that he would either leave the courtroom or remain mute through the remainder of the proceedings. The Judge instructed defense counsel that to do any of those things would be “at his peril.” (internal quotation marks omitted)).

argument in response to an objection, refuse to allow an attorney to make any further record, limit the scope of questions during examination, or threaten a mistrial if the “zealotry” goes too far.<sup>91</sup> Some judges rely on informal disincentives to accomplish the desired effect of chilling zealous advocacy.<sup>92</sup> And then there are cases that almost strain the limits of credulity, like *Jordan v. County Court*.<sup>93</sup> In that case, the judge instructed defense counsel to listen and told her that if she “opened her mouth one more time” before the judge finished, defense counsel would be held in contempt and jailed.<sup>94</sup> When the judge finished speaking, petitioner stated, “Excuse me, Your Honor.”<sup>95</sup> The judge then immediately ordered defense counsel to jail for thirty days.<sup>96</sup>

Contempt allegations are rarely tried, and convictions are rarely appealed. As a result, criminal defense attorneys in a given jurisdiction are sent powerful messages about the level of their advocacy “not through the

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91. See, e.g., *McCullough v. State*, 108 S.W.3d 582, 584 (Ark. 2003) (On the day of trial, defense counsel asked the Judge to recuse based on some pre-trial issues. The Judge declined to recuse and defense counsel asked the Court, twice, to make a record. On the third request to make a record, the Judge interrupted defense counsel and, in open court, ordered defense counsel taken to jail and counsel was held in contempt and sentenced to ten days in the county jail); *Rowell v. State*, 644 S.W.2d 596, 598 (Ark. 1983) (Defense counsel was held in contempt for asking questions the Judge had ordered not to be asked, despite clarification by defense counsel who believed his questions were appropriate under the Judge’s order, but were harmful to the prosecution); *People v. Graves*, 384 N.E.2d 1311, 1312–13 (Ill. 1979) (Defense attorney questioned a witness who had been his client’s accomplice and made an agreement with the state for a reduced sentence. Defense counsel wished to question the witness about the penalty the witness avoided by agreeing to testify to show bias. Raising an objection regarding the jury’s learning the potential penalty for the defendant through such questioning, the judge and prosecutor crafted limited questions about the penalty for defense counsel to ask. Defense counsel chose to ask his own questions about the penalty and was held in contempt); *Meek v. State*, 930 P.2d 1104, 1106–07 (Nev. 1996) (Both the prosecutor and defense counsel were admonished by the court for their ungentlemanly performance; however, only defense counsel was held in contempt and fined, all in the presence of the jury.).

92. See, e.g., *Weaver v. Superior Court*, 572 P.2d 425, 427 (Alaska 1977). After the court granted defense counsel’s request for a mistrial due to insufficient voir dire caused by the judge, the court “imposed a \$100 fine on [defense counsel] for contemptuous conduct.” *Id.* The Alaska Supreme Court reversed the sanction and remanded the case to the superior court. *Id.* at 432; see also *Burke v. Superior Court*, No. A129122, 2011 WL 126011,3 at \*4 (Cal. Ct. App. Apr. 5, 2011) (stating that defense counsel was told by the judge—after the court believed that counsel’s opening statements exceeded the limits set by a pre-trial motion—that while the court understood defense counsel’s “enthusiasm,” defense counsel still should have “known better” (internal quotation marks omitted for first quotation)). Additionally, in one example from one of my students during an internship, after ruling against the defense in a suppression hearing that the court had been very resistant to, the court made the student attorney turn, face the courtroom, and apologize to everyone in the courtroom “for making everyone wait and taking up the court’s time.”

93. *Jordan v. Cnty. Court*, 722 P.2d 450 (Colo. App. 1986).

94. *Id.* at 451 (internal quotation marks omitted).

95. *Id.* (internal quotation marks omitted).

96. *Id.*

careful development of evidentiary rules, or trial procedures, but by disciplining attorneys and other participants in the trial process.”<sup>97</sup> To paraphrase Justice Marshall, the danger of this “sword of Damocles is that it hangs—not that it [strikes].”<sup>98</sup>

So, there was almost no way that Carol Huneke would have been found ineffective, as long as she stood, awake, by her client. But the threat of contempt if she fought too hard was all too real.

### III. RECONCEPTUALIZING THE ROLE OF THE PUBLIC DEFENDER

Criminal defense attorneys owe each individual client a duty of fidelity that requires the defense attorney to give “entire devotion to the interest of the client, warm zeal in the maintenance and defense of [the client’s] rights and the exertion of [the lawyer’s] utmost learning and ability.”<sup>99</sup> This duty of fidelity means that defense attorneys cannot use the client as a vehicle to effect social change if the client does not share that goal. In other words, there may be a tension between what is commonly called “cause-lawyering” and fidelity to the individual client that may present itself when criminal defense counsel is faced with an opportunity to combat racial bias.<sup>100</sup>

But the theoretical tension between the defense attorney’s ethical obligation to represent the stated interests of her individual client, and any larger obligation she may feel to combat invidious race discrimination, in many cases, presents a false binary in practice.<sup>101</sup> First, ethical canons are clear that criminal defense counsel must never take up a cause through his or her representation that is antithetical to the client’s goals. Second, so long as criminal defense counsel offers unvarnished advice that allows the

97. Raveson, *supra* note 32, at 483.

98. *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (discussing the deterrent effect of a statute imposing imprecise proscriptions on speech).

99. See ABA, *CANONS OF PROF’L ETHICS* 8 (1908). Zealous advocacy is the bedrock concept of ethical lawyering. As Henry Lord Brougham famously described the defense attorney’s obligation in 1820:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 *HOFSTRA L. REV.* 1319, 1322 (2006) (alteration in original) (quoting 2 *TRIAL OF QUEEN CAROLINE* 3 (1821)).

100. See M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 *N.Y.U. REV. L. & SOC. CHANGE* 351, 379–80 (2012), for a recent discussion of cause-lawyering in the context of client-centered representation.

101. For a fuller discussion of the tension between cause-lawyering and the defender’s duty to represent individual clients, see Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 *N.Y.U. J. LEGIS. & PUB. POL’Y.* 999, 1016–19 (2013).

client to make an informed decision about the goals of the representation, defense counsel can pursue a certain cause. Finally, the same way that the unfairness in the criminal justice system makes it a more procrustean system for everyone, taking steps to make the criminal justice system more fair for people of color will result in a better system for all criminal defendants, regardless of their race.<sup>102</sup> It will “frequently be the case” that the client’s individual goals and criminal defense counsel’s systemic goals will be aligned.<sup>103</sup>

The ethical equities address the question of whether defense counsel can raise race. Strategic considerations answer the question of whether defense counsel should raise race explicitly. Recent social science and empirical research suggest that calling attention to race as an issue reduces reliance on stereotypes.<sup>104</sup> According to these studies: “when race is made salient, individuals tend to treat [w]hite and [b]lack defendants the same[, but w]hen race is not made salient, individuals tend to favor white defendants over black defendants.”<sup>105</sup> These studies, as well as the current demographics of the criminal justice system, suggest that a new tack that includes criminal defense counsel injecting explicit discussion of race issues is a prudent litigation strategy.

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102. *Id.* at 1018. As Professor Rapping explains:

To the extent that our collective dehumanization of African-Americans facilitates our promotion and acceptance of a draconian criminal justice system that confronts every person accused of crime, all defendants benefit from a more racially sensitive public. By racializing crime and exploiting a public willingness to accept harsh treatment of a criminal population perceived to be black, politicians have been able to expand the categories of behavior defined as criminal and enact increasingly punitive sentencing schemes. While these forces have certainly been fueled by the association between race and crime, they have harshly impacted everyone accused of crime regardless of race.

*Id.* (citation omitted).

103. *Id.* at 1019.

104. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI-KENT L. REV. 997, 1026–27 (2003) (determining that presenting jurors with race-based voir dire questions in cases involving interracial violence reduced racial bias in white jurors); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1373–76 (2000) (finding that in interracial domestic violence cases, white jurors were more likely to treat white and black defendants the same if the defendant referred to himself using his race than if he simply referred to himself as a man); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 216–20 (2001) (finding that white jurors were more likely to treat white and black defendants equally if a defense witness spoke about the defendant being the target of racial slurs). For a summary of Sommers and Ellsworth’s work on race salience, see, Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

105. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1563 (2013).

The following suggestions are meant to offer ways that defense attorneys can bring up bias issues in juvenile and criminal cases so that these issues can be fully and fairly vetted like any other legal issue that may serve as a remora to a just and balanced outcome. These arguments likely will not win the substantive legal point; in fact, they will probably be met with a great deal of resistance. Instead, they serve as vehicles for criminal defense counsel to inject issues concerning race discrimination into the courtroom conversation, which, for too many reasons to recount in this short Essay, manages to bypass race bias while being steeped in it.

A. *PRE-TRIAL*

1. Motion to Dismiss in the Interests of Justice (or, in Juvenile Cases, in the Best Interests of the Child)<sup>106</sup>

Many jurisdictions allow the filing of a motion to dismiss in a case in which the equities tip the scales in favor of sparing the defendant the risks of going forward with the case. These can be captioned as motions to dismiss in the interests of justice in criminal cases, or, in juvenile delinquency cases, as motions to dismiss in the best interests of the child.<sup>107</sup> The goal is to use workaday legal arguments to raise overt arguments pertaining to race discrimination. Because the motion is captioned with a title so broad that any reason that serves “the interests of justice” or “the best interests of the child” is properly included in it, these motions might be excellent ways to get race-related issues that would not otherwise be heard before the court. This technique can be useful in cases with clear racial overtones, like a case in which a client of color is charged with assault on a white police officer, or in which a child of color has been charged with fighting with another child who the client claims used racial slurs. But there are other opportunities to file this kind of motion as well, for example, in jurisdictions that have advisory sentencing guidelines that would lead to greatly disproportionate sentences, or that have schools that have zero tolerance policies that disproportionately affect students of color. Defense counsel has just as much right to claim to represent the public’s interest in a non-discriminatory

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106. Versions of many of these suggestions were included in an earlier piece I wrote called *Raising Race*, published in *The Champion*, the magazine of the National Association of Criminal Defense Lawyers. See Robin Walker Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 24. Additional recommendations from that piece included formation of disproportionate minority contact (“DMC”) practice groups within public defender offices and advocacy organizations. DMC Practice Groups can aid in drafting model motions and jury instructions and organizing strategic and persuasive arguments for defense attorneys to use in their cases, including the specific vehicles mentioned here: motions to dismiss in the interests of justice, motions to suppress, and jury instructions.

107. The State Training Director for Juvenile and Complex Litigation at the Colorado Office of the Public Defender, Ann Roan, will be field-testing this motion in juvenile cases.

criminal justice system as prosecutors have to claim to represent public safety.

## 2. Motions to Suppress: Testing Implicit Race Bias

Although case law seems to have foreclosed raising arguments concerning pretextual stops as grounds for suppression of evidence under the Fourth Amendment, there may be ways for criminal defense counsel to take up this issue, if not head on, then from another direction. In *Whren v. United States*, the Court turned to consideration of police motivation under the Fourth Amendment. The Court held that police officers may use minor traffic violations as a pretext to stop drivers for suspected drug involvement.<sup>108</sup> So long as the police have probable cause to believe that a driver has committed a traffic violation, the police can stop the driver, no matter the officers' subjective motivations.<sup>109</sup> The *Whren* facts are particularly striking because the *Whren* police officers had no evidence to suspect the defendant and his passenger, both African American men, of involvement in a drug crime besides the Washington, D.C. "high drug area" in which they were stopped.<sup>110</sup> According to the Court, a police officer's possible racial bias in making traffic stops is inconsequential to the determination of whether the officer's behavior was "reasonable" under the Fourth Amendment so long as the officer can point to an actual traffic violation.<sup>111</sup> Importantly, the Court was careful to point litigants in a different direction, stating that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intent plays no role in ordinary, probable-cause Fourth Amendment analysis."<sup>112</sup>

Contrasting *Whren* with *Batson v. Kentucky* is instructive. In *Batson*, the Supreme Court considered how the Equal Protection Clause intersects criminal justice at the jury selection stage. The *Batson* Court held the Equal Protection Clause forbids the government from using its peremptory challenges "to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."<sup>113</sup> *Batson* allowed defendants to use a kind of empirical evidence to make a prima facie showing of intentional invidious discrimination: the pattern of the prosecutor's exercise of peremptory strikes.<sup>114</sup> Once the defendant has established a prima facie case, the burden of production shifts to the

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108. *Whren v. United States*, 517 U.S. 806, 818–19 (1996).

109. *See id.* at 818.

110. *Id.* at 808.

111. *Id.* at 809.

112. *Id.* at 813.

113. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

114. *See id.* at 96–97.

prosecution “to come forward with a [race] neutral explanation.”<sup>115</sup> The burden of persuasion remains with the defendant to show purposeful discrimination, which is decided by the court in its consideration of the strength of the prosecutor’s proffered race-neutral explanation. Notably, the *Batson* Court reaffirmed that the dangers of invidious discrimination in jury selection extended beyond the defendant to include the juror as well as the entire community.<sup>116</sup> In addition to the criminal defendant’s right to a jury chosen from a cross-section of the community in a manner free of invidious discrimination,<sup>117</sup> the *Batson* Court sought to safeguard the prospective juror’s right to serve, and the public’s interest in confidence in the jury system, and eradication of continuing invidious discrimination, both inside and outside the courtroom.<sup>118</sup>

In both *Whren* and *Batson*, the Court examined the intent of the government actor. In the Fourth Amendment context, the Court held that the intent was irrelevant; in the Equal Protection context, the Court established a procedure for cursory review of the government actor’s intent. Criminal defense counsel can make use of the parallels between these cases to argue that the trial court should allow defense counsel to introduce evidence to test the officer’s testimony that the officer observed a traffic violation, including: (1) the officer’s record of arrests; (2) evidence of

115. *Id.* at 97.

116. *Batson*, 476 U.S. at 87–88; see also *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 140–42 (1994) (discussing the importance of protecting potential jurors from discriminatory jury selection techniques); *Georgia v. McCollum*, 505 U.S. 42, 48–50 (1992) (discussing the importance of eliminating discriminatory jury selection practices); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618–19 (1991) (discussing the need to protect potential jurors from discrimination); *Powers v. Ohio*, 499 U.S. 400, 409–10 (1991) (noting the importance of jury service as a reason for eliminating discrimination in jury selection).

117. *Batson*, 476 U.S. at 85–87. “Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.” *Id.* at 86.

118. *Id.* at 87. “The harm . . . extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Id.* One commentator notes that the public views juries as “representative of the community.” Anna M. Scruggs, Note, *J.E.B. v. Alabama ex rel. T.B.: Strike Two for the Peremptory Challenge*, 26 LOY. U. CHI. L.J. 549, 580 (1995), “Discriminatory jury selection undermines [public] confidence in the jury’s neutrality, its ability to adhere to the law, and the fairness of the verdict it determines.” *Id.* at 581. Media commonly report on the gender and racial make-up of juries. *Id.* at 582. This is particularly true in high profile cases.

The Court acknowledges the continued importance of public opinion and perceptions of the jury system. One of the primary reasons the Court chose to extend *Batson*’s requirements to the defendant’s use of peremptory challenges was the fear that discrimination by either party undermines public confidence in the jury system. *McCollum*, 505 U.S. at 49–50, 59. Similarly, in extending *Batson* to prohibit gender-based peremptory challenges, the Court stated that the “community is harmed by the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.” *J.E.B.*, 511 U.S. at 140.

whether the neighborhood actually is a “high crime area;” and (3) witness accounts of the entire interaction between the officer and the defendant.

B. TRIAL: USE OF NARRATIVE

Telling the client’s story can be one of the most subversive things criminal defense counsel does.<sup>119</sup> Particularly in high volume courts, like those that hear misdemeanor and municipal cases, the first goal on the court’s agenda is case processing. Efficient disposal of cases is often diametrical to nuanced, individualized examination of each defendant and the full context and circumstances of that defendant’s life. The inertia of the machinery of the courtroom does not leave much room for such consideration. It is not uncommon for critical stages of a case, like arraignment or bail hearings, to be handled in mere minutes.

Unfortunately, this is exactly the kind of situation that encourages expression of implicit race biases. Scholars have considered the role of implicit race bias in the courtroom and on defense counsel.<sup>120</sup> As federal district court Judge Mark Bennett explains, “[i]mplicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement.”<sup>121</sup> “A stereotype is a well-learned set of associations that link a set of characteristics with a group label.”<sup>122</sup> The good news is that “only a subset of [Americans] actually endorse” negative racial stereotypes.<sup>123</sup> The bad news is that mere “rejection of [negative racial] stereotype[s] . . . does not eradicate the stereotype[s] from [one’s] . . . knowledge structure.”<sup>124</sup> And although we may

119. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450, 1487 (2005) (arguing that the silencing of criminal defendants, instead of being a protective “victory for defendants,” is actually a failure of the democratic process that “exclude[s] [defendants] from the ‘marketplace of ideas’ that shape[s] the criminal justice system”).

120. See generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (describing the potential impact of implicit bias on courtroom actors at each stage in a criminal case). For articles examining how implicit bias affects defense attorneys, see Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004) (examining the racial attitudes of capital attorneys), Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012) (exploring how racial attitudes affect the way defense attorneys interact with clients and choose juries), Rapping, *supra* note 101 (examining the impact of implicit bias on the major courtroom actors in the criminal justice system, with a focus on criminal defense attorneys), and Richardson & Goff, *supra* note 57 (discussing how implicit race bias affects the way public defenders distribute their scant resources).

121. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POLYREV. 149, 149 (2010).

122. Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading?: The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1140 (1995).

123. *Id.*

124. *Id.*



reject these biases, “we unconsciously act on such biases even though we may consciously abhor them.”<sup>125</sup>

Implicit racial bias against African Americans is pervasive and well-documented. Rooted in ubiquitous, pernicious stereotypes about African Americans, implicit racial bias is “perpetuated within [our] culture in subtle, yet highly effectual, ways.”<sup>126</sup> In other words, the stereotypes are so well-woven into the fabric of American culture that they are invisible. For example, social science studies reveal that people are more likely to perceive a given ambiguous action as aggressive and dangerous when performed by an African American than when the same action is performed by a white person.<sup>127</sup> In addition, people misread hostility in African American faces more often than in white faces.<sup>128</sup> Social science studies also show that individuals are more likely to perceive a weapon in the hands of an African American than in the hands of a white person, even when the African American person is actually unarmed.<sup>129</sup>

But studies also show that the force of these implicit racial biases can be blunted. For example, research indicates that when jurors have a three-dimensional picture of the client, it is more difficult to reduce the defendant to a two-dimensional stereotype.<sup>130</sup> Indeed, some jurisdictions have a jury instruction that specifically empowers jurors to acquit on evidence of the defendant’s character alone. In addition, priming jurors with ideas about

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125. Bennett, *supra* note 121, at 149 (2010).

126. Devine & Elliot, *supra* note 122, at 1149.

127. See Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976) (concluding that seventy-five percent of individuals observing an African American shoving a white person considered the shove constituted “violent” behavior, while only seventeen percent of those observing a white person shoving an African American described the shove as “violent” behavior and forty-two percent described the interaction as “playing around”); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980) (concluding that both African American and white children described relatively innocuous behavior by African Americans as more threatening than similar behavior by whites).

128. See Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 345 (2004) (finding that faces displaying relatively hostile expressions were categorized as African American by individuals with high prejudice); Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 643 (2003) (concluding that individuals with high implicit racial bias saw hostility as appearing more quickly and lingering longer in African American faces than in Caucasian faces).

129. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (finding that seeing Black faces made study subjects more likely to see guns and knives, regardless of the individual’s explicit racial attitudes).

130. Rapping, *supra* note 101, at 1038 (citing research that “suggests that by developing a narrative that promotes the client as a devoted husband, a loving father, a committed son, or a dedicated employee, we can potentially help to suppress the more pernicious racial stereotype”).

“fairness and equality [can] suppress . . . racial and other stereotypes.”<sup>131</sup> Accordingly, the use of narrative at every opportunity also has the potential to address implicit race bias by offering, throughout the case, a complete view of the client.

Opportunities to inject the client’s narrative abound. The most obvious places to inject the client’s narrative are the opening statement and closing arguments, when defense counsel is addressing the fact-finder directly. Bail determinations and sentencing hearings are also good opportunities for defense counsel to provide a full narrative about the client. In addition, defense attorneys could have more liberal ideas about whether the client should testify. Generally, criminal defendants are encouraged to let their lawyers do their talking for them. But silence undermines the system’s goal of individualized consideration.<sup>132</sup>

### C. POST-TRIAL: JURY INSTRUCTIONS

Jury instructions offer many opportunities to address invidious race discrimination issues at criminal trials. There are several advantages to using jury instructions as a vehicle to address race issues. The main advantage of jury instructions is that, since they come from the judge, jury instructions have an air of credibility. And, unlike in other parts of the trial, when objections from either side are possible, the jury instructions are uninterrupted. In addition, in many courtrooms, judges not only read jury instructions aloud, but also provide the jurors with a written set of instructions for use during deliberations. Also, jury instructions are given near the end of the trial, after the close of evidence, so they are fresh in jurors’ minds as they undertake the weighty task of deliberating.

In addition to educating the jury about implicit race bias with jury instructions, there are many other possibilities for constructing jury instructions that implicate implicit bias research. A self-defense case might allow for a jury instruction that people are more likely to perceive a given ambiguous action as aggressive and dangerous when performed by an African American than when the same action is performed by a white person,<sup>133</sup> or that people misread hostility in African American faces more often than in white faces.<sup>134</sup> Certainly the Trayvon Martin case, as well as the Michael Dunn “loud music” murder trial, spotlight this phenomenon linking aggressive behavior with African Americans, and particularly, with African American men and boys.<sup>135</sup> Social science studies also show that

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131. Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 332 (2012).

132. See Natapoff, *supra* note 119, at 1464–66.

133. See *supra* note 127.

134. See *supra* note 128.

135. See Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES (March 16, 2012), <http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html>;

individuals are more likely to perceive a weapon in the hands of an African American than in the hands of a white person, even when the African American person is actually unarmed.<sup>136</sup>

#### CONCLUSION

The social and systemic disincentives to take up race issues—not the least of which is the fact that the law functions to insulate the criminal justice system from race-based challenges—are real and astoundingly effective. As each case has closed a door to deracinating racial injustice in the criminal justice system—*McCleskey*, with its explicitly acknowledgement that American society must tolerate a certain amount of racial bias; *Whren* with its imprimatur on officers' use of race as a proxy for dangerousness; *Purkett* with its sanctioning of the all-white jury—criminal defense attorneys have responded by relinquishing our responsibility to continue the fight for racial justice. But it is important to remember that the United States Supreme Court defended “separate but equal” before *Brown v. Board of Education* tore down Jim Crow. Perhaps the United States is in the early stages of this next movement with criminal defense attorneys, at its forefront. What is at stake is the soul of our criminal justice system. The question is whether our understanding of justice is so meager that it cannot include true racial justice. The same way a river can wear jagged rocks into smooth stones, the arguments above are suggestions to begin the process of re-shaping the conversation in the courtroom so that it is race-conscious. And until the arguments are won and there is honest appraisal of the disproportionate minority contact in the criminal justice system, just changing the conversation will be victory enough.

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Lizette Alvarez, *Weapon in Slaying of Florida Teenager Figures Again in Court*, N.Y. TIMES (Feb. 12, 2014), <http://www.nytimes.com/2014/02/13/us/weapon-in-slaying-of-florida-teenager-figures-again-in-court.html>.

136. See *supra* note 129.