THE COLOR OF JUSTICE

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FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA. By *Sara Mayeux*. University of North Carolina Press. 2020. Pp. xi, 271. $26.95.

INTRODUCTION

Writing about history requires making certain decisions: when to start the account, what to include and exclude, which documents and artifacts to rely upon, and what questions to address. One factor that can significantly shape those decisions is the social and political moment occurring at the time the author writes. It is with this in mind that I read Sara Mayeux's[1] thoroughly researched and engaging account of the history of public defenders, *Free Justice: A History of the Public Defender in Twentieth-Century America*. As the subtitle indicates, it is not *the* history, but rather *a* history of defense counsel for low-income defendants. Despite explicit language in the Sixth Amendment, adopted in 1791, guaranteeing "the accused . . . to have the Assistance of Counsel for his defence,"[2] the substantive right to counsel is largely a twentieth-century invention.[3] Mayeux, a scholar of twentieth-century United States legal history, is well-suited to examine this development.

In deciding where to anchor this account, Mayeux focuses on elite corporate lawyers during the Progressive Era, their philanthropic efforts, and the legal profession's changing identity. *Free Justice* unearths the legal profession's dramatic shift in attitude toward public defense over the course of the twentieth century. Elite lawyers initially viewed public defense as akin to communism or as the socialization of the private bar, but by midcentury they regarded public defenders as exemplars of democracy and "the American way of life" (pp. 3–5).

This dramatic shift, according to Mayeux, enabled most indigent-defense delivery models to transition away from elite lawyers' benevolence and ad hoc

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1. Associate Professor of Law and History, Vanderbilt Law School.
2. U.S. CONST. amend. VI.
3. Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493 (2021).

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services to state-financed public-defender offices, legal aid societies, and nonprofits. *Gideon v. Wainwright*,[4] the Supreme Court decision extending the right to counsel to indigent defendants accused of crime, was part of the shift. But as Mayeux uncovers, larger forces were already in motion.[5]

As Mayeux acknowledges, the legal profession encountered great difficulty in carrying out *Gideon*'s aspirational mandate of championing democracy and protecting due process (p. 150). *Free Justice* is less convincing at explaining why; Mayeux points to funding constraints and the profession's inability to enforce its own standards for effective representation.[6] However, the book misses the opportunity to interrogate the role that racism and white supremacy played in shaping the legal profession and legal services, including the right to counsel for low-income defendants. As other legal historians have recognized, the subordination of nonwhite people, particularly Black people, and the criminalized lens through which society viewed them, profoundly shaped criminal procedure, due process, and indigent defense.[7] This is not to say that *Free Justice* ignores the role of racism and white supremacy, but the book treats them as supporting players,[8] when they were central to the design of indigent defense and continue to impact its (dys)functionality.

In this Review of *Free Justice*, I argue that one cannot tell a history of public defense without interrogating the political, social, and legal status of Black and other nonwhite people[9] charged with crime. Informing my approach is the nation's current engagement in a racial reckoning and the increased awareness of racism's pervasive impact.[10] I often apply a critical race lens to a

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4. 372 U.S. 335, 342–45 (1963).

5. P. 35 (describing Progressive Era legal reformers' focus on modernizing criminal law and procedure).

6. *E.g.*, p. 183.

7. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (explaining that the Court's intervention in Black defendant cases involving egregious Jim Crow "justice" in the South helped shape modern criminal procedure); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1171 (2019) ("During the pre-*Powell* era, two dominant visions of legal aid existed. . . . Race figured into each model.").

8. *See, e.g.*, p. 47 (mentioning that the legal profession's control over standards and licensure made entering the profession harder for immigrant and minority groups); pp. 69–74 (explaining that successful "challenges to mob-dominated trials in the Jim Crow South" helped advance due process in the criminal context); p. 154 (noting that racism was "the unspoken elephant" in criticism about criminal adjudications after *Gideon*).

9. I am referring both to groups of people society currently recognizes as people of the global majority, such as Latinx people, Asian Americans, and Native Americans, as well as subgroups of European immigrants from the late 1800s and early 1900s when the United States adopted a more restrictive allocation of whiteness based on perceived capacity for self-governance and pathologized behavior. *See, e.g.*, MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998); *see also infra* Section I.B.

10. *See, e.g.*, *Looking Back at a Year-Long Racial Reckoning Since George Floyd's Killing*, PBS: NEWSHOUR (May 25, 2021, 6:52 PM), https://www.pbs.org/newshour/show/looking-back-at-a-year-long-racial-reckoning-since-george-floyds-killing [perma.cc/ZWF8-9WA6].

get a fuller picture of this nation's legal history.[11] As Professor Derrick Bell's student, I learned that even if the presence of racism is not immediately apparent in a historical event, policy decision, or legal development, it often played a significant role.[12] I witnessed this firsthand as an assistant federal public defender in Tennessee, where I spent nearly a decade representing indigent defendants pursuing habeas relief from their murder convictions and death sentences.[13] Even in cases where racism and white supremacy did not initially appear relevant, they impacted the proceedings.[14] My subsequent experience as senior counsel at the NAACP Legal Defense and Educational Fund,[15] advancing racial justice in criminal and civil cases, reinforced this reality.

In this Review, I focus on the role that racism and white supremacy played in the criminal legal system and its impact on the creation, scope, and trajectory of modern indigent defense. We cannot understand the impact of racism, particularly anti-Black racism, without recognizing that white supremacy undergirds it.[16] By applying a critical race lens to the history of indigent defense and the development of the right to counsel, my hope is to provide additional insight into why public defense has struggled to deliver justice to the accused. I also use this lens to suggest alternative ways to advance justice for poor people ensnarled in the criminal legal system.

My hope for this Review is that it generates new avenues of inquiry and encourages future scholarship on indigent defense that grapples centrally with racism and white supremacy. In Part I, I identify a central tenet of critical race theory and apply it to *Free Justice*'s utopian framework and Progressive Era notions of criminal conduct, charity, and the legal profession. In Part II, I examine the post-*Gideon* fallout in underresourced Black communities, the

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11. Critical race theory embraces narrative and storytelling to advance claims and clarify arguments. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 45–46 (3d ed. 2017).

12. Alexis Hoag, *Derrick Bell's Interest Convergence and the Permanence of Racism: A Reflection on Resistance*, HARV. L. REV. BLOG (Aug. 24, 2020), https://blog.harvardlawreview.org/derrick-bells-interest-convergence-and-the-permanence-of-racism-a-reflection-on-resistance [perma.cc/3PJR-74XT] (citing DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004)).

13. *See Alexis J. Hoag*, BROOKLYN L. SCH., https://www.brooklaw.edu/Contact-Us/Hoag-Alexis [perma.cc/S6FU-M9K7].

14. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 444 (1994) (describing awareness that "racism permeated" every death penalty case, even ones "that at first seemed to involve no such issue").

15. LDF is the nation's "premier legal organization fighting for racial justice" to "fulfill[] the promise of equality for all Americans." *About Us*, NAACP L. DEF. & EDUC. FUND, https://www.naacpldf.org/about-us [perma.cc/Y3XG-S4XP].

16. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370–72 (1988) (explaining the historical relationship between white supremacy and racial stereotypes and characterizations about Black people that "coalesced into an extensive legitimating ideology").

growth of mass criminalization,[17] and ineffective-assistance-of-counsel jurisprudence through a critical race lens. I conclude the Review with thoughts on a different method of delivering justice to indigent people facing criminal charges.

I. APPLYING A CRITICAL RACE LENS

Critical race theory (CRT) is a theoretical framework and movement that challenges traditional approaches to civil rights. Developed by law students and scholars in the late 1970s and early 1980s, CRT enables us to understand the role that racism played in the development of laws and policies.[18] A central tenet of critical race theory is that racism is an ordinary, common occurrence.[19] This reality is based, in part, on the fact that this nation is socially organized by race and ethnicity, and that white supremacy helped shape aspects of our legal system,[20] economy,[21] and politics.[22] This acknowledgment enables us to recognize the extent of racism's entrenchment, while also freeing us to be more creative about imagining ways to change these power structures. The question is not whether racism had an impact, but rather, to what extent and what can we learn from racism's impact? Applying this tenet to the history of indigent defense and the right to counsel can help us better understand their development and present-day operations.[23]

This Part examines the themes Mayeux raises in *Free Justice*—indigent defense's utopian framework, public perceptions of criminality, Progressive

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17. A more expansive term than "mass incarceration," mass criminalization refers to policing, prosecution, court monitoring, court fines and fees, incarceration, parole, and the collateral consequences that result from arrest, conviction, and incarceration. *See* Deborah Small, *Cause for Trepidation: Libertarians' Newfound Concern for Prison Reform*, SALON (Mar. 22, 2014, 12:30 PM), https://www.salon.com/2014/03/22/cause_for_trepidation_libertarians_newfound_concern_for_prison_reform [perma.cc/RRG7-YCGD].

18. DELGADO & STEFANCIC, *supra* note 11, at 4.

19. *Id.* at 8–9.

20. *See* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3, 11 (Angela J. Davis ed., 2017) (explaining that after slavery, "states looked to the criminal justice system to construct policies and strategies to maintain white supremacy and racial subordination").

21. *See* JOSHUA D. ROTHMAN, FLUSH TIMES AND FEVER DREAMS: A STORY OF CAPITALISM AND SLAVERY IN THE AGE OF JACKSON (2012) (detailing America's culture of speculation that drove up cotton production, resulting in the Panic of 1837 and eventually the Civil War, and which would eventually become a defining characteristic of American capitalism).

22. *See, e.g.*, Wilfred Codrington III, *The Electoral College's Racist Origins*, ATLANTIC (Nov. 17, 2019), https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918 [perma.cc/D7NP-X2XC] (noting that the Electoral College system was designed to empower white Southerners and that the system continues to dilute Black people's votes).

23. This application is all the more compelling in light of the current conservative backlash to CRT. *See, e.g.*, Trip Gabriel & Dana Goldstein, *Disputing Racism's Reach, Republicans Rattle American Schools*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/06/01/us/politics/critical-race-theory.html [perma.cc/GPS2-G2M7].

Era charity, and the developing legal profession—through a race-conscious lens. By acknowledging that white supremacy and anti-Black racism shaped these elements, we can better imagine ways to dismantle racism's hold on the criminal adjudication process.

A. *A Raceless Utopia*

Mayeux situates *Free Justice* within political activist Edward Bellamy's reformist ideals, both titularly and conceptually (pp. 26–29). In his weekly newspaper *The New Nation*, Bellamy promoted the concept of "free justice," recommending that the state fund defense lawyers—just as it funded prosecutors—to defend the accused and ensure equality before the law for low-income defendants (p. 28). Mayeux mentions Bellamy's 1888 politically influential utopian novel, *Looking Backward: 2000–1887*.[24] Although Bellamy used the book to advocate for income equality, it ignored racism's role in creating and perpetuating structural inequality. The main character, Julian West, a Boston lawyer, falls asleep and wakes up in the year 2000. In the future, West finds that there is only one human race, equalized by a shared income.[25] Criminal behavior, known as "atavism," is recognized "as the recurrence of an ancestral trait" because society abolished the primary motive for crime: want.[26] Without poverty and desperation, people had little incentive to commit robbery, rape, or murder; instead, any "atavist" behavior was the product of a person's biological makeup.[27]

Without crime, the legal system in Bellamy's future eschewed lawyers, adversarial trials, and punishment, striving instead for the unbiased truth.[28] Society expected those with "an ancestral" disposition for atavistic behavior to plead guilty.[29] For a proponent of "free justice," it is curious that defense lawyers were nonexistent in Bellamy's fictional utopia. Instead, when an accused person refused to plead guilty, "the judge appoint[ed] two colleagues" who either "agree[d] that the verdict found [wa]s just," or tried the case again, pursuing truth rather than an acquittal or a conviction.[30]

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24. Pp. 26–29 (citing EDWARD BELLAMY, LOOKING BACKWARD, 2000–1887 (Oxford Univ. Press. 2007) (1888)).

25. Bellamy's only engagement with race is through Sawyer, West's "faithful colored man," who tends to West's needs in present-day 1887. BELLAMY, *supra* note 24, at 13. In the future, West surmises that Sawyer perished in a fire. *Id.* at 26–27.

26. *Id.* at 118–19.

27. *Id.* at 119.

28. *See* p. 27.

29. *See* BELLAMY, *supra* note 24, at 120 ("If he is a criminal he needs no defense, for he pleads guilty . . . . The plea of the accused . . . is usually the end of the case.").

30. *Id.* Mr. West's guide to the future explains that "these men are [far] from being like your hired advocates and prosecutors, determined to acquit or convict." *Id.*

Echoing Bellamy's raceless utopia, many of the first public-defender offices ignored the structural racism inherent in the criminal adjudication process.[31] These early defender offices were often ill-equipped to acknowledge and address the racial discrimination their clients faced.

B. *The Color of Crime*

Looking Backward's depiction of people biologically predisposed to crime reflected the belief that a person's race (as opposed to external factors) dictated criminal behavior. These concepts developed early in the nation's history and morphed alongside changing notions of race over time. Although the right to counsel as we know it today did not yet exist,[32] the legal system's early conceptualization of crime is instructive for understanding the contemporary shortcomings of indigent defense.

A few decades after white settlers brought enslaved Africans to the shores of colonial America, white supremacy began to shape the social and legal ordering.[33] The developing ideology of Black inferiority and innate difference informed early colonial laws and the slave codes.[34] Some of these laws relied upon race—that of the victim and of the perpetrator—to determine what conduct was considered criminal and the appropriate punishment.[35] They cast Black people's conduct as criminal, worthy of the most severe punishment, and simultaneously failed to recognize Black people as victims of what would otherwise constitute crime.[36]

In *The Condemnation of Blackness*, historian Khalil Gibran Muhammad provides a detailed account of how criminality became increasingly racialized as Black after Emancipation.[37] He points to the Progressive Era as "the founding moment for the emergence of an enduring . . . discourse of [B]lack dysfunctionality."[38] Chronologically, this is where *Free Justice* starts its account.

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31. P. 161 ("From the Progressive Era through the 1960s, the predominantly white male lawyers at the top of public and voluntary defender offices had often managed to discuss [indigent defense] under the pretense that it had nothing to do with race.").

32. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 707 (1996) (noting that the Framers only intended counsel for people charged with capital crimes and that the judge could act as counsel for those facing lesser charges).

33. *See, e.g.*, Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799, 810 (2008) (detailing a mixed-race woman's appeal from a court order declaring her an enslaved person and ineligible for freedom because she was a "mulatto").

34. *See, e.g.*, Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993).

35. Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 997–99 (2020).

36. *Id.*

37. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010).

38. *Id.* at 7.

Recognizing that race is a socially constructed, malleable concept,[39] the Black-white racial binary[40] was a helpful, if imperfect, spectrum on which Progressive Era reformers could place the influx of European and Chinese immigrants[41] and the existing indigenous and Mexican American populations.[42]

One end of the binary contained people with perceptively "light" qualities, like honesty, purity, and intelligence, and who were capable of assimilating into the dominant American culture.[43] On the other end of the spectrum were people with "dark" or "black" qualities (savagery, ugliness, and ignorance) and those who were incapable of assimilation, perpetually foreign or other.[44] A propensity for crime fell on the "dark/black" end of the spectrum.[45]

The Progressive Era also overlapped with the eugenics movement, influencing ideas about race and genetically predetermined characteristics.[46] Social scientists and policymakers began to view criminal conduct, mental illness, and other "defective" traits as biologically predetermined instead of resulting from structural inequality or other external forces.[47] Criminality in particular was seen as an inherent trait, or even a personality type, typical of Black people and other nonwhites.[48]

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39. *See, e.g.*, ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE (2014); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

40. *See, e.g.*, NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 396 (2010) (explaining the historical and contemporary significance of the Black-white racial binary in the United States even in an increasingly multicultural society and where the "category of whiteness—or . . . more precisely, a category of non[-B]lackness" has expanded).

41. Angela M. Banks, *Respectability and the Quest for Citizenship*, 83 BROOK. L. REV. 1, 10–12 (2017).

42. At the conclusion of the Mexican-American War in 1848, the two nations signed the Treaty of Guadalupe Hidalgo, which granted the United States large portions of Mexico (present-day California, Nevada, Utah, Arizona, New Mexico, and large parts of Texas and Colorado). The Treaty granted U.S. citizenship to the Mexican and indigenous people residing in those territories. *See* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1616–17 (2000).

43. *See* John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 298–306 (1997).

44. *Id.* Joseph Conrad's influential novel *Heart of Darkness* memorably described Black Africans as subhuman. *See* JOSEPH CONRAD, HEART OF DARKNESS 37–38 (Owen Knowles & Allan H. Simmons eds., Cambridge Univ. Press 2018) (1899).

45. *See, e.g.*, Stevenson, *supra* note 20, at 12 (explaining that the presumption of Black men as "criminals" developed out of the presumptive identity of Black men as "slaves").

46. I thank Alice Ristroph for exploring these issues with me that she developed in *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563 (2018).

47. *See, e.g.*, ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 5–6 (2016).

48. *See* MUHAMMAD, *supra* note 37, at 35.

Ida B. Wells, a Progressive Era civil rights pioneer, waged a campaign against this presumption of Black criminality.[49] Through her journalism and activism, Wells brought awareness to the true horrors of lynching,[50] including the denial of due process for the accused.[51] While decrying extrajudicial lynchings, Wells advocated for social services for Black people, including the assistance of counsel and the opportunity for a fair trial.[52]

Wells's efforts revealed that many Progressive Era reformers were selectively charitable based on the race of the recipient. The idea of racialized predisposition to criminal behavior shaped who reformers deemed deserving of social services, leading to "dire consequences for [B]lacks" and other nonwhite people.[53] Just as in Bellamy's utopian future, such people were expected to plead guilty without the assistance of counsel. With this in mind, it is easier to understand the ad hoc nature of indigent defense in the Progressive Era and the unmet demand for legal services among nonwhite people charged with crime. *Free Justice* neglects to interrogate how the racial identity of those accused of crime impacted the delivery of criminal defense services in the Progressive Era—or, in other words, who was deemed deserving of defense.

C. *The Color of Charity*

As with most benefits and services for low-income people, whether publicly or privately funded, there are those whom society deems deserving and

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49. *See* Caitlin Dickerson, *Ida B. Wells, 1862–1931: Took On Racism in the Deep South with Powerful Reporting on Lynchings*, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/interactive/2018/obituaries/overlooked-ida-b-wells.html [perma.cc/ZF2P-RRNF]. The *New York Times*'s "Overlooked" series features obituaries that the newspaper neglected to write at the time of death because it focused on "the lives of men, mostly white ones." Amisha Padnani and Jessica Bennett, *Overlooked*, N.Y. TIMES (Mar. 8, 2018), https://www.nytimes.com/interactive/2018/obituaries/overlooked.html [perma.cc/BW7D-848G].

50. Dickerson, *supra* note 49. At the time, mainstream (white) media regularly reported about white mobs enacting swift justice and lynching Black men for raping white women. *Cf.* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 4–5 (2002) ("Stories of sexual assault, insatiable [B]lack rapists, tender white virgins, and manhunts led by 'determined men' that culminated in lynchings [filled] . . . the South's daily newspapers . . . .").

51. IDA B. WELLS, CRUSADE FOR JUSTICE 270–73 (Alfreda M. Duster ed., 2d ed. 2020) (describing Wells's testimony before the Illinois governor, attorney general, and other lawmakers and officials about the lawlessness with which white mobs lynched Black men who were entitled to "be tried by law").

52. *Id.* at 256–57 (publicly refuting remarks regarding Black men's criminality with facts about "the [true] causes of lynchings and making a plea for a fair trial of every accused person no matter what the crime charged").

53. *See* MUHAMMAD, *supra* note 37, at 133 (describing race-neutral antislavery legislation meant to protect white women from prostitution that ignored the plight of Black people ensnarled in convict leasing).

those it deems undeserving.[54] *Free Justice* raises this distinction when describing how various early voluntary-defender and legal-aid organizations chose their clients. For example, "Boston's Voluntary Defenders Committee sought to 'provide counsel for *deserving* men and women'" (p. 64; emphasis added). Mayeux tells us that defender organizations borrowed prospective client criteria from civil legal-aid organizations, which turned on "worthiness" (p. 64).

What constituted "desert" or "worth" was decidedly vague and allowed for bias, prejudice, and stereotypes to influence these determinations. *Free Justice* explains that organizations' funding requests sometimes contained hints about their desired clientele. These documents specified factors such as youth, lack of criminal history, low income, plausible innocence, and "[b]earing no responsibility for their situation" (p. 64). The implication was that guilty people were less deserving of free representation. This prerequisite of innocence forced defense attorneys to make threshold determinations about culpability based on scant information about a prospective client's case. Such determinations were based in part on race, as attorneys were susceptible to relying on stereotypes about which types of people were predisposed to crime.[55]

The presumption of Black criminality and guilt moved Black people outside the realm of "deserving" counsel. This was similarly true for Mexican Americans, Chinese Americans, and other ethnically and racially marginalized groups.[56] Ossei-Owusu found that "parts of the legal reform world prioritized the needs of ethnic whites in their creation of a system of legal aid" to the detriment of indigent Black defendants and other defendants from the global majority.[57] Prior to the Court's 1932 requirement that counsel be appointed in death-penalty cases,[58] legal-aid and public-defender offices only "tepidly addressed the needs of nonethnic whites."[59] Yet Mayeux does not opine on "[h]ow . . . [racial] stereotypes shaped voluntary defenders' interactions with clients," nor on how exactly "racial ideology likely factored into . . . worthiness determinations" (p. 65). I found this to be a significant

54. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 48–51 (2017) (describing the moral construction of poverty, including the distinction between those who escape moral condemnation for "their failure to contribute or prosper" and those who are morally condemned for their failures).

55. Song Richardson and Phillip Goff observed a similar phenomenon in contemporary indigent defense, finding that defense counsel's anti-Black bias can result in the defender spending less "time, effort, and scarce resources" on cases involving Black clients. L. Song Richardson & Phillip Atiba Goff, Essay, *Implicit Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2641 (2013).

56. *See* Banks, *supra* note 41, at 10–21 (describing the political construction of Black, Chinese, and other immigrants as "threatening" or "problematic"). Over time, "ethnic" whites were able to align themselves with whiteness and shed the cloak of criminality. *See, e.g.*, Brent Staples, Opinion, *How Italians Became 'White,'* N.Y. TIMES (Oct. 12, 2019), https://www.nytimes.com/interactive/2019/10/12/opinion/columbus-day-italian-american-racism.html [perma.cc/DU5R-ECTZ].

57. Ossei-Owusu, *supra* note 7, at 1183.

58. Powell v. Alabama, 287 U.S. 45 (1932).

59. Ossei-Owusu, *supra* note 7, at 1183.

shortcoming of the book and a missed opportunity for Mayeux to interrogate the impact that the racialized presumption of criminality had on voluntary-defender services, legal-aid organizations, and the clientele they served.

During the Progressive Era, mainstream social services often did not consider low-income Black people to be deserving.[60] As previously noted, Wells spoke out against the reform movement's failure to include Black people. She lamented that "[a]ll other races in the city are welcomed into the settlements, YMCA's, YWCA's . . . and every other movement for uplift if only their skins are white."[61] Wells decried that the "[o]nly . . . social center [that] welcomes the Negro . . . is the saloon."[62] Racial marginalization, Wells explained, contributed to Black people having higher rates of contact with the criminal legal system, not their presumed propensity for crime.[63] But Wells was working against the long-standing and powerful narrative of inherent Black criminality.

The benevolence of voluntary-defender and legal-aid organizations depended in part on defenders' racially biased and stereotyped determinations of their potential clients' guilt. This in turn implicated whether whole groups of people had rights "worthy" of defending. As a stopgap, some of these groups formed mutual-aid societies to fund or directly provide legal services to their members.[64] We cannot divorce this early history from the present-day funding difficulties of indigent-defense service providers. In many jurisdictions, lawmakers fail to allocate the necessary funds to indigent defense, leading to inadequate funding for defender services that serve an outsized proportion of Black clients. Today, communities where indigent defense is most in crisis tend to have large underresourced and underserved Black populations, such as Detroit,[65] East Baton Rouge and New Orleans,[66] and St. Louis.[67] Further,

60. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 203–08 (2d ed. 2017) (describing Progressive Era welfare policy as enabling "deserving" white mothers to stay home while forcing Black and other "less privileged women to do low-wage work" outside the home).

61. WELLS, *supra* note 51, at 257.

62. *Id.*

63. *Id.* at 256 ("With no friends [Black people] were railroaded into the penitentiary.").

64. *See, e.g.*, Ossei-Owusu, *supra* note 7, at 1183–90; Hoag, *supra* note 3, at 1510 (describing the Protective National Detective Association formed by Black Alabamans in 1925 to provide paying members with free criminal and civil legal services).

65. Eli Hager, *One Lawyer. Five Years. 3,802 Cases.*, THE MARSHALL PROJECT (Aug. 1, 2019, 6:00 AM), https://www.themarshallproject.org/2019/08/01/one-lawyer-five-years-3-802-cases [perma.cc/BVG3-AY9J].

66. Radley Balko, Opinion, *Louisiana's Indigent Defense System Is Broken. A New Bill May Only Make It Worse.*, WASH. POST (June 1, 2021, 12:10 PM), https://www.washingtonpost.com/opinions/2021/06/01/louisianas-indigent-defense-system-is-broken-new-bill-may-only-make-it-worse [perma.cc/Y8ND-TC92].

67. Matt Ford, *A 'Constitutional Crisis' in Missouri*, ATLANTIC (Mar. 14, 2017), https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444 [perma.cc/D478-6YCS].

this racially checkered system of "free justice" has the potential to jeopardize the constitutional rights of all indigent criminal defendants.[68]

D. *The Color of the Legal Profession*

Racism and white supremacy also played a role in determining which lawyers might be available to provide free legal services to low-income people. The same social forces that shaped Progressive Era notions about race, crime, and charity impacted the makeup of the legal profession. Applying a critical race lens to Mayeux's account of the elite legal profession's involvement in indigent defense helps make sense of the profession's abruptly shifting views from opposing publicly funded defense services to eventually supporting public defenders. Although not explicitly stated in *Free Justice*, these elite lawyers were almost exclusively white, male, Protestant, and native born; most were from economically privileged backgrounds.[69]

During the early 1900s, elite lawyers around the country coalesced into various professional bar associations, where they focused on legal-training and bar-admission standards.[70] The membership in these associations was primarily comprised of privileged white men.[71] Early on, these organizations excluded Black and Jewish lawyers, among other ethnically marginalized groups, from membership, and they used their influence to exclude these same groups from entering the profession.[72] *Free Justice* concedes that in promulgating and maintaining barriers to the profession, bar associations made it more difficult for people from "immigrant and minority groups" to train as lawyers and to provide legal services to the poor, including indigent defense.[73] But the book declines to argue that elite lawyers' eventual acceptance of free defender services for the poor was based in part on its desire to maintain white supremacy within the legal profession.

Elite lawyers' early opposition to public defense was as much about self-preservation and maintaining white supremacy within the bar as it was about their fear of the legal profession's socialization. Ossei-Owusu explains that the

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68. Approximately 80% of people charged with crime are eligible for court-appointed counsel. Although the majority of the prison population is Black or Latinx, almost 70% of incarcerated white people reported having court-appointed counsel, compared to 77% of Black and 73% of Latinx incarcerated people. Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, THE MARSHALL PROJECT (Sept. 22, 2017, 1:15 PM), https://www.themarshallproject.org/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor [perma.cc/T834-P343].

69. *See, e.g.*, LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 30–31, 39–40 (2002).

70. Pp. 11–12, 47–50 (discussing the American Bar Association and the New York City Bar Association).

71. *See, e.g.*, George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL ED. 103 (2003).

72. *Id.* at 110–11.

73. Pp. 47, 164 (noting that in many southern states there were only a handful of Black lawyers and that in Georgia the criminal-defense bar was virtually entirely white).

American Bar Association sought to rid the profession of ethnic outsiders, including southern and eastern European immigrants and Jewish people, many of whom provided criminal-defense services to the poor.[74] In an effort to "purify" the profession, elite lawyers sought to institutionalize criminal defense and prevent "nonwhite" lawyers from "preying" on unrepresented, vulnerable clients in court.[75] Thus, elite lawyers' early interest in low-level criminal cases was more about purifying the profession than about altruism and advancing "free justice."

A similar movement occurred in the medical profession with the establishment of the American Medical Association, and with a parallel result: excluding nonwhite doctors from the profession made it harder for ethnically marginalized people to access healthcare.[76] *Free Justice* does not explore how the institutionalization of indigent defense curtailed certain demographics of people from receiving legal services, nor does it examine the impact the restriction of legal services may have had on poor people who were also racially marginalized. The legal profession's early ideas about criminality and legal services for the poor shaped the availability and quality of indigent defense for future generations.

II. FREE (IN)JUSTICE

It is widely understood that *Gideon*'s aspirational mandate of championing democracy and protecting due process remains unfulfilled.[77] "A Permanent Crisis," chapter 4 of Mayeux's book, explores the various obstacles that local jurisdictions encountered when trying to implement the Court's mandate in *Gideon*. Even today, the funding necessary to provide defense services to low-income people charged with crime has never fully materialized.[78] The impediments are multifaceted, but they mirror some of the obstacles that existed when the legal profession initially set out to provide defense services to indigent people. These include perceptions about the "underserving" poor and the criminalized lens through which society views marginalized people. Racism and white supremacy underscore both.

As the twentieth century progressed, society began to assign the privileges of whiteness to Eastern Europeans and other "ethnic" whites, moving them

74. Ossei-Owusu, *supra* note 7, at 1173–76 (describing law reformers' desire to "purify" the profession and "protect" vulnerable immigrant defendants from predatory "shyster" lawyers who lacked ethics, standing, and competence).

75. *Id.* at 1173–77, 1181.

76. *See, e.g.*, Robert B. Baker, *History of Medicine: The American Medical Association and Race*, 16 VIRTUAL MENTOR 479, 479–88 (2014) (detailing the history of the AMA's exclusion of Black doctors from the 1870s through the 1960s).

77. *See, e.g.*, Paul D. Butler, Essay, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2190 (2013) (referring to *Gideon* as "a spectacular failure" at making the criminal legal system fairer for indigent people).

78. Pp. 185–86 (noting that "local public defenders have not yet succeeded in securing a stable commitment to federal support," resulting in uneven access both among states and within them).

outside the realm of "undeserving" and removing the presumption of criminality.[79] However, Black people and other ethnically marginalized groups remained. Shortly after the Court decided *Gideon*, President Johnson empowered a commission to study widespread racial disorder throughout the nation.[80] The Kerner Commission's report concluded that "[o]ur Nation is moving toward two societies, one [B]lack, one white—separate and unequal."[81] The Kerner Report offers a helpful historical touchstone against which to examine the ongoing indigent-defense crisis.

This Part examines Black rebellion following the unfulfilled promise of the civil rights era, including *Gideon*, and the subsequent backlash resulting in mass criminalization. It then applies a critical race lens to *Gideon*'s inevitable follow-up, the right to effective counsel.[82] The ineffectiveness standard simultaneously restricted the rights of indigent defendants and shielded the legal profession from allegations of inadequate representation.

A. *The Color of Protest*

The Supreme Court's sweeping language promoting due process, fairness, and equality in *Gideon* did not include details on how localities and states were to fund such an enterprise. Although the Court later clarified that the right to counsel attached not only at trial but also to earlier and later stages of the criminal adjudication process, it remained vague about how jurisdictions were to implement the right. *Free Justice* details the difficulty large municipalities had in implementing indigent-defense services, such as Atlanta, Boston, and Philadelphia.[83] Each of these jurisdictions had a different system for delivering representation to poor people charged with crime, but each encountered similar opposition from their local stakeholders to securing the necessary funds. What *Free Justice* does not interrogate is the role that racism may have played.

Applying a critical race lens can help us make sense of the Court and legal profession's support—in the abstract—of free justice and the greater societal unwillingness to fund it. As a threshold matter, criminal defense, framed as such, continues to be a politically unpopular social service. Attitudes about "deserving" recipients of aid persist, and, as a constituency, people charged and convicted of crimes tend to lack political leverage because of widespread

79. *See supra* Sections I.B, I.C.

80. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIV. DISORDERS, at 1 (1967) [hereinafter KERNER REPORT].

81. *Id.*

82. Strickland v. Washington, 466 U.S. 668 (1984) (recognizing that the right to counsel includes the right to effective counsel and establishing the cause-and-prejudice standard to determine counsel's effectiveness).

83. P. 165 (explaining Fulton County's refusal to match donated funds for the Atlanta Legal Aid Society to provide indigent-defense services); pp. 80–85 (Boston); pp. 131–35 (Philadelphia).

felony-disenfranchisement laws.[84] But many recipients of "free justice" can—and did—make their voices heard.

Free Justice mentions defendants' complaints in the late 1960s about "assembly-line justice," whereby appointed counsel swiftly disposed of an indigent defendant's case with a plea deal and minimal legal advocacy.[85] But what Mayeux fails to recognize or explore is that these complaints were part of larger, widespread Black protest against the criminal legal system. In her recent book *America on Fire*, historian Elizabeth Hinton examines the history of Black rebellion.[86] She catalogues over 1,200 Black rebellions throughout the country between 1964 and 1969, including in the three cities (Atlanta, Boston, and Philadelphia) that Mayeux profiles.[87] President Johnson's Kerner Commission concluded that this nationwide civil disorder was partially based on Black people's perception that the courts denied "the poor and uneducated . . . equal justice with the affluent."[88] More specifically, the Report noted that "[t]he belief is pervasive among ghetto residents that lower courts in our urban communities dispense 'assembly-line' justice."[89] Mass arrests and prosecutions of Black people in the wake of the rebellions only exacerbated this problem: the Report observed that the criminal legal system was ill-equipped to provide due process to the accused.[90] The "[m]ost prominent" issue "was the shortage of experienced defense lawyers to handle the influx of cases in any fashion approximating individual representation."[91] The Report noted that the "riot situations" made the need for prompt, effective legal counsel "particularly acute."[92]

Widespread Black demonstrations against structural inequality, particularly within the criminal legal system, reveal an underexplored aspect of post-*Gideon* criticism. It also helps contextualize the contemporary Black Lives

84. *See generally* CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, THE SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 (2016).

85. P. 144 (quoting KERNER REPORT, *supra* note 80, at 157).

86. ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S (2021).

87. *Id.* at 313–27.

88. *See* KERNER REPORT, *supra* note 80, at 183; *see also id.* at 65 (explaining that civil disorders arose out of a "reservoir of pervasive and deep grievance" in the Black community, including about prejudice and discrimination).

89. *Id.* at 183. At the time of publication, scholars, journalists, and others regularly used "ghetto" to refer to under-resourced residential areas with high concentrations of Black people, many of which resulted from "white flight" from city centers following World War II. *See* Daniel B. Schwartz, *How America's Ugly History of Segregation Changed the Meaning of the Word 'Ghetto*,' TIME (Sept. 24, 2019, 5:00 PM), https://time.com/5684505/ghetto-word-history [perma.cc/LB9H-DHGD].

90. *See* KERNER REPORT, *supra* note 80, at 184.

91. *Id.* at 186.

92. *Id.*

Matter movement, which protests state-sanctioned violence and white supremacy and advances Black liberation.[93] Although the Kerner Report pointed to abusive policing practices, structural racism and inequality, and inadequate social services as causing the mass rebellions, the Johnson administration largely ignored addressing these issues. Instead, it relied on increasing law enforcement, calling for a War on Crime.[94] And despite the Kerner Report's recommendation to make *effective* defense counsel immediately available to people charged with crime, many local jurisdictions failed to prioritize funds for indigent-defense services.[95] Black people's demands for change, and then the Report, actually spurred an antithetical response from local communities and the federal government.

Following the rebellions, the perception of Black people as inherently criminal further cemented, creating a perverse disincentive to fund legal assistance to people believed to have destroyed their own communities. After the turbulent 1960s, even liberals backed a tough police response.[96] As described *infra* in Section I.B, the presumption of Black criminality helped shape society's and lawmakers' perceptions that low-income Black people were less deserving of services and assistance, including criminal defense. And instead of rallying against increased arrests and prosecutions, defender organizations adopted tough-on-crime rhetoric, making their requests for increased funds "in law-and-order terms" (p. 178). The response from defenders was to further entrench themselves within the War on Crime and frame their request for increased funds as a necessary part of increasing arrests and prosecutions.[97] An approach that would have benefited indigent clients—one that Black-led defender organizations were and are making[98]—would have been to address the root of the problem by advocating against mass criminalization.

B. *Mass Underrepresentation*

With the benefit of hindsight, we know that the Johnson administration's War on Crime, and the Nixon administration's subsequent War on Drugs, did little to address structural inequality. These campaigns explicitly targeted and disproportionately impacted Black people, fueling what we now know as mass criminalization.[99]

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93. *See Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory [perma.cc/3YNN-D3EY].

94. *See* HINTON, *supra* note 86, at 8–9.

95. *See* pp. 184–86.

96. HINTON, *supra* note 86, at 8–9.

97. *See* p. 178.

98. *See* pp. 174–76 (describing the Roxbury Defenders Committee, an offshoot of the Massachusetts Defenders Committee that was led and overseen by Blackpeople); *see also infra* Conclusion (discussing organizing principles of the Black Public Defender Association).

99. *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (tracing the rise of policing, prosecution, and incarceration to the Johnson administration's social-welfare programs).

Mayeux notes that the nationwide increase in arrests and prosecutions in the early 1970s drastically increased the caseloads of already underresourced indigent defense providers.[100] She contrasts the "tidy picture" of free justice that Progressive reformers envisioned with the often "discouraging and confusing" reality of overburdened criminal courts a decade after *Gideon* (p. 179). Yet *Free Justice* does not acknowledge the central role that racism and white supremacy played in the policy decisions contributing to that reality. The book's failure to do so curtails its ability to analyze how long-standing notions of Black criminality, competing images of poor people as deserving and undeserving, and social welfare intersected with the Court's recognition of the right to counsel for the poor.

Through a critical race lens, perhaps we can best recognize the Court's decision in *Gideon* as a "temporary 'peak[] of progress,'" one that "slid[] into irrelevance as racial patterns adapt[ed] in ways that maintain[ed] white dominance."[101] Legal scholar Paul Butler argues that even had states fully enforced the promise of *Gideon*, indigent defendants, particularly indigent Black defendants, would still lose.[102] He argues that *Gideon* made things worse for poor people because having defense counsel provided the appearance of due process in the face of a system designed to "overpunish [B]lack and poor people."[103] Mayeux astutely recognizes that after *Gideon*, defense counsel "st[ood] in as both scapegoat and absolution for all of the obvious problems" with the criminal legal system, but she stops short of acknowledging that racism was a factor (p. 184).

The public defender's shortcomings—the failure to provide due process in a racist, overburdened system—does not fall on attorneys alone. Other systems and structures also played a role. Although *Gideon* and its progeny guaranteed counsel for the poor, it did not specify how states and local jurisdictions should provide it. As Mayeux explains, prior to the Court's ruling, many metropolitan jurisdictions had established institutional defender offices, including legal-aid societies; some jurisdictions later relied on nonprofit organizations supported by a combination of state and private funds.[104] However, many rural communities, particularly in the South, relied upon judges to appoint private attorneys (p. 179). These appointments came with a variety of funding structures—a flat-fee contract for an unlimited number of cases, a single rate per case, or an hourly rate with a salary cap—all of which

100. *See* pp. 178–80.

101. Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 HOW. L.J. 79, 79 (1991).

102. *See* Butler, *supra* note 77.

103. *Id.* at 2191.

104. *See* p. 8 (describing public defense in California in the early 1900s); pp. 63–64 (noting pre-*Gideon* voluntary-defender services in Boston and Philadelphia, and the New York Legal Aid Society).

disincentivized counsel to spend time or resources on the case.[105] These divergent delivery models, often dictated by geography, impacted the quality of the representation that poor people received.

Free Justice recognizes that defense lawyers alone cannot provide defendants a fair trial. It acknowledges that police, prosecutors, and politicians are all implicated in whether a defendant recieves due process. But it leaves open the possibility that if the legal profession could address "the practical challenges" of delivering indigent defense, including phasing out "the old method of case-by-case appointments" in favor of institutional defenders, public defenders could perhaps help provide justice and equality to poor people (p. 179). However, *Free Justice* concludes in the early 1970s, just as mass criminalization begins, so that possibility is not refuted within the book.

In their 2013 study of public defenders and implicit bias, racial justice scholars Song Richardson and Phillip Goff found that implicit racial bias can impact the way public defenders advocate on behalf of their clients, including how they evaluate evidence, the time they spend interacting with clients, and the length of the punishment they accept on their client's behalf.[106] Faced with overwhelming caseloads, Richardson and Goff found that public defenders triage their clients.[107] These conditions can trigger implicit racial bias, resulting in some defenders spending less "time, effort, and scarce resources" on cases involving "stereotypically '[B]lack' feature[d]" clients.[108] These findings, and those from similar studies,[109] signal that there are larger structural forces that impact the delivery of indigent defense—forces that increasing indigent-defense funding would not necessarily address.

C. *The Right to Effective Counsel*

The book's epilogue invites readers to consider what would come to dominate my legal practice: ineffective assistance of counsel (IAC). Two decades after *Gideon*, the Court refined defendants' right to counsel in *Strickland v. Washington*, a capital case involving a Black man, David Leroy Washington, who was sentenced to death.[110] The Court recognized that the right to counsel

105. *See* David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers*, in INDIGENT REPRESENTATION TASK FORCE, LIBERTY AND JUSTICE FOR ALL: PROVIDING RIGHT TO COUNSEL SERVICES IN TENNESSEE app. c at 96 (2017), https://tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf [perma.cc/M82V-KMR9].

106. Richardson & Goff, *supra* note 55, at 2634–41.

107. *Id.*

108. *Id.* at 2641.

109. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–56 (2004); Joseph J. Avery et al., *Is Your Own Team Against You? Implicit Bias and Interpersonal Regard in Criminal Defense*, 161 J. SOC. PSYCH. 543, 543 (2020), https://doi.org/10.1080/00224545.2020.1845593 (studying criminal-defense attorneys in forty-three U.S. states and finding that criminal-defense attorneys harbor significant implicit bias in favor of white defendants and against Black defendants in ways that impact interpersonal relationships between clients and attorneys).

110. 466 U.S. 668 (1984).

must also include the right to effective assistance.[111] In a cruel twist, the defendant was unable to benefit from the standard his case created; Florida executed him two months after the Court's decision.[112] Mr. Washington's inability to prove his trial lawyer rendered constitutionally ineffective assistance was an ominous precursor for how subsequent defendants would fare.[113]

As a capital appellate defender, I raised IAC claims in every federal habeas petition I filed.[114] I noticed a common theme: underlying each of the factually detailed and varied IAC claims I raised—counsel's failure to investigate the client's social history, to remove a biased juror, to raise a *Batson* challenge[115]—was incongruency in the attorney-client relationship and a breakdown in communication between the two. At the heart of such discord was often counsel's lack of cultural awareness and competency. Yet the Court's standard for determining effectiveness does not account for cultural incompetence. It also does not necessarily protect against defense counsel's overt racism against the client.[116]

My post-conviction clients, both Black and white, all of whom were indigent, had been represented by trial lawyers who often did not have the time, expertise, or resources to adequately represent them. In each case, the trial court appointed counsel from a list of eligible private attorneys, not defenders from institutional offices.[117] Trial counsel then failed to adequately introduce mitigating evidence that would have humanized the client and may have con-

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111. *Strickland*, 466 U.S. at 671.

112. Jesus Rangel, *Confessed Murderer of 3 Executed in Florida*, N.Y. TIMES (July 14, 1984), https://www.nytimes.com/1984/07/14/us/confessed-murderer-of-3-executed-in-florida.html [perma.cc/2M69-C68S].

113. *See* Ossei-Owusu, *supra* note 7, at 1228–30 (describing the difficult and high burden defendants face in winning claims of ineffective assistance of counsel, which "ha[s] been and continue[s] to be particularly acute for [racial] minorities").

114. A study found that 81 percent of federal habeas petitions challenging state death sentences included IAC claims. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Habeas Litigation in the U.S. District Courts* 5 (Vand. L. Sch. Pub. L. & Legal Theory, Working Paper No. 07-21, 2007), https://ssrn.com/abstract=1009640 [perma.cc/V4L3-VB4S].

115. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (finding the removal of potential jurors based on race violates the Equal Protection Clause and the defendant's Sixth Amendment right to an impartial jury).

116. *See* Osborne v. Terry, 466 F.3d 1298, 1316 (11th Cir. 2006) (denying an IAC claim as procedurally defaulted where white trial counsel referred to Black client as a "little n[***]er deserv[ing] the chair").

117. On occasion, my clients had co-defendants represented by institutional defender offices. To avoid a conflict of interest, the court appointed private counsel for my clients. In these instances, the co-defendant was spared the death penalty. I deduced that had my clients had defenders from institutional offices, they would have been less likely to receive the death penalty. *See* Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE. L.J. 1835, 1844 (1994) ("The compensation provided to individual court-appointed lawyers is so minimal that few accomplished lawyers can be enticed to defend capital cases. Those who do take a capital case cannot afford to devote the time required to defend it properly.").

vinced the decisionmaker not to sentence their client to death. One trial lawyer failed to develop and present psychiatric evidence showing that my client's childhood exposure to horrific violence—witnessing his friend's murder, discovering a murdered person near his apartment—resulted in hypervigilance and an outsized response to perceived threats. Instead, counsel glossed over my client's childhood as merely growing up in "the projects." Had counsel provided the jurors with more nuanced mitigating evidence, at least one juror may have voted to spare my client's life.[118] The trial lawyers did not know what they did not know about the people they represented.

Although cultural incompetence is not yet an actionable claim for habeas relief, these experiences taught me that race, ethnicity, and culture are relevant to effective assistance of counsel, and by extension, the right to counsel.[119] Mayeux notes that some defender organizations realized that providing adequate representation required an awareness of their clients' distinct communities and cultures, but *Free Justice* does not go further (pp. 159–60).

Current IAC jurisprudence falls short of protecting defendants from lawyers who fail to advocate for them in culturally informed and responsive ways. The legal standard, which requires the petitioner to show that but for counsel's deficient performance, there is a reasonable probability that the outcome of their case would have been different, prioritizes innocence.[120] Yet, counsel's bigotry against the defendant (or the group to which the defendant belongs) can detrimentally impact the defendant's case regardless of the defendant's culpability. My current research looks at interventions that would help defense lawyers obtain cultural competence: recognizing IAC as a fundamental error not requiring a showing of prejudice; advocating for criminal defense standards and guidelines to require counsels' cultural competence; and mandating that law schools teach cultural competence, akin to medical schools.[121]

While these measures have the potential to improve representation for indigent defendants on an individual level, it is clear that indigent defense requires a more systemic intervention. Applying a critical race lens empowers us to consider these and other far-reaching remedies.[122]

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118. Tennessee requires a unanimous jury vote for death, meaning a single juror's vote for life can result in a life sentence for the defendant. *See* TENN. CODE ANN. § 39-13-204(g) (Supp. 2020).

119. Hoag, *supra* note 3, at 1541–42 (describing the importance of counsel's cultural competence when developing mitigating evidence to secure a favorable outcome on the client's behalf).

120. Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (disagreeing with the majority's prejudice requirement because the right to due process exists regardless of culpability).

121. *See, e.g.*, LIAISON COMM. ON MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL 10 (2021), https://lcme.org/publications/#Standards [perma.cc/S55Z-SJ3Z] (requiring medical-school curricula to "include[] content regarding . . . [t]he basic principles of culturally competent health care").

122. *See* Bell, *supra* note 101, at 79 (accepting that racism is here to stay "free[s] [us] to imagine and implement racial strategies that can bring fulfillment and even triumph").

CONCLUSION

Progressive Era reformers were likely unable to predict the growth and scale of today's criminal adjudication system. Relative to the rest of the world, the United States stands alone at the rate it polices, prosecutes, and incarcerates its residents.[123] Rather than focusing on defense counsel to address mass criminalization and the racial disparities within the criminal legal system, I conclude with a focus on what feeds the beast: police and prosecutors. Bellamy envisioned a utopian future without defense lawyers;[124] I invite us to contemplate a future where police and prosecutors no longer play such outsized roles. Instead of "free justice," something more expansive: freedom.

Following the 2020 mass demonstrations in support of Black Lives Matter,[125] activists' calls for decarceral reforms gained broader support among scholars and lawmakers.[126] For example, in March 2021, Baltimore state's attorney Marilyn Mosby announced that her office would no longer prosecute drug possession, prostitution, trespassing, and other low-level offenses.[127] These are the same types of crimes that drove up Black incarceration rates during the Progressive Era.[128] Mosby's decarceral approach will have an immediate impact on Black Baltimoreans, who comprise over 60 percent of the population.[129] Jurisdictions across the nation have been taking similar steps.[130]

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123. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [perma.cc/Q7E5-2JLR].

124. *See supra* Section I.A.

125. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [perma.cc/64K9-PJNJ].

126. *See, e.g.*, Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108 (2020); Note, *Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors*, 134 HARV. L. REV. 1859 (2021) (arguing for police-less prosecutors to advance transformative justice rather than a punishment-oriented approach to prosecution).

127. Tom Jackman, *After Crime Plummeted in 2020, Baltimore Will Stop Drug, Sex Prosecutions*, WASH. POST (Mar. 26, 2021, 8:00 AM), https://www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions [perma.cc/HN9Z-M9NB].

128. MUHAMMAD, *supra* note 37, at 232–33 (explaining that urban police officers in the North targeted recent Black migrants for minor and petty offenses).

129. *Baltimore City, Maryland*, U.S. CENSUS BUREAU: QUICKFACTS, https://www.census.gov/quickfacts/fact/table/baltimorecitymaryland,US/PST045219 [perma.cc/5YC6-R3R7]. Black people make up an outsized portion of those incarcerated for drug violations nationwide. Jackman, *supra* note 127 (noting that Black people comprise 35 percent of those incarcerated for drug offenses, even though Black people only make up 13 percent of the nation's population).

130. *See, e.g.*, Amelia Templeton, *Oregon Becomes 1st State in the US to Decriminalize Drug Possession*, OPB (Nov. 4, 2020, 12:00 PM), https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs [perma.cc/YT2N-SS29]. New Mexico, Connecticut, and Virginia legalized marijuana possession and use in 2021, for a total of eighteen states and Washington, D.C., where marijuana use by adults over the age of twenty-one is legal. Jeremy Berke, Shayanne Gal & Yeji Jesse Lee, *Marijuana Legalization Is Sweeping the US. See Every State Where Cannabis Is Legal.*, INSIDER (July 9, 2021, 9:20 AM), https://www.businessinsider.com/legal-marijuana-states-2018-1 [perma.cc/8Y96-RXQL].

The Black Public Defender Association (BPDA) has also driven recent decarceral efforts. The BPDA formed in 2018 with the intention of fighting against and ending mass incarceration.[131] In stark contrast to the elite lawyers who promoted "free justice," the BPDA's membership includes "Black public defenders [who] identify with and are committed to the populations they serve."[132] Taking an expansive view of the criminal legal system, the BPDA issued powerful recommendations to the newly elected Biden administration,[133] targeting seven areas for reform: juvenile dependency, juvenile delinquency, education, immigration, incarceration, reentry, and housing.[134] The BPDA's message was clear: "To advance race equity in this country, the Administration must start by dismantling the deep-seated, oppressive systems of racism within the carceral systems that disproportionately harm Black communities."[135]

Despite the permanence of racism and the vastness of the problem, there is value in advocating against oppression. If the BPDA were to achieve its goal of ending mass criminalization, its attorneys would have advocated themselves out of a job. I hear a similar desire from my students who aspire to be public defenders. Although through different means, they would find themselves in something like Bellamy's utopian future where public defenders are rendered obsolete.

131. *About Us*, BLACK PUB. DEF. ASS'N, http://blackdefender.org/about-us [perma.cc/KV8F-K2XD].

132. *See id.*

133. BLACK PUB. DEF. ASS'N, DISRUPTING CARCERAL SYSTEMS: BPDA'S RECOMMENDATIONS TO THE BIDEN-HARRIS ADMINISTRATION 6, http://blackdefender.org/wp-content/uploads/2021/04/bpda-biden-harris-report.pdf [perma.cc/7RZ4-K4GB] ("The goal of this paper is to shine a glaring light on the historical and present role of white supremacy and racism in carceral systems.").

134. *Id.* at 2.

135. *Id.* at 6.