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From Poverty to Personhood: Gideon Unchained

Ken Strutin

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FROM POVERTY TO PERSONHOOD: GIDEON UNCHAINED

Ken Strutin[†]

I.	INTRODUCTION.....	267
II.	POVERTIES OF CONFINEMENT.....	272
	A. <i>Poverty’s Reach into Prison</i>	273
	B. <i>Constitutional and Legislative Concerns For Indigent Prisoners</i>	277
	C. <i>Poor Access to Technology Limits Pro Se Lawyering</i>	282
III.	MASS INCARCERATION	285
IV.	HOW TO BUILD A LAWYER?.....	292
V.	SHAPING THE LAW WITHOUT COUNSEL	295
	A. <i>Ross. v. Moffitt</i>	296
	B. <i>Pennsylvania v. Finley</i>	301
	C. <i>Murray v. Giarratano</i>	303
	D. <i>Realities of the Law Without Counsel</i>	310
VI.	CONCLUSION	313

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I. INTRODUCTION

Injustice is born in poverty¹ and lives in prison. Every day, the U.S. prison system sacrifices millions of futures,² allowing inmates to be lost in the machinery of a system that excludes lawyers from the last line of defense.³ Neither finality nor a right to counsel has caused the United States to recognize that financial inequality imposes limitations on justice and that justice does not end at conviction and subsequent confinement.⁴ Due process and equal protection can expose the roots of mass incarceration in prejudice and poverty, and reveal longstanding justifications for a right to post-conviction counsel.

1. U.S. CENSUS BUREAU, HOW THE CENSUS BUREAU MEASURES POVERTY (2016), <https://www.census.gov/topics/income-poverty/poverty/about.html> [<https://perma.cc/UG87-DESN>] (explaining that “the Census Bureau uses a set of money income thresholds that vary by family size and composition to determine who is in poverty” and that “[i]f a family’s total income is less than the family’s threshold, then that family and every individual in it is considered in poverty”); U.S. DEP’T OF HEALTH & HUM. SERVS., POVERTY GUIDELINES (effective Jan. 13, 2018), <https://aspe.hhs.gov/poverty-guidelines> [<https://perma.cc/PQ3P-6L44>]; see Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the U.S.*, ¶ 4, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018), https://digitallibrary.un.org/record/1629536/files/A_HRC_38_33_Add-1-EN.pdf [<http://perma.cc/PTS7-EBRG>] (reporting that “[a]bout 40 million live in poverty, 18.5 million in extreme poverty, and 5.3 million live in Third World conditions of absolute poverty”).

2. See Alston, *supra* note 1, ¶ 4; Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control”*, FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [<http://perma.cc/X3QK-B352>] (noting that incarceration often “strip[s] [people] of basic civil and human rights” and “operates to control people . . . and virtually all aspects of their lives”).

3. See Courtney Mault, *Last Line of Defense*, SUPER LAWYERS, <https://www.superlawyers.com/alabama/article/last-line-of-defense/0b590dda-a7ab-4b32-bc86-cbd9e739aabd.html> [5ZCV-AAPC].

4. See Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After ‘Gideon’*, ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/> [<http://perma.cc/ZA6A-6LD7>].

In *Gideon v. Wainwright*, Gideon argued that poverty led to inequality and the United States heard him.⁵ However, millions in prison plead inequality and no one hears them. For these inmates, dignity and autonomy are suspended, replaced with fear and uncertainty.⁶ Thus, indigent prison inmates inhabit an underworld where no one speaks for the dead. For after the jury has gone home and the court has decided the appeal, no right to counsel exists.⁷ And without representation, the punished are extinguished by time—trapped in the limbo of ineffective self-representation, harsh confinement, prejudice, and indifference.⁸ Post-conviction justice is based on an equation that does not add up—a Sixth Amendment that protects the process for conviction but abandons the means for vindication.⁹ Poverty has become the lodestone of justice that attracts the full spectrum of constitutional rights for post-conviction redress.

5. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”).

6. See Amanda Ploch, Note, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 N.Y.U. J. INT’L L. & POL. 886, 894–98 (2012); Abby Rogers, *Inmates Describe What it’s like to Walk into Prison on that Very First Day*, BUS. INSIDER (Jul. 5, 2012, 8:54 AM), <https://www.buinessinsider.com/what-its-like-in-prison-2012-7> [<https://perma.cc/R29F-SHTB>].

7. *Murray v. Giarratano*, 492 U.S. 1, 13 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555, 559 (1987) (holding that “a defendant has no federal constitutional right to counsel . . . when attacking a conviction that has long since become final upon exhaustion of the appellate process”); *Ross v. Moffitt*, 417 U.S. 600, 618–19 (1974).

8. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 881 (2009) (noting that “all state-created prison conditions should be understood to constitute punishment for Eighth Amendment purposes”); *Deliberate Indifference and Inmates’ Civil Rights*, EXPERT WITNESS NEWS (Oct. 19, 2015), <http://www.expertwitnessnews.com/deliberate-indifference-and-inmates-civil-rights/> [<http://perma.cc/T5AA-Y5TA>]. See generally Melissa Hogenboom, *Criminal Myths: Misconceptions About Criminals and Crime*, BBC (Apr. 16, 2018), <http://www.bbc.com/future/story/20180412-criminal-myths-misconceptions-about-criminals-and-crime> [<https://perma.cc/G8XH-R9B2>] (looking at “the consequences of locking up women who are mentally ill, discovering how personality changes in prison and looking at the mistaken idea that long prison sentences reduce crime”).

9. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for

Prison populations are the product of sentencing laws, parole practices, and the attrition of reentry and early release. Overall, the core of confinement is at staggeringly high numbers, built up in less than one generation.¹⁰ Social scientists, policy makers, and legal scholars ask about the true composition of the nation's prison population in terms of risks to public safety.¹¹ However, these questions overlook the more important human costs of ignoring the suffering that the justice system imposes on the uncounted innocent and the disenfranchised guilty.¹² A true picture of the United States'

his defence."); *Mason v. Arizona*, 504 F.2d 1345, 1354 (9th Cir. 1974) (holding that a prisoner was not deprived of equal protection rights when he was denied access to the public defender's investigative staff to prevent a conflict of interest between two criminal defendants).

10. See OLIVER HINDS ET AL., *PEOPLE IN PRISON 2017 2* (2018), <https://www.vera.org/publications/people-in-prison-2017> [<https://perma.cc/AD2E-DYQF>] (describing overall incremental decline, as well as individual state-level increases in the national incarcerated population, relying on data gathered directly from the jurisdictions); PENAL REFORM INT'L, *GLOBAL PRISON TRENDS 2018 10-15* (2018), https://www.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf [<https://perma.cc/EA3F-HPKK>]; THE SENTENCING PROJECT, *INCARCERATED WOMEN AND GIRLS, 1980-2016 1* (2018) <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls-1980-2016.pdf?eType=EmailBlastContent&eId=12d509dd-a247-4f77-a4f8-6d0fdbe0cd6e> [<https://perma.cc/YV6P-ZULP>] ("The female prison population stands nearly eight times higher than in 1980. More than 60% of women in state prisons have a child under the age of 18."); Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/S73J-M3TT>] (providing a comprehensive overview of incarceration nationwide and noting that "[t]he American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 102 federal prisons, 1,852 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories").

11. See ADAM GELB, *YOU GET WHAT YOU MEASURE: NEW PERFORMANCE INDICATORS NEEDED TO GAUGE PROGRESS OF CRIMINAL JUSTICE REFORM 2* (2018), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/you_get_what_you_measure.pdf [<https://perma.cc/DM9B-QH69>] (arguing that "[t]racking the sheer number of incarcerated individuals and those under correctional supervision is essential but not enough to know whether we are making progress toward a more fair and effective criminal justice system.").

12. Ken Strutin, *Mass Incarceration and the "Degree of Civilization"*, L. & TECH. RESOURCES FOR LEGAL PROFESSIONALS (Sept. 4, 2012), <https://www.llrx.com/2012/09/mass-incarceration-and-the-degree-of-civilization/> [<https://perma.cc/CVF4-STS4>] ("Incarceration is when a person loses their freedom pending trial or by serving a

confined would likely reveal a broad swath of pain, mistreatment, and injustice. However, it appears that no group has endeavored to take a census on the exact number of prisoners enduring these punishments.¹³

Perjury, official misconduct, ineffective assistance of counsel, forensic error,¹⁴ and racial profiling all contribute to the countless people who are enchained and imprisoned for crimes they did not commit—or that didn't happen at all.¹⁵ These inmates are penalized beyond reasonable human limits to de facto life sentences,¹⁶ where

sentence. Mass incarceration is when millions of people are imprisoned and kept there based on a generation of tough on crime policies. Viewed another way, incarceration is a personal problem; mass incarceration is everyone's problem. And the number of people behind bars, which is higher in the United States than anywhere in the world, creates a ripple effect throughout the criminal justice system and society at large.”).

13. See D'Vera Cohn, *Counting Prisoners in the 2010 Census*, PEW RES. CTR. (Feb. 11, 2010), <http://www.pewsocialtrends.org/2010/02/11/counting-prisoners-in-the-2010-census/> [<http://perma.cc/533Z-PTKD>] (explaining the process of counting prisoners); see also *Prison Gerrymandering Project*, PRISON POL'Y INITIATIVE, <https://www.prisonersofthecensus.org/impact.html> [<http://perma.cc/7QL4-QXVM>] (noting that the “way the Census Bureau counts people in prison creates significant problems for democracy and for our nation's future” and “leads to a dramatic distortion of representation and state and local levels, and creates an inaccurate picture of community populations for research and planning purposes”).

14. See THE NAT'L REGISTRY OF EXONERATIONS, *EXONERATIONS IN 2017* (2018), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> [<https://perma.cc/44Q2-VTMV>] (listing exonerations for 2017).

15. SAMUEL R. GROSS ET AL., *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* ii (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [<https://perma.cc/6UZ5-LH2Z>] (noting that “African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated” and that African Americans “constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016)”).

16. See Ken Strutin, *The Realignment of Incarcerative Punishment: Sentencing Reform and the Conditions of Confinement*, 38 WM. MITCHELL L. REV. 1313, 1313 (2012) [hereinafter Strutin, *Realignment*] (discussing how the prison model of punishment is “overdue for deconstruction or at least a major overhaul” and noting that the “length of time to be served is imposed without any mention or consideration of the conditions of confinement”).

parole is forever impending, and old age and sickness are the only ends to life in confinement.¹⁷

Living in fear of mistreatment and suffering from isolation, there is no end to the Job-like¹⁸ conditions prisoners face.¹⁹ Hence, confinement is the domain of pain and suffering.²⁰ For the confined, the legal remedy largely consists of self-reliant—that is, pro se—lawyering. Given the limited access to and the decayed condition of routinely available legal knowledge, such pro se lawyering often leads to blind self-representation and naïve expectations of fruitful resolutions. Indeed, no known survey has thoroughly documented prison law libraries' detailed conditions, nor are there reports on any existing resources in solitary confinement, psychiatric commitment, or immigration detention.²¹ Only prison biographies fully expose the

17. Ken Strutin, *Life Expectancy and the Algorithms of Confinement*, N.Y. L.J., (Mar. 26, 2018), <https://www.law.com/newyorklawjournal/2018/03/26/life-expectancy-and-the-algorithms-of-confinement/> [<https://perma.cc/NJ4K-BGCB>] (explaining how life expectancy regulates time in confinement); see HUMAN RIGHTS WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 1-2 (2018), https://www.aclu.org/sites/default/files/field_document/coderedreportdeathsicedetention.pdf [<https://perma.cc/2JQX-3V2R>] (finding that systemic problems with the medical care in immigration detention facilities contributed to a large number of deaths).

18. *Job* 1:1–22 (telling the story of Job, a man who suffered severe physical and mental anguish, yet was innocent of wrongdoing).

19. See, e.g., Gabrielle Banks & Keri Blakinger, *Heat Wave Sparks Concerns in Sweltering Texas Prisons*, HOUS. CHRONICLE (July 22, 2018), <https://www.chron.com/news/houston-texas/houston/article/Heat-wave-sparks-concerns-in-sweltering-Texas-13089898.php> [<https://perma.cc/TG5K-6A6Q>] (“State prison officials are in emergency-response mode this week as a heat wave bears down on a large swath of Texas, rivaling the system that triggered the deaths of 10 inmates from heat stroke in 2011.”); Michael Waters, *How Prisons Are Poisoning Their Inmates*, OUTLINE (July 23, 2018, 10:40 AM), <https://theoutline.com/post/5410/toxic-prisons-fayette-tacoma-contaminated> [<https://perma.cc/Q6B2-KVCL>] (“[A]n environmental impact statement considers only the impact the prison might have on the local environment, not the impact the local environment might have on the prison or on the people incarcerated within it.”).

20. Ken Strutin, *Pleading Dignity: Alchemizing Form Into Substance*, N.Y. L.J., (May. 17, 2016, 2:00 AM), <https://www.law.com/newyorklawjournal/almID/1202757300282/pleading-dignity-alchemizing-form-into-substance/> [<https://perma.cc/T9Y-8G32>] [hereinafter Strutin, *Pleading Dignity*] (explaining that this chronic state of fear and agony stifles the cognitive life of these pro se defendants).

21. Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171 (2013) (discussing how prison law libraries are not a means of accessing information, but a means of controlling inmates’

widespread poverty and dismal living faced by those held in confinement.²²

II. POVERTIES OF CONFINEMENT

Our prisons are fueled by poverty that stigmatizes personhood and elbows out constitutional rights.²³ The unrepresented poor are the very same pro se defendants who share prison cells with the fortunate few who manage to retain a lawyer.²⁴ The latter have the right to hire counsel to file habeas corpus writs and discretionary appeals; the former resort to making copies of other represented prisoners' briefs and refile them as writs.²⁵ An impoverished prisoner

behavior); see KATE LEWIS, CENSORSHIP AND SELECTION IN PRISON LIBRARIES 3–4 (2013), http://www.pages.drexel.edu/~kmm558/eport/522_biblio_lewis.pdf [<http://perma.cc/95HU-GH4L>] (noting that “[c]ollection policies are not completely standard in United States prison libraries, and so the extent of censorship is not known” and that there is “a definite need for more academic investigation into finding ways of incorporating actual inmate experiences into how collection policies are enacted”).

22. See generally William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111 § 2[a] (1973) (describing inmates' complaints of physical abuse); Dana Goldstein, *Riker's Island Population 9,790: New York's Penal Colony Through the Eyes of People Who Live and Work There*, INTELLIGENCER, <http://nymag.com/intelligencer/2015/06/inside-rikers-island-interviews.html> [<http://perma.cc/W5GC-BKBG>] (describing prison life through the eyes of inmates).

23. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<http://perma.cc/9DNR-CPCU>]. See generally Ed Pilkington, *Why the UN is Investigating Extreme Poverty . . . in America, the World's Richest Nation*, GUARDIAN (Dec. 1, 2017, 1:00 PM), <https://www.theguardian.com/world/2017/dec/01/un-extreme-poverty-america-special-rapporteur> [<https://perma.cc/4Q4B-HVQS>] (“With 41 million Americans officially in poverty according to the US Census Bureau (other estimates put that figure much higher), one aim of the UN mission will be to demonstrate that no country, however wealthy, is immune from human suffering induced by growing inequality.”).

24. See *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) (affirming the right to privately retain counsel, the Court declared that “[b]y denying petitioner any opportunity whatever to obtain counsel on the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment”); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”).

25. See 39 C.J.S. *Habeas Corpus* § 1 (2018) (“The writ of habeas corpus is an order directed to anyone having a person in custody to produce the person at a time and

is only appointed pro bono counsel under very rare, discretionary circumstances after the “*Gideon* limit” has been reached.²⁶ At the inception of a criminal prosecution, poverty metrics allow appointed lawyers to level the playing field between the wealthy and the poor.²⁷ But additional requirements and thresholds are necessary if the right to counsel is ever going to reach into prison—where poverty and inequality are unrelenting.

A. *Poverty’s Reach into Prison*

For the indigent defendant, finances become intimately intertwined with their liberty almost immediately. It begins with the inability to post bail. Consequently, the indigent defendant is unable to support a family while in custody. Moreover, even when a defendant is able to post bail, he may lose the ability to support his family due to employer concerns about the pending charges.²⁸ Next,

place stated in the order and to show why the person is held in custody. The writ stands as a safeguard against imprisonment of those held in violation of the law.”); *see also* Greenwell v. Court of Appeals for the Thirteenth Judicial Dist., 159 S.W.3d 645, 650 (Tex. Crim. App. 2005) (“An order denying relief on the merits is a final judgment *in the habeas corpus proceeding*. Therefore, it is immediately appealable by the unsuccessful petitioner.” (quoting 43B GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 47.51 (2d ed. 2001))).

26. 18 U.S.C. § 3006A(a)(2) (2010) (stating that when the court determines that the “interests of justice so require . . . representation may be provided for any financially eligible person”); Jonathan J. Neal, “*Critical Stage*: Extending the Right to Counsel to the Motion for New Trial Phase,” WM & MARY L. REV. 783, 783 (2003) (noting that the circuit courts are split “over the reach Supreme Court’s Sixth Amendment right to counsel doctrine as it applies to criminal defendants in the post-trial setting” (citations omitted)).

27. *See* 18 U.S.C. § 3006A(a)(1), (2); *see also* MINN. STAT. § 611.17 (2012) (providing the financial eligibility guidelines for Minnesota state courts to determine if a defendant qualifies for a public defender); 7 U. S. COURTS, GUIDE TO JUDICIARY POLICY § 230 (2009), <http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-determining-financial-eligibility> [<https://perma.cc/WV6X-ZBGD>] (providing the guidelines for determining eligibility for federal public defense).

28. Bronwyn Timmons, *Can an Employer Fire You over Pending Charges?*, NEST, <https://woman.thenest.com/can-employer-fire-over-pending-charges-19967.html> [<http://perma.cc/M5PH-9SMG>]; *see* Lanie Petersen, *Can I Still Get a Job If I Got Arrested and Not Convicted?*, CHRON, <https://work.chron.com/can-still-job-got-arrested-but-not-convicted-21382.html> [<http://perma.cc/8GRQ-XABS>] (addressing the difficulties that an arrest record may cause in the employment status of the accused).

the defendant is unable to afford private counsel, expert witnesses, or investigators. As a result of the defendant's finances—or rather, his lack thereof—most decisions about his case have already been decided. Poverty takes hold of the defendant's decision-making while prison seals his fate. Stated simply, poverty and prison do all the thinking. Put together, they are responsible for a defendant's induced guilty plea, negligent waiver of appeal, and unseen compromises made in absence of the guidance from hired counsel. So indeed, poverty forces less fortunate people into mass incarceration.²⁹

Over time, poverty has become a catalyst to the institutional prejudices that result from incarceration.³⁰ Incarceration, when paired with poverty, further exacerbates the hardships of the societally disadvantaged that stem from a variety of characteristics,

29. See Alston, *supra* note 1, ¶ 71 (“Mass incarceration is used to make social problems temporarily invisible and to create the mirage of something having been done.”).

30. See Michelle Alexander, Speech at the Unitarian Universalist Association General Assembly (June 2012), <https://www.uua.org/multiculturalism/ga/new-jim-crow> [<http://perma.cc/3CXE-76KM>] (“For the rest of their lives, once branded [as a felon], you may find it difficult, or even impossible to get housing or even to get food.”); *Criminalization of Race and Poverty*, INSTITUTE FOR POL’Y STUD., <https://ipsdc.org/criminalization-of-race-and-poverty/> [<http://perma.cc/T43V-MAJ9>] (“Poor and low-income people, especially people of color, face a far greater risk of being targeted, profiled, fined, arrested, harassed, violated and incarcerated for minor offenses than other Americans.”).

including race;³¹ gender;³² gender preference; indigenoussness;³³ homelessness;³⁴ religion; citizenship status;³⁵ mental disabilities;³⁶

31. Mass incarceration is the fullest expression of racism and bias. “Racial and ethnic minorities have long been disproportionately represented in the US criminal justice system. While accounting for only 13 percent of the US population, African Americans represent 28.4 percent of all arrests. According to Bureau of Justice Statistics approximately 3.1 percent of African American men, 1.3 percent of Latino men, and 0.5 percent of white men are in prison. Because they are disproportionately likely to have criminal records, members of racial and ethnic minorities are more likely than whites to experience stigma and legal discrimination in employment, housing, education, public benefits, jury service, and the right to vote.” *Discrimination, Inequality, and Poverty—A Human Rights Perspective*, HUM. RTS. WATCH (Jan. 11, 2013, 7:01 PM) (citations omitted), <https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective> [<https://perma.cc/Z58H-NMJM>].

32. See Alston, *supra* note 1, ¶¶ 56–60 (describing social discrimination in access to and quality of services to the female poor, further exacerbated by racism and non-citizenship); see also Claire Melamed, *Gender Is Just One of Many Inequalities that Generate Poverty and Exclusion*, GUARDIAN (Mar. 9, 2012, 3:00 PM), <https://www.theguardian.com/global-development/poverty-matters/2012/mar/09/gender-inequality-poverty-exclusion> [<https://perma.cc/29A9-8ESB>] (discussing how gender, along with class, race, and ethnicity, has a role in inequality).

33. See Alston, *supra* note 1, ¶¶ 61–64 (noting that “[p]overty, unemployment, social exclusion and loss of cultural identity also have significant mental health ramifications and often lead to a higher prevalence of substance abuse, domestic violence and alarmingly high suicide rates in indigenous communities, particularly among young people” and that “[s]uicide is the second leading cause of death among American Indians and Alaska Natives aged between 10 and 34” (citation omitted)).

34. See *id.* ¶¶ 43–46 (“Homelessness on this scale is far from inevitable and reflects political choices to see the solution as law enforcement rather than adequate and accessible low-cost housing, medical treatment, psychological counselling and job training.” (citation omitted)).

35. The inherent crossover between criminal law and the nation’s immigration policy is undeniable. “Immigration laws and policies have the power to conflate race, ethnicity and national origin with lawbreaking, economic rivalry and terrorism. A targeted noncitizen occupies an indissoluble bubble of isolation . . . [F]or them America is an inside out prison comprised of sensitive locations, sanctuary cities, and degrading confinement. If the immigration system bears a resemblance to criminal justice, it is because they share a forge upon which people are hammered out.” Ken Strutin, *Detainers, Detention and Deportation: From Presence to Personhood*, L. & TECH. RESOURCES FOR LEGAL PROFESSIONALS (Apr. 29, 2018) (citation omitted), <https://www.llrx.com/2018/04/detainers-detention-and-deportation-from-presence-to-personhood/> [<https://perma.cc/5SN9-5ZMG>]; see Erika J. Nava, *Legal Representation in Immigration Courts Leads to Better Outcomes, Economic Stability*, N.J. POL’Y PERSP. (June 19, 2018), <https://www.njpp.org/blog/legal-representation->

and deficits in education.³⁷ The economically disadvantaged deserve a right to post-conviction counsel in light of the conditions created or further exacerbated by confinement and the resulting discrimination and indifference.³⁸

in-immigration-courts-leads-to-better-outcomes-economic-stability [https://perma.cc/9JV6-ZUQ2] (“Studies have shown that offering legal representation in immigration court increases the likelihood of an individual winning their case, being released to their families, and consequently improving the lives of families. In addition, legal representation has positive impacts in the communities where immigrants reside as deportations not only hurt the individuals, but also their families and local economies. Creating . . . program[s] that expand[] access to counsel for detained immigrants will not only bolster [affected] immigrant families, but the broader state economy.” (citation omitted)); *see also* Erik Slobe, *California Enacts Law That Limits When Immigration Status Can Be Used In Open Court*, JURIST (May 18, 2018, 7:55 PM), <https://www.jurist.org/news/2018/05/california-enacts-law-that-limits-when-immigration-status-can-be-used-in-open-court/> [https://perma.cc/6LTR-URQE] (discussing newly enacted California legislation prohibiting introduction of a party’s immigration status absent judge’s approval).

36. *See* Megan Hadley, *Judges Called ‘Last Line of Defense’ for Mentally Ill in Justice System*, CRIME REP. (Apr. 16, 2018), <https://thecrimereport.org/2018/04/16/prison-should-be-the-last-resort-for-mentally-ill-experts-say/> [https://perma.cc/83ZL-DYN7] (“The use of jails and prisons as frontline treatment facilities for individuals with serious mental illness—for lack of adequate alternatives—is a ‘horrible American tragedy.’” (quoting Judge Steven Leifman of the Eleventh Judicial Circuit Court of Florida)).

37. *See* Caitlin Curley, *How Education Deficits Drive Mass Incarceration*, GENFKD (Nov. 18, 2016, 1:02 PM), <http://www.genfkd.org/education-deficiency-drives-mass-incarceration> [http://perma.cc/CV5U-LKTW] (“A common thread through the American incarceration system is a widespread inmate education deficiency.”).

38. *See* Ken Strutin, *Prison Affected People: Punished to the Margins of Life*, L. & TECH. RES. FOR LEGAL PROF. (Dec. 30, 2016), <https://www.llrx.com/2016/12/prison-affected-people-punished-to-the-margins-of-life/> [https://perma.cc/97A4-78G8] [hereinafter Strutin, *Prison Affected People*] (discussing how “[i]mprisonment is a gut-wrenching transformation that ages youth; saps vitality; claws at sanity; tears down dignity; and steals the consolations of sleep, solitude, and security . . . [which] has become accepted, even anticipated, as the path of criminal justice”); *id.* (“The incarcerative experience embraces many scenarios that affect well-being, daily living, and dignity: accessibility, mobility, independence and self-care (ADA/Rehabilitation Act); adult and juvenile classifications and aging in (elderly entering prison, young people aging into elderhood); death-in-custody (homicide, suicide, illness, accident, neglect, mistreatment); disabilities (sensory, cognitive); double-bunking and overcrowding; gender identity and sexual orientation (LGBT); infectious diseases as well as chronic and acute medical conditions; mental health (problems, disorders, illness); sexual abuse and rape (PREA); and solitary confinement.”); Becky Pettit & Bryan Sykes, *Incarceration*, PATHWAYS, Special Issue 2017, at 24–26, https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_incarcera

B. *Constitutional and Legislative Concerns For Indigent Prisoners*

Constitutional representation peaked with *Gideon* and crept behind prison bars through the United States Supreme Court's holding in *Bounds v. Smith*.³⁹ However, constitutional representation lost ground to both *Casey's*⁴⁰ actual-injury standing requirement and the restrictions of the Antiterrorism and Effective Death Penalty Act (AEDPA)⁴¹ on writ of habeas corpus applications.⁴² These changes left inmates who were virtually unrepresented to make post-conviction decisions on their own.⁴³

tion.pdf [<https://perma.cc/M54F-55RF>] (discussing how studies have shown a large segment of the African-American population are imprisoned in such numbers and durations that negatively implicate post-conviction means of economic self-sufficiency, overall well-being of their children, and fosters generations of inequality). “Despite decades of declines in crime and much talk about criminal justice reform, incarceration remains a critical axis of racial and ethnic inequality in the United States.” *Id.* at 26; see also Lovisa Stannow, *Standing By as Prisoners Are Raped*, N.Y. TIMES (Jun. 20, 2018), <https://www.nytimes.com/2018/06/20/opinion/prison-rape-sexual-violence.html> [<https://perma.cc/RS5K-8RND>] (describing the shortfalls of prison condition assessments and the need for legislation to improve them, such as the First Step Act, H.R. 5682, 115th Cong. (2nd Sess. 2018), apropos of the Prison Rape Elimination Act).

39. *Bounds v. Smith*, 430 U. S. 817, 824–25 (1977) (holding that indigent inmates must be provided, at the state's expense, with adequate assistance in preparing for their defense, including appointing counsel, filing appropriate paper work, and paying docket fees).

40. *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (holding that actual injury is required for inmates to allege a constitutional violation and that it is not enough to allege inadequate law libraries or legal assistance—inmates must show the alleged shortcomings hindered efforts to pursue a legal claim). Thus, the systemwide remedy granted in *Bounds* was found to be beyond what was necessary. *Id.* at 355.

41. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2254 (1996)) (limiting the application for a writ of habeas corpus by a person in custody to one year upon a final judgement or alleged constitutional violation by the state).

42. One scholar has argued that due to the complexity of the AEDPA's standards for habeas review—as well as the need for additional outside fact-finding in many cases—the right to counsel ought to exist to ensure access to the courts. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1282 (2012) [hereinafter Uhrig, *Gladiators*]; Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 604 (2009).

43. Strutin, *Pleading Dignity*, *supra* note 20 (“The majority of people in prison have been plea bargained there without the constitutional backbone of a trial or the

The concept of legislative exoneration is moving at a snail's pace and only a modest amount of balance has been restored, due to the recent friction of freestanding actual innocence and gateway claims.⁴⁴ The absence of counsel has left pro se defendants on their own to make use of new forensics for introducing newly discovered evidence, to competently argue against systemic injustices, and to handle ineffective-assistance-of-counsel claims in hindsight.⁴⁵

dignity of humane punishment. So, their uncounseled pleadings speak to the broken promises of justice and just treatment, while dignity remains a ghost trapped behind bars." (citations omitted)). See generally *People v. Emmett*, 254 N.E.2d 744, 745 (N.Y. 1969) ("There is no substitute for the single-minded advocacy of appellate counsel. Experience has demonstrated that they not infrequently advance contentions which might otherwise escape the attention of judges of busy appellate courts, no matter how conscientiously and carefully those judges read the records before them."); Strutin, *Pleading Dignity*, *supra* note 20 ("For want of the proper form, an incarcerated person's writ is lost; for want of legal understanding, their cause is lost. But where human dignity is valued, no petition should be denied because it was written on the wrong stationery.").

44. See, e.g., *Other Virginia Exonerations: Marvin Anderson*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995> [<http://perma.cc/6K5R-PE7L>] (describing the nineteen-year process of exoneration for one convicted felon); see also Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 423 n.10 (2018) (noting that "[i]nnocence serves as a 'gateway' when it allows defendants to bypass procedural restrictions" and that "[i]nnocence serves as a 'freestanding' when it warrants issuance of a writ of habeas corpus").

45. See *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (codified as amended at 28 U.S.C. § 2254(b)(2) (2012)) (first citing *Murray v. Giarratano*, 492 U. S. 1 (1989) (applying to capital cases); then citing *Pennsylvania v. Finley*, 481 U. S. 551 (1987) (refusing to excuse procedural default in a federal habeas corpus claim on account of ineffectiveness of counsel, the Court reasoned that "[t]here is no constitutional right to an attorney in state post-conviction proceedings"); *id.* at 752 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982) (noting that where there is no constitutional right to counsel there can be no deprivation of effective assistance and stating that "[c]onsequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *id.* at 752, 755 (stating that the petitioner must live with the consequences of his attorney's error but when collateral review is the "first forum" for raising ineffectiveness, the Court recognized a right to litigate); see also *Martinez v. Ryan*, 566 U.S. 1, 17 (2012) (noting that, under state law, claims of ineffective assistance of trial counsel "must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that

In *Betts v. Brady*, the Supreme Court declared that “[e]very court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.”⁴⁶ Yet, considering convictions valid when defendants are denied constitutional representation creates the notion that justice is only served to those who can financially afford it.⁴⁷ As a result, the law has struggled to keep up with social progression and has correspondingly turned a blind eye to the conditions of our prisons.

However, there has been a steady expansion of judicial values since *Gideon*'s essential reliance on poverty.⁴⁸ Beginning with due process and equal protection, fair trial has extended into fair sentencing—eschewing excessive punishment and embracing cognitive rights.⁴⁹ In *Jones v. Barnes*, the Supreme Court touted the accused’s basic decisional rights, noting that “[i]t is also recognized that the accused has the ultimate authority to make certain

proceeding was ineffective”); *Maples v. Thomas*, 565 U.S. 266, 271 (2012) (“Abandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the default at Maples’ death-cell door.”).

46. *Betts v. Brady*, 316 U.S. 455, 462, (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (“Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.”).

47. *See id.* at 466 (stating that “it is evident that the constitutional provisions to the effect that the defendant should be ‘allowed’ counsel . . . were intended to do away with the rules which denied representation . . . but were not aimed to compel the state to provide counsel for a defendant”).

48. *See* Justin F. Marceau, *Gideon’s Shadow*, 122 YALE L.J. 2482, 2488–97 (2013) (discussing the judicial doctrines of retroactivity, limitations on habeas, challenging prior convictions, and harmless error that developed from *Gideon*’s holding); *see also* 18 U.S.C. § 355 (a) (2010) (articulating “factors to be considered in imposing a sentence”); *cf.* *United States v. Booker*, 543 U.S. 220, 253 (2005) (discussing the promulgation of sentencing guidelines as a means of Congress seeking to achieve greater uniformity in judicial system sentencing).

49. *See* Ken Strutin, *Litigating from the Prison of the Mind: A Cognitive Right to Post-Conviction Counsel*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 343, 413 (2016) [hereinafter Strutin, *Litigating*] (“The right to post-conviction counsel might be born anew from the cognitive conditions of confinement.”); *see also* *Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> [http://perma.cc/HPJ5-J837] (discussing “step[s] toward fairness” in the discrepancy in sentencing between crack and powder cocaine offenses).

fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal” and, to a certain degree, proceed pro se.⁵⁰ Jurisprudence on self-representation and waiver of rights also speaks to the advancement of values that safeguard the right of due process.⁵¹ Thus, *Gideon* started an earnest discussion of values underlying the Sixth Amendment—the right that protects rights.

Congress added the Sixth Amendment “right to counsel” when slavery was an accepted evil, women could not vote, and society systematically discriminated against the poor.⁵² The Sixth Amendment grew in stature after the Civil War Amendments abolished slavery, federalized equality, and eventually opened the door to state due process.⁵³ And yet, Jim Crow, segregation, and inequality persist by law and custom.⁵⁴ Hence, the development of the constitutional right to counsel crawled from the decision in *Powell v. Alabama*⁵⁵ to the decision in *Gideon*.⁵⁶

50. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that defense counsel was not required to raise all non-frivolous issues requested by a defendant if counsel exercised professional judgment in deciding which issues to raise).

51. The *Jones* dissent stressed the importance of “the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process.” *Id.* at 763 (Brennan, J., dissenting).

52. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 1–14 (2d ed. 2012) (asserting that despite advances since the civil rights era, the United States remains fundamentally racist); MARK E. KANN, *THE GENDERING OF AMERICAN POLITICS: FOUNDING MOTHERS, FOUNDING FATHERS, AND THE POLITICAL PATRIARCHY* 3–8 (1999) (arguing that gender bias was established during the founding of the country); Gerald L. Neuman, *Equal Protection, “General Equality” and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 296 (1999) (“[T]he Constitution has not been interpreted as entitling the poor, or the middle class, to the quality of counsel that rich defendants can afford.”).

53. See *What Were the Reconstruction Amendments?*, LAWS, <https://constitution.laws.com/reconstruction-amendments> [<http://perma.cc/4QF3-VCBS>] (explaining that the Thirteenth, Fourteenth, and Fifteenth Amendments form the Civil War Amendments and describing the rights that these amendments confer).

54. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1 (2010) (noting that “America is still not an egalitarian society”).

55. *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that trial court’s failure to appoint effective counsel for defendants constitutes a violation of a defendant’s right to due process under the Fourteenth Amendment).

56. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

The exoneration movement⁵⁷ has created ripples in post-conviction waters, accumulating statistics that decry the infallibility and finality of criminal convictions and the role of discrimination.⁵⁸ Although actual innocence provides some resistance against the force of the AEDPA restrictions, a constitutional right to post-conviction counsel must go further—based on the broad tenets of equal justice. To expand the right to post-conviction counsel requires a platform for Sixth Amendment justice as broad as the platforms in *Gideon* and *Douglas v. California*⁵⁹—cases that spoke to financial poverty.

Consequently, the AEDPA has hardened the justice system against meaningful review, vindication, and redemption.⁶⁰ At the same time, the AEDPA has elevated the need for professional representation in the increasingly complex arena of federal habeas corpus review.⁶¹ Post-conviction review must look beyond the false images of the convicted and confined, beyond the stigma and obloquy, and focus instead on prisoners' constitutional dignity. Ultimately, a post-conviction right to counsel would move justice forward on all fronts, exposing systemic errors, malfeasance, and prejudice—all of which are root causes of mass incarceration.⁶²

57. Craig Haney, *Exoneration and Wrongful Condemnsions: Expanding the Zone of Perceived Injustice in Death Penalty Cases* 37 GOLDEN GATE U. L. REV. 131, 133, 138 (2006); Richard E. Leo, Has the Innocence Movement Become an Exoneration Movement? The Risks and Rewards of Redefining Innocence 6–7 (Mar. 1, 2016) (unpublished research paper) <https://bit.ly/2Qrzhdp> [<http://perma.cc/S5VS-RXRW>].

58. See, e.g., GROSS, *supra* note 15, at 1; Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. U.S. AM. 7230, 7231 (2014) [hereinafter Gross, *Rate of False Conviction*], <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4034186/pdf/pnas.201306417.pdf> [<http://perma.cc/JF9A-2HFH>].

59. *Douglas v. California*, 372 U. S. 353, 356–57 (1963) (holding that defendants were denied equal protection under the law when their appeal of right was decided without the benefit of representation by counsel).

60. See generally Uhrig, *Gladiators*, *supra* note 42, at 1271–75 (arguing for a constitutional right to counsel for state inmates in all initial federal habeas corpus proceedings based on access-to-the-courts doctrine).

61. See John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 290 (2006) (“In the habeas corpus context, even more clarity is required given the complexity of the tolling provisions, the fact that most prisoners do not have counsel to assist in the preparation of a habeas petition, the inadequacy of many prison law libraries, and the potential unjust loss of liberty—and in some cases, life.”).

62. See Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2035 (2018) (noting

Without regard to wealth or innocence, *Gideon* enfranchised the unrepresented poor. Still, poverty is but one obstacle to dignity. Prejudices against the poor, people of color, culture, religion, lifestyle, psychology, and physique—differences that pool into the misery of mass incarceration—permeate the justice system.⁶³ Although *Gideon* alone cannot absolve society of its guilt, *Gideon* could awaken lawmakers and judges to the injustices that outlive the verdict.

C. Poor Access to Technology Limits Pro Se Lawyering

When focusing on prisoners' lawyering skills, the Court perhaps fails to consider the lack of prisoner access to current information. A crucial societal change since *Gideon* is the rise of an information-reliant culture. Although the twenty-first century has fostered the first generation that has been largely educated, entertained, and socialized through computers, millions of people who are entrenched in poverty and confinement are the exception.⁶⁴ Because the impoverished are without access to technology, their meaningful access to the courts is limited.⁶⁵

that “[s]ince the 1970s, incarceration in state and federal United States jurisdictions has grown exponentially, making the U.S. a global anomaly in its rate of imprisonment” and that “[n]ew approaches taken by the police, courts, prosecutors, and defense attorneys to efficiently process this rapid escalation have both responded to and contributed to the problem”).

63. See Alston, *supra* note 1, ¶¶ 71, 72. See generally Trevor George Gardner, *Racial Profiling as Collective Definition*, 2 SOC. INCLUSION, 52–59 (2014) (exploring the co-construction of race and criminality through racial profiling).

64. See Mirko Bagaric, et. al., *The Hardship That is Internet Deprivation and What it Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON. L. REV. 261 (2017) (noting that the “pain that comes with internet denial” creates “a considerable hardship”).

65. See Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819, 821 (2008) (noting that although the Constitution guarantees prisoners meaningful access to the courts, few prisons allow inmates access to digital legal research tools); see also *Lewis v. Casey*, 518 U.S. 343, 408 n.5 (1996) (Stevens, J., dissenting) (“Although a prisoner would lose on the merits if he alleged that the deprivation of that right occurred because the State, for example, did not provide him with access to on-line computer databases, he would also certainly have ‘standing’ to make his claim.”). But see James L. Esposito, *Virtual Freedom—Physical Confinement: An Analysis of Prisoner Use of the Internet*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 48–50 (2000) (listing examples of inmates who have been able to use the internet as a public forum).

An inmate's ability to learn is environmentally limited, meaning that his or her knowledge is limited by the accessible resources. In rare instances, confinement turns people into autodidacts,⁶⁶ but for most, the division between the pro se prisoner and the technologically sophisticated lawyer is insurmountable.⁶⁷ Moreover, the already-existent information barrier that separates the poor from the rest of society multiplies when the indigent find themselves behind bars.⁶⁸ Technology is enhancing the quality of legal research.⁶⁹ Legal technology companies are increasingly turning toward artificial

66. Autodidacts produced by confinement include Malcolm X, who copied a dictionary word-for-word, and Robert Franklin Stroud, better known as the "Birdman of Alcatraz," who became a respected ornithologist and published author, all while incarcerated. *When X = Literacy*, N.Y. TIMES (Jan. 6, 1993), <https://www.nytimes.com/1993/01/06/opinion/when-x-literacy.html> [<https://perma.cc/5KPZ-QHAR>]; *Famous Inmates: Robert "the Birdman of Alcatraz" Stroud*, ALCATRAZHISTORY.COM, <http://www.alcatrazhistory.com/stroud.htm> [<https://perma.cc/AJD5-WZHY>].

67. No professional born into this new world can escape the inevitable union with increasingly smart technologies that will redefine lawyering. See Benjamin R. Dryden, Comment, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, U. PA. J. CONST. L. 819, 821 (2018) ("In the real world . . . the democratic process denies prisoners access to the free law-related websites available online."); Edgar Alan Rayo, *AI in Law and Legal Practice—A Comprehensive View of 35 Current Applications*, TECHEMERGENCE.COM, <https://www.techemergence.com/ai-in-law-legal-practice-current-applications/> [<https://perma.cc/RPB6-5AXY>] (discussing new AI applications for due diligence; predication technology; legal analytics; document automation; and electronic billing).

68. Dryden, *supra* note 65 at 821. Technology also has the capacity to reveal the inevitable human shortfalls in research, even among lawyers and law clerks. See generally, CASETEXT, THE PREVALENCE OF MISSING PRECEDENTS 2–4 (2018), <https://user-assets-unbounce-com.s3.amazonaws.com/ce2dad7b-7124-4bda-9b4a-6bc574d2a166/bba98a0d-55ed-4b42-b37f-def6c7ca7a63/the-prevalence-of-missing-precedents-study.original.pdf> [<https://perma.cc/S623-D7XZ>] (describing the frequency with which litigators miss precedent cases); *Casetext Survey Finds 'Shocking' Level of Missing Relevant Cases in US Courts*, ARTIFICIALLAWYER.COM (Jun. 8, 2018), <https://www.artificiallawyer.com/2018/06/08/casetext-survey-finds-shocking-level-of-missing-relevant-cases-in-us-courts/> [<https://perma.cc/AC8T-57YE>] ("New research conducted by legal AI-led litigation research system Casetext, has shown that 83% of US judges and their clerks find that lawyers' briefs are missing relevant cases that could impact the trial 'at least some of the time.'").

69. Jason Tashea, *More Than 25 New Legal Tech AI Players Have Emerged in Past Year*, REPORT SAYS, A.B.A. J. (May 17, 2018, 3:08 PM), http://www.abajournal.com/news/article/more_than_25_new_legal_tech_ai_players_have_emerged_in_past_year_report_say [<https://perma.cc/5DCU-WHGX>] ("Artificial intelligence offerings in the legal tech field have increased by nearly two-thirds over the last year.").

intelligence systems to streamline research.⁷⁰ Moreover, technological databases can be laced with bias and prejudice.⁷¹ Hence, prisoners are doubly victimized by human racism and technology bias.

Prisoners are also often custodians of obsolete skills and outdated sources.⁷² Additionally, a library—like a written brief—is

70. Technology is a game changer in legal research, to which attorneys and judges are slowly adapting. Owen Byrd, *Legal Analytics vs. Legal Research: What's the Difference?*, L. TECH. TODAY (June 12, 2017), <https://www.lawtechnologytoday.org/2017/06/legal-analytics-vs-legal-research/> [https://perma.cc/JE82-R2GV] (noting that “[l]egal analytics involves mining data contained in case documents and docket entries, and then aggregating that data to provide previously unknowable insights into the behavior of the individuals (judges and lawyers), organizations (parties, courts, law firms), and the subjects of lawsuits (such as patents) that populate the litigation ecosystem” and that “[l]itigators use legal analytics to reveal trends and patterns in past litigation that inform legal strategy and anticipate outcomes in current cases”). A Casetext poll of 100 state and federal judges revealed that “[m]ore than two-thirds of judges surveyed said that attorneys missing cases before them has materially impacted the outcome of a motion or proceeding.” Jake Heller, *You're Bad at Legal Research, and Your Judge Knows It*, ABOVE L. (May 24, 2018, 2:34 PM), <https://abovethelaw.com/2018/05/artificial-confusion-youre-bad-at-legal-research-and-your-judge-knows-it/> [https://perma.cc/NZ68-8Z9G]. In turn, attorneys are putting more energy into the use of AI in legal research to maintain and raise the quality of search results. Indeed, legal analysis is lending itself more and more to algorithmic enhancement beyond the range of human abilities.

71. The faults and prejudices of human thinking are being passed down and legitimized by machine learning and big data. Julia Angwin et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [https://perma.cc/5AQH-J2LY]; Stephen Buranyi, *Rise of the Racist Robots—How AI Is Learning All Our Worst Impulses*, GUARDIAN (Aug. 8, 2017, 2:00 PM), <https://www.theguardian.com/inequality/2017/aug/08/rise-of-the-racist-robots-how-ai-is-learning-all-our-worst-impulses> [https://perma.cc/Z346-8R39] (explaining that a new computerized prejudice against the poor and people of color has been sanitized by algorithms adopted without scrutiny); Ken Strutin, *Risk Assessment for Computerized Humanity*, N.Y. L.J. (Jul. 23, 2018, 2:30 PM), <https://www.law.com/newyorklawjournal/2018/07/23/risk-assessment-for-a-computerized-humanity/> [https://perma.cc/K6ZU-XEJN] (“We have only just arrived at a time when implicit bias in judicial sentencing has been acknowledged.”); see Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing*, 104 J. CRIM. L. & CRIMINOLOGY 489, 491–92 (2014).

72. See ELIZABETH GREENBERG ET AL., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 29, 77 (2007) (discussing studies showing “[p]rison inmates had lower average prose, document, and quantitative literacy than adults living in households”).

not the functional equivalent of a lawyer. However, without a library, the pro se defendant is at an extreme disadvantage.

III. MASS INCARCERATION

Statistics exist that measure mass incarceration.⁷³ However, those numbers may be misleading,⁷⁴ for they only count bodies behind bars.⁷⁵ Statistics do not take into account the persons who fill up the nation's stockpile of punishment.⁷⁶ There are few, if any, numbers that reveal the number of innocent, wrongfully convicted, excessively punished, mistreated, abused, and dying prisoners.⁷⁷

73. See E. ANN CARSON, PRISONERS IN 2016 1 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/ZVQ8-8VCL>] (providing statistics on the U.S. prison population and reporting that the “United States had an estimated 1,505,400 prisoners under the jurisdiction of state and federal correctional authorities as of December 31, 2016”).

74. MALCOLM C. YOUNG, PRISONERS IN 2016 AND THE PROSPECTS FOR AN END TO MASS INCARCERATION 1 (2018), <http://www.communityalternatives.org/pdf/FINAL-Prisoners-in-2016-and-the-Prospects-for-an-End-to-Mass-Incarceration-11-June%20-May-2018.pdf> [<https://perma.cc/FTX8-FJ2B>] (stating that “[a]t the end of 2016 this nation was far from reducing prison populations at a pace that would end mass incarceration in the foreseeable future, if at all” and that “it will take decades to accomplish the goals announced by prominent reform organizations: a prison population under one million; a prison population half its present size”); Ted Gest, *Incarceration Decrease? Drop in Prison Numbers Called ‘Anemic’*, CRIME REP. (June 13, 2018), <https://thecrimereport.org/2018/06/13/incarceration-decrease-researcher-calls-drop-in-prison-numbers-anemic/> [<https://perma.cc/D46T-PJMF>].

75. See JACOB KANG-BROWN ET AL., THE NEW DYNAMICS OF MASS INCARCERATION 6–7 (2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-new-dynamics-of-mass-incarceration/legacy_downloads/the-new-dynamics-of-mass-incarceration-report.pdf [<https://perma.cc/52WV-PGHM>] (proposing “a wider set of metrics by which to analyze incarceration trends to supplement the old standard of state prison population: 1) prison admissions[,] 2) jail admissions, 3) pretrial jail populations[,] and 4) sentenced jail populations”).

76. Studies usually focus on rates of recidivism. See BUREAU OF JUSTICE STATISTICS, RECIDIVISM, <https://www.bjs.gov/index.cfm?ty=tp&tid=17> [<https://perma.cc/8W7K-F4YC>], (collection of statistical studies concerning recidivism rates among persons released from prison); see also GELB, *supra* note 11, at 2 (suggesting “at least two new and more nuanced indicators” to “know whether we are making progress toward a more fair and effective criminal justice system”—correctional population composition and recidivism by risk).

77. See, e.g., Gross, *Rate of False Conviction*, *supra* note 58 at 7231 (measuring the number of “death-sentenced defendants in the United States, 1973–2004” using the categories of “executed,” “died on death row but not executed,” “still on death

Both the “broken windows theory”⁷⁸ and the “mosaic theory”⁷⁹ suggest that capturing wrongful convictions and injustices through routine review at the individual level might help illuminate the systemic harms that otherwise go unnoticed. Prisoner surveys and the National Registry of Exonerations only catalog the data that is known.⁸⁰ Assigning counsel creates opportunities to find the uncounted actual innocents, the abused and tortured, those who are discriminated against—those who suffer from all forms of unpronounceable wrongs and unrecognized legal harms.⁸¹ In the

row” “removed from death row but not exonerated,” “exonerated, under threat of execution,” and “exonerated, not under threat of execution”).

78. Adam J. McKee, *Broken Windows Theory*, ENCYCLOPEDIA BRITANNICA (Dec. 13, 2017) <https://www.britannica.com/topic/broken-windows-theory> [<https://perma.cc/J8U2-CQTQ>] (explaining that the “broken windows theory” is an “academic theory proposed by James Q. Wilson and George Kelling in 1982 that used broken windows as a metaphor for disorder within neighbourhoods” and that the theory “links disorder and incivility within a community to subsequent occurrences of serious crime”); see George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/544K-WR6M>] (“Social psychologists and police officers tend to agree that if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken.”).

79. Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012), <https://bit.ly/2C5c3W0> [<http://perma.cc/VW6N-N8P6>] (“Under the mosaic theory, searches can be analyzed as a collective sequence of steps rather than as individual steps.” (citing *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2012), *aff’d sub. nom* *United States v. Jones*, 565 U.S. 400 (2012)); Ken Strutin, *Mosaic Theory: A New Perspective for Human Privacy*, N.Y. L.J. (2013) [<https://advance.lexis.com/search?crd=808ab01d-a8f1-471e-a577-fe04e862b9c6&pdsearchterms=LNSDUID-ALM-NYLAWJ-1202620361750&pdbyasscatordocs=False&pdmfid=1000516&pdisurlapi=true>] (“Borrowed from the worlds of art, economics and national security, mosaic theory has found resonance in criminal cases for creating composite pictures from bits of disparate data.”).

80. See, e.g., *Data Collection: Survey of Inmates in State Correctional Facilities (SISCF)*, BUREAU JUST. STATIST., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=275> [<http://perma.cc/97WU-GHU5>]; *Library: Research: Statistics/Data*, NAT’L PREA RES. CTR., <https://www.prearesourcecenter.org/library/research/statisticsdata> [<https://perma.cc/EY5S-H57C>] (listing of various research and data collected on prisoner sexual abuse and rape in relation to the 2003 Prison Rape Elimination Act); National Registry of Exonerations, MICH. ST. U. C.L., <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/N2KZ-AUM6>].

81. See Amber Baylor, *Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 12, 25–28

context of evaluating convictions or conditions of confinement, the process of individual fact-finding may be the best barometer of a justice system impeded by layers of doctrinal finality, deference, and comity. That barometer was the promise of *Gideon*,⁸² the inspiration behind the decades-long litigation in *Brown v. Plata*,⁸³ and the work of innocence projects at the forefront of forensic reformations.⁸⁴

The effects of mass incarceration extinguish any realistic hope of successful self-lawyering.⁸⁵ For example, many convicted prisoners carry the excruciating burdens of being innocent, wrongfully convicted, and over-punished.⁸⁶ Additionally, the majority of the

(2015) (“Defense attorneys are the most likely outside parties to learn of outrageous conditions at the detention center through conversations with incarcerated clients.”).

82. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

83. *Brown v. Plata*, 563 U.S. 493, 509, 522 (2011) (affirming judgment where judicial fact finding revealed the “impact of overcrowding” and “understaffing, inadequate facilities, and unsanitary and unsafe living conditions”).

84. See *The Need for Forensic Reform*, INNOCENCE PROJECT (Oct. 10, 2014), <https://www.innocenceproject.org/the-need-for-forensic-reform/> [<http://perma.cc/A2WM-GDSV>] (announcing the Innocence Project’s “launch of the Campaign for Forensic Standards”); see also Ken Strutin, *Report—President’s Council of Advisors on Science and Technology Casts Doubt on Criminal Forensics*, L. & TECH. RESOURCES FOR LEGAL PROFESSIONALS (Mar. 19, 2017), <https://www.llrx.com/2017/03/report-presidents-council-of-advisors-on-science-and-technology-casts-doubt-on-criminal-forensics> [<https://perma.cc/TJ2P-8CSE>] [hereinafter Strutin, *Report*] (“Among the more than 2.2 million inmates in U.S. prisons and jails, countless may have been convicted using unreliable or fabricated forensic science. The U.S. has an abiding and unfulfilled moral obligation to free citizens who were imprisoned by such questionable means.” (quoting Alex Kozinski, *Rejecting Voodoo Science in the Courtroom*, WALL ST. J. (Sept. 19, 2016), <https://www.wsj.com/articles/rejecting-voodoo-science-in-the-courtroom-1474328199> [<https://perma.cc/AS4V-R2HG>])).

85. 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, 348 (2006) (“Mass imprisonment has resulted in a predictable increase in post-conviction appeals and habeas corpus filings, mostly by pro se litigants.”).

86. See *Actual innocence*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The absence of facts that are prerequisites for the sentence given to a defendant.”); *Wrongful conviction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A conviction of a person for a crime that he or she did not commit.”); see also *Misconviction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The wrongful conviction of an innocent person, usually as a result of erroneous or fraudulent forensic evidence or mistaken eyewitness identification.”). Additionally, some sentences are illegal or excessive. See Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J.L. & Soc. CHANGE 1, 29 (2016) (“[I]n modern jurisprudence, actual innocence plays ‘only a small role’ in adjudication of habeas corpus petitions.”); Jessica S. Henry, *Smoke but No Fire: When Innocent People Are*

incarcerated are enveloped in a system built on overcriminalization, racial profiling, mandatory minimums, parole nullification, procedural default, finality, and pro se lawyering.⁸⁷ Indeed, criminal law, poverty, and racism have inevitably become deeply intertwined.⁸⁸ Underfunded and overburdened, *Gideon's* promise remains unfulfilled; hence, becoming a contributor to mass incarceration.⁸⁹ As one scholar noted:

There has also been a visible shift in the American conscience about crime and criminality that has created a presumption of guilt that poor and minority defendants must overcome to avoid conviction once arrested. The confluence of these factors makes the risk of wrongful conviction fearfully high and has fueled real doubts about many cases.⁹⁰

Gideon spoke to poverty without addressing the underlying source of racism⁹¹ and spoke to innocence without acknowledging the

Wrongly Convicted of Crimes That Never Happened, 55 AM. CRIM. L. REV. 665, 665 (2018) (“Nearly one-third of exonerations involve the wrongful conviction of an innocent person for a crime that never actually happened.”).

87. See Ting Ting Cheng et al., *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 CITY N.Y. L. REV. 203, 238 (2008) (discussing a survey of criminal defense attorneys serving indigent clients who stated that “[t]he criminal justice system is still structured to work against poor people of color, who often experience unequal treatment as a result of racial profiling, police abuse, and discrimination”).

88. See Stevenson, *supra* note 85, at 342. (“The notion that the criminal justice system is unfair is not just an apocryphal lament by the besieged and disaffected. Courts *have* become much more tolerant of error in the administration of criminal justice. Many of the current problems result from the sheer volume of criminal cases that systems must now manage. Other systemic problems reflect policy choices about how we respond to post-conviction complaints about illegal, incorrect, and unjust convictions and sentences. These policy choices must be reexamined.”).

89. *Id.* at 344 (“Although some remedial efforts have been undertaken, thousands of people have likely been wrongly convicted and imprisoned as a result of unreliable and underfunded legal assistance.” (citations omitted)).

90. See *id.* at 345 (describing “a presumption of guilt and that poor and minority defendants must overcome to avoid conviction once arrested”).

91. See Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2240 (2013) (“The critical problem of the criminal justice system now, and the one that particularly burdens African Americans, is not the wrongful conviction of the innocent, as important as it is to remedy that injustice. The problem is a lack of fairness in deciding what to criminalize and how to enforce those prohibitions. Most criminal defendants affected by the war on drugs, other forms of overcriminalization, and mandatory minimums and other harsh sentences are, as far as can be known, guilty, and thus cannot, at least systematically, be exonerated even by excellent

vast spectrum that might end in absolute guilt.⁹² Moreover, racial profiling, overcriminalization, and presumed guilt based on geography and areas of high crime have all escaped notice.⁹³ Although the right to counsel may have enshrined yesterday's innocence, the right left behind excessive convictions and confinements—a balloon payment for the next generation.⁹⁴

counsel. But convictions of the guilty selected for punishment because of race are not the kinds of judgments *Gideon* was designed to prevent, and under the Court's decisions, they are not injustices which counsel can normally address.”).

92. See Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J. L. & SOC. CHANGE 315, 324 (2010) (“The dominance of the rhetoric of innocence also comes at the expense of the not-quite-so-innocent but equally unfairly treated. Examples of the not-quite-so-innocent run the gamut. There are criminal defendants who are guilty of something but not the worst thing they are charged with. There are defendants who are guilty of something other than what they are charged with. There are defendants who committed the crime charged but with significant mitigating or extenuating circumstances. There are defendants who committed the crime but they had never done anything like this before, they lost control in a trying situation. There are defendants who committed the crime and it is no wonder in view of how they came into the world and what they endured after. There are defendants who committed the crime and have no excuse whatsoever but, as death penalty lawyer Bryan Stevenson says, ‘[e]ach of us is more than the worst thing we ever did.’”); see also Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 749–50 (2010) (“The term ‘wrongful conviction’ itself is, perhaps, artificially limited, as it excludes many convictions that are highly problematic but not technically ‘erroneous—such as, for example, those obtained by guilty pleas coerced by over-charging.’ Elevated attention to ‘glamorous’ innocence claims may distract resources from the many other problems in the system that need attention, such as disproportionate punishment. As Susan Bandes argues in the capital punishment context, ‘Given the enormous amount of work left to be done in reforming the criminal justice system it would be dispiriting to think that the movement drew all its power from revulsion at the execution of those able to prove they were blameless.’”). See generally Ken Strutin, *Truth, Justice and the American Style Plea Bargain*, 77 ALB. L. REV. 825, 828 (2014) [hereinafter Strutin, *Truth*] (explaining different forms of innocence and discussing various cases demonstrative of variations of innocence).

93. Chin, *supra* note 91, at 2236 (“The Court’s second goal [in *Gideon*] was to protect African Americans subject to the Jim Crow system of criminal justice. But, as it had in *Powell v. Alabama*, the Court pursued this end covertly and indirectly, attempting to deal with racial discrimination without explicitly addressing it.”).

94. See Lauren Salins & Shepard Simpson, *Efforts to Fix A Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1157 (2013) (“The U.S. prison population experienced a rapid influx between 1970 and 2007, growing by over 700% and effectively bringing the nation to the global forefront as the world’s biggest incarcerator. In 2008, 1 in 100 American adults was behind bars;

Today, rates of innocence among the convicted cannot easily be judged and are often underestimated.⁹⁵ Too many verdicts remain unexcavated.⁹⁶ Hence, the Court propelled a concept of innocence rarity ahead of systemic failings that created mass incarceration.⁹⁷ *Gideon* perpetuated—or poorly addressed—a bifurcated system of justice that channels wealthy defendants to retained counsel and well-funded resources, and poor defendants to the mainstreams of racial profiling, gender discrimination, and the badges of indigence. It is the composition of the mass incarcerated that drives the results for each

by 2009, 1 in 31 adults in the United States was either incarcerated or on some form of probation. As of 2011, the United States imprisoned approximately 1.6 million offenders, or about 25% of the world's prison population, despite being home to only 5% of the world's population.”).

95. Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES A14 (Mar. 25, 2008) (discussing Professor Samuel R. Gross's perspective: “Once we move beyond murder and rape cases, we know very little about any aspect of false conviction.”).

96. See Leon Friedman, *The Problem of Convicting Innocent Persons: How Often Does It Occur and How Can It Be Prevented?*, 56 N.Y.L. SCH. L. REV. 1053, 1056 (2012) (discussing an analysis based upon 2009 criminal statistics that revealed “a rough approximation of 24,704 cases” resulting in the conviction of innocent people each year); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 761 (2007) (“To a great extent, those who believe that our criminal justice system rarely convicts the factually innocent and those who believe such miscarriages are rife have generally talked past each other for want of any empirically justified factual innocence wrongful conviction rate.”).

97. Joseph M. Dittkoff, *The Ever More Complicated “Actual Innocence” Gateway to Habeas Review: Schlup v. Delo*, 115 S. Ct. 851 (1995), 18 HARV. J.L. & PUB. POL'Y 889, 896 (1995) (citing *Schlup v. Delo*, 513 U.S. 298, 322 n.36 (1995)) (discussing the Supreme Court's focus on the rarity of successful actual innocence defenses); see *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring) (“Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.”).

of these channels.⁹⁸ Indeed, there are different kinds of poor,⁹⁹ and to truly achieve equal protection the right to counsel must be based on more than balancing wealth.

Additionally, there are the post-incarceration forums that leave persons without counsel, such as parole, clemency, and civil rights actions.¹⁰⁰ Strikingly, as individuals progress through the system, fact-finding seems to grow—with newly discovered evidence, recantations, and false confessions—while the right to counsel seemingly dwindles.¹⁰¹ By the time the full record of an incarcerated person's case is assembled, the person is often without resources and representation.

Thus, lawyering for the dignity of the mass incarcerated is socially constructive because it addresses the underlying causes:

98. In the technological information age, it is a contest between “million-dollar brains” and “million-dollar blocks.” Compare Ken Strutin, *The Million Dollar Brain*, N.Y. L.J. (May 14, 2018), [<https://advance.lexis.com/search?crd=0bbf9552-71be-4ce0-9f09-ff4d8a19b12b&pdsearchterms=LNSDUID-ALM-NYLAWJ-glm45gdklj&pdbyasscitor docs=False&pdmfid=1000516&pdisurlapi=true>] [hereinafter Strutin, *Million Dollar Brain*] (“Legal education, information technology and law practice add up to an expensive thinking machine. So, the right to counsel means access to a million-dollar brain—the product of natural and artificial intelligences. Now that lawyers have been upgraded by technology, the right to counsel needs upgrading as well.”), with Emily Badger, *How Mass Incarceration Creates ‘Million Dollar Blocks’ in Poor Neighborhoods*, WASH. POST (July 30, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/07/30/how-mass-incarceration-creates-million-dollar-blocks-in-poor-neighborhoods/?utm_term=.4e60b44437cd] [<https://perma.cc/WH4L-B6BL>] (“This is the perverse form that public investment takes in many poor, minority neighborhoods: ‘million-dollar blocks,’ to use a bleak term first coined in New York by Laura Kurgan at Columbia University and Eric Cadora of the Justice Mapping Center. Our penchant for incarcerating people has grown so strong that, in many cities, taxpayers frequently spend more than a million dollars locking away residents of a single city block.”).

99. ERIC JENSEN, *TEACHING WITH POVERTY IN MIND: WHAT BEING POOR DOES TO KIDS’ BRAINS AND WHAT SCHOOLS CAN DO ABOUT IT* 6 (2009) (listing six types of poverty: situational, generational, absolute, relative, urban, and rural).

100. See, e.g., Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W.L. REV. 55, 72 (2014) (“[C]lemency is the final check on whether the entire legal system has failed.”).

101. In federal habeas review, post-conviction fact-finding is circumscribed by the state court record, often completed without the benefit of appointed counsel. See, e.g., *Cullen v. Pinholster*, 563 U.S. 170, 189–90 (2011) (holding that an attorney abandoning investigation into mitigating factors after acquiring minimal knowledge from a limited amount of sources does not prima facie demonstrate ineffective assistance of counsel).

poverty, racism, disempowerment, and discrimination.¹⁰² But, as some observed, *Gideon* was a procedural decision, not a social one.¹⁰³

IV. HOW TO BUILD A LAWYER?

Without any training or knowledge, the incarcerated person cannot effectively analyze their proper cause of action, determine the legal root of their problems, assert their legal rights, or request the appropriate relief.

As a comparison, a person trapped in quicksand needs someone standing on firm ground to pull him out of danger. This analogy represents the heart and soul of the attorney-client relationship—a distinct product of human dignity, where skilled advocates draw on their years of experience to pull up the downtrodden and the forlorn.¹⁰⁴ When the imprisoned extend themselves through the mind of counsel, the marginalization of confinement weakens.

Over the years, the Supreme Court has developed recipes for legal representation that, in their minds, have justified assigning lawyers in the first stages of trial and appeal, but not during the latter

102. See Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 153 (2002) ("Yet we can also view lawyering at the margins in terms of the broader vision of human dignity permitted only when those marginalized by social and economic structures are central.").

103. See, e.g., Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1479 (2005) ("The representation of accused clients like Gideon in the criminal justice system further exposes the tensions between process considerations and rights mobilization.").

104. See Arthur B. LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME L. REV. 41, 48–50 (1975) (discussing the attorney-client representation in the context of representing indigent defendants).

stages.¹⁰⁵ In *Powell*,¹⁰⁶ the Court delivered a vote in favor of appointed counsel by focusing on certain factors:

[T]he ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives¹⁰⁷

This is a set of circumstances all too common for those serving prison time.¹⁰⁸ The Court even described cognitive and physical challenges as being rampant amongst pro se prisoners.¹⁰⁹ Accordingly, the Court felt the right to counsel was situational:

All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to

105. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”); see Strutin, *Litigating*, *supra* note 49 at 347–49; cf. Karen Sloan & Tony Mauro, *From Convict to Counsel: Clearing the Hurdles to Practice*, NAT’L L.J. (May 25, 2018, 11:35 A.M.), <https://www.law.com/nationallawjournal/2018/05/25/from-convict-to-counsel-clearing-the-hurdles-to-practice/> [<https://perma.cc/55TX-V5JH>]. Erin Thompson, *Law Schools Are Failing Students of Color*, NATION (June 5, 2018), <https://www.thenation.com/article/law-schools-failing-students-color/> [<https://perma.cc/X6DY-NXY6>] (“Legal education has failed and will continue to fail minorities. This shouldn’t be surprising, since the entire American system of restricting admission to the practice of law has long been designed, explicitly or implicitly, to exclude minorities. Nowadays, of course, minorities are no longer simply prohibited from entering law school. Instead, the system loads many of them with staggering debt before killing their hopes, leaving them hanging from the very bootstraps they had hoped to use to rise.”).

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

107. *Id.* at 71.

108. See Strutin, *Realignment*, *supra* note 16, at 1353–56 (listing common issues that incarcerated persons face).

109. See Strutin, *Litigating*, *supra* note 49, at 360–65.

preclude the giving of effective aid in the preparation and trial of the case.¹¹⁰

Each iteration of the Court's reasoning focused on the personal characteristics of the accused.¹¹¹ For instance, in describing the hypothetical case of a prisoner charged with a capital offense, the Court described him as "deaf and dumb, illiterate and feeble-minded."¹¹²

But it was this characterization from *Powell* that held sway in *Gideon*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."¹¹³

More recently, in *Lafler v. Cooper*¹¹⁴ and *Missouri v. Frye*,¹¹⁵ the Court examined the invaluable impact of lawyering skills during plea bargaining—a process that propels the resolution of approximately ninety-five percent of today's cases.¹¹⁶

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

111. *See id.*

112. *Id.* at 72.

113. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (citing *Powell*, 287 U.S. at 68–69) ("If charged with crime, [the pro se defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [has] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

114. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (stating that "criminal justice today is for the most part a system of pleas, not a system of trials" and that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas . . . the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences").

115. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (stating that "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages").

116. *Lafler*, 566 U.S. at 170; Strutin, *Truth, supra* note 92, at 837 ("According to the Bureau of Justice Statistics cited by the Supreme Court, guilty pleas represent

Courts often seem to believe that a brief can be recycled post-conviction and stand in the place of a lawyer.¹¹⁷ However, the totality of lawyering is not comprised in any one brief, no matter how comprehensive or insightful. The brief alone is simply not a replacement for an attorney.

The right to counsel alchemizes the human experience by placing one's mind, liberty, and entire welfare into the direct care and responsibility of another human being. The client, however, can never separate himself from the events that led to his confinement. The attorney is distinguishable from the client in this regard. The attorney can separate herself from the underlying events that led to the client's incarceration. Furthermore, the attorney remains free from the burdens of confinement and therefore retains a clear mind and sound judgement to defend her client.

V. SHAPING THE LAW WITHOUT COUNSEL

The Sixth Amendment right to counsel dutifully protects due process and equal protection in trials, pleas, and direct appeals.¹¹⁸ But habeas corpus and other post-conviction remedies stand apart, uninvited to dine at the main table.¹¹⁹ Instead, the unrepresented are left to feed on the scraps of those who are fortunate enough to be guided by hired counsel.

annually ninety-seven percent of federal and ninety-four percent of state convictions.”).

117. Strutin, *Litigating*, *supra* note 49 at 377, 381.

118. Compare U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”), with GOV'T PUBL'G OFFICE, RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS 1622, <https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017-10-7.pdf> [<http://perma.cc/7ASL-EM8N>] (explaining that neither “appeals [nor] post-conviction applications for collateral relief” are “considered to be criminal prosecutions for purposes of the [Sixth] Amendment”).

119. *The Right to a Public Defender*, JUSTIA, <https://www.justia.com/criminal/procedure/miranda-rights/right-to-public-defender/> [<http://perma.cc/H62K-JV7X>] (“The Sixth Amendment generally does not include a right to court-appointed counsel in post-conviction proceedings, such as appeals and *habeas corpus* proceedings.”).

A. *Ross v. Moffitt*

Gideon's right to counsel at the trial stage grew to include direct appeal under *Douglas*,¹²⁰ but ran out of constitutional steam in *Ross v. Moffitt*, where the Court held that there was no constitutional requirement that indigent state defendants be appointed counsel for discretionary state appeals or applications for Supreme Court review.¹²¹ In two North Carolina cases, Claude Franklin Moffitt, the accused, enjoyed the benefit of appointed counsel at trial and on first appeal.¹²² However, the discretionary appeal to the state supreme court and later, to the U.S. Supreme Court, faltered for lack of assigned counsel.¹²³ Yet, the Fourth Circuit eventually granted the right to counsel in both cases based on “fairness and equality.”¹²⁴

The Supreme Court reversed.¹²⁵ In doing so, the Court noted that several Fourteenth Amendment cases—cases pertaining to a litigant’s inability to pay for transcripts or filing fees—lacked explicit constitutional footing.¹²⁶ Moreover, the Court analogized that discretionary appeals fall outside the explicit purview of the due process clause.¹²⁷ Citing *Douglas*, the majority articulated that the rationale for first-appeal representation goes beyond financial access:

[A] State does not fulfill its responsibility toward indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in

120. *Douglas v. California*, 372 U. S. 353 (1963).

121. 417 U.S. 600, 610, 618–19 (1974).

122. *Id.* at 603.

123. *Id.* at 603–04.

124. *Id.* at 604–05.

125. *Id.* at 619.

126. *Id.* at 605–07 (listing cases such as *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Lane v. Brown*, 372 U.S. 477 (1963) as examples that “invalidated . . . financial barriers to the appellate process,” and *Douglas v. California*, 372 U. S. 353 (1963), in which “the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent’s access to the appellate system was adequate”); *id.* at 608–09 (stating that neither the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment “by itself provides an entirely satisfactory basis for the results reached” in “the *Griffin* and *Douglas* lines of cases”).

127. *Id.* at 610–11 (citing *McKane v. Durston*, 153 U.S. 684 (1894) (“[I]t is clear that the State need not provide any appeal at all The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way.”)).

order to appeal . . . the State must go further and provide counsel for the indigent on his first appeal as of right.¹²⁸

Thus, the majority implicitly asserted that access to a court without the guidance of counsel was a meaningless right—at least on direct appeal—when those without means relied on the appeals court to assess the merits of each case.¹²⁹

The Court in *Ross* further explained how the Due Process and Equal Protection Clauses of the Fourteenth Amendment specifically applied to the *Griffin* and *Douglas* holdings: “‘Due process’ emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. ‘Equal protection,’ on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”¹³⁰

The key concept from *Douglas* was that poverty should not close the only door to an appeal as of right.¹³¹ According to *Ross*, even the Equal Protection Clause had its limitations in conjunction to discretionary review:

The question is not one of absolutes, but one of degrees. In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.¹³²

The Court in *Ross* stated that at the point of discretionary appeal, a lawyer would have already briefed the case in the intermediate appellate court, which would empower the pro se prisoner to pursue a discretionary appeal alone.¹³³ Appeals to the highest state court or U.S. Supreme Court are less concerned with the accuracy of a

128. *Id.* at 607.

129. *Id.* at 608.

130. *Id.* at 609.

131. *Id.* at 611.

132. *Id.* at 612.

133. *Id.* at 615 (“At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.”).

particular verdict than the direction of the law.¹³⁴ The Supreme Court recognized the efficacy of representation on discretionary review:

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding.¹³⁵

Still, the majority did not abandon the belief that value of counsel alone warranted assignment of counsel in every situation.¹³⁶ Similarly, this reasoning applied to the appointment of counsel for petitioning the Supreme Court for certiorari, where accuracy of the verdict gives way to the general interests of jurisprudence.¹³⁷

Similar to *Bounds*, the Court in *Ross* found that the states were free to set up any system that met their needs without the compulsion of a federal constitutional mandate:

134. *Id.* (“The critical issue in [the North Carolina Supreme Court], as we perceive it, is not whether there has been ‘a correct adjudication of guilt’ in every individual case, but rather whether ‘the subject matter of the appeal has significant public interest,’ whether ‘the cause involves legal principles of major significance to the jurisprudence of the State,’ or whether the decision below is in probable conflict with a decision of the Supreme Court. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above.” (citations omitted)).

135. *Id.* at 616.

136. *Id.* (“[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process.”).

137. *Id.* at 616–17. The Supreme Court applied its reasoning equally to petitioners under the federal system and further explained “this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for certiorari in this Court.” *Id.* at 617. For support, the Court pointed to *Drumm v. California*, 373 U.S. 947 (1963), *Mooney v. New York*, 373 U.S. 947 (1963), and *Oppenheimer v. California*, 374 U.S. 819 (1963); ultimately concluding: “In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so.” *Ross*, 417 U.S. at 617–18.

We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review. Some States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time.¹³⁸

Justice Douglas, writing for the dissent, emphasized the idea of differential justice based on wealth.¹³⁹ Discretionary appeals call for skill and legal knowledge beyond that of a pro se prisoner attempting to reiterate a claim already raised at trial.¹⁴⁰ The highest court shapes the course of law for those lacking financial resources—who are without a voice at both the state and federal level. Accordingly, legal representation should rise to the level of a constitutional right, especially for otherwise helpless indigent defendants.¹⁴¹

The *Ross* decision was concerned with overextending the Fourteenth Amendment into venues without any mandates.¹⁴² The

138. *Ross*, 417 U.S. at 618; see *Bounds v. Smith*, 430 U.S. 817, 831 (1977) (“Among the alternatives are the training of inmates as paralegal assistants to work under lawyers’ supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices.” (citation omitted)).

139. *Ross*, 417 U.S. at 619–20 (Douglas, J., dissenting) (“[T]here can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’” (quoting *Douglas v. California*, 372 U.S. 353, 355 (1963))).

140. *Id.* at 620–21 (Douglas, J., dissenting) (quoting *Moffitt v. Ross*, 483 F.2d. 650, 653 (4th Cir. 1973) *rev’d*, 417 U.S. 600 (1974)) (“In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.”).

141. *Id.* at 621 (Douglas, J., dissenting) (quoting *Moffitt*, 483 F.2d. at 655) (“*Douglas v. California* was grounded on concepts of fairness and equality. The right to seek discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the ‘same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals.’”).

142. See *id.* at 612 (majority opinion) (stating that “there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to the principles recognized in other decisions by this Court”).

appeals system—discretionary review in particular—is not constitutionally required, and neither equal protection nor due process demands representation beyond the first appeal.¹⁴³ And yet, reversals by the highest courts create the precedent that governs the fairness and equal application of the laws in all cases.¹⁴⁴ For the most part, this law is made by retained counsel in a selective tranche of cases.¹⁴⁵ However, prisoners, the poor, and the disenfranchised—who are the majority of the punished—have little input, if any at all.¹⁴⁶

Moreover, appeals can be the nucleus of retrials, which thereafter require the appointment of counsel. Markedly, this outcome undermines the logic of protecting the innocent at the beginning and begrudging the guilty after the fact. Yet, there is always a chance that one's innocence will be restored and their actual innocence finally revealed.¹⁴⁷ No plea or trial is perfect beyond all doubt or any challenge.

143. See 28 U.S.C. § 1291 (1994) (granting the court of appeals jurisdiction over appeals from all final decisions of the district courts); see also Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 n.4 (1985) (“It has long been clear that the right to appeal is statutory, and is not constitutionally compelled.” (citation omitted)).

144. See generally 28 U.S.C. § 1257 (2018) (granting the Supreme Court certiorari review “where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution”).

145. See Joan Biskupic et al., *The Echo Chamber: A Small Group of Lawyers and its Outsized Influence at the U.S. Supreme Court*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/5TGB-VE3T>] (finding that 66 of the 17,000 lawyers who petitioned the Supreme Court were involved in 43% of the cases the high court chose to decide from 2004 through 2012).

146. See *id.* (statement of Justice Ruth Bader Ginsburg) (“Business can pay for the best counsel money can buy. The average citizen cannot . . . That’s just a reality.”).

147. See Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 57 (1991) (examining the importance of the appeals process and how representation plays a role; specifically noting Justice Harlan’s dissent in *Douglas* declaring that guidance of counsel is “necessary to the fair administration of justice” within a discretionary appeal (quoting *Douglas v. California*, 372 U.S. 353, 366 (1963) (Harlan, J., dissenting)); see also Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139, 1183–84 (2014) (discussing the rare conditions under which a defendant may appeal, the difficulty to prove innocence at the appeals stage, and the reasons preservation of evidence is sometimes not readily available).

B. Pennsylvania v. Finley

Dorothy Finley was convicted of murder by the state of Pennsylvania and sentenced to life in prison.¹⁴⁸ After the court of appeals affirmed Finley's conviction, she filed a post-conviction motion pro se.¹⁴⁹ The trial court denied her motion, but the Supreme Court of Pennsylvania reversed that decision and ordered appointment of counsel.¹⁵⁰ On remand, the lawyer appointed to represent Finley concluded there were no issues worthy of review.¹⁵¹ The trial court agreed, granted counsel's request to withdraw, and dismissed the motion.¹⁵²

When Finley received another appointed lawyer to appeal that decision, the Superior Court held that the first lawyer's withdrawal had violated the procedures in *Anders v. California*.¹⁵³ In the U.S. Supreme Court, Justice Rehnquist rejected the idea that *Anders* could apply to a post-conviction proceeding because there was no right to counsel.¹⁵⁴ However, *Anders* drew its strength from the equal-protection reasoning of *Douglas*; a case addressing the right to counsel in a direct appeal.¹⁵⁵

148. *Pennsylvania v. Finley*, 481 U.S. 551, 553 (1987).

149. *Id.*

150. *Id.* (citing *Commonwealth v. Finley*, 440 A.2d 1183, 1184–85 (Pa. 1981)).

151. *Finley*, 481 U.S. at 553.

152. *Id.*

153. *Id.* at 553–54 (citing *Commonwealth v. Finley*, 479 A.2d 568, 570 (Pa. Super. Ct. 1984) (noting that Pennsylvania adheres to the standards set out in *Anders v. California*, 386 U.S. 738 (1967)); *id.* at 551 (listing the procedures in *Anders* for appointed counsel for an indigent defendant to withdraw as (1) if “on direct appeal” the attorney “finds the case to be wholly frivolous,” the attorney “must request the court’s permission to withdraw” and must “submit a brief referring to anything in the record arguably supporting the appeal”; (2) “a copy of the brief must be furnished the [sic] indigent and time must be allowed for him to raise any points that he chooses”; and (3) “the court itself must then decide whether the case is wholly frivolous”); see *Anders*, 386 U.S. at 744 (holding that the failure to grant the services of an advocate to an indigent petitioner seeking initial review of conviction—as contrasted with an *amicus curiae*, which would have been available to an appellant with financial means—violated petitioner’s rights to fair procedure and equality under the Fourteenth Amendment); see also *Commonwealth v. Finley*, 440 A.2d 1183, 1184–85 (Pa. 1981) (ordering the trial court to determine whether Finley is entitled to the appointment of counsel on remand).

154. *Finley*, 481 U.S. at 555.

155. *Id.* at 554 (citing *Douglas v. California*, 372 U.S. 353, 357–58 (1963)).

In *Finley*, the majority spoke in terms of fairness and equality: “We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today.”¹⁵⁶ The Court went on to say: “Rather, it is the source of that right to a lawyer’s assistance, combined with the nature of the proceedings, that controls the constitutional question. In this case, respondent’s access to a lawyer is the result of the State’s decision, not the command of the United States Constitution.”¹⁵⁷ Accordingly, the Court’s holding in *Finley* fell directly in line with *Ross*’s reasoning.¹⁵⁸

Thus, after trial and direct appeal, proceedings are treated as collateral and inconsequential civil matters,¹⁵⁹ which means that copies of the appellate record and brief suffice—just as in *Ross*—to create “meaningful access” to the courts.¹⁶⁰ Still, without a right to post-conviction counsel, an appellant is denied all associated rights.¹⁶¹ In *Finley*, the appellant had a lawyer, the trial court reviewed her claims, and the state owed her nothing more.¹⁶² Succinctly put, the Court reverted to the *Bounds* rationale, leaving the discretion to implement access to procedures beyond the constitutional right to counsel to the states.¹⁶³

156. *Id.* at 555 (citing *Johnson v. Avery*, 393 U.S. 483, 488 (1969)).

157. *Id.* at 556.

158. *Ross v. Moffit*, 417 U.S. 600, 610 (1974) (“We do not believe that the Due Process Clause requires [a State] to provide respondent with counsel on his discretionary appeal to the State Supreme Court.”).

159. *Finley*, 481 U.S. at 557.

160. *Id.*; *Ross*, 417 U.S. at 615.

161. However, *Maples*, *Martinez*, and *Pinholster* might suggest a changing tide. See *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (“Cause for a procedural default exists where ‘something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . “impeded [his] efforts to comply with the State’s procedural rule.”’ (alterations in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753(1991)); *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.”); *Cullen v. Pinholster*, 563 U.S. 170, 195–96 (2011) (reaffirming that the *Strickland* standard governs ineffectiveness of counsel challenges).

162. See *Finley*, 481 U.S. at 557–58.

163. *Id.* at 559 (“At bottom, the decision below rests on a premise that we are unwilling to accept[—]that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to

Dissenting, Justice Brennan noted the basic values of an adversarial system:

Even if the *Anders* requirements were not mandated by due process, the performance of Finley's counsel clearly violated minimal standards of fundamental fairness. At a minimum, due process requires that counsel perform as an advocate. The "very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is fundamentally unfair for appointed counsel to argue against his or her client's claims without providing notice or an opportunity for that client either to proceed *pro se* or to seek the advice of another attorney.¹⁶⁴

The tension created in the *Anders* scenario is magnified a thousand times when the *pro se* prisoner faces the entire armamentarium of post-conviction law when making their claim. No mere *Anders*-like procedure will protect their interests.¹⁶⁵

C. *Murray v. Giarratano*

Murray v. Giarratano was the last nail in the coffin for an inmate's right to counsel in post-conviction proceedings.¹⁶⁶ This decision refused to extend the federal right of appointed counsel to various state and federal habeas proceedings.¹⁶⁷ Joseph M. Giarratano, along with other Virginia prisoners facing capital punishment, asked for appointment of counsel in his state habeas proceeding.¹⁶⁸ When it was denied, Giarratano filed a section 1983 action¹⁶⁹ against the state

develop and implement programs to aid prisoners seeking to secure postconviction review."); see *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

164. *Finley*, 481 U.S. at 568 (Brennan, J., dissenting) (citations omitted).

165. Compare *Anders v. California*, 386 U.S. 738 (1967) (requiring appointed counsel on subsequent post-conviction appeals after the first appeal of right to act as advocate, not as *amicus curiae*), with *Finley*, 481 U.S. 551 (majority opinion) (holding that an indigent prisoner had no due process right to appointed counsel in post-conviction proceeding after exhaustion of appellate process).

166. 492 U.S. 1 (1989).

167. See *id.*; *Finley*, 481 U.S. 551; *Bounds*, 430 U.S. 817.

168. *Murray*, 492 U.S. at 4.

169. 42 U.S.C. § 1983 (2018) (prohibiting the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" under "any color of any statute, ordinance, regulation, custom, or usage, of any State, Territory, or the District of Columbia" of "any citizen of the United States or person within the jurisdiction thereof"); see *Richardson v. McKnight*, 521 U.S. 399, 412 (1997); *Wyatt v.*

and its director of the Department of Corrections, Edward W. Murray.¹⁷⁰ The district court certified a class of defendants comprising everyone on death row, present and future, who was indigent and unable to afford counsel.¹⁷¹

Relying on *Bounds* and the special considerations of capital punishment, the district court recognized that (1) the death row inmates had limited time to prepare their petitions, (2) each case was “unusually complex,” and (3) the inmates’ burden of living under the pall of execution interfered with their ability to represent themselves.¹⁷² Further, the district court found that the “plaintiffs [were] incapable of effectively using lawbooks to raise their claims” and concluded that providing inmates library access and permitting them to keep books in their cells was not enough.¹⁷³ Simply stated, the court realized that no collection of books could replace the meaningful guidance of counsel at such a critical stage.¹⁷⁴

Under the district court’s ruling, retaining counsel was beyond the means of death row prisoners; the appointment of a legal advisors pursuant to *Bounds* was insufficient; and appointment of full representation after the filing of a petition—which might trigger a hearing—was deemed too late.¹⁷⁵ Moreover, the district court decided that pro bono or volunteer attorneys were too small in

Cole 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”).

170. *Murray*, 492 U.S. at 4.

171. *Id.*

172. *Id.* (citing *Giarratano v. Murray*, 668 F. Supp. 511, 513 (E.D. Va. 1986), *reh’g*, 847 F.2d 1118 (4th Cir. 1988), *aff’d*, 847 F.2d 1118 (4th Cir. 1988), *rev’d*, 492 U.S. 1 (1989)).

173. *Id.* at 4–5 (citing *Giarratano*, 668 F. Supp. at 513).

174. *See id.* at 5. *See generally* Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1175 (2013) (“What’s required is legal services, not law books.” (quoting William Bennett Turner, NAACP Attorney, Relevant Court Decisions—A Legal View, Address Before the Prison Legal Libraries: Idea into Reality Conference (Apr. 22, 1972))).

175. *See Murray*, 492 U.S. at 5–6 (noting that “the District Court concluded that Virginia’s provisions for appointment of counsel after a petition is filed did not cure the problem” and that this “was primarily because ‘the timing of the appointment is a fatal defect’ as the inmate ‘would not receive the attorney’s assistance in the critical stages of developing his claims’” (footnote omitted) (quoting *Giarratano*, 668 F. Supp. at 515)).

number to provide “a meaningful right of access to the courts.”¹⁷⁶ So, the district court ordered Virginia to create an assigned counsel program for this very purpose.¹⁷⁷ The district judge's farsighted reasoning was initially rejected on appeal, then affirmed by an en banc panel in a subsequent rehearing of the case.¹⁷⁸ The fact-finding below concerning the special considerations relevant to death row inmates convinced the Fourth Circuit Court of Appeals of the need for “personal attorneys.”¹⁷⁹ In the Fourth Circuit’s view, capital litigation took this case out of the purview of *Finley*.¹⁸⁰ Unfortunately, this reasoning did not hold up before the Supreme Court.¹⁸¹

Justice Rehnquist, writing for the majority, extinguished the last embers of due process and equal protection in the post-conviction right-to-counsel arena.¹⁸² Citing *Finley*, he declared that meaningful access did not impose an obligation on states to provide post-conviction counsel.¹⁸³ The Court reiterated that the Sixth Amendment’s ambit begins with the trial as per *Gideon*¹⁸⁴ and extends to direct appeal under *Douglas*.¹⁸⁵ The right to counsel, according to the majority, protected the presumption of innocence, which could only be shorn away by a fair trial.¹⁸⁶ Nevertheless, because discretionary appeals and habeas corpus arrive after the presumption of guilt has settled in, no federal constitutional right to appointed counsel existed post-appeal.¹⁸⁷

Because discretionary post-conviction remedies are currently a weak and unimpressive source of justice, the states seemingly have

176. *Id.* at 6.

177. *Id.* (stating the district court decision was limited to state habeas corpus because no such right existed insofar as federal habeas was concerned (citing *Ross v. Moffitt*, 417 U.S. 600, 618–17 (1974))).

178. *Id.*

179. *Id.*

180. *Id.* at 7 (“*Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, thought the Fourth Circuit, ‘*Finley* did not involve the death penalty.’” (citation omitted) (quoting *Giarratano v. Murray*, 847 F.2d 1118, 1122 (4th Cir. 1988), *rev’d*, 492 U.S. 1 (1989))).

181. *Id.* at 10.

182. *Id.* at 1.

183. *Id.* at 10.

184. *Id.* at 7 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963)).

185. *Id.* (first citing *Douglas v. California*, 372 U.S. 353, 357–58 (1963); then citing *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956)).

186. *Id.* at 7.

187. *Id.* at 7–8 (citing *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)).

no duty to provide counsel. Even the heightened scrutiny of death-penalty prosecutions did not warrant this additional layer.¹⁸⁸ Specifically, no duty to provide counsel exists because there is a belief that capital cases are frontloaded with protections to avoid miscarriages of justice. And yet, miscarriages of justice persist;¹⁸⁹ thus, invalidating the notion that the Eighth Amendment provides adequate safeguards.¹⁹⁰

More damning was *Murray's* treatment of *Bounds*. The majority read *Bounds* to mandate access to courts through law books, not lawyers:

The Court held in *Bounds* that a prisoner's "right of access" to the courts required a State to furnish access to adequate law libraries in order that the prisoners might prepare petitions for judicial relief. But it would be a *strange jurisprudence* that permitted the extension of that holding to partially overrule a subsequently decided case such as *Finley* which held that prisoners seeking judicial relief from

188. *Id.* at 8–9.

189. See Gross, *Rate of False Conviction*, *supra* note 58, at 7234 (“We present a conservative estimate of the proportion of erroneous convictions of defendants sentenced to death in the United States from 1973 through 2004, 4.1%.”); *id.* at 7235 (“This is only part of a disturbing picture. Fewer than half of all defendants who are convicted of capital murder are ever sentenced to death in the first place. Sentencing juries, like other participants in the process, worry about the execution of innocent defendants. Interviews with jurors who participated in capital sentencing proceedings indicate that lingering doubts about the defendant’s guilt is the strongest available predictor of a sentence of life imprisonment rather than death. It follows that the rate of innocence must be higher for convicted capital defendants who are not sentenced to death than for those who are. The net result is that the great majority of innocent defendants who are convicted of capital murder in the United States are neither executed nor exonerated. They are sentenced, or resentenced to prison for life, and then forgotten.” (footnote omitted) (citations omitted)).

190. *Murray*, 492 U.S. at 10 (“We think that these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed.” (footnote omitted)).

their sentence in state proceedings were not entitled to counsel.¹⁹¹

In other words, *Bounds* stopped defendants' right to counsel at the library bookshelves.

However, the majority in *Murray* would not promote the notion that *Bounds* overruled *Finley*. The Court was concerned that ad hoc fact-finding in each state would create inconsistencies and burden the states' judicial systems.¹⁹² To bolster this point, the majority again resorted to the "categorical" findings stated in the *Gideon* line of cases concerning the trial and direct appeal rights to counsel for the indigent.¹⁹³ And without any seeming contradiction, the Court approved the abandonment of the case-by-case analysis of *Betts*,¹⁹⁴ while leaving the current haphazard system of discretionary pro bono counsel intact.¹⁹⁵ Thus, *Finley's* scope was expanded to include the death penalty, unhampered by the *Bounds* holding.¹⁹⁶ To that end, the case was remanded to assess the level of library access.¹⁹⁷

191. *Id.* at 11 (emphasis added) (citing *Bounds v. Smith*, 430 U.S. 817, 828 (1977)).

192. *Id.* at 11–12. Consider that this logic led from the totality-of-circumstances approach of *Betts* to the categorical right under *Gideon*. Interestingly, one scholar has observed that the categorical approach of *Gideon* has been undermined by the case-by-case logic of ineffective assistance of counsel cases, beginning with *Strickland*. See David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in CRIMINAL PROCEDURE STORIES 101, 117 (2006) ("In the end, the ineffectiveness standard does less to protect defendants from bad lawyers than it does to legitimate the poor quality of representation generally provided to criminal defendants.")

193. *Murray*, 492 U.S. at 12 (listing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); and *Powell v. Alabama*, 287 U.S. 45 (1932)).

194. *Id.* (citing *Betts v. Brady*, 316 U.S. 455, 471–72 (1942)).

195. *Murray*, 492 U.S. at 27, n.18 (Stevens, J., dissenting) ("The availability of appointed counsel on federal habeas thus presents the specter of a petitioner filing for federal habeas corpus and attaining counsel, only to have the petition dismissed as unexhausted and remanded to state court. Such a haphazard procedure scarcely would serve any interest in finality. It would further raise questions regarding the obligations not only of the appointed counsel to effect exhaustion at the state level, but also of the Federal Treasury to pay for those efforts." (citation omitted)).

196. *Id.* at 13–14 (O'Connor, J., concurring); *id.* at 13–14 (Kennedy, J., concurring). Unlike *Gideon*, post-conviction counsel for the poor was a purely legislative choice. See *id.* at 13–14 (Kennedy, J., concurring).

197. *Id.* at 13 (majority opinion) ("Petitioners and respondents disagree as to the practices currently in effect in Virginia state prisons with respect to death row

Justice Stevens, writing for the dissent, singled out *Bounds*'s imperative premise of having “meaningful access” to the courts as a facet to the right to counsel.¹⁹⁸ The wellspring was *Powell*'s emphasis on the cognitive and educational challenges of the accused and confined—oppressive conditions that burdened decision-making and the time limits for defense preparation—that militated the need for representation.¹⁹⁹ The dissent drew on a line of cases demanding financial equality in pursuing the appellate process, given that faulty convictions are reserved on appeal and such claims may otherwise remain undetected.²⁰⁰

Justice Stevens went on to recount the course of the right to counsel and the frontier of the post-conviction right imposed by due process.²⁰¹ Yet, the definition of fairness that separated a “meaningful appeal” from a “meaningless ritual” had yet to be determined.²⁰² From the Court's perspective, the previous decisions constituted *access* to the courts. However, the right to counsel begged further inquisition.

prisoners. Respondents contend that these prisoners are denied adequate and timely access to a law library during the final weeks before the date set for their execution. If respondents are correct, the District Court on remand may remedy this situation without any need to enlarge the holding of *Bounds*.”). Stranger still is the belief that information access and the right to representation are somehow distinct. See Ken Strutin, *Justice Without 'Bounds' and the Poverties of Confinement*, N.Y. L.J. (Sept. 23, 2014), <https://www.law.com/newyorklawjournal/almID/1202669775191/> [<https://perma.cc/DV5X-99H3>] (“Every step in information evolution has brought literacy and enlightenment, from the discovery of language and writing to the invention of printing and computing. Each stride forward has left behind the poor, the punished[,] and the confined. The ideas behind the right to counsel and the right to libraries have historically and mistakenly been treated as separate. Today, the revelations of science and technology impel the recognition of both as one.”).

198. *Murray*, 492 U.S. at 15–16 (Stevens, J., dissenting).

199. *Id.* at 16–17 (Stevens, J., dissenting) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)); see *Powell*, 287 U.S. at 57–58 (“The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.”).

200. *Murray*, 492 U.S. at 17 (Stevens, J., dissenting) (citing decisions concerning filing fees and transcript costs: *Lane v. Brown*, 372 U.S. 477 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); and *Griffin v. Illinois*, 351 U.S. 12 (1956)).

201. *Murray*, 492 U.S. at 17–19 (Stevens, J., dissenting).

202. *Id.* at 19 (Stevens, J., dissenting).

The issue was not merely “whether there [was] an absolute ‘right to counsel’ in collateral proceedings, but whether due process require[d] that these respondents be appointed counsel in order to pursue legal remedies.”²⁰³

The dissent's answer relied on the special considerations of death row inmates that *Finley* did not address.²⁰⁴ In other words, the uniqueness of capital punishment and its need for heightened scrutiny—coupled with the statistical fact that appellate review is not enough to protect life in capital cases²⁰⁵—warranted post-conviction counsel across the board.²⁰⁶ Because some claims can only be made post-appeal, the appellate record and brief, on their own, are not equal to the task of pursuing total justice.²⁰⁷ Indeed, federal habeas review is curtailed by the record in state court, making post-conviction fact-finding vital.²⁰⁸

Lastly, Justice Stevens argued that the conditions on death row, like solitary confinement or other institutional settings without access to adequate libraries, burden prisoners' ability to prepare and file petitions of any kind.²⁰⁹ Added to this factor is the complexity of

203. *Id.* (Stevens, J., dissenting).

204. *Id.* at 28–29 (Stevens, J., dissenting) (stating that “a judgment that it is not unfair to require an ordinary inmate to rely on his own resources to prepare a petition for postconviction relief does not justify the same conclusion for the death row inmate who must acquire an understanding of this specialized area of law and prepare an application for state of execution as well as a petition for collateral relief” and that “there is a profound difference between capital postconviction litigation and ordinary postconviction litigation in Virginia” and that “to obtain an adequate opportunity to present their postconviction claims fairly, death row inmates need greater assistance of counsel than Virginia affords them” (citations omitted)).

205. *Id.* at 20–24 (Stevens, J., dissenting).

206. *Id.* at 23–24 (Stevens, J., dissenting) (“There is, however, significant evidence that in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality. Federal habeas courts granted relief in only 0.25% to 7% of noncapital cases in recent years; in striking contrast, the success rate in capital cases ranged from 60% to 70%. Such a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process.” (footnotes omitted)).

207. *Id.* at 25–26 (Stevens, J., dissenting).

208. *Id.* at 26–27 (Stevens, J., dissenting).

209. *Id.* at 27–28 (“Unlike the ordinary inmate, who presumably has ample time to use and reuse the prison library and to seek guidance from other prisoners experienced in preparing *pro se* petitions, a grim deadline imposes a finite limit on the condemned person’s capacity for useful research.” (citation omitted)).

death-penalty post-conviction litigation and the drained mental state of those facing death.²¹⁰ In its conclusion, the *Murray* opinion pronounced: “Meaningful access, and meaningful judicial review, would be effected in this case only if counsel were appointed, on request, in time to enable examination of the case record, factual investigation, and preparation of a petition containing all meritorious claims, which the same attorney then could litigate to its conclusion.”²¹¹

D. Realities of the Law Without Counsel

Bounds’s philosophical notion that the doctrinal scales should never tip in favor of the right to counsel ignores the changing landscape and the harsh realities of poverties that *Gideon* explained.²¹² Under our current system, true justice is sacrificed for efficiency and commoditized into jail and prison time. In such a system, effective representation is compromised from the beginning.

The presumption of innocence earned its place in U.S. jurisprudence from the Supreme Court’s decisions in *In re Winship*²¹³ and *Gideon*.²¹⁴ Since then, the presumption of innocence has lost its sanctity through the rise of plea bargaining, as evidenced by the prevalence of exonerations. As a result, the revered doctrine of presumed innocence has devolved into a presumption of guilt.²¹⁵

210. *Id.* at 27–28. See generally Strutin, *Litigating*, *supra* note 49, at 344, 354 (explaining the inhumane challenges faced by those who are imprisoned without counsel).

211. *Murray*, 492 U.S. at 29 (Stevens, J., dissenting).

212. *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (explaining that a person who cannot afford to hire an attorney has no guarantee to a fair trial unless counsel is provided for the person).

213. *In re Winship*, 397 U.S. 358, 363 (1970) (“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895))).

214. *Gideon*, 372 U.S. at 345.

215. See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 357 (1995) (stating that when “an accused’s innocence, whether factual or legal, is overcome by standards of proof associated with . . . plea bargaining” the “result of the criminal process is a presumption of guilt and a status degradation”).

Criminal justice was not invented to protect finality, but largely to preserve innocence.²¹⁶ Every day, the innocent plead guilty and bow to the tyranny of probable cause, charging decisions,²¹⁷ predicate or enhanced offenses,²¹⁸ excessive bail, conditions of confinement,²¹⁹ poverty, racial prejudice,²²⁰ government leveraging, sentencing length, mandatory minimums,²²¹ excessive caseloads,²²² narrowing

216. See *In re Winship*, 397 U.S. at 363; Kimberly Kessler Ferzan, *Preventive Justice and the Presumption of Innocence*, 8 CRIM. L. & PHIL. 505, 523 (2014) (“At the end of the day, what matters is not the label of a system as criminal nor the invocation of the presumption of innocence. Rather, what matters is that the state accord its citizens with the proper respect.”); Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In The Hands of Real Jurors, is Either Of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 250 (2006) (“One might expect that . . . jurors would at least understand the pattern instructions on the presumption of innocence. If so, one would be greatly mistaken.” (citation omitted)); Richard D. Friedman, *A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873, 883 (2000).

217. See *Guide for Users: II. Preliminary Proceedings*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 269, 269 (2017) (“The government has broad discretion to initiate and conduct criminal prosecutions because of the separation of powers doctrine and because prosecutorial decisions are ‘particularly ill-suited for judicial review.’” (quoting *Wayte v. U.S.*, 598, 607 (1985))); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 315 (2017) (discussing suggested changes for recalibrating the charging function for prosecutors); *Prosecutorial Discretion*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 269 (2017).

218. See, e.g., Caitlyn L. Hall, *Good Intentions: A National Survey of Life Sentences for Violent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1101, 1126–38 (2013) (discussing triggering and predicate offenses that are both violent and nonviolent offenses resulting in life in prison).

219. See Michele Deitch & Michael B. Mushlin, “What’s Going On in Our Prisons?,” N.Y. TIMES (Jan. 4, 2016), <https://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html> [<https://perma.cc/3LUE-BSE6>].

220. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1615 (1985).

221. See *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004) (holding that any facts may be used by courts to increase a sentence beyond statutory maximums, except for prior convictions, when the jury finds such facts are present beyond a reasonable doubt); Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner’s Perspective*, 2004 B.Y.U. L. REV. 935, 935 (2004); see also Stephanos Bibas, *Judicial Fact-Finding and Sentencing Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150, 1153 (2001).

222. See Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (Jun. 17, 2015), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> [<https://perma.cc/ADB7-QYXC>] (“Excessive caseloads contribute to this trend, and result in a ‘meet ‘em and plead ‘em’ system of justice, in which clients have little more

windows of post-appeal review, and the war on crime. A plea that is secured under these pressures does not sanitize or constitutionalize convicting the innocent. Most problematically, under these pressures, constitutional violations exclude a prisoner's waiver of rights²²³ and convictions. These injustices cannot be erased by a system of contractual guilt where, due to the realities they face, the poor are pressured into accepting plea agreements.

Therefore, part of the cure for mass incarceration is the right to counsel—the fountainhead of new learning, discovery, and thinking.²²⁴ There is no substitute for the vision and voice of experience, or the zealousness of human advocacy.²²⁵ Post-conviction relief requires more than legal mechanics. It is the confidence, compassion, trust, and zealousness of counsel for the oppressed, outcast, and disenfranchised that levels the playing field in every courthouse.²²⁶

than a brief conversation in the courtroom with a harried public defender before pleading guilty.”); *see, e.g.*, Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, *GUARDIAN* (Sept. 7, 2016), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system> [<https://perma.cc/7UAW-37M7>] (“In Cole County, Missouri, defenders work more than 225% above the recommended caseload limits.”).

223. Waivers now include the right to trial, appeal, and claims of ineffective assistance of counsel. *See Waiver of Issues at Trial*, U.S. COURT-MARSHAL LAWYER PHILIP D. CAVE, <https://www.court-martial.com/waiver-of-issues-at-trial.html> [<http://perma.cc/YTW2-Q2PP>].

224. *See Strutin, Report, supra* note 84 (“Decrying the lamentable state of forensic proof, Ninth Circuit Judge Alex Kozinski, a senior adviser to PCAST, admonished: ‘Among the more than 2.2 million inmates in U.S. prisons and jails, countless may have been convicted using unreliable or fabricated forensic science. The U.S. has an abiding and unfulfilled moral obligation to free citizens who were imprisoned by such questionable means.’”).

225. *See Strutin, Million Dollar Brain, supra* note 98 (“Legal education, information technology[,] and law practice add up to an expensive thinking machine. So, the right to counsel means access to a million-dollar brain—the product of natural and artificial intelligences. Now that lawyers have been upgraded by technology, the right to counsel needs upgrading as well.”).

226. In defense of the poor and any who are at risk of stigmatization and loss of liberty, process must become passion. *See Steven Zeidman, Raising the Bar: Indigent Defense and the Right to a Partisan Lawyer*, 69 *MERCER L. REV.* 697, 708 (2018) (“It is therefore critical to ensure that only partisan lawyers—those who bleed for their clients, who stay up nights agonizing over each case they handle and what they could have done better, who trek out to jails and prisons in the heat of the summer and the cold of the winter, who are fully and unequivocally committed and faithful to their clients—are permitted to represent indigent defendants.”).

VI. CONCLUSION

Gideon extended the mind of the accused onto their attorney.²²⁷ When the Supreme Court put poverty at the forefront of the Sixth Amendment, it exalted human dignity. It also opened a door to all the poverties that separate people from justice through incarceration. Specifically, mass incarceration that is inherently fueled by discrimination not only creates, but also perpetuates, a crisis of wrongful conviction, excessive punishment, and inhumane treatment of human beings.²²⁸ Recognizing that poverties exact an unconstitutional toll on the imprisoned can rescue millions from the legal death of confinement.²²⁹

The composition of the imprisoned population tells a tale of penury, racism,²³⁰ gender discrimination,²³¹ mistreatment due to

227. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963).

228. See generally Joshua Dubler & Vincent Lloyd, *Think Prison Abolition in America is Impossible? It Once Felt Inevitable*, *GUARDIAN* (May 19, 2018), <https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable> [https://perma.cc/623G-6ZBR] (“In accounting for the rise of what many now call ‘mass incarceration[,]’ scholars point to race, politics[,] and economics as driving factors.”).

229. See generally Franklin D. Roosevelt, President of the United States, State of the Union Address: The Four Freedoms (Jan. 6, 1941) (“This nation has placed its destiny in the hands and heads and hearts of its millions of free men and women; and its faith in freedom under the guidance of God. Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory.”).

230. See D.J. Sifton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 L. & INEQUALITY: J. THEORY & PRAC. 53, 53 (2002) (noting that “the term ‘institutionalized racism’ is not too harsh a term” for the “statistic” that “[t]here are more [B]lack people in prisons and jails than in colleges and universities” (alteration in original) (quoting C. Victor Lander, *Racism in the Criminal Justice System*, 2 ANN. 2000 ATLA-CLE 1801 (2000))).

231. See Melamed, *supra* note 32 (“Gender is just one of a multiplicity of inequalities that combine to form the patterns of poverty and exclusion that we see in the world today.”); see, e.g., Hannah Brenner et. al., *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 527 (2016) (“We then consider how, by virtue of incarcerated status, it is impossible for women victimized in prison to meet the ideal victim standards, ultimately rendering their attempts at seeking justice futile.”).

gender identity and preference,²³² mental disability,²³³ and the raw victimization that accompanies all confinement. Hence, a post-conviction right to counsel ought to draw from the well of incarceration, with a presumption of poverties.

Prison cuts a swath through humanity.²³⁴ And like every evil invention—racism, slavery, and genocide—prison falls heaviest on the poor, people of color, noncitizens, minorities, and politically and socially contrived outcasts—the essential “others” that society segregates and demonizes. By confiscating freedom and stealing destinies, incarceration instills fear and empowers short-sighted, bargained-for justice. And yet, every petition from a prisoner is a declaration of an intent to live, filed in defiance of every indignity that has been inflicted for the sake of retribution.²³⁵

Everyone in prison, jail, immigration detention,²³⁶ and civil confinement are under the absolute control and mercy of the state.

232. See generally Strutin, *Prison Affected People*, *supra* note 38 (discussing that “[t]he incarceration experience embraces many scenarios that affect well-being, daily living, and dignity[,]” including “gender identity and sexual orientation (LGBT)” among the list of scenarios).

233. See Hadley, *supra* note 36 (providing statistics and estimates showing the prevalence of mental health problems rampant amongst prisoners and jail inmates).

234. Capture, confinement, suffering, and death are facets of various systems of dehumanization, destruction, and terror. See generally *Morales v. Schmidt*, 340 F. Supp. 544, 548–49 (W.D. Wis. 1972), *rev’d*, 489 F.2d 1335 (7th Cir. 1973) (“With respect to the intrinsic importance of the challenges, I [Judge James E. Doyle] am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational.”).

235. The atavism of civil death would of necessity drag down the right to counsel with it. See, e.g., *Gallop v. Adult Corr. Instituts.*, 182 A.3d 1137, 1141 (R.I. 2018) (“We are of the opinion that [General Laws 1956] § 13–6–1 is clear and unambiguous on its face and should be construed according to its plain and ordinary meaning, as intended by the Legislature. The statute unambiguously declares that a person such as plaintiff, who is serving a life sentence, is deemed civilly dead and thus does not possess most commonly recognized civil rights. The Legislature has enumerated certain exceptions to § 13–6–1—‘[h]owever, the bond of matrimony shall not be dissolved’—but there is no exception for claims impacting a prisoner’s civil rights.” (alteration in original) (citations omitted)).

236. See Lorelei Laird, *Separating Families Violates Civil Rights, Won’t Work and Is Inhumane*, *ABA President Says*, A.B.A. J. (June 12, 2018), http://www.abajournal.com/news/article/separating_families_violates_civil_rights_wont_work_and_is_inhumane_aba_pre [<https://perma.cc/7RJY-VY28>] (“A letter written by ABA President Hilarie

Lawyers must serve as independent, fearless, and conflict-free advocates. These qualities—which are, by extension, inherently and necessarily encompassed in the right to counsel—are invaluable to the prisoner who is perpetually encumbered by confinement.

Time feels heavier in prison, where people of all kinds are ceaselessly confined to four concrete walls. For the punished, life is but the distribution of pain—a million screams muffled by miles of concrete. It is a kind of suffering that is neatly organized, yet incomprehensible to law makers and judges. Prison imposes the pain of retribution multiplied by unfixed time and uncertainty of release.²³⁷ It deadens humanity through the exaltation of suffering. Prisoners are ruled by the tyrannies of timelessness, pain of confinement, and uncertainty of punishment's end—each guided by the invisible hand of racism and systematic oppression. As a result, pain, poverty, and discrimination lay the foundation for the need for post-conviction representation.

Gideon brought the Sixth Amendment to the poor.²³⁸ This decision was thereafter reimagined to serve indigent appellants in a

Bass reiterates the association's strong opposition to the Justice Department's month-old practice of separating families at the border. The letter, released Tuesday, says public comments from Trump administration officials have made it clear that "a primary purpose of the "zero tolerance" policy is to serve as a deterrent."").

237. Uncertainty is the great villain of incarceration: not knowing when, if ever, the prison gate will open. Protecting the right to counsel post-conviction is one means of freeing the incarcerated from uncertainty and provides them with hope that justice might be served after all. See generally Carrie Johnson, *Prisoners Face Uncertainties As Number of Halfway Houses Are Cut*, N.H. PUB. RADIO (Oct. 20, 2017, 9:11 PM), <https://www.nhpr.org/post/prisoners-face-uncertainty-number-halfway-houses-are-cut#stream/0> [<http://perma.cc/Y8PQ-7HCL>] (explaining that the "Federal Bureau of Prisons has quietly ended contracts with several halfway houses across that country" and that "[s]ome inmates say that change is keeping prisoners locked up longer and hurting their chances of finding work on the outside"); Allison Schragger, *In America, Mass Incarceration Has Caused More Crime Than It's Prevented*, QUARTZ (July 22, 2015), <https://qz.com/458675/in-america-mass-incarceration-has-caused-more-crime-than-its-prevented/> [<http://perma.cc/NU26-WAAS>] (noting that "jail time often depends on the judge that is assigned, the prosecutor, available evidence, and how busy the court is"); *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/time-death-row> [<http://perma.cc/CM8Z-QV8A>] (noting that "prisoners on death row inmates live in a state of constant uncertainty over when they will be executed").

238. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

sub-constitutional direct-review context.²³⁹ Moreover, *Gideon* signified a philosophical departure from the judicial system's limited focus on retribution and instead focused on constitutional values and human dignity. But then, *Gideon*'s Sixth Amendment progress came to a halt.²⁴⁰ As *Gideon*'s influence continues to wane, prison usurps today's justice system of its inherent humanity. Instead of refining Sixth Amendment protections contemplated in *Gideon*, prison libraries are filled with outdated, densely written, and overly complex law books that ultimately provide unrealistic notions about lawyering. Accordingly, the right to be heard, to be represented by counsel, and to redress grievances must counterbalance the governmental powers that interrupt liberty, suspend dignity, and denigrate autonomy. Without proper balance, justice simply cannot be served. Thus, a return to *Gideon* would be a step in the right direction for criminal justice and could tip the scales of justice towards equality.

More than one million lawyers fill today's workforce, and yet justice is served in such meager portions.²⁴¹ Despite a significant influx of lawyers, millions of individuals and their futures are cast away without any hope. What kind of society enhances laws and multiplies lawyers while diminishing notions of liberty and justice? Mass incarceration began and continued under *Gideon*'s watch. The enshrinement of the right to counsel dominated; meanwhile, criminalization increased swiftly through the rise of racial profiling,

239. See *id.*; Mark V. Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1871-72 (2001), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1255&context=facpub> [<https://perma.cc/7NSW-P4CA>] (discussing "subconstitutional doctrines as supplements to the forms of judicial review that dominate theorizing about constitutional law").

240. See C.J. Ciaramella, *The Disappearing Sixth Amendment*, REASON (June 2017), <https://reason.com/2017/05/07/the-disappearing-sixth-amendme/> [<http://perma.cc/FMD2-D4EZ>].

241. See Debra Cassens Weiss, *Lawyer Population 15% Higher Than 10 Years Ago, New ABA Data Shows*, A.B.A. J. (May 3, 2018), http://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows [<https://perma.cc/DK3G-6KAP>] (stating that "[t]he total number of lawyers in the United States as of Dec. 31 was 1,338,678"). See generally Legal Profession Statistics, A.B.A., https://www.americanbar.org/resources_for_lawyers/profession_statistics.html [<https://perma.cc/9Q4N-YWN7>] (providing "[c]urrent statistical data . . . to assist with research on lawyers and the legal profession").

mandatory minimums, and wrongful convictions. As a direct result, prison populations exploded. It will likewise take another storm of social energy to recognize that decreasing incarceration begins with the right to counsel. Indeed, the Special Rapporteur on extreme poverty and human rights concluded his recent report by declaring: “In the United States, it is poverty that needs to be arrested, not the poor simply for being poor.”²⁴²

The feudal world that produced the Magna Carta heralded the social contract of modern democracy.²⁴³ Further, that world “provided the chief justification for later efforts to limit royal authority and has come to be recognized as an important source for the modern conviction that human rights and dignity are safe only within the framework of a constitution.”²⁴⁴ A living constitution does not succumb to the architects of fear.²⁴⁵ It rises above the evils of racism, hatred and poverty.

The isolated prisoner is helpless before the law without the guidance of counsel. The prisoner faces the weight of the state and the public’s condemnation, and has neither the ability nor the resources to wage a battle for freedom from inside a cell. But his attorney does. The capable attorney is equipped with legal education and training, and possesses knowledge and skills designed to aid the client in his endeavors. Thus, the attorney can accomplish feats that the client cannot. For this simple reason alone—from indictment to conviction, from jail to prison—the impoverished prisoner not only deserves to

242. Alston, *supra* note 1, ¶ 73.

243. See RAY STRINGHAM, *MAGNA CARTA: FOUNTAINHEAD OF FREEDOM* 123–24 (1966); James Podgers, *America’s Magna Carta*, A.B.A.J., June 2015, at 36, 38; James Podgers, *Learning Opportunity: ABA Initiatives Seek to Raise Public Awareness About the Magna Carta’s Significance*, 100 A.B.A. J., Dec. 2014, at 66–67; David Hudson, *This Day in History: The Magna Carta, a Foundation of Our Democracy*, WHITE HOUSE (June 15, 2015, 3:36 PM), <https://obamawhitehouse.archives.gov/blog/2015/06/15/day-history-magna-carta-foundation-our-democracy> [<https://perma.cc/2GYD-8NWD>].

244. SIDNEY PAINTER, *MEDIAEVAL SOCIETY* 100 (1951).

245. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 290–91 (1988) (Brennan, J., dissenting) (highlighting that the “Constitution is a living reality, not parchment preserved under glass” in asserting that the majority’s holding violated First Amendment rights (quoting *Shanley v. Ne. Indep. Sch. Dist. Bexar Cty.*, 462 F.2d 960, 972 (5th Cir. 1972))); see also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1743 (2007) (discussing our living Constitution and its relation to our “rising national consciousness”); see, e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584, 2593, 2605–06 (2015) (holding that the Constitution protects the right to same-sex marriage).

be represented, representation should be a basic, fundamental, constitutional right. Thus, *Gideon* must be unchained so that the innocent may go free.

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