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Sara Mayeux
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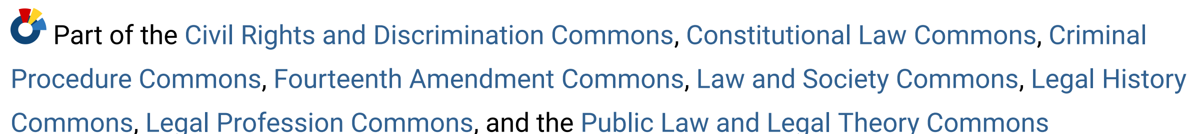
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ARTICLE

WHAT *GIDEON* DID

*Sara Mayeux**

Many accounts of Gideon v. Wainwright*'s legacy focus on what* Gideon *did not do—its doctrinal and practical limits. For constitutional theorists,* Gideon *imposed a preexisting national consensus upon a few "outlier" states, and therefore did not represent a dramatic doctrinal shift. For criminal procedure scholars, advocates, and journalists,* Gideon *has failed, in practice, to guarantee meaningful legal help for poor people charged with crimes.*

Drawing on original historical research, this Article instead chronicles what Gideon *did—the doctrinal and institutional changes it inspired between 1963 and the early 1970s.* Gideon *shifted the legal profession's policy consensus on indigent defense away from a charity model toward a public model. By 1973, this new consensus had transformed criminal practice nationwide through the establishment of hundreds of public defender offices and the expansion of lawyers' presence in low-level criminal proceedings. This Article describes these changes primarily through the example of Massachusetts, while contextualizing that example with national comparisons.*

*The broad outlines of these post-*Gideon *changes are familiar to legal scholars. But situating these changes in a longer historical context and tracing them in detail from the perspective of lawyers on the ground in the 1960s yields two insights that help to explain the seemingly permanent post-*Gideon *crisis in indigent defense. First, the post-*

* Sharswood Fellow, University of Pennsylvania Law School. For feedback on earlier drafts and/or helpful conversations, thank you to Barbara Babcock, Stephanos Bibas, Jim Campbell, Dan Ernst, George Fisher, Anne Fleming, Jean Galbraith, Lily Geismer, Bob Gordon, Sophia Lee, Serena Mayeri, Jack Rakove, Judith Resnik, Dorothy Roberts, David Rudovsky, Bob Weisberg, the Penn Law Faculty Ad Hoc Workshop, the Penn Legal History Writers' Bloc(k), and fellow participants in the 2015 Hurst Summer Institute in Legal History. Thank you also to Sasha Zheng and the *Columbia Law Review* for editorial suggestions; the Penn Law library staff, including Ed Greenlee, Joe Parsio, and Merle Slyhoff, for locating far-flung materials; and the librarians and archivists at Harvard Law Library, Historical & Special Collections; the Rockefeller Archive Center; and the Georgetown University Law Center, E.B. Williams Law Library, Special Collections, particularly Katja Hering. At the 2014 Policy History Conference, co-panelists Alex Gourse, Sophia Lee, and Karen Tani, as well as the audience, provided helpful comments on an early version of this research. For research and travel support, I also thank Penn Law, the Harvard Law Berger-Howe Legal History Fellowship, the American Historical Association Littleton-Griswold Fellowship, the Stanford University Graduate Research Opportunity Grant, and the Stanford History Department.

Gideon *transformation was indeed limited in its practical effects, but its limits derived not only from politics but also from history—and from the legal profession itself. Lawyers themselves, long before* Gideon*, framed indigent defense as low-status, low-pay, less-than-fully-professional legal work. That framing survived even as private charities became post-*Gideon *public defenders. Second, the post-*Gideon *transformation was also limited—or, perhaps, destined to be perceived as limited—by tensions inherent in the attempt to provide large-scale legal assistance through government bureaucracies. Characteristics now identified as symptoms of crisis—such as politically determined funding, ever-expanding caseloads, and triage advocacy—first appeared as innovations that lawyers perceived* Gideon *to require. As public defenders proliferated, so too did complaints that they were underfunded and overworked, and that they encouraged guilty pleas over trials.*

The origins of the indigent defense crisis lie not only in Gideon*'s neglect but also, paradoxically, in* Gideon*'s transformative influence. This history lends some support to recent scholarly expressions of skepticism about* Gideon*, but it also provides some reasons for optimism: If the indigent defense crisis derives not only from intransigent political indifference but also from contingent choices made by lawyers, then lawyers may retain more power than they realize to mitigate the crisis.*

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INTRODUCTION

"But it may be that what is most important about a 'development' project is not so much what it fails to do but what it does do; it may be that its real importance in the end lies in the 'side effects' . . . ."[1]

On an ordinary morning in 1973, a local police court judge took his seat on the bench. His docket that day spanned the usual gamut: a woman with a penchant for phoning a neighbor and yelling curse words, the regular carousel of public intoxication charges. Nothing distinguished that day from any other, except that a New York reporter was present to observe the judicial goings-on in this provincial backwater. Later in the day, after court had adjourned, the local judge spoke to the New York reporter. He mocked the elaborate procedures he was expected to follow by his higher-ups in Washington, D.C. "'Take those two bitches screaming at each other,'" the judge mused. "'What's the Supreme Court got to do with *them*? Or those drunks! It's a farce that I have to ask every one of them if he wants a lawyer.'"[2] Ten years before, the U.S. Supreme Court had famously held, in the landmark case of *Gideon v. Wainwright*, that judges must appoint counsel for criminal defendants too poor to afford a lawyer.[3] Down in the basement of the judicial pyramid, local police court Judge Elijah Adlow remained unconvinced.

Judge Adlow sat not in the backwards and benighted South, which, today, is often described as *Gideon*'s primary target.[4] He sat in Boston. Across the Charles River, the Harvard mandarins intoned the requisite respects for *Gideon*; it showed, they supposed, that the "legal process" was

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1. James Ferguson, The Anti-Politics Machine: "Development," Depoliticization, and Bureaucratic Power in Lesotho 254 (Univ. of Minn. Press 1994) (1990).

2. Richard Harris, Annals of Law: In Criminal Court—I, New Yorker, Apr. 14, 1973, at 45, 72, http://archives.newyorker.com/?i=1973-04-14#folio=044 (on file with the *Columbia Law Review*) [hereinafter Harris, In Criminal Court—I].

3. Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding Sixth Amendment's guarantee of counsel "is made obligatory upon the States by the Fourteenth Amendment").

4. See, e.g., Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 273 (2009) [hereinafter Friedman, The Will of the People] (describing Chief Justice Earl Warren's motivation in *Gideon* as desire to impose federal right to counsel on "five remaining states, all in the South"); Lucas A. Powe, Jr., The Warren Court and American Politics 386 (2000) ("*Gideon* was the last important purely southern criminal procedure case."); William J. Stuntz, The Collapse of American Criminal Justice 222 (2011) [hereinafter Stuntz, Collapse] ("*Gideon* mattered chiefly in the South."); Donald A. Dripps, Why *Gideon* Failed: Politics and Feedback Loops in the Reform of Criminal Justice, 70 Wash. & Lee L. Rev. 883, 895 (2013) [hereinafter Dripps, Why *Gideon* Failed] ("By 1963, only a few states, concentrated in the south, did not appoint counsel for all felony defendants. Outside of those states, *Gideon* did not require dramatic changes."); cf. Corinna Barrett Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. Pa. L. Rev. 1361, 1396 (2004) (suggesting part of *Gideon*'s attraction was it "increased the opportunities for judicial oversight of suspect Southern courts").

"redeeming itself."[5] Nor, apart from his blunt style, was Adlow a lone maverick. Some Massachusetts judges supported the Warren Court's mandates, but most were indifferent, and a handful, like Adlow, resisted actively.[6] Throughout the 1960s, Massachusetts lawyers complained that "a few" judges were "hostile . . . to the entire concept of *Gideon*."[7] The Massachusetts legislature, for its part, refused to fund the fledgling state public defender agency at the levels requested, much less the levels prosecutors received.[8]

It may seem odd to encounter hostility to *Gideon* in Massachusetts. Constitutional scholars typically list Massachusetts as one of the forty-five states where the right announced in *Gideon* "was already settled practice."[9] This characterization of *Gideon* relies on state law in 1963, as well as the Supreme Court briefs and opinion in *Gideon* itself.[10] From this bird's eye perspective, it appears that most states already provided counsel, at least in felony cases, before *Gideon*.[11] Thus, *Gideon* was a largely symbolic judicial exhortation to a few "backward"[12] "holdout states,"[13] "concentrated in the south,"[14] to catch up with the "enlightened" rest of the nation.[15] Twenty-three states signed an amicus brief

5. Paul Freund, Justice Was Done for One and All, N.Y. Times (June 21, 1964), http://www.nytimes.com/1964/06/21/justice-was-done-for-one-and-all.html?_r=0 (on file with the *Columbia Law Review*) (noting that through reading book about *Gideon*, "we are made . . . to feel that, in the redemption of a forlorn outcast, the legal process is redeeming itself").

6. See infra section III.A.3 (describing how various judges actively resisted applying right to counsel in all criminal cases).

7. Mass. Defs. Comm., Report to National Legal Aid and Defender Association on Suffolk County Model Defender Project 16 (1966) (on file with the *Columbia Law Review*), *in* Papers of Herman LaRue Brown, 1890–1969, Harvard Law School Library Historical & Special Collections box 3, folder 4 (Modern Manuscripts Collection), Cambridge, Mass. [hereinafter LRB Papers].

8. See infra Part III (describing obstacles to funding Massachusetts public defender agency).

9. Akhil Reed Amar, America's Unwritten Constitution 112 (2012); see also Justin Driver, Constitutional Outliers, 81 U. Chi. L. Rev. 929, 939–40 (2014) ("[T]he overwhelming majority of the nation already adhered to the rule that *Gideon* would articulate even before the Court issued its landmark decision.").

10. See infra notes 355–356 (discussing state law in 1963 and amicus briefs in *Gideon*).

11. See, e.g., Driver, supra note 9, at 939 (stating "overwhelming majority of the nation already adhered to the rule that *Gideon* would articulate even before the Court issued its landmark decision").

12. Powe, supra note 4, at 394 ("*Gideon* required five backward states to change their laws and behavior.").

13. Driver, supra note 9, at 939 (noting "only five holdout states continued to deny" right to counsel at time of *Gideon*).

14. Dripps, Why *Gideon* Failed, supra note 4, at 895 ("By 1963, only a few states, concentrated in the south, did not appoint counsel for all felony defendants.").

15. Lain, supra note 4, at 1398 (describing how *Gideon* "validated a well-established national consensus, suppressing Southern states that were out-of-step with the rest of the

endorsing Clarence Earl Gideon's right-to-counsel claim—an amicus brief coordinated and drafted by an assistant attorney general for the State of Massachusetts.[16]

Alternatively, perhaps Judge Adlow's hostility is not surprising at all. Criminal procedure scholars typically describe *Gideon* as a groundbreaking decision whose potential has never been realized.[17] Far from "settled practice," the *Gideon* right has been consistently undermined by legislators, taxpayers, and lower-level judges nationwide.[18] Fifty years later, "indigent defendants navigate courts nearly alone."[19] This characterization of *Gideon* relies on policy reports, personal experiences, and newspaper exposés, all drawing upon first-person observation of day-to-day practice in the nation's criminal courts in the decades after 1963.[20] In this view from the trenches, some states appear worse than others, but public defenders nationwide are underfunded and overworked.[21] Moreover, because of harsh sentencing laws and coercive plea bargaining practices, even relatively well-funded public defenders have little leverage in

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country's enlightened sense of fairness and equality").

16. Brief for the State Government Amici Curiae, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 62-155), 1962 WL 115122; see also Anthony Lewis, *Gideon*'s Trumpet 141–48 (1964) [hereinafter Lewis, *Gideon*'s Trumpet] (describing states' work on *Gideon* amicus brief); Krista Zanin, Through the Skill of a Local Lawyer, Massachusetts Is Part of *Gideon*'s Legacy, Mass. Bar Ass'n Law. J., Mar. 2003, http://www.massbar.org/publications/lawyers-journal/2003/march/through-the-skill-of-a [http://perma.cc/GJ8F-ZLPN] (discussing Massachusetts Assistant Attorney General's role in coordinating and drafting brief). Some sources list twenty-two state signatories because New Jersey was inadvertently omitted from the list on the filed brief. See Bruce A. Green, Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?, 122 Yale L.J. 2336, 2340 n.19 (2013)

17. See infra section V.A (summarizing criminal procedure scholarship on Gideon).

18. See infra section V.A (same).

19. Matt Apuzzo, Holder Backs Suit in New York Faulting Legal Service for Poor, N.Y. Times (Sept. 25, 2014), http://www.nytimes.com/2014/09/25/nyregion/holder-backs-suit-in-new-york-faulting-legal-service-for-poor.html (on file with the *Columbia Law Review*) (summarizing plaintiffs' claims in class action lawsuit challenging New York's indigent defense system); see also Karen Houppert, Chasing *Gideon*: The Elusive Quest for Poor People's Justice, at x (2013) [hereinafter Houppert, Chasing *Gideon*] ("[I]nnocent people are routinely . . . denied basic access to an attorney."). For scholarly expressions of similar claims, see, e.g., Stephanos Bibas, Shrinking *Gideon* and Expanding Alternatives to Lawyers, 70 Wash. & Lee L. Rev. 1287, 1288 (2013) (describing indigent defense as "Potemkin lawyering . . . far removed from *Gideon*'s vision"); Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*, 122 Yale L.J. 2150, 2152 (2013) ("Every day in thousands of courtrooms . . . the right to counsel is violated.").

20. E.g. Eve Brensike Primus, Effective Trial Counsel After *Martinez v. Ryan*: Focusing on the Adequacy of State Procedures, 122 Yale L.J. 2604, 2606 (2013) [hereinafter Primus, Effective Trial Counsel] (describing consensus "that excessive caseloads, poor funding, and a lack of training plague indigent defense delivery systems throughout the states").

21. Id.

advocating for their clients.[22] Thus, *Gideon* remains an "unfulfilled promise."[23]

The dominant scholarly narratives about *Gideon* are not necessarily inaccurate nor are they irreconcilable. Even if *Gideon* amplified existing right-to-counsel doctrine in most states, states may have varied both before and after *Gideon* in how effectively they enforced that doctrine.[24] Or perhaps *Gideon* initially reflected a national consensus that later eroded.[25] However, both the "outlier" and "failed promise" narratives emphasize what *Gideon* did not do—its doctrinal and practical limits. Scholars have devoted less attention to what *Gideon* did—the doctrinal, institutional, political, and conceptual changes that it inspired.[26] Return-

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22. See Gabriel J. Chin, Race and the Disappointing Right to Counsel, 122 Yale L.J. 2236, 2254 (2013) (arguing even zealous defense lawyers generally cannot challenge "war on drugs or other broad government policies"); David E. Patton, Federal Public Defense in an Age of Inquisition, 122 Yale L.J. 2578, 2580–81, 2588–90 (2013) (describing legal and political obstacles to federal defenders' adversarial leverage).

23. Erwin Chemerinsky, Lessons from *Gideon*, 122 Yale L.J. 2676, 2680 (2013) ("I also lament [*Gideon*'s] unfulfilled promise."); see also Primus, Effective Trial Counsel, supra note 20, at 2606 (suggesting "promise of *Gideon v. Wainwright* remains largely unfulfilled").

24. In the right-to-counsel context, as in many other legal contexts, commentators frequently identify a gap between ideals (embodied in doctrine) and reality (embodied in practice). See, e.g., Justin F. Marceau, *Gideon*'s Shadow, 122 Yale L.J. 2482, 2487 (2013) (identifying "mismatch between the ideal and the real in the *Gideon* context"); Carol S. Steiker, *Gideon* at Fifty: A Problem of Political Will, 122 Yale L.J. 2694, 2701 (2013) (describing indigent defense as "embarrassment to the ideal of justice").

25. Many observers frame *Gideon*'s history as a declension narrative, in which the states made progress in enforcing *Gideon* until the 1980s' "punitive turn" and/or the onset of some fiscal crisis. See, e.g., Chemerinsky, supra note 23, at 2686 (describing indigent defense burden as having "increased tremendously as a result of an enormous increase in criminalization, prosecution, and incarceration" in "decades following *Gideon*"); Margaret A. Costello, Fulfilling the Unfulfilled Promise of *Gideon*: Litigation as a Viable Strategic Tool, 99 Iowa L. Rev. 1951, 1956 (2014) ("During the 1960s and 1970s, crime rates increased significantly, leading to more prosecutions and a greater need for indigent defense counsel."); Roger A. Fairfax, Jr., Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda, 122 Yale L.J. 2316, 2319 (2013) (noting "overbroad criminalization and enforcement strategies . . . have contributed to unmanageable caseloads" for defenders); Erica J. Hashimoto, The Price of Misdemeanor Representation, 49 Wm. & Mary L. Rev. 461, 465 (2007) [hereinafter Hashimoto, Price] ("[I]ndigent defense budgets have not kept pace with the increased number of cases pouring into the indigent defense system."); M. Clara Garcia Hernandez & Carole J. Powell, Valuing *Gideon*'s Gold: How Much Justice Can We Afford?, 122 Yale L.J. 2358, 2375 (2013) ("*Gideon*'s spirit is drowning in the undertow of the criminalization tide."); see also, Houppert, Chasing *Gideon*, supra note 19, at ix–x, 91 (describing how *Gideon* initially spurred "genuine" progress in indigent defense, later eroded by "massive changes" in law enforcement).

26. For discussions of *Gideon* within general histories of the Warren Court, see Morton J. Horwitz, The Warren Court and the Pursuit of Justice 91–98 (1999); Powe, supra note 4, at 397–444. Outside of synthetic histories such as these, relatively few scholarly studies explore *Gideon*'s reception in detail. For a notable exception, see Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law 31–35

ing to the perspective of lawyers and judges on the ground in the 1960s, who worked in the midst of this whirlwind of changes, raises questions not clearly answered by either the "outlier" or the "failed promise" accounts of *Gideon*.

Consider, again, Massachusetts: In the view of the Bay State's highest court as of 1967, *Gideon* had "created a requirement of representation of criminal defendants on a scale unprecedented in this Commonwealth."[27] Given that Massachusetts already had a judicial rule providing for counsel in most felony cases before *Gideon*, why did Massachusetts jurists nevertheless understand *Gideon* to impel such momentous changes? Why were some local judges, like Judge Adlow, so critical of *Gideon*? How were Massachusetts debates over *Gideon*'s implementation resolved, with what consequences? If *Gideon* has failed to achieve the ostensible goals that lawyers and legal scholars assign it—such as providing the poor with effective legal advocacy, or equalizing the treatment of rich and poor by the criminal courts—what has *Gideon* achieved, for better or worse? While there is certainly no shortage of writing on *Gideon*, reconstructing *Gideon*'s initial reception in local legal communities can still illuminate underemphasized dimensions to the historical import of this landmark case.

As this Article chronicles, *Gideon* catalyzed a shift in the legal profession's consensus understanding of why and how to provide indigent criminal defense. Before *Gideon*, particularly on the East Coast, indigent defense was often viewed as a charitable bar initiative that aimed to help the "worthy" poor, particularly those with strong innocence claims.[28] The day-to-day tasks of indigent defense were viewed as training fodder rather than fully professional legal work, suitable for recent law graduates who wanted to gain courtroom experience before joining a firm.[29] By defining indigent defense as a constitutional right, *Gideon* appeared to render this charity model obsolete; selective charity could not meet a universal entitlement.[30] Elite lawyers reconceptualized indigent defense as a state responsibility and a practice specialty in itself, rather than training for

(2008). Teles focuses on *Gideon*'s symbolic role in helping to catalyze the organized bar's support for public interest lawyering, primarily in the civil context. Id.; see also Jerold H. Israel, *Gideon v. Wainwright*—From a 1963 Perspective, 99 Iowa L. Rev. 2035, 2056–57 (2014) [hereinafter Israel, From a 1963 Perspective] (reflecting he initially underestimated *Gideon*'s import because he focused on limits of "its immediate practical impact and its potential doctrinal contributions" rather than "its symbolic impact").

27. Abodeely v. County of Worcester, 227 N.E.2d 486, 488 (Mass. 1967). For a similar judicial estimate of *Gideon*'s impact, see In re Articles of Incorporation of the Def. Ass'n of Phila., 307 A.2d 906, 908 (Pa. 1973) ("Commencing with . . . *Gideon* . . . , the scope of judicially mandated representation of the poor increased dramatically.").

28. See infra section I.B.2 (describing indigent defense prior to *Gideon*).

29. See infra section I.B.1 (describing personnel practices of pre-*Gideon* indigent defense charity).

30. See infra section I.C, Part II (tracing shift in conception of indigent defense from charity model to constitutional entitlement).

future practice.[31] In the new ideal articulated in *Gideon*-era professional standards, government-salaried, career public defenders should represent poor defendants as a matter of right, whether or not they are "worthy."[32]

Between 1963 and the early 1970s, this new consensus transformed criminal practice nationwide in two important ways. First, *Gideon* motivated the establishment and expansion of hundreds of public defender offices, in some places through the conversion or public subsidy of pre-*Gideon* private charities: Between 1964 and 1973, the number of defender organizations nationwide quadrupled from 145 to 650.[33] Just prior to *Gideon*, only 25% of Americans lived in an area with an organized defender.[34] Ten years later, 64% did, and almost every large city in the United States had some type of public defender.[35] Second, *Gideon* expanded lawyers' presence in low-level criminal proceedings. Before *Gideon*, only a handful of states provided counsel in nonfelony cases.[36] By 1970—two years before the Supreme Court expressly announced a misdemeanor right to counsel—thirty-one states were attempting to provide counsel in some set of lower-level cases.[37] When Judge Adlow complained about *Gideon*, it was really these post-*Gideon* changes that angered him. Adlow was open to appointing private counsel if he thought a lawyer was genuinely needed, but he thought that public

31. See infra Part II (providing account of new post-*Gideon* policy consensus on indigent defense).

32. See infra Part II (explaining shift in conception of indigent defense from privilege to right).

33. Nat'l Legal Aid & Def. Ass'n, In Search of Justice: The Final Report of the National Defender Project 114 (1973) (on file with the *Columbia Law Review*) [hereinafter In Search of Justice], *in* Record Group: Grants, Grant # 06400098, Reels 2070–71, Ford Foundation Archives, Rockefeller Archive Ctr., Sleepy Hollow, N.Y. [hereinafter Ford Foundation Archives]. This number includes both municipal public defenders and nongovernmental organizations providing criminal defense, usually with some public subsidy.

34. Nat'l Legal Aid & Def. Ass'n, The Other Face of Justice: A Report of the National Defender Survey Funded by the Law Enforcement Assistance Administration of the U.S. Department of Justice 13 (1973) (on file with the *Columbia Law Review*) [hereinafter Other Face of Justice]. In 1951, under 14% of Americans lived in an area with an organized defender, public or private. See Emery A. Brownell, Legal Aid in the United States: A Study of the Availability of Lawyers' Services for Persons Unable to Pay Fees 137 chart IV.B (1951).

35. Other Face of Justice, supra note 34, at 13. Specifically, 92% of "metropolitan counties" (defined as counties with over 500,000 residents) had an organized defender in 1973. Id.

36. See John F. Decker & Thomas J. Lorigan, Comment, Right to Counsel: The Impact of *Gideon v. Wainwright* in the Fifty States, 3 Creighton L. Rev. 103, 106 (1970) (describing increase in number of states appointing counsel in low-level cases after *Gideon*).

37. Id. The Supreme Court addressed the question in Argersinger v. Hamlin, 407 U.S. 25 (1972).

defenders complicated simple cases with overwrought constitutional arguments.[38]

In their broad outlines, these post-*Gideon* changes are familiar to legal scholars.[39] But situating these changes within a longer historical context and tracing them in detail from the perspective of lawyers and judges on the ground yields two insights that help to explain the United States' seemingly permanent crisis in indigent defense. First, the post-*Gideon* transformation was indeed limited in its practical effects—as scholars and advocates have lamented—but its limits derived not only from politics but also from history, or what social scientists call path dependence.[40] Neither inchoate precursors nor ad hoc experiments, pre-*Gideon* indigent defense efforts had enduring consequences for post-*Gideon* institutions, as lawyers carried vestiges of the charity model into the post-*Gideon* world. Second, the post-*Gideon* transformation was also limited—or, perhaps, destined to be perceived as limited—by its own internal ambiguities. With or without charitable vestiges, the public model of indigent defense contained the seeds of its own critique. Like an optical illusion, the *Gideon* vision of universal, state-provided legal assistance oscillated from the start with its darker inverse of impersonal,

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38. See Deckle McLean, The Justice of Elijah Adlow, Bos. Globe, Apr. 27, 1969, at C8 (on file with the *Columbia Law Review*) (describing Adlow's preference for appointing private counsel and quoting Adlow's complaint that public defenders use "legalistic tricks").

39. For sources briefly discussing the post-*Gideon* expansion of public defender offices, see, e.g., Andrew Lucas Blaise Davies & Alissa Pollitz Worden, State Politics and the Right to Counsel: A Comparative Analysis, 43 Law & Soc'y Rev. 187, 189–90 (2009) [hereinafter Davies & Worden, State Politics] (describing different types of state-implemented indigent defense programs); Richard D. Hartley et al., Do You Get What You Pay For? Type of Counsel and Its Effect on Criminal Court Outcomes, 38 J. Crim. Just. 1063, 1063 (2010) (describing increase in number of public defender offices and increased representation by public defenders post-*Gideon*); Hashimoto, Price, supra note 25, at 469 (recounting state efforts to comply with *Gideon* decision); Erica Hashimoto, The Problem with Misdemeanor Representation, 70 Wash. & Lee L. Rev. 1019, 1035 (2013) [hereinafter Hashimoto, Problem] (noting limited effect of *Gideon* decision); Alissa Pollitz Worden et al., A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States, 74 Alb. L. Rev. 1423, 1424 (2011) [hereinafter Worden et al., Patchwork] (noting decentralized state implementation of *Gideon* decision). Legal scholars are less likely to attribute the expansion of counsel in low-level proceedings to *Gideon* because the misdemeanor right to counsel is now attached doctrinally to *Argersinger*. See, e.g., Hashimoto, Price, supra note 25, at 477 (describing *Argersinger*'s influence); Hashimoto, Problem, supra, at 1035–36 (defining *Gideon* as guaranteeing felony counsel and arguing that *Argersinger* affected more states).

40. Although "path dependence" has many meanings, some more technical than others, the term is used here only to loosely invoke something like Paul Pierson's definition: the way that early policy choices become "self-reinforcing" over time, closing off alternative paths and making later policy "reversals very difficult." Paul Pierson, Politics in Time 10–11 (2004). More generally, this Article takes inspiration from Pierson's insight that understanding policy development "often requires . . . attention to processes that play out over considerable periods of time." Paul Pierson, The Study of Policy Development, 17 J. Pol'y Hist. 34, 34 (2005).

bureaucratic case processing. Characteristics now identified as symptoms of crisis—such as inadequate funding, ever-expanding caseloads, and triage advocacy oriented around pleas instead of trials—first appeared as lawyers began to implement the transition to large-scale indigent defense that they thought *Gideon* required.[41] The origins of the indigent defense crisis lie not only in *Gideon*'s neglect but also, paradoxically, in *Gideon*'s transformative influence.

The Article proceeds chronologically, using archival materials and other primary historical sources to reconstruct the landscape of indigent criminal defense before and after *Gideon* primarily through the example of Massachusetts, while also contextualizing that example with nationwide comparisons.[42] The Article builds upon a number of excellent historical studies about particular dimensions of legal aid and indigent defense in Massachusetts, as well as the larger historical literature on the history of legal aid nationwide.[43] In its long timeframe, use of one jurisdiction as a case study, and emphasis upon the dominant role of elite lawyers in shaping the politics of indigent defense, the Article most directly parallels, and builds upon, Michael McConville and Chester Mirsky's pioneering study of indigent defense in New York City

41. See infra section III.B (detailing conflicts arising out of state implementation of *Gideon* decision).

42. While no state offers a perfect microcosm of indigent defense nationwide, tracing policy developments over a long timeframe within one jurisdiction is the most controlled way to isolate change over time. For indigent defense, Massachusetts offers an appealing case study both for practical reasons (including the wealth of archival materials, the state's small size and the relatively small number of actors involved in indigent defense, and the available secondary literature on Massachusetts legal history for contextualizing those materials) and for conceptual reasons (including the high concentration of legal scholars in and around Boston who were supportive of *Gideon* in principle, the disconnect between those scholars' views and the realities of the Boston criminal courts, and the state's reputation, deserved or otherwise, as a "liberal" bellwether—see Lily Geismer, Don't Blame Us: Suburban Liberals and the Transformation of the Democratic Party 14–16 (2014)). As discussed infra in section III.C, the major post-*Gideon* changes in Massachusetts reflected broad national patterns, although, to be sure, further research would likely illuminate a more complex pattern of local and regional variation.

43. For a recent overview of, and illuminating revision to, the historiography on legal aid, see generally Felice Batlan, Women and Justice for the Poor: A History of Legal Aid, 1863–1945 (2015) (reconstructing history of legal aid from women's history perspective). On the history of public defenders, see infra Parts I, II. For historical studies of legal aid and indigent defense in Massachusetts, see generally Batlan, supra, at 36–45 (describing legal aid work of Boston's Women's Educational and Industrial Union); Alan Rogers, "A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780–1980, 41 Am. J. Legal Hist. 440 (1997) (surveying history of court-appointed counsel in capital cases); Michael Grossberg, Altruism and Professionalism: Boston and the Rise of Organized Legal Aid, 1900–1925: Part II, 22 Bos. B.J., June 1978, at 11, 20–21 (describing early history of Boston Legal Aid Society); Christopher G. Griesedieck, The Right to Counsel in Boston, 1963–1983: The Legal Services Movement from *Gideon* to the Committee for Public Counsel Service (Apr. 2011) (unpublished B.A. honors thesis, Boston College) (on file with the *Columbia Law Review*) (surveying Boston bar's legal aid efforts primarily by examining *Boston Bar Journal*).

from 1917 through the 1980s.[44] However, this Article departs from Professors McConville and Mirsky's interpretation in two ways. First, Professors McConville and Mirsky dismissed organized indigent defense as an elite ploy to ensure "the rapid processing and inevitable conviction of indigent defendants," believing that "institutional defenders" could never be true adversaries of the state.[45] Instead of measuring past defenders against an adversarial ideal, this Article seeks to understand lawyers' own changing conceptions of the defender's role.[46] Second, Professors McConville and Mirsky posited the New York Legal Aid Society as an unchanging "microcosm" of indigent defense nationwide. [47] They recognized neither significant differences between public and voluntary defenders nor meaningful change over time, arguing that "indigent criminal defense systems came into being prior to *Gideon*, and survived thereafter in a substantially unchanged form."[48] In their account, *Gideon* "simply expanded the number of defendants" subjected to representation by "non-adversarial" defenders.[49] This Article instead emphasizes institutional diversity and change over time in the history of indigent defense, arguing both that pre-*Gideon* public and voluntary defenders were genuinely opposing models and that *Gideon* triggered changes in kind, not just scale, in the practice of indigent defense.

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44. Michael McConville & Chester L. Mirsky, Criminal Defense of the Poor in New York City, 15 N.Y.U. Rev. L. & Soc. Change 581 (1987); see also Chester L. Mirsky, The Political Economy and Indigent Defense: New York City, 1917–1998, 1997 Ann. Surv. Am. L. 891, 894–902 (reviewing his earlier research on origins of indigent defense in New York City); James B. Jacobs, Remembering Chester Mirsky, N.Y.U. L. Mag., Autumn 2006, at 48, 48, http://blogs.law.nyu.edu/magazine/2006/remembering-chester-mirsky/ [http://perma.cc/LJS7-XN43] (describing Professors McConville and Mirsky's project "as a classic").

45. McConville & Mirsky, supra note 44, at 610; see also Mirsky, supra note 44, at 1013–15 (describing organized indigent defense as nonadversarial and incompatible with rule of law).

46. These interpretive departures reflect differences of both methodology and generational standpoint. Professors McConville and Mirsky relied primarily on published articles and annual reports, which they took to reflect lawyers' beliefs. See George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 196–97 (2003) (noting Professors McConville and Mirsky, in their related project on plea bargaining, "emerged from their investigation convinced that [lawyers'] rhetoric was genuine" but suggesting "disavowals of zealous advocacy" could also be interpreted as strategic). In addition to published sources, this Article draws on archival research into lawyers' and organizations' correspondence, private notes, and meeting minutes. Also, Professors McConville and Mirsky carried out their research at a moment of growing concern about public defenders' caseloads. Thus, they may have been primed to find historical precursors for a nonadversarial, "case processing" model of indigent defense. In that way, their article not only offers valuable insight into the history of indigent defense but is also, itself, a primary source reflecting the 1980s critiques of public defenders described in Part IV, infra.

47. McConville & Mirsky, supra note 44, at 583.

48. Id. at 583, 592 n.40, 631 (concluding voluntary defender represented only superficial rejection of public defender, because voluntary and public defenders' lawyering practices were "identical").

49. Id. at 654; see also id. at 694 (noting *Gideon* increased "proportion of the population served by institutional defenders").

Parts I and II describe the rise and fall of the pre-*Gideon* charity model of indigent defense, in which privately funded organizations staffed by short-term trainees defended small numbers of "worthy" clients. In the 1950s, this selective conception of indigent defense was threatened by doctrinal development toward a constitutional right to counsel in all criminal cases. Part II explains how *Gideon* triggered the final abandonment of the charity model, at least intellectually, by the national legal elite. The charity model did not characterize pre-*Gideon* indigent defense in every part of the country, but it would powerfully shape the limits of *Gideon*'s implementation everywhere. At the time of *Gideon*, some cities, concentrated in the West, had longstanding municipal public defender offices, while rural areas and much of the South continued to rely on case-by-case appointments of private counsel. But the charity model predominated in the East Coast cities familiar to the national legal elite. When lawyers began the process of implementing *Gideon*, they looked to existing public defender offices as models to some extent, but often through the lens of assumptions carried over from the charity model. More generally, the existence of both a charity model and a public model sustained the perception among lawyers that the right to counsel could be implemented through a variety of institutional setups. This perception helps to explain why the public model was not simply implemented wholesale after *Gideon*, even though it most closely approximated *Gideon*-era professional standards.

Parts III and IV provide the Article's core account of historical change, tracing how local efforts to conform laws, institutions, and practices with *Gideon* generated a new hybrid public-charity model of indigent defense. In implementation, local bar leaders modified the public model partly to accommodate local conditions and legislative and judicial resistance, but also to incorporate elements of the charity model that they still valued or, at least, did not consider problematic. Public defenders remained low-pay, low-status lawyers like their charitable predecessors, but no longer controlled their caseloads. Instead of defining their role as providing intensive trial advocacy for especially sympathetic defendants, they now saw themselves as providing triage assistance for all defendants, usually by negotiating pleas.

The magnitude of the shift in how defenders conceptualized their work likely exceeded any corresponding shift in the incidence of guilty pleas overall. While the ratio of pleas to trials may have increased somewhat, plea bargaining was not new and most defendants, with or without counsel, had pled guilty long before *Gideon*. But now, the experience of pleading was typically mediated by a public defender, and so courtroom participants and observers—including defendants themselves—often construed plea bargaining as a suboptimal form of advocacy necessitated by defense-side resource constraints. Across both advocacy and scholarship, complaints mounted about overworked, underfunded public defenders who did little but advise guilty pleas. As time passed and *Gideon*

floated above the muck of day-to-day practice into the constitutional pantheon, these complaints became reinterpreted not as ironic side effects of *Gideon*'s implementation but as evidence that *Gideon* was being neglected, generating the diagnosis of crisis that persists to this day. Part V suggests how this history might enrich scholarly and policy discussions about both *Gideon* specifically and indigent defense more generally, followed by a more general concluding reflection on *Gideon*'s meaning and legacy.

Before proceeding, some caveats are in order. In arguing that the post-*Gideon* indigent defense crisis can be understood, to an underappreciated extent, as the product of pre-*Gideon* historical legacies and internal contradictions embedded within the *Gideon* consensus, it is emphatically not the Article's intent to deny either the existence or the virulence of political antipathy toward criminal defendants and toward the poor. Nor can this Article fully capture *Gideon*'s initial reception and implementation in every part of the country. Post-*Gideon* responses differed in places like Los Angeles and Chicago, which had long-established municipal public defenders, and in regions like the Deep South, with little pre-*Gideon* organized defender tradition of any kind.[50] This Article shows, however, that even in states where *Gideon* did have immediate, transformative, and lasting effects on criminal practice, those effects soon appeared, to many observers, like a crisis.

I. BEFORE *GIDEON*: THE CHARITY MODEL OF INDIGENT DEFENSE

The story of organized indigent defense in Massachusetts begins in 1935 with the unlikely meeting of two disparate Boston lawyers: Wilbur Hollingsworth, who had worked his way through the night program at the working-class Suffolk Law School, and LaRue Brown, a graduate of Phillips Exeter, Harvard College, and Harvard Law School, who had served in the Wilson and Harding administrations.[51] Hollingsworth

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50. In the Deep South and in Texas, cities were slower to establish public defenders after *Gideon* for complicated reasons beyond the scope of this Article. See, e.g., Hernandez & Powell, supra note 25, at 2362–64 (discussing post-*Gideon* developments in El Paso); Jennifer E. Laurin, *Gideon* by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense, 12 Ohio St. J. Crim. L. 325, 349 (2015) (noting Houston "was the largest court system in the country without a public defender office" until 2010); Sara Mayeux, Notes Toward a History of the Indigent Defense Crisis in the Deep South 8–19 (July 2015) (unpublished manuscript) (on file with the *Columbia Law Review*) (discussing halting efforts to establish public defender in Atlanta after *Gideon*); Albert Samaha, Indefensible: The Story of New Orleans' Public Defenders, BuzzFeed News (Aug. 13, 2015, 1:21 AM), http://www.buzzfeed.com/albertsamaha/indefensible-new-orleans-public-defenders-office#.vhKdxVRp [http://perma.cc/LLR8-9PT3] ("Before Hurricane Katrina, New Orleans didn't even have a full-time public defender's office.").

51. On Brown, see Obituaries: LaRue Brown Dies, 85, Bos. Globe, Apr. 4, 1969, at 31 (on file with the *Columbia Law Review*) [hereinafter Obituaries: LaRue Brown Dies] (summarizing Brown's accomplishments); see also Brown, Herman LaRue Papers, 1890–1969: Finding Aid, Harvard Univ. Lib. (2003), http://oasis.lib.harvard.edu/oasis/deliver/

decided to start an organization to help poor people charged with crimes, and, in the course of soliciting support from the bar, showed up one day at Brown's office.[52] Brown connected Hollingsworth with a fellow white-shoe lawyer, Daniel Lyne, who, along with Richard Hale, of the law firm Hale and Dorr, and Raynor Gardiner, of the Boston Legal Aid Society, had experimented a few years before with a short-lived "voluntary defender" project.[53] Now, with Hollingsworth's initiative, the Voluntary Defenders Committee reopened on a permanent basis, with Hollingsworth as chief counsel, Lyne and Gardiner among the board members, and Brown as the board's chairman.[54] Clients came to the Committee through a mix of jail referrals, court appointments, and office walk-ins.[55]

A. *The Voluntary Defenders Committee of Boston*

The Voluntary Defenders Committee met an important need. Before *Gideon*, less-than-wealthy Massachusetts defendants went to court with whatever low-cost or volunteer counsel they could scrounge together. For most of the pre-*Gideon* era, they had no state right to appointed counsel except in capital cases, and only a limited, uncertain federal right.[56] The Boston Legal Aid Society, founded in 1900, had a

~law00070 [http://perma.cc/E9UH-4KMZ] (providing timeline of Brown's biography). Brown served as an assistant attorney general from 1918–1919 and solicitor general of the United States Railroad Administration from 1920–1921. Id. On Hollingsworth, see Andrew Garber, Average Students Stand out in These College Scholarships: Wilbur Hollingsworth Has Given $70,000 to 140 Students While Living on Social Security, Portland Press Herald (Portland, ME), Nov. 28, 1998, at 1A (on file with the *Columbia Law Review*) (describing how Hollingsworth worked full-time and attended law school at night).

52. See Transcript of LaRue Brown's Reminiscences (estimated 1963) (on file with the *Columbia Law Review*) [hereinafter LaRue Brown Reminiscences], *in* LRB Papers, supra note 7, box 16, folder 4.

53. On the earlier experiment, see Richard W. Hale, Boston Voluntary Defenders Committee, 15 Mass. L.Q. 31, 31 (1930) (describing Committee and concluding its services were unnecessary in Massachusetts).

54. Flyer, Voluntary Defs. Comm. (Nov. 18, 1935) (on file with the *Columbia Law Review*) [hereinafter Voluntary Defs. Comm. Flyer], *in* LRB Papers, supra note 7, box 1, folder 1 (listing Voluntary Defenders Committee members); Before the Judge with No Lawyer: Defendant Without Money Will Be Helped by Defenders' Committee, Bos. Globe, June 9, 1935, at 48 (on file with the *Columbia Law Review*) [hereinafter Bos. Globe, Before the Judge] (explaining Committee's role of "aid[ing] citizens without funds who are brought into criminal courts").

55. See Hale, supra note 53, at 35 (listing breakdown of Voluntary Defenders Committee case sources).

56. As of 1959, Massachusetts statutes required courts to appoint counsel only in capital cases. See Mass. Gen. Laws ch. 313, § 23 (1959) (codified as amended at ch. 276, § 37A (2002)). See generally Rogers, supra note 43 (chronicling history of appointed counsel in Massachusetts capital cases). Like most states, Massachusetts had a right-to-counsel provision in its state constitution but construed the provision narrowly. See Mass. Const. pt. I, art. XII; Allen v. Commonwealth, 87 N.E.2d 192, 194–95 (Mass. 1949) (holding Massachusetts Constitution does not require appointed counsel); William M.

blanket policy of refusing criminal cases. In Boston's famously insular Irish Catholic neighborhoods, anyone in serious legal trouble would likely have turned to his ward boss or parish priest, who might, in turn, have referred him to one of the city's small but growing cadre of Irish lawyers.[57] But overall, probably about half of Massachusetts criminal defendants appeared in court on their own.[58] In his historical study of plea bargaining, George Fisher found that about half of defendants in Middlesex County had counsel by 1844, and that the number hovered around that percentage through the early 1900s.[59] Although comprehensive data is unavailable for subsequent decades, one 1953 study

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Beaney, The Right to Counsel in American Courts 80–82 (1955) (noting most states construed right-to-counsel provisions narrowly). In 1958, the Massachusetts Supreme Judicial Court promulgated a rule requiring the appointment of counsel in felony cases prosecuted in the superior courts. See Sup. Judicial Ct. R. 10, 337 Mass. 812 (1958) (adopting rule for assignment of counsel in noncapital felony cases).

In 1942, the U.S. Supreme Court held that the Fourteenth Amendment required states to provide counsel in noncapital cases presenting "special circumstances." See Betts v. Brady, 316 U.S. 455, 473 (1942) ("[W]hile want of counsel in a particular case may result in a conviction lacking in . . . fairness, we cannot say that the Amendment embodies an inexorable command that no trial . . . can be fairly conducted and justice accorded a defendant who is not represented by counsel."); see also *Allen*, 87 N.E.2d at 195 (declining to apply *Betts* where defendant, thirty-two-year-old black man, was "mature," "not mentally defective," and had not raised questions of "unfair conduct by the public authorities" or complex factual or legal issues). The *Betts* rule was widely viewed as "amorphous." Beaney, supra, at 164; see also id. at 188–94 (collecting criticisms of *Betts* doctrine); Jerold H. Israel, *Gideon v. Wainwright*: The "Art" of Overruling, 1963 Sup. Ct. Rev. 211, 264 [hereinafter Israel, Overruling] (describing *Betts* rule as vague and manipulatable).

57. On the Boston Legal Aid Society refusing criminal cases, see Grossberg, supra note 43, at 16 (listing "defending criminal complaints" as one of "Society's most significant taboos"). On the role of the ward boss and parish priest, see Thomas H. O'Connor, The Boston Irish: A Political History 121–22, 139–40 (1995) [hereinafter O'Connor, Boston Irish]. On Irish lawyers, see Paula M. Kane, Separatism and Subculture: Boston Catholicism, 1900–1920, at 51–52 (1994) (noting 20% of Boston lawyers were Irish by 1900). For references to ward bosses referring constituents to "legal advice" or "legal services," see O'Connor, Boston Irish, supra, at 122, 124, 180–81, 212; William V. Shannon, Boston's Irish Mayors: An Ethnic Perspective, *in* Boston, 1700–1980: The Evolution of Urban Politics 199, 207 (Ronald P. Formisano & Constance K. Burns eds., 1984). For parallel examples of legal assistance within minority communities, see Batlan, supra note 43, at 99–100 (describing New York mission that "aided Chinese immigrants who had been arrested"); id. at 178 (noting Chicago Negro Fellowship League "provided pro bono lawyers to African American men accused of serious crimes").

58. This estimate is based on Professor Fisher's book recounting the history of plea bargaining in the United States and a series of surveys of criminal prosecutions in Massachusetts in the early 1950s undertaken by the Voluntary Defenders Committee. See Fisher, supra note 46, at 97; see also Voluntary Defs. Comm., Survey of Criminal Prosecutions in Massachusetts for the Years 1949–1950–1951–1952, at 9 (1953) (on file with the *Columbia Law Review*) [hereinafter Voluntary Defs. Comm. Survey] (finding 57.5% of indicated defendants and overall 54% of criminal defendants were unrepresented), *in* LRB Papers, supra note 7, box 1, folder 3.

59. Fisher, supra note 46, at 97.

reported that over half of Massachusetts defendants received no legal assistance.[60]

Boston's Voluntary Defenders Committee was modeled after similar organizations in New York and Philadelphia, formed as East Coast alternatives to the "public defender." During the Progressive Era, legal reformers urged local governments to provide lawyers for the poor.[61] In 1914, Los Angeles opened the nation's first municipal public defender; by 1930, a number of cities, including San Francisco and Chicago, had followed suit.[62] These first-generation public defenders were celebrated not in the language of constitutional rights, but rather in the Progressive Era vocabulary of good-government reform. Public defenders, their advocates predicted, would crowd out the crooked "shysters" who trawled jailhouses for desperate clients, cooperate with prosecutors, and negotiate plea bargains to eliminate costly trials.[63]

Before *Gideon*, the public defender remained primarily a West Coast and Midwestern innovation because in East Coast cities, the private bar opposed it.[64] Criminal lawyers worried that public defenders would steal

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60. Voluntary Defs. Comm. Survey, supra note 58, at 9 ("Considering all defendants, 54% were without legal assistance.").

61. In the 1890s, California lawyer Clara Foltz first promoted the idea of a "public defender" to counter the public prosecutor. See generally Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz 288–319 (2011) ("As a personal achievement, [Foltz's] conception of the public defender ranks with opening the legal profession to women and winning the constitutional clauses."); Barbara Allen Babcock, Inventing the Public Defender, 43 Am. Crim. L. Rev. 1267, 1270–74, 1280–313 (2006) [hereinafter Babcock, Inventing] (chronicling Foltz's role in origin of public defenders). By the 1910s and 1920s, public defender proposals appeared often in law and criminology journals, although these proposals often differed from Foltz's original idea in their emphasis on plea bargaining rather than trial advocacy. For discussions of Progressive Era public defender proposals, see Fisher, supra note 46, at 194–200; Babcock, Inventing, supra, at 1274–79; Gregory Barak, In Defense of the Rich: The Emergence of the Public Defender, 3 Crime & Soc. Just. 2, 8–11 (1975); Sara Mayeux, The Case of the Black-Gloved Rapist: Defining the Public Defender in the California Courts, 1913–1948, 5 Cal. Legal Hist. 217, 224–29 (2010) [hereinafter Mayeux, Defining the Public Defender]; McConville & Mirsky, supra note 44, at 596–610.

62. See Lisa J. McIntyre, The Public Defender: The Practice of Law in the Shadows of Repute 38–41 (1987) (chronicling origins and early history of Cook County public defender system); McConville & Mirsky, supra note 44, at 602 (recounting establishment of public defenders in Los Angeles and other cities).

63. See Mayeux, supra note 61, at 224–27 (discussing reformer agendas); see also Fisher, supra note 46, at 196–97 (contrasting attitudes of early reformers); Babcock, Inventing, supra note 61, at 1274–77 (comparing Foltz's vision for public defenders with other Progressive models).

64. See Beaney, supra note 56, at 218 ("The organized bar has raised substantial objections, and exerted powerful opposition, to the public-defender plan from the very beginning."); McConville & Mirsky, supra note 44, at 602–03 ("[T]he organized bar sought to insure that those who could afford an attorney would be required to retain a private lawyer."). For a tally of public defenders as of 1957, see Edward N. Bliss, Jr., Directory of Public Defenders (1957) (on file with the *Columbia Law Review*). This pamphlet, researched by an investigator for the Los Angeles Public Defender, listed public

their business, but more damaging to the reform's prospects was the opposition of elite corporate lawyers. They had little interest in criminal work themselves but viewed government-provided criminal defense as a slippery slope toward socializing the legal profession.[65] They preferred philanthropically funded indigent defense controlled by the private bar, along the model of civil legal aid societies. The New York legislature rejected a public defender bill in 1912, and two years later, the New York City Bar Association officially denounced the public defender model.[66] Instead, from 1917 to 1920, the Rockefeller family underwrote an experimental "voluntary defender" program in New York, which was deemed successful and made a permanent division of that city's Legal Aid Society, and soon inspired imitation in Philadelphia and Boston.[67]

In some ways, voluntary defender organizations reflected the elite legal aid movement's conservative philosophy.[68] During the Progressive Era, prominent lawyers promoted legal aid as a vehicle for convincing immigrants that they could vindicate their rights through existing institutions rather than revolutionary politics,[69] establishing a lasting template of assimilationist legal aid rhetoric that voluntary defender supporters

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defenders in California, Connecticut, Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York (Monroe County), Ohio, Oklahoma, Rhode Island, and Tennessee, plus the Boston, New York City, and Philadelphia voluntary defenders.

65. See McConville & Mirsky, supra note 44, at 600–02 ("The elite characterized such notions as visionary, the 'prelude to complete socialization of the bar, and as subversive of fundamental rights.'").

66. Id. at 611–13. On elite lawyers' parallel fears of government control of civil legal aid, see Grossberg, supra note 43, at 13–14.

67. See McConville & Mirsky, supra note 44, at 617–18. Some East Coast lawyers endorsed public defenders, including most famously the New York lawyer Mayer Goldman, a prolific advocate for the public defender. See Obituary, Mayer C. Goldman, Defender of Poor, N.Y. Times, Nov. 25, 1939, at 21 (on file with the *Columbia Law Review*) (detailing Goldman's endorsement of public defenders). For discussions of Goldman's proposals in the secondary literature, see Fisher, supra note 46, at 195; Babcock, Inventing, supra note 61, at 1277–79; McConville & Mirsky, supra note 44, at 605. For other examples of East Coast support for public defenders, see, e.g., Alexander Holtzoff, Defects in the Administration of Criminal Justice, 9 F.R.D. 303, 305 (1949) (detailing exhortations from New York federal judge for more public defenders).

68. The phrase "elite legal aid movement" is used here to refer to the male- and lawyer-dominated "second generation of legal aid associations [that] developed in the late nineteenth and the early twentieth century" and promoted legal aid as a way to assimilate immigrants, in contrast to the earlier and more expansive tradition of legal aid provided through women's organizations. See Batlan, supra note 43, at 4–5. On this movement's conservatism, see Grossberg, supra note 43, at 20 ("Lacking a comprehensive theory of urban poverty, legal aid lawyers refused to recognize the complex web of political, economic, and social circumstances facing poor urbanites . . . .").

69. See Batlan, supra note 43, at 87 (describing how New York Legal Aid Society defined mission "as Americanizing and disciplining new immigrants into the wage economy"); id. at 97–98 (quoting rhetoric touting legal aid to mitigate workers' "tendency towards communism" and make immigrants into "loyal and enthusiastic citizens").

echoed for decades thereafter.[70] One member of the Boston Voluntary Defenders board predicted that making every defendant "feel he has had a fair trial will go a long way towards reducing crime."[71] Conversely, if defendants concluded "that there is one law for the rich and another for the poor," they might leave prison bitter.[72] Beyond rhetoric, the activities of voluntary defender organizations also embodied the elite legal aid movement's primarily procedural conception of justice.[73] They focused upon representing individual defendants, not lobbying for substantive law reform.

At least in Boston, however, the Voluntary Defenders Committee attracted supporters with a range of political commitments and reasons for joining. Wilbur Hollingsworth came from a modest background and was driven by an idiosyncratic egalitarianism more than by any particular ideology.[74] Longtime board chairman LaRue Brown was a New Deal Democrat and staunch civil libertarian; he sometimes supported Republicans for state office, but only because, like many Massachusetts "Yankees," he viewed the state-level Irish Catholic Democratic Party machine as irredeemably corrupt.[75] Along with his wife Dorothy—whose sister was the *Nation* editor Freda Kirchwey—Brown supported an array of civil libertarian causes and prisoners' rights campaigns in addition to the Voluntary Defenders.[76]

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70. In a 1901 speech, the theologian Lyman Abbott endorsed legal aid as a safeguard against "revolution"; decades later, the Boston Voluntary Defenders Committee quoted his words on the cover of its annual report. Lyman Abbott, Speech at the 25th Anniversary Dinner of the Legal Aid Society in New York, *in* 1953 Annual Report of the Voluntary Defenders Committee (1954) (on file with the *Columbia Law Review*) [hereinafter 1953 Annual Report], *in* LRB Papers, supra note 7, box 1, folder 5.

71. Letter from Samuel Vaughan, Counselor-at-Law, Loring, Coolidge, Noble & Boyd, to Robert Cutler (July 14, 1936) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 1.

72. 1939 Annual Report of the Voluntary Defenders Committee (1940) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11; see also Letter from Samuel Vaughan to Wilbur Hollingsworth, Voluntary Defs.' Comm. (Mar. 7, 1944) (on file with the *Columbia Law Review*) (proposing language for annual report saying because of Voluntary Defenders Committee's provision of counsel to defendants "without funds," no one "can get an anti-social attitude from a feeling that he has not had a proper presentation of his side of the case"), *in* LRB Papers, supra note 7, box 6, folder 7.

73. See Batlan, supra note 43, at 139, 161–62 (describing elite legal aid movement's procedural conception of justice); id. at 168 (contrasting "law-based model of legal aid" with "holistic approach" advanced by social workers).

74. See Garber, supra note 51 (describing how Hollingsworth, late in life, established scholarship for mediocre students).

75. See Obituaries: LaRue Brown Dies, supra note 51 (describing Brown as "highly respected New England liberal and an ardent Democrat" who encouraged "Republican and Democratic [candidates] alike"). On Yankee views of the Irish machine as corrupt and the Massachusetts tradition of liberal Republicans, see generally Geismer, supra note 42, at 14–15.

76. Estelle B. Freedman, Maternal Justice: Miriam Van Waters and the Female Reform Tradition 284, 318 (1996) (referencing Brown's involvement in prison reform);

B. *Characteristics of the Charity Model*

1. *Indigent Defense as Low-Pay Training for Novice Lawyers.* — True to its name, the Voluntary Defenders Committee relied largely on volunteer labor. Long-time chief counsel Wilbur Hollingsworth was paid decently, if modestly.[77] But his assistants worked for free in the organization's early years, and even after they started to be paid, earned very little.[78] For instance, in 1947, the median net income for a salaried Massachusetts lawyer was $5,438.[79] The next year, Hollingsworth's salary was $5,400, right around the median, but assistant counsel Thomas Dwyer made only $2,000—less than half the median—and assistant counsel James Leydon only $1,500.[80] Through the 1950s, Hollingsworth's assistants and secretaries earned "considerably" less than their counterparts in Boston law firms, district attorney's offices, and even the Boston Legal Aid Society.[81] LaRue Brown noted in 1954 that a lawyer at the Boston firm that is now Ropes & Gray had "expressed a desire to work in our office for a year," but could not afford such a large pay cut.[82]

Members of the board rationalized the low-pay, high-turnover model as a way to provide young lawyers with courtroom practice before they joined private firms. Typically, Hollingsworth's assistants stayed for one to three years.[83] The exceptional assistant who stayed much longer—Thomas Dwyer, who worked under Hollingsworth for seven years—proved the rule, because he still viewed the work as a stepping stone

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Obituaries: LaRue Brown Dies, supra note 51.

77. See Memorandum from LaRue Brown 3 (1956) (on file with the *Columbia Law Review*) (describing Hollingsworth's salary as "modest"), *in* LRB Papers, supra note 7, box 6, folder 12.

78. For instance, Laurence Channing's name appears on 1937 letterhead as assistant counsel, but the 1938 budget form notes that he served "on a part time basis without compensation." Form, 1938 Budget for the Voluntary Defenders Committee for the Community Federation of Boston (Nov. 9, 1937) (on file with the *Columbia Law Review*) [hereinafter 1938 Budget Form], *in* LRB papers, supra note 7, box 6, folder 2.

79. Albert P. Blaustein & Charles O. Porter, The American Lawyer 16 (1954).

80. Dwyer's salary for 1948 was listed at $2,000; his 1947 salary was $1,400; and his predicted salary for 1949 was $2,400 in the Committee's Greater Boston Community Fund Budget Summary Sheet for 1949, a copy of which was attached to the Letter from Daniel J. Lyne, Treasurer, Voluntary Defs. Comm., to Samuel Vaughan, Secretary, Voluntary Defs. Comm., Inc. (Nov. 18, 1948) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 9. Leydon's salary was listed at $1,500 for 1948 and was predicted at $2,000 for 1949. Id.

81. Notes for Budget Meeting (1954) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 6.

82. Id.

83. For instance, staff lists in the organization's annual reports suggest that Laurence Channing assisted Hollingsworth from 1936 to 1940; Edward Duggan from 1941 to 1942; Irving Helman for a few months in 1943; J. Marshall Leydon from 1948 to 1949; Simon Scheff from 1950 to 1951; George H. Lewald from 1952 to 1954; Howard A. Weiss from September 1953 to August 1954; and Samuel A. Wilkinson from 1955 to 1957.

toward private practice.[84] Upon resigning, he thanked Hollingsworth and the Committee "for the invaluable training and experience."[85] In a 1954 grant application, the Committee explained that "its budget has never been sufficient" to hire "experienced criminal lawyers at high salaries." But, the application continued, that deficiency had its silver lining. The office had made a "practice of hiring young lawyers who are interested in court work and have been recently admitted to the bar . . . . The program [had] worked out so well over the years that it would probably be continued regardless of budgetary requirements."[86]

Students supplied another font of free labor. In 1949, a group of Harvard Law students formed a club to aid Hollingsworth and staff; the next year, the law school gave them office space and an annual subsidy.[87] The Harvard Voluntary Defenders, as they were known, conducted legal research, interviewed clients in jail, tracked down witnesses, and appeared at arraignments and in lower-level district court proceedings.[88] Perhaps aggrandizing their involvement, they soon boasted that they had relieved Hollingsworth's "overworked staff of most of their jail, investigatory, and district (lower) court work."[89] Harvard Law School's dean, Erwin Griswold, praised the program as "a very considerable bargain," enabling "one lawyer operating out of the Boston office," in Suffolk County, to provide indigent defense in neighboring Middlesex County for "a very small expenditure of money."[90] For Griswold, the legal

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84. See Letter from Thomas E. Dwyer to LaRue Brown (Aug. 5, 1953) (on file with the *Columbia Law Review*) (noting Dwyer had for some time been considering taking next "step" to private practice), *in* LRB Papers, supra note 7, box 6, folder 13.

85. Id.

86. Voluntary Defs. Comm., Report for First Six Months of Expansion Program Under Grant from the Fund for the Republic (1954) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 6. This is not to say that the board thought these salaries were adequate. The 1951 Annual Report insisted, "We have got to pay our existing staff more money. We want to pay Mr. Hollingsworth's assistants, respecttively, $5,500 and $3,000 per year." 1951 Annual Report of the Voluntary Defenders Committee (1952) (on file with the *Columbia Law Review*) [hereinafter 1951 Annual Report], *in* LRB Papers, supra note 7, box 6, folder 11.

87. Harvard Law Underwrites HVD Group, Harv. L. Sch. Rec., Nov. 8, 1950, at 1; Voluntary Defender Committee Hailed as Permanent Harvard Law Function, Harv. L. Sch. Rec., Mar. 1, 1950, at 1.

88. Voluntary Defender Committee Hailed as Permanent Harvard Law Function, supra note 87, at 1; see also Joel Woodey, For the Indigents Voluntary Defenders Defend, Harv. L. Rec., Sept. 9, 1960, at 13 (describing student prison visits).

89. Harvard Voluntary Defs., Third Annual Report (1952) (on file with the *Columbia Law Review*), *in* Harvard Law School Special Collections Red Set SMC box 10, folder 3 #8636257 [hereinafter HLS Special Collections]. The same phrase occurs in the Harvard Voluntary Defs., Fifth Annual Report (1954) (on file with the *Columbia Law Review*), *in* HLS Special Collections, supra, Red Set SMC box 10, folder 3 #8636257.

90. Letter from Erwin N. Griswold to Robert Prouty (Oct. 26, 1955) (on file with the *Columbia Law Review*) [hereinafter Letter from Griswold to Prouty], *in* LRB Papers, supra note 7, box 1, folder 7.

problems of the poor could be "effective[ly]" handled by "young Law students . . . in their spare time."[91]

As implied by Griswold's description, elite law schools neither expected nor encouraged their students to pursue criminal defense as a permanent career. By the turn of the twentieth century, the American bar had become highly stratified.[92] Corporate practice sat atop the ladder of prestige; criminal defense, along with personal-injury law, languished at the bottom.[93] At Harvard, renowned for training "corporate experts," students were required to take advanced courses in corporations, taxation, and financial accounting, but only one introductory course in criminal law.[94] Columbia Law School did not even offer criminal law before 1931, when the young Herbert Wechsler revived the course.[95] Wechsler's influential curriculum, however, avoided the "nuts and bolts" of criminal practice, focusing instead upon philosophical rumination about the nature of punishment.[96] The aim was not to prepare criminal practitioners, but high-level policymakers.[97]

On the West Coast, indigent defense could be a respectable career option. In Los Angeles, public defenders enjoyed civil-service protections and salaries, and some of the office's attorneys remained in the office for

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91. Id. ("[O]ne attorney operating out of the Boston office can keep a dozen or more young Law students busy in their spare time working up cases for him . . . . Because of our interest and cooperation, you can provide an effective service in Middlesex County at a very small expenditure of money.").

92. See Robert W. Gordon, The Legal Profession, *in* Looking Back at Law's Century 287, 287–90 (Austin Sarat et al. eds., 2002) (noting increasing stratification in legal industry); see also McConville & Mirsky, supra note 44, at 599–600 (describing "disaffection of elite lawyers from the practice of criminal law" in New York City). This hierarchy had racial and class dimensions. Prestigious corporate firms almost exclusively hired white Protestant men educated at university-based law schools; Jewish and immigrant lawyers educated at proprietary law schools predominated in personal-injury law and criminal defense. African American lawyers and women also often made their start by taking criminal cases. See generally Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer (2012) (chronicling lives of several African American lawyers who took criminal cases early in careers); Barbara Allen Babcock, Women Defenders in the West, 1 Nev. L.J. 1 (2001) (describing careers of several early women lawyers who worked as defenders); Joel E. Black, Citizen Kane: The Everyday Ordeals and Self-Fashioned Citizenship of Wisconsin's "Lady Lawyer," 33 Law & His. Rev. 201, 211–13 (2015) (detailing unusual career of Kate Kane, female lawyer who challenged common beliefs about "women's ability to practice law").

93. See Gordon, supra note 92, at 289 (discussing "prestige hierarchy" within legal profession).

94. Arthur E. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817–1967, at 367 (1967); see also id. at 337–39 (describing curriculum of 1960s).

95. Anders Walker, The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course, 7 Ohio St. J. Crim. L. 217, 227 (2009).

96. Id. at 231.

97. See id. (describing focus on training students on "criminal law policy" and disdain towards "criminal practitioners").

decades.[98] In the 1930s and 1940s, the head public defender in Los Angeles was paid two to four times what Hollingsworth earned (which Hollingsworth does not appear to have known).[99] Each year, the *Los Angeles Times* pictured the public defender alongside the sheriff, postmaster, school superintendent, district attorney, and other local officials in its souvenir poster of "Professional Men of Los Angeles."[100] To elite lawyers back East, however, the civic standing of Western public defenders appeared like a flaw, not a feature. LaRue Brown disparaged public defenders as "costly."[101] In contrast, he wrote, the Voluntary Defenders enjoyed "a tremendous amount of devoted service from underpaid staff members whose primary interest is the work they do [and] not what they get for it."[102] Brown also worried that public defenders would be "subject to political pressure, for appointments to [the] staff etc., because politicians control the finances."[103] Brown did not appear to have had much actual data about public defenders; rather, he projected onto them his general disdain for local government.[104] Like many New England "Yankees," Brown viewed Boston's municipal offices—including the district attorney's office—as swamps of Irish patronage, and assumed that a public defender would become similarly bogged down.[105]

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98. See, e.g., Burt A. Folkart, Ellery Cuff, 92; Joined Public Defender in '28, L.A. Times (Sept. 16, 1988), http://articles.latimes.com/1988-09-16/news/mn-2023_1_public-defender [http://perma.cc/UMW8-6C29] (describing defender's thirty-five-year career); Public Defender Vercoe to Retire, L.A. Times, Oct. 30, 1946, at A1 (on file with the *Columbia Law Review*) (describing defender's thirty-two-year career).

99. See Frederic H. Vercoe's Individual Financial Statement to Bank 1 (Aug. 12, 1937) (on file with the *Columbia Law Review*), *in* Frederic H. Vercoe Papers, Dep't of Special Collections, Charles E. Young Research Library, UCLA, box 8, folder: Financial Statement, Coll. 725. Vercoe recorded an annual salary of $7,200 for 1937; Hollingsworth's salary in 1937 was $1,725. The gap narrowed when Hollingsworth's salary was raised to $3,650.

100. See, e.g., Prominent Public Officials, L.A. Times, Jan. 1, 1924, at 40 (on file with the *Columbia Law Review*); Representative Judiciary, Civic, and Professional Men of Los Angeles, L.A. Times, Jan. 2, 1941, at 20 (on file with the *Columbia Law Review*).

101. 1952 Annual Report of the Voluntary Defenders Committee (1953) (on file with the *Columbia Law* Review) [hereinafter 1952 Annual Report] (noting in Brown's "Statement of the President" that "Office of Public Defender[] is not only less efficient, but more costly to the community"), *in* LRB Papers, supra note 7, box 5, folder 2; see also 1951 Annual Report, supra note 86 (praising voluntary defender as less costly).

102. LaRue Brown, Handwritten Notes on Back of Memorandum for 1956 Budget Request for Voluntary Defenders Committee (Oct. 11, 1955) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 8.

103. Suggestions on Voluntary Defenders Budget (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 10.

104. The observation that Brown did not have much data about other public defender offices is based on the author's review of the defender-related materials in the LaRue Brown Papers.

105. On Boston Yankee disdain for Irish patronage politics, see generally Lawrence J. Vale, From the Puritans to the Projects: Public Housing and Public Neighbors 290–91 (2000).

The pre-*Gideon* dominance of the charity model in Boston was not inevitable, then; it reflected the distinctive choices and political assumptions of prominent East Coast lawyers. Within American legal culture, the West Coast offered an alternative public model by the 1910s and 1920s, but that model's influence was limited by geographic distance and professional hierarchies. Nor was the pre-*Gideon* charity model simply a necessary accommodation to funding levels. The Voluntary Defenders Committee did complain about volatile budgets, but for ideological reasons, never sought public subsidies, which might have proven more stable. Thus, the Voluntary Defenders board not only worked within resource constraints but also helped to generate and preserve those resource constraints through their skepticism about publicly funded legal aid. This skepticism was widely shared among the leaders of the East Coast bar. In 1952, Boston's most famous legal aid advocate, the Hale and Dorr law firm partner Reginald Heber Smith, convened a gentlemen's dinner at the Ritz-Carlton to discuss how the Legal Aid Society and the Voluntary Defenders "might extend their work to meet the full need in Metropolitan Boston . . . without resort to government subsidies."[106]

In some ways, Boston took the charity model to an extreme. New York and Philadelphia also rejected the public defender model, but their voluntary defenders received larger and steadier donations from local philanthropists.[107] As a result, they hired more staff attorneys, paid somewhat higher salaries, and served more clients.[108] The New York Legal Aid Society, which received annual subsidies from Wall Street law firms, functioned something like a public defender by the 1950s in the sense that its lawyers were routinely appointed by the courts any time a defendant requested counsel.[109] Still, the New York and Philadelphia

106. Letter from Reginald Heber Smith to the Hon. John C. Higgins (Feb. 4, 1952) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 4; see also Grossberg, supra note 43, at 17–18 (discussing Smith's career and prominence).

107. See Beaney, supra note 56, at 216 (discussing financing methods for voluntary defenders in New York and Philadelphia).

108. The New York Legal Aid Society's criminal branch had twenty-four staff attorneys in the late 1950s, plus investigators and clerical staff. Philadelphia's voluntary defender had five staff lawyers in the late 1950s, so it was closer in size to Boston's, but it also had four investigators and five clerical workers. Ass'n of the Bar of the City of N.Y. & the Nat'l Legal Aid & Def. Ass'n, Equal Justice for the Accused 121–22 n.16 (1959) [hereinafter Equal Justice for the Accused]. At the New York Legal Aid Society, attorney salaries ranged from $3,200 to $7,650 in 1957; at the Defender Association of Philadelphia, from $4,200 to $5,600. In Boston, the starting salary was only $2,000. Id. at 122 n.21.

109. See Beaney, supra note 56, at 207 ("In . . . New York, it is customary for the court to appoint a lawyer from the legal-aid society when the defendant expresses a desire for counsel."). The New York Legal Aid criminal branch handled 3,035 cases in the first quarter of 1950, Beaney, supra note 56, at 216 n.34, an order of magnitude higher than the Boston Voluntary Defenders Committee's caseloads in the same period. Professors McConville and Mirsky note that the city originally provided office space for the voluntary defenders and describe the organization as an "unofficial" part of "the administration of criminal justice in New York County." McConville & Mirsky, supra note 44, at 623.

voluntary defenders resembled Boston's in the core respects: They were philanthropically rather than publicly funded; they relied partly on volunteer labor; and they paid staff attorneys "less than" their city's market rate for lawyers in private practice.[110]

2. *Defending the "Worthy" Poor.* — The Voluntary Defenders Committee never purported to offer a universal service. Hollingsworth evaluated would-be clients based on their "apparent worthiness,"[111] borrowing a formulation frequently used by civil legal aid societies.[112] However, legal aid societies developed detailed criteria for determining what types of clients and cases were "worthy."[113] A smaller and more informal operation, the Voluntary Defenders Committee instead relied on a loose set of background assumptions about what types of clients the organization represented. The ideal client was young, with no criminal history, accused of a crime he "did not commit," and extremely poor—preferably, "penniless."[114] The opposite of "worthy" clients were "habitual" or "professional" criminals.[115] As explained in an early annual re-

110. Equal Justice for the Accused, supra note 108, at 51.

111. Voluntary Defs. Comm., Request for Public Contributions (Nov. 18, 1935) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 1. The Committee's annual reports identified the organization's mission as representing "worthy" defendants. See, e.g., 1949 Annual Report of the Voluntary Defenders Committee (1950) (on file with the *Columbia Law Review*) (noting Committee was "[o]rganized to provide counsel for indigent and worthy persons accused of crime"), *in* LRB Papers, supra note 7, box 6, folder 11.

112. In determining worthiness, the Voluntary Defenders Committee initially stated that it had adopted "the principles adopted in civil matters by the Boston Legal Aid Society." Voluntary Defs. Comm. Flyer, supra note 54. The New York Legal Aid Society had a similar rule of aiding only "worthy" individuals. McConville & Mirsky, supra note 44, at 615–16, 618–19; see also Batlan, supra note 43, at 132 (quoting Chicago Legal Aid Society board member who disagreed with society's practice of "stating that the society limited its services to 'worthy cases'").

113. See Grossberg, supra note 43, at 15–16 (describing Boston Legal Aid Society's "elaborate screening process designed to detect 'meritorious poor'").

114. 1941 Annual Report of the Voluntary Defenders Committee (1942) ("Voluntary Defenders Committee was organized to give to the penniless defendant . . . the same right to representation that the defendant with funds has always enjoyed."), *in* LRB Papers, supra note 7, box 6, folder 11. "The work of the Voluntary Defenders Committee . . . has demonstrated that there are many more people than we had supposed who, through some unfortunate set of circumstances, find themselves in jail quite helpless to defend themselves in court for a crime they did not commit." Letter from Raynor M. Gardiner to Samuel Vaughan (June 8, 1937) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 2 (describing how clients were mainly under twenty-six years of age and uniformly "without influence"); see also 1936–1937 Annual Report of the Voluntary Defenders Committee (1937) (on file with the *Columbia Law Review*) [hereinafter 1936–1937 Annual Report], *in* LRB Papers, supra note 7, box 6, folder 11.

115. See 1935–1936 Annual Report of the Voluntary Defenders Committee (1936) (on file with the *Columbia Law Review*) [hereinafter 1935–1936 Annual Report] ("The Committee will not . . . defend the habitual criminal."), *in* LRB Papers, supra note 7, box 6, folder 11; 1937–1938 Annual Report of the Voluntary Defenders Committee (1938) (on file with the *Columbia Law Review*) [1937–1938 Annual Report] ("The Committee . . . does

port, the Committee would not represent a "man who admits his guilt but intends to plead not guilty and 'beat the rap'; and while the Committee is careful not to judge a man solely by his police record, 'first-offender cases' have a special claim on its services. Organized crime is not helped in any way."[116] Luckily, the Committee reported, this requirement proved easy to enforce, because "professional criminals . . . do not apply to the Voluntary Defender. They want a lawyer of their own choosing, and seem to be able to pay for his services."[117]

Given the larger cultural context of the era, race and gender likely helped to shape the organization's "worthiness" determinations, at least implicitly. By the Progressive Era, ideas about criminality had become closely intertwined with racial stereotypes, and social scientists and legal scholars often described African Americans as especially prone to petty and violent street crime.[118] Meanwhile, references to "professional criminals" would have invoked, at least in a vague sense, the specter of bootlegging, bookmaking, and protection rackets within European (and especially Italian) immigrant communities.[119] However, the organization's statistics do not permit systematic analysis of exactly how these cultural tropes structured its work. The Committee did not report statistics on its clients by race, although the annual reports' descriptions of particular cases occasionally identify clients as "colored."[120] The reports did include statistics by religion for some years, which could serve as a rough proxy for ethnicity, but reported these statistics only as an aggregate encompassing both rejected and accepted clients, so it is not possible to tally whether certain types of applicants were more likely to be rejected.[121]

The Committee distinguished its "worthy" clients from "professional criminals" partly out of fundraising necessity. American culture had long

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not defend habitual or professional criminals."), *in* LRB Papers, supra note 7, box 6, folder 11; 1938 Budget Form, supra note 78 (defining "scope of work" as "[t]o assist poor people (not habitual criminals) who are accused in criminal cases"); Pamphlet, The Voluntary Defenders Committee: Its Story and Its Service (1936) (on file with the *Columbia Law Review*) ("The Committee does not defend the habitual criminal."), *in* LRB Papers, supra note 7, box 5, folder 3; see also Bos. Globe, Before the Judge, supra note 54, at 48 (noting Committee will refuse case if defendant "is a gangster or a man with a long record").

116. 1937–1938 Annual Report, supra note 115.

117. 1936–1937 Annual Report, supra note 114.

118. See generally Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America 88–145 (2011) (detailing development of social scientific ideas linking race with criminality during Progressive Era).

119. On cultural tropes of organized crime, see David E. Ruth, Inventing the Public Enemy: The Gangster in American Culture, 1918–1934, at 2 (1996).

120. See, e.g., 1945 Annual Report of the Voluntary Defenders Committee (1946) (on file with the *Columbia Law Review*) ("[W]e were asked to represent four colored soldiers."), *in* LRB Papers, supra note 7, box 5, folder 2; 1952 Annual Report, supra note 101 (describing client as "extremely polite and naive little colored boy").

121. See, e.g., 1952 Annual Report, supra note 101 (providing number of defendants identified as Catholic, Protestant, and Jewish).

stigmatized swaths of the poor as "undeserving" of aid, particularly those who indulged in any kind of vice.[122] To repel that stigma, the Committee filled its annual reports with elaborate narratives of sympathetic clients: gullible outsiders framed by career criminals; family men whose children suffered while their fathers were jailed.[123] Dynamics within the legal profession further encouraged the Committee to portray its clients as extremely destitute and socially isolated. By the 1930s, the complaint that unscrupulous lawyers made a lucrative specialty out of abetting "professional criminals" was a cliché of elite law reform literature.[124] To maintain support from the private bar, the Committee needed both to distance itself from disreputable criminal practice and to avoid any appearance of competing with reputable private firms. Fundraising materials emphasized that the Voluntary Defenders would not represent "anyone who can pay a lawyer."[125]

But "worthiness" was not merely a fundraising device, nor, in practice, an unyielding moral prerequisite. The Voluntary Defenders became much less selective over time, suggesting that "worthiness" also functioned pragmatically as a flexible framework for allocating limited

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122. Michael B. Katz, The Undeserving Poor: America's Enduring Confrontation with Poverty 1–3, 6–7 (rev. ed. 2013) (tracing history of cultural ideas about "undeserving poor" and "redefinition of poverty as a moral condition"); see also David Huyssen, Progressive Inequality: Rich and Poor in New York, 1890–1920, at 70–80 (2014) (tracing intellectual genealogy of distinctions between "worthy" and "unworthy" poor and providing examples of charities denying aid to those deemed "unworthy"); Vale, supra note 105, at 19–20, 26–28 (describing how, dating to seventeenth century, Massachusetts communities were reluctant to aid poor people "seen as undeserving"); id. at 86 (describing how Progressive Era settlement houses in Boston categorized poor into "hierarchy of worthiness").

123. See, e.g., 1946 Annual Report of the Voluntary Defenders Committee (1947) (on file with the *Columbia Law Review*) [hereinafter 1946 Annual Report] (lamenting "sheer tragedy" that families suffer when father is wrongfully imprisoned), *in* LRB Papers, supra note 7, box 6, folder 11; 1952 Annual Report, supra note 101 (describing typical client as "ordinary individual involved in difficulties which were many times due to circumstances beyond his control"); Voluntary Defs. Comm., Its Story and Its Service (1936) (on file with the *Columbia Law Review*) (describing "[t]hree [s]tories from [c]ase [r]ecords," including case of "young clerk" who was "unjustifiably arrested"), *in* LRB Papers, supra note 7, box 5, folder 3.

124. See, e.g., U.S. Nat'l Comm'n on Law Observance & Enf't, Report on Prosecution 27–28 (1931) (decrying "'professional' defender" who "advise[s] lawbreakers how to operate successfully"); Sienna Delahunt, The Gentlemen at the Bar, *in* Raymond Moley, Our Criminal Courts 62, 62–63 (1930) (describing criminal practice as disreputable "since it is impossible to build up a clientele except among professional criminals").

125. E.g., 1935–1936 Annual Report, supra note 115 ("The committee will not represent anyone who can afford to employ private counsel . . . ."); 1937–1938 Annual Report, supra note 115 (noting "Committee does not charge fees, nor does it defend anyone who can pay a lawyer" and "rejects a case if the defendant or his family can afford to pay for counsel"). New York voluntary defenders had the same policy of "avoiding cases in which a private lawyer could earn a fee." McConville & Mirsky, supra note 44, at 625 n.274; see also id. at 625–26 (discussing how New York defenders avoided antagonizing private bar by refusing to take compensable cases).

resources. In the early years, Hollingsworth rejected one-fourth to one-third of would-be clients.[126] By the late 1950s, the Committee only rejected one applicant out of ten.[127] By then the Committee had a larger budget and staff, especially as compared to the war years of the 1940s when Hollingsworth essentially worked alone.[128] The Committee had not officially relaxed its standards, nor did it systematically benchmark caseloads to resources: While both caseloads and budgets steadily increased, they did not increase in perfect tandem, so per-case expenditures fluctuated year-to-year.[129] Still, on some intuitive level, Hollingsworth seems to have gradually expanded the meaning of "worthiness" based on a rough sense of the Committee's growing capacity.[130]

The Committee also kept caseloads low by limiting its jurisdiction to particular courts. By one estimate, the Voluntary Defenders Committee handled 70% of all felony cases in Suffolk County.[131] In neighboring counties, however, the Committee only operated during years when funds allowed and, except for a Springfield office opened in 1954, had virtually no presence outside of metropolitan Boston.[132] And even in Boston, the Committee generally appeared only in the superior courts, not the lower-level district courts.[133] In fact, lawyers rarely appeared in

126. See infra Table 2 (tallying percentage of cases rejected during 1935–1958).

127. See infra Table 2 (showing percentage of cases rejected decreased significantly).

128. See 1943 Annual Report of the Voluntary Defenders Committee (1944) [hereinafter 1943 Annual Report] (on file with the *Columbia Law Review*) (noting organization operated "with a staff reduced to the General Counsel and clerical help"), *in* LRB Papers, supra note 7, box 6, folder 11.

129. See infra Table 1 (showing fluctuation of per-case expenditure during 1935–1958).

130. The emphasis here is on the word "rough." By the late 1950s, the Committee was running budget deficits, and its 1958 Annual Report described the organization as "undermanned and underpaid." Annual Report of the Voluntary Defenders Committee, *in* Indigent Defendant 5, 5 (1958) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 3.

131. Wilbur Hollingsworth, [Draft] Budget 1964–5 (Sept. 12, 1963) (on file with the *Columbia Law Review*) ("For many years the District Attorney of Suffolk County has estimated that the Defenders Committee is obliged to handle at least seventy percent of the felony cases."), *in* LRB Papers, supra note 7, box 2, folder 4.

132. See 1952 Annual Report, supra note 101 (referencing previous year's discontinuation of work in Middlesex County and lamenting "limited funds" require "confin[ing] our work to Suffolk County"). On the Springfield office, see Clipping, Defenders' Service Launched, Springfield Daily News, Aug. 23, 1954 (on file with the *Columbia Law Review*) (reporting opening of Voluntary Defenders Committee's office in Springfield), *in* LRB Papers, supra note 7, box 1, folder 6. Even though it generally operated on a larger scale, the New York Legal Aid Society also shrunk its geographic jurisdiction in years where it received fewer contributions. See Beaney, supra note 56, at 217 n.36 (discussing how New York Legal Aid Society suffered budget deficit in 1933 and temporarily discontinued branch service in Harlem and Brooklyn).

133. See 1946 Annual Report, supra note 123 ("For some years we have accepted very few cases in the District and Municipal Courts . . . . While we would like to appear more often in these courts . . . with the staff consisting of only two attorneys, to attempt to defend persons in all of these courts would be physically impossible.").

the Massachusetts district courts for either side; non-attorney police officers often represented the prosecution.[134] The long-term descendants of the eighteenth-century justice of the peace courts, the district courts remained judge-dominated, fast-paced, informal tribunals into the late twentieth century, with verdicts issued by judges rather than juries.[135] District court proceedings were generally not even transcribed, as there was no need to preserve the record for appeal, since parties who lost in district court could request a de novo jury trial in superior court.[136] Yet the district courts resolved 95% of the criminal cases in Massachusetts, which were primarily misdemeanors but included some low-level felonies.[137]

3. *Defenders as Trial Lawyers.* — Within its limitations, the Voluntary Defenders Committee promoted a robust conception of a defender's duties to his clients that emphasized the vindication of innocence claims. Early in his tenure, Hollingsworth reflected on what he had learned about the benefits of defense counsel. "Juries are usually able to truly decide the case from the facts," he observed, but "without counsel, a defendant is often unable to get the true facts before the jury."[138] Hollingsworth described a recent manslaughter trial in which his client was charged with killing her husband; she claimed that he was abusive and that she had stabbed him in self-defense.[139] Thanks to Hollingsworth's work tracking down eyewitnesses to corroborate her

134. See Fisher, supra note 46, at 4, 244 n.8. Into the 1970s, nonattorney police officers prosecuted district court cases in Boston—a practice the Boston Lawyers' Committee for Civil Rights decried as possibly ultra vires and as "demean[ing to] the criminal process." Stephen Bing & Stephen Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston 29–30 (1970); see also Harris, In Criminal Court—I, supra note 2, at 48 (observing district attorneys prosecuted felonies in Boston Municipal Court, but police officers prosecuted misdemeanors).

135. See Margo Miller, Should State's District Courts Have Juries?, Bos. Globe, Aug. 1, 1971, at 10 (on file with the *Columbia Law Review*) (describing history of district courts, lack of juries, and criticisms of courts' informality). The district courts were unified in 1921 into a statewide system of seventy-six district courts, with the Boston Municipal Court remaining administratively independent. Beginning in 1964, they began experimenting with juries in some cases. Mass. Corr. Ass'n, The Basic Structure of the Administration of Criminal Justice in Massachusetts 34–35, 70 (5th ed. 1968) [hereinafter Basic Structure].

136. See Basic Structure, supra note 135, at 33 (noting that district court trials proceed "without a jury but a person thus convicted has a right to a jury trial de novo, in the Superior Court"); Anson Smith, Poorer the Man, Poorer the Justice, Bos. Globe, Jan. 19, 1972, at 1 (on file with the *Columbia Law Review*) (describing de novo trial system and noting district court trials were transcribed only if defendant hired his own stenographer).

137. See Basic Structure, supra note 135, at 33 ("About 95% of all criminal charges are disposed of" in district courts). In addition to misdemeanors, district courts could try felonies with possible sentences of up to five years but could only impose sentences of up to two-and-a-half years. Id. at 34.

138. Letter from Wilbur G. Hollingsworth to Samuel Vaughan (Dec. 3, 1937) (on file with the *Columbia Law Review*) [hereinafter Letter from Hollingsworth to Vaughan Dec. 3, 1937], *in* LRB Papers, supra note 7, box 6, folder 2.

139. Id.

story, the jury acquitted the woman of all charges.[140] Hollingsworth did not mention trying to negotiate a plea deal for the woman, nor (in an age before the full constitutionalization of criminal procedure) did he mention mounting any procedural challenges to the police investigation.[141] Rather, he defined his role as investigating the facts and arguing, on the basis of those facts, for the jury to acquit.[142]

Trial practice was central to Hollingsworth's work—which is not to say that he tried all or even most of his cases. If a client admitted his guilt, Hollingsworth encouraged a plea and might reject altogether a client who admitted guilt but insisted on a trial.[143] However, Hollingsworth tried enough cases that trial preparation and court appearances must have occupied the bulk of his time. For example, out of the 264 cases where Hollingsworth actually represented defendants in 1944, he pled out approximately 172—about 65%—of his cases and tried about 17%—approximately forty five cases.[144] That worked out to forty-five trials—almost one trial every work week.[145] Also, when he did try cases, he usually won.[146] In 1944, for instance, he won a "not guilty" verdict in thirty of his forty-five trials.[147] Hollingsworth boasted that no "law firm in Boston . . . [had] a higher percentage of acquittals."[148] For clients, then, the charity model often worked well, but those clients were a small group. Hollingsworth could try so many cases because he had the

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140. See id. (explaining benefit defendant receives when counsel investigates incident for which client is charged). On a separate occasion, Hollingsworth noted an investigation he undertook for a robbery case that ultimately defeated a strong case against the defendant. See Letter from Wilbur G. Hollingsworth to Samuel Vaughan (May 4, 1937) (on file with the *Columbia Law Review*) (recounting how counsel's investigation "established a story quite different from that told by the complaining witnesses"), *in* LRB Papers, supra note 7, box 6, folder 2.

141. See Letter from Hollingsworth to Vaughan Dec. 3, 1937, supra note 138 (describing investigation and trial without mention of plea negotiations or procedural objections).

142. Id. For similar descriptions of his role in these terms, see 1944 Annual Report of the Voluntary Defenders Committee (1945) (on file with the *Columbia Law Review*) [hereinafter 1944 Annual Report] (documenting Voluntary Defenders Committee's initiation of investigation upon accepting defense of indigent client), *in* LRB Papers, supra note 7, box 6, folder 11; cf. Letter from Wilbur G. Hollingsworth to Samuel Vaughan (May 3, 1943) (on file with the *Columbia Law Review*) (noting his work sometimes includes social services referrals), *in* LRB Papers, supra note 7, box 6, folder 6.

143. See 1944 Annual Report, supra note 142 (explaining Committee's decision not to represent guilty defendants who insist on going to trial).

144. See id. (documenting results of 450 applications for assistance made to Committee).

145. See id. ("Counsel for the Committee represented defendants in forty-five trials.").

146. Id.

147. Id. Similarly, of sixty-seven charges that went to trial in 1943, Hollingsworth won acquittals on fifty-one charges. 1943 Annual Report, supra note 128.

148. Ratio of Defendants Lacking Counsel Brings Free Legal Service to Area, Springfield Union, Aug. 23, 1954 (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 6.

discretion to reject cases altogether. There is no way to track what happened to the nameless defendants whom Hollingsworth refused to represent or the many more who never made it into his office. Perhaps they found other lawyers, but many of them probably went to court alone and pled guilty.

TABLE 1: VOLUNTARY DEFENDERS COMMITTEE EXPENDITURES AND CASELOAD, 1935–1958

Year	Nominal Total Expenditures	Real Total Expenditures (2013 $)	Total Cases Handled*	Nominal Expenditures per Case**	Real Expenditures per Case**
FY 1935–1936	$1,977	$33,200	151	$13	$219
FY 1936–1937	2,767	44,900	193	14	227
FY 1937–1938***	4,924	81,400	298	17	273
1939	5,502	92,300	321	17	288
1940	5,491	91,200	280	20	326
1941	5,789	91,500	266	22	344
1942	5,570	79,600	257	22	310
1943	6,224	83,800	263	24	319
1944	6,951	92,000	254	27	362
1945	7,597	98,300	230	33	427
1946	9,519	113,000	247	39	457
1947	9,924	103,000	343	29	300
1948	13,264	128,000	387	34	331
1949	16,139	158,000	428	38	369
1950	16,164	156,000	399	41	391
1951	19,671	176,000	625	31	278
1952	21,408	188,000	648	33	290
1953	24,063	210,000	844	29	249
1954	24,405	212,000	1,030	24	206
1955	29,730	259,000	1,160	26	223
1956	*No Data*	*No Data*	*No Data*	*No Data*	*No Data*
1957	*No Data*	*No Data*	*No Data*	*No Data*	*No Data*
1958	35,334	285,000	1,120	32	258

* In the Annual Reports published from 1936 through 1959, the Voluntary Defenders listed a total number of cases including a breakout figure for “cases declined.” “Cases declined” is subtracted from total cases to arrive at the “total cases handled.” It should be noted that the Committee sometimes conducted some research and investigation in these cases before ultimately declining to represent the defendant. However, because there is no way of assessing how much time was generally spent on these cases, these preliminary investigations have been excluded from the total cases handled, so that the caseload data above reflects only cases in which the Voluntary Defenders represented the defendant in court in some capacity. It is likely that the Voluntary

Defenders did not spend enough time on these cases to alter the data in any systematic way.

** These figures were determined by dividing the total expenditures by the total cases handled. This figure should be interpreted only as a rough average to aid in comparing the Committee's level of resources across years, not as an estimate of resources devoted to any individual case, which likely varied from case to case.

*** The data for 1937–1938 is for June 1937 through September 1938, not a twelve-month year.

Rounding Note: In this table, all nominal figures have been rounded up to the next whole dollar. The raw figures (including dollars and cents, if given) were entered for conversions, but the conversion calculator rounds to the nearest hundred or thousand dollars (depending on the order of magnitude).

Sources: Annual Reports (1936–1955, 1959), *in* LRB Papers, supra note 7. The Measuring Worth simple purchasing power calculator (http://measuringworth.com/), which multiplies by percentage increase in Consumer Price Index (CPI), was used to convert nominal figures into real figures. For detailed citations and data used for calculations, see Appendix.

TABLE 2: VOLUNTARY DEFENDERS COMMITTEE PERCENTAGE OF CASES DECLINED, 1935–1958

Year	Number of Applicants	Number of Cases Declined	Percent Declined
FY 1937–1938	317	97	31%
1939	425	104	24%
1940	450	51	11%
1941	406	140	34%
1942	356	99	28%
1943	389	126	32%
1944	358	104	29%
1945	325	95	29%
1946	360	113	31%
1947	488	145	30%
1948	485	98	20%
1949	518	90	17%
1950	508	109	21%
1951	708	83	12%
1952	735	87	12%
1953	915	71	8%
1954	1,185	155	13%
1955	1,250	90	7%
1956	*No Data*	*No Data*	*No Data*
1957	*No Data*	*No Data*	*No Data*
1958	1,297	177	14%

Sources: Annual Reports (1936–1955, 1959), *in* LRB Papers, supra note 7. For detailed citations and data used for calculations, see Appendix.

C. *Right-to-Counsel Doctrine Undermines the Charity Model*

In the 1950s, jurists increasingly hinted that counsel might be a constitutional right, not a charitable benefaction.[149] Under the 1942 Supreme Court case of *Betts v. Brady,* counsel was constitutionally required in noncapital cases only if they presented special circumstances.[150] In its first eight years of applying *Betts,* the Court found

149. Of course, for federal cases, the Supreme Court found a right to appointed counsel earlier. See Johnson v. Zerbst, 304 U.S. 458, 467 (1938) ("[T]he Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel . . . ."). Prior to *Gideon,* however, the scope of that right and its practical implementation generated "widespread confusion." Beaney, supra note 56, at 76.

150. 316 U.S. 455 (1942); see also Bute v. Illinois, 333 U.S. 640, 677 (1948) (restating right to counsel in noncapital state felony cases presenting "special circumstances").

"special circumstances" about half of the time.[151] But after 1950, the Court found "special circumstances" in every right-to-counsel case that it decided.[152] And in 1956, the Court pronounced that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[153] Although not made in the context of a right-to-counsel ruling, such a "sweeping statement" cemented the perception that the Warren Court was especially concerned with the plight of indigent defendants.[154] Court-watchers speculated that the Justices would soon replace *Betts* with a blanket right to counsel.[155] In 1960, the attorney general of Massachusetts, Ed McCormack, foresaw that it was "just a question of time . . . before the right of representation by counsel will invariably be held a constitutional right."[156]

The doctrinal momentum exerted a gravitational pull upon the elite bar's policy preferences. As the Court moved towards a more comprehensive right to counsel in the 1950s, the elite bar adjusted to the idea of publicly funded indigent defense. For too long, wrote the Wall Street law firm partner and prominent legal-aid supporter Harrison Tweed, "lawyers as well as laymen" had equated public defense with the "hobgoblin" of communism.[157] In reports and model legislation, bar leaders now recommended that cities establish organized defender offices.[158] These recommendations left to local choice whether these offices should be fully public or public–private hybrids. The New York Legal Aid Society proposed in 1957 that it accept public funds for criminal cases but remain a private entity, lest indigent defense become

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151. See Beaney, supra note 56, at 170 ("In the fourteen noncapital cases which came before the Supreme Court between 1942 . . . and 1950, half of the claims were allowed and half rejected.").

152. See Gideon v. Wainwright, 372 U.S. 335, 350–51 (1963) (Harlan, J., concurring) (noting Court had not found "special circumstances to be lacking" since 1950); see also Israel, Overruling, supra note 56, at 251–61 (summarizing line of cases through which Court eroded *Betts* rule).

153. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

154. Israel, Overruling, supra note 56, at 245; see also Israel, From a 1963 Perspective, supra note 26, at 2041–42 (charting influence of "*Griffin* principle" on arguments made to Court and on its opinions).

155. See Beaney, supra note 56, at 156–58, 170 (noting Court saw increase in "petitions for review by the Supreme Court of state cases involving counsel claims").

156. Letter from Edward McCormack to Paul Feeney (May 25, 1960) (on file with the *Columbia Law Review*) [hereinafter Letter from McCormack to Feeney] (recounting suggestion of Dean Erwin Griswold of Harvard Law School), *in* LRB Papers, supra note 7, box 1, folder 12.

157. Harrison Tweed, Foreword to Equal Justice for the Accused, supra note 108, at 5, 5–6. Tweed had served as president of the New York Legal Aid Society, the New York City Bar Association, and the American Law Institute.

158. Equal Justice for the Accused, supra note 108, at 29–30; Brownell, supra note 34, at 249; Commissioners on Uniform State Laws Approve Model Defender Act, 43 J. Am. Judicature Soc'y 95, 95 (1959). For a scholarly endorsement of the public defender model from the same decade, see Beaney, supra note 56, at 220–21, 224.

"an indirect form of patronage."[159] But even partial endorsements of public defense reflected significant movement in the profession's mainstream position. In the civil realm, many bar leaders accepted public-sector legal aid only in the late 1960s and even then, only reluctantly.[160]

Why did the elite bar begin to shift its position? In theory, a right to counsel could still be satisfied through private charity or even case-by-case appointments. But elite lawyers had long complained about the quality of court-appointed counsel—those complaints were partly why the first public and voluntary defenders had been established.[161] Nor was it realistic to imagine that the volume of cases implied by a universal entitlement could be handled through private charities alone, given the volatility of philanthropic funding. And in a world where the right to counsel was an enforceable right, it would not be merely unfortunate if charities could not serve everyone. It would be, in the eyes of lawyers, dangerous: The federal courts might start releasing state prisoners if their convictions had been uncounseled.[162] More generally, lawyers may have simply assumed some association between rights and public funding, even if the association was not fully theorized. While state constitutions confer many affirmative rights, American legal culture had no strong jurisprudential tradition explaining how positive rights derived from the federal Constitution should be implemented.[163]

In Boston, judicial recognition of a right to counsel quite literally undermined the charity model of indigent defense. Throughout the 1950s, the Voluntary Defenders Committee's primary funder—United Community Services, metropolitan Boston's community chest—threatened to withdraw its donations, arguing "that a job of this magnitude should be undertaken by the State rather than by a private charitable organization."[164] For a time, the Committee staved off its funders' threats

159. McConville & Mirsky, supra note 44, at 629 (quoting Legal Aid Society Attorney in Chief).

160. See Teles, supra note 26, at 34.

161. See McConville & Mirsky, supra note 44, at 596–99 (describing Progressive Era critiques of assigned counsel).

162. In 1954, Massachusetts observers warily noted "a number of U.S. Supreme Court decisions" suggesting that *Betts* had "created a grave problem for Massachusetts." Clipping, Defenders' Service Launched, Springfield Daily News, Aug. 23, 1954 (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 6.

163. See Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 1–3 (2013) ("America is widely believed to be exceptional in its lack of positive constitutional rights and its exclusive devotion to negative ones," but "state constitutions force us to question th[is] ubiquitous assertion . . . ."). In other policy contexts, poverty lawyers' attempts to constitutionalize "a more robust welfare state" would meet with "extremely limited success." Id. at 5.

164. Memorandum from Raynor Gardiner to LaRue Brown in Regard to Voluntary Defender (Sept. 28, 1955) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 7. On reliance on United Community Services (UCS) by 1950, see 1950 Annual Report of the Voluntary Defenders Committee (1951) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2. "Community chest" or

with supportive letters from local legal luminaries.[165] But then, in 1958, the Massachusetts Supreme Judicial Court adopted an administrative rule requiring the superior courts to appoint counsel in all felony cases.[166] United Community Services reacted by ominously informing the Voluntary Defenders that its funding for 1960 represented a "terminal allotment."[167] After years of threats, United Community Services had followed through, arguing—in LaRue Brown's paraphrase—that if the state requires counsel, "let the state pay for it."[168]

With its coffers dwindling, the Voluntary Defenders Committee took its funders' advice and lobbied for statewide public defender legislation.[169] In response, in 1960, the Massachusetts legislature enacted a barebones bill establishing a "Massachusetts Defenders Committee" to be appointed by the state Judicial Council.[170] The brief act stated only that

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"red feather" agencies were established in cities nationwide in the first decades of the twentieth century to centralize fundraising for all of a region's social services agencies, and federated into United Way in 1970. See Olivier Zunz, Philanthropy in America 51–52, 69, 177 (2011). On UCS of Boston in particular, see Stephan Thernstrom, Poverty, Planning, and Politics in the New Boston 9–10 (1969).

165. See, e.g., Letter from Griswold to Prouty, supra note 90 (encouraging UCS to grant Committee's request for financial support); Letter from Charles E. Wyzanski, Jr. to LaRue Brown (Oct. 21, 1955) (on file with the *Columbia Law Review*) (expressing "unreserved[] . . . support" for Committee's funding application to UCS and permitting Brown to use letter accordingly), *in* LRB Papers, supra note 7, box 1, folder 7. Describing other letters, see Memorandum from Wilbur Hollingsworth to LaRue Brown (Nov. 7, 1955) (on file with the *Columbia Law Review*) (listing letter senders who wrote to "urge full support of our office by the U.C.S. so that it will not be necessary to curtail any of our present activities"), *in* LRB Papers, supra note 7, box 1, folder 7. It is not entirely clear why Boston's UCS became so opposed to funding indigent defense; Philadelphia's equivalent organization funded that city's Defender Association without complaint. UCS had a conservative reputation within Boston, but under its 1950s leadership was trying to move away from that reputation, for instance by funding juvenile delinquency projects. See Thernstrom, supra note 164, at 8–9.

166. Sup. Judicial Ct. R. 10, 337 Mass. 812, 813 (1958); see also Pugliese v. Commonwealth, 140 N.E.2d 476, 479 (Mass. 1957) (holding state constitution's due process guarantee required appointing counsel for intellectually disabled, noncapital defendant).

167. Letter from UCS Associate Director to Raynor M. Gardiner (Feb. 8, 1960) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 12.

168. LaRue Brown, Equal Justice Under the Law, 50 Mass. L.Q. 57, 59 (1965).

169. Opinion, From Private to Public, Bos. Pilot, May 14, 1960 (on file with the *Columbia Law Review*) (advocating for speedy passage of pending legislation that would provide indigent defense services "at public expense" to "entire Commonwealth"), *in* LRB Papers, supra note 7, box 1, folder 12; see also LaRue Brown, Letter to the Editor, Averting Broken Lives, Broken Homes Not Measured in Dollars and Cents, Bos. Globe, May 7, 1959, at 14 (on file with the *Columbia Law Review*) (urging legislature to enact public defender bill).

170. Act of Aug. 5, 1960, ch. 565, 1960 Mass. Acts 490, 490–91 (codified at Mass. Gen. Laws ch. 221, § 34D) (repealed in 1983); At the State House: Senate Sends Furcolo Bill to Create 11-Member Public Defender Group, Bos. Globe, Aug. 4, 1960, at 2 (on file with the *Columbia Law Review*); see also Hollingsworth–Brown Correspondence Tracking the Bill's Progress (Aug. 1960) (on file with the *Columbia Law Review*) (documenting bill's passage

the Committee would "provide counsel" for indigent defendants in all cases where counsel was legally required, and authorized the Committee to "adopt such rules and regulations" and "appoint such professional, clerical and other assistants as may be necessary" to carry out that task.[171] In effect, the new agency was just the Voluntary Defenders Committee with a few new board members and a new name.[172] LaRue Brown remained chair of the board, Wilbur Hollingsworth remained chief counsel, and for a time, the agency even used its predecessor's leftover stationery.[173]

II. THE *GIDEON* CONSENSUS: TOWARDS A PUBLIC MODEL OF INDIGENT DEFENSE

Handed down in March 1963, *Gideon* catalyzed the elite bar's halting support for urban public defender offices into an establishment consensus.[174] This effect may seem unexpected because *Gideon* arose from a sleepy Florida beach town and the Supreme Court's published opinions in *Gideon* nowhere use the phrase "public defender." Reading the decision literally, one might conclude that the Court intended only that judges would appoint private counsel for indigent defendants, case by case. Justice Black's majority opinion opens by highlighting the Florida trial judge's apology to the accused burglar Clarence Earl Gideon that he was unable to "appoint Counsel to defend you in this case."[175] Later in the opinion, Justice Black emphasizes that defendants need lawyers because the government "hires lawyers to prosecute."[176] Nowhere acknowledged in *Gideon* is the reality that in some places—including Alameda

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by Senate and signing into law by governor), *in* LRB Papers, supra note 7, box 1, folder 13. The bill passed with an emergency preamble making it effective immediately, which Attorney General Ed McCormack suggested. See Letter from McCormack to Feeney, supra note 156.

171. Mass. Gen. Laws ch. 565, § 1 (1960). The statute was later revised to provide for appointment directly by the Massachusetts Supreme Judicial Court. Act of April 24, 1962, ch. 366, 1962 Mass. Acts (codified at Mass. Gen. Laws ch. 221, § 34D) (repealed in 1983) ("[P]lacing the appointive power of the members of the Massachusetts Defenders Committee in the justices of the Supreme Judicial Court.").

172. See Letter from Wilbur Hollingsworth to LaRue Brown (Aug. 16, 1960) (on file with the *Columbia Law Review*) (reporting Judicial Council named five past Voluntary Defenders Committee board members and six new members to initial board of Massachusetts Defenders Committee), *in* LRB Papers, supra note 7, box 1, folder 12.

173. See id. For leftover stationery, see Letter from Wilbur G. Hollingsworth to LaRue Brown (Oct. 10, 1960) (showing correction to new name on former Committee's letterhead), *in* LRB Papers, supra note 7, box 1, folder 12.

174. For background on *Gideon*, see Lewis, *Gideon*'s Trumpet, supra note 16, at 3–10. For the many rich journalistic and first-person remembrances of the backstory behind *Gideon* and its immediate effects in Florida, see Houppert, Chasing *Gideon*, supra note 19; Bruce R. Jacob, The *Gideon* Trials, 99 Iowa L. Rev. 2059 (2014); Bruce R. Jacob, Memories of and Reflections About *Gideon v. Wainwright*, 33 Stetson L. Rev. 181 (2003).

175. Gideon v. Wainwright, 372 U.S. 335, 337 (1963).

176. Id. at 344.

County, California, where Chief Justice Warren, as district attorney, had helped to establish a public defender in 1927—the government had also long hired lawyers to defend.[177]

But beyond *Gideon*'s text, a penumbral *Gideon* quickly developed through the decision's reception and elaboration by elite legal-liberal journalists, lawyers, and academics.[178] In these commentators' interpretation, *Gideon* had less to do with rural Florida than with cities, and either required or strongly encouraged those cities to establish public defenders or some private equivalent.[179] Within a year of the decision, *New York Times* reporter Anthony Lewis summarized and advanced this reading of *Gideon* in his widely read, celebratory book about the case, *Gideon's Trumpet*. After recounting the history of public defenders, Lewis reported an expert consensus that "there is no decent alternative in populous urban areas to an office that has a regularly employed staff of lawyers representing indigents," whether "a public defender or, alternatively, a voluntary legal-aid organization."[180] In their public speeches if not in their legal opinions, Supreme Court Justices endorsed this consensus. At a national conference on indigent defense in 1969, Chief Justice Warren fondly recalled his interactions with the Alameda County public defender,[181] and his recently appointed successor, Chief Justice Burger, predicted that "the organized defender approach" would soon "be the prevailing mode of representation."[182]

Throughout the 1960s and into the 1970s, this reading of *Gideon* was reinforced through professional handbooks of "best practices" and quasi-official guidance documents.[183] A handbook published by the National

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177. Moreover, the other indigent defense case decided on the same day, Douglas v. California, 372 U.S. 353 (1963), involved the Los Angeles public defender.

178. As one New York judge observed, the decision "prompted the legal profession to reexamine the procedures by which [the right to counsel] is afforded to an indigent defendant." Mitchell D. Schweitzer, Book Review, 65 Colum. L. Rev. 183, 184 (1965) (quoted in Israel, From a 1963 Perspective, supra note 26, at 2057). On midcentury legal liberalism, see Laura Kalman, The Strange Career of Legal Liberalism 2 (1998) (defining legal liberalism as "trust in the potential of courts, particularly the Supreme Court," to enact nationwide policy change and noting this faith has been associated with political liberalism since Warren Court era, because of "liberal law professors' and social reformers' faith in the transformative power of the Warren Court" increased).

179. See Lewis, *Gideon*'s Trumpet, supra note 16, at 209–10 (summarizing commentary after *Gideon*).

180. Id. at 200.

181. Albert W. Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179, 1220 (1975).

182. Beth Lynch & Nancy E. Goldberg, The Dollars and Sense of Justice; A Study of the Law Enforcement Assistance Administration as It Relates to the Defense Function of the Criminal Justice System, at v (1973).

183. See Alissa Pollitz Worden & Andrew Lucas Blaize Davies, Protecting Due Process in a Punitive Era: An Analysis of Changes in Providing Counsel to the Poor [hereinafter Worden & Davies, Protecting Due Process], *in* 47 Studies in Law, Politics, and Society: New Perspectives on Crime and Criminal Justice 71 (Austin Sarat ed., 2009) (noting by 1970s,

Legal Aid and Defender Association (NLADA) in 1965 explained that case-by-case appointments could work only in low-poverty areas: "In urban areas the community should consider the institution of a public defender or other centrally-administered service."[184] In 1973, the federal government's National Advisory Commission on Criminal Justice Standards and Goals recommended that every jurisdiction maintain both "a full-time public defender organization, and a coordinated assigned counsel system involving substantial participation of the private bar."[185] Although contemplating the occasional use of assigned counsel, these standards envisioned public defenders as the primary providers of indigent defense.[186] The standards further specified that a city's head public defender should be paid as highly as "the presiding judge of the trial court," while line defenders should be salaried comparably to "attorney associates in private law firms."[187] Joint standards issued by the NLADA and the American Bar Association (ABA) similarly proposed "experienced, competent, and zealous" public defenders salaried roughly the same as prosecutors.[188]

The *Gideon* consensus gained material support from the Ford Foundation, the juggernaut of Cold War-era big philanthropy, which operated almost as an unofficial government agency in the 1960s.[189] In

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legal profession "agreed on the core components of a 'best practices' model for indigent defense"); Nancy A. Goldberg, Defender Systems of the Future: The New National Standards, 12 Am. Crim. L. Rev. 709, 709 (1975) (describing history and content of national standards recommending establishment of defender systems). This Article interprets these documents as efforts to translate *Gideon*'s requirements into policy recommendations. In contrast, Professors McConville and Mirsky lambasted them as a cynical effort to give an "adversarial veneer" to indigent defense systems that they viewed as incompatible with *Gideon*. McConville & Mirsky, supra note 44, at 652; see also id. at 658 (arguing ABA, NLADA, and National Advisory Commission standards sought to rationalize "continued reliance on institutional defenders and assigned counsel," which had failed "to provide adversarial advocacy in conformity with *Gideon*'s mandate").

184. Other Face of Justice, supra note 34, at 164; see also Lynch & Goldberg, supra note 182 (arguing "volume of cases requires an organized system of well-trained defenders" rather than "noblesse oblige").

185. Other Face of Justice, supra note 34, at 159 (quoting Standard 13.5, Method of Delivering Defense Services).

186. The ABA's draft standards on defense services were more equivocal, stating that jurisdictions should utilize "a defender or assigned counsel system or a combination of these." Id. at 161 (quoting Standard 1.2).

187. Id. at 159 (quoting Standards 13.7 and 13.11).

188. In Search of Justice, supra note 33, at 20 (quoting 1965–1966 Defender Standards).

189. See Alice O'Connor, Poverty Knowledge: Social Science, Social Policy, and the Poor in Twentieth-Century U.S. History 126–29 (2002) (describing Ford Foundation and other large foundations' personnel overlap and policy influence on Kennedy and Johnson Administrations); Zunz, supra note 164, at 174–80, 211 (describing enormous wealth and policy influence of Ford Foundation as well as Carnegie, Rockefeller, and Duke Foundations at midcentury and quoting Senator Daniel Patrick Moynihan's description of Ford Foundation's anti-poverty programs as "new level of American government"). On the Ford

1963, the Ford Foundation announced a $2.3 million grant to the NLADA—later increased to $4.3 million—to establish, expand, and assist public defenders nationwide.[190] In *Gideon's Trumpet*, Anthony Lewis celebrated the Ford grant as a visionary philanthropic response to *Gideon*.[191] Actually, the NLADA had applied to Ford for the grant two years before.[192] But *Gideon* infused the initiative with urgency and purpose.[193] *Gideon* also inspired Ford to recruit "a Project Director of national stature" to give the project greater visibility—the U.S. Army's Judge Advocate General, Charles "Ted" Decker.[194]

On paper, the *Gideon* consensus in favor of publicly funded indigent defense contravened elements of the traditional charity model. Voluntary defender organizations had never paid salaries comparable to law firms, nor attempted to represent every indigent defendant within their area. The *Gideon* consensus also left open important questions, including who was supposed to pay for all of these new, well-compensated public defenders. Today, most legal scholars assign states the primary fiscal responsibility for satisfying *Gideon*.[195] Initially, however, influential interpreters of *Gideon* offered a range of views about who should pay for indigent defense. Some, like Clinton Bamberger of the Johnson Administration's Office of Economic Opportunity, did locate responsibility with the states.[196] Others, including Attorney General

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Foundation's role in founding most of the major liberal public-interest law firms, see Teles, supra note 26, at 51–52.

190. See Nat'l Def. Project of the Nat'l Legal Aid & Def. Assoc., Basic Policy Statement and Application Guide 8 (1965) (on file with the *Columbia Law Review*) (describing expanded budget to "provide increased geographic distribution" of National Defender projects), *in* Ford Foundation Archives, supra note 33, Reel 2071, Grant #06400098.

191. See Lewis, *Gideon*'s Trumpet, supra note 16, at 211 (describing Ford Foundation project as response to *Gideon*).

192. Nat'l Legal Aid & Def. Ass'n to the Ford Found., A Proposal for a Defender Development Project (Sept. 17, 1961) (on file with the *Columbia Law Review*) (presenting 1961 letter from NLADA to Ford Foundation applying for grant), *in* Ford Foundation Archives, supra note 33, Reel 3032, Grant #06400098.

193. See Email from John J. Cleary, Former Deputy Dir., Nat'l Def. Project of the Nat'l Legal Aid & Def. Ass'n to Sara Mayeux, Sharswood Fellow, Univ. of Pa. Law Sch. (Oct. 6, 2014, 10:27 PM) (on file with the *Columbia Law Review*) (describing remembrances of former project staffer on National Defender Project as having "helped implement Gideon (1963)").

194. Letter from Clarence H. Faust to Henry T. Heald, Grant Request—Public Affairs (Nov. 6, 1963) (on file with the *Columbia Law Review*), *in* Ford Foundation Archives, supra note 33, Reel 2070, Grant #06400098; see also Letter from Orison S. Marden to Joseph M. McDaniel, Jr. (Oct. 11, 1963) (on file with the *Columbia Law Review*) (describing selection of Project staff, including Decker), *in* Ford Foundation Archives, supra note 33, Reel 2070, Grant #06400098.

195. See, e.g., David Rudovsky, *Gideon* and the Effective Assistance of Counsel: The Rhetoric and the Reality, 32 Law & Ineq. 371, 373 (2014) (noting *Gideon* "imposed an unfunded mandate on state and local governments").

196. See E. Clinton Bamberger, Speech to Nat'l Legal Aid & Def. Ass'n Conference (Nov. 18, 1965) (on file with the *Columbia Law Review*) (referring to "States' obligations to

Robert Kennedy, construed *Gideon* as a mandate to the legal profession.[197] General Decker urged "the bar and the bench [to] seek the necessary funds" to provide indigent defense in their area, whether from private funders or "from other sources."[198] The NLADA proposed yet another alternative, arguing that federal agencies must provide the funds because "the states must comply not only with their own state codes, but with the mandates of the Federal Constitution as well."[199] Given these uncertainties, the *Gideon* consensus among elite commentators sat atop roiling confusion in the criminal court trenches over how to actually implement the consensus.

III. AFTER *GIDEON*: THE HYBRID PUBLIC-CHARITY MODEL OF INDIGENT DEFENSE

Six months after *Gideon*, a hundred New England judges, legislators, journalists, and lawyers gathered to try to figure out what changes *Gideon* required of their states.[200] Similar discussions took place within each state. Lawyers involved with the Massachusetts Defenders Committee referenced *Gideon* frequently in their 1960s correspondence, circulating memos with pithy titles like "Budget under *Gideon*" and less pithy titles like "Study of the Impact upon the Massachusetts Defenders Committee of the Decision by the Supreme Court of the United States of *Gideon v. Wainwright*, 373 U.S. 335."[201] One Massachusetts Defenders board mem-

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provide the representation required by recent decisions of the Supreme Court"), *in* LRB Papers, supra note 7, box 2, folder 11.

197. See Hon. Robert F. Kennedy, Address Prepared for Delivery Before the New England Conference on the Defense of Indigent Persons Accused of Crime 6 (Nov. 1, 1963), http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/11-01-1963Pro.pdf [http://perma.cc/F6B2-BUVH] (stating in reference to providing counsel to indigent, "To you of the courts, the law schools and the profession, I offer the Justice Department's pledge of full cooperation in meeting that challenge").

198. Charles L. Decker & Arnold S. Trebach, Status Report: The National Defender Project (May 8, 1964) (on file with the *Columbia Law Review*), *in* Ford Foundation Archives, supra note 33, Reel 2071, Grant #06400098.

199. Lynch & Goldberg, supra note 182, at vi, 26; see also Goldberg, supra note 183, at 736–37 (arguing for "stable," "long-term" federal funding of local and state defender offices). In the mid-1970s, the ABA proposed a federal Center for Defense Services to fund state public defenders. See Norman Lefstein & Sheldon Portman, Implementing the Right to Counsel in State Criminal Cases, 66 A.B.A. J. 1084, 1084–85 (1980) (describing proposal to establish Center for Defense Services to strengthen indigent defense representation).

200. Letter from Paul C. Reardon, Conference Chairman, New England Def. Conference, to LaRue Brown, Re: New England Defender Conference (Sept. 25, 1963) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 13. The agenda included a panel on states' obligations to provide counsel, including "the effects of recent decisions of the United States Supreme Court," describing the problem as "national in scope and emergency." Program, New England Law Inst., Inc., The New England Conference on the Defense of Indigent Persons Accused of Crime 1–2 (Oct. 31, 1963) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 13.

201. Voluntary Defs. Comm., Study of the Impact upon the Massachusetts Defenders Committee of the Decision by the Supreme Court of the U.S. of Gideon v. Wainwright, 373

ber worried that *Gideon* had launched his state's courts into "a period of serious crisis."[202]

At the time and since, critics have charged the Warren Court with reducing the lofty principles of the Bill of Rights into a workaday "code of criminal procedure."[203] Yet, in a federalist polity with thousands of differently organized and partially overlapping court systems and police departments, each with its own procedures and terminology, seemingly specific constitutional mandates still required extensive translation to map onto local institutional realities. In carrying out that translation, state and local policymakers drew not only upon abstract standards and guidance documents, but also upon their own memories, assumptions, and personal contacts. In Massachusetts, the result was neither unchanging continuation of the pre-*Gideon* charity model nor plug-and-play implementation of the post-*Gideon* public model, but rather, a new and ultimately unstable hybrid containing elements of both models.

A. *From Voluntary Defenders to Public Defenders*

By 1969, the Massachusetts Defenders Committee was a fully state-funded agency with dozens of salaried attorneys.[204] But the path to this outcome was circuitous. For the first few years after *Gideon*, the legislature and the governor responded to the agency's requested budgets by slashing them.[205] In funding requests, the agency explained that its "volume of cases" was multiplying because of recent Supreme Court decisions and warned "that convictions [would] be overturned" if defendants were not

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U.S. 335 (1964) (on file with the *Columbia Law Review*) [hereinafter Voluntary Defs. Comm., Study of the Impact of *Gideon*], *in* LRB Papers, supra note 7, box 5, folder 3.

202. Frederick H. Norton, Esq., Address on Justice for the Poor: The Effect of Recent Decisions of the United States Supreme Court on the Administration of Justice in Massachusetts 1 (Mar. 5, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 5.

203. See generally Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 953–54 (1965) ("[I]n applying the Bill of Rights to the states, the Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment . . . ."). For a recent update of Friendly's critique, see Stuntz, Collapse, supra note 4, at 78, 216–18.

204. See Edgar A. Rimbold, Public Defender of Indigent Defendants in Criminal Cases: "No Tub Thumping," 14 Bos. B.J., Jan. 1970, at 7, 13 (describing Massachusetts Defenders Committee costs as "entirely borne by the Commonwealth").

205. For instance, Governor John Volpe slashed the 1965–1966 request from $709,000 to $250,500 before sending it to the legislature. David Hern, Budget Slash for Defenders, Bos. Sunday Herald, Mar. 7, 1965 (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 16. In 1964, a member of the MDC board told a local bar association that the agency had met with "extreme difficulty in obtaining from" the Massachusetts legislature "sufficient funds to perform its duties in a matter which it feels is required under the Constitution." Norton, supra note 202, at 8.

provided adequate counsel.[206] Nevertheless, state legislators resisted expanding the defender agency—although, at least in part, out of concern for the private bar. Like some of the public defender's early opponents, lawyers within the Massachusetts legislature believed that "spending the state's money to defend criminals . . . takes away fees from some deserving lawyers."[207] Rather than principled arguments, the pump-priming effect of outside funding would ultimately convince the legislature to fund the agency's expansion.

Securing funding was one of many challenges the agency's lawyers faced as they struggled to implement the changes they thought *Gideon* required. Three challenges that the Massachusetts Defenders Committee encountered in the 1960s demonstrate especially clearly how pre-*Gideon* legacies shaped efforts to implement the new public model. First, in debates over how aggressively to lobby the legislature for higher salaries, the agency divided over how thoroughly *Gideon* required repudiating the pre-*Gideon* charity model. Second, to lawyerize the district courts as *Gideon* seemed to require, the agency would have to massively expand its staff. When the state proved reluctant to fund the expansion, the agency turned to foundation and federal grants to bridge the gap. But once the agency had secured funds to hire lawyers for the district courts, a third issue arose, as defenders tussled with local judges who bristled at public defenders' interference with their traditional prerogatives.

1. *Defining a Salary Scale.* — Once defenders were defined as salaried state employees, questions arose about what their salaries should be.[208] While *Gideon*-era professional standards recommended that defenders earn salaries commensurate with law firm associates or prosecutors, it was no simple matter to realize those recommendations through the complex politics of state budget requests. In 1964, the Massachusetts Defenders Committee requested state funds to raise every attorney's salary to a floor of $5,000. That figure would, a few years before, have aligned defenders' pay with entry-level prosecutors. But that same year, Massachusetts passed an "extremely large increase in pay for judges and

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206. Form, Mass. Defs. Comm., Summary of Requests for Appropriations 1–2 (Oct. 8, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 7. For other references to *Gideon* in funding correspondence, see, e.g., Form, Mass. Defs. Comm., Additional Budget Request (Apr. 7, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 5.

207. LaRue Brown Reminiscences, supra note 52, at 16; see also Letter from Herman LaRue Brown to Rutherford (draft) (Dec. 10, 1965) (on file with the *Columbia Law Review*) (recalling difficulties persuading lawyers within Massachusetts legislature of necessity of funding indigent defense), *in* LRB Papers, supra note 7, box 2, folder 10.

208. The issue of public employee salaries has a rich political history of its own. See generally Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940 (2013) (chronicling how salaries replaced fee-based compensation for government work). Public defenders postdated the larger "salary revolution," so the question was not whether they should be salaried but what their salaries should be.

district attorneys."[209] Boston prosecutors now earned between $10,000 and $20,000.[210] In contrast, public defenders earned "the lowest salary paid to an attorney performing legal duties on a full-time basis by any State agency" in Massachusetts.[211]

Hollingsworth and the board quarreled over whether the agency should accept this reality or more aggressively lobby the legislature to equalize defender and prosecutor pay. Whether out of genuine conversion to the *Gideon* consensus, self-serving reasons (as the board suspected), or a combination of both, Hollingsworth maintained that public defenders should be paid equally to prosecutors. Accordingly, when the board asked him to prepare a post-*Gideon* budget estimate, he replied by simply sending them the district attorney salary scale.[212] Hollingsworth had grown frustrated by what he perceived as the board's sluggish reaction to *Gideon*. In July 1963, he complained to the board that "for three and one-half months, with all of the experience and knowledge at our command, we have done nothing but talk."[213] "The Gideon decision," Hollingsworth wrote, "is now the law of this Commonwealth and makes it mandatory to provide counsel in every court of the Commonwealth to every defendant charged with a serious crime . . . . The Massachusetts Defenders Committee is not presently providing such representation."[214]

Hollingsworth's insistence on comparing defender and prosecutor salaries exasperated the board. "We need figures of cases" to calculate the budget, LaRue Brown wrote, "not . . . salaries of politically appointed assistant district attorneys," which Brown thought were higher than the

209. Letter from Wilbur Hollingsworth, Chief Counsel, Mass. Defs. Comm., to Samuel Wilkinson, Chairman, Mass. Defs. Comm. (Mar. 9, 1964) (on file with the *Columbia Law Review*) [hereinafter Letter from Hollingsworth to Wilkinson], *in* LRB Papers, supra note 7, box 2, folder 4.

210. See Wilbur Hollingsworth, Draft Budget, Budget 1964–1965 (Sept. 12, 1963) (on file with the *Columbia Law Review*) [hereinafter Hollingsworth, Draft Budget 1964–1965], *in* LRB Papers, supra note 7, box 2, folder 4. By comparison, first-year salaries in large law firms revolved around $7,000 in the mid-1960s. Richard L. Abel, American Lawyers 82 (1991) ("[S]tarting salaries offered by large law firms skyrocketed from about $7,000 in the mid-1960s to $70,000 twenty years later.").

211. Draft Letter from Samuel A. Wilkinson, Chairman, Mass. Defs. Comm., to Budget Dir. (Mar. 20, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 7.

212. Letter from W.G. Hollingsworth, Chief Counsel, Mass. Defs. Comm., to Budget Sub-Committee (Sept. 12, 1963) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 1, folder 17; see also Letter from Hollingsworth to Wilkinson, supra note 209 ("[I]f Ways and Means wants to pay an assistant district attorney $9,400 for prosecuting motor vehicle violations in Middlesex, it should not complain if the Defenders Committee asks for more than $3,000 for a man to defend serious felonies.").

213. Letter from Wilbur Hollingsworth, Chief Counsel, Mass. Defs. Comm., to Edward Duggan, Chairman, Lyne, Woodsworth & Evarts (July 9, 1963) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 4.

214. Hollingsworth, Draft Budget 1964–1965, supra note 131.

agency could realistically ask for.[215] Brown worried that requesting too large a budget would provoke a backlash, and legislators might replace the agency with an assigned counsel system.[216] Perhaps Brown was right that Hollingsworth's proposal would have backfired. But Brown's many years defending the charity model's low-pay, high-turnover salary scale likely colored his judgment on this point. Even after *Gideon*, Brown described indigent defense not as a career track but as a way station for "young attorneys," providing "valuable training and experience, which they later made use of when they went with a law firm."[217] Hollingsworth thought *Gideon* rendered this model obsolete, and as a result, a rift developed between him and the board, which continued to view the agency as "a training ground for young lawyers."[218] Partly because of this disagreement, the board fired Hollingsworth in June 1964 and promoted one of his assistants, Edgar Rimbold, to replace him as chief counsel.[219] After he was fired, Hollingsworth told the press, "I think that at the present time the public defender project in Massachusetts is a complete failure."[220]

2. *Lawyerizing the District Courts.* — In Massachusetts, *Gideon* proved especially disruptive in the district courts, where lawyers had traditionally been sparse. About a year after *Gideon*, Wilbur Hollingsworth argued in a test case that *Gideon* required counsel in all district court cases.[221] The state's highest court rejected Hollingsworth's argument but agreed that it

215. Letter from LaRue Brown to Wilbur Hollingsworth (Sept. 13, 1963) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 12. It is not clear from the files if Brown actually sent this letter (or a similar letter) to Hollingsworth.

216. See id. ("Asking for so large an amount could quite possibly greatly encourage those who would prefer an assigned counsel system to our committee . . . .").

217. New England Law Inst., Inc., The New England Conference on the Defense of Indigent Persons Accused of Crime: Reports on Discussions of Panel Topics "A," "B," and "C" 26 (1963) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 14. Others at the conference questioned whether the goal was "to educate the bar or to provide competent counsel?" If the latter, then public defenders should be "adequately paid and work on a full-time basis." Id.

218. Unidentified Newspaper Clipping Attached to Mass. Defs. Comm. Meeting Minutes, Founder Of Defenders To Fight 'Quit' Demand, June 19, 1964 (on file with the *Columbia Law Review*) [hereinafter Founder to Fight Demand], *in* LRB Papers, supra note 7, box 2, folder 4.

219. Defenders Appoint New Chief, Bos. Globe, July 1, 1964, at 6 (on file with the *Columbia Law Review*); Defenders Fire Hollingsworth, Bos. Globe, June 20, 1964, at 3 (on file with the *Columbia Law Review*). For the vote to terminate Hollingsworth, see Minutes from Massachusetts Defenders Committee Meeting (June 19, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 4. Disagreements over *Gideon* were not the sole cause. Once they decided to terminate Hollingsworth, Brown and other board members dredged up other complaints. There were also personality conflicts and some legitimate concerns about Hollingsworth's office management.

220. Founder to Fight Demand, supra note 218; see also Hollingsworth Bids High Court Probe Defenders, Bos. Globe, June 14, 1964, at 1 (reporting Hollingsworth's description of Massachusetts Defenders as "lousy system").

221. Commonwealth v. O'Leary, 198 N.E.2d 403 (Mass. 1964).

was "prudent" for district courts to appoint counsel in all but "the most trifling" cases.[222] Soon thereafter, the court revised state judicial rules to require district courts to appoint counsel in all cases with a possible prison term.[223] Complying with that rule presented enormous logistical challenges. One statewide study estimated that 60% of defendants charged with "serious charge[s]" in district court were uncounseled.[224] Combining that figure with his understanding of *Gideon*, LaRue Brown estimated 32,250 cases each year in which counsel was required but not being provided.[225] To expand its caseload on that order of magnitude, the Massachusetts Defenders Committee would need a massive infusion of resources—and perhaps twenty-six times its current number of lawyers.[226] In light of these calculations, Brown described *Gideon*'s "burden upon the defense mechanism" as "almost appalling."[227] Board member Raynor Gardiner grumbled "that any attempt to take care of all the more serious cases in the district courts is a little like trying to bail out the ocean."[228]

As it happened, "trying to bail out the ocean" was precisely the sort of innovative project that 1960s foundations and federal agencies were eager to fund. In 1965, the Massachusetts Defenders Committee partnered with Action for Boston Community Development (ABCD), a public–private hybrid established to coordinate Ford Foundation urban renewal funding for metropolitan Boston, and secured a grant from Ford's National Defender Project to hire defenders for the Suffolk County district courts.[229] The next year, the agency secured a much larger grant from the federal Office of Economic Opportunity (OEO)—the lead agency in President Johnson's War on Poverty—to expand into the

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222. Id. at 405.

223. Sup. Judicial Ct. R. 10, 347 Mass. 808, 809 (1964).

224. Voluntary Defs. Comm., Study of the Impact of *Gideon*, supra note 201, at 2.

225. Id. at 3.

226. See Bos. Office Case Load (1964) (on file with the *Columbia Law Review*) (estimating need for 182 attorneys in Suffolk County alone), *in* LRB Papers, supra note 7, box 2, folder 16.

227. Letter from LaRue Brown to Permanent Charity Fund (Apr. 16, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 1. The archival copy is a draft, so it is not clear if Brown sent this version.

228. Letter from Raynor Gardiner to LaRue Brown (Mar. 19, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 5; see also Frederick H. Norton, Jr., The *Gideon* Case: A Mandate for the Organized Bar, 8 Bos. B.J., Sept. 1964, at 7, 8 (observing Massachusetts Defenders Committee could handle superior court cases but had resources "completely inadequate" to handle volume of district court cases).

229. Mass. Defs. Comm., Second Report to National Legal Aid and Defender Association on Suffolk County Model Defender Project (1966) (on file with the *Columbia Law Review*) [hereinafter Mass. Defs. Comm., Second Report], *in* LRB Papers, supra note 7, box 3, folder 6; Huge Free Attorney Plan, Bos. Globe, Jan. 25, 1965, at 30 (on file with the *Columbia Law Review*) (announcing National Defender Project $138,000 grant for Suffolk County model defender program).

district courts statewide.[230] With the OEO funds, the Massachusetts Defenders nearly doubled its legal staff, bringing its total to fifty-eight attorneys, and opened regional offices throughout the state.[231] Towards the end of 1966, chief counsel Edgar Rimbold reported that the Ford and OEO grants had enabled the agency to provide "complete representation" in all seventy-two district courts statewide—"a striking increase" from the previous year.[232] Rimbold continued: "This is 'volume representation' of the type that appears to be mandatory for any state to furnish, if it is to conform with the *Gideon* requirements."[233]

By 1967, these multiple funding streams had converged into a much expanded, if fiscally byzantine, agency.[234] Outside funding worked where reasoned argument had failed to convince the Massachusetts legislature to expand the agency's budget. With grant monies, the agency could hire staffers on short-term contracts and then ask the legislature to fund their salaries on a permanent basis, replacing abstract budget requests with actual people who would lose their jobs absent legislative action. In 1967, with the OEO grant scheduled to terminate at the end of the year, Massachusetts Defenders staffers personally contacted every member of

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230. See Press Release, Voluntary Defs. Comm., at 1 (July 21, 1966) (on file with the *Columbia Law Review*) [hereinafter 1966 Press Release] (announcing $579,544 OEO grant for Massachusetts Defenders expansion), *in* LRB Papers, supra note 7, box 5, folder 3. The OEO was established by the 1964 Economic Opportunity Act to coordinate $947 million in federal funding for job training, rural economic development, legal services, and other anti-poverty programs, spurring a "feverish" frenzy of grant proposals from programs large and small throughout the country. Annelise Orleck, Introduction: The War on Poverty from the Grass Roots Up, *in* The War on Poverty: A New Grassroots History, 1964–1980, at 1, 9–11 (2011) (Annelise Orleck & Lisa Gayle Hazirjian eds., 2011). In securing an OEO grant, the Massachusetts Defenders Committee took advantage of a brief window before Congress amended the Act to prohibit using OEO funds for criminal defense. See 42 U.S.C. § 2809(a)(3) (1970) ("No funds or personnel made available for such program . . . shall be utilized for the defense of any person indicted . . . for the commission of a crime . . . .").

231. See 1966 Press Release, supra note 230 (announcing ability to increase legal staff using OEO funds).

232. Mass. Defs. Comm., Second Report, supra note 229, at 16, 21.

233. Id. at 4.

234. The Boston office housed twenty-one attorneys paid directly by Massachusetts; eight attorneys paid by the Ford Foundation through the National Defender Project, which in turn made a grant to ABCD; and eight attorneys paid by the OEO through the vestigial corporate entity of the Voluntary Defenders Committee. Satellite attorneys statewide were paid primarily through the OEO grant. These numbers are taken from a handwritten table of all attorneys and their salary sources in 1966 to 1967 and 1967 to 1968 among a stack of budget materials. Massachusetts Def. Comm., Budget Materials 1966–1968, *in* LRB Papers, supra note 7, box 4, folder 10. The OEO grant was made to the Voluntary Defenders Committee because OEO grants required "maximum feasible participation" from poor people, Equal Opportunity Act of 1964, Pub. L. No. 88-452, § 202(a)(3), 78 Stat. 508, 516, and the Massachusetts Defenders Committee's board consisted primarily of attorneys. So they revived the Voluntary Defenders Committee and expanded it with six generic placeholder board spots for poor people, none of whom seem to have actually attended any meetings.

the state Senate.[235] Their lobbying worked; the state assumed the salaries of the OEO-hired lawyers.[236] The next year, the agency again warned the legislature of looming layoffs.[237] The legislature responded with an appropriation that, while short of the agency's request, was enough to "absorb all of the [Ford Foundation] Model Defender Program" and "all of the work . . . under the OEO program."[238]

3. *Battling Judges.* — Once defenders had been hired and paid, they still needed judges to appoint them to cases. Particularly in the district courts, appointments were not always forthcoming. The MDC reported that Boston's Judge Adlow felt that the higher courts, in interpreting *Gideon*, had "gone too far."[239] After an incident in which a defender refused Adlow's demand that the defendant testify,[240] Adlow stopped appointing the Massachusetts Defenders in his courtroom, complaining, in one lawyer's account, that they "worr[ied] too much about constitutional rights and things like that in petty cases."[241] As board member William Homans, Jr. described, in Adlow's view, public defenders "should only handle serious cases" and "'petty stuff' should be . . . handled by the judge in his own way."[242] As an example of Adlow's

235. Minutes from Massachusetts Defenders Committee Meeting 1 (June 29, 1967) (on file with the *Columbia Law Review*) ("[I]t was necessary for the staff of the MDC to contact every Senator in the State."), *in* LRB Papers, supra note 7, box 3, folder 15; see also Letter from James G. Crowley, Reg'l Adm'r, Office of Econ. Opportunity, to William P. Homans, Jr., Exec. Dir., Voluntary Defs. Comm. (July 10, 1967) (on file with the *Columbia Law Review*) (establishing December 31, 1967, as end date), *in* LRB Papers, supra note 7, box 3, folder 15.

236. See Letter from Albert L. Kramer to LaRue Brown & Edward J. Duggan (July 24, 1967) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 15.

237. Minutes from Massachusetts Defenders Committee Meeting 1 (Apr. 3, 1968) (on file with the *Columbia Law Review*) [hereinafter April 1968 Mass. Defs. Comm. Minutes] ("We are seeking additional money because if we obtain only that amount recommended by the Governor we will lose three attorneys in Boston . . . ."), *in* LRB Papers, supra note 7, box 4, folder 11.

238. Minutes from Massachusetts Defenders Committee Meeting 1 (Aug. 8, 1968) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 4, folder 12.

239. April 1968 Mass. Defs. Comm. Minutes, supra note 237.

240. Memorandum from Edgar A. Rimbold, Chief Counsel, Mass. Def. Comm., to Comm. Members 2 (Jan. 29, 1965) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 14; see also Adlow and Due Process, Bos. Globe, Oct. 17, 1966, at 16 (on file with the *Columbia Law Review*) (describing similar incident); Robert Kenney, Judge Adlow Castigates Public Defenders, Orders Accused to Testify, Bos. Globe, Oct. 15, 1966, at 1 (on file with the *Columbia Law Review*) (describing similar incident).

241. Memorandum from William P. Homans, Jr. 3 (Oct. 17, 1966) [hereinafter Memorandum from Homans] (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 5.

242. Id. at 6. The MDC again assigned an attorney to Adlow's courtroom in October 1966, but the attorney received no appointments for two months. Letter from Frederick H. Norton, Jr., Sec'y, Mass. Defs. Comm., to Hon. Elijah Adlow, Chief Justice, Bos. Mun. Court (Dec. 20, 1966) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 5.

"own way," Homans recounted Adlow's claim "that in [Adlow's] court the Negro people were treated less harshly because they were not as responsible for their conduct as white people."[243] Perhaps Adlow intended this statement as a reassuring illustration of his leniency, or, more likely, as a provocation implying that he might stop being so lenient if lawyers kept challenging him. The Massachusetts Defenders heard instead a distressing admission that Adlow decided cases according to paternalism, racism, and personal whim—all the more reason why defendants in Adlow's courtroom needed lawyers.[244]

Judge Adlow, in the words of one Boston lawyer, "was more flamboyant than most judges here, but he wasn't at all atypical."[245] In Roxbury, a district judge bristled when a robbery witness refused to identify the defendant as the robber, testifying that it had been too dark for her to see. The judge, on his own motion, held the witness for perjury and "found the defendant guilty."[246] The Lowell district court regularly encouraged defendants to waive the right to counsel en masse.[247] In New Bedford, a district court judge once fined public defenders' clients three times the fine he assessed unrepresented defendants appearing the same day on the same charge.[248] Into the late 1960s, the presiding judge of the Dorchester district court appointed personal friends rather than the

243. Memorandum from Homans, supra note 241.

244. One Boston lawyer described Adlow as "paternalistic toward defendants—as long as they go along with him . . . . There is no rule of law in that courtroom." Harris, In Criminal Court—I, supra note 2, at 57. Observers differed dramatically in interpreting Adlow's idiosyncrasies. Compare Arthur L. Berney & Harry A. Pierce, An Evaluative Framework of Legal Aid Models, 1975 Wash. U. L.Q. 5, 23 n.45 (remembering Adlow's approach to law as "always ad hoc, often visceral, and frequently nonconstitutional, but—one felt warmly—thoroughly fair more often than not"), and Theodore Chase, The President's Page: The Courts and the Massachusetts Defenders Committee, 13 Bos. B.J., Feb. 1969, at 3, 4 (describing Chief Justice of Boston Municipal Court as unconcerned with "technical niceties" but "practical and expeditious"), with James K. Glassman, A Day in Court: Brass Tacks, Harvard Crimson (Nov. 23, 1968), http://www.thecrimson.com/article/1968/11/23/a-day-in-court-pbybou-walk/ [http://perma.cc/Z34D-CA9P] (describing visit to Adlow's courtroom as "frightening confrontation with irrational authority").

245. Harris, In Criminal Court—I, supra note 2, at 45; see also id. at 74 ("[M]any judges apparently share Judge Adlow's resentment toward lawyers who get in the way."). Nor were Massachusetts judges unique: Public defenders nationwide complained of judicial pressure and abuse. See Alschuler, supra note 181, at 1237 ("Public defenders almost universally conceded that . . . judges subject [them] to . . . severe forms of pressure.").

246. Minutes from Massachusetts Defenders Committee Meeting 2 (Oct. 23, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 2.

247. Cf. id. at 1 (providing data on widespread waivers of counsel among indigent defendants in Lowell District Court).

248. Attachment to Letter from Edward J. Harrington, Jr. to William P. Homans, Jr. (Jan. 6, 1967) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 4, folder 3.

Massachusetts Defenders Committee to indigent cases and then billed the city of Boston for reimbursement.[249]

B. *Characteristics of the Hybrid Model*

1. *What's Old: Low Pay, Low Status.* — After *Gideon*, vestiges of the charity model continued to shape working conditions for public defenders in Massachusetts, as demonstrated most concretely through defenders' persistently low salaries.[250] Chief Counsel Edgar Rimbold explained in 1967 that he had to hire a revolving cast of recent law school graduates "because we can not pay a high salary [sic]."[251] As one Massachusetts defender told a reporter: "The pay's bad . . . but I live with my parents, so I manage. A married man couldn't really afford this job."[252] In 1972, NLADA evaluators issued a withering report on the Massachusetts Defenders Committee.[253] Among many criticisms, the report lambasted the agency's "inexcusably low salaries" and recommended a pay scale "roughly competitive" with law firms and "at least equivalent to . . . legal service programs and the district attorney's office."[254]

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249. See Minutes from Massachusetts Defenders Committee 1 (Mar. 13, 1969) (on file with the *Columbia Law Review*) (noting "many close friends of Judge Troy's had been appointed"), *in* LRB Papers, supra note 7, box 5, folder 1; cf. Judges Say "Way Out of Line": Dorchester Court Fees Hit, Record American, Jan. 16, 1969, at 10 (on file with the *Columbia Law Review*) (discussing "practice of appointing independent lawyers for the poor" and not public defenders), *in* LRB Papers, supra note 7, box 5, folder 1. On reports of Brighton and Charlestown district court judges not making MDC appointments, see ABCD Unified Legal Service Program Committee Minutes (June 17, 1965) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 12. In response to these issues, the Supreme Judicial Court revised its rules to specify that the MDC should be appointed in all cases absent "exceptional circumstances." Sup. Judicial Ct. R. 10, 355 Mass. 803 (1969).

250. See Joseph M. Harvey, Case Crush Hits Public Defenders, Bos. Globe, Apr. 9, 1971 at 1 (on file with the *Columbia Law Review*) (noting in 1971, Massachusetts Defenders' salaries started at $7,935, whereas Boston law offices started at $12,000).

251. Minutes from Massachusetts Defenders Committee Meeting 3 (Nov. 16, 1967) (on file with the *Columbia Law Review*) [hereinafter Nov. 1967 Minutes], *in* LRB Papers, supra note 7, box 3, folder 13. In 1974, a study of Legal Aid criminal lawyers in Brooklyn similarly found that these lawyers tended to be young (averaging thirty-two years of age and less than five years of legal experience). James P. Levine, The Impact of "*Gideon*": The Performance of Public and Private Criminal Defense Lawyers, 8 Polity 215, 222 tbl.2 (1975).

252. Richard Harris, Annals of Law: In Criminal Court—II, New Yorker, Apr. 21, 1973, at 44, 58–60 [hereinafter Harris, In Criminal Court—II] (on file with the *Columbia Law Review*).

253. See Richard Connolly, Report Blasts Defender Unit on Pay, Case Load, Attitude, Bos. Globe, Sept. 8, 1972, at 3 (on file with the *Columbia Law Review*) (discussing NLADA's "hard-hitting opinion" on MDC).

254. Nat'l Criminal Justice Reference Serv., Evaluation Report of the National Legal Aid and Defender Association on the Massachusetts Defenders Committee 90, 131 (1972), https://www.ncjrs.gov/pdffiles1/Digitization/26189NCJRS.pdf [https://perma.cc/2SHL-GNGU] [hereinafter NLADA Evaluation Report].

Critics of the agency's pay scale had a shallow understanding of why defenders' salaries were so low. Apparently unaware of the board's internal budgetary debates just a few years before,[255] the NLADA evaluators interpreted the agency's pay scale as a straightforward response to inadequate legislative appropriations—in other words, as evidence of a stingy state commitment to *Gideon.* "The responsibility to provide adequate and effective defender services is mandated by the Constitution," the NLADA report noted, citing *Gideon* and the just-decided *Argersinger v. Hamlin*, which extended *Gideon* to misdemeanors punished by jail time.[256] "It is obvious that the [Massachusetts] legislature has not provided the resources requested to carry out this obligation."[257] Of course, the NLADA report was right that defenders' salaries were dictated by state funding levels. But those funding levels partly reflected the path-dependent outcome of the board's own post-*Gideon* decisions to start its budget requests from a low baseline—over the objections of the ousted Wilbur Hollingsworth, who urged a more aggressive lobbying strategy.[258] And those post-*Gideon* decisions reflected, in turn, board members' decades-long habit, under the charity model, of rationalizing low pay for indigent defenders.[259]

2. *What's New: "Volume Representation."* — Now that defendants had a right to counsel, the Massachusetts Defenders had to represent them regardless of how "worthy" they seemed.[260] While the Voluntary

255. See supra section III.A.1 (describing discussions on salary scale).

256. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); NLADA Evaluation Report, supra note 254, at 90.

257. NLADA Evaluation Report, supra note 254, at 90.

258. See supra section III.A.1 (addressing post-*Gideon* salary determinations).

259. Massachusetts defenders continue to earn comparatively low salaries, although in a change from the 1960s—and one that makes Massachusetts quite atypical—Massachusetts prosecutors now earn less than defenders. See John R. Ellement, Criminal Justice Lawyers Are Becoming "Working Poor," Study Says, Bos. Globe (May 8, 2014), https://www.bostonglobe.com/metro/2014/05/08/mass-bar-association-study-says-criminal-justice-lawyers-are-becoming-working-poor/IXYXjmj4veKz8pLE2wuswJ/story.html (on file with the *Columbia Law Review*) ("Massachusetts ranks dead last in annual salaries paid to public defenders . . . ."); Gabrielle Gurley, Public Defender Blues, CommonWealth Mag. (Jan. 15, 2014), http://commonwealthmagazine.org/uncategorized/004-public-defender-blues/ [http://perma.cc/CFE8-2TMR] ("The $40,000 starting salary of a full-time public defender in Massachusetts is among the lowest in the country."); Sacha Pfeiffer, Low Pay Blamed for High Turnover Among Public Defenders, Bos. Globe (Jan. 13, 2015), https://www.bostonglobe.com/business/2015/01/13/group-recommends-increasing-low-salaries-for-prosecutors-public-defenders/IoQGniSJ3Oml36mrWV77hN/story.html (on file with the *Columbia Law Review*) ("The Massachusetts Bar Association found that public defenders in this state are paid the lowest salaries in the country . . . ."). While explaining these recent developments is beyond the scope of this Article, defenders' low pay may partly reflect the enduring legacy of pre-*Gideon* views of indigent defense as charitable rather than professional work.

260. By comparison, "worthiness"-type distinctions have historically factored into eligibility determinations for public benefits not defined as constitutional rights. See, e.g., Vale,

Defenders Committee had occasionally referenced its "heavy case load," its fundraising materials also highlighted trial victories and the plight of individual clients.[261] The Massachusetts Defenders Committee board spoke constantly about the agency's "heavy case load."[262] Liberated from the need to appease charitable benefactors, but also with more clients than anyone could keep track of, the agency no longer published annual reports with suspenseful narratives of individual cases. Instead, it made grant reports in which clients merged into faceless sums.[263] Nationwide, too, numbers had replaced dramatic true-crime accounts as the currency for measuring indigent defense. In the early 1970s, public defenders reported processing 400 cases a month in Chicago; 922 cases at a time in New York City; "merely" 300 cases in Oakland; and in Philadelphia, up to fifty cases a day.[264]

The agency's budget also multiplied, increasing almost tenfold from pre-*Gideon* levels within a few years, but in the long run, could not keep pace with the increase in caseloads.[265] Although caseload records are spotty, it seems that per-case funding may have held roughly steady initially after *Gideon*, particularly during the years when the agency had outside foundation and federal funding. But, by 1971, the agency's per-case funding appears to have dipped below the Voluntary Defenders Committee's 1958 per-case spending—even as per-case litigation costs might have been expected to rise, due to the growing body of constitutional criminal procedure law, which rendered even straightforward criminal cases potentially complex.[266] These rough estimates should be taken as purely suggestive. Still, they suggest that defenders had some material basis for their perception that post-*Gideon* caseloads outstripped the available resources.

Defenders' perceptions likely also had subjective dimensions. During the years of the Voluntary Defenders, Hollingsworth chose his cases.[267] He may have felt overworked, but he could console himself by thinking about the rejected cases he was not working on. He may have

supra note 105, at 8–9 (discussing how Boston leaders used post–New Deal public housing "to reward the most meritorious of the working poor").

261. E.g., 1953 Annual Report, supra note 70 (referencing "heavy case load" but also giving narratives of individual cases).

262. Minutes from Massachusetts Defenders Committee Meeting 1 (Nov. 16, 1964) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 2, folder 7.

263. E.g., Mass. Defs. Comm., Second Report, supra note 229, at app. A.

264. Alschuler, supra note 181, at 1248.

265. See infra Table 3.

266. See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 55 (1997) [hereinafter Stuntz, Uneasy Relationship] (positing constitutionalization of criminal procedure "ought to have *raised* litigation costs"); Speech on Massachusetts Defenders Committee (1964) (on file with the *Columbia Law Review*) (observing growing complexity of motions practice in criminal cases due to new constitutional doctrines), *in* LRB Papers, supra note 7, box 1, folder 13.

267. See supra Table 2 (tallying cases Hollingsworth declined).

wished that he could help more clients, but that was a problem of resources, not constitutional enforcement. In contrast, the Massachusetts Defenders controlled neither their resources nor their caseloads, as *Gideon* established that each of their clients had a constitutional right to their efforts. Instead of feeling that they had selected a subset of "worthy" clients from some larger universe, they more likely felt the opposite: that if they had not been burdened with so many cases, they could have devoted more time to those clients with the strongest defenses.

TABLE 3: MASSACHUSETTS DEFENDERS COMMITTEE LEGISLATIVE APPROPRIATIONS AND OUTSIDE FUNDING, 1960–1972

Pre-1960 Data for the Voluntary Defenders Committee (For Comparison)

Year	Nominal Total Expenditures	Real Total Expenditures (2013 $)	Total Cases Handled	Nominal Expenditures per Case	Real Expenditures per Case
1958	35,334	285,000	1,120	32	258

Post-1960 (Note: complete data not available for all years)

Fiscal Year(s)	Nominal Legis. Appropriations	Real Legis. Appropriations (2013 $)	Nominal Outside Funds	Real Outside Funds	Caseload (est.)	Nominal Funding per Case (est.)	Real Funding per Case (est.)
1962	82,500	635,000					
1963	88,570	674,000					
1964	100,847	757,000					
1965	168,374	1,240,000					
1966	250,500	1,800,000	85,261 (NLADA)	612,000			
1967	357,335	2,490,000	169,051 (OEO) 70,056 (NLADA)	1,670,000			
1968	586,920	3,930,000	189,902 (OEO)	1,270,000	18,128	32.37 (without outside funds) 42 (with outside funds)	217 (without outside funds) 287 (with outside funds)
1969	819,906	5,210,000					
1970	952,474	5,710,000					
1971	1,099,938	6,330,000			40,000	27.49	158
1972	1,140,162	6,350,000			42,000	27.15	151.19

Sources: Mass. Def. Comm., A Report of the Massachusetts Defenders Committee (1976), https://archive.org/details/reportofmassachu00mass_1 [https://perma.cc/9JK8-NST5]; NLADA Evaluation Report, supra note 254; OEO Proposal (Oct. 1966); State Auditor reports. The Measuring Wealth simple purchasing power calculator, which multiplies by percentage change in adjusted CPI, was used to convert nominal figures into real figures. For detailed calculations and data used for citations, see Appendix.

Note: Because these figures were pulled from multiple sources that may not have been using mutually consistent accounting conventions, they should be taken as rough estimates useful for getting a sense of the order of magnitude of the organization's budget growth more than as precise figures. Similarly, the per-case funding estimates are intended to offer a very rough basis of comparison across years, not as a literal estimate of resources expended on any individual case.

3. *Defenders as Plea Brokers.* — Since they could not contain their ballooning caseloads by rejecting clients, post-*Gideon* public defenders instead redefined their duties as triage.[268] Moving away from their charitable predecessors' vision of intensive investigation and trial advocacy, they now conceptualized their work in terms of selecting a few cases to investigate thoroughly and, in all of the remaining cases, facilitating pleas. In 1970, the Boston Lawyers' Committee for Civil Rights observed that the Massachusetts Defenders used "plea bargaining" as "a necessary technique to deal with an overwhelming caseload."[269] Of course, Hollingsworth had also negotiated pleas for many clients, but there was a difference—he did not describe plea bargaining as a caseload management technique, but rather as a secondary service he could offer to clients who admitted their guilt, while reserving his primary service of trial advocacy for other clients.[270] Accordingly, he had measured his successes by tallying acquittals.[271] Instead, the Massachusetts Defenders now measured success not along a guilty–not guilty binary but in terms of sentencing outcomes. For instance, in the low-level district courts, they counted guilty pleas as "favorable result[s]" if they avoided jail time.[272] In 1973, Edgar Rimbold explained to a reporter, "'Our men know the system. They know the judges, the prosecutors, and the best way to get a good deal for their clients. That's what attorneys from this office do—get the best possible deal for their clients.'"[273]

This shift likely reflected changes in defenders' conception of their role—and perhaps changes in the rate of *counseled* defendants who pled guilty—more than it reflected overall changes in plea rates or case outcomes. Even if plea rates climbed higher after *Gideon*, they were starting from a high baseline.[274] There was never any golden age of

268. For descriptions of post-*Gideon* indigent defense as "triage," see, e.g., Cara H. Drinan, Getting Real About *Gideon*: The Next Fifty Years of Enforcing the Right to Counsel, 70 Wash. & Lee L. Rev. 1309, 1336 (2013) [hereinafter Drinan, Getting Real] ("Budget constraints and excessive caseloads have made triage an essential component of modern public defense."); L. Song Richardson & Phillip Atiba Goff, Implicit Racial Bias in Public Defender Triage, 122 Yale L.J. 2626, 2631–34 (2013) (addressing how defenders are "forced by circumstances to engage in triage"); Stuntz, Uneasy Relationship, supra note 266, at 40 ("[D]efense lawyers' most important job is triage.").

269. Bing & Rosenfeld, supra note 134, at 32.

270. See supra section I.B.3 (discussing Hollingsworth's conception of advocacy).

271. See supra section I.B.3 (discussing Hollingsworth's pride in his office's rate of acquittals).

272. Bing & Rosenfeld, supra note 134, at 32.

273. Harris, In Criminal Court—II, supra note 252, at 45.

274. See Stuntz, Uneasy Relationship, supra note 266, at 26 n.95 (comparing 1962 sample finding guilty plea rates of 74% for defendants with assigned counsel and 48% for defendants with retained counsel to mid-1970s sample finding guilty plea rate "for defendants as a whole" had risen to 80%). But note that in 1962, there would also have been more defendants without counsel at all, who may have pled guilty as well. Cf. Fisher, supra note 46, at 14 (describing phenomenon of defendants pleading guilty because they "lack-

adversary combat in Anglo American legal history. Most criminal cases have always been resolved through guilty pleas or, at most, through quick and perfunctory trials, and widespread plea bargaining predated the public defender in many jurisdictions, including Massachusetts.[275] As a matter of historical causation, then, plea bargaining did not originate in response to public defenders' resource constraints.[276] Still, if they were not responsible for plea bargaining, public defenders had long been associated with the practice—since the first Progressive Era defenders were praised for cooperating with prosecutors—and they certainly helped to entrench its continued dominance.[277]

Initially in the late 1960s, Massachusetts was celebrated as a national leader in implementing *Gideon* precisely because its public defender agency displayed characteristics now identified as symptoms of *Gideon*'s neglect: funding at the mercy of the state legislature, high caseloads, and triage representation. Speaking at the 1967 NLADA convention, General Decker of the Ford Foundation's National Defender Project "singled out the MDC" as "the best project in the country."[278] The next year, the Massachusetts Defenders' chief counsel, Edgar Rimbold, was elected chairman of NLADA's Defenders Committee.[279] The agency's ever-growing caseloads were not, in Rimbold's view, a symptom of *Gideon*'s betrayal. Rather, they reflected a shift to the "volume representation" required "to conform with *Gideon*."[280] Rimbold assured his funders at the NLADA that the "[q]uality" of representation "did not decrease with the increase in volume."[281] He later implied that representation had actually

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ed lawyers and [they] properly saw that they had little chance of winning if they went to trial on their own").

275. See Malcolm M. Feeley, Court Reform on Trial: Why Simple Solutions Fail 20–23 (1983) (discussing prevalence of guilty pleas in early American criminal trials). By 1900, 87% of Middlesex County criminal adjudications ended in guilty pleas. Fisher, supra note 46, at 12; see also id. at 1 (dating dominance of plea bargaining at least to 1920s, and decades earlier "in some places"); id. at 6–8 (noting 1920s scholarly discovery of widespread plea bargaining).

276. Scholars have offered a range of causal accounts for the rise of plea bargaining, including "the ever-weightier burden of modern jury trials" and "the electoral pressure of new immigrants." Fisher, supra note 46, at 1–2. Based on careful analysis of Massachusetts trial records, George Fisher concluded instead that plea bargaining began, and has persisted, because it serves the interests of prosecutors and judges. Id. at 2.

277. See id. at 17, 198 (examining role of plea bargaining in creation and practice of public defender offices).

278. Nov. 1976 Minutes, supra note 251.

279. April 1968 Mass. Defs. Comm. Minutes, supra note 237.

280. Mass. Defs. Comm., Second Report, supra note 229, at 4. For an indication of how much Rimbold's view differs from that espoused by scholars today, see Steven Zeidman, *Gideon*: Looking Backward, Looking Forward, Looking in the Mirror, 11 Seattle J. for Soc. Just. 933, 937 (2013) (lamenting "Gideon's original request for a lawyer to be appointed to represent him at trial has devolved into lawyers appointed to simply negotiate plea bargains").

281. Mass. Defs. Comm., Second Report, supra note 229.

improved, because, through repeat interactions with district attorneys, public defenders "could secure more favorable bargains" than private counsel.[282] "We have been dealing with the prosecutors for a long time," Rimbold explained, and "we have a reputation for being able to evaluate a case. They trust us."[283]

But the Massachusetts agency's reputation quickly tumbled from its brief post-*Gideon* heights. Line defenders were less sanguine than Rimbold about the service they offered. "I try to get back to the office at the end of each afternoon and interview some of the people I'm going to have to represent here," one lawyer said, but usually "I can't manage it. So I meet the client here [in court] for the first time and devote all of five or ten minutes to him when he may face several years in prison. It's just not right."[284] By the early 1970s, the agency's caseloads were widely described as unsustainable, and courtroom observers disputed whether plea-centered advocacy represented a gain for defendants.[285] A reporter from the *New Yorker* allowed that "the public defender who has any intelligence quickly learns the ropes and discovers ways to help a client," but immediately added the caveat that defenders were "crippled by huge case loads that often compel them to rush through cases."[286] A judge granted that the Massachusetts Defenders did "as good [a job] as one can expect, I suppose, under the circumstances," but worried that "no attorney can handle twenty cases a day."[287] The Boston chapter of the Lawyers' Committee for Civil Rights similarly disagreed about the virtues of "volume representation." Under this system, the Lawyers' Committee reported, "defendants are depersonalized. They become cases, charges, numbers, instead of clients."[288]

In 1973, the Massachusetts Defenders board responded to the mounting complaints by replacing chief counsel Edgar Rimbold with a young and idealistic Harvard Law graduate, Gerard Schaefer.[289] The

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282. Alschuler, supra note 181, at 1224.

283. Id.; see also Harris, In Criminal Court—II, supra note 252, at 45 (quoting Rimbold's statement that "[o]ur men know . . . the judges, the prosecutors, and the best way to get a good deal for their clients").

284. Harris, In Criminal Court—II, supra note 252, at 62 (quoting lawyer).

285. See, e.g., Connolly, supra note 253, at 3 (reporting NLADA evaluators' findings that "caseload is so high as to preclude meaningful representation"); Harvey, supra note 250 (reporting on Committee's complaints of overwhelming caseloads).

286. Harris, In Criminal Court—I, supra note 2, at 80–81.

287. Harris, In Criminal Court—II, supra note 252, at 57 (quoting Judge King).

288. Bing & Rosenfeld, supra note 134, at 31. For a similar critique from a New York-based reformer, see Harris, In Criminal Court—I, supra note 2, at 82 (quoting Vera Institute's Herbert Sturz, who complained "legal-aid lawyers . . . end up representing a docket—that is, the system—just like a D.A. or a judge").

289. See Harris, In Criminal Court—II, supra note 252, at 74; Law Appointment, Bos. Globe, Aug. 18, 1972, at 2 (on file with the *Columbia Law Review*) (noting Schaefer's appointment as "part of a move . . . to revitalize [MDC] leadership"). Rimbold remained on staff as a trial lawyer. See Connolly, supra note 253, at 3.

NLADA, in its 1972 evaluation of the agency, had castigated Rimbold's leadership.[290] Rimbold, like Hollingsworth before him, had attended Suffolk Law, and he tended to hire fellow Suffolk alums; the NLADA evaluators wondered why the agency did not hire more attorneys from "the number of excellent law schools" in Boston.[291] Just as the NLADA report did not fully capture the longer-term causes for the agency's low salary scale, it also overlooked the deep roots beneath the office's personnel patterns. The evaluators personalized their assessment of the office's hiring practices into an attack on Rimbold for lacking vision, rather than acknowledging that elite law schools had for decades implicitly discouraged their students from considering indigent defense as a career.

Rimbold's replacement, like the NLADA evaluators, viewed the Massachusetts Defenders' staff lawyers as insufficiently zealous. Rather than hiring recent graduates who wanted only "to get experience," Schaefer aimed to hire "young lawyers who . . . really want to be public defenders."[292] By then, LaRue Brown had been dead for four years, and William Homans, Jr., a Boston-area civil liberties luminary, had joined the board.[293] Unlike Brown, Homans had personal experience in criminal defense.[294] All of these changes presaged elite lawyers' newfound interest in indigent defense, which was gaining liberal cachet as part of the burgeoning field of poverty law.[295] But beneath the specific personalities and developments involved, the constant administrative turmoil within the Massachusetts Defenders Committee reflected something deeper: the basic instability of the legal profession's efforts to graft longstanding charitable understandings of indigent defense—understandings whose origins were not always recognized at the level of conscious discussion—onto the new, post-*Gideon* understanding of indigent defense as a constitutional right.

It had taken several years of legislative wrangling and grant writing for Rimbold to get the Massachusetts Defenders Committee into the

290. NLADA Evaluation Report, supra note 254, at 9 ("The Chief Counsel displays nothing which can in any sense be called leadership.").

291. Id. at 12.

292. Harris, In Criminal Court—II, supra note 252, at 76 (quoting deputy chief counsel Scott Harshbarger on changes to office under Schaefer).

293. See Obituaries: LaRue Brown Dies, supra note 51, at 31 (noting Brown's date of passing); Julia P. Bell, Yankee Lawyer, Bos. Globe, May 5, 1974, at A6 (on file with the *Columbia Law Review*) (describing William Homans's career and noting his service on Massachusetts Defenders Committee board since 1964).

294. See Mark S. Brodin, What One Lawyer Can Do for Society: Lessons from the Remarkable Career of William P. Homans, Jr., 46 New Eng. L. Rev. 37, 37–42 (2011) (highlighting Homan's notable career as criminal defense and civil liberties lawyer); Bell, supra note 293, at A6 (same).

295. See Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973, at 1–2 (1993) (describing 1960s "explosion" of lawyer and law student interest in representing poor people).

district courts. Then, in 1972, the agency pulled back out of most of the Boston area district courts, in order to pare down defenders' caseloads.[296] Limiting caseloads, Schaefer explained, would mean that "our lawyers, interviewers, and investigators can spend the time that is necessary . . . to do the job right. Of course," he added, "the reshuffling was bad for the defendants who now get no representation . . . except by private lawyers appointed by the court, who are often worse than no lawyer at all."[297] Thus, within ten years of *Gideon*, the Massachusetts Defenders Committee had already undergone the full cycle of *Gideon*'s implementation: administrative reorganization, rising caseloads, fights for legislative funding and judicial recognition, internal debates over the ethics of indigent defense, ending with another administrative reorganization. The specifics would change, but this basic cycle has continued to repeat itself through the present day.[298]

C. *The* Gideon *Consensus Goes National*

The turbulent expansion of the Massachusetts Defenders Committee represented one local iteration of a national trend. By 1973, virtually every American city had some form of public defender office or private equivalent, and 64% of Americans lived within the jurisdiction of an organized defender.[299] Even nominally private defenders usually now operated with public funds.[300] Both of the old flagships of the charity model of indigent defense—the New York Legal Aid Society and the Defender Association of Philadelphia—had converted into government

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296. Margo Miller, Defenders to Pull Out of Mass. Courts, Bos. Globe, Apr. 21, 1972, at 12 (on file with the *Columbia Law Review*).

297. Harris, In Criminal Court—II, supra note 252, at 74 (quoting Schaefer).

298. In 1984, the Massachusetts Defenders Committee was reorganized into the Committee for Public Counsel Services. The system now relies more on appointed counsel than full-time public defenders. See Holly R. Stevens et al., Ctr. for Justice, Law & Soc'y at George Mason Univ., State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008, at 33–34 (2010) ("Bar advocates are appointed in the majority of district court cases, which include misdemeanor cases and initial appearances in some felony cases."); see also Darryl K. Brown, Epiphenomenal Indigent Defense, 75 Mo. L. Rev. 907, 917–18 (2010) [hereinafter Brown, Epiphenomenal] (discussing Massachusetts litigation in 2000s over inadequate indigent defense funding); Dan Ring, Massachusetts Gov. Deval Patrick Faces Opposition to His Plan to Overhaul Indigent Defense, Mass Live (Feb. 26, 2012, 12:07 PM), http://www.masslive.com/news/index.ssf/2012/02/massachusetts_gov_deval_patric_83.html [http://perma.cc/Q6FL-6A7S] (discussing recent proposals that agency hire more full-time defenders to reduce reliance on appointed counsel).

299. Ellen Keller, Note, The Immunity of Public Defenders Under Section 1983, 27 Clev. St. L. Rev. 244, 246 n.20 (1978) (citing Other Face of Justice, supra note 34, at 13). Given varying uses of the term "defender," many of these new public defenders may have functioned more like assigned counsel systems. See Goldberg, supra note 183, at 718–21 (describing variety of models under label of "defender").

300. See Goldberg, supra note 183, at 723–24 (describing nonprofit defender systems operating with public funding in different U.S. cities).

contractors.[301] The public defender model made much less progress in the South and Southwest than in other regions, and all states continued to rely on assigned counsel for some types of cases.[302] But for indigent defendants in much of the country, and especially in cities, the most likely scenario by the mid-1970s was representation by a public defender.[303]

Massachusetts's rocky efforts to lawyerize the low-level district courts also reflected nationwide changes. Before *Gideon*, only five states attempted to provide counsel in "less serious criminal cases."[304] By 1970, that number had mounted to thirty-one.[305] If measured by the number of states appointing counsel in felony cases, *Gideon* appears to have directly implicated only a few Southern states.[306] Measured instead by the number of states that responded by prophylactically providing counsel in some set of lower-level cases, *Gideon*'s national influence reached beyond a narrow reading of its doctrinal mandate, spanning every region and including such populous bellwether states as California, Texas, and New York.[307] As two law students observed in 1970, "If the intent of the Supreme Court in *Gideon* was to urge, without expressly commanding, the states to extend the Sixth Amendment guarantee of counsel to defendants other than accused felons, the results have been very satisfactory."[308] In the long run, the results would prove less satisfactory than they initially appeared, as many states have failed to maintain compliance with misdemeanor counsel requirements.[309] Still, the direction of the

301. See id. (noting New York Legal Aid Society and Philadelphia's defender system contract with local government to provide indigent defense); McConville & Mirsky, supra note 44, at 694–95 ("In New York City, after 1965, the Legal Aid Society's criminal defense division became entirely dependent upon city and state funds.").

302. See Brown, Epiphenomenal, supra note 298, at 912–13 (describing variety of state systems); Worden et al., Patchwork, supra note 39, at 1428–30 (same). For a state-by-state survey, see generally Stevens et al., supra note 298 (detailing indigent defense delivery, spending, and structure in each state).

303. In 1999, ninety of the one hundred most populous counties had a public defender while eighty-nine had an assigned counsel system (suggesting a great deal of overlap), with public defenders handling 82% of cases overall. Carol J. DeFrances & Marika F.X. Litras, U.S. Dep't of Justice, Bureau of Justice Statistics, Indigent Defense Services in Large Counties, 1999, at 1 (2000); see also Caroline Wolf Harlow, U.S. Dep't of Justice Bureau of Justice Statistics, Defense Counsel in Criminal Cases 5 (2000) (finding 68.3% of state felony defendants in seventy-five most populous counties were represented by public defender in 1996).

304. Decker & Lorigan, supra note 36, at 105–06.

305. Id. at 106.

306. See infra Figure 1.

307. See infra Figure 2.

308. Decker & Lorigan, supra note 36, at 105–06 (footnote omitted).

309. See Hashimoto, Problem, supra note 39, at 1019–21 ("[T]here is substantial evidence—both anecdotal and statistical—suggesting that some jurisdictions routinely fail to provide legal representation to those constitutionally entitled to it."); Nat'l Ass'n of Criminal Def. Lawyers, Minor Crimes, Massive Waste: The Terrible Toll of America's

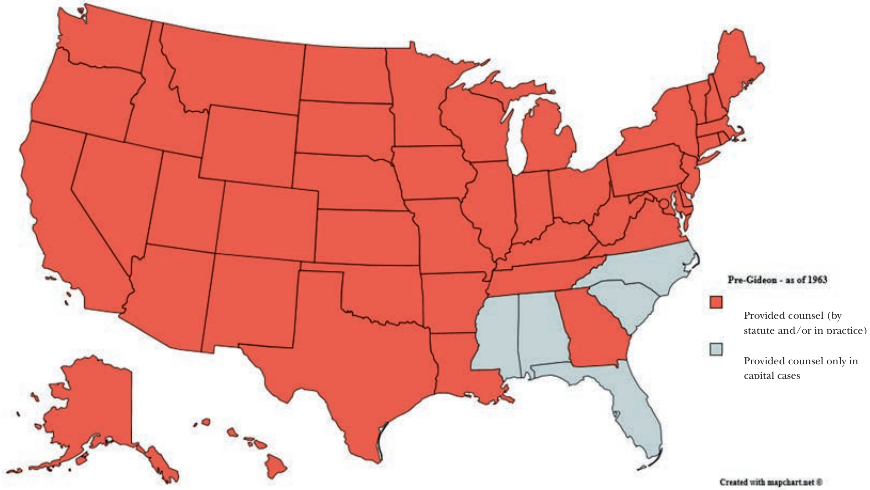
momentum was clear: Lawyers, judges, and policymakers all interpreted *Gideon* as a signal that their states should move towards providing more counsel in more cases.[310]

Broken Misdemeanor Courts 8–9 (2009) (discussing barriers to and solutions for effective representation in misdemeanor courts).

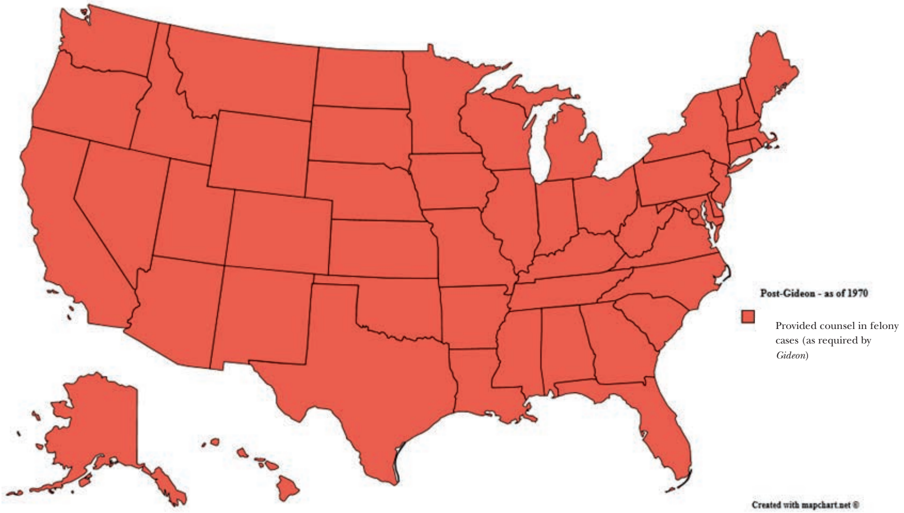
310. Lower federal courts also read *Gideon* this way. See, e.g., James v. Headley, 410 F.2d 325, 327 (5th Cir. 1969) (noting language of *Gideon* "is broad enough to apply to all criminal offenses").

FIGURE 1. POST-*GIDEON* CHANGES IF MEASURED BY RIGHT TO COUNSEL IN FELONY CASES

Before



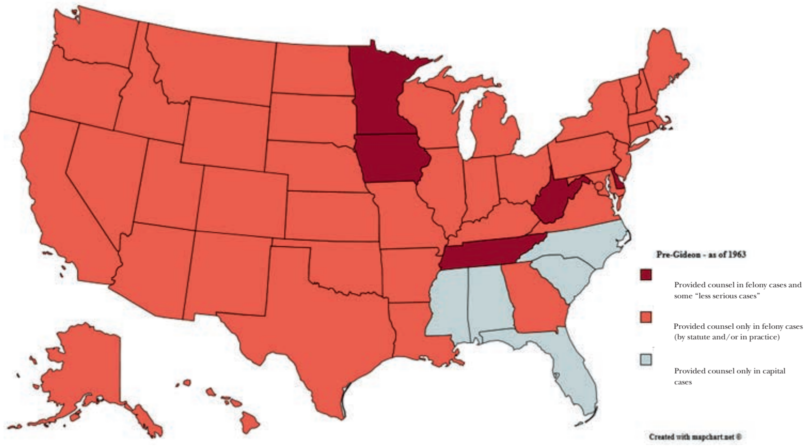
After



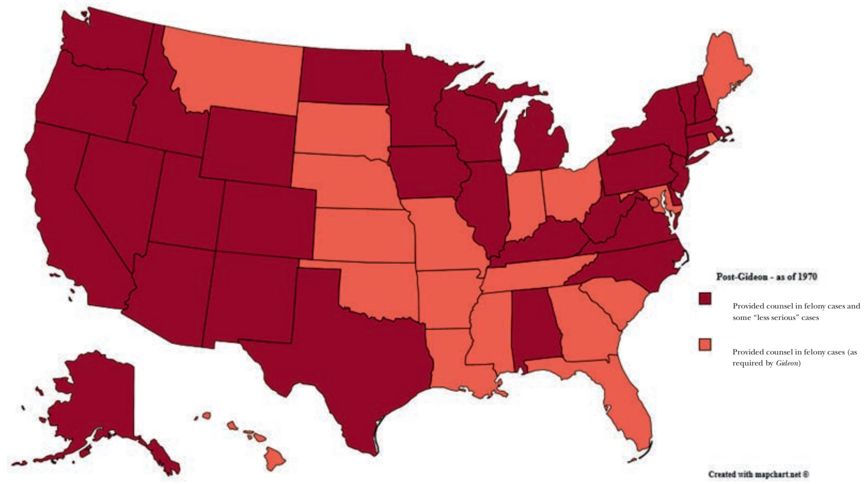
Source: Decker & Lorigan, supra note 36, at 133.

FIGURE 2. POST-*GIDEON* CHANGES IF MEASURED BY RIGHT TO COUNSEL IN SOME SET OF MISDEMEANORS

Before



After



Source: Decker & Lorigan, supra note 36, at 133.

IV. ORIGINS OF THE INDIGENT DEFENSE CRISIS

> *"With our organization in existence, no criminal defendant who is without funds . . . need get an antisocial attitude from a feeling that lack of money has prevented him from having a proper presentation of his case."*[311]
>
> *"And even when they're arrested, whites are ahead because more of them can afford attorneys. A lot of black cats end up in prison solely because they didn't have someone to really present their case in court. They're left with the public defenders, whom prison inmates quite accurately call 'penitentiary deliverers.'"*[312]

In the midst of its ongoing contretemps with the legislature, outside funders, and its lawyer and journalist critics, the Massachusetts Defenders Committee also began hearing doubts about its worth from a new source: its own clients. One prisoner praised the organization as "a great champion of the poor,"[313] but his does not seem to have been the majority view.[314] In the late 1960s, the agency fielded complaints, especially from the predominantly black neighborhood of Roxbury, that its lawyers were culturally distant from their clients and, as "government lawyers," could not be trusted.[315] This cultural divide converged with the turn to "volume representation" in the observations of Boston University Professor Robert Spangenberg, who ran a law student clinic in the Roxbury District Court. In 1968, Professor Spangenberg shared with the Massachusetts Defenders board the concerns of his staff and students that "the MDC [was] overworked and understaffed," had no office presence or name recognition in the neighborhoods it served, and employed no black attorneys.[316]

In part, these complaints reflected Boston-specific demographic shifts that widened the gap between defenders and their clients. Between 1940 and 1970, Boston's black population more than tripled, mostly

311. 1943 Annual Report, supra note 128, *in* LRB Papers, supra note 7, box 6, folder 11.

312. Interview by Playboy with Eldridge Cleaver in S.F., Cal. (Dec. 1968), reprinted in Nat Hentoff, Eldridge Cleaver: A Candid Conversation with the Black Panther Leader, Playboy Kinja (Feb. 10, 2014, 10:00 AM), http://playboysfw.kinja.com/eldridge-cleaver-a-candid-conversation-with-the-black-1518621816 [http://perma.cc/P7HJ-8NNC] [hereinafter Playboy, Eldridge Cleaver Interview].

313. The Poor Are Pawn's???, Insider (Inmates of the Norfolk County House Correction & Jail, Dedham, Mass.) (1969) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 1.

314. See Connolly, supra note 253, at 3 (reporting NLADA findings that "most prisoners interviewed believed that they had not received real representation").

315. Minutes from Massachusetts Defenders Committee Meeting (Aug. 31, 1967) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 14.

316. Id. These concerns animated the establishment in 1971 of the Roxbury Defenders Committee, which, until it was folded into the state public defender in 1984, served as a community-based alternative defender. See Roderick I. Ireland, The Roxbury Defenders Committee: Reflections on the Early Years, 95 Mass. L. Rev. 153, 153–55 (2013). For a contemporary portrait of the Roxbury Defenders, see Harris, In Criminal Court—II, supra note 252, at 78–87.

because of newcomers escaping the Jim Crow South, while almost a third of its white population took advantage of racially structured federal subsidies, market opportunities, and other incentives to move to the suburbs.[317] As a result, Boston transformed from an almost entirely European–American city with a small and long-established black population into a more typical Northern city with a sizable population of black residents trapped by racist laws, policies, and practices in deteriorating "ghetto" enclaves like Mattapan and Roxbury.[318] Meanwhile, as more affluent whites moved away, the Irish Americans who remained in South Boston and Charlestown suffered from poverty and social instability not dissimilar to conditions in Roxbury.[319]

But these local complaints also presaged mounting evidence of defendant anger nationwide. Echoing their Boston counterparts, defendants in San Francisco groused that their city's public defenders were "'reluctant to go to trial.'"[320] In 1970, New York City inmates petitioned the mayor with their grievance that Legal Aid lawyers opened every client meeting by proposing a plea deal.[321] Public defenders fared little better in controlled studies, as criminologists began regularly publishing findings that indigent defendants felt pressured to plead guilty.[322] In interviews with a political scientist, Connecticut prisoners described their lawyers not as advocates but as middlemen who simply relayed plea offers. "A public defender," one prisoner explained, "is just like the prosecutor's assistant."[323]

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317. Boston's population was counted at 3% black in 1940 and 16% black in 1970. Ronald P. Formisano, Boston Against Busing: Race, Class, and Ethnicity in the 1960s and 1970s, at 25 (2nd rev. ed. 2004); see also Vale, supra note 105, at 267–71, 301–16 (describing Boston's transformation in 1960s away from "overwhelmingly white" city). Although similar patterns played out in cities nationwide, Boston was somewhat unique in the scale of the transformation as it had historically had one of the smallest black populations of any Northern city. On the growth of Boston's suburbs, see Geismer, supra note 42, at 19–42.

318. Geismer, supra note 42, at 19–42 (discussing postwar demographic shifts in Boston area).

319. See generally Formisano, supra note 317 (discussing Irish American communities in South Boston and Charlestown in 1970s). For a memoir describing the persistence of entrenched poverty in Irish South Boston well into the 1980s and 1990s, see generally Michael Patrick MacDonald, All Souls (2007).

320. Alschuler, supra note 181, at 1206 n.84 (quoting San Francisco Committee on Crime, A Report on the San Francisco Public Defender's Office 4-7, A-2 (1970)).

321. Id. at 1241 n.176.

322. See Zeidman, supra note 280, at 939–40, 940 n.24 (assembling studies showing "plea mentality and directive is deeply entrenched"); see also Alan F. Arcuri, Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views, 4 Int'l J. Criminology & Penology 177, 183 (1976) (defendants "reported that they were pressured into pleading guilty"); Glen Wilkerson, Public Defenders as Their Clients See Them, 1 Am. J. Crim. L. 141, 143 (1972) (reporting Denver defendants' expressions of "widespread skepticism and cynicism" about public defenders and "[r]eal or imagined pressure to plead guilty").

323. Jonathan D. Casper, Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender, 1 Yale Rev. L. & Soc. Action 4, 6 (1971). Prior to *Gideon*, some lawyers

If measured by sentencing outcomes, defendants were likely mistaken that they would have fared better with "a street lawyer."[324] Empirical studies generally find that public defenders perform no worse than private lawyers, and in some settings, they perform much better.[325] In other words, Edgar Rimbold may have been right that defenders' familiarity with "the system" benefited their clients. Of course, whether it is a good thing that public defenders effectively navigate the plea bargaining maze depends on one's views about plea bargaining, and whether it is a good thing that public defenders' clients receive roughly the same punishment as everyone else depends on one's views about substantive criminal and sentencing laws.

If measured by subjective perceptions, however, the post-*Gideon* transition to a public-charity hybrid model of indigent defense had real costs both for defenders' morale and for defendants' beliefs about whe-

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opposed to the public defender model had predicted that public defenders would "'harden' toward all defendants' stories because of the volume of cases" and that defenders would enjoy overly cozy relationships with prosecutors and judges. Beaney, supra note 56, at 219.

324. Casper, supra note 323, at 7.

325. Early post-*Gideon* studies comparing public defenders with alternatives found no significant differences in outcomes. See Levine, supra note 251, at 224–26 (providing 1975 study finding Brooklyn Legal Aid lawyers investigated as diligently as private attorneys, though they took fewer cases to trial); Gerald R. Wheeler & Carol L. Wheeler, Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice. Type of Counsel, Pretrial Detention, and Outcomes in Houston, 26 Crime & Delinq. 319, 321–23 (1980) (summarizing literature as of 1979). Recent studies also report no consistent, significant difference between public defenders and appointed counsel. See James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes, 122 Yale L.J. 154, 157 n.6 (2012) (summarizing literature); see also Hartley et al., supra note 39, at 1065 (suggesting "type of counsel is not a strong predictor of case processing decisions").

In a study of Philadelphia murder cases, public defenders' clients had lower conviction rates and a much lower probability of receiving a life sentence than defendants with appointed counsel (although in part because of Philadelphia's extremely low compensation for appointed counsel). Anderson & Heaton, supra, at 159, 178–79; see also Laurin, supra note 50, at 340 (showing North Carolina public defenders achieved "superior outcomes" to appointed counsel); Michael A. Roach, Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes, 16 Am. L. & Econ. Rev. 577, 602 (2014) (explaining nationwide data suggests public defenders outperform assigned counsel); Radha Iyengar, An Analysis of the Performance of Federal Indigent Defense Counsel 3 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), http://www.nber.org/papers/w13187 [http://perma.cc/4ECX-YCHK] (arguing federal defendants receive shorter sentences with public defender than appointed attorney).

Comparisons of public defenders with retained counsel are more difficult to control for selection bias. See generally Morris B. Hoffman et al., An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent," 3 Ohio St. J. Crim. L. 223 (2005). Some studies suggest that retained counsel outperform public defenders, but only under certain conditions. See Hartley et al., supra note 39, at 1065 (collecting references); id. at 1067–68 (finding attorney type had no overall significant effect in one year's data from Cook County, Illinois, although private counsel outperformed public defenders, and vice versa, under certain conditions).

ther the courts were fair.[326] Though plea bargaining resolved most cases in practice, American legal culture still idealized adversary trial.[327] The gap between the adversary ideal and their day-to-day work blended, in defenders' minds, with their low salaries and high caseloads, causing them always to feel as though they were doing less for each client than they could have with more resources.[328] Defendants, too, romanticized trials and assumed "that if their attorneys were willing to fight vigorously on their behalf, they might be acquitted."[329] In 1974, legal scholar Albert Alschuler described plea bargaining as a tragic machine that could only produce different flavors of bad outcomes: If a defender "refuses to 'coerce his client,' he insures his own failure" at trial, but if he "does 'coerce his client' . . . he damages the attorney-client relationship, confirms the cynical suspicions of the client . . . and incurs the resentment of the person whom he seeks to serve."[330]

This outcome would surely have dispirited the Progressive Era philanthropists, and their Cold War successors, who touted legal aid as a way to insulate the urban poor from radical politics.[331] Of course, prisoners complained about the criminal courts before *Gideon*. But now, public defenders, far from alleviating defendants' concerns, often became the focus of those complaints. While Chief Justice Warren spoke fondly of the Alameda County public defender in the late 1960s, another celebrity denizen of Oakland advanced a different view. Black Panther Party leader Eldridge Cleaver, in a 1968 interview, explained the Party's appeal by describing a typical black defendant who, "in a stupor of confusion," takes his public defender's advice to plead guilty in exchange for a lesser

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326. On the difficulty of quantifying subjective dimensions to a public defender's relationship with clients, see Worden et al., Patchwork, supra note 39, at 1435.

327. See Jerome H. Skolnick, Social Control in the Adversary System, 11 J. Conflict Resol. 52, 52–53 (1967) (describing U.S. legal system's norm of adversary conflict).

328. Already in the 1970s, some scholars observed low morale among public defenders caused by "an expanding caseload and inadequate financing." Wilkerson, supra note 322, at 146. In the 1990s, scholars and advocates identified "staggering caseloads, tremendous time pressure, limited resources, and inadequate training" as factors causing public defender "burnout." Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 Harv. L. Rev. 1239, 1240–41 (1993); see also Robert L. Spangenberg & Tessa J. Schwartz, The Indigent Defense Crisis Is Chronic, Crim. Just., Summer 1994, at 13, 15 (reporting 1990 survey findings that 60% of public defender offices said heavy caseloads made it difficult to recruit attorneys).

329. Alschuler, supra note 181, at 1310; see also Harris, In Criminal Court—II, supra note 252, at 80 (noting "many defendants have a mystique about trials").

330. Alschuler, supra note 181, at 1310. Alschuler extended this model to both public defenders and private defense attorneys, but arguably, public defenders had the added burden of being seen as "government" lawyers. See id. at 1247 (excerpting clients' complaints that public defender is "like prosecutor's assistant" and "playing a middle game"); see also Levine, supra note 251, at 235–36 (speculating *Gideon* created "vicious cycle" in which defendants assumed their public defenders were "inadequate" and did not trust them to go to trial, further diminishing number of trials); Skolnick, supra note 327, at 65 (observing clients and defenders have different understandings of attorney's role).

331. See supra section I.A (discussing evolution of indigent defense).

charge.[332] Then he "wakes up in the penitentiary, starts exchanging experiences with other guys who have been through the same mill; and if he wasn't a rebel when he went in, he'll be a revolutionary by the time he gets out."[333]

For a time, legal scholars recognized cynicism about public defenders as a disconsonant note in the larger story of *Gideon*'s implementation. In 1967, Abraham Blumberg, a lawyer-turned-sociologist and acerbic critic of the legal profession, observed the tension between *Gideon*'s celebration of "*adversary, combative*" lawyering and the reality that courts were bureaucracies.[334] This disconnect, in Blumberg's prediction, would yield "ironic" consequences: Doctrine aimed at protecting individual rights would end up "enriching court organizations with more personnel and elaborate structure, which in turn will maximize organizational goals of 'efficiency' and production. Thus, many defendants will find that courts will possess an even more sophisticated apparatus for processing them toward a guilty plea!"[335] About a decade later, legal scholar Malcolm Feeley placed a more positive but still ironic spin on *Gideon*'s effects. By making the local courts more professionalized, Feeley wrote, the expanding right to counsel had also "raise[d] expectations" and "expose[d] practices to closer scrutiny . . . . Thus, an irony: as things [got] better they appear[ed] to get worse."[336]

But *Gideon*'s role in bureaucratizing (or professionalizing) the criminal courts soon faded from memory. As *Gideon* receded into the past, scholars and advocates reinterpreted public defenders' high caseloads, volatile funding, and avoidance of trials not as "'volume representation' of the type that appears to be mandatory" under *Gideon*,[337] but as signs that *Gideon*'s mandates were being neglected. *Gideon*, in the title of the American Bar Association's 1983 report identifying a "crisis in

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332. Playboy, Eldridge Cleaver Interview, supra note 312.

333. Id. To be sure, most California public defender offices (including Alameda County's) predated *Gideon*, but Cleaver's rhetoric is archetypical of post-*Gideon* discourse nationwide framing public defenders as bureaucrats.

334. Abraham S. Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, Law & Soc'y Rev., June 1967, at 15, 18. For an overview of Blumberg's career, see Wolfgang Saxon, A.S. Blumberg, 75, Professor Concerned with Equal Justice, N.Y. Times (Nov. 19, 1996), http://www.nytimes.com/1996/11/19/us/a-s-blumberg-75-professor-concerned-with-equal-justice.html (on file with the *Columbia Law Review*). In the same year, Berkeley sociologist Jerome Skolnick similarly observed that criminal court actors felt pressure to cooperate, even though doing so required appearing to deviate from the courts' ostensibly adversarial norm. Skolnick, supra note 327, at 52.

335. Blumberg, supra note 334, at 39.

336. Feeley, supra note 275, at 206. Unlike Blumberg, however, Feeley disagreed that courts were bureaucracies in the classical social-scientific sense, since they lacked "rational organization, hierarchical control, common purpose, and central administration." Id. at 17–18.

337. Mass. Defs. Comm., Second Report, supra note 229, at 4.

indigent defense funding," had come "undone."[338] From that report on, advocates have described indigent defense in a language of "crisis" that has never abated.[339] In the 1960s, Robert Spangenberg, as a young Boston University law professor, had alerted the Massachusetts Defenders Committee to his concerns about their impersonal advocacy. In the 1990s, Spangenberg—now the nation's leading expert consultant on indigent defense policy—expressed similar concerns on a national scale, lamenting that "overburdened public defenders are often forced to pick

338. ABA Standing Comm. on Legal Aid & Indigent Defendants, *Gideon* Undone: The Crisis in Indigent Defense Funding (1983), http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/gideonundone.authcheckdam.pdf [http://perma.cc/YAW2-B4FP] [hereinafter ABA, *Gideon* Undone]. The report's text was more equivocal: "unless positive steps are taken to address these problems, the promise of *Gideon v. Wainwright* will indeed be undone." Id.

339. See, e.g., Eve Brensike Primus, Am. Const. Soc'y for L. & Pol'y, Litigation Strategies for Dealing with the Indigent Defense Crisis 1 (2010), https://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf [https://perma.cc/TK2G-XQY7] [hereinafter Primus, Litigation Strategies] ("The indigent defense delivery system in the United States is in a state of crisis."); Joel M. Schumm, Standing Comm. on Legal Aid & Indigent Defendants, ABA, National Indigent Defense Reform: The Solution Is Multifaceted app. B at 37 (2012), http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf [http://perma.cc/FG9A-MWZD] (reporting findings on "the indigent defense crisis in America"); Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 Hastings L.J. 1031, 1039 (2006) ("To be sure, in a host of areas, thoughtful commentators refer to the justice system, at least with respect to the right to counsel, as being in critical disarray."); Fairfax, supra note 25, at 2318–19 ("The failings of *Gideon* have been thoroughly documented, and are properly attributed in large part to the crisis in indigent defense funding." (footnote omitted)); Richardson & Goff, supra note 268, at 2631 ("Indigent defense is in a state of crisis."); Worden et al., supra note 39, at 1426–27 (noting consensus that "public defense is in a state of perpetual crisis"); David Carroll, *Gideon*'s Despair: Four Things the Next Attorney General Needs to Know About America's Indigent Defense Crisis, Marshall Project (Jan. 2, 2015, 7:15 AM), https://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis [http://perma.cc/8MKJ-6RUD] ("Fifty years after . . . *Gideon* . . . the U.S. Department of Justice has found that right-to-counsel services in America 'exist in a state of crisis.'"); Andrew Cohen, Eric Holder: 'A State of Crisis' for the Right to Counsel, Atlantic (Mar. 15, 2013), http://www.theatlantic.com/national/archive/2013/03/eric-holder-a-state-of-crisis-for-the-right-to-counsel/274074/ [http://perma.cc/9HAR-B4GP] ("America's indigent defense systems exist in a state of crisis." (quoting Eric Holder)); U.S. Dept. of Justice, Office of Justice Programs & Bureau of Justice Assistance, Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations, at ix (2000), http://www.sado.org/fees/icjs.pdf [http://perma.cc/YEH6-6KPH] ("[I]ndigent defense in the United States today is in a chronic state of crisis."); Debra Carsens Weiss, Would Decriminalizing Minor Offenses Help Indigent Defense Crisis? ABA Committee Weighs In, Am. B. Ass'n J. (Jan. 8, 2013, 2:00 PM), http://www.abajournal.com/news/article/decriminalizing_minor_offenses_could_help_indigent_defense_crisis_aba_commi/ [http://perma.cc/4Y3Q-5PKC] (noting "perpetual crisis in indigent defense" (internal quotation marks omitted)). For early examples of articles identifying an "indigent defense crisis," see e.g., Paul Calvin Drecksel, The Crisis in Indigent Criminal Defense, 44 Ark. L. Rev. 363, 381–82 (1991); Spangenberg & Schwartz, supra note 328.

and choose which cases to focus on."[340] That observation appeared in an ABA report that was published in 1994, but could have been published in any year since then: *The Indigent Defense Crisis Is Chronic*.[341]

Since the 1980s, the phrase "indigent defense crisis" has functioned on two levels: as a description of observed conditions and as a conceptual paradigm for all discussions of indigent defense policy. At the level of observed conditions, advocates were likely correct that funding and caseload pressures worsened in the 1980s and 1990s as states got "tough on crime."[342] Although total funding for indigent defense increased in those decades, caseloads grew faster than funding could catch up, so per-case funding declined.[343] In this sense, "crisis" identifies acute funding emergencies that are conceptually fixable, if difficult politically. Yet, "indigent defense crisis" could also function as a permanent paradigm—a label for a "chronic" condition—because, in seed form, virtually every perceived symptom of the crisis was already present in *Gideon*'s immediate aftermath: "insufficient funding; high defender caseloads; low levels of attention to individual cases; low client satisfaction," and "high plea rates."[344] At some level of magnitude, then, these symptoms may simply be artifacts of what happens when *Gideon* is implemented in local criminal courts. If so, then the persistent rhetoric of "crisis" might

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340. Spangenberg & Schwartz, supra note 328, at 15; see also ABA, *Gideon* Undone, supra note 338, at 10–12 (providing testimony of Robert Spangenberg on burdens on public-defender system). On the Spangenberg Group's consulting work, see Laurin, supra note 50, at 335 n.52 ("[T]he Spangenberg Group . . . is typically called in to produce one-off assessments of state systems in crisis, or nationwide surveys that provide only a very high-level sketch of indigent defense trends."); Worden et al., Patchwork, supra note 39, at 1459 ("[T]he Spangenberg Group [has] frequently been brought into states to examine public defense systems and publish reports on their successes and failures.").

341. Spangenberg & Schwartz, supra note 328.

342. On the "tough on crime" turn in state policy, see, e.g., Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 3–6 (2007) (describing construction of "new civil and political order structured around the problem of violent crime" between 1970s and 2000s, resulting in historic growth of prison population).

343. See Stuntz, Collapse, supra note 4, at 57 ("[I]nflation-adjusted, per-case spending on lawyers for indigent defendants fell by more than half from the late 1970s to the early 1990s."); id. at 256 ("Per-case spending on lawyers for indigent defendants fell by half between 1979 and 1990."); Worden & Davies, Protecting Due Process, supra note 183, at 82–83 (noting overall increases in funding); Spangenberg & Schwartz, supra note 328, at 14 (concluding growth in caseloads outstripped funding increases). These conclusions are based on aggregate nationwide figures and may mask different local patterns. For example, Louisiana cut aggregate defense spending in the 1980s. See Stuntz, Uneasy Relationship, supra note 266, at 56 n.184 ("The Chief Justice of the Louisiana Supreme Court has noted that his state's spending on indigent defense was cut during the late 1980s while the caseload was undergoing a 45% increase.").

344. Worden et al., Patchwork, supra note 39, at 1456 (summarizing "familiar repertoire of problems" with indigent defense). Worden et al. also note "lack of state oversight" as an oft-identified problem, which is more of a problem in states with highly localized systems. Id.

unwittingly reflect a much more fundamental challenge to the *Gideon* consensus itself.[345]

V. *GIDEON*'S MEANING AND LEGACY

A gulf separates popular and scholarly assessments of *Gideon*'s legacy. The leading popular account remains Anthony Lewis's panegyric and proleptic *Gideon's Trumpet*.[346] A fervent and influential acolyte of the Warren Court, Lewis expressed high hopes that *Gideon* would inspire the reforms needed so that "every man charged with crime will be capably defended."[347] Outside of museums and textbooks, however, "*Gideon* discourse" has moved far away from Lewis's initial optimism.[348] In line with larger historiographical developments that have tempered appraisals of the Warren Court's influence, scholars have emphasized that most states already recognized "a basic right to appointed counsel"

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345. For a perceptive discussion of the limitations of "crisis" rhetoric in criminal justice scholarship, see Feeley, supra note 275, at xi–xiv, 192–93 (arguing crisis frame often lacks historical perspective and results in flawed reform efforts).

346. See Powe, supra note 4, at 379–85 (describing *Gideon*'s Trumpet as "canonical history of *Gideon*"); see also Lawrence M. Friedman, Crime and Punishment in American History 302, 527 n.26 (1993) (summarizing *Gideon* and citing *Gideon*'s Trumpet); Paul Butler, Poor People Lose: *Gideon* and the Critique of Rights, 122 Yale L.J. 2176, 2195 (2013) [hereinafter Butler, Poor People Lose] (identifying *Gideon*'s Trumpet as *Gideon*'s "creation myth"). The *Gideon* display at the National Constitution Center features an image of the cover of *Gideon*'s Trumpet. See photographs by Sara Mayeux (Feb. 14, 2015) (on file with the *Columbia Law Review*). For examples of *Gideon*'s Trumpet being assigned or recommended to students, see, e.g., New London High School Summer Reading List 2014 2, http://images.pcmac.org/SiSFiles/Schools/CT/NewLondon/NewLondonHigh/Uploads/Publications/Summer%20Reading%20Packet%202014%20-%20Website.pdf [http://perma.cc/SNF5-NFHB] (last visited Oct. 8, 2015); Before You Arrive: Summer Assignments, Univ. of Cal., Irvine, Sch. of Law, http://www.law.uci.edu/orientation/pre-orientation.html [http://perma.cc/W5HL-SZ8N] (last visited Oct. 8, 2015); Suggested Reading, Univ. of Ala. Sch. of Law, http://www.law.ua.edu/admissions/accepted-students/suggested-reading/ [http://perma.cc/Y9D6-45Z7] (last visited Oct. 8, 2015). On *Gideon* as a paradigmatic Warren Court case, see also Friedman, The Will of the People, supra note 4, at 273 ("For many, *Gideon* crystallized all that was good about the Warren Court's activism . . . .").

347. Lewis, *Gideon*'s Trumpet, supra note 16, at 205; see also Anthony Lewis, Supreme Court Extends Ruling on Free Counsel: Holds States Must Provide Lawyers for All Poor in Serious Criminal Cases, N.Y. Times, Mar. 19, 1963, at 1 (on file with the *Columbia Law Review*) (predicting *Gideon* "should spur state efforts to set up new methods of providing counsel"). On Lewis's influence and stance toward the Warren Court, see generally Lyle Denniston, Anthony Lewis: Pioneer in the Court's Pressroom, 79 Mo. L. Rev. 902, 902–03 (2015) ("Tony Lewis was America's witness to 'the Warren Court' . . . ."); Linda Greenhouse, The Rigorous Romantic: Anthony Lewis on the Supreme Court Beat, 79 Mo. L. Rev. 907, 907 (2015) ("[Lewis] chronicled the Warren Court's progressive constitutional revolution at the peak of its energy and transformative power."); Dahlia Lithwick, Anthony Lewis, 79 Mo. L. Rev. 971, 971–73 (2015) ("Tony Lewis changed everything about Supreme Court reporting.").

348. The phrase "*Gideon* discourse" comes from Butler, Poor People Lose, supra note 346, at 2179.

before 1963.[349] In the parlance of constitutional theory, then, *Gideon* was not a heroic countermajoritarian ruling but an example of a case imposing a national consensus upon a few remaining "outliers."[350] Meanwhile, criminal procedure scholars maintain that theoretical guarantees of counsel have failed, in practice, to guarantee meaningful legal help for the poor.[351] Scholars, advocates, and journalists have published thousands of articles exposing *Gideon*'s "failed promise"[352] or "muted trum-

349. Amar, supra note 9, at 112 ("[A] basic right to appointed counsel was already part of the fabric of America's lived Constitution [prior to *Gideon*]."). On changing scholarly assessments of the Warren Court, see generally Kalman, supra note 178, at 2–5 (discussing opinions of scholars with "faith in the transformative power of the Warren Court"); Christopher W. Schmidt, Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement, 33 Law & Hist. Rev. 93, 103–05 (2015) (summarizing legal historians' changing assessments of impact of seminal Warren Court case *Brown v. Board of Education*).

350. Driver, supra note 9, at 931–32; see also Amar, supra note 9, at 112, 115 (noting *Gideon* "merely codif[ied] a preexisting national consensus"); Friedman, The Will of the People, supra note 4, at 273 ("By the time of *Gideon*, forty-five states were requiring that all indigents accused of felonies be provided counsel."); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 16–17 (1996) (including *Gideon* as example of case "imposing" national consensus "on resisting local outliers"); Lain, supra note 4, at 1398 (stating *Gideon* "validated a well-established national consensus, suppressing Southern states that were out-of-step with the rest of the country's enlightened sense of fairness and equality").

351. E.g. Drinan, Getting Real, supra note 268, at 1311 ("[E]ven the most basic understanding of the right to counsel has never been fully implemented."); see also Fairfax, supra note 25, at 2318 ("[T]here is near-universal acceptance . . . that our system of indigent defense is broken.").

352. E.g. Brennan Ctr. for Justice, Justice Update: *Gideon*'s 50, Smarter Sequester Cuts (Mar. 21, 2013), http://www.brennancenter.org/newsletter/justice-update-gideons-50th-smarter-sequester-cuts [http://perma.cc/NR3V-4Z2F] (listing events under heading "*Gideon*'s Failed Promise"); Karen Houppert, Locked Up Without a Key in New Orleans, Nation (Aug. 22, 2012), http://www.thenation.com/article/locked-without-key-new-orleans/ [http://perma.cc/VA97-7JE9] (introducing series of articles "investigating the failed promise of *Gideon*"); An Unequal Defense: The Failed Promise of Justice for the Poor, Seattle Times (Apr. 4–6, 2004), http://seattletimes.com/news/local/unequal defense [http://perma.cc/3N9N-6DYA] (linking to numerous articles highlighting problems with public defense). For variations on the "promise" trope, see John H. Blume & Sheri Lynn Johnson, *Gideon* Exceptionalism?, 122 Yale L.J. 2126, 2143 (2013) (underfunding makes "promise of *Gideon* a sham"); David Cole, *Gideon v. Wainwright* and *Strickland v. Washington*: Broken Promises, *in* Criminal Procedure Stories 101, 102–03 (Carol S. Steiker ed., 2006) (claiming "despite the promise of 'effective assistance' set forth in *Strickland*, in actuality as long as the state provides a warm body with a law degree . . . little else matters"); Marceau, supra note 24, at 2485 (describing "right to counsel's reality" as "an unfulfilled, illusory promise"); Rudovsky, supra note 195, at 372 (2014) ("[T]here is near unanimous agreement that the 'promise' of *Gideon* has been systematically denied . . . ."); Eric A. Holder & Dick Thornburgh, *Gideon*—A Watershed Moment, National Association of Criminal Defense Lawyers, Champion Mag. (June 2012), http://www.nacdl.org/Champion.aspx?id=24999 [http://perma.cc/U489-9F2W] (observing "full promise of the rights guaranteed under *Gideon* has yet to be fully realized"); see also Nat'l Right to Counsel Comm., Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 2 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf [http://perma.cc/D9B4-SXKW] (arguing indigent

pet."[353] Even Anthony Lewis concluded, in retrospect, that his optimism had been misplaced.[354]

A. Gideon*'s Past*

This Article offers a historical perspective that falls somewhere between hopeful prolepsis and resigned pessimism about *Gideon*'s legacy. *Gideon* mattered more than its skeptics claim, but the changes *Gideon* catalyzed—such as the spread of the public defender model and the expansion of lawyers' presence in low-level criminal proceedings[355]—cannot be categorized as uniformly progressive or uniformly retrograde.

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defense systems "make a mockery of the great promise of the *Gideon* decision"). See generally ABA Standing Comm. on Legal Aid & Indigent Defendants, *Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice iv (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [http://perma.cc/T2AT-PPXR] (concluding "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not . . . provide effective representation" and suggesting solutions); Thomas E. Daniels, *Gideon*'s Hollow Promise: How Appointed Counsel Are Prevented from Fulfilling Their Role in the Criminal Justice System, 71 Mich. B.J. 136 (1992) (discussing barriers to success of appointed counsel); Richard Klein, The Emperor *Gideon* Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625 (1986) (detailing how severe underfunding of agencies providing defense counsel endangers Sixth Amendment); Note, *Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 Harv. L. Rev. 2062 (2000) (suggesting litigated reform as means of improving indigent defense). For other formulations describing *Gideon* as failed or illusory, see Bright & Sanneh, supra note 19, at 2160 (arguing "right to counsel" is "fiction"); Butler, Poor People Lose, supra note 346, at 2190 ("If *Gideon* was supposed to make the criminal justice system fairer for poor people and minorities, it has been a spectacular failure."); Fairfax, supra note 25, at 2321 ("Falling Short of *Gideon*'s Dream."). See generally Dripps, Why *Gideon* Failed, supra note 4 (discussing reasons for *Gideon's* failure and suggesting reform agendas); Eve Brensike Primus, The Illusory Right to Counsel, 37 Ohio N.U. L. Rev. 597, 598 (2011) (arguing "criminal justice system essentially prevents defendants from ever being able to challenge their counsels' ineffective assistance," and suggesting solutions).

353. Chester Fairlie, *Gideon*'s Muted Trumpet, 69 A.B.A. J. 172 (1983); Lewis R. Katz, *Gideon*'s Trumpet: Mournful and Muffled, 55 Iowa L. Rev. 523 (1970); Victoria Nourse, *Gideon*'s Muted Trumpet, 58 Md. L. Rev. 1417 (1999); Kim Taylor-Thompson, Tuning Up *Gideon*'s Trumpet, 71 Fordham L. Rev. 1461 (2003); Paul Butler, *Gideon*'s Muted Trumpet, N.Y. Times (Mar. 17, 2013) http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html (on file with the *Columbia Law Review*); see also Steiker, supra note 24, at 2697 (collecting examples).

354. Anthony Lewis, Abroad at Home; A Muted Trumpet, N.Y. Times (Aug. 16, 1991), http://www.nytimes.com/1991/08/16/opinion/abroad-at-home-a-muted-trumpet.html (on file with the *Columbia Law Review*) ("In the real world, the promise of *Gideon* is not being kept."); Anthony Lewis, The Silencing of *Gideon*'s Trumpet, N.Y. Times Mag. (Apr. 20, 2003), http://www.nytimes.com/2003/04/20/magazine/the-silencing-of-gideon-s-trumpet.html (on file with the *Columbia Law Review*) ("Clarence Gideon . . . would be disappointed today at the imperfect realization of his dream.").

355. See supra section III.C (noting number of states providing counsel in "less serious criminal cases" increased from five before *Gideon* to thirty-one in 1970).

Like most historical transformations, these changes entailed gains as well as losses, their costs and benefits fell unevenly, and there is no way to know what would have happened in a counterfactual world in which they were managed differently. Nor could these post-*Gideon* changes wash away the pre-*Gideon* past. *Gideon* should be understood not only as a promise to individual defendants and an exhortation to outlying states, but also as a political tool that has been used in different ways in different places, always within the context of preexisting local traditions and hierarchies.

Along the way, the history described in this Article also suggests more specific revisions to both the "outlier" and "failed promise" accounts of *Gideon*. Although the tally that *Gideon* abrogated doctrine in only five "outlier" states is too schematic,[356] it does capture an important point about *Gideon*: For a Warren Court criminal procedure case, *Gideon* met with little official state-level opposition. By contrast, *Miranda v. Arizona* imposed a rule that only three states had previously adopted and that twenty-six states formally opposed in an amicus brief.[357] But measuring by formal support alone underestimates *Gideon*'s reach. Nationwide, elite commentators, state-level policymakers, and local lawyers interpreted *Gideon* to require a variety of legal and institutional changes. If Anthony Lewis's romantic prose has fallen out of fashion, he was not wrong to predict that *Gideon*'s implementation would prove an "enormous social task" throughout the "vast, diverse country."[358]

In carrying out that task, lawyers grappled not only with political resistance but also with the conceptual and institutional remnants of

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356. See Yale Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right of an Accused," 30 U. Chi. L. Rev. 1, 19 (1962) (originating assertion that only five states did not require court-appointed attorneys for indigent felony defendants). Abe Fortas relied upon Kamisar's article in his brief to the Court, Brief for Petitioner, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 105), 1962 WL 115120, at *30–31, and it is often cited by scholars as well. See, e.g., Friedman, The Will of the People, supra note 4, at 273 n.346; Lain, supra note 4, at 1392 n.163. However, Kamisar ranged the states on a spectrum, with thirty-seven states with an express felony right to counsel; eight states that appeared to provide counsel in practice despite lacking an express provision; and five states with no statewide right to counsel in law or practice, although some urban counties in those states did provide counsel. Kamisar, supra, at 17–20. Kamisar allowed that "rules and statutes do not necessarily reflect practices at the trial level." Id. at 18. And Kamisar may have overlooked some local variation; for instance, he counted Pennsylvania as a state that provided counsel in practice primarily based on information from Philadelphia and Pittsburgh. Id. at 19.

Even at the level of formal rules, the 45/5 split underestimates *Gideon*'s reach. For example, the pre-*Gideon* Massachusetts rule requiring the appointment of felony counsel applied only in the superior courts. See supra note 56. But the lower-level district courts also had jurisdiction to try some felonies. So, in that sense, Massachusetts should be included as a sixth state where *Gideon* required changes to state-level, felony right-to-counsel doctrine. Presumably, there may have been other, similar intra-state nuances.

357. See Lain, supra note 4, at 1399–400 (noting "only three states required police to warn suspects of their rights prior to custodial interrogation" prior to *Miranda*).

358. Lewis, *Gideon*'s Trumpet, supra note 16, at 205.

their own pre-*Gideon* indigent defense efforts. That path dependence suggests modifications to the "failed promise" narrative of *Gideon*. Particularly within the criminal procedure literature, most scholars attribute present-day indigent defense funding levels to political indifference or even outright legislative defiance of the *Gideon* mandate.[359] Others invoke variants of interest-group theory to present the underfunding of indigent defense as almost inevitable, given that public resources are limited and criminal defendants are an unsympathetic lobby.[360] There is surprisingly little empirical literature testing these assumptions about the politics of indigent defense; to the contrary, state-by-state comparisons of indigent defense funding raise questions about how universally the assumptions apply.[361] But even assuming that political

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359. See, e.g., Bright & Sanneh, supra note 19, at 2160 (accusing state governments of disregarding obligations under *Gideon*); Dripps, Why *Gideon* Failed, supra note 4, at 924 ("Legislators have consistently failed to provide the levels of funding that would be required for even minimally adequate representation."); Richardson & Goff, supra note 268, at 2628 (citing "lack of political will to fulfill *Gideon*'s promise"). For anecdotal evidence of one legislator's indifference to funding indigent defense, see Deborah L. Rhode, Access to Justice, 69 Fordham L. Rev. 1785, 1791 (2001) (quoting one legislator as saying "he [did not] care if indigents [were] represented or not" (alterations in original)). Scholars reserve some blame for the Burger Court, which they accuse of backtracking on *Gideon* by setting minimal standards for effective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). See, e.g., Blume & Johnson, supra note 352, at 2142 (claiming *Strickland* rendered *Gideon* "ephemeral"); Bright & Sanneh, supra note 19, at 2170 (arguing *Strickland* "eroded the reach of *Gideon*"). But see Israel, From a 1963 Perspective, supra note 26, at 2056 (arguing *Strickland* was fully compatible with *Gideon*).

360. See, e.g., Primus, Litigation Strategies, supra note 339, at 3 (describing how voters will punish state legislators who support "defense-friendly reforms"); Chemerinsky, supra note 23, at 2692 ("Neither the poor nor their attorneys have sufficient political influence to ensure adequate resources."); Donald A. Dripps, Up from *Gideon*, 45 Tex. Tech L. Rev. 113, 121 (2012) [hereinafter Dripps, Up from *Gideon*] ("[I]ndigent defense competes for public funds with other urgent priorities."); Steiker, supra note 24, at 2700 (stating "it is not surprising" that indigent defense is low political priority); see also Bright & Sanneh, supra note 19, at 2153 ("[G]overnments have no incentive to provide competent representation, which could frustrate their efforts to convict, fine, imprison, and execute poor defendants."); Fairfax, supra note 25, at 2322 (positing legislators view "law enforcement and corrections . . . as more central to the state's core criminal justice function" than indigent defense).

361. State-level indigent defense funding is not correlated with incarceration rates. Brown, Epiphenomenal, supra note 298, at 915–16; see also Worden & Davies, Protecting Due Process, supra note 183, at 98 ("[I]ncarceration rates did not prove strongly predictive of low investment in indigent defense . . . ."). As Darryl Brown notes, that does not mean there is no "ideological linkage" between the two, but if so, it is not straightforward. See Brown, Epiphenomenal, supra note 298, at 922 ("[T]here [may be] alternate and competing ideologies, with some prevailing in certain jurisdictions and others predominating elsewhere.").

More generally, empirical studies suggest weak ties between partisan politics and indigent defense policy. One longitudinal analysis found no correlation between state-level indigent defense funding and "the ideology of political elites" (as measured by a state's governor and legislative party leaders); this analysis did find an association between "racial composition," "political illiberality," and "lower rates of spending on indigent defense," although the association was strongest during the 1980s' "punitive turn." Worden &

conditions for indigent defense are unfavorable, this Article shows that lawyers played an outsized role in shaping those conditions.[362] Today's levels of government provision for indigent defense reflect not only present-day political judgments but also the cumulative legacy of decades in which many lawyers themselves rejected the idea of government-subsidized indigent defense.

B. Gideon*'s Future*

Reframing our historical narratives of *Gideon* can also open up new conversations about how to move forward, both for criminal procedure scholarship and for indigent defense policy. Scholars have prescribed myriad cures for what they diagnose as *Gideon*'s failure.[363] These range from doctrinal adjustments to the appellate standard for ineffective assistance of counsel[364] and structural reform litigation[365] to more aggressive bar oversight of defense attorneys[366] and the expansion of law school

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Davies, Protecting Due Process, supra note 183, at 89, 97–98; see also Davies & Worden, State Politics, supra note 39, at 211 ("In short, the politics of indigent defense are driven less by straightforward economic factors than by the forces that appear to have influenced punishment policies over the last three decades."); Alissa Pollitz Worden & Robert E. Worden, Local Politics and the Provision of Indigent Defense Counsel, 11 Law & Pol'y 401, 413–15 (1989) [hereinafter Worden & Worden, Local Politics] (comparing county indigent defense spending within Georgia and finding fiscal pressures, bar association activity, and judicial preferences were more determinative than public's preferences); Worden et al., Patchwork, supra note 39, at 1455 (suggesting indigent defense policy trajectories are better explained by economic rather than political factors).

362. On this point, see also Worden & Worden, Local Politics, supra note 361, at 405, 407, 413–15 (noting political power of bar associations and local legal communities may have felt threatened by public defender systems). In Houston, judicial opposition helped prevent the adoption of a public defender in the 1970s. See Wheeler & Wheeler, supra note 325, at 325.

363. See Dripps, Up from *Gideon*, supra note 360, at 121 (noting academics have developed numerous "plausible argument[s] for reform" of indigent defense).

364. E.g., Blume & Johnson, supra note 352, at 2147; Primus, Effective Trial Counsel, supra note 20, at 2607–08 (celebrating dialogue between federal and state courts, which may "result in more realistic opportunities for defendants to raise ineffective assistance of trial counsel claims in state courts").

365. E.g., Primus, Litigation Strategies, supra note 339, at 8 (arguing "Congress should add a new chapter to Title 28 that would create a specific habeas corpus cause of action for systemic right-to-counsel violations"); see also Cara H. Drinan, The Third Generation of Indigent Defense Litigation, 33 N.Y.U. Rev. L. & Soc. Change 427, 462–75 (2009) (suggesting structural litigation strategies). For an account from a lawyer involved in litigating one such case in Michigan, see Costello, supra note 25, at 1968–75. For news coverage of a recent high-profile example, see James C. McKinley, Jr., In New York, Cuomo Pledges More Aid for Lawyers of the Indigent, N.Y. Times (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/nyregion/in-new-york-cuomo-pledges-more-aid-for-indigents-in-court.html (on file with the *Columbia Law Review*).

366. Steiker, supra note 24, at 2705 ("These organizations could do more to police attorney quality through bar discipline, especially in some of the lowest-performing jurisdictions that produce the horror stories that are all too easy to find.").

clinics focusing on criminal defense.[367] For every proposal, one can find countervailing critiques pointing out its shortcomings.[368] In recent years, a few scholars have advanced a still more pessimistic counternarrative of "*Gideon* skepticism." They argue that courts and commentators have fixated on the right to counsel instead of dismantling deeper causes of inequality in criminal justice, such as racist policing, excessive criminal laws, and draconian sentencing.[369] Some call for lawyers to relinquish their "ambitions for lawyerizing the world" and instead try to simplify court proceedings so that lawyers are less necessary.[370]

By emphasizing *Gideon*'s institutional effects rather than its doctrinal limits or its political neglect, this Article offers two possible ways of synthesizing and selecting from the literature's panoply of policy solutions. In one sense, this history reinforces "*Gideon* skepticism" as a more promising pathway towards meaningful equity in the criminal

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367. Bright & Sanneh, supra note 19, at 2173 ("More [clinics] are needed so that students see the desperate needs of poor people accused of crimes and learn to provide competent and ethical representation.").

368. E.g., Bibas, supra note 19, at 1293–96 (questioning prioritization of legal rather than institutional solutions); Drinan, Getting Real, supra note 268, at 1325, 1331–32 (arguing systemic litigation diverts resources and should only be used as "measure of last resort"); Steiker, supra note 24, at 2700 (questioning focus on appellate doctrine).

369. Alexandra Natapoff, *Gideon* Skepticism, 70 Wash. & Lee L. Rev. 1049, 1051–52 (2013) ("In other words, the treatment, conviction and punishment of individuals may be unfair in ways that their attorney, no matter how skilled, cannot meaningfully address."); see also Bibas, supra note 19, at 1293–96 (questioning prioritization of legal rather than institutional solutions); Butler, Poor People Lose, supra note 346, at 2179 ("Even full enforcement of *Gideon* would not significantly improve the wretchedness of American criminal justice."); id. at 2191, 2195, 2203–04 ("[E]ven if the defender community were victorious in getting what it wanted out of *Gideon* . . . American criminal justice would still overpunish black and poor people."); Chin, supra note 22, at 2240, 2259 ("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 . . . . The problem is a lack of fairness in deciding what to criminalize and how to enforce those prohibitions."); Dripps, Up from *Gideon*, supra note 360, at 114 (arguing "lingering fantasy that the Court someday, somehow, will force legislatures to pony up the resources for effective indigent defense . . . has failed and should be declared a failure"); Fairfax, supra note 25, at 2320 ("By pursuing strategies that reconsider our reliance on criminalization and incarceration, we can move toward a regime with fewer indigent criminal defendants in need of representation . . . ."); cf. Steiker, supra note 24, at 2700–01 (arguing full funding for indigent defense is unlikely so reformers should consider alternative goals like decriminalizing low-level offenses).

370. Bibas, supra note 19, at 1290, 1300–07; see also Drinan, Getting Real, supra note 268, at 1336–37, 1339–44 (arguing for differentiated professional roles within criminal defense, analogous to the medical profession's use of nurse practitioners); Dripps, Up from *Gideon*, supra note 360, at 127–28 (advocating for lay representation in juvenile and misdemeanor cases). Dripps also floats the more "radical" proposal of creating a separate, non-J.D. career track for public defense. Id. at 129–30; see also Rhode, supra note 359, at 1806, 1814–16 (advocating for simplified legal procedures and opening routine legal work to nonlawyers in both civil and criminal contexts).

courts than another generation of *Gideon* jeremiads.[371] In some contexts, poor people might be better served by reforms to make lawyers less necessary, and also to reduce the consequences of having an ineffective lawyer, than by continued and possibly counterproductive attempts to expand *Gideon*'s reach beyond the capacity (or will) of existing institutions.[372] There would be fewer situations in which poor people suffered from the lack of an effective lawyer if there were fewer situations in which poor people were charged with a crime to begin with, and for the cases that would remain, the resulting declines in caseloads might enable public defenders to revive what both lawyers and defendants valued about the pre-*Gideon* charity model—its emphasis on intensive factual investigation and trial advocacy.[373]

In another and perhaps paradoxical sense, however, this Article's historical account could also encourage a renewed *Gideon* optimism. On the recent occasion of *Gideon*'s fiftieth anniversary, Stephen Bright and Sia Sanneh challenged lawyers "to lobby for poor people accused of crimes," arguing that the profession's monopoly on legal services entails "a responsibility to ensure that the criminal justice system has integrity."[374] Bright and Sanneh could have offered a more direct justification than the profession's monopoly. The legal profession has not passively acquiesced to legislative neglect of indigent defense. Rather, lawyers themselves have been historically responsible both for many of the

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371. See Bibas, supra note 19, at 1289 (describing "expansionist dream" of *Gideon* as "unattainable mirage"); Drinan, Getting Real, supra note 268, at 1312 (arguing lawyers "should be more realistic in our efforts to enforce the right to counsel"); Dripps, Up from *Gideon*, supra note 360, at 114 (describing "lingering fantasy" courts will force legislatures to adequately fund indigent defense); Natapoff, *Gideon* Skepticism, supra note 369, at 1054 (arguing defense counsel alone cannot remedy institutional injustice in criminal process). For a related argument on access to justice in both civil and criminal contexts, see Rhode, supra note 359, at 1790, 1815–16 (criticizing legal profession for relying on "ceremonial platitudes" rather than advocating "realistic objectives").

372. See Drinan, Getting Real, supra note 268, at 1339 (citing example of pyrrhic victory in Maryland litigation to provide counsel at bail hearings to show "that suing to expand the right to counsel when the existing contours of that right have yet to be fulfilled can be risky").

373. For similar arguments, see id. at 1326 (suggesting decriminalization would "relieve some of the pressure on the public defense function"); Spangenberg & Schwartz, supra note 328, at 52 (arguing "decriminalizing minor misdemeanors" would help reduce defender caseloads); see also Bibas, supra note 19, at 1298 (endorsing "grand bargain, in which legal services were deeper but more focused, with a narrower but more rigorously policed mandate"). Bibas proposes reaching this arrangement by reducing the complexity of litigation and opening low-level criminal proceedings to paraprofessionals, but decriminalization could promote similar results by reducing the overall number of criminal cases. But for an important exploration of the downsides to decriminalization, see Alexandra Natapoff, Misdemeanor Decriminalization, 68 Vand. L. Rev. 1055, 1055 (2015) (arguing decriminalization "preserves many of the punitive features and collateral consequences of the criminal misdemeanor experience, even as it strips defendants of counsel and other procedural protections").

374. Bright & Sanneh, supra note 19, at 2173.

developments that heightened criminal defendants' need for lawyers and for the long tradition of assumptions, rhetoric, and material allotments devaluing the lawyers who actually meet that need.[375] If the indigent defense crisis derives not from intransigent political realities but from contingent choices made by lawyers, then lawyers may retain not only more responsibility but also more power than they realize to mitigate the conditions they diagnose as crisis.

CONCLUSION

Reading through generations of memos, articles, policy reports, and court decisions about the right to counsel, it can start to seem like someone is always getting *Gideon* wrong. Wilbur Hollingsworth thought the Massachusetts Defenders Committee board was underestimating what *Gideon* required, while the board, in turn, thought the Massachusetts legislature was doing the same. Constitutional theorists think that Warren Court acolytes are wrong to celebrate *Gideon* as a brave and pioneering decision. It was merely suppressing outliers. Public defenders think that schoolchildren and law students are naive to believe that *Gideon* is a meaningful standard. It is violated every day. Criminal procedure scholars think the appellate courts get *Gideon* wrong when they uphold convictions over plausible claims of incompetent counsel, that legislators get *Gideon* wrong when they allocate meager funds to indigent defense, and that voters get *Gideon* wrong when they grouse that funding defenders amounts to "coddling criminals." Pace Judge Elijah Adlow, almost no one declares that the Supreme Court itself got *Gideon* wrong, but beyond that, no one agrees on what exactly *Gideon* means or requires.

What would it mean to get *Gideon* right? As a matter of legal history, as this Article has illustrated, that is not a useful question. Instead of trying to divine some transhistorically correct meaning of *Gideon* against which to measure present-day actors, lawyers and legal and constitutional historians should recognize that *Gideon*'s meaning has always been both contested and contestable and seek to understand the political and social conditions that have empowered certain understandings of *Gideon* to prevail in particular local contexts. The present disconnect between widespread celebration of a Supreme Court decision and widespread cynicism about its implementation, rather than a lamentable but predictable disconnect between platonic ideals and messy reality, is itself a historical phenomenon worth investigating. What larger political and social structures enable a polity's legal rhetoric and material enforcement of that rhetoric to diverge so substantially? What work has *Gideon* been doing in the criminal courts, if not the work that indigent defense

375. For a related argument that the legal profession is complicit in devaluing public-interest lawyering, see Rhode, supra note 359, at 1808–15 (claiming "access to justice is a favorite theme in bar rhetoric but a low priority in reform agendas").

advocates think it should be doing? Similar questions could and should be asked not just about *Gideon* but about all of the Warren Court's criminal procedure cases.[376] Rich archival sources exist and enough time has passed to develop a more complex understanding of how these cases both took part in and contributed to broader historical changes, such as the rise of mass incarceration.

Still, there is valuable moral electricity coursing through the vast body of literature in which people accuse one another of getting *Gideon* wrong.[377] If not a useful question for legal history, *Gideon*'s meaning implicates urgent questions of law and policy. Economic inequality is only getting worse.[378] Through their conversations about *Gideon*, lawyers and legal scholars confront the challenge of whether and how it is possible to devise a system of criminal process that, if it does not ameliorate inequality, at least does not systematically exacerbate it. Perhaps no process can eliminate the built-in "wealth effect" of the American choice to rely on lawyers, rather than neutral state actors, to investigate and present the evidence in criminal proceedings.[379] But, as lawyers have long recognized in debates over indigent defense both before and since *Gideon*, there are better and worse ways of mitigating that wealth effect. Voters and legislators may or may not follow, but lawyers and legal scholars should take the lead in advocating for the better ways. On an ordinary morning in 1973, Boston police court judge Elijah Adlow wondered about two ordinary women who appeared before him that day, "What's the Supreme Court got to do with *them*?" The answer, at least as concerns *Gideon*, is both more and less than scholars have sometimes assumed. But the answer is not nothing.

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376. Scholars have periodically noted the relative lack of historical scholarship contextualizing the Warren Court's criminal procedure cases. E.g., Klarman, supra note 350, at 62 (describing "scholarship seeking to provide a positive, as opposed to a normative, account of the dramatic doctrinal innovations of this period" as practically nonexistent); Lain, supra note 4, at 1364 (describing scholarship considering these cases in social and political context as "virtually nonexistent").

377. See, e.g., Bright & Sanneh, supra note 19, at 2155 (arguing criminal courts "lack[] legitimacy" and calling for "courts, legislatures, executives, and members of the legal profession . . . to respond with a sense of urgency").

378. For recent discussions of this phenomenon by legal scholars, see David Singh Grewal, The Laws of Capitalism, 128 Harv. L. Rev. 626, 632–41 (2014) (reviewing Thomas Piketty, Capital in the Twenty-First Century (2014)) (summarizing Piketty's empirical finding of increasing economic inequality); Samuel Moyn, Thomas Piketty and the Future of Legal Scholarship, 128 Harv. L. Rev. Forum 49, 49 (2014) (commenting on Piketty's documentation of income inequality and subsequent legal scholarship analyzing his findings).

379. For the phrase "wealth effect," see John H. Langbein, The Origins of Adversary Criminal Trial 102–03 (A.W. Brian Simpson ed., 2003) (arguing adversary criminal procedure is "intrinsically skewed to the advantage of wealthy defendants"); cf. Bright & Sanneh, supra note 19, at 2156 (arguing in practice system is only truly adversarial for wealthy).

Appendix

A. *Sources of Data for Tables 1 and 2*

Fiscal Year 1935–36

- Report of the Voluntary Defenders Committee (June 1, 1936) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During its first year of operation [June 1, 1935, to June 1, 1936], the Voluntary Defenders Committee received 151 acceptable cases and appeared in court in behalf of defendants 82 times."
- Expenses: $1,976.97

Fiscal Year 1936–37

- Report of the Voluntary Defenders Committee (June 1, 1937) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "From June 1, 1936 to June 1, 1937, 193 applicants were accepted by the Committee . . . . The defender appeared in Court in one hundred and thirteen cases."
- Expenses: $2,767.10

Fiscal Year 1937–38

- Report of the Voluntary Defenders Committee (Sept. 1, 1938) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- During the period June 1, 1937, to September 1, 1938, "we received 395 applications . . . .We refused to represent nineteen of them because they could afford to retain private counsel or because they wanted to be defended in a trial although admittedly guilty . . . . A number of applicants only needed advice of one sort or another—there were seventy-eight such cases."
- Expenses: $4,924.32

Handwritten note: "No report on Sept. 1, 1938 to Jan. 1, 1939 made—next report was made on calendar year basis."

1939

- Report of the Voluntary Defenders Committee (Jan. 1, 1940) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During 1939 [January 1, 1939, to January 1, 1940], 480 persons appealed to the Committee for help . . . . Of the 480 persons who came to us in 1939, 55 needed legal advice only. Fifty-four were refused aid because of their ability to retain private counsel and

fifty were refused for reasons confidential between applicant and counsel."

- Expenses: $5,502.17

1940

- 1940 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1941) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During the year 1940, the Committee received five hundred and eight applications for assistance . . . . Of this number, fifty-eight were in need of legal advice only. Fifty-one were refused assistance because of their financial ability to retain counsel and one hundred and nineteen were refused for reasons confidential between applicant and counsel . . . ."
- Expenses: $5,490.82

1941

- 1941 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1942) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During the year [January 1, 1941, to January 1, 1942], 466 requests for assistance were received . . . . Of the 466 applicants, 60 were in need of legal advice only. 55 were refused assistance because of their financial ability to retain counsel, and 85 were refused for reasons confidential between applicant and counsel."
- Expenses: $5,788.67

1942

- 1942 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1943) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During the year [January 1, 1942, to January 1, 1943], 403 applications were made to the Committee. Of these, 47 applicants were in need of legal advice only. Thirty-eight were refused because of their financial ability to retain counsel and 61 were refused for reasons confidential between applicant and counsel."
- Expenses: $5,570.19

1943

- 1943 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1944) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During the year [January 1, 1943, to January 1, 1944], 427 applications for aid were made to the office . . . . While 38 of the

applicants were in need of legal advice only . . . . Fifty-six applicants were refused because of their financial ability to retain counsel and 70 were refused for reasons confidential between applicant and counsel. The remaining 263 cases . . . ”

- Expenses: $6,224.06

1944

- 1944 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1945) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2.
- “During the year [January 1, 1944, to January 1, 1945], four hundred and fifty applications for assistance were made to the office . . . . Ninety-two of the applicants were in need of legal advice only . . . . Thirty-eight applicants were refused because of their ability to retain private counsel, and sixty-six were refused for reasons confidential between applicant and Counsel.”
- Expenses: $6,951.39

1945

- 1945 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1946) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- “Three hundred and ninety-seven applications for assistance were received during the year [January 1, 1945, to January 1, 1946]. Seventy-two of these applicants were in need of legal advice only . . . . Twenty-five applicants were refused because of their ability to retain private counsel, and seventy were refused on the merits of the case.”
- Expenses: $7,597.37

1946

- 1946 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1947) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- “During the year [January 1, 1946, to January 1, 1947], 444 applications for assistance were received. Eighty-four of these applicants were in need of legal advice only . . . . Thirty-two applicants were refused because of their ability to retain private counsel and 81 were refused on the merits of the case.”
- Expenses: $9,518.64.

1947

- 1947 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1948) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2.
- "Of the 603 applications received [from January 1, 1947, to January 1, 1948], 115 of the applicants were in need of legal advice only . . . . 43 applicants were refused after investigation because of their ability to retain private counsel, and 102 were refused on the merits of the case or because the applicant did not come within the group of non-professional criminals for whose defense the Committee is organized."
- Expenses: $9,924.09

1948

- 1948 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1949) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "During the year [January 1, 1948, to January 1, 1949], we received 667 applications for assistance . . . . 182 were in need of advice . . . . Fifty-seven eventually retained other counsel, and 13 more were refused because of our belief that they were financially able to hire counsel. Twenty-eight were refused on the merits of the case."
- Expenses: $13,263.53

1949

- 1949 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1950) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2.
- "We received 733 new cases during the year [January 1, 1949, to January 1, 1950] . . . . We classified 215 cases as "Advice" . . . . Fifty-four clients eventually retained private counsel . . . . We refused to accept the cases of fourteen applicants because we were of the opinion that they had sufficient means to employ private counsel. The Voluntary Defenders Committee obviously does not wish to compete with the Bar . . . . Twenty-two clients were refused because we did not believe that their cases had sufficient merit . . . . The Committee will not defend individuals who admit that they are guilty but insist on having their case tried, in the hope that they may be acquitted."
- Expenses: $16,138.93

1950

- 1950 Annual Report of The Voluntary Defenders Committee Incorporated (Jan. 1, 1951) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 6, folder 11.
- "We received 740 new cases during the year [January 1, 1950, to January 1, 1951] . . . . We classified 232 cases as 'Advice.' Fifty-one clients eventually retained private counsel . . . . We refused to accept the cases of fifteen applicants because we were of the opinion that they had sufficient means to employ private counsel. The Voluntary Defenders Committee has no desire to compete with the Bar . . . . Forty-three clients were refused because we did not believe their cases had sufficient merit for the Committee to undertake to represent them. The committee will not defend individuals who admit that they are guilty but nevertheless insist on pleading innocent and having their cases tried, in the hope that they may be acquitted."
- Expenses: $16,164.19

1951

- 1951 Annual Report of the Voluntary Defenders Committee Incorporated For the Year (Jan. 1, 1952) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2.
- "Our counsel and his two assistants conducted 91 trials in 1951 . . . . [These trials] do not reflect the labor devoted to the remaining 655 cases. Of these, 31 were refused because the defendant was able to employ counsel or was not the type of person whom we are willing to represent, i.e., professional criminals, or persons who though plainly guilty wish to force a trial upon the off chance of a sympathetic jury. In 25 cases the Grand Jury refused to indict; in 13 instances the defendant was released by action of the court or the District Attorney; in 52 cases private counsel eventually undertook representation of the defendant."

Note: The table gives a total of 625 cases, which was calculated by adding 91 trials to the 655 remaining cases, then subtracting the 31 refused cases, the twenty-five non-indicted cases, the thirteen dismissed cases, and the fifty-two private counsel cases. Arguably, the nonindicted and dismissed cases could be included in the total, which would yield 663 cases.

- Expenses: $19,671.30

1952

- 1952 Annual Report of the Voluntary Defenders Committee Incorporated For the Year (Jan. 1, 1953) (on file with the

Columbia Law Review), *in* LRB Papers, supra note 7, box 1, folder 5.

- "In 1952 . . . we handled 735 cases . . . . Because we determined that the defendant could obtain private counsel or should not receive our services for various other reasons, we refused 31 requests for assistance. In fifty-six cases defendants were able to retain private counsel."
- Expenses: $21,407.68

1953

- The Voluntary Defenders Committee, "'I Confess' [Annual Report for 1954]" (Jan. 1, 1954) (on file with the *Columbia Law Review), in* LRB Papers, supra note 7, box 5, folder 2.
- "During the year 1953 we received 915 cases . . . . Because we determined that the defendant could obtain private counsel or should not receive our services for various other reasons, we refused 36 requests for assistance. In 35 cases defendants were eventually able to retain private counsel."
- Expenses: $24,062.80

1954

- Annual Report of the Voluntary Defenders Committee Incorporated For the Year 1955 (Jan. 1, 1955) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2.
- "In 1954, we received 1185 cases . . . . We refused to handle 61 cases because we determined that the defendant could obtain private counsel or should not receive our services for various other reasons. In 94 cases, defendants were eventually able to retain private counsel."
- Expenses: $24,405.18

1955

- Annual Report of the Voluntary Defenders Committee (1955) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 2.
- "In 1955 [January 1, 1955, to January 1, 1956] we received 1,250 cases . . . . We refused to accept 90 cases because we felt that the defendant in each case was able to afford private counsel or for various reasons was not eligible for our services."
- Assets: $17,701.36
- Income: $24,585.06
- Expenses: $29,729.78

- Net Loss: $5,144.72

1958

- The Indigent Defendant [Annual Report of the Voluntary Defenders Committee for 1958] (1959) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 5, folder 3.
- For the period January 1, 1958 to January 1, 1959:

New Cases: 1,368

- Not Indicted: 28
- Dismissed by Court: 43
- Refused—Ineligible: 16
- Refused—Out of Jurisdiction: 31
- Refused—Financial Reasons: 39
- Retained Other Counsel: 91
- Expenses: $35,333.77

B. *Sources of Data for Table 3*

Legislative appropriations for the years 1962–1964 are taken from:

- Voluntary Defenders Committee, Inc., Office of Economic Opportunity Application for Community Action Program 4 (May 10, 1966) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 3.

Legislative appropriations for the years 1965–1972 are taken from:

- National Criminal Justice Reference Service, An Evaluation Report of the National Legal Aid and Defender Association on the Massachusetts Defenders Committee 91 (1972), https://www.ncjrs.gov/pdffiles1/Digitization/26189NCJRS.pdf [https://perma.cc/3569-BS96].
- These two sources provide overlapping data for fiscal 1965 and 1966. For fiscal 1965, there is a slight discrepancy between the two sources, which may simply be a typographical error. The OEO application lists appropriations for 1964–65 of $169,574 while the NLADA report lists appropriations for fiscal 1965 of $168,374. For the other year that the two sources overlap (fiscal 1966) they both list the same figure, $250,500.

Figures on outside funding are taken from:

- The Commonwealth of Massachusetts, Department of the State Auditor, Report on the Examination of the Accounts of the

Massachusetts Defenders Committee from May 25, 1965 to June 6, 1966 (Oct. 10, 1966) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 2.

- Schedule No. V, Suffolk County Model Defender Project Receipts and Disbursements May 25, 1965 to June 6, 1966.
  - Total cash on hand plus receipts: $85,261.03
- The Commonwealth of Massachusetts, Department of the State Auditor, Report on the Examination of the Accounts of the Massachusetts Defenders Committee from June 6, 1966 to April 12, 1967 (Sept. 15, 1967) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 3, folder 2.
- Schedule No. V, Suffolk County Model Defender Project Receipts and Disbursements June 6, 1966 to April 12, 1967.
  - Total cash on hand plus receipts: $70,056.02
- Schedule No. VI, Comprehensive Program for Legal and Related Services for the Poor—Federal Grant Receipts and Disbursements August 1, 1966 to April 12, 1967.
  - Total Receipts from Federal Government: $169,051.15
- The Commonwealth of Massachusetts, Department of the State Auditor, Report on the Examination of the Accounts of the Massachusetts Defenders Committee from April 12, 1967 to March 27, 1968 (June 28, 1968) (on file with the *Columbia Law Review*), *in* LRB Papers, supra note 7, box 4, folder 12.
- Schedule No. II, Receipts and Disbursements April 20, 1967 to March 27, 1968.
  - Total Receipts from Federal Government: $189,802.40

Caseload estimates are taken from:

- 1968
  - Edgar A. Rimbold, Public Defender of Indigents in Criminal Cases: “No Tub Thumping,” 14 Bos. B.J. 7, 11–12 (1970).
  - “In the fiscal year ending June 30, 1968, the number of cases (defendants) assigned by the courts of the Commonwealth to the Massachusetts Defenders Committee amounted to 18,128.”
- 1971
  - Massachusetts Defenders Committee, A Report of the Massachusetts Defenders Committee (1976), https://archive.org/details/reportofmassachu00mass_1 [https://perma.cc/NZ47-NVWU].

    - "In 1971, the number of defendants represented reached nearly 40,000 while the budget was only $1,099,938 and the staff numbered 62."
- 1972
    - Richard Harris, Annals of Law: In Criminal Court—II, New Yorker 44 (Apr. 21, 1973).
    - Rimbold "went on to explain that the M.D.C. currently had a staff of seventy-five lawyers—part-time and full-time—who had handled forty-two thousand cases the year before."