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## Gideon Skepticism

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# Gideon Skepticism

Alexandra Natapoff\*

## Abstract

*The criminal defense lawyer occupies a special doctrinal place in criminal procedure. It is the primary structural guarantor of fairness, the single most important source of validation for individual convictions. Conversely, if a person did have a competent lawyer, it generates a set of presumptions that his trial was in fact fair, the evidence sufficient, and his plea knowing and voluntary. This is a highly problematic legal fiction. The presence of counsel advances but cannot guarantee fair trials and voluntary pleas. More fundamentally, a lawyer in an individual case will often be powerless to address a wide variety of systemic injustices. A defendant may be the victim of overbroad laws, racial selectivity in policing, prosecutorial overcharging, judicial hostility to defendants, or harsh mandatory punishments and collateral consequences, none of which his lawyer can meaningfully do anything about. In response to these limitations, criminal scholarship offers a variety of skeptical counter-narratives about the ability of defense counsel to police the accuracy and fairness of their clients' guilty pleas and sentences. Such skepticism is particularly appropriate in the misdemeanor context, in which millions of cases are created and rushed through an assembly-line process without much evidence or scrutiny. In this world, the presence or absence of counsel is just one piece of a much larger puzzle of systemic dysfunction. Accordingly, while the right to counsel remains an important ingredient in fair trials and legitimate convictions, it cannot bear the curative weight it has been assigned in the modern era of overcriminalization and mass judicial processing. Other legal actors and institutions should share more responsibility for protecting defendants, a*

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*responsibility that now rests almost entirely and unrealistically on the shoulders of defense counsel.*

### *Table of Contents*

I. Introduction .....	1050
II. The Right to Counsel as the Dominant Proxy for Fairness .....	1057
A. As a Cure for Coercion.....	1058
B. As a Cure for Inaccuracy .....	1060
C. As an Indirect Way of Evaluating the Legitimacy of Plea Bargains .....	1063
III. <i>Gideon</i> Skepticism .....	1066
IV. <i>Gideon</i> Skepticism in the Misdemeanor System .....	1070
V. Alternative Models of Guaranteeing Fairness.....	1073
A. The Public Defender Office as an Institutional Force .....	1074
B. <i>Gideon</i> Versus <i>Brady</i> .....	1076
C. Educate Misdemeanor Defendants .....	1080
VI. Conclusion.....	1086

### *I. Introduction*

“One can imagine a cynical prosecutor saying: ‘Let them have the most illustrious counsel, now. They can’t escape the noose. There is nothing that counsel can do for them at the trial.’”<sup>1</sup>

Ever since *Gideon v. Wainwright*<sup>2</sup> proclaimed that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,”<sup>3</sup> the Supreme Court has quietly established the inverse proposition: if a person had competent counsel, his conviction was probably

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1. *Escobedo v. State of Ill.*, 378 U.S. 478, 488 (1964) (quoting *Ex parte Sullivan*, D.C., 107 F. Supp. 514, 517–18 (D. Utah 1952)).

2. *Gideon v. Wainwright*, 373 U.S. 335 (1963).

3. *Id.* at 344.

fair.<sup>4</sup> As the right that ensures that “all other rights of the accused are protected,”<sup>5</sup> the right to counsel has become a central lens through which to evaluate the criminal process, and it is often seen not only as a necessary but increasingly sufficient guarantor of core defendant entitlements. The Supreme Court treats counsel as a cure for coercion and inaccuracy; a competently counseled plea is all but unassailable.<sup>6</sup> A convicted defendant who had a lawyer by his side will have a tough time overturning his conviction unless he can show counsel to have been ineffective.<sup>7</sup> In various ways, having a competent lawyer has become a kind of proxy for the conclusion that a defendant was treated fairly by the criminal system.

This conflation of counsel with fair treatment is highly problematic. A person can be convicted in myriad unfair ways unrelated to the presence or absence of counsel. Defendants may have been selected in racially tainted processes, or overcharged by overzealous prosecutors under overbroad laws.<sup>8</sup> Innocent defendants may plead guilty because they cannot afford bail pending trial and will lose jobs, homes, or children by remaining incarcerated, or they may plead because the trial penalty is too great relative to the plea offer.<sup>9</sup> If they do not plead, defendants

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4. See *infra* notes 32–49 and accompanying text (noting Supreme Court case law tending to establish that where counsel was competent, proceedings were fair).

5. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

6. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (discussing the Court's “optimistic view of the defense attorney's role” in plea bargaining).

7. See *McMann v. Richardson*, 397 U.S. 759, 772 (1970) (“[A] plea of guilty in a state court is not subject to collateral attack in a federal court on the ground that it was motivated by a coerced confession unless the defendant was incompetently advised by his attorney.”). For a discussion of how withdrawing a plea works outside the context of ineffectiveness, see Kirke D. Weaver, *A Change of Heart or A Change of Law? Withdrawing A Guilty Plea Under Federal Rule of Criminal Procedure 32(e)*, 92 J. CRIM. L. & CRIMINOLOGY 273, 273 (2002) (“[C]ourts are unquestionably reluctant to permit defendants to withdraw from their plea agreements once approved by the court.”).

8. See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2119 (2010) (discussing “stories of prosecutors who knowingly engage in unethical behavior—who overcharge questionable cases to pressure defendants to enter guilty pleas, make prejudicial and misleading statements to both judges and juries, and, most routinely of all, withhold exculpatory evidence that might undermine their impressive conviction rates”).

9. See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA

may be convicted by jurors hostile to their appearance, race, or prior criminal record.<sup>10</sup> Once convicted, they may be sentenced in ways that bear little relation to their personal culpability under mandatory minimum sentencing laws or overly harsh guidelines, or by judges who exercise their discretion subtly affected by racial or other biases.<sup>11</sup> 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.<sup>12</sup>

Such limitations on the role of counsel are at their height in the misdemeanor context. The petty offense system generates cases and convictions by the millions in a speedy, low-scrutiny process in which outcomes are largely predetermined.<sup>13</sup> Some of

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L. REV. 119, 119–20 (2009) (“[C]ollateral consequences often overshadow the direct penal sentences in criminal cases. In addition to deportation, courts categorize many other severe consequences as collateral, including involuntary civil commitment, sex-offender registration, and loss of the right to vote, to obtain professional licenses, and to receive public housing and benefits.”).

10. See, e.g., Douglas O. Linder, *Bending Toward Justice: John Doar and the “Mississippi Burning” Trial*, 72 MISS. L.J. 731, 769–74 (2002) (discussing the impact of racism in Civil Rights-era trials).

11. See Anthony Nagorski, *Arguments Against the Use of Recidivist Statutes That Contain Mandatory Minimum Sentences*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 214, 214 (2010) (“The punishment a defendant serves under a recidivist statute may be disproportionate to the actual offense committed.”).

12. What constitutes “fair” or “unfair” takes numerous forms and is hardly a settled matter. For one version, see Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215, 215–16 (2003) (arguing that the Court abandoned a fertile line of “public-regarding” fairness analysis when it turned from due process to incorporation); see also Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 LAW & SOC. INQ. 237, 246–48 (2011) (identifying a strain of fairness discourse within the due process model concerned with outcomes and equality); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1139–41 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*] (arguing that the Court’s new plea bargaining jurisprudence represents a new “broader understanding of injustice” that includes informational and punishment inequities).

13. This Article is one of a series of articles exploring the significance of the misdemeanor process for the United States criminal system as a whole. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–18 (2012) (describing lack of due process, inaccuracies, and racial dynamics of the petty offense process); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. (forthcoming 2013) [hereinafter Natapoff, *Aggregation*] (exploring how the misdemeanor process generates convictions in the aggregate in violation of core criminal justice norms).

the dysfunctions of the misdemeanor process are themselves counsel-related, flowing from staggering caseloads and lack of time that defense counsel have to consult with clients, investigate, or litigate cases.<sup>14</sup> But many other flaws are structural and insensitive to counsel's performance. Police arrest large numbers of young African American men for disorder crimes as a way of managing urban spaces.<sup>15</sup> Prosecutors often convert urban arrests into formal charges with little or no scrutiny, thereby ensuring that urban populations will face the criminal adjudicatory process one way or another.<sup>16</sup> Because poor defendants often cannot make bail, they may have to sacrifice work or child care in order to contest their cases, and therefore plead guilty in large numbers.<sup>17</sup> Punishments for petty offenses are also standardized, expected, and accepted by prosecutors and courts alike so that defendants face strong barriers to individualized consideration.<sup>18</sup> Most of these factors are beyond the control of defense counsel, and even lawyers with time and resources to contest such cases can do little to alleviate the hydraulic pressures on defendants—even innocent ones—to plead.

The classic model of counsel as the guarantor of defendant rights and dignity turns out to be a partial picture. There are

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14. See ERICA J. HASHIMOTO, AM. CONSTITUTION SOC'Y FOR LAW AND POLICY, ASSESSING THE INDIGENT DEFENSE SYSTEM 10 (Sept. 2010), <http://www.acslaw.org/files/Hashimoto%20Indigent%20Defense.pdf> (discussing the case load limitations faced by public defenders).

15. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 475–76 (2000) (describing the law enforcement tactic of enforcing low-level crimes in urban areas, leading to a substantial increase in misdemeanor arrests).

16. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1709–10 (2010) (describing low prosecutorial declination rates).

17. See Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 138 (2007)

[I]f a poor person could not afford bail and remained in jail pretrial, plea bargaining and trial processes would be designed so as to affect his decision making at that pretrial detention point . . . [A] great number of people held pretrial for minor offenses—and maybe serious offenses—would be willing to plead guilty just to get out of jail.

18. For a detailed description of these phenomena, see Natapoff, *Aggregation*, *supra* note 13 (discussing the standardized treatment of defendants).

some things that defense lawyers are well-situated to handle, and they mostly have to do with litigating evidence and law—in other words, the adversarial process. If the evidence is weak, counsel have litigation weapons to attack the government’s case.<sup>19</sup> If police violate the Fourth or Fifth Amendment during an investigation, counsel have constitutional tools to eliminate the evidence obtained.<sup>20</sup> Good defense counsel are well-situated to uncover government errors with respect to law, evidentiary admissibility, guidelines calculations, and the like.<sup>21</sup> Even in petty cases in which there may not be much evidence in the first place, defense counsel can theoretically challenge police accounts or produce witnesses of their own. But these opportunities are by their nature limited. When unfairness flows not from lack of evidence or a government mistake, but from institutional features of the criminal process, defense lawyers have fewer tools to protect their clients. When the process has become more bureaucratic and less adversarial, as it has in the petty offense context, classic adversarial defense weaponry matters less.

To put it another way, when case outcomes actually depend on the law and the evidence, defense counsel can be very powerful. But at the bottom of the penal pyramid where offenses are petty, caseloads immense, and litigation rare, law and evidence exert weak influences.<sup>22</sup> Instead, prosecutorial

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19. See, e.g., FED. R. CRIM. P. 12(b)(3) (providing some of those weapons, including motions “alleging a defect in instituting the prosecution” and “alleging a defect in the indictment or information . . .”).

20. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”); *Id.* amend. V (guaranteeing grand jury indictment, due process, no double jeopardy, and the right against self-incrimination); Georgetown Law Journal Association, *Fifth Amendment at Trial*, 91 GEO. L.J. 567, 567–68 (2003) (providing a summary of the Fifth Amendment’s impact on a criminal trial); John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1108–10 (1989) (discussing the scope of the Fourth Amendment’s protections).

21. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

22. For a conceptualization of the criminal process as a penal pyramid in which legality wanes towards the bottom, see Alexandra Natapoff, *The Penal Pyramid: Linking Criminal Theory and Social Practice* (2013) (unpublished manuscript) (on file with author).

discretion and institutional habits dominate cases, and defense lawyers are at a structural disadvantage. William Stuntz made this point indirectly when he noted that as law recedes, prosecutors have more power over case outcomes than defense counsel.

[W]here law does not reign, the district attorney's office generally does. This is one point on which I differ with . . . [the view that] defense attorneys "are the linchpins of the plea-bargaining system": improve the quality of the advice defendants get from their lawyers, and bargains will improve too. There is some merit to that position. But given the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys.<sup>23</sup>

In effect, the weaker the shadow of trial, the weaker the role of defense counsel.

Despite such limitations, the defense institution has come to bear the lion's share of responsibility for maintaining systemic fairness. Because institutional flaws are rarely actionable, we ask instead about the defense lawyer: was she good, was she zealous, did she have enough time to litigate the case?<sup>24</sup> If so, the law often concludes that the defendant got a fair trial and that the conviction was sound.<sup>25</sup> The Court's fixation on the right to counsel, and the weakness of other meaningful remedies for unfairness, have turned defense counsel into the cod liver oil of the criminal process, prescribed for a wide range of ailments even when it may be merely palliative.

Of course the right to counsel is not the system's sole regulator: criminal procedure is replete with doctrinal remedies that regulate numerous features of the criminal process. Fourth Amendment law, selective prosecution doctrine, double jeopardy, and a host of other rules exist to guard against numerous forms of unfairness.<sup>26</sup> But unlike the right to counsel, such rules tend to

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23. William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2549, 2558 (2004).

24. See *infra* Parts II.A–C (discussing the evaluation of defense counsel as a proxy for solving structural issues).

25. See *infra* notes 62–66 and accompanying text (discussing the presumption attached when a defendant is competently counseled).

26. See U.S. CONST. amend. V ("No . . . person [shall] be subject for the same offense to be twice put in jeopardy of life or limb . . ."); *United States v.*



be entitlement-specific. With the possible exception of *Brady* disclosure rules,<sup>27</sup> they do not ensure the operation of other rights or features of the adversarial process, only the ones to which they are specifically addressed. By contrast, the right to counsel stands alone as a system-wide remedy for multiple forms of unfairness and error, playing a universally validating role as the right that protects “all other rights.”<sup>28</sup> As the Supreme Court put it, “[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”<sup>29</sup>

Even as this Article traces the limits to this counsel-centric model, it recognizes defense counsel as the preeminent existing safeguard for defendant rights and accurate outcomes. Indeed, some of counsel’s most important contributions to systemic legitimacy are not tied to the enforcement of legal rules at all. The adversarial process is a messy place in which sometimes a tenacious lawyer can change results simply by refusing to give up. In cases in which the legal outcome may be a foregone conclusion, there remains deep value to the defense lawyer who affirms the humanity and dignity of the defendant by listening to, advocating for, and respecting him.<sup>30</sup> This Article suggests only that above and beyond those functions, there are structural flaws in the criminal system—the misdemeanor process in particular—that zealous advocacy cannot cure, and that the *Gideon* model should be complemented by other ways of policing systemic fairness.

This Article begins by exploring the ways in which the Supreme Court has made counsel a proxy for various fairness inquiries and thereby sidelined scrutiny of other aspects of the

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Armstrong, 517 U.S. 456, 465 (1996) (establishing that selective prosecution is prosecutorial misconduct); *supra* note 11 and accompanying text (discussing the impact of the Fourth Amendment at trial).

27. See *infra* Part V.B (discussing the *Brady* disclosure rules).

28. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

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

30. See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1208–11 (2004) (“Defenders uphold the political philosophy underlying the American system of justice and safeguard the dignity of each member of society no matter how low he or she has fallen.”).

criminal process that burden or disadvantage defendants. It then surveys the growth of what I call “*Gideon* skepticism”: the recognition that defense counsel cannot perform the legitimating role it has been assigned in areas such as plea bargaining and guideline sentencing.<sup>31</sup> It argues that *Gideon* skepticism should be at its height with respect to the misdemeanor process, in which counsel is least able to counteract large-scale institutional tendencies towards inaccuracy, procedural laxity, and racial selection bias. It concludes by thinking about alternative mechanisms to ensure the fair functioning of the criminal process, including greater roles for public defender offices, prosecutors, and especially in the misdemeanor context, defendant education.

## *II. The Right to Counsel as the Dominant Proxy for Fairness*

In a variety of ways, the Court has made counsel the *sine qua non* of legitimacy, the touchstone for figuring out whether the system is working the way it should. Mostly this is substantive: having competent counsel establishes a strong presumption that the trial was fair or that the plea was intelligent.<sup>32</sup> Sometimes it is a matter of procedure. For example, an ineffective counsel claim has become a prerequisite for habeas review when defendants failed to raise claims below, meaning that procedurally defaulted claims must almost always be accompanied by an allegation of ineffective assistance of counsel (IAC).<sup>33</sup> This Part explores some of the specific doctrinal

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31. See *infra* Part II.C (noting the use of defense counsel to ensure fairness in plea bargaining).

32. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (noting that the two-part *Strickland* test applies to pleas and “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 474–75 (1996) (discussing the presumptions established by case law that assume a trial is fair and an attorney competent).

33. See Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 112 (1993) (noting that “a procedurally defaulted claim—that is, a claim not timely raised in state court—cannot be

dynamics by which the Court has turned the right to counsel into a proxy for other fairness values.

*A. As a Cure for Coercion*

Since the vast majority of convictions are the result of plea bargains, counsel's role in validating those bargains is perhaps its single largest contribution to systemic legitimacy. Ever since the Court upheld the constitutionality of plea bargaining, it has relied on counsel to dissipate the coercive pressure of that process.<sup>34</sup> In *Brady v. United States*,<sup>35</sup> the Court held that a defendant who pled guilty in order to avoid the death penalty was not coerced, largely because he was advised by "competent counsel."<sup>36</sup> The Court found "[no] evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty."<sup>37</sup> Even more specifically, the Court distinguished the coercion it had previously found in *Bram v. United States*,<sup>38</sup> noting that "*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel."<sup>39</sup> By contrast, "*Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel."<sup>40</sup> In effect, the presence of counsel dissipated the threat of the death penalty: a defendant's knowledge of his options and ability to make rational decisions

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raised on federal court [absent] 'cause' for the default and 'prejudice' from failing to raise the claim").

34. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (establishing the constitutionality of plea bargaining).

35. *Id.* at 742.

36. See *id.* at 749–50; see also *id.* at 748 n.6 ("Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel.").

37. *Id.* at 750.

38. *Bram v. United States*, 168 U.S. 532 (1897).

39. *Brady*, 397 U.S. at 754.

40. *Id.*

that render his plea uncoerced were presumed to flow from the presence of counsel.

Similarly in *McMann v. Richardson*,<sup>41</sup> a companion case to *Brady*, the Court upheld a guilty plea because it was made in consultation with competent counsel, even though the defendant pled guilty because the government threatened to introduce his illegally obtained coerced confession.<sup>42</sup> As Justice Brennan argued in dissent, the majority attached “talismanic significance to the presence of counsel . . . . As long as counsel is present when the defendant pleads, the Court is apparently willing to assume that the government may inject virtually any influence into the process of deciding on the plea.”<sup>43</sup>

After *Brady* and *McMann*, the Court maintained its position that counsel presumptively cures coercion. In *North Carolina v. Alford*,<sup>44</sup> the Court upheld the guilty plea even when the defendant maintained his innocence, reasoning

[t]hat he would not have pleaded except for the opportunity to limit the possible [death] penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant’s advantage.<sup>45</sup>

Likewise in *Bordenkircher v. Hayes*,<sup>46</sup> the Court wrote that “[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion.”<sup>47</sup>

In effect, *Brady*, *McMann*, and their progeny elided the question of knowing and voluntary plea with the presence of

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41. *McMann v. Richardson*, 397 U.S. 759 (1970).

42. *See id.* at 769–70 (“In our view a defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant’s confession.”).

43. *Id.* at 784 (Brennan, J., dissenting); *see also* Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (discussing *McMann*).

44. *North Carolina v. Alford*, 400 U.S. 25 (1970).

45. *Id.* at 31.

46. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

47. *Id.* at 363.

counsel. The Court restated the proposition in 1973, stating that a defendant “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the [competence] standards.”<sup>48</sup> As one scholar put it, after *Brady* “the Court treated the assistance of counsel as a proxy for voluntariness in pleading, effectively establishing that a counseled plea is presumptively valid.”<sup>49</sup> In these ways, the right to counsel has come to replace substantive questions of coercion and voluntariness.

### *B. As a Cure for Inaccuracy*

The Court also deploys counsel as a response to the threat of inaccuracy, on both a small and large scale. For example, in *United States v. Wade*,<sup>50</sup> the Court established a right to counsel at postindictment lineups as a remedy for the problem of suggestiveness and inaccuracy inherent in the lineup process.<sup>51</sup> As the Court explained, “[P]resence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial . . . . That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.”<sup>52</sup>

*Wade* illustrates how the right to counsel can become a procedural substitute for substantive underlying accuracy concerns.<sup>53</sup> Postindictment defendants are not entitled to nonsuggestive lineups.<sup>54</sup> Rather, they are entitled to lawyers who

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48. Tollett v. Henderson, 411 U.S. 258, 267 (1973).

49. Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2019 (2000).

50. United States v. Wade, 388 U.S. 218 (1967).

51. *Id.* at 236–37 (“[T]he postindictment lineup was a critical stage of the prosecution . . .”).

52. *Id.* at 236, 238.

53. See *id.* at 235 (“[T]he first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.”).

54. See *id.* at 251 (White, J., dissenting in part and concurring in part) (“The Court assumes a narrower evil as the basis for its rule-improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad

can witness suggestive lineups and challenge them later at trial in pursuit of more accurate results.<sup>55</sup> Ironically, before the right to counsel attaches, defendants are entitled to a due process inquiry which asks directly about the suggestiveness and accuracy of the lineup procedure, that is, the real underlying concern.<sup>56</sup> Because the due process standard of “unnecessary suggestiveness” is very hard to meet,<sup>57</sup> as a practical matter *Wade* benefits defendants because it confers a flat postindictment right to counsel.<sup>58</sup> But the right to counsel remains an indirect remedy or proxy for the reliability concern.

More broadly, the Court has established counsel as an indicator of systemic accuracy through its ineffective assistance of counsel (IAC) rules. *Strickland v. Washington*<sup>59</sup> holds that the primary purpose of the right to counsel is to ensure fair trials, by which it mostly means that counsel’s job is to ensure “reliable” results: “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”<sup>60</sup> Conversely, when counsel is constitutionally effective, we are entitled to treat the results not only as accurate but fair.<sup>61</sup>

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prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications . . .”).

55. See *id.* at 230 (majority opinion) (noting that a lawyer is more apt to protect the defendant’s rights at a lineup, because “neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect”).

56. See *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977) (explaining that the due process inquiry weighs the witness’s “opportunity . . . to view the criminal at the time of the crime, [his] degree of attention, the accuracy of his prior description . . . , the level of certainty demonstrated . . . , and the time [elapsed]” against “the corrupting effect of the suggestive identification itself”).

57. See *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (upholding show-up of defendant to hospitalized witness).

58. See *United States v. Wade*, 388 U.S. 218, 237 (1967) (“[T]he postindictment lineup was a critical stage of the prosecution at which [a constitutional right to counsel attached].”).

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

60. *Id.* at 691–92. Ensuring accuracy is not counsel’s only job, just the primary one. See *Kimmelman v. Morrison*, 477 U.S. 365, 384–85 (1986) (finding counsel ineffective for failing to suppress incriminating albeit reliable evidence).

61. See *supra* Part II (discussing the presumptions established when counsel is deemed competent).

In the trial context,<sup>62</sup> the Court equates the presence of inculpatory evidence with reliability, and in turn makes reliability a trigger for a finding of effective counsel.<sup>63</sup> This move is instantiated in the definition of prejudice, under which it is very difficult for a defendant to show prejudice, and therefore IAC, in face of weighty evidence, no matter how deficient the attorney.<sup>64</sup> As a result, in a trial in which there is substantial evidence, the mere presence of counsel puts an imprimatur of fairness and accuracy on that proceeding, since under *Strickland* that lawyer will likely be found competent.<sup>65</sup>

The problem with this equation is that the simple existence of evidence does not make a conviction accurate, let alone fair. Scholars of wrongful convictions tell us that incompetent counsel is not the primary source of error in serious cases: prosecutorial misconduct, mistaken eyewitness identification, lying informant witnesses, and sloppy forensic labs are.<sup>66</sup> They also tell us that defense lawyers have weak tools to combat such errors. The defense will be unaware of prosecutorial misconduct; mistaken

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62. Pleas are treated somewhat differently after *Lafler v. Cooper*. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (clarifying that in the plea context, the demand for a “just result” is not solely about the reliability of convictions but also “the fairness and regularity of the processes that preceded” the plea).

63. See *Strickland*, 466 U.S. at 694 (“An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable . . .”).

64. See *id.* at 710–13 (Marshall, J., dissenting) (complaining that the majority position reduces the purpose of counsel to ensuring accuracy without regard to whether “fundamentally fair procedures” were used).

65. See *id.* at 694 (majority opinion) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

66. See BRANDON GARRETT, CONVICTING THE INNOCENT 1–14 (2012) (providing an example of wrongful conviction and discussing the reasons); ROB WARDEN, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, THE SNITCH PROJECT 3 (2004), <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf> (identifying lying informants as responsible for 45.9 percent of wrongful convictions, making them “the leading cause of wrongful convictions in U.S. capital cases”). But see Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (“It is not the facts of the crime, but the quality of legal representation, that distinguishes [a] case, where the death penalty was imposed, from many similar cases, where it was not.”).

eyewitness testimony and lying informants are infamously difficult to challenge;<sup>67</sup> and counsel may lack opportunities to examine evidence independent of government labs.<sup>68</sup> In other words, counsel are underequipped to combat major sources of error even as the Court holds them up as the primary sources and indicia of reliable outcomes. The presence of counsel can thus serve to mask rather than cure inaccuracies of the process.

*C. As an Indirect Way of Evaluating the Legitimacy of Plea Bargains*

The Court's new plea jurisprudence in *Padilla v. Kentucky*,<sup>69</sup> *Missouri v. Frye*,<sup>70</sup> and *Lafler v. Cooper*<sup>71</sup> has been hailed as the beginning of plea regulation. Commentators have called it a "watershed" moment,<sup>72</sup> breaking "new ground,"<sup>73</sup> and ushering in a "new era."<sup>74</sup>

Lost in the shuffle is the fact that the Court has opened the door to scrutinizing the plea process indirectly through the narrow lens of attorney competence. In other words, the Court is not developing a new, direct, substantive jurisprudence of legitimate plea bargaining, for example with notions of unconscionability, duress, equity, or other limitations commonly found in other kinds of contract law.<sup>75</sup> Instead, the

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67. See GARRETT, *supra* note 66, at 142–44 (suggesting better ways of dealing with lying informants and noting the problem).

68. See Brandon Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 412 (2007) (discussing the forensic lab example).

69. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

70. *Missouri v. Frye*, 131 S. Ct. 856 (2011).

71. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

72. Bibas, *Regulating the Plea-Bargain Market*, *supra* note 12, at 1118.

73. Nancy King, *Lafler v. Cooper and AEDPA*, 122 YALE L.J. ONLINE 29 (2012).

74. Justin Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CON. L. 1161, 1161 (2012). *But see* Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39, 39 (2012) (arguing that *Frye* and *Lafler* "do not represent a novelty in the law, but rather continue the longstanding recognition by the courts that 'plea bargaining' is an integral part of our criminal justice system").

75. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1935–36 (1992) (surveying various contractual approaches



*Padilla/Frye/Lafler* line ensures that plea bargaining will be scrutinized, as are so many other criminal processes and outcomes, centrally by reference to what the defense attorney did or did not do.<sup>76</sup> Accordingly, if IAC remains the only doorway to judicial regulation of plea bargaining, much of that process will remain unregulated.<sup>77</sup>

The counsel lens is particularly narrow in the plea bargaining context because defense counsel are disadvantaged in the bargaining process vis-à-vis prosecutors.<sup>78</sup> Prosecutors can leverage overbroad laws, information imbalances, the threat of pretrial incarceration, and their own charging discretion to shape the bargaining environment of a case.<sup>79</sup> Mandatory minimum sentences and heavy trial penalties often pressure defendants into pleading no matter how good their lawyers are.<sup>80</sup> Insofar as post-*Lafler* courts evaluate defense counsel's performance against the "market price"<sup>81</sup> for certain offenses or ask whether defense counsel obtained the "expected postplea sentence,"<sup>82</sup> they will effectively be asking whether defense counsel acquiesced to

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to plea bargaining).

76. To the extent that the Court regulates plea bargains directly, it does so by asking whether the plea was knowing and voluntary. As described above, that inquiry has also come to turn on counsel's performance. *See supra* Part II.A–C (discussing counsel's alleged role in preventing coercion, maintaining accuracy, and protecting defendants in plea bargaining).

77. *See Lynch, supra* note 74, at 41 (predicting that most IAC claims about attorney deficiency in the plea context will fail). *But see* Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 37–38 (2012) (suggesting that post-*Frye*, "sentencing courts [might creatively] reduce sentences to approximate what the expected postplea sentence would have been").

78. *See* Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroaded Criminal Defendants*, 75 U. COLO. L. REV. 863, 919 (2004) ("[D]efendant class suffers from enormous disadvantages throughout the guilty plea process . . .").

79. *See, e.g.,* *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (noting that a plea agreement waiving the defendant's right to assess relevant information is not unconstitutional); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (noting that a prosecutor may increase charges if the defendant forgoes a plea agreement because "so long as the prosecutor has probable cause to believe that the accused committed an offense . . . , the decision whether or not to prosecute, and what charge to file . . . , generally rests entirely in his discretion").

80. *See supra* Part II.C (noting the systemic pressures a defendant faces in deciding whether to accept a plea bargain).

81. Scott & Stuntz, *supra* note 75, at 1923.

82. Bibas, *Taming Negotiated Justice, supra* note 77, at 38.

standard prosecutorial practices. The structural challenges of fair plea bargaining thus far exceed the question of counsel's performance in individual cases.

In sum, the Court has made counsel the gateway through which we evaluate the voluntariness of pleas, the reliability of outcomes, and the plea bargaining process more generally. In so doing, the right to counsel obscures other fairness-related questions such as whether the plea was coerced or substantively appropriate. Tracey Meares describes this trajectory in historical terms as a move towards rights and away from fairness.<sup>83</sup> She argues that when the Court established the right to counsel as a matter of incorporation doctrine rather than as a matter of fundamental fairness, it marked a turn away from a more public-regarding approach to criminal procedure.<sup>84</sup> Prior to *Gideon*, the Court often decided cases not only by reference to whether a specific right was violated but also asked the question whether the criminal process was in fact fair.<sup>85</sup> Meares argues that *Gideon* represents an abandonment of the fundamental fairness inquiry, which has been replaced by a more mechanistic application of rights.<sup>86</sup>

The turn towards the right to counsel is a strong example of this trajectory. Not only has rights jurisprudence displaced the Court's public-regarding fairness inquiry, the right to counsel has

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83. See Meares, *supra* note 12, at 215 ("*Gideon* marks the beginning of a shift in the Court's articulation of the requirements of fair trials away from notions of fundamental fairness in the Due Process Clause and toward reference to the Bill of Rights via the process of incorporation.").

84. See *id.* at 221–24 (arguing that the incorporation-based reasoning to the right to counsel represents a marked ideological shift).

85. See *id.* at 220 (describing the earlier approach and noting the Court's historical position that "[t]he criminal defendant was not the only relevant stakeholder in determining whether a trial was 'fair,' and that 'the public, as well as criminal defendants, has an obvious interest in the fundamental fairness of the criminal justice system'").

86. See *id.* at 215

*Gideon*, I believe, represents a break with a kind of constitutional decisionmaking in the criminal procedure area—a break that has negative consequences. Specifically, *Gideon* marks the beginning of a shift in the Court's articulation of the requirements of fair trials away from notions of fundamental fairness in the Due Process Clause and toward reference to the Bill of Rights via the process of incorporation.

actually replaced other established fairness metrics such as coercion and accuracy.

### III. Gideon Skepticism

Skepticism already exists about the ability of counsel to guarantee fairness in the ways that the Court asserts. The classic and most pervasive form of skepticism is instrumental: a vast literature maintains that because the defense bar is overworked and underfunded, it cannot actually perform the adversarial function assigned to it and therefore the right to counsel as currently implemented is an “empty promise,”<sup>87</sup> a “broken promise,”<sup>88</sup> and “a national disgrace.”<sup>89</sup> Part of this conclusion flows from what might be labeled “*Strickland* skepticism,” the conclusion that *Strickland*’s low bar for attorney competence has effectively gutted the substantive right to counsel, thereby permitting this state of affairs to persist.<sup>90</sup> This literature is particularly strong in the misdemeanor context: much of the scholarship critical of the minor offense process blames lack of counsel competence and resources in relation to the massive size of the petty docket.<sup>91</sup>

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87. See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HAST. CONST. L.Q. 625, 625 (1986).

88. See AM. BAR ASSOC. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 1 (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://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (“[F]orty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country.”).

89. See Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOYOLA L.A. L. REV. 869, 894 (2009) (“In many jurisdictions, the current system of indigent defense is a national disgrace.”).

90. See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680 (2007) (“[T]here is no effective remedy for defendants whose attorneys are constitutionally deficient at trial.”).

91. See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT’L ASSN. OF CRIMINAL DEFENSE LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 39–45 (2009), available at <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> (noting a lack of standards and a lack of experienced counsel in misdemeanor cases); John D. King, *Beyond “Life and*

A different, smaller literature suggests that defense counsel cannot perform its assigned functions for structural reasons, not because lawyers lack the time or ability, but because the very nature of plea bargaining or sentencing prevents it. For example, Albert Alschuler has long maintained that defense counsel cannot, as the Court assumes, counter the inherent coerciveness of the plea process and in fact have become its handmaidens.<sup>92</sup>

Indeed, the record in *Brady* suggests that the principal function of a competent attorney in the guilty-plea system is exactly the opposite of the function suggested by the Supreme Court. Rather than dispel the coercive impact of a promise of leniency, the attorney must make the defendant realize with full clarity the coercive power of the alternatives that he faces.<sup>93</sup>

Or as Stephanos Bibas points out, in a world dominated by plea bargaining, defense lawyers are part and parcel of the market process, not a counterweight to it.<sup>94</sup>

The rigidity of the U.S. Sentencing Guidelines (Guidelines) has also generated concerns about the waning influence of the defense function. As Margareth Etienne explains, the Guidelines

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*Liberty*": *The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013) (arguing that the misdemeanor courts unjustly focus on process costs rather than a defendant's guilt or innocence); J.D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 21 (Erik Luna & Marianne Wade eds., 2011) ("[V]olume is the most salient factor . . . . By all accounts, prosecutors, courts, and defense attorneys are swamped . . . ."); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011) (noting a crisis of "widespread lack of zealous representation for indigent people charged with misdemeanors" and observing that "[m]any individuals charged with low-level crimes receive representation from defense attorneys with overwhelming caseloads, in a criminal justice system singularly focused on rapid finality in the large numbers of docketed cases").

92. Albert Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58 (1975) (arguing that defense counsel alone cannot counter the coerciveness of the plea process).

93. *Id.*; see also Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) ("Today's guilty-plea system leads even able, conscientious, and highly motivated attorneys to make decisions that are not really in their clients' interests.").

94. See Bibas, *Regulating the Plea-Bargain Market*, *supra* note 12, at 1140–41 ("While the plea bargaining market is grossly flawed in other ways, the fault does not lie with defense lawyers who are simply doing their jobs.").

fundamentally altered the nature of counsel's role.<sup>95</sup> For example, the "acceptance of responsibility" provision confers a benefit on defendants who do not contest the charges against them.<sup>96</sup> Etienne found this to have a chilling effect on defense advocacy because judges may impose higher sentences on defendants whose lawyers mount zealous defenses.<sup>97</sup> Second, and more broadly, the Guidelines confer significant and lopsided bargaining power on the prosecution, limiting counsel's advocacy, substantive arguments, and negotiation options.<sup>98</sup> Etienne concludes that these provisions have fundamentally curtailed defense lawyering in lasting ways, and that "the Guidelines have dramatically altered what it means to be a criminal defense lawyer in federal court and, relatedly, what the right to have a lawyer means to a federal criminal defendant."<sup>99</sup>

In a somewhat different vein, the innocence discourse has given rise to what might be called an "accuracy movement" in which evidentiary accuracy has become the touchstone of systemic fairness. Accuracy advocates often deemphasize the right to counsel, not because they consider it unimportant, but because they see other reforms as more directly relevant to the

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95. See Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 434–36 (2004) [hereinafter Etienne, *Declining Utility*] ("These policy decisions have greatly affected what defense lawyers do as advocates and what it means to be represented by counsel."); Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pays for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2108 (2003) ("Permitting the federal sentencing laws or individual judges to undermine the accepted rationale behind the laws of ethics and professionalism is bad policymaking and results in poorly conceived norms of advocacy.").

96. See Etienne, *Declining Utility*, *supra* note 95, at 446 ("While the acceptance of responsibility provision presents defendants with the possible benefit of lowering their sentences by three levels, this opportunity is not without its costs.").

97. See *id.* at 447 ("[L]awyers worry that the defendant might be denied acceptance of responsibility based on the cumulative number of motions and arguments they make or their general aggressiveness in contesting specific aspects of the government's case.").

98. See *id.* at 475 ("Attorneys decried their own disempowerment as lawyers under the federal scheme. They described feeling powerless as advocates in the face of tremendously high stakes in which prosecutors 'hold [all] the cards.'").

99. *Id.* at 431.

core concern of improving accurate case outcomes.<sup>100</sup> Forensic lab reform, recording lineups and interrogations, DNA collection, and other such accuracy-oriented reforms reflect an indirect form of *Gideon* skepticism in the sense that they displace the right to counsel as the central mechanism by which evidentiary accuracy is guaranteed.<sup>101</sup> Instead, police investigation is seen as the primary locus of error in which direct regulation—not adversarial testing—is the best path to accuracy.

In an article entitled *The Decline of Defense Counsel and the Rise of Accuracy*, Darryl Brown articulates the crux of this skepticism.<sup>102</sup> He argues that the role of defense counsel is in decline along with the demise of the adjudicative process, and that, in a world dominated by plea bargains, this is not such a bad thing.<sup>103</sup> He surmises that “[b]etter crime-lab funding, scientifically grounded methodologies, and accreditors’ scrutiny improve forensic evidence reliability as much as—and probably more than—defense-attorney scrutiny. Thus, crime labs can replace part of the function of diminished defense counsel.”<sup>104</sup> Ultimately, the idea goes, if police investigations were sufficiently accurate, the need for counsel might wither away.

A final form of *Gideon* skepticism points to evidence that, under some circumstances, having a lawyer can actually make things worse for defendants. Erica Hashimoto concludes that in federal misdemeanor court, pro se defendants may obtain better outcomes than when they are represented.<sup>105</sup> Similarly, one study

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100. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) (“Right-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication. But defense counsel’s commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt.”).

101. See *id.* at 1613 (noting administrative and scientific means of improving trial accuracy).

102. See *id.* at 1591 (critiquing the ability of the *Gideon*-based system of “adversarial advocacy” to provide for accuracy in criminal defense and describing “a new model” that “use[s] executive and judicial actors to supplement weak defense counsel in the task of improving evidence reliability”).

103. See *id.* at 1591–92 (arguing that alternative efforts to “improve the quality of investigation” serve in part “to compensate for weaknesses of adversarial adjudication”).

104. *Id.* at 1643.

105. See Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM.

found that in certain jurisdictions, juveniles without counsel are treated more leniently than those with counsel.<sup>106</sup> This perception that lawyers may make life harder for their clients while maintaining the appearance of fairness led one commentator to argue against importing the right to counsel into the civil context, arguing that “*Gideon* has worked out great for everyone in the system except criminal defendants.”<sup>107</sup>

#### IV. *Gideon Skepticism in the Misdemeanor System*

Such skepticism about the regulatory efficacy of the right to counsel should be extended to the massive petty offense system. Most misdemeanor counsel as a practical matter cannot provide a zealous defense, or sometimes any defense at all, due to underfunding and massive caseloads. But even misdemeanants with highly skilled, committed counsel with time to litigate still suffer the systemic harms of the petty offense machinery. The worst features of the petty offense process—its indiscriminate sweep and racial skew—flow in large part from urban policing practices in which minor arrests are used to implement order maintenance policies.<sup>108</sup> Such stops and arrests often occur without evidentiary basis, driven by neighborhood demographics rather than evidence of wrongdoing.<sup>109</sup> The dignitary and liberty

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& MARY L. REV. 461, 490–94 (2007) (observing that pro se defendants in the study overall attained better sentencing outcomes than represented defendants).

106. See Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1237–38 (1989) (“[Y]ouths with attorneys are between two and three times more likely to receive severe dispositions than are those youths without counsel.”).

107. Ben Barton, *Against Civil Gideon (And For Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1230 (2010).

108. See Natapoff, *Misdemeanors*, *supra* note 13, at 1331, 1334–35 (describing how arrests are often made in certain urban areas for “zero tolerance and order maintenance” policies and these arrests often occur in “poor minority communities and high-volume policing contexts” and may include racial profiling).

109. See *id.* at 1331–35 (describing that a number of arrests in urban policing lack probable cause, implicate innocent people, and “create high risks of evidentiarily weak arrests”); see also Natapoff, *Aggregation*, *supra* note 13, at 17–20 (describing numerous class action lawsuits against New York Police

harms that result from baseless stops and arrests, or from selection processes tainted by race and class, occur long before counsel is appointed.

Even with respect to the adversarial process for which defense lawyers are best equipped, misdemeanor counsel play a limited role. As law professor and public advocate Chris Fabricant wrote during his time in the Bronx Defenders office, “well over half of my cases are misdemeanors, and I have had a disgraceful number of innocent clients, many of whom plead guilty.”<sup>110</sup>

Fabricant’s innocent clients pled because of a series of structural features of the petty offense process: they were selected for arrest in the first place through racially skewed order-maintenance policing; they faced prolonged incarceration because they couldn’t make bail; the police submitted generic evidence that was tolerated and accepted by the high-volume, low scrutiny court system; and they came from a social environment in which criminal convictions were a common fact of life and therefore easier to accept.<sup>111</sup> In other words, they pled because of factors that their attorney could do little or nothing about.

To put it another way, to say “[t]he process is the punishment”<sup>112</sup> is to recognize that the misdemeanor system burdens and pressures defendants regardless of the evidence, their rights, or their culpability—in other words, the things that lawyers are supposed to address.<sup>113</sup> A recent study of the New

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Department alleging baseless and racially-motivated arrest practices); *infra* note 123 and accompanying text (citing these lawsuits).

110. M. Chris Fabricant, *Rousting the Cops: One Man Stands up to the NYPD’s Apartheid-Like Trespassing Crackdown*, VILLAGE VOICE, Oct. 30, 2007.

111. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–243 (Russell Sage Foundation, New York, 1979) (describing common attributes of a criminal defendant and the pretrial process including pretrial release, representation, and the fact that while Connecticut, the state at issue in this study, has a liberal pretrial release policy, those that are detained before trial are more likely to plead guilty); see also *id.* at 27–28 (describing reasons for plea bargaining as avoidance of the expense and “spectacle” of a “public trial”); *id.* at 46–47 (describing the relatively amicable relationship between police and prosecutor); *id.* at 149–51 (describing the constraints on case preparation for both prosecutors and defense attorneys that reduce the level of scrutiny applied to evidence and other factors).

112. *Id.* at 199.

113. See *id.* at 199–201 (referring to characteristics of the process that



York lower court system found that even defendants who had their cases dismissed—the gold standard of good defense lawyering—still suffered numerous restrictions on their time, resources, and liberty, and were handled in disrespectful, marking and controlling ways that left significant injuries.<sup>114</sup>

Josh Bowers makes a similar point when he argues that for most defendants, it makes sense to take a plea to a misdemeanor even if they are innocent.<sup>115</sup> Penalties are standardized and low and many defendants have a prior record, making a new conviction less socially costly.<sup>116</sup> By contrast, the costs of contesting the charge may be high, including time in jail, the need for continuous court appearances, and the risk of a much higher sentence after trial.<sup>117</sup> In a world where it makes sense even for innocent defendants to plead guilty, there is not much left for defense counsel to do. In this view, not only defense attorneys but the adversarial truth-seeking process itself has become increasingly irrelevant.<sup>118</sup>

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burden defendants as opposed to issues that would otherwise be of concern to defense attorneys, such as “an immediate concern for return to work or their children,” where the costs of the length of process exceed that of a conviction and sentence).

114. See Issa Kohler-Hausmann, *Misdemeanor Justice: The Penal Logic of Dismissal* 22, 27–29 (Mar. 2012) (unpublished manuscript) (describing the various hassles criminal defendants experience and stating that “there is not a single defendant whose case was eventually dismissed that did not experience the imprint of penal power through some aspect of the inevitable procedures of case adjudication”) (on file with the Washington and Lee Law Review).

115. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–20 (2008) (“For the typical innocent defendant in the typical case—which I will demonstrate is a recidivist facing petty charges—the best resolution is generally a quick plea in exchange for a light, bargained-for sentence.”).

116. See *id.* at 1121–22 (indicating that “most innocent defendants are probably recidivists,” which encourages plea-bargaining but makes it difficult to prove innocence, and stating that most pleas lead to “trivial sentences” that avoid the “pretrial process” that functions as punishment before a defendant is ever sentenced).

117. See *id.* at 1132–34 (describing process costs for defendants that elect to go to trial, including “weeks or months” of pretrial appearances and other matters before trial, with often higher costs for those who are innocent “because they are more likely to put forward positive defenses”).

118. See *id.* at 1122–23 (arguing that for innocents in low-stakes cases, “[t]he adversarial model breaks down, or at least becomes a secondary consideration to workgroup cooperative principles,” so “[f]or all involved, the best pleas are quick pleas” that “are most efficiently reached at low market

Insofar as the adversarial process is not dead, Fabricant's story reminds us of what lawyers are good for.<sup>119</sup> When he got a "unique" client who wanted to fight his trespassing charge and forego the plea offer of community service, Fabricant marshaled evidence, resisted the routine conviction process, and obtained an acquittal.<sup>120</sup> But the case is hardly representative: Fabricant was working in one of the most lauded public defender offices in the country and he had an atypical client who was willing to risk imprisonment on principle.<sup>121</sup> Indeed, it was Fabricant's *only* trespassing trial.<sup>122</sup> A system in which it takes a unique defendant to fully benefit from a stellar lawyer's skills is not a system in which defense counsel are guaranteeing much fairness.<sup>123</sup>

### V. Alternative Models of Guaranteeing Fairness

The scale and institutionalization of the modern misdemeanor system have hollowed out the ability of individual defense counsel to make the system work fairly. This invites consideration of alternative mechanisms, not to replace counsel but to complement the outdated individual advocacy model.

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prices").

119. See Fabricant, *supra* note 110 (describing the case of David M., in which David turned down a plea deal and chose to go to trial, relying on Fabricant to challenge the witness testimony of an officer who testified to arresting David despite having not actually conducted the arrest).

120. See *id.*

121. See *id.* (stating that Fabricant was a staff attorney at the Bronx Defenders and that David M. turned down a plea deal of "seven days of community service and five for social service" to go to trial, risking "a lifelong criminal record," fines, and "maybe even more jail time").

122. See *id.* (observing that while he had other trespassing *cases*, none had previously gone to *trial* before the trespassing case discussed in the article).

123. The NYPD's trespassing policies are currently the subject of a class action civil rights lawsuit. See Amended Complaint at 1–5, *Davis v. City of New York*, No. 10 Civ. 0699 (SAS) (S.D.N.Y. May 27, 2012) (challenging certain New York trespass enforcement activities in public housing areas as violations of the Fourth and Fourteenth Amendments and federal civil rights acts); see also Complaint at 1–4, *Ligon v. City of New York*, No. 12 Civ. 2274 (S.D.N.Y. Mar. 28, 2012) (challenging NY police program "Operation Clean Halls" in which police stop, search, and arrest residents of public housing projects typically for the offense of trespassing).

There are at least three alternatives: (1) strengthen the public defender office as an institutional actor, (2) draft other institutional actors—especially prosecutors but also courts—into greater service on behalf of systemic fairness, and (3) empower criminal defendants.

### *A. The Public Defender Office as an Institutional Force*

There are significant legal and ethical barriers faced by public defender offices when contemplating collective action and an institutional approach to indigent representation.<sup>124</sup> The central legal impediment is the individualized model of client representation itself: office-wide policies that may benefit the defendant class, the community, or both may conflict with a defendant's interests in an individual case.<sup>125</sup> But there have nevertheless been instances in which defender offices have collectively and successfully opposed prosecutorial policies or sought to change court practices. For example, defender offices have taken institutional stances on appeal,<sup>126</sup> resisted prosecutorial demands for appeal waivers,<sup>127</sup> and fought to

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124. See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternative Visions of the Public Defender*, 84 GEO. L.J. 2419, 2422 (1996) (criticizing tendency of public defender offices to “uncritically accept individualized concepts of their role”); see also Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1235–43 (2005) [hereinafter Etienne, *Cause Lawyering*] (describing ethical impediments to collective public defender action but also describing instances where defender offices collectively resisted prosecutorial policies).

125. See Etienne, *Cause Lawyering*, *supra* note 124, at 1235–36 (indicating that while collective action would allow many defendants in aggregate to benefit, the brunt of costs would be borne up front by the first few to attempt to demand trials, contrary to their own interests and those of defense attorneys charged with representing them individually).

126. See Taylor-Thompson, *supra* note 59, at 2456 n.137 (describing an organizing principle of preserving life of the client for offices defending clients on death row that “may, for example, sometimes prompt a defender to file appeals even if the client indicates a desire to cease fighting his execution”).

127. See Etienne, *Cause Lawyering*, *supra* note 124, at 1236–39 (describing various strategies used by certain private and public criminal defense attorneys against a federal policy seeking to standardize no-waiver plea agreements, including successful collective approaches).

expand the availability of *Miranda* warnings to non-English speakers.<sup>128</sup>

Robin Steinberg proposes an institutional model of “holistic defense” in which public defender offices address not only the substance of criminal cases but a whole host of collateral, civil, and personal problems generated by the criminal process.<sup>129</sup> Similarly, the NYU Brennan Center’s Community-Oriented Defender Network takes the collective action idea beyond the courtroom.<sup>130</sup> The Center argues that in order to ensure fairness for defendants within the legal system, public defender officers should also work actively with communities and social service providers to “break the continuing cycle of individuals’ encounters with the criminal and juvenile justice systems . . . . This includes systemic reform of failing criminal justice policies, and enlistment of community members and institutions in problem-solving ventures.”<sup>131</sup> The idea is that *Gideon*’s promise of a fair defense is not only about individual cases but includes institutional work on criminal justice and related social welfare policies. For example, the San Francisco Public Defender Office partners with social service organizations to provide services to at-risk youth, above and beyond their legal representation needs.<sup>132</sup> In Minneapolis, the Legal Rights Center “has engaged in partnerships with the public schools, a women’s prison, the child protective agency, and the police department to enable methods of reconciliation that avoid court intervention.”<sup>133</sup> Numerous other defender

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128. See *id.* at 1240–42 (discussing collective approaches to ensure the provision of *Miranda* rights in Spanish to Spanish-speaking defendants facing arrest).

129. See generally Robin Steinberg, *Heeding Gideon’s Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013).

130. See MELANCA CLARK & EMILY SAVNER, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 7 (Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law 2010), [http://brennan.3cdn.net/930f13b765ab919c80\\_ylm6beoe2.pdf](http://brennan.3cdn.net/930f13b765ab919c80_ylm6beoe2.pdf).

131. *Id.* at 11.

132. *Id.* at 27–28 (describing two partnership programs between the community programs for adolescents and the Reentry Unit of the San Francisco Public Defender’s office).

133. *Id.* at 27.

organizations work with other institutions as a way of “reimagining the role of the traditional defender.”<sup>134</sup>

Such efforts reconceptualize public defender offices as an influence not only on the application of legal rules in specific cases but on larger power dynamics and social policies that shape the criminal justice institution. Despite funding and legal barriers, public defender offices thus have various institutional opportunities to improve the fairness and responsiveness of the criminal process vis-à-vis defendants. Such an institutional approach expands the classic *Gideon/Strickland* lens: instead of asking only what an individual lawyer could or should have done in an individual case, we can ask more broadly how legal advocacy on behalf of defendants as a class might render the system fairer and more responsive.

### B. *Gideon Versus Brady*

By its nature, the dominant *Gideon* model of fairness revolves around defense counsel. But *Brady v. Maryland* offers an alternative way of thinking about fairness by shifting responsibility to the prosecutor.<sup>135</sup> Indeed, the *Brady* Court imposed its famous disclosure obligations explicitly to promote systemic fairness and in recognition of the central role played by prosecutors in ensuring that justice is done: “Society wins not only when the guilty are convicted but when criminal trials are fair.”<sup>136</sup>

*Brady* is one of those rare doctrines in which the evaluation of fairness is unmediated by defense counsel: either the prosecution disclosed or it didn’t.<sup>137</sup> *Brady* stands for the

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134. *Id.* at 14.

135. See Bennett Gershmann, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 686 (2006) (“More than any other rule of criminal procedure, *Brady* has illuminated the prosecutor’s constitutional and ethical obligations to ensure that defendants receive fair trials . . .”).

136. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“The United States wins its point whenever justice is done its citizens in the courts.” (internal quotations omitted)); see also *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (describing the prosecutor as “the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done” (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))).

137. See *Brady*, 373 U.S. at 87 (“We now hold that the suppression by the

proposition that fair process is also the responsibility of the prosecutor, that the prosecutor is charged with “doing justice” rather than merely obtaining convictions, and it serves as the spiritual counterweight to the adversarial model in which each side dukes it out as hard as they can.<sup>138</sup> Indeed, even as Meares mourned the Court’s abandonment of the due process-based inquiry, she noted that the “Court did not completely abandon fundamental fairness analysis in constitutional criminal procedure in the modern era,” citing *Brady* as the main counterexample.<sup>139</sup>

Of course *Brady* stands for a much narrower proposition than *Gideon*: prosecutors need merely disclose exculpatory evidence, whereas *Gideon* established a structural entitlement to advocacy writ large. Nevertheless, *Brady* contains the seeds of the idea that counsel is not a defendant’s only representative.

In practice, the *Brady* rule has not worked this way.<sup>140</sup> Prosecutorial violations are widespread,<sup>141</sup> and *Brady* is widely viewed as having failed as a fairness guarantor.<sup>142</sup> One might say that *Brady* didn’t change the adversarial structure so much as

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prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

138. See *id.* at 87–88 (“A prosecution that withholds evidence on demand of an accused which . . . would tend to exculpate . . . or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with . . . justice . . .”).

139. Meares, *supra* note 12, at 224.

140. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1360–64 (2011) (declining to find a civil rights violation where the prosecutor’s office violated *Brady*).

141. See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089, 2090 (2010) (noting that *Brady* violations are “one of the most common types of prosecutorial misconduct”).

142. See Lisa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y. L. SCH. L. REV. 969, 970 (2011–2012) (“[I]t has been almost universally acknowledged that [the *Brady*] requirements have not resulted in sufficient disclosure by prosecutors.”); see also Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483–84 (2009) (exploring how the *Brady* doctrine inherently fails to ensure disclosure); Gershmann, *supra* note 135, at 687–88 (“*Brady* has failed as a discovery doctrine. *Brady* is insufficiently enforced when violations are discovered, and virtually unenforceable when violations are hidden . . . . The extent to which prosecutors fail to discharge their *Brady* obligations . . . is almost impossible to measure accurately.”).

succumb to it. Nevertheless, those due process-based responsibilities stand as a reminder that prosecutors have structural obligations to ensure that defendants are treated fairly.

In that spirit, various commentators have proposed a more expansive understanding, and commensurately more rigorous regulation, of the prosecutorial role. For example, Stephanos Bibas argues that in light of the Court's new appreciation of prosecutorial power in plea bargaining, prosecutors should play a greater role in ensuring clarity and fairness of those bargains.<sup>143</sup> Dan Medwed argues for tighter regulation of prosecutorial decision-making, given institutional pressures and psychological biases that impede fair and accurate decisionmaking.<sup>144</sup> Rachel Barkow proposes applying principles of administrative law to prosecutorial offices in order to curtail the dangers of unchecked prosecutorial powers.<sup>145</sup> Angela Davis suggests developing prosecutorial racial impact statements to monitor the racial effects of charging practices.<sup>146</sup> Each of these proposals recognizes that we live in a universe in which the prosecutor—not defense counsel or even the court—holds many if not most of the cards, and that therefore it makes sense to impose on those powerful

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143. See Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 12, at 1145–46, 1156–57 (arguing that prosecutors should be aware of collateral consequences in offering pleas to improve the bargaining process and that as “repeat players,” prosecutors are in a better position to provide clearer terms and should clarify what terms are being imposed).

144. See DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* (NYU Press, 2012) (documenting how prosecutors experience professional incentives and psychological pressures that contribute to wrongful convictions); see also Fred Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 230–38 (2005) (discussing potential regulatory measures to address problems of prosecutor discretion in the postconviction or sentencing context).

145. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 870–74 (2009) (providing an overview of the powerful position federal prosecutors occupy and recommending the use of a “model from administrative law” such as the separation of investigative and advocate functions from adjudicative functions).

146. See, e.g., Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 219–24 (2007) (advocating that prosecutors conduct racial impact studies of their own charging practices).

players greater responsibilities for the overall integrity of the system.

In the misdemeanor context, prosecutors have two main jobs: deciding whether to convert arrests into formal criminal charges, and running the plea process. In the first arena, greater prosecutorial responsibility might include more rigorous screening, both for evidentiary validity and for racial impact.<sup>147</sup> In jurisdictions with low declination rates, prosecutors effectively validate policing policies by converting arrests more or less automatically into formal charges.<sup>148</sup> Were prosecutors to scrutinize arrests more heavily, it would increase the integrity of the resulting convictions. Indeed, this is already occurring in a limited way in New York, where the Bronx District Attorney's Office has instituted more rigorous screening of trespassing cases in recognition of the flaws of the policing process.<sup>149</sup> More fundamentally, prosecutors are in a position to decide whether petty offenses like trespassing, loitering, and disorderly conduct should translate into convictions at all, or whether such conduct should be diverted out of the already overwhelmed criminal justice system.

With respect to pleas, the lack of true adversariality in the petty offense process places prosecutors in a more powerful and therefore more responsible relationship to defendants. The misdemeanor process thus offers an opportunity to shake up the prosecutorial conviction bias, a bias that might be defensible when more culpable conduct has been alleged but is mostly bureaucratic habit when the underlying offense is truly minor.<sup>150</sup>

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147. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–36 (2002) (advocating for greater prosecutorial screening as alternative to the plea-bargaining versus criminal trial dichotomy of dealing with those arrested and charged); see also Davis, *supra* note 146, at 206 (“[A]lthough police officers bring individuals into the system with the arrest power, only prosecutors have the power to formally charge them with crimes—a power that often predetermines their fate.”).

148. See Wright & Miller, *supra* note 147, at 34 (indicating that declination rates refer to “refusals to prosecute a case after the police recommend charges”).

149. See Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 26, 2012, at A1 (describing a policy implemented in July of 2012 by the Bronx District Attorney's office to not prosecute a charge of trespass of a public housing unit, because many so charged have been innocent, “unless the arresting officer is interviewed to ensure that the arrest was warranted”).

150. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117



With an understanding that not all misdemeanor arrests need or should result in convictions, prosecutors could take steps to ensure that defendants don't plead just to get out of jail, that defendants understand the collateral consequences of pleading guilty, and in general that petty convictions and their consequences reflect more substantive determinations of culpability rather than institutional charging practices and overbroad laws.<sup>151</sup>

### *C. Educate Misdemeanor Defendants*

One of the great, seemingly intractable sources of unfairness in the criminal system is that most defendants have a limited ability to stand up for themselves, either pro se before a tribunal, or in relationship to their own lawyers.<sup>152</sup> This inability is a function both of the technical and specialized nature of law itself, and the fact that most of the criminal justice population is poor, undereducated, suffering from substance abuse and/or mental health challenges, and thus in a poor position to understand their legal options or advocate for themselves.<sup>153</sup>

In many ways, the right to counsel is the system's proffered antidote to the social disadvantages that wrack the defendant pool. The model is that even the poorest subliterate defendant

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HARV. L. REV. 2463, 2472 (2004) ("[Prosecutors'] psychology of risk aversion and loss aversion reinforces the structural incentives to ensure good statistics and avoid risking losses.").

151. This is Josh Bowers's point about the need for misdemeanor prosecutors, or if not them, then some decisional actor, to hew more closely to questions of normative rather than legal guilt. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1705–10 (2010).

152. I have written about this phenomenon more extensively elsewhere. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452 (2005) [hereinafter Natapoff, *Speechless*] ("Defendant silence thus extends beyond the courtroom. It is part of a larger phenomenon of expressive disempowerment of those disadvantaged groups who tend to become defendants: racial minorities, the poor, the undereducated or illiterate, juveniles, the unemployed, or people with criminal histories, mental health or substance abuse problems.").

153. See *Kowalski v. Tesmer*, 543 U.S. 125, 140–41 (2004) (Ginsburg, J., dissenting) (surveying illiteracy statistics and concluding that most defendants do "not possess the skill necessary to pursue a competent pro se appeal").

will be treated fairly if they have counsel. But whatever its merits for serious cases, this model breaks down in the misdemeanor system in which counsel's abilities to counter unfairness are structurally limited and heavy caseloads undermine the possibilities of the attorney-client relationship itself.<sup>154</sup> A defendant whose lawyer takes ten minutes in a courthouse hallway to convey a plea offer is unlikely to feel either that his lawyer truly functioned as his representative, or that he had much choice about the resolution of his case.<sup>155</sup>

If lawyers are not enough to ensure a fair fight between defendants and the state, then defendants need more personal ammunition. This idea is implicit in the recognition that wealthy, well-educated, empowered defendants are better situated, not only because they can afford better representation, but because they have more self-confidence, a better understanding of their options, and may be more likely to stand up for themselves against the government.<sup>156</sup> In that vein, we might decide to educate and support vulnerable misdemeanor defendants directly, giving them the knowledge and tools to develop stronger understanding and confidence about their legal choices, rather than assuming that a lawyer alone will confer those things. This is especially appropriate in misdemeanor court where defendants typically get scant time with their attorneys and are therefore

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154. See Natapoff, *Speechless*, *supra* note 152, at 1459–63 (discussing the need for counsel to consider the potential for perjury from even truthful defendants when testifying against the prosecutor's case, prejudicial effects of a defendant's criminal history that prevent a defendant from speaking on his or her own behalf, and limitations on attorney-client communication in overburdened systems).

155. See *id.* at 1462–63

In overburdened state courts, it is not uncommon for a defendant to meet his public defender, hear about the deal, and decide what to do—all in the span of less than an hour and within the confines of a court lock-up or hallway while waiting to go into court.

156. See, e.g., Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 275–92 (1993) (documenting subordinated female linguistic responses to police assertions of authority); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 536–42 (1992) (describing the difficulty that poor tenants had in asserting themselves in court); Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 952 (2002) (describing African Americans' "racial dis-ease" with their subordinate position and vulnerability to police).

presumed to understand and consent to their convictions based on little or no consultation.

The idea that the criminal system should directly educate defendants is not as farfetched as it may seem. We often rely on educating defendants through warnings and judicial colloquies to ensure or enhance defendant understanding and choice. Rule 11 requires judges to engage defendants directly to ascertain, and improve if necessary, their personal understanding of their own pleas.<sup>157</sup> The idea behind the *Miranda* warning is that the final guarantor of fairness is the well-informed suspect who makes choices on his own.<sup>158</sup> While these strategies have been widely criticized as ineffective in practice,<sup>159</sup> the system nevertheless relies on the idea of direct defendant education as a way of guaranteeing the fairness of convictions.

Even in the felony context, such proposals are not unheard of. For example, Bibas's proposal for clearer, standardized plea agreements is effectively an effort to strengthen defendants' personal ability to engage in meaningful plea bargaining.<sup>160</sup> As described above, community-oriented defense often includes a community legal education component.<sup>161</sup> Outside the formal criminal system, Street Law and other know-your-rights

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157. See FED. R. CRIM. P. 11 (noting that prior to accepting a guilty plea a judge "must address the defendant personally in open court" after the defendant has been sworn in and "inform the defendant of, and determine that the defendant understands," his or her rights and the terms and consequences of pleading).

158. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

159. See, e.g., Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 773 (2009) (noting that many consider *Miranda* to have been a "spectacular failure").

160. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 12, at 1153–56 (proposing ways of improving defendant comprehension of plea bargains modeled on other consumer protections, for example by putting them in writing, using standardized terms, and creating cooling-off periods).

161. See CLARK & SAVNER, *supra* note 130, at 19–27 (describing different programs at public defender offices that incorporate community education on legal matters, such as DefensaNDS in Harlem, which informs clients of "lateral consequences of conviction," and MAGIC programs in San Francisco, which "empower[] community organizations to solve systemic problems").

programs educate young people about the choices they may need to make before they ever encounter the criminal system.<sup>162</sup> In these various ways, people working in and around the criminal system view defendant education as an important component of a fair system in light of the sometimes limited role that counsel can realistically play.<sup>163</sup>

To be sure, the idea of educating defendants outside the attorney–client relationship is in tension with the traditional lawyering model. That model relies heavily on counsel to educate defendants and to help them shape their cases; going outside that relationship for information or direction is disfavored. Indeed, courts are sometimes considered to be in a bind if they perceive counsel to be functioning inadequately, on the theory that court intervention might constitute interference with the primary attorney–client relationship.<sup>164</sup> The ABA Model Rules caution lawyers against providing legal advice to represented parties.<sup>165</sup> In sum, there is not a lot of procedural room for someone other than a defendant’s attorney to educate and advise him about his case. Nevertheless, in jurisdictions where attorneys spend scant minutes advising their clients to plead to minor offenses, there is more conceptual space to bolster defendant understanding through other sources.

Direct defendant education is not a substitute for counsel, although in practice it might lead to more pro se representation. Rather, it should be understood as part of the genre of practices

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162. See, e.g., *Civic & Law-Related Education*, STREET LAW, [http://www.streetlaw.org/en/topics/civic\\_lawrelated\\_education](http://www.streetlaw.org/en/topics/civic_lawrelated_education) (last visited Apr. 3, 2013) (describing Street Law’s legal education resources and providing relevant links) (on file with the Washington and Lee Law Review).

163. See, e.g., Barton, *supra* note 107, at 1233–34 (arguing that a strong pro se court system would serve poor civil litigants better than a right to counsel).

164. See William Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge’s Role*, 93 HARV. L. REV. 633, 637 (1980) (“[Judicial] [i]ntervention does present certain undeniable difficulties. It requires the judge to depart from his traditional neutral rule. Moreover, inquiry into counsel’s litigation strategy could jeopardize the confidential relationship between counsel and client and impair the adversary process.”).

165. See MODEL RULES OF PROF’L CONDUCT R. 4.2 (1983) (barring communication with “a person the lawyer knows to be represented by another lawyer”). But see *id.* at cmt. 4 (“Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.”).

in which people making life-altering decisions get general counseling or preliminary education before entering into the actual decision-making process. Low income homebuyers, for example, may receive financial literacy training before reading and signing a mortgage.<sup>166</sup> Patients may receive health literacy coaching before consulting with an actual surgeon.<sup>167</sup> Of course such counseling is the prototypical lawyer's job, but misdemeanor counsel typically lack time to perform this educational role, and even when they do it, they do so in the time-pressured context of the actual plea decision in which defendants may not be able to sort through large amounts of information to make an informed decision.<sup>168</sup> Accordingly, we can think of direct defendant education as a way of preparing defendants to work with their overburdened lawyers.

Some such educational strategies already exist. The Marin County Public Defender, for example, produced a bilingual informational video on DUI offenses, explaining the basic process and answering frequently asked questions in both English and Spanish.<sup>169</sup> The videos are posted on the office webpage and on YouTube.<sup>170</sup> The Washoe County Public Defender's office in Nevada worked with the University of Nevada School of Social Work to establish a student internship in which social work

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166. See Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415, 433 (2009) ("A frequently cited analysis by Hiram and Zorn of participants in Freddie Mac's Affordable Gold mortgage program found that, controlling for selection effects, classroom-based homeownership counseling significantly reduced mortgage delinquency rates.").

167. See Brietta Clark, *Using Law to Fight a Silent Epidemic: The Role of Health Literacy in Health Care Access, Quality & Cost*, 20 ANNALS HEALTH L. 253, 278–79 (2011) (describing forms of "patient coaching" that are used to "empower patients to ask the right questions to help them make medical decisions about diagnostic or treatment options").

168. See, e.g., Christopher L. Peterson, "Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances, 69 WASH. & LEE L. REV. 893, 915–17 (2012) (describing the certain psychological factors that imposed limits on effective decision-making including "distressed abbreviated reasoning patterns" such as under "emotional distress" and "information overload" in the face of an array of complex information required in making a decision).

169. THOMAS GIOVANNI, COMMUNITY ORIENTED DEFENSE: START NOW 15 (Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law 2012), [http://brennan.3cdn.net/7cbfc3d811dd931019\\_y6m6ii3k1.pdf](http://brennan.3cdn.net/7cbfc3d811dd931019_y6m6ii3k1.pdf).

170. *Id.*

students meet with accused persons to collect and provide additional information.<sup>171</sup>

In a similar vein, public defender offices could prepare educational films to be shown in jails, much like the ones shown to prospective jurors in court.<sup>172</sup> Such films could describe the basic contours of common misdemeanor cases and some of the consequences of pleading guilty and going to trial. For example, the film could explain that the elements of loitering in Baltimore include “to interfere with, impede, or hinder the free passage of pedestrian or vehicular traffic” after receiving a warning.<sup>173</sup> The film could tell defendants to be prepared to talk to their lawyer about whether they engaged in this conduct, and whether there were any witnesses. The film could also tell defendants the average wait time before trials are set in that jurisdiction, and common collateral consequences of pleading guilty to certain offenses, such as losing access to public housing or other government benefits. Films could be supplemented with written materials made available at booking.

To be sure, there are many potential problems. A generic film can only provide a little bit of knowledge, proverbially a dangerous thing. Defendants may become confused, or subsequently reject good advice given by their lawyers. They may conclude they are innocent when they are not, or that they have legal issues when they do not. Some defendants will be left out because they have cases or scenarios that are not addressed by the film. More instrumentally, jails, prosecutors, courts, and even some defender offices may resist the idea of implicitly encouraging defendants to litigate rather than to plead.

The theoretical objection to generalized education is that criminal cases are not generalized and therefore require individualized legal counseling. Or, to put it in doctrinal terms, lay people cannot be expected to make sound, informed legal decisions without the trained “guiding hand of counsel.”<sup>174</sup> But

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171. *Id.* at 13.

172. Non-profit agencies could also theoretically perform this non-representative counseling function, but because non-lawyers would be limited in the advice they could give, the public defender’s office is the obvious choice.

173. BALTIMORE, MD., CITY CODE art. 19, § 25-1 (2008).

174. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (internal citations omitted).

while this may well be true for serious cases, the misdemeanor system already treats defendants in bulk, processing cases by category with scant attention to individualized evidence. At the very least, we can educate defendants about the categories they have been put into, and about the outcomes that everyone else in the system regards as inevitable. This may help them have more meaningful conversations with their lawyers, and bring outcomes closer to the ideal of informed defendant choice.

### *VI. Conclusion*

Garrett distrusted me from the get-go.<sup>175</sup> Over the course of his criminal career he had numerous experiences with court-appointed counsel, and he considered me—his newly-appointed Federal Public Defender—just another government functionary whose job was to put him in prison. But after several days and long hours of conversation, he started to soften. Once he saw me actively pursue leads and take issues seriously, he came to look forward to our visits in the jail lock-up. His tired face would crack open with a smile when he saw me through the plexiglass, and he'd lean in conspiratorially while we discussed his case.

One day, Garrett seemed more serious than usual. After chatting for a few moments, he said he had something important to ask me.

"I really appreciate the time you put into my case," he said. "And after all this talk, I feel like, well, my case is pretty serious."

I assured him that his case was indeed serious and that he was looking at significant prison time.

"So," he said. "I want to ask your opinion. Since I got this serious case and all. Do you think I should get a lawyer?"

It took me a moment to get his meaning, but then I explained to Garrett that I was in fact an attorney, that it was my job to represent him, and that I would do the very best I could.

"Oh, I know," he assured me. "You're real good. No offense. I just meant, do you think I should get a paid lawyer?"

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175. Not my former client's real name.

Fifty years ago, Clarence Earl Gideon had an intuition that what he needed was a lawyer: to be his champion and to ensure his fair treatment under the Constitution. That deep intuition about the central protective role of defense counsel persists, influencing the Supreme Court and aspiring Clarence Darrows, and offenders like Garrett, who accept the ideal even if they reject the current system of public defense.

Nothing in this Article is intended to demean the fact that a good, responsive lawyer can have deep value to a defendant. The value is not merely the instrumental one of winning a case or reducing a sentence, but the dignitary value of being represented by a skilled advocate who can make the system work for those who are rarely heard. But no number of Clarence Darrows can make the modern sprawling criminal system fundamentally fair, especially in the high-volume, low-scrutiny petty offense context. Other actors and institutions need to bear greater responsibility for preserving the rights and dignity of defendants and for maintaining the structural fairness of the process as a whole.