
CIVIL VS. CRIMINAL LEGAL AID

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ABSTRACT

The past few decades have highlighted the insidious effects of poverty, particularly for poor people who lack access to legal representation. Accordingly, there have been longstanding calls for “Civil Gideon,” which refers to a right to counsel in civil cases that would address issues tied to housing, public benefits, family issues, and various areas of law that poor people are often disadvantaged by due to their lack of attorneys. This civil right to counsel would complement the analogous criminal right that has been constitutionalized. Notwithstanding the persuasive arguments made for and against Civil Gideon, it is less clear why there is such a sharp distinction between civil and criminal legal aid. This Article re-examines longstanding assumptions about the civil-criminal legal aid divide and highlights some underexamined explanations: the legal profession’s historical implication in this division; courts’ unwillingness to use their inherent powers to appoint counsel; and courts’ enduringly narrow understandings of when poor people should be provided with lawyers. These insights prompt alternative reflections on how to best deliver legal services to poor people.

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“There is a gulf, fixed by history and tradition, between civil and criminal matters that will not easily be bridged.”¹

“Most public defenders do not think beyond the termination of the pending criminal case. Many civil legal aid attorneys would like to think that their client population has little contact with the criminal justice system. And never the twain shall meet.”²

INTRODUCTION

There is a long, documented history of legal advocates and scholars highlighting the innumerable plights of the poor.³ Whether one looks at Progressive Era reforms of legal institutions,⁴ the mid-twentieth century development of poverty law as an area of intellectual inquiry and professional practice,⁵ or the twenty-first century renewed interest in law and

1. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 82 (1919).

2. McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. 56, 56 (2003).

3. See, e.g., ESTHER LUCILE BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* (1938); EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES* (1951); MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1995); BRYANT GARTH, *NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION* (1980); EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974); SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* (1990); VICKI LENS, *POOR JUSTICE: HOW THE POOR FARE IN THE COURTS* (2016); DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004); SMITH, *supra* note 1; PATRICIA M. WALD, *LAW AND POVERTY: 1965* (Abram Chayes & Robert L. Wald eds., 1965).

4. FELICE BATLAN, *WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863–1945* (2015); JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990* (1997); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

5. *CASES AND MATERIALS ON LAW AND POVERTY* (Paul H. Dodyk et al. eds., 1969); NATIONAL CONFERENCE ON LAW AND POVERTY, *CONFERENCE PROCEEDINGS* (1965); *THE LAW OF THE POOR* (Jacobus TenBroek ed., 1966); Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 *FORDHAM URB. L.J.* 1391 (2007); Stephen Wexler, *Practicing Law for Poor*

poverty,⁶ the legal profession has had pronounced views about law's relationship to poor people. One variant of the bar's outlook—which some might say is straightforward and others might say is self-aggrandizing—is the belief that lawyers can mitigate poor people's problems through legal assistance.⁷ Government underwriting of indigent defense and civil legal aid organizations is central to this view. The former is embodied in judicial interpretations of the Sixth Amendment right to appointed counsel in *criminal* cases.⁸ Mountainous quality control questions aside,⁹ the right to counsel, which was enshrined in the landmark decision *Gideon v. Wainwright*, is relatively uncontroversial.¹⁰ Legal aid organizations that supply representation to poor people in *civil* actions do not benefit from the

People, 79 YALE L.J. 1049 (1970); A. Kenneth Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROBS. 211 (1966).

6. This is not to say that there was no interest in the intervening period, but scholars have described the stop-and-go like interest in poverty law during the last quarter of the twentieth century, specifically in the areas of scholarship, curriculum, and practice. See Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 365 (2007) (noting how “poverty law and urban law became big topics in the 1960s and 1970s,” and observing that “[p]oor people and cities are hardly less important now than then, nor their situations less dire; but they are no longer in fashion”); Davis, *supra* note 5, at 1404 (discussing how “virulent attacks on the welfare system” in the 1990s “negatively affected law students’ and law schools’ appetite for an expanded poverty law curriculum”); Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1402 (1995) (describing the “renewed interest in the theory and practice of poverty law”); Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199, 199 (1993) (contending that poverty law “faded during the late 1970s and 1980s” and “experienced a resurgence of interest”). For a range of recent takes on law and poverty, see Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389; Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019); Richard M. Re, *Equal Right to the Poor*, 84 U. CHI. L. REV. 1149 (2017); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323 (2016); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016); David A. Super, *ACUTE POVERTY: The Fatal Flaw in U.S. Anti-Poverty Law*, 10 U.C. IRVINE L. REV. 1273 (2020).

7. Compare Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012) (arguing that more lawyers is not always the answer to the problems of the poor and advancing various proposals, specifically pro se litigant reform, which might be “bad for lawyers” but “good for citizens and the economy as a whole by reducing the deadweight burden of legal fees”), with John Pollock & Michael S. Greco, *It’s Not Triage If the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40, 44–55 (2012) (arguing that civil cases involve complexity that pro se litigants may not be able to overcome and arguing for a civil right to counsel in specific circumstances).

8. U.S. CONST. amend. VI.

9. Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1583–1605 (2020) (describing the scope of ineffective assistance of counsel doctrine).

10. *Gideon v. Wainwright*, 372 U.S. 335 (1963). But see Shaun Ossei-Owusu, *The Welfarist Right to Counsel*, 68 UCLA L. REV. (forthcoming) (on file with author) (describing originalist objections to the expansion of the right to counsel).

same kind of national and constitutionalized legal welfarism. Instead, they are subject to a patchwork of statutory schemes,¹¹ legislative beneficence,¹² private charity,¹³ and due process balancing.¹⁴ Criminal legal aid, though certainly qualified, is a right. Civil legal aid, though required in some instances, does not have the same obligatory legal character.

Consequentially, advocates have spent decades arguing for a civil right to counsel, often referred to as “civil *Gideon*.”¹⁵ Proponents of a civil right to counsel are attuned to poor people’s noncriminal legal needs. Indigent parties may need lawyers to challenge evictions,¹⁶ public benefit determinations,¹⁷ and terminations of parental rights,¹⁸ to name a few. Civil *Gideon* supporters are careful not to denigrate the plight of criminal

11. See generally Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009) (providing a survey of statutes); Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006) (same).

12. 42 U.S.C. § 2996 et seq. (creating the Legal Services Corporation, which is the largest single funder of civil legal aid for low-income Americans); see also *About LSC*, LEGAL SERVICES CORP., <https://www.lsc.gov/about-lsc#:~:text=LSC%20is%20the%20single%20largest,assistance%20to%20low-income%20Americans> [<https://perma.cc/XMT9-JURU>].

13. Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 75–76 (2016) (describing how legal fellowships funded by private organizations support public interest work); Daria Fisher Page, *A Pedagogy of Anxiety: The Dangers of Specialization in Legal Education and the Profession*, 44 J. LEGAL PROF. 37, 44–45 (2019) (same); Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79, 104 (2007) (noting that contemporary American civil legal assistance is decentralized and reliant on philanthropy and volunteerism).

14. See Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 892 (2015) (describing how “the rights for criminal defendants and civil litigants developed along different tracks, with the former defined by rules and the latter left to discretionary standards”).

15. See, e.g., Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527 (2006); Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006); Earl Johnson Jr., *50 Years of Gideon, 47 Years Working Toward a “Civil Gideon,”* 47 CLEARINGHOUSE REV. 47 (2013); Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL’Y 683 (2011); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503 (1998).

16. See, e.g., MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 303–305 (2016); Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55 (2018); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009).

17. See, e.g., Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131 (2008); Kia C. Franklin, *Advocacy in Health Proceedings in New York State*, 25 TOURO L. REV. 437 (2009); Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273 (2009).

18. See, e.g., Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1 (2017); Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States’ Response to Lassiter*, 14 TOURO L. REV. 247 (1997).

defendants, and, in some instances, document the blurring of the civil and criminal legal systems that leaves civil litigants unrepresented in actions that have penal consequences.¹⁹ But the query nevertheless remains: why are criminal defendants primarily entitled to counsel? Surely, some civil *Gideon* supporters argue, the loss of a home, health care, or a child is equal to and in some instances contends with the loss of liberty that allows defendants to receive counsel (particularly misdemeanants).²⁰

The answers to the civil-criminal legal aid distinction typically rest in a few places. One descriptive explanation points to the divide between civil and criminal procedure. As Bill Stuntz has observed, criminal procedure—and the right to appointed and effective counsel specifically—is subject to close constitutional scrutiny whereas civil procedure, as a relative matter, tends to be more governed by the rules of procedure, statutes, nonconstitutional common law, or local customs.²¹ A related, though more normative rationale, highlights the differences between civil and criminal sanctions and the attendant interests involved in both kinds of actions. Criminal law’s function of expressing moral condemnation, as famously explained by Henry Hart,²² coupled with Weberian ideas about the state’s unique punishment monopoly,²³ give criminal legal aid a little more primacy.

19. See, e.g., Brooke D. Coleman, *Prison Is Prison*, 88 NOTRE DAME L. REV. 2399 (2013).

20. See Alexander D. Forger, *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions - Address: The Future of Legal Services*, 25 FORDHAM URB. L.J. 333, 337 (1998) (“For the family out on the street with no housing, or for the spouse who is being battered and abused, or for the person deprived of needed health care, these matters can be every bit as vital as those that affect people who are faced with incarceration.”); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 547 (2009) (discussing the lack of a right to appointed counsel in removal proceedings, which are considered civil, and suggesting that it is counterintuitive that “an indigent immigrant who has lived here legally since childhood is entitled to a lawyer when he faces a night in jail for a minor criminal offense but when that same person faces lifetime exile from his U.S. citizen family, his career, and his home, he is not entitled to any legal assistance at all.”); Sabeth, *supra* note 14, at 908–10 (detailing the prioritization of liberty, which allows for the provision of counsel and housing, which is considered a basic human need, but deprioritized in the right to counsel context).

21. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1–4 (1996) (discussing how criminal procedure is completely constitutionalized while civil procedure is not and observing how the provision of counsel and counsels’ performance are uniquely governed by constitutional concerns while such issues, in criminal procedure, are governed by rules of civil procedure, statute, nonconstitutional common law or local custom). *But see* Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1327–28 (2007) (suggesting that although the “civil procedure canon includes very few constitutional decisions,” civil justice is a space where “constitutional questions are raised, litigated, and resolved” and identifying connections between constitutional principles and themes that appear in the standard civil procedure course). See generally John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984) (arguing that constitutional law should play more of a role in civil procedure).

22. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404–06 (1958).

23. MAX WEBER, THE VOCATION LECTURES 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

Under this line of thinking, the loss of liberty or life that can come with the imposition of criminal liability and the consequences of error are uniquely severe and require the presence of an attorney in criminal proceedings.²⁴ This explanation is plausible, but rests on shakier ground considering the aforementioned melding of the civil and criminal legal systems and the longstanding acknowledgement that these areas have porous boundaries.²⁵ Nevertheless, the primacy of the criminal still holds some sway in juridical and scholarly thinking.

A textual approach to the civil-criminal legal aid divide highlights the Sixth Amendment's language, which specifically denominates a right to counsel in "criminal prosecutions."²⁶ Under this brand of constitutional interpretation, there is no similar civil analog in the Constitution, and, thus, no similar right to counsel. The closest constitutional possibility, which represents another explanation for the civil-criminal legal aid divide, rests in the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause.²⁷ Put in its simplest terms, the Court has explained that this provision requires the appointment of counsel in civil cases only after a *Mathews v. Eldridge*-style consideration of the state's interests vis-à-vis a litigant's interests.²⁸ Another theme gestures toward the ways contentious legislative politics have limited the scope and federally-funded civil legal aid.²⁹

24. See *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (ruling that deprivation of defendant's Sixth Amendment right to choice of counsel is a structural error and not subject to harmless error review but required a reversal of conviction); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."). Cf. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 3 (1990) (noting that requirement of proof beyond a reasonable doubt and the prohibition on government appeal of acquittals causes the government to bear most of the risk of error in criminal trials and contending that neither of these procedural mechanisms have counterparts in civil procedure).

25. See, e.g., George H. Dession, *Sanctions, Law and Public Order*, 1 VAND. L. REV. 8 (1947); Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753 (1943); Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213 (1958); Rollin M. Perkins, *The Civil Offense*, 100 U. PA. L. REV. 832 (1952); Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

26. U.S. CONST. amend. VI; see also *Austin v. United States*, 509 U.S. 602, 608 (1993) ("The protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.'").

27. U.S. CONST. amend. XIV.

28. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

29. See, e.g., BRENNAN CTR. FOR JUSTICE, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? (2001); KENNETH F. BOEHM & PETER T. FLAHERTY WHY THE LEGAL SERVICES CORPORATION MUST BE ABOLISHED (1995), http://thf_media.s3.amazonaws.com/1995/pdf/bg1057.pdf; EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES (2013); Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39 (1994);

These theoretical, textualist, constitutional, and normative justifications each have great explanatory value. Indeed, the analysis offered in the following pages is indebted to these insights. But the prevailing explanations for the civil-criminal legal aid divide only cover part of a very complicated and unflattering story. In the advocacy for and against civil *Gideon*, it is still not robustly clear why the division between civil and criminal legal aid exists.

This Article provides some additional explanations for why the divide between civil and criminal legal aid exists. I argue that civil and criminal legal aid bifurcation is also a byproduct of the legal profession's own doing, as well as judicial choices that have garnered less attention by scholars and practitioners. In the legal profession context, I highlight how early twentieth century legal service providers and leaders of the bar reified the civil-criminal divide during crucial moments of legal aid institutionalization, notwithstanding persuasive arguments that both should be housed under the same roof. This separation shaped the institutional patterns, priorities, and configurations of legal services organizations in ways that are still palpable today though rarely acknowledged. This separation shaped something as simple as nomenclature: the common association of legal aid with civil concerns and public defenders with criminal issues (even though some early legal aid organizations provided criminal defense while some public defender offices assisted in civil cases).³⁰ More substantively, the bar's separation of civil and criminal legal aid defined the terrain of legal assistance once legislatures and courts began to weigh in more substantively on legal aid issues in the middle of the twentieth century and thereafter.

Accordingly, this leads to the Article's explanation of how the judiciary contributed to the division between civil and criminal legal aid. Two features are at play here—one more commented upon in legal scholarship than the other. The less-discussed element points to courts' differential use of their inherent powers to appoint counsel in criminal and civil cases. Inherent powers, defined simply, refer to courts' authority to regulate its affairs, supervise the judicial process, and administer justice.³¹ Since the turn of the

Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737 (2002).

30. See *infra* note 73.

31. This authority is different in state and federal courts as a descriptive and normative matter. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805 (1995); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

twentieth century, trial courts used this authority to appoint counsel in criminal cases with less reluctance than they did in civil cases, and higher courts often approved. This prioritization of appointments in the criminal context amplified existing rationales for the primacy of criminal proceedings over civil proceedings, notwithstanding real-time objections. Before *Powell v. Alabama*,³² the landmark Progressive Era decision that enshrined a right to counsel in capital cases, the assignment of counsel in criminal cases was undergirded the belief that such provisions were a public obligation in ways civil legal aid was not. The Court's post-*Powell* jurisprudence and the institutionalization of legal aid organizations overlaid this emphasis on appointments in the criminal context.

The more commented-on explanation of the civil-criminal legal aid divide points to the Supreme Court's interpretations of when counsel is necessary.³³ In line with the above-mentioned prioritization of criminal legal aid, the Court has understood the Sixth Amendment's right to appointed counsel more expansively in criminal proceedings. It has been more noncommittal in civil and quasi-criminal contexts that implicate the Fourteenth Amendment's Due Process Clause. The Court's decisions in *Lassiter v. Department of Social Services*³⁴ and *Turner v. Rogers*³⁵ are prime exhibits for this line of thinking. Analyses of the Court's late twentieth century right to counsel jurisprudence in these areas are correct, but this Article offers a supplemental twist: I argue that the Court's more limited reading of the appointment of counsel under due process principles actually predates these cases by almost a century. Beginning in the late nineteenth century, the Court refused to endorse a Due Process Clause right to counsel in civil cases—whether appointed or privately retained—notwithstanding specific liberty deprivations that flowed from such proceedings.³⁶ These interpretations accompanied the reification of the civil-criminal divide within the legal profession and lower courts' differential use of their inherent authority power. By the time civil *Gideon*-like arguments made it to the Court in cases like *Lassiter*, the outcome was not a foregone conclusion, but the divide was more hardened than scholars and advocates often acknowledge.

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

33. Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805 (2012); Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260 (2013); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009).

34. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

35. *Turner v. Rogers*, 564 U.S. 431 (2011).

36. *See infra* Part III.

This account of how the legal profession and the judiciary contributed to the civil-criminal legal aid divide could be read as a modest scholarly addendum, especially considering the Article's agnostic position on the civil *Gideon* movement. But the historical reveal has normative implications for a host of subject matter areas, ideological positions, and legal advocates. Drawing on a tradition of scholarship that has cast a critical eye on the bar,³⁷ this account invites self-reflection on the ways the legal profession, and the legal aid community, in particular, has and continues to reify the divide between civil and criminal legal aid. For the slightly larger population of advocates and opponents of civil *Gideon*, the Article's argument illustrates the historical depth of the civil-criminal divide. This bifurcation has been informed by a mix of reasonable concerns about resource conservation, uneven constitutional interpretations of when poor people need lawyers, and undisguised policy choices by legal aid institutions and the bench.

But this is not just an insider, legal aid conversation. This account adds another chapter to a longstanding literature that interrogates the civil-criminal divide.³⁸ In doing so, the Article attempts to bridge the gap between poverty law—which has been the domain of civil legal aid and relatively disengaged with criminal justice issues until recently—and criminal justice scholarship—which acknowledges the role of poverty but has been generally detached from *poverty law* as a field.³⁹ Overall, the aim is to show how legal aid distinctions are contingent, merit reevaluation of the civil-criminal

37. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 540–50 (1985); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453 (2008); Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506 (2012); Bruce A. Green, *Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713 (1999); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

38. See, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1400 (2018); Elizabeth D. Katz, *Criminal Law in A Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241 (2019); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999); Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017); Ion Meyn, *Constructing Separate and Unequal Courtrooms*, ARIZ. L. REV. (2020) (forthcoming) (on file with author); Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985 (2018); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2006); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

39. See *infra* Part IV.

binary, and highlight the broader divide between criminal justice and poverty law.

This Article proceeds in four Parts. Part I describes how the legal profession reinforced the civil-criminal legal aid divide during important moments of legal aid institutionalization. Part II examines how courts' differential use of their inherent powers contributed to the divide. In this Part, I show how courts endorsed the use of inherent powers in criminal cases but had more reservations about this authority in civil cases. Part III examines how judicial interpretations of when poor people needed lawyers shaped civil and criminal legal aid. Part IV offers some insights into what this history can offer the contemporary administration of civil and criminal legal aid. The Conclusion provides parting thoughts on the salience of the divide.

A few caveats are in order before proceeding. First, it is important to note that race, gender, and political economy shape the institutional development of legal aid. This Article does not thoroughly interrogate those intersections in part because I engage them more specifically in other articles,⁴⁰ as do others.⁴¹ Second, this account accepts the real differences between the civil and criminal legal systems as well as different interests that are in play in both forms of adjudication.⁴² Both fields contain various niceties that may not require counsel in some instances and necessitate counsel in others. Moreover, though the analysis offered herein could be deployed in service of arguments for or against a civil right to counsel, this Article is not interested in making a case for either; that work has been capably done elsewhere.⁴³ Instead, I aim to highlight some underthematized

40. See Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019); Ossei-Owusu, *supra* note 10.

41. See BATLAN, *supra* note 4; Gwen Jordan, *Radical Women and the Development of Legal Aid Societies in Chicago and Los Angeles, 1886–1914*, 18 J. GENDER RACE & JUST. 69, 87 (2015).

42. See Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62, 72 n.20 (2014) (noting that criminal defense organizations tend to differ from civil legal aid organizations because of the stakes at risk, the incentives for compromise or going forward, and the process through which the organizations find and select their clients); Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 CARDOZO L. REV. 1585, 1587 (1998) (“Few would think of combining civil and criminal procedure into one code because of the many policy differences inherent in the two justice systems.”); Robinson, *supra* note 38, at 206 (1996) (describing how criminal liability signals moral condemnation of the offender whereas civil liability serves functions such as conduct regulation, compensation of injured persons, and efficient distribution of loss).

43. See, e.g., Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013); Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010); Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287 (2013); Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1 (2003); Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56 (2019); Russell Engler, *Access to Justice, Civil Right to Counsel, and*

explanations for why the institutional and intellectual divide between civil and criminal legal aid exists. I hope to situate these insights within broader conversations about how to best meet poor people's legal needs.

I. THE LEGAL PROFESSION AND THE CIVIL-CRIMINAL LEGAL AID DIVIDE

This Part chronicles how the legal profession contributed to the civil-criminal legal aid divide during important moments of legal aid institutionalization. At the risk of being repetitive, the point of this portion of the Article is not to suggest that the legal profession is *responsible* for the divide. This Part also resists simple accounts of professional siloing and specialization. Instead, the goal is to show how institutional prioritizations—which were influenced by a host of legitimate as well as suspect considerations—shaped the differential delivery of legal services.

A. THE DIVIDED PROGRESSIVE ERA

The right to counsel, as enshrined in the Sixth Amendment, was traditionally understood as a negative liberty. The basic idea was that the government could not prevent a criminal defendant from obtaining counsel, but it did not have an affirmative obligation to provide criminal defendants with attorneys or pay for their services if counsel was appointed.⁴⁴ On a federal level, this was the doctrinal status quo until 1932, when the Court enshrined a limited right to counsel by way of the Fourteenth Amendment's Due Process Clause in *Powell v. Alabama* and required state governments to provide attorneys to indigent capital defendants.⁴⁵ Before *Powell*, practices varied by states, but it was common for judges to assign counsel in serious cases through their inherent powers (as discussed in Part II), statute, or state constitution.⁴⁶ Such assignment was spotty and ineffective, as the lack of compensation for assigned attorneys disincentivized them from engaging in competent lawyering.⁴⁷ Things were bleaker on the civil side. Although in

the Role of the Judge, 56 CT. REV. 10 (2020); Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065 (2009); Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317 (2001).

44. *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (noting that there was “no general obligation on the part of the government” to “retain counsel for defendants or prisoners” and that the purpose of the Sixth Amendment's right to counsel was to “merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government”).

45. *Powell v. Alabama*, 287 U.S. 45, 65–73 (1932).

46. *See infra* Part II.

47. *See, e.g.*, Mayer C. Goldman, *Necessity for a Public Defender*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 660, 662 (1915) (“An indigent person who goes to trial with assigned counsel, who is either indifferent, incompetent, unscrupulous or working without compensation (except in some jurisdictions, in capital cases) is naturally at a disadvantage . . .”); *see infra* notes 58, 167.

forma pauperis statutes and inherent powers allowed state and federal judges to assign counsel to poor people in civil cases, they exercised this power infrequently, leading Harvard Law Professor John Maguire to complain, “the present American system of assignment is more a will o’ the wisp than a true beacon of hope for the indigent.”⁴⁸ The deficiencies of the assigned counsel system on the criminal side, along with the relative unavailability of appointment on the civil side, helped spawn the legal aid movement.

New York reformers hoping to mitigate the wartime inequality of the 1860s were central to the institutionalization of legal aid. The first organization, the Working Women’s Protective Union (“WWPU”), was founded in 1863 with the goal of providing legal services to working women who were subject to employer fraud. Legal historian Felice Batlan has shown how this organization, like many others that have been airbrushed from history until recently, often entailed the “provision of legal services to poor women—often *by* other women.”⁴⁹ WWPU created space for the German Legal Protection Society (The Deutscher Rechtsschutz Verein. In 1876 Edward Salmon, a German lawyer, along with German elites, developed this charity-oriented organization out of concern for German immigrants who were unfamiliar with the chicanery of Gilded Age New York City and taken advantage of by their landlords, employers, and merchants.⁵⁰ In 1890, the organization expanded to non-Germans and subsequently transformed into the Legal Aid Society of New York City, which still exists today.⁵¹ Although cognizant of the problems of criminal justice administration in New York City, resource constraints led the philanthropic organization to prioritize civil legal aid over criminal legal aid for almost four decades.⁵² It did not develop a formal criminal defense practice until 1920.⁵³ In the meantime, many other cities took cue from the New York-based organization and its influential leader Arthur von Briesen, whom President and Chief Justice Taft

48. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 389 (1923).

49. Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910*, 28 L. & HIST. REV. 931, 933 (2010). Philadelphia and Chicago had similar organizations. *See id.*; Jordan, *supra* note 41, at 87.

50. Leonard McGee, *The New York Legal Aid Society (1876–1925)*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 27 (1926).

51. *About Us*, LEGAL AID SOC’Y, <https://legalaidnyc.org/about> [<https://perma.cc/PDJ9-ARNA>].

52. JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY, 1876–1926*, at 261 (1928) (noting that the organization’s founders “left an absolutely unmistakable record of their intention to assist indigent criminal defendants” but because of “an absolute lack of money and personnel,” the organization had to “refuse most criminal business, despite a dark suspicion that the interests of the poor were not adequately safeguarded before police magistrates and in other criminal tribunals”).

53. James Bronson Reynolds, *The Public Defender*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 476, 476 (1922).

referred to as the “philanthropic leader of the bar.”⁵⁴ Boston (1900), Philadelphia (1902), Chicago (1905), Pittsburgh (1908), Detroit (1909), Louisville (1913), and others cities created legal aid organizations modeled in part by the New York experience.⁵⁵ This emulation, which commenced a form of path dependency, meant that most legal aid societies also focused primarily on civil issues.⁵⁶

At the same time, the movement for public defenders also surfaced. This crusade was led by Clara Foltz, a legal pioneer who worked part-time as a criminal defense attorney and witnessed the vagaries of the assigned counsel system.⁵⁷ In 1893, she gave a speech at the Chicago World Fair that she published as a proposal for a public defender.⁵⁸ “Connected with the court is a public prosecutor,” she wrote, who was “selected for his skill in securing convictions. . . . But what machinery is provided for the defense of the innocent? None. Absolutely none.”⁵⁹ Foltz also commented on the quality of the assigned counsel, which had gone undiscussed in scholarship and public writing on the criminal justice system. “[T]he rule is that court appointees are wholly unequal to the public officers with whom they are to cope. . . . The appointees come from failures in the profession, who hang about courts hoping a stray dollar or two from the unfortunate, or from the kindergartens of the profession just let loose from college and anxious to learn the practice.”⁶⁰

Foltz proposed a public defender system centered on a public advocate as opposed to legal aid’s charity model. This advocate, she argued, should

54. MAGUIRE, *supra* note 52, at xi.

55. REGINALD HEBER SMITH, JUSTICE AND THE POOR 140–44 (1919). Some additional cities include San Francisco in 1915, Milwaukee in 1916, Denver in 1924, Baltimore in 1929, and Oakland in 1929. John S. Bradway, *The Growth of Legal Aid Work*, 13 NEB. L. BULL. 240, 249–50 (1935).

56. *See infra* notes 97–98; BOSTON LEGAL AID SOCIETY, FIRST ANNUAL REPORT OF THE BOSTON LEGAL AID SOCIETY 1900–1901, at 9, 14 (1901) (noting that the Board of Directors decided that criminal cases should not be undertaken “except to make such investigation as to be reasonably sure that no injustice was being done”); LEGAL AID SOC’Y OF PHILA., ANNUAL REPORT OF THE LEGAL AID SOCIETY OF PHILADELPHIA 7 (1904) (describing how “the Society never appears for a party charged with a crime, unless it has the strongest reasons to believe in the innocence of its applicant, and in most of the cases it has been able to lay facts before the District Attorney or the committing Magistrate which would lead to the abandonment or dismissal of the charge”); Marguerite Raeder Garipey, *The Legal Aid Bureau of the United Charities of Chicago*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 35 (1926) (describing how legal aid organizations at the turn of the century in Chicago handled some criminal issues and that “[p]ractically all the cases handled by the Legal Aid Bureau are civil cases, although occasionally the Bureau sends an attorney to represent clients in police court cases where the person needing legal aid is a member of a family being helped by the United Charities, or some other social agency”).

57. *See generally* BARBARA BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ (2011).

58. Clara Foltz, *Public Defenders-Rights of Persons Accused of Crime-Abuses Now Existing*, 48 ALB. L.J. 248, 248 (1893).

59. *Id.*

60. *Id.* at 249.

be equal in skill, resources, and staff to the prosecutor.⁶¹ This proposal was partially adopted by Los Angeles, which developed the first municipally-funded public defender office in 1913.⁶² Midwestern jurisdictions, such as Minneapolis and Columbus, and western cities, such as Portland and San Francisco, followed suit.⁶³ As Sara Mayeux explains, the private bar in East Coast cities rejected the idea of publicly-funded criminal or civil legal aid because they were concerned about government involvement in the provision of legal services more generally.⁶⁴ Instead, cities such as Philadelphia, Boston, and New York opted for “Volunteer Defender Committees”—separate criminal legal aid organizations that were privately funded.⁶⁵ By the time the Supreme Court offered its first articulation of an affirmative right to legal assistance in 1932, the institutional lines were sketched locally, with civil legal aid on one side and criminal legal aid on the other.

Herein lies an important first point on the division between civil and criminal legal aid: as organizations developed during the Progressive Era and thereafter, many of them further entrenched the divide. Such demarcation existed despite many legal elites’ recognition that civil and criminal legal aid had similar exigencies. A star-studded list of lawyers made this point. In 1919, Reginald Heber Smith authored *Justice and the Poor*, the first national legal aid survey.⁶⁶ In his book, he argued that legal aid organizations failed to develop meaningful criminal defense practices and concluded that “[t]he public defender movement is the result of their shortcoming.”⁶⁷ He encouraged civil legal aid societies to “strain every effort to provide assistance in this important field” and “take advantage of the momentum of the public defender idea, and merge it with themselves, by establishing public defender departments.”⁶⁸ For Smith, having “two sets of organizations existing side by side” would lead to “unfortunate results in duplication of work and increased expense to be borne by the public or the community.”⁶⁹ Northwestern University Law School Dean and evidence luminary John Henry Wigmore observed, “The public defender . . . has at last come in

61. *Id.* at 250.

62. MAYER C. GOLDMAN, *THE PUBLIC DEFENDER: A NECESSARY FACTOR IN THE ADMINISTRATION OF JUSTICE* 87 (1919).

63. REGINALD HEBER SMITH & JOHN S. BRADWAY, *GROWTH OF LEGAL-AID WORK IN THE UNITED STATES: A STUDY OF OUR ADMINISTRATION OF JUSTICE PRIMARILY AS IT AFFECTS THE WAGE EARNER AND OF THE AGENCIES DESIGNED TO IMPROVE HIS POSITION BEFORE THE LAW* 63–65 (1936).

64. Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 30–31 (2016).

65. *Id.*

66. SMITH, *supra* note 55.

67. *Id.* at 156.

68. *Id.*

69. *Id.*

sight . . . [b]ut in the meantime, in civil cases, is there not a field in which the public-salaried official advocate may play a modest part? And is it not a part which would go far to remove some of the worst reproaches of present-day justice? We refer to a public legal adviser for the poor.”⁷⁰ Chief Justice Taft put it plainly when he stated, “It may be well to unite both civil and criminal cases and make the public defender a part of the general department of free legal service.”⁷¹ Smith, Wigmore, and Taft were not alone and they were not the last cohort of legal elites to lodge these recommendations.⁷² While there were appreciable differences between the civil and criminal systems, those distinctions did not necessarily justify differences in the *delivery* of legal services as the past practices of organizations that provided both demonstrate.⁷³ What explains the hardening of this divide, notwithstanding reformers arguing for a melding of civil and criminal legal aid? The historical record suggests that attorney preferences, resource constraints, the bar’s self-interest, and path dependency played a role in maintaining the Progressive Era civil-criminal legal aid divide.

The first explanation points to the relative undesirability of criminal law within the legal profession. The famous Cleveland Survey conducted by legal luminaries Roscoe Pound and Felix Frankfurter spells this out in more detail. In their survey of approximately 386 Cleveland attorneys, half stated

70. John H. Wigmore, *Shall the Legal Profession Be Reorganized?*, 4 J. AM. INST. CRIM. L. & CRIMINOLOGY 641, 642–43 (1914).

71. SMITH & BRADWAY, *supra* note 63, at iv.

72. See *infra* notes 133–36; AM. BAR ASS’N, REPORT OF THE FORTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT MINNEAPOLIS, MINNESOTA 633 (1923) (“No meritorious case, whether civil or criminal, that is cognizable in the courts of the country, ought to be denied the services of an able, courageous and loyal advocate, and no person, however humble, ought to be able to say in any American community that his cause, civil or criminal, is beyond his means to adequately present.”); Austin F. Macdonald, *Public Legal Aid Work*, 14 NAT’L MUN. REV. 564, 565 (1925) (“There is no sound reason in theory why criminal cases should not be included within the scope of the legal aid bureau’s activity. The man accused of theft needs protection equally with the man defrauded of his earnings.”); Maurice Parmelee, *Public Defense in Criminal Trials*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 735, 746 (1911) (“The logical sequel to public defense would, I believe, be free civil justice; that is to say, the employment of attorneys by the public for the pleading and defense of civil cases. There is no more equality before the law for rich and poor in the civil courts than there is in the criminal court, for the possibility of winning his case, however much in the right he may be, for the plaintiff or defendant in a civil suit depends very largely upon his ability to secure efficient counsel. There will not be justice for all until both criminal and civil procedure is made free.”); George S. Van Schaick, *The Handicap of Poverty in Litigation*, 12 CORNELL L.Q. 460, 463 (1927) (noting that “[t]he need of counsel for the poor is confined to no one class of cases.”).

73. See John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 179 (1930) (noting how Northwestern University Law School sends its students to the Legal Aid Bureau of Chicago for work in civil and criminal matters); Robert H. Gault, *The Public Defender*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 8, 9 (1923) (noting how, in 1920, the Los Angeles Public Defender handled 522 criminal cases and approximately 8,000 civil cases); Thomas A. Larremore, *Portland and Legal Aid*, OR. L. REV., June 1921, at 6–7 (discussing how the Portland public defender engaged in some civil matters and proclaiming that legal aid “cannot be confined to assistance given in civil matters but must be broadened to include the defense of indigents charged with crime”).

that they accepted no criminal cases at all because of ethical issues, preferences for civil work, and as “a matter of taste.”⁷⁴ Out of 128 responses to why they refused to take criminal cases, more than a quarter (39 attorneys) pointed to “ethical” and “aesthetic” reasons, whereas more than a third (52 people) stated a “mere expression of preference for civil work.”⁷⁵ The authors added more texture to these findings and noted, “[a]s everybody knew before this survey was attempted, and as nearly everybody knows in every American city, except when regular clients are involved or an exceptionally large fee is in sight, most of the better grade of lawyers deliberately stay away from the criminal courts.”⁷⁶ With this fact in mind, they somberly concluded that criminal law “has become a sort of outlaw field which many a lawyer avoids as he avoids the slums of the city.”⁷⁷ The longstanding ethical debates around criminal representation, particularly for the unpopular social group that constitutes the criminally accused, lend credence to this the idea that preference shaped the lack of organized criminal legal aid during this period.⁷⁸

Another explanation for the bifurcated institutionalization of criminal and civil legal aid points to resource constraints.⁷⁹ Since many of these organizations began as primarily civil in their orientation, the focus here is on their failure to incorporate criminal defense into their practice. On this issue, one scholar noted, “[m]ost of the legal aid bureaus are swamped with work and handicapped by a lack of funds. The inclusion of criminal cases would result in a volume of applications which it would be impossible for them to handle.”⁸⁰ Most notably, the Legal Aid Society of New York tried

74. RAYMOND FOSDICK, REGINALD HEBER SMITH, HERBERT B. EHRMANN, ALFRED BETTMAN, HOWARD F. BURNS, BURDETTE G. LEWIS, HERMAN M. ADLER, ALBERT M. KALES, M. K. WISEHART, FELIX FRANKFURTER & ROSCOE POUND, *CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO* 218–19 (Roscoe Pound & Felix Frankfurter eds., 1922).

75. *Id.*

76. *Id.*

77. *Id.*

78. See JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER (1983); HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman eds., 2013); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177–79 (1983); Joseph Edward Downs & Alvin L. Goldman, *The Obligation of Lawyers to Represent Unpopular Defendants*, 9 HOW. L.J. 49, 49 (1963); Morris L. Ernst & Alan U. Schwartz, *The Right to Counsel and the “Unpopular Cause,”* 20 U. PITT. L. REV. 727, 730 (1959); David Goldberger, *Would You Defend an Unpopular Cause?*, 5 BARRISTER 46 (1978).

79. F. R. Aumann, *The Public Defender in the Municipal Court of Columbus*, 21 AM. INST. CRIM. L. & CRIMINOLOGY 393, 394 (1930) (describing how the Public Defender of Columbus in 1926 was in existence from 1919–1926 but was discontinued for one year and noted how “[t]he discontinuance of the office was not based on any opposition to its purpose or program” but that “[i]t was presumably dictated by financial reasons,” while also mentioning that “other factors determined the matter” as well).

80. Macdonald, *supra* note 72, at 565.

to develop a criminal practice in 1905 and 1906 but failed due to funds and would not be successful in that endeavor for another decade.⁸¹ Writing in the 1930s, one writer attributed the dearth of criminal legal aid work to a lack of human resources and explained, “criminal cases involve more court work than the meagre staff of many legal aid offices can handle if criminal cases run into large numbers.”⁸² Mayer Goldman, a New York attorney who wrote about public defenders in the first few decades of the twentieth century, consistently noted that legal aid societies were not equipped to take on criminal defense due to lack of personnel and funds.⁸³

Economic motivations and the bar’s self-interest also played a role in reinforcing the civil-criminal legal aid divide. The legal profession understood criminal legal aid as more of a governmental responsibility. With the exception of a few cities that rejected the public defender model and established privately funded defender organizations, criminal defense was actualized in two ways: through a few municipally funded public defenders offices and more generally through a haphazard assigned counsel system where the government conscripted attorneys into providing representation.⁸⁴ Yet, irrespective of the form, the dominant belief was that criminal defense was a government obligation; the march toward *Gideon* trended in that direction. Considering the relative professional undesirability of criminal defense for the poor, this understanding of state responsibility was not disruptive to the bar’s bottom line. On the other hand, civil legal aid encapsulated a wide range of subject matters such as housing, employment, bankruptcy, and family law, to name a few. These were areas the private bar engaged, which raised the prospect of competition and led them to be more discerning about poor people’s deservingness of civil legal services. The bar understood civil legal aid as an operation that should be handled privately and by the bar. There were exceptions to this preference, but it was a dominant attitude.⁸⁵ This preference for privatization expressed itself

81. See SMITH, *supra* note 1, at 144.

82. Patricia Collins, *Poverty “Stands” in the Way of Complete Justice*, FED. PROBATION, July 1938, at 43.

83. Mayer C. Goldman, *Public Defender*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 557, 558 (1915) (“Legal Aid societies are generally handicapped by lack of sufficient funds as has been evidenced by their frequent appeals to the public for financial support.”); Mayer C. Goldman, *Public Defenders for the Poor in Criminal Cases*, 26 VA. L. REV. 275, 277–78 (1940) (“Furthermore, legal aid and kindred groups, are always handicapped by lack of sufficient funds. It is unnecessary to detail the constant requests for funds from legal aid groups that they might continue to properly function. Their annual reports and public appeals for moneys indicate clearly how they have always handicapped in their work.”); see also SMITH, *supra* note 1, at 156 (“[A]ll societies are overworked and undermanned, so that they have feared to be swamped if they opened the flood-gates of criminal applications.”).

84. Bruce Andrew Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 373–77 (1981).

85. See BATLAN, *supra* note 4, at 188 (noting that by 1940, at least twelve legal aid organizations

through: concerns about government interference; an insistence that only the truly poor be able to receive this service; and anxious reassurances that civil legal aid should not, did not, and would not undermine the mainstream practice of law by taking money out of ordinary practitioners' pockets. Charles Evans Hughes, who served as the second president of the Legal Aid Society of New York before returning to the Court as Chief Justice, captured these sentiments in 1920 when he insisted that legal aid "is not intended to enter into competition with members of the Bar, and hence applications are not entertained where the applicant is able to pay reasonable attorneys' fees."⁸⁶ This anti-competitive spirit would be a theme in civil legal aid advocacy and writing well into the 1950s.⁸⁷

A final reason why civil and criminal legal aid institutions began to take shape the way they did relates to the New York office's failure to establish a criminal defense practice in the early years. Reginald Heber Smith's *Justice and the Poor* noted that the Legal Aid Society of New York's failure to develop an office was negatively interpreted by organizations that followed its template. "Other societies, lacking in experience and not clearly understanding the position of legal aid work in its relation to the administration of justice, saw that criminal cases did not appear in the New York reports and blindly adopted what they supposed was some rule or policy against such work."⁸⁸ In short, there was a form of path dependency and mimicry that may have contributed to some organizations' failure to develop defense practices.

received county-level funding and describing how government funding caused anxiety within the legal profession and led to an insistence on that legal aid be funded by private donors to maintain autonomy).

86. Charles E. Hughes, *Legal Aid Societies, Their Function and Necessity*, 43 ANN. REP. A. B.A. 227, 233 (1920).

87. Georgina J. Bingert, *Legal Aid in Modern Society*, WOMEN LAW. J., Summer 1950, at 12 (1950) (suggesting that a civil legal aid organization "is really a large law office, with the exception that the people who apply there for help cannot pay for it" and noting that this difference means that they "are not in competition with the Bar"); John S. Bradway, *Legal Aid Clinics in Less Thickly Populated Communities*, 30 MICH. L. REV. 905, 908 (1932) ("All legal aid organizations must avoid competition with the bar."); Claude E. Clarke, *Legal Aid by Privately Supported Organizations*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 54, 55 (1926) (Attorney for the Cleveland Legal Aid Society assuring and reassuring that civil legal services was nonthreatening and observing that members of the local bar "come to be supporters of the work, realizing that the organization is helping these indigent persons whom they by virtue of their professional oath are obligated to assist, that its object is not competition for their business, but co-operation to attain a common end"); Orison S. Marden, *Legal Aid, the Private Lawyer and the Community*, 20 TENN. L. REV. 757, 758 (1949) (ABA Chairman, Standing Committee on Legal Aid Work describing how, in big cities with legal aid organizations, private sector lawyers have recognized that "instead of being new competition for private lawyers, Legal Aid actually tends to bring new clients to them" as people became more aware of the availability of legal services); see *infra* note 128. But see TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT, at xiv (1987) (cautioning against monopolization arguments that do not grapple with nonmonopolistic behaviors of the bar).

88. See SMITH, *supra* note 1, at 144.

Despite the generally taken for granted assumptions about the differences between civil and criminal legal aid, some reformers and scholars would try to narrow the distinctions. Smith, working with the American Bar Association's Committee on Legal Aid Work, proposed a "Poor Litigants" statute that put civil and criminal legal aid on the same footing. The key part of the model statute stated, "Any person whether a resident or nonresident, citizen or alien, may be admitted to participate as a poor litigant in any cause, civil or criminal, pending or proposed, before any court of original or appellate jurisdiction"⁸⁹ The proposal had little impact on the delivery of legal services.⁹⁰ Thereafter, professional legal organizations would rarely offer formal statutory recommendations on how to address poor people's lack of access to lawyers. That silence has not gone unnoticed.⁹¹

Ultimately, various factors caused civil legal aid to be the predominant organizational form through the middle of the twentieth century. But this division was not a foregone conclusion.

B. FRACTURED WAR ON POVERTY

As the Supreme Court began to weigh in on the issue of legal aid for poor defendants in the 1930s, the right to counsel slowly transformed from a negative to a positive right.⁹² More civil and criminal legal aid offices surfaced too. By the close of the 1940s, there were approximately thirty

89. See *First Draft of a Poor Litigant's Statute*, 49 A.B.A. REP. 386 (1924), reprinted in SMITH & BRADWAY, *supra* note 63, at 106–107.

90. Lee Silverstein, *Waiver of Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21, 23 (1967) ("Apparently this statute has had little or no influence, and the few reforms achieved in the last four decades have come from other sources.").

91. James Maxenier minces no words describing the omission of the legal profession when it came to issues of poverty. He writes, "In 1878 reform-minded lawyers founded the American Bar Association. Not until forty years later did the Association address the issue of legal aid. In 1892 commercially-sensitive lawyers established the National Conference of Commissioners of Uniform State Laws, now known as the Uniform Laws Commission. It quickly proposed a Uniform Sales Act, but in 120 years it has yet to propose an access to justice act. The closest that it has come is the Model Public Defender Act for use in criminal justice. In 1913 progressive lawyers founded the American Judicature Society to work for better courts. Although it has campaigned vigorously for nonpolitical judicial selection, it has not found room in its program to promote civil legal aid for the poor. In 1923 reform-minded lawyers led by like-minded judges and academics, established the American Law Institute. Not until 2009 did a representative of a legal aid society address the Institute. None of its model acts or restatements provides for access to civil justice. In 1938 in the Federal Rules of Civil Procedure, the bar accomplished the most important reform since the 1848 New York code. In the Federal Rules it achieved a long sought goal: judicial and not legislative control of civil procedure. The Federal Rules make no provision for access to justice. I am aware of no proposal to incorporate access to justice into the Rules." James R. Maxeiner, *A Right to Legal Aid: The ABA Model Access Act in International Perspective*, 13 LOY. J. PUB. INT. L. 61, 103–05 (2011).

92. See *Powell v. Alabama*, 287 U.S. 45, 65–73 (1932) (ruling that the Due Process Clause of the Fourteenth Amendment required states to appoint counsel to indigent capital defendants); *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938) (holding that compliance with the Sixth Amendment's right to assistance of counsel is a prerequisite to a federal court's deprivation of a criminal defendant's liberty).

criminal legal aid offices across the country—a significant jump from the previous figure of five offices three decades earlier.⁹³ On the civil side, the number of offices increased during the same period from approximately thirty to ninety.⁹⁴ But “the tumultuous times of the 1930s and 1940s” drained resources from organizations.⁹⁵ Trends in appellate litigation hardened the civil-criminal legal aid distinction during this period. Organizations like the NAACP and the ACLU litigated many of the right to counsel cases in the 1940s and 1950s, whereas there was no civil legal aid analog during this period (and it would not come until the 1960s).⁹⁶

The disinterest in appellate advocacy on the civil side was part of a culture of limited resources and narrow expectations. Attorneys could not “worry about creating new right for their clients through appeals or proposing legislative reforms.”⁹⁷ As I and others have explained elsewhere, fears of socialism also played a role in the legal profession’s resistance to government involvement in civil and criminal legal aid.⁹⁸ As was the case in the medical profession, the thinking here, particularly during the Red Scare of the 1950s, was that government-sponsored legal aid was not only socialist but would preempt the work of the legal profession.⁹⁹ In 1951, the future President of the American Bar Association, Robert Storey, wrote a scathing article in the pages of the Association’s journal fiercely rejecting the idea of government-provided counsel in civil contexts.¹⁰⁰ This would be a popular position for the remainder of the decade, notwithstanding the passage of legal aid statutes in England.¹⁰¹

Two literary developments softened the aversion to welfarism in the mid-twentieth century. The first book, *The Affluent Society* was authored by John Kenneth Galbraith.¹⁰² Galbraith was a post-Keynesian economist and public intellectual who believed that government had a role to play in the

93. BROWNELL, *supra* note 3, at 35.

94. *Id.* at 26.

95. JOHNSON, *supra* note 29, at 35.

96. Anthony O’Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 757–67 (2011); see LAWRENCE, *supra* note 3.

97. JOHNSON, *supra* note 29, at 42.

98. See, e.g., AUERBACH, *supra* note 37, at 57; BATLAN, *supra* note 4, at 149; JOHNSON, *supra* note 29, at 36; Mayeux, *supra* note 64, at 24; Ossei-Owusu, *supra* note 40, at 1181.

99. MONTE M. POEN, HARRY S. TRUMAN VERSUS THE MEDICAL LOBBY: THE GENESIS OF MEDICARE (1979).

100. See Robert G. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100 (1951); see also Robert G. Storey, *Lawyers in Modern Society*, 12 TEX. B. J. 324 (1949) (making similar arguments).

101. See Lord Parker of Waddington, *The Development of Legal Aid in England Since 1949*, 48 A.B.A. J. 1029 (1962); Reginald Heber Smith, *The English Legal Assistance Plan: Its Significance for American Legal Institutions*, 35 A.B.A. J. 453 (1949).

102. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1958).

economy. In addition to addressing the conventional wisdom of then-existing economics, the 1958 book, which was originally titled *Why the Poor Are Poor*, pushed for the use of taxes to support investments in public goods such as schools, hospitals, and roads.¹⁰³ The second book, *The Other America*, was published in 1962 by democratic-socialist Michael Harrington and was a multi-racial, multi-geographical expose of American inequality.¹⁰⁴ *The Other America* described the conditions of what Harrington estimated was approximately 40 to 50 million Americans living in poverty.¹⁰⁵ *The Affluent Society* and *The Other America* influenced the national conversation on poverty. “If Galbraith brought poverty into the national consciousness, Harrington placed it on the national conscience.”¹⁰⁶ Both books profoundly influenced the president’s agenda,¹⁰⁷ which ultimately morphed into President Johnson’s War on Poverty.¹⁰⁸ Of course, poverty reduction was a key plank of an interracial civil rights movement that preceded these books.¹⁰⁹ In any event, government officials and liberals believed that anti-poverty measures could advance domestic and international Cold War imperatives.¹¹⁰

This warmth to social welfare seeped into the criminal justice system and helped foment an environment where federal indigent defense legislation could be passed. Various proposals for a federally funded public defender

103. *Id.*

104. MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962).

105. *Id.* at 7.

106. ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* 1010 (2002).

107. *Id.* (“Kennedy read both Galbraith and Harrington; and I believe that *The Other America* helped crystallize his determination in 1963 to accompany the tax cut by a poverty program. Galbraith’s unremitting guerilla warfare in support of the public sector against ‘reactionary’ Keynesianism certainly played its part too.”).

108. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973*, at 61 (1998) (“[P]ublic discussion of Kennedy’s interest in an antipoverty crusade increased Johnson’s desire to do something at once.”).

109. See MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2006); ROBERT BAUMAN, *RACE & THE WAR ON POVERTY: FROM WATTS TO EAST L.A.* (2008); GORDON K. MANTLER, *POWER TO THE POOR: BLACK-BROWN COALITION AND THE FIGHT FOR ECONOMIC JUSTICE, 1960–1974* (2013); WESLEY G. PHELPS, *A PEOPLE’S WAR ON POVERTY: URBAN POLITICS AND GRASSROOTS ACTIVISTS IN HOUSTON* (2014).

110. See, e.g., DAVID R. JARDINI, *OUT OF THE BLUE YONDER: THE RAND CORPORATION’S DIVERSIFICATION INTO SOCIAL WELFARE RESEARCH, 1946–1968* (1996) (describing the interface between national security and social welfare policymaking during the Cold War); JENNIFER S. LIGHT, *FROM WARFARE TO WELFARE: DEFENSE INTELLECTUALS AND URBAN PROBLEMS IN COLD WAR AMERICA* (2005) (describing President Johnson’s staffing of antipoverty programs with officials from the Department of Defense); JOY ROHDE, *ARMED WITH EXPERTISE: THE MILITARIZATION OF AMERICAN SOCIAL RESEARCH DURING THE COLD WAR* (2013) (describing how Pentagon-funded social scientists used their expertise to solve military problems in the 1950s and by the 1960s, applied their knowledge to domestic issues).

system languished in Congress for years.¹¹¹ A bundle of precedents and procedures—specifically *Powell's* progeny and Federal Rules of Criminal Procedure 5 and 44—supported a federal appointment of counsel,¹¹² but they lacked teeth. Federal and state courts, as explained in Part II, operated under the common law rule that attorneys were officers of the court, required to represent indigent defendants without compensation,¹¹³ and could be punished under courts' contempt powers if they unreasonably refused to serve.¹¹⁴ The lack of a payment structure served as a disincentive and reflected itself in the higher percentage of guilty pleas made by defendants represented by appointed counsel. A Robert Kennedy-endorsed Department of Justice-sponsored report nudged Congress into passing the Criminal Justice Act ("CJA") in 1964, which earmarked funds for indigent defense in federal courts.¹¹⁵ In the words of John S. Hastings, Chief Judge of the Seventh Circuit and chairman of the committee responsible for implementing the CJA, the purpose of the Act was to "promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."¹¹⁶ While the CJA only applied to a smaller federal docket, it represented an important legislative step in criminal legal aid. Meanwhile, the Court extended the right to counsel in a variety of directions in the 1960s. It used the Fourteenth Amendment's Due Process Clause to incorporate the Sixth Amendment's right to assistance of counsel to states in *Gideon v. Wainwright*.¹¹⁷ The same day it decided *Gideon*, the Court used the Fourteenth Amendment's Equal Protection Clause to broaden the right to appointed counsel to first appeals as of right.¹¹⁸ Throughout the 1960s the right would be extended to various critical stages of criminal

111. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 17-18 (1963) [hereinafter ATTORNEY GENERAL'S REPORT] ("From the late 1930's to the present, bills intended to place the representation of financially disadvantaged persons on a systematic basis have been introduced in both houses of Congress.").

112. FED. R. CRIM. P. 5 (1946); FED. R. CRIM. P. 44 (1946).

113. See, e.g., *Nabb v. United States*, 1 Ct. Cl. 173, 173 (1864) (rejecting two lawyers' claim that the government was indebted to them for their appointed representation of a Kickapoo Indian and holding that the right to counsel provision was about the rights of the accused "but not any liability on the part of the United States"); *Johnson v. Whiteside County*, 110 Ill. 22, 24-25 (1884) (holding counsel assigned to defend a poor person is not entitled to compensation from the county or state); *Pardee v. Salt Lake County*, 118 P. 122, 125 (Utah 1911) (holding there is no express legal duty on counties in Utah to pay for an attorney for an indigent defendant).

114. See *infra* Part II; DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 238 (1977).

115. The Allen Report was commissioned by Attorney General Kennedy, led by Michigan Law professor Francis Allen, and investigated the state of federal courts. See ATTORNEY GENERAL'S REPORT, *supra* note 111.

116. John S. Hastings, *The Criminal Justice Act of 1964*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 426, 426 (1966) (citing Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 U.S. Stat. 552 (1964)).

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

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

adjudication.¹¹⁹

At the same time, legislative developments in the world of civil legal aid would be contested inside and outside of the profession, and ultimately buttressed the civil-criminal legal aid divide. Congress would pass the Economic Opportunity Act of 1964, which led to the creation of the Office of Economic Opportunity (“OEO”).¹²⁰ This federal agency created various Great Society programs, most notably the Legal Services Program (“LSP”). This initiative planted “neighborhood law offices” in major cities in an attempt to address anti-poverty imperatives.¹²¹ While poor people did not accumulate the same kinds of judicial wins when it came to civil legal aid, the work of LSP organizations was critical to eventual Supreme Court decisions that expanded the rights of poor people.¹²² Still, in this “golden age” of poverty law, self-interest, path dependencies, and resources constraints would reappear as relevant factors in the bifurcated worlds of civil and criminal legal aid. The federal government’s legislative involvement in organized civil legal aid added political and legal twists. Most notably, LSP repeatedly prohibited funded organizations from engaging in the large swath of criminal defense work that the Supreme Court increasingly ruled was a state responsibility post-*Gideon*.¹²³ Policymakers justified these exclusions by arguing that federal funding of civil legal aid organizations engaged in criminal defense work would be duplicative since states were now required to provide representation. The story could stop here, as these stipulations were tied to the federal carrots that helped legal aid grow in the 1960s, but the restrictions were not absolute, and some

119. See *United States v. Wade*, 388 U.S. 218, 237 (1967) (holding that the right to counsel post-indictment line-up); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (ruling that the right to counsel applies to post-trial proceedings for revocation of probation or imposition of deferred sentencing); *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964) (ruling that the right to counsel exists during police interrogations).

120. 42 U.S.C. § 2809(a)(3) (repealed 1981).

121. JANE HANDLER, *NEIGHBORHOOD LEGAL SERVICES—NEW DIMENSIONS IN THE LAW* (Leora Wood Wells ed., 1966).

122. See LAWRENCE, *supra* note 3, at 123–47; DAVIS, *supra* note 3, at 70–118.

123. LEGAL SERVICES PROGRAM, REPORT OF THE LEGAL SERVICES PROGRAM, OFFICE OF ECONOMIC OPPORTUNITY, TO THE AMERICAN BAR ASSOCIATION 10 (1966) (“Service may be afforded to eligible clients in areas of the criminal law where representation is not constitutionally required, such as misdemeanors, juvenile court, competency proceedings, if such representation is not provided locally.”); Economic Opportunity Amendments of 1967, Pub. L. 90-222, 81 Stat. 672, 698–99 (1967) (“No funds or personnel made available for such program (whether conducted pursuant to this section or any other section in this part) shall be utilized for the defense of any person indicted (or proceeded against by information) for the commission of a crime, except in extraordinary circumstances where, after consultation with the court having jurisdiction, the Director has determined that adequate legal assistance will not be available for an indigent defendant unless such services are made available.”); see generally Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976) (describing the statutory changes to the Legal Services Program and its transformation into the Legal Services Program).

organizations did engage in criminal defense.¹²⁴

Besides legislative restrictions, the civil-criminal legal aid divide became prominent in the 1960s due to some of the similar themes that plagued the legal aid community before the War on Poverty. Path dependencies continued to be a problem. *Gideon's* mandate and the LSP program breathed new life into existing civil and criminal legal aid organizations but also generated new offices that were sometimes patterned after their pre-War on Poverty predecessors.¹²⁵ Resource allocations also shaped the divide. But this time, unlike the Progressive Era, there was a Supreme Court ruling that mandated that states be the primary funder of criminal defense.¹²⁶ *Gideon* spawned an increase in public defender offices and further naturalized the idea that indigent defense was a governmental responsibility.¹²⁷ The federal government's conditional entry into civil legal aid did not activate the same ideas about financial obligation. But federal underwriting of civil legal aid meant new and existing providers had a choice. They could accept federal dollars and work primarily in the civil space. Alternatively, they could reject such federal money, rely on the previously inadequate private funding sources and local support (if they were lucky), and provide civil and criminal legal aid. One could easily understand this funding scheme as being about legislative limitations. But the subtler, more longstanding issue around this arrangement was tied to how the availability of resources shaped which organizations did civil and criminal work, as well as the continued normalization of the belief—during a historic War on Poverty—that state or federal governments did not have the same obligation to provide legal services to poor civil parties that they did criminal defendants. Institutional patterns and resource constraints would continue to shape the administration of civil and criminal legal aid.

Self-interested concerns about civil legal aid crowding out the private bar also contributed to the civil-criminal divide. There was longstanding anxiety within the bar that civil legal aid—which included more desirable

124. Charles R. Williamson, *Legislative Law Reform: A New Challenge*, 5 CLEARINGHOUSE REV. 380, 382 (1971) (noting that before the restrictions, criminal representation constituted approximately 8% of the work in the Legal Services Program); LEGAL SERVICES PROGRAM, *supra* note 124, at 12–13 (describing the work of the Houston Legal Foundation, which provided civil and criminal legal aid through funding from OEO for the former and for the Ford Foundation for the latter).

125. LAWRENCE, *supra* note 3, at 28 (detailing the increase in spending, staffing, and projects under LSP); Mayeux, *supra* note 64, at 73–77 (describing the increase in criminal legal aid and representation for felonies and misdemeanors post-*Gideon*).

126. See Mayeux, *supra* note 64, at 48 (noting how the Court's move toward a comprehensive right to counsel "exerted a gravitational pull upon the elite bar's policy preferences" and caused it to get "adjusted to the idea of publicly funded indigent defense.").

127. *Id.*

practice areas than criminal defense—would compete with the private sector.¹²⁸ After the rollout of LSP, Sargent Shriver, Director of the OEO, attempted to assuage the legal profession at an ABA Annual meeting. He assured the bar that “[W]e are not trying to take paying customers away from the private practitioners of the law either by establishing new standards of indigency or by taking revenue-producing cases,” and added, “[w]e have made provisions for grievance procedures, referral procedures, even for a right of first refusal running to a chosen representative of a local bar.”¹²⁹ Criminal legal aid was acceptable to the bar because criminal representation of indigent defendants was not highly sought-after work and became a constitutional requirement imposed on the states. On the other hand, civil legal aid included some matters of interest to the private practitioners and made the profession more resistant to a government regime that provided too much civil assistance. This economic self-interest played a role in generating the distinctions within legal aid.

Besides this concern about federally-funded civil legal aid shaping the legal market, there were more internecine struggles. A younger generation of lawyers interested in attacking poverty through impact litigation and community empowerment stood on one end; on the other side was an older guard who had more traditional conceptions of what practicing law for poor people should look like.¹³⁰ While both groups eventually reached a place of détente, the strong presence of a corporate bar that was historically hostile to government-subsidized legal assistance reaffirmed the notion that civil legal aid was not a per se governmental responsibility like criminal legal aid.¹³¹ American Bar Foundation researcher and legal expert Lee Silverstein

128. Marna S. Tucker, *Pro Bono Publico or Pro Bono Organized Bar?*, 60 A.B.A. J. 916, 917 (1974) (discussing how, in the 1920s, the legal profession implemented client income limits, eligibility standards, and heightened rules the solicitation of business to ensure that legal aid programs would not compete economically with the practicing bar and noting how, by the 1970s “[t]he profession’s attitude has not changed in the decades since, but has become much less crass”).

129. R. Sargent Shriver, *The OEO and Legal Services*, 51 A.B.A. J. 1064, 1065 (1965).

130. See HANDLER, *supra* note 121, at 14 (“In some cities the basic philosophical difference between the service-oriented programs of the legal aid societies and the innovative, social-change emphasis of the new legal projects has made mutual understanding difficult.”).

131. Clara Ann Bowler, *National Legal Services—The Answer or the Problem for the Legal Profession?*, 50 CHI.-KENT L. REV. 415, 422 (1973) (“[T]he OEO legal services attorney must operate under the political scrutiny of the same forces who are oppressing the poor and is often too socially alienated from his clients to engage in the direct organizing of poor people’s organizations.”); Anthony M. Champagne, *Lawyers and Government Funded Legal Services*, 21 VILL. L. REV. 860, 861 n.4 (1976) (“Obtaining support from a conservative ABA has often required the compromise of the program’s original goals, particularly that of reforming areas of the law which discriminate against the poor.”); Eric W. Wright, Note, *Competition in Legal Services Under the War on Poverty*, 19 STAN. L. REV. 579, 585 (1967) (discussing local bar associations to control legal services programs and noting how the structure of the bar associations and the attitudes of those who control them may make them unsympathetic to the broader purposes of the legal services programs).

summed it up best: there was a portion of the legal profession who believed that “[p]ublic funds are all right on the criminal side because the Supreme Court has imposed this obligation on the states, but on the civil side it is a local responsibility.”¹³² Although scholars,¹³³ practitioners,¹³⁴ and future judges¹³⁵ commented on the artificiality of the civil-criminal legal aid divide and suggested that both be housed under the same roof, the bar’s self-interest would serve as one of the many reasons why that union was never fully actualized.

The 1960s was the “golden age” of poverty law, as Matthew Diller has described it.¹³⁶ The decade built on a century-long movement to provide legal services to some of society’s most marginalized members. But the period counterintuitively fortified the civil-criminal legal aid divide. During this War on Poverty, the bar built on institutional patterns developed during the Progressive Era, continued its resource-based allocation of legal services,

132. Lee Silverstein, *Thoughts on the Legal Aid Movement*, 40 SOC. SERV. REV. 135, 151 (1966).

133. Duke Law School’s Dean and Legal Aid Clinic leader argued, “Civil and criminal legal aid should be merged in order to provide an integrated program of legal services for the poor.” A. Kenneth Pye & George C. Cochran, *Legal Aid—A Proposal*, 47 N.C. L. REV. 528, 584 (1969). Sociologists studying civil courts, wrote, “[T]he distinction between a civil and criminal proceeding is often not meaningful at this level of the judicial system. Thus, the psychopathic and juvenile courts, although not formally criminal in nature, in fact make decisions that result in involuntary loss of liberty. Moreover, other courts and agencies handling civil matters involving the poor frequently employ essentially criminal sanctions in support of their decisions and actions. This is a prominent feature of courts dealing with consumer credit and family support. We suspect, in fact, that there is a greater difference in the character of the proceeding between upper and lower-level courts than between civil and criminal proceedings within lower-level courts.” Jerome E. Carlin, Jan Howard & Sheldon L. Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, L. & SOC’Y REV, Nov. 1966, at 29 n.84.

134. Chairman of the Board of Directors for the Legal Services Corporation Roger Crampton argued that courts “tend to dismiss the need of poor civil litigants for counsel by characterizing their legal problems as ‘simple’ . . . [and] have taken unrealistic and shortsighted views of the due process and equal protection rights of indigents in civil proceedings.” He also argued “[t]he needs of the poor for legal assistance, however, do not correspond to the judicial distinction drawn between civil and criminal actions.” Roger C. Crampton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 676 (1976). Attorney General Nicholas deB. Katzenbach noted, “So far, that concern has focused on the rights of a poor person accused of a crime. Now, the concern is extending beyond the confines of criminal law. And this is as it should be. Hopelessness and poverty do not observe neat jurisdictional lines between civil and criminal.” Nicholas deB. Katzenbach, *Address, in THE EXTENSION OF LEGAL SERVICES TO THE POOR*, 9–10 (1964).

135. As a former NAACP lawyer and California judge wrote,

The public defender system is an excellent device in the quest for justice for the underprivileged—if the public defender is given staff and funds that will enable him to match skill and wits with the public prosecutor. Welfare recipients need counsel, perhaps as a class, as laws, rules, and regulations become ever more complicated. The social worker can no longer serve as counsel as she did in the days of direct handouts. The slum tenant and the preyed-upon installment buyer need lawyers.

Loren Miller, *Race, Poverty, and the Law*, 54 CALIF. L. REV. 386, 403 (1966). Future poverty lawyer and federal appellate judge Patricia Wald noted, “Ideally, the poor man should be able to obtain any kind of legal services he needs in one place: civil or criminal, preventive or remedial.” WALD, *supra* note 3, at 66.

136. Diller, *supra* note 6.

and further institutionalized its ideological beliefs about when poor people deserved lawyers. Concurrent judicial practices would also shape how legal aid institutionalized.

II. INHERENT POWERS AND ASSIGNED COUNSEL

This Part examines how courts' practice of assigning counsel in criminal cases shaped the civil-criminal legal aid distinction. The practice of assigning counsel in cases typically emerged from a variety of sources: in the capital/felony offense context, assignment occurred through statutory authorization and limited interpretations of state constitutional provisions. More generally, the assignment of counsel occurred through courts' discretion.¹³⁷ One version of this latter adhococracy was tied to trial courts' strategic use of their inherent powers to assign counsel in criminal cases and their non-use of this authority in civil cases. In Section II.A, I offer a general description of inherent powers and describe the relatively uncontroversial use of this authority in criminal cases. Part II.B describes how courts were less willing to use their inherent powers in civil cases, which I argue contributed to the civil-criminal divide.

A. THE BOUNDARIES OF INHERENT POWERS AND CRIMINAL APPOINTMENTS

Before describing courts' use of inherent powers in criminal cases, it is crucial to sketch the contours of this contested authority. As civil procedure scholar Stephen Burbank notes, when one tries to define the term inherent powers, "we immediately encounter a problem of definition that has eluded or bedeviled many courts and commentators for years."¹³⁸ The scope of inherent powers is different in state and federal courts, but in both arenas, there is a strong combination of discretion and ambiguity. Courts have described this power in almost mystic terms. One federal court explained inherent powers as "those implied powers that are necessary for a court to manage its affairs" and warned that this authority should only be used "to achieve the orderly and expeditious disposition of cases," and when they are

137. WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 80–89 (1955) (discussing how varied state appointment of counsel practices emanated from court rules, statute, and interpretations of state constitutional provisions and discussing how appointment in different states was dependent on whether the defendant was facing a capital offense, a felony, and/or requested it); SMITH, *supra* note 1, at 103 (describing how some states have developed statutes that gave courts express power to assign counsel); Joan Moonan, Note, *Denial of Counsel to Indigent Defendants in State Criminal Trials as a Violation of Due Process*, 27 MARQ. L. REV. 34, 38 (1942) (explaining the constitutional and statutory sources of the right to counsel).

138. Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1004 (1983).

'essential to preserve the authority of the court.'¹³⁹ A state supreme court described inherent powers as an authority that "governs that which is essential to the existence, dignity, and function of a court because it is a court" and maintained that these powers should not be used "to serve the 'relative needs' or 'wants' of the judiciary, but only for 'practical necessity in performing the judicial function.'"¹⁴⁰ The Supreme Court, adding to this mystique, has warned, "because of their very potency, inherent powers must be exercised with restraint and discretion."¹⁴¹ To call this authority vast and vague would be an understatement.

One of the most straightforward definitions of inherent authority was offered by the late courts scholar Daniel Meador, who described the power as "the authority of a trial court, whether state or federal, to control and direct the conduct of civil litigation without any express authorization in a constitution, statute, or written rule of court."¹⁴² The fact of courts' inherent authority powers was noted by the judiciary in the early nineteenth century. In 1912, the Supreme Court ruled that "certain implied powers must necessarily result to our Courts of justice from the nature of their institution" and added that such tribunals "no doubt possess powers not immediately derived from statute."¹⁴³ Inherent powers are broad, but for the purpose of this Article include: court's authority to appoint counsel, promulgate rules related to procedure, discipline attorneys, regulate the legal profession, and compel the legislature to provide the funding necessary for courts to exercise their judicial function.¹⁴⁴

Yet courts' inherent powers are not without critique, and invocation of this authority is riddled with contradictions. Most notably, the idea of inherent powers defies the careful constitutional delineation of separation of powers and the courts' role within that division.¹⁴⁵ This authority seems to grant courts powers beyond statutory authorization in ways that would be

139. *MultiPlan, Inc. v. Holland*, 937 F.3d 487, 501 (5th Cir. 2019) (first quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); and then quoting *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 460 (5th Cir. 2010)).

140. *State v. S.L.H.*, 755 N.W.2d 271, 275 (Minn. 2008) (first quoting *State v. A.*, 304 N.W.2d 353, 358 (Minn. 1981); and then quoting *In re Clerk of Lyon County Courts' Comp.*, 241 N.W.2d 781, 786 (Minn. 1976)).

141. *Chambers*, 501 U.S. at 44.

142. Meador, *supra* note 31, at 1805.

143. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

144. Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 *BUFF. L. REV.* 525, 545 (1983); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 *MD. L. REV.* 18, 49–50 (1990). See generally Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 *A.B.A. J.* 635, 635–36 (1935) (describing the general contours of inherent authority).

145. Meador, *supra* note 31, at 1819.

bizarre to legal scholars in most other instances.¹⁴⁶ “The Court,” Robert Pushaw maintains, “has never explained how the Constitution simultaneously limits federal courts . . . yet authorizes them to exercise broad and virtually unreviewable inherent authority. The Justices have generally avoided these larger constitutional questions by focusing on the individual inherent power involved in each case.”¹⁴⁷ A similar critique could be offered in the context of state courts.¹⁴⁸ Notwithstanding the boundlessness some scholars and courts attach to inherent powers, it is still subject to legislative override.¹⁴⁹

Still, courts have deployed their inherent powers throughout American history, particularly in the context of assigned counsel in criminal cases.¹⁵⁰ Throughout the mid-nineteenth century, and thereafter, state supreme courts affirmed trial courts’ inherent power to appoint attorneys for poor litigants, particularly in the criminal context.¹⁵¹ In the 1859 case *Carpenter v. Dane County*, the Supreme Court of Wisconsin ruled that the inherent power of courts to assign counsel to indigent criminal defendants was “as clear and complete as though expressly enjoined upon them by statute.”¹⁵² The next

146. Pushaw, *supra* note 31, at 739.

147. *Id.*

148. Howard B. Glaser, Wachtler v. Cuomo: *The Limits of Inherent Powers*, 78 JUDICATURE 12, 19 (1994) (noting that “[t]he paradox of the inherent powers doctrine is that its very exercise violates the separation of powers in order to preserve the branch’s status as a coequal and independent unit of government” but identifying some limiting principles).

149. *See id.*; Burbank, *supra* note 138, at 101.

150. *See, e.g.*, Millemann, *supra* note 144; Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981); David L. Shapiro, *The Enigma of the Lawyer’s Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980).

151. *State ex rel. Gentry v. Becker*, 174 S.W.2d 181, 184 (Mo. 1943) (“[W]hen the court assigns or requests counsel to represent an indigent, at least one charged with a crime, it is not only the duty of the attorney to accept the assignment and act but he is also not at liberty to decline the appointment except under certain circumstances.”); *Watkins v. Commonwealth*, 6 S.E.2d 670, 671 (Va. 1940) (“While there is no specific provision in the Constitution of Virginia guaranteeing to persons accused of crime the right to have the assistance of counsel It is well settled that courts of record having criminal jurisdiction possess the inherent authority, independent of statute, to appoint counsel to defend paupers and other indigent persons charged with crime.” (citations omitted)); *Cutts v. State*, 45 So. 491, 491 (Fla. 1907) (“With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel, and generally it will be found that the humanity of the law has provided that if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government; but when no such provision is made, it is the duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance, nor spare his best exertions in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped [sic] would be disposed to do so.” (quoting THOMAS B. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 477 (7th ed. 1906))); *Hendryx v. State*, 29 N.E. 1131, 1132 (Ind. 1892) (ruling that appointment of counsel to indigent defendant “was necessary to accomplish the ends of public justice” and that “the court possessed the inherent power to make the appointment in the absence of a statute”).

152. *Carpenter v. County of Dane*, 9 Wis. 274, 278 (1859).

year, the Supreme Court of California came to the same conclusion when it tied the criminal trial courts' inherent power to the regulation of the bar and professional expectations of attorneys. The Supreme Court of California noted that it was "part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means."¹⁵³ More than a decade later, the Supreme Court of Georgia emphasized its inherent authority power to assign counsel in criminal cases without compensation by emphasizing the common law roots of appointment and the professional expectations of lawyers.¹⁵⁴ The appointment of counsel in specific criminal cases would continue through the turn of the century and occur by way of inherent authority, statute, and/or state constitution.¹⁵⁵ As Deborah Rhode has explained, though there is little systematic information about the frequency of appointed counsel, the available information suggests that judges exercised their power to appoint counsel in criminal cases and infrequently in civil matters.¹⁵⁶

B. CIVIL APPOINTMENTS AND JUDICIAL RELUCTANCE

Courts were reluctant to use their inherent powers to appoint counsel in civil cases. This unwillingness existed despite the noblesse oblige that was implicit in the bar and surfaced in the judicial rhetoric around attorneys' acceptance of appointments.¹⁵⁷ Consider the Supreme Court's extolment of lawyers in an 1866 case involving Congress's passage of a law that disbarred former Confederate officials:

In a free country, courts without counsel could not for a moment be tolerated. The history of every such government demonstrates that the safety of the citizen greatly depends upon the existence of such a class of men. The courts also require, for the safe and correct exercise of their own powers, their aid. The preservation of liberty itself demands counsel. In all

153. *Rowe v. Yuba County*, 17 Cal. 61, 63 (1860).

154. *Elam v. Johnson*, 48 Ga. 348, 350 (1873).

155. See sources cited *supra* note 151.

156. DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 5 (2005); see also Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 9–10 (2004) (noting how on the criminal side, states adopted a variety of practices related to the appointment of counsel for serious crimes and capital cases, whereas on the civil side "state laws regarding civil appointments were more spare").

157. Scholarship on the legal profession of the late nineteenth and early twentieth century legal profession has described this ethos. See Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & SOC. INQUIRY 1, 1 (1999) (describing the diversity of ethical thought in the legal profession at the turn of the century); Cummings, *supra* note 156, at 9 (describing how "public service was conceptualized as a form of charity to the poor, which was generally provided through court appointment or professional courtesy"); see also David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 720 (1988) ("Perhaps it would be most accurate to view the elite late-nineteenth century bar as a somewhat schizophrenic mix of public spirit and private service—and its ideology an equally bewildering mix of progressivism and Mr. Herbert Spencer's social statics.").

the revolutionary struggles of the past to attain or retain liberty, success, where it has been achieved, has been ever owing greatly, if not principally, to their patriotic efforts. Congress would, therefore, but convert themselves into a mere assemblage of tyrants, regardless of the safety of the citizen, recreant to the cause of freedom, and forgetful of the guarantees of the Constitution, if they attempted to deny to the courts and to the citizen the assistance of counsel.¹⁵⁸

Despite this professed importance of attorneys, and courts' technical ability to appoint counsel, judges would rarely provide representation to poor civil litigants. This disparity was also confusing to early twentieth century observers. In 1919, legal aid expert Reginald Heber Smith noted that judges use their "inherent power of courts to assign attorneys, on the general theory that they are agents of the court and ministers of justice."¹⁵⁹ Yet he struggled to explain why judges declined to do so in civil cases. His bewilderment is worth quoting at length:

Analytically, it would appear that this power of the courts to assign attorneys to assist poor persons in cases where representation was necessary was a complete answer to the difficulty of the expense of attorneys. Practically, it has been no solution at all . . . For some reason this power seems never to have been used. Judges who are thoroughly familiar with the practice in the New York and Chicago municipal courts state that within their recollection counsel have never been assigned in civil cases . . . The system is so thoroughly in disuse that in many quarters its very existence is denied . . . It is not easy to state with precision why a system so deep-rooted in the history of our legal institutions should both in England and in the United States fall into such neglect . . . In America it ought to be revived. There should be such a lively sense of obligation on both bench and bar that no civil suitor should be forced by poverty to do without counsel in cases requiring skilled preparation and presentation.¹⁶⁰

The predictable difference in these cases, and the criminal proceedings that courts would say justified the use of inherent powers to appoint counsel, would seem to be the deprivation of liberty. But this justification fails for two reasons. The first, discussed in detail in the next Part, points to courts' failure to appoint counsel in other liberty depriving contexts.¹⁶¹ Second, the jurisprudential development of attorneys' obligation to accept appointments was not tied to the *defendant's* liberty interests, but hinged on the idea that attorneys have a "duty to assist in the administration of justice as a condition

158. *Ex parte Garland*, 71 U.S. 333, 372–73 (1866).

159. SMITH, *supra* note 1, at 100.

160. *Id.* at 100–02.

161. *See infra* Part III.

of the license to practice and/or as an officer of the court, and that accepting court appointments is part of that duty.”¹⁶² As many scholars have shown, some attorneys have resisted these mandatory pro bono-like schemes and raised their own legal challenges under state and federal constitutions. These challenges included arguments that their conscription was an unconstitutional taking; claims that assigned lawyers were being forced to represent people and positions that they did not support in violation of their right to freedom of speech and association; equal protection challenges premised on the contention that assignments imposed a unique and unfair burden on the bar that other professionals did not experience; and arguments that these assignments constituted involuntary servitude.¹⁶³ These claims, which were typically raised in criminal cases involving assignments, had limited success. Courts often reverted back to their inherent powers, noted that attorneys were officers of the court who had to carry out court appointments, and emphasized the point that accepting such assignments was one of the conditions of being able to practice law.¹⁶⁴ Ultimately, these rationales were available to courts in the context of civil appointments, but would be reserved primarily for criminal cases.

Courts’ different use of their inherent powers to appoint counsel in civil cases had a few interrelated implications—all of which I present as descriptive rather than normative matters. First, this differential use of inherent authority reiterated to the legal profession and the public that poor criminal defendants had more legal entitlement to counsel than poor civil litigants. To use Kathryn Sabbeth’s more contemporary formulation, this differential use privileged criminal legal aid and government’s penal power over the dangers of state and private power that civil litigants have long encountered.¹⁶⁵

Second, the differential use of inherent powers, which occurred before and during the Progressive Era professionalization of the bar, had spillover effects for the institutional development of legal aid organizations.¹⁶⁶ The assignment of counsel in criminal cases, which would continue to draw from

162. Rosenfeld, *supra* note 150, at 273.

163. See Green, *supra* note 84; RHODE, *supra* note 156, at 7–12; Rosenfeld, *supra* note 150, at 265–79; Shapiro, *supra* note 150, at 762–77.

164. See sources cited *supra* note 163; see also *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 298–310 (1989) (ruling on statutory grounds that courts could not compel representation but leaving open the issue of whether federal courts possess the inherent authority to service).

165. See Sabbeth, *supra* note 14, at 921–24.

166. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

courts' inherent powers as well as statutes and limited interpretations of state constitutions, became the reference point for both criminal and civil legal aid. Advocates of the public defender model seized on what was essentially an ad-hoc, inefficient, yet public-provided "system" of appointments in criminal cases. They transformed the assigned counsel into the public defender model: a civil servant tasked with representing the rights of the poor.¹⁶⁷ On the civil side, the absence of judicial appointments created a vacuum that provided its own justification for institutionalization, while generally buoying the argument that civil legal aid should be private in nature.¹⁶⁸ While the division between civil and criminal law preexisted organized legal assistance, the institutionalization of legal aid would help enshrine these two fields as different and separate, despite objections to this division from people within the profession.¹⁶⁹

Congress tried to close the poverty gap in federal courts by passing the *in forma pauperis* statute in 1892.¹⁷⁰ The legislative history of the statute notes that it was designed to "open the United States courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the courts under their rules."¹⁷¹ This law waived the cost for indigent parties upon filing an

167. See BROWNELL, *supra* note 3, at 136 (describing how the assigned counsel system worked when communities were smaller, prosecutors charged less, and procedural rules were simpler); SMITH, *supra* note 1, at 103 ("The truth about the assignment system in criminal cases is that as a whole it has proved a dismal failure, and that at times it has been worse than a failure."); Foltz, *supra* note 58; Samuel Rubin, *Criminal Justice and the Poor*, 22 AM. INST. CRIM. L. & CRIMINOLOGY 705, 712 (1932) ("[M]ost of the states either assign counsel without pay, which we consider an inadequate plan, or make no provision at all for the general run of cases. Most of the states should undertake reforms in this field, and the best solution, we consider, is the Public Defender." (quotations omitted)).

168. MAGUIRE, *supra* note 52, at 402 (describing the inadequacy of the assigned counsel in urban civil cases and suggesting that legal aid societies, along with a retained assignment system in smaller communities where there are less legal aid needs, would be optimal); Willis L. M. Reese, *Legal Aid and the Law Student: Four Truisms*, 8 J. LEGAL EDUC. 321, 321 (1955) ("[T]he poor should preferably be represented by paid specialists rather than by assigned counsel. . . . [T]he legal problems of the poor are quite different from those which many lawyers meet in the course of their practice. Typical of such problems, apart from those involving the criminal law, are the collection of unpaid wage claims, small loans, installment contracts, wage assignments, garnishments, workmen's compensation, and the rights of a tenant against his landlord."); Glenn R. Winters, *Why I Believe in Legal Aid: Equal Justice for All in America*, 43 A.B.A. J. 617, 618 (1957) (discussing how counsel is "never assigned in civil cases" and arguing that "it is important that all cases, large and small, civil and criminal, be decided right, and legal aid helps to make it so.").

169. See *infra* notes 63–71.

170. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915) ("[I]n any court of the United States 'may commence and prosecute to conclusion' any such suit or action without being required to prepay fees or costs, or to give security therefor, upon filing an affidavit of poverty, and which also provides that he may avoid a demand for fees or security pending an action by a like affidavit, applies to proceedings on appeal or writ of error, which are within its equity, and not excluded by its letter.").

171. H.R. Rep. No. 52-1079, at 1 (1892).

affidavit of poverty, but it was designed specifically for civil plaintiffs. It would not be extended to the criminal law and defendants until 1910.¹⁷² Some states had their own versions of statutes that provided some form of financial relief; but as one scholar during the early twentieth century observed, such relief was rare and often dealt more with the waiver of fees than with the provision of counsel.¹⁷³ Nevertheless, the federal in forma pauperis statute allowed for the appointment of counsel in civil cases. Yet, throughout the middle of the twentieth century, judges rarely appointed counsel to indigent parties in civil cases despite having inherent powers and statutory authorization at their disposal. At the bubbling cauldron that was Yale Law School in the 1960s,¹⁷⁴ one well-cited student note reflected on this decades-long unwillingness.¹⁷⁵ The note highlighted how state and federal statutes allowed courts to appoint counsel in civil cases but lamented how the “appointment of counsel under such statutes is discretionary with the court, and in practice is grudgingly granted.”¹⁷⁶ Writing around the same time, Ninth Circuit judge Ben Duniway similarly explained how federal courts approached the federal in forma pauperis statute “with hostility and the poor litigant with suspicion.”¹⁷⁷ Cuing the language of deservingness and resource constraints that also influenced the configuration of legal aid organizations, Duniway explained that judges had a “penurious attitude toward the expenditure of public funds” and were “afraid of being overwhelmed by groundless lawsuits.”¹⁷⁸ Whether these concerns are considered legitimate or derelict, this unwillingness made the civil-criminal legal aid divide more pronounced.

This reluctance by federal and state judges occurred at the same time the federal government slowly inched toward a more robust right to appointed counsel in federal criminal courts through case law,¹⁷⁹ rules of criminal procedure,¹⁸⁰ federal statutes,¹⁸¹ and incorporation to states via

172. Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866, 866.

173. MAGUIRE, *supra* note 52.

174. LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS (2005).

175. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 546 (1967).

176. *Id.* at 546.

177. Ben. C. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1277 (1966).

178. *Id.*

179. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (“Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”).

180. FED. R. CRIM. P. 44 (1946) (“If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.”).

181. 18 U.S.C. § 3006A(a) (1964) (“Each United States district court, with the approval of the

Gideon. In short, the appointment of counsel in criminal cases formalized and was prioritized whereas the appointment of counsel in civil cases paled in comparison. The poverty law efforts of the 1960s and 1970s partially offset the gap in civil representation, but even in that altruistic moment, and thereafter, courts would continue to understand the right to appointed counsel for poor civil litigants as a privilege.¹⁸² Interestingly, this appointment gap still exists. Many scholars—including supporters and opponents of a civil *Gideon*—have identified the continued ambiguity of courts’ inherent powers as a site where the access to justice gap might be addressed.¹⁸³

Ultimately, courts’ differential use of their inherent powers to appoint counsel has contributed to the civil-criminal legal aid gap. Importantly, the claim here is not that appointment differentials *created* the gap. One could make a reasonable argument that even if courts assigned counsel in civil cases historically, there would still be a meaningful gap in how civil and criminal legal aid is configured. Instead, the point is that courts’ reluctance to appoint counsel in one area vis-à-vis the other area had the expressive function of communicating ideas about when lawyers were necessary for poor people. The legal profession, as discussed in the beginning of this Part, made meaning of these differential appointment practices and institutional design choices in response. For appellate courts, as discussed in more detail in the next Part, these practices became justifications for subsequent constitutional interpretations of when poor people needed lawyers.

judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies of misdemeanors) . . . who are financially unable to obtain an adequate defense.”).

182. United States *ex rel.* Gardner v. Madden, 352 F.2d 792, 793 (9th Cir. 1965) (“It is true that the appointment of counsel in a civil case is, as is the privilege of proceeding in forma pauperis, a matter within the discretion of the district court. It is a privilege and not a right.”); Sierra v. Lehigh County, 617 F. Supp. 427, 429 (E.D. Pa. 1985) (“Although a district court may in its discretion appoint counsel pursuant to 28 U.S.C. § 1915(d), there is no constitutional or statutory right thereto.”); Carter v. Telectron, Inc., 452 F. Supp. 939, 943 (S.D. Tex. 1976) (“The indigent plaintiff is accorded a privilege, not a right, and the scope of this privilege rests heavily in the Court’s discretion.”).

183. Bibas, *supra* note 43, at 1299 (“There are alternatives to an automatic, across-the-board right to counsel. Courts, for example, could apply their inherent authority to appoint counsel in cases with particular needs for lawyers. . . . [C]ourt appointment could turn on various categories of defendants who especially need counsel, such as those who are juveniles, mentally ill, mentally retarded, or unable to speak English.”); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 475–78 (2009) (encouraging defense counsel to remind state judges about their inherent powers to address problems in indigent defense); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 192 (2006) (discussing courts’ recent articulation of their inherent powers as the basis for assigning counsel and suggesting that this is a “fruitful area for further research, advocacy, or perhaps litigation”); see also Nino C. Monea, *The Administrative Power: How State Courts Can Expand Access to Justice*, 53 GONZ. L. REV. 207 (2017); Sarah B. Schnorrenberg, *Mandating Justice: Naranjo v. Thompson as a Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 264 (2019).

III. CONSTITUTIONAL INTERPRETATION AND CIVIL-CRIMINAL LEGAL AID DIVIDE

This Part explores how the civil-criminal legal aid divide is also a byproduct of the Supreme Court's understanding of when due process principles demand the provision of counsel to indigent civil litigants. The Court's understanding of this issue may be considered familiar ground to scholars and practitioners considering the its notorious opinion in *Lassiter v. Department of Social Services*,¹⁸⁴ its more recent decision in *Turner v. Rogers*,¹⁸⁵ and the commentary surrounding both cases.¹⁸⁶ In *Lassiter*, the Court used its newly-minted *Mathews v. Eldridge* balancing test to rule that due process principles did not require the state to provide counsel to a poor black woman in a termination of parental rights proceeding.¹⁸⁷ In *Turner*, the Court ruled that the Due Process Clause does not demand the appointment of counsel in a civil contempt proceeding with carceral consequences and instead required that states only implement safeguards that would prevent the erroneous deprivation of liberty.¹⁸⁸ Both decisions revealed the Court's uneven approach to appointed counsel in civil proceedings where the stakes are high for indigent parties. Most notably, Brooke Coleman has powerfully contended that "prison is prison" and has suggested that carceral consequences should govern whether the right to counsel attaches and not the civil-criminal categorization.¹⁸⁹ This Part does not seek to rehash the debate around the appropriateness of extending the right to appointed counsel. Instead, it aims to deepen existing accounts by situating the doctrinal incoherence and inconsistencies within a longer history of constitutional interpretation that has italicized the civil-criminal legal aid

184. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). The decision has been criticized in strong terms. See, e.g., Brooke D. Coleman, *Lassiter v. Department of Social Services: Why Is It Such a Lousy Case?*, 12 NEV. L.J. 591, 592–93 (2012) (describing the decision as one that offers no acknowledgment of racism, sexism, or poverty and noting that the Court's "characterization of motherhood and its value to our society is not just off-putting, it is plain irksome"); Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1108 (2010) (drawing on Justice Blackmun's personal papers and revealing that Blackmun considered the *Lassiter* decision, authored by Justice Potter Stewart, to be "one of PS's worst opinions[.]").

185. *Turner v. Rogers*, 564 U.S. 431 (2011).

186. See Abel, *supra* note 33; Aviel, *supra* note 43; Bibas, *supra* note 43; Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223 (2016); David J. Dreyer, *Déjà Vu All over Again: Turner v. Rogers and the Civil Right to Counsel*, 61 DRAKE L. REV. 639 (2013); Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31 (2013); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 154–61 (2011).

187. *Lassiter*, 452 U.S. at 29; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

188. *Turner*, 564 U.S. at 431.

189. Coleman, *supra* note 19.

distinction. Civil proceedings with penal consequences serve as the entry points for this discussion.

A. DEPORTATION'S CIVIL-CRIMINAL STATUS

Deportation (also called removal) proceedings have historically occupied a unique position in the civil and criminal legal systems. In his classic book, *The Limits of the Criminal Sanction*, Herbert Packer explained how “deportation . . . under our present legal arrangements, is punishment but not *criminal punishment*,” and added, “[p]unishment is a concept; *criminal punishment* is a legal fact.”¹⁹⁰ Courts have historically hewed to this understanding, but have met resistance.¹⁹¹ Jurists have objected to the characterization of immigration proceedings as simply civil while calling attention to immigration law’s counsel-demanding complexity.¹⁹² In *Fong Yue Ting v. United States*, which upheld the constitutionality of Section 6 of the Geary Act (and extended the Chinese Exclusion Act of 1882), Justice Fuller rejected the majority’s sanitizing description of deportation as “removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare.”¹⁹³ In a strongly-worded dissent, Justice Fuller, wrote, “Deportation is punishment. It involves first an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment.”¹⁹⁴ Indeed, one scholar

190. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35 (1968) (emphasis added).

191. See, e.g., *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (“[N]or is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (noting that “deportation is not a punishment for crime”).

192. *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’ A lawyer is often the only person who could thread the labyrinth.” (quoting ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL* 107 (1985))); *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977) (“We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos’s labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”); *Ex parte Chin Loy You*, 223 F. 833, 838 (D. Mass. 1915) (“It is true that the right to counsel secured by the Constitution relates only to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. To make the defendant’s substantial rights in a matter involving personal liberty depend on whether the proceeding be called ‘criminal’ or ‘civil’ seems to me unsound. Indeed, historically the right to counsel in civil cases and upon charges of misdemeanors antedates such right in cases of felony and treason.” (citations omitted)).

193. *Fong Yue Ting*, 149 U.S. at 709.

194. *Id.* at 740.

describes the characterization of deportation as not-punitive and the civil-criminal distinction as two of the many “fictions” in immigration law.¹⁹⁵ Despite deportation’s penal character, “the Supreme Court has rarely, if ever, seriously considered the basic analytical and normative questions raised by the civil/criminal dichotomy in the deportation context.”¹⁹⁶ Nevertheless, whether one is persuaded by the formalist civil-criminal division or the more critical recognition of deportation’s existence in the “netherworld” of both, the Court’s decision-making in the area has had consequences for legal aid.¹⁹⁷

In 1912, the Court would weigh in directly on the constitutionality of deportation proceedings involving unrepresented immigrants. *Low Wah Suey v. Backus* involved a Chinese woman who was accused of being a sex worker in violation of a 1910 amendment to the Immigration Act of 1907, which expanded on prostitution-related deportation.¹⁹⁸ Although she was refused the right to be represented by counsel in all stages of the preliminary proceedings, and was examined without the presence of counsel by various immigration officers, the Court found no constitutional violation.¹⁹⁹ Although some courts concluded that the *exclusion* of counsel rendered proceedings unfair,²⁰⁰ it was more common for them to find no procedural infirmity in cases involving the absence of an attorney, irrespective of whether the party wanted privately retained or appointed counsel.²⁰¹ Judges continued to comment on the seriousness of deportation. Justice Brandeis famously declared, “[t]o deport one who so claims to be a citizen, obviously deprives him of liberty . . . [i]t may result also in loss of both property and life; or of all that makes life worth living.”²⁰² Decades later, Justice Murphy similarly noted that deportation is often as great, if not greater, than the

195. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 53 (1989).

196. Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1464 (2011).

197. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (suggesting that deportation does not “fit neatly into the civil or criminal box” and that “it lives in the netherworld in between”).

198. *Low Wah Suey v. Backus*, 225 U.S. 460, 466 (1912). See generally Pooja R. Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53 (2018).

199. *Low Wah Suey*, 225 U.S. at 476.

200. See, e.g., *Roux v. Comm’r of Immigration*, 203 F. 413 (9th Cir. 1913); *In re Madeiros*, 225 F. 90 (D. Mass. 1914); *Ex parte Chin Loy You*, 223 F. 833, 838 (D. Mass. 1915); *Ex parte Vilarino*, 47 F.2d 912 (S.D. Cal. 1930), *aff’d*, 50 F.2d 582 (9th Cir. 1931).

201. See *Ex parte Vilarino*, 50 F.2d; *Ex parte Kishimoto*, 32 F.2d 991 (9th Cir. 1929); *Jew Hong Sing v. Tillinghast*, 35 F.2d 559 (1st Cir. 1929); *Plane v. Carr*, 19 F.2d 470 (9th Cir. 1927); *Guiney v. Bonham*, 261 F. 582 (9th Cir. 1919); *United States ex rel. Drachmos v. Hughes*, 110 F.2d 662 (3d Cir. 1940); *Ex parte Cahan*, 42 F.2d 664 (S.D. Cal. 1930); *United States ex rel. Castro-Louzan v. Zimmerman*, 94 F. Supp. 22 (E.D. Pa. 1950); *Sire v. Berkshire*, 185 F. 967 (W.D. Tex. 1911).

202. *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922) (citation omitted).

imposition of a criminal sentence since one who is deported “may lose his family, his friends and his livelihood forever” and be forced to return to a native land, potentially leading to “poverty, persecution and even death.”²⁰³ Notwithstanding these consistent warnings about the liberty-depriving nature of deportation, this sanction did not achieve significant status as a matter of legal aid jurisprudence.

Although courts were willing to understand deportation as per se penal, courts would eventually interpret the Fifth Amendment’s Due Process Clause as affording noncitizens the right to *retain* counsel at their own expense. Congress compelled this reading. As one appellate court has noted, Congress recognized the right to counsel as one of “the rights stemming from the Fifth Amendment guarantee of due process” and actualized that recognition via statute.²⁰⁴ The Immigration and Nationality Act of 1952, passed a year after a McCarthyist scare galvanized the legal profession into rejecting any scheme of government-funded legal aid, provides that “[i]n any removal proceedings before an immigration judge and in any appeal proceedings . . . the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.”²⁰⁵ *The Code of Federal Regulations* also places the responsibility for procuring counsel on the party risking deportation and makes it clear that they can be represented “by an attorney or other representative of his or her choice . . . at no expense to the government.”²⁰⁶ In basic terms, individuals would not benefit from any right to appointed counsel in deportation proceedings, whether they were indigent or not.

The statutory framework and the interpretation of a Fifth Amendment Due Process right to retain counsel in removal proceedings reified the criminal-legal aid divide. This arrangement kept potential deportees—at least those subject to removal for non-criminal conduct—outside of the criminal legal aid regime that would expand post-*Gideon*. This exclusion occurred amidst a growing judicial and legislative recognition of poor people’s need for lawyers. Yet courts continued to designate deportation as non-criminal, and perhaps more importantly, endorsed the federal government’s explicit disavowal of payment for counsel in deportation proceedings. This approach to legal aid did not have to be the case. Charles Gordon, who served as counsel for the United States Immigration and Naturalization Service and was one of the leading experts in twentieth

203. *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

204. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

205. 8 U.S.C. § 1362 (emphasis added); *see also* 8 U.S.C. § 1229a(b)(4).

206. 8 C.F.R. § 1003.16 (1997).

century immigration law, stated this plainly. Writing in 1961, he explained how “immigration proceedings are not criminal cases, but it would not require too great a leap to find that the conceptions of fundamental fairness under the Due Process Clause of the [F]ourteenth [A]mendment should be carried over to the identical prescription of the [F]ifth [A]mendment.”²⁰⁷ That did not happen. Deportation’s statutory and jurisprudential framework shaped the civil-criminal legal aid divide by placing the liberty-depriving event that is deportation on the civil side. This framework, which courts have unsatisfactorily explained,²⁰⁸ effectively signaled to the bar and the public who is deserving of state-funded legal aid, what type of legal assistance government was willing to subsidize, and what kind of liberty deprivation was sufficiently penal to warrant government-provided counsel. Courts have been inelegantly importing other constitutional criminal defense principles into the civil deportation world ever since.²⁰⁹

Judicial and congressional unwillingness to put forth a more welfarist right to counsel took new meaning beginning in the 1970s and 1980s. During that period, the civil legal aid world that immigrants historically derived some benefits from came under political scrutiny, whereas immigration law increasingly adopted criminal enforcement *priorities* but rejected the *protections* of criminal adjudication.²¹⁰ Of course, like the legal aid societies

207. Charles Gordon, *Right to Counsel in Immigration Proceedings*, 45 MINN. L. REV. 875, 894 (1961).

208. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 131 (2008) (describing how courts have offered little analysis on the statutory and constitutional sources of noncitizens right obtain counsel of choice beyond recognition of existence).

209. See *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (ruling that the Sixth Amendment requires defense attorneys to advise noncitizen defendants about the deportation consequences of a guilty plea). The right to effective assistance of counsel is tied to the Sixth Amendment, and, since the deportation is considered a civil proceeding, this requirement for effectiveness should not be relevant to deportation proceedings. But as Peter Markowitz explains, the majority of circuits have recognized a right to effective assistance of counsel in deportation proceedings under due process principles. Markowitz, *supra* note 197, at 1318–19 (canvassing cases). “The oddity of a right to effective assistance, without the corresponding right to any assistance at all, is perhaps the clearest example of doctrinal incoherence in the courts’ treatment of the nature of removal proceedings.” *Id.* at 1320; see also Kaufman, *supra* note 208, at 131–33 (discussing how courts have issued inconsistent rulings on a range of issues including, but not limited to, defective waivers of counsel, continuances, and transfers to remote locations that unconstitutionally interfere with this right to counsel).

210. Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 645 (1994) (“Immigration politics in the 1980s, however, separated advocacy for increased admissions into the United States from efforts to prevent restriction of social benefits and legal protections for the poor in general.”); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 305–06 (1982) (describing the exclusion of undocumented immigrants from representation by LSC funded organizations); Roger C. Cramton, *Why Legal Services for the Poor?*, 68 A.B.A. J. 550 (1982) (defending critiques against civil legal services and arguing that deportation proceedings are an area where the rights of poor people should be enforced); Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 620–27 (2011) (describing how legal aid was historically connected to the development of legal aid and how,

discussed in Part I, and the gun-shy lower courts hearing civil cases discussed in Part II, these decisions were likely animated by cost concerns, sincere beliefs about the necessity of lawyers in this area, ideas about deservingness, and/or careful considerations of tradeoffs. Nevertheless, courts' interpretations of deportation and due process shaped the structure of the civil-criminal legal aid divide by making criminal proceedings the primary reference point for which the right to *appointed* counsel was applicable. This privileging of the criminal process as a cherished site of appointment now seems anachronistic considering the integration of immigration law and criminal law.²¹¹ But it has had consequences for the administration of civil and criminal legal aid and the population of noncitizens in need of both services.²¹²

beginning in the 1970s, legislative restrictions and various legal restrictions have helped create a volume of unmet legal need for immigrants); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (discussing how immigration law has adopted “features of the criminal justice model that can roughly be classified as enforcement” whereas components “that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected.”); Joseph F. Preloznik, *Wisconsin Judicare: An Experiment in Legal Services*, 57 A.B.A. J. 1179, 1181 (1971) (describing a state effort by the private bar to provide legal services to poor people and its avoidance of helping people in deportation proceedings).

211. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (describing how the fusion of immigration and crime control has been shaped by national security rhetoric); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013) (empirical study of the criminal justice system that maps out different forms of immigration enforcement); César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346 (2014) (challenging the traditional understanding of immigration detention as civil confinement and arguing that it should be understood as punishment); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1838 (2011) (observing that prosecution for unlawful entry, which is the most common criminal violation, “straddles the criminal-civil line” and maintaining that “[t]he line is permeable in practice, leaving the government free to choose between criminal and civil options in any given case”); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019) (detailing the emergence of self-deportation laws that merge civil and criminal law and seek to remove immigrants through indirect methods); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (theorizing the convergence, overlaps, and distinctions between criminal law and immigration law).

212. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015) (empirical study of deportation cases finding that only 14% of detained immigrants secured representation); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 9–10 (2008) (federal appellate judge discussing how an immigrant who appears pro se or does not have counsel at removal proceedings “will be at a disadvantage” and describing how “[o]ften times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different”); Jamie Longazel, *Relieving the Tension: Lay Immigration Lawyering and the Management of Legal Violence*, 52 L. & SOC'Y REV. 902 (2018) (discussing the work nonprofit and faith-based organizations staffed with non-lawyers who provide legal services to immigrants); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1651–52 (1997) (describing how INS detainees are often “confined at remote facilities with restrictive phone and visitation policies . . . pressured (and sometimes coerced) to abandon their search for a lawyer by INS officers and immigration judges” who are concerned with quick processing, which leads “most detainees [to] abandon

B. INVESTIGATIONS, HEARINGS, AND COUNSEL

Deportation was not the only area where constitutional interpretations helped structure the civil-criminal legal aid divide. The expansion of the administrative state during the middle of the twentieth century generated new challenges for thinking about rights and their relationship to legal actions.²¹³ The rise of the administrative state also amplified the longstanding issue of penal sanctions that emerged out of proceedings that were stripped of the typical features of a criminal trial.²¹⁴ A key debate that surfaced was the thin line between investigative and adjudicatory proceedings. Beginning in the 1940s, several appellate courts decided cases in this area that ultimately influenced the Court's thinking on whether counsel was required.

Bowles v. Baer involved an investigation into Empire Packing Company for violations of ceiling prices for meat sales.²¹⁵ The Administrator of the Office of Price Administration ("OPA"), who was tasked with establishing price controls during the outbreak of World War II, handled the investigation.²¹⁶ The Office subpoenaed fifteen people who did business with Empire and instructed them to bring documents related to the meat purchases from that company.²¹⁷ All but one were represented by an attorney from Empire, and after some questioning, a representative from OPA told each person that their attorney and the court reporter would have to leave.²¹⁸ The attorneys and reporter refused to do so unless authorized by their clients, who all refused to answer any questions in the absence of their attorneys and the reporter.²¹⁹ The Administrator sought an injunction from the district court to compel the parties' private testimonies.²²⁰ The court ordered the witnesses to testify without counsel and the reporter but held that the investigation could be open to the public; counsel and the reporter could attend as long as they did not interfere with the proceedings.²²¹ Both sides appealed this decision.²²² At this point, the drama was captured headlines, with the *Chicago Tribune* reporting, *OPA Kangaroo Court Ban is Up to*

any hope of finding an attorney").

213. See generally KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016) (discussing the legal and historical conceptualization of welfare rights).

214. Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51, 69–79 (1943).

215. *Bowles v. Baer*, 142 F.2d 787, 788 (7th Cir. 1944).

216. *Id.*

217. *Id.* at 788.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

Washington.²²³ Conjuring concerns about the uncounseled confessions that Chicago has a long history of,²²⁴ the newspaper described how the “alphabetical bureau chiefs in Chicago” were trying to conduct “star chamber” interrogations of witnesses in their enforcement cases.²²⁵ The Seventh Circuit ultimately reversed the lower court’s decision and concluded that the district court did not have the statutory power to regulate the nature of the investigation.²²⁶ The appellate court offered what would become a well-cited description of the difference between investigative and adjudicative proceedings—the latter of which courts would say demanded the presence of counsel.

This was an investigation, not a hearing. Investigations are informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone. *Investigations, such as this by the OPA, have no parties and are usually held in private, just as a grand jury carries on its investigations in private. Investigations may very properly be held in private.* On the other hand, in a hearing there are parties, and issues of law and of fact to be tried, and at the conclusion of the hearing, action is taken which may materially affect the rights of the parties. Hearings are usually open to the public. *The parties are entitled to be present in person and by counsel and to record the proceedings or be provided with a record by the hearing body.* The parties to a hearing are entitled to participate therein, to argue, and to brief their case, and, if findings of fact and an order are made, they are entitled to be furnished copies. *These essential differences between an investigation and a hearing are what permit the two proceedings to be conducted in different manners.*²²⁷

This interpretation of investigations—which did not require the typical adjudicative protections like the right to counsel—would grow in importance. Two months later, the Third Circuit would issue a ruling that would add to this investigative-adjudicative division. *United States v. Pitt* involved a proclaimed Jehovah’s Witness minister who was found guilty of failing to appear at his local board for induction into the United States Army.²²⁸ The Selective Service Agency’s regulation prohibited any person

223. *OPA Kangaroo Court Ban is Up to Washington*, CHI. TRIB., Sept. 18, 1943, at 9.

224. See, e.g., ANDREW S. BAER, *BEYOND THE USUAL BEATING: THE JON BURGE POLICE TORTURE SCANDAL AND SOCIAL MOVEMENTS FOR POLICE ACCOUNTABILITY IN CHICAGO* (2020); ELIZABETH DALE, *ROBERT NIXON AND POLICE TORTURE IN CHICAGO, 1871–1971* (2016); LAURENCE RALPH, *THE TORTURE LETTERS: RECKONING WITH POLICE VIOLENCE* (2020).

225. *OPA Kangaroo Court Ban is Up to Washington*, supra note 226, at 9.

226. *Bowles*, 142 F.2d at 789.

227. *Id.* at 788–89 (emphasis added) (citations omitted).

228. *United States v. Pitt*, 144 F.2d 169, 170 (3d Cir. 1944).

other than the registrant from appearing before the local board.²²⁹ The court noted that this prohibition essentially denied the right to be represented by counsel.²³⁰ Although this was not the substance of Pitt's claim, the court would offer dicta that coincided with *Bowles* and provided fodder for future courts confronted with individuals who refused to be inducted. It noted, "While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before the selective service agencies are not within that category."²³¹ Other courts followed suit in ways that scholars have underappreciated for decades.²³² Importantly, this case and others considered the right to *retain* counsel, but the rulings subsequently ended up being interpreted in the context of appointment and implicated civil legal aid questions.

Draft board hearings presented a noteworthy lose-lose proposition for people who wanted the representation of counsel to avoid liberty-depriving outcomes. Refusing induction could lead to incarceration. Yet if one opted for conscription, that invited its own version of liberty deprivation. David Rudovsky and Norman Dorsen have argued that compulsory military service is a severe deprivation of liberty that "removes young men from their homes, occupations, education and family for long periods of time and deprives them of an intrinsic condition of freedom—the direction and control of their lives."²³³ The problems posed by quasi-penal proceedings did not go unnoticed. In an administrative law decision more noted for its implications for non-delegation doctrine, Justice Rutledge authored a strongly worded dissent that criticized the trend of using administrative procedures that subverted the criminal process and constitutional protections, including the right to a defense and a fair trial.²³⁴ However, his warnings were not heeded

229. *Id.* at 172.

230. *Id.* at 172.

231. *Id.*

232. *See, e.g.*, *United States v. Sturgis*, 342 F.2d 328 (3d Cir. 1965); *Niznik v. United States*, 173 F.2d 328 (6th Cir. 1949); *Peterson v. United States*, 173 F.2d 111 (6th Cir. 1949); *United States v. Schwartz*, 143 F. Supp. 639, 640 (E.D.N.Y. 1956).

233. Norman Dorsen & David Rudovsky, *Some Thoughts on Dissent, Personal Liberty and War*, 54 A.B.A. J. 752, 753 (1968).

234. *Yakus v. United States*, 321 U.S. 414, 482–84 (1944) ("The question is not merely whether the . . . proceeding is adequate in the constitutional sense for some of the purposes pertinent to that proceeding. It is rather what effect shall be given to the civil determination in the later and entirely different criminal trial. It is whether, by substituting that civil proceeding for decision of basic issues in the criminal trial itself, Congress can foreclose the accused from having them decided in that trial and thereby deprive him of the protections in trial guaranteed all persons charged with crime and thus of full and adequate defense. . . . Th[is] procedural pattern is one which may be adapted to the trial of almost any crime. Once approved, it is bound to spawn progeny . . . In short the way will have been found to avoid, if not altogether the power of the courts to review legislation for consistency with the Constitution, then in part at least their obligation to observe its commands and more especially the guaranteed protections of persons charged with crime in the trial of their causes. This is not merely control or

as bureaucracies would develop regulations that were stripped of due process protections and enforced in proceedings that could lead to penal consequences.

Ultimately, the modernization of the administrative state played a crucial role in the development of legal aid. More specifically, administrative constitutionalism—“the process by which the administrative state both shapes and is shaped by constitutional norms”²³⁵—had critical consequences for understandings of the right to counsel. With the bureaucratization of society came a slow accretion of ideas about when legal aid was necessary.²³⁶ Critically, this occurred during the same time when there were live debates about the right to counsel in the criminal context, as the Court had not drawn a firm line in the sand until *Gideon* was decided. In the meantime, the post-war administrative state would rapidly develop and come to conclusions about the need for counsel more quickly.

In re Groban,²³⁷ an under-the-radar Supreme Court case, illuminates the staggered ways the right to counsel developed in the criminal versus civil context. Although generally relegated to the margins of constitutional and administrative law, *Groban* is an important case that clarified the Court’s position on the issue of legal counsel in quasi-criminal administrative proceedings. The decision provided a logic that later courts would utilize when public benefits hearings proliferated in the 1960s and 1970s. *Groban* involved two defendant brothers who owned an Ohio mill that burned in January 1954.²³⁸ The Fire Marshal believed that the brothers committed arson.²³⁹ A state statute allowed the Fire Marshal to conduct a private investigative proceeding in which he could exclude “all persons other than those required to be present.”²⁴⁰ Refusal to be sworn and to testify could lead

definition of jurisdiction. It is rather unwarranted abridgement of the judicial power in the criminal process, unless at the very least it is confined specifically to situations where the special proceeding provides a fair and equal substitute for full defense in the criminal trial or other adequate safeguard is afforded against punishment for violating an order which itself violates or may violate basic rights.”).

235. Jeremy K. Kessler, *New Look Constitutionalism: The Cold War Critique of Military Manpower Administration*, 167 U. PA. L. REV. 1749, 1750 (2019); see also Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015).

236. Richard L. Cousineau, *Constitutional Law: Right to Counsel—The Right to Assistance of Counsel in Administrative Proceedings*, 34 NOTRE DAME L. REV. 90, 95–98 (1958).

237. *In re Groban*, 352 U.S. 330 (1957).

238. *Id.* at 331.

239. *Id.*

240. *Id.* (quoting OHIO REV. CODE ANN. § 3737.13 (LexisNexis 1954)).

to commitment in the county jail until the person complied.²⁴¹ The brothers came to the proceeding with a retained attorney, but the deputy fire marshal would not allow counsel to be present.²⁴² The brothers refused to testify, were held in contempt, and imprisoned.²⁴³ They argued in all stages of their appeals that the exclusion of their attorney was unconstitutional and that the Due Process Clause gave them a right to assistance of counsel in their testimony.²⁴⁴

Thus, the question raised in *Groban* was this: do individuals have a constitutional right to assistance of retained counsel under the Due Process Clause when testifying as a witness in an investigative proceeding conducted by a state fire marshal about causes of a fire? In a short opinion written by Justice Reed and joined by four other Justices, the Court held that there was no right to counsel in an investigatory proceeding.²⁴⁵ The majority underlined the already-existing distinction between investigative and adjudicatory proceedings and placed the Grobans' hearing in the former camp.²⁴⁶ Since the fire marshal's investigation was simply about fact gathering and not prosecution, the Court reasoned, the Fourteenth Amendment was not implicated.²⁴⁷ Moreover, the Court held that even though a witness may have a legal duty to speak, and although their testimony might provide a basis for criminal charges, a right to counsel was not required.²⁴⁸

Groban is still good law and helped lay the groundwork for later cases that nixed the prospect of legal assistance in administrative proceedings with criminal consequences.²⁴⁹ But it was not without problems. First, the Court trivialized the similarities between law enforcement and non-police personnel tasked with rules enforcement and punishment (in this case, the fire marshal). To be sure, the majority's decision rests on plausible distinctions between the typical criminal prosecution and the particular brand of investigation that the fire marshal was authorized to conduct. But the Court minimized the fire marshal's arrest power and the potential submission of evidence to the district attorney if arson charges were filed—all of which

241. *Id.*

242. *Id.* at 332.

243. *Id.* at 331.

244. *Id.* at 332.

245. *Id.* at 335 (“We hold that appellants had no constitutional right to be assisted by their counsel in giving testimony at the investigatory proceeding . . .”).

246. *Id.* at 333.

247. *Id.* at 334–35.

248. *Id.* at 332.

249. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); *Anonymous v. Baker*, 360 U.S. 287 (1959).

suggested the strong possibility that the interrogation “was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime.”²⁵⁰ Like the *Groban* majority, opponents of a right to counsel in administrative settings sometimes point to the difference between prosecutors and administrative investigators and usually emphasize the former’s unique enforcement power. While technically correct, this overlooks administrative bureaucrats’ ability to collect information from a variety of mandatory reporters in their efforts to ensure compliance.²⁵¹ In her study of poor mothers who receive public benefits, Khiara Bridges identifies how coercion and power imbalances are often implicit in interrogations.²⁵² Such compulsion is magnified in the context of a governmental actor that can wield the state’s power in a criminal or civil investigation. As Justice Black noted in his dissent, it is quite possible that a person could be charged with a crime based on their statements in an investigative administrative proceeding.²⁵³ Crucially, the right to counsel in the subsequent criminal trial would be “a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination.”²⁵⁴

Groban is important for a few reasons. First, it was a decision that placed the right to counsel outside the civil (administrative) context. Although it dealt with the question of the right to *retain* counsel, as opposed to having counsel *assigned*, the former is typically understood as a lower threshold. As right to counsel jurisprudence developed in the 1960s and 1970s, it became clearer that if people were not allowed to bring their own attorneys to certain investigative proceedings, there would certainly be no obligation for the government to provide one. These developments helped sow the seeds for the civil versus criminal legal aid status quo that we have today.

Groban is also another instance of a judicial unwillingness to see the kinds of penal consequences that could flow from civil proceedings.²⁵⁵ Like judicial rulings on deportation, the Court rejected the idea that civil

250. *In re Groban*, 352 U.S. at 349 (Black, J., dissenting).

251. These individuals include physicians, social workers, teachers, and mental health professionals. The ability to collect information can have unique consequences for poor women and women of color who are often subject to investigations by agencies. See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317 (2014); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012); Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189 (2016).

252. BRIDGES, *supra* note 251, at 168.

253. *In re Groban*, 352 U.S. at 344 (Black, J., dissenting).

254. *Id.*

255. *See id.*

proceedings with penal consequences necessitated the presence of counsel. While the Court could certainly not portend the expansion of the penal state, it did not have to; previous jurisprudence, as well as the arguments put forth by the parties and the dissent, called attention to the hazards of this sharp delineation between investigative and adjudicative proceedings. The post-1960s fervor for law and order and a skepticism of governmental responsibility to the poor would widen this seemingly artificial distinction. By the time the Court heard cases like *Goldberg v. Kelly*,²⁵⁶ which declined to weigh in on the issue of counsel for public benefits recipients, fine lines were drawn.

Taken as a whole, this Part identifies how pre-*Lassiter* interpretations of when the right to counsel is necessary shaped the civil-criminal legal aid division. In deportation and administrative proceedings with liberty-depriving consequences, federal courts insisted on narrowing what fell into the category of criminal. With the help of Congress, which revised statutes and clarified the federal government's unwillingness to provide counsel to indigent immigrants, the divide in the legal aid world deepened. While the outcomes of *Lassiter* and *Turner* were not forgone conclusions, they were prefigured by generations of jurisprudence that have gone unnoticed.

IV. LEGAL AID FOR THE FUTURE

Identifying conceptual inconsistencies and uncovering historical patterns can be edifying, but outstanding questions remain. If one accepts this account of how the legal profession and the judiciary hardened the division between civil and criminal legal aid, what are the pragmatic takeaways? What is the practical vision moving forward, especially considering the current and real differences between these two fields as well as their longstanding overlap? Some tentative answers lie in a larger gap that animated this Article: the divide between criminal justice and poverty law.

The ways poverty intersects with criminal law and procedure are ostensibly well-understood by practitioners and scholars in both areas due to a growing literature on the criminalization of poverty and the collateral consequences of mass incarceration.²⁵⁷ The permutations are seemingly

256. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

257. See, e.g., ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012); CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (2019); JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE (2011); LOIĆ WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Eisha Jain,

endless. Criminal justice contact can lead to or exacerbate existing poverty by precluding the formerly incarcerated from accessing certain public benefits²⁵⁸ and by creating a stigma that frustrates their ability to obtain meaningful employment.²⁵⁹ Living in poor neighborhoods or participating in social welfare programs for the poor invites increased government scrutiny in ways that can manufacture criminal justice contact.²⁶⁰ Finally, there is an interstitial area where it is unclear which came first: the criminalization or the poverty. Here one might consider the dizzying assortment of court costs, fees, and fines emblemized in the Ferguson Report.²⁶¹ The public discourse on the relationship between poverty and crime is also growing due to popular scholarly texts that address this intersection as well as more recent social tumult.²⁶² COVID-19 has generated calls for, and implementation of, decarceration strategies.²⁶³ The pandemic has also highlighted the fact that

Prosecuting Collateral Consequences, 104 GEO. L.J. 1197 (2016); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

258. See, e.g., 21 U.S.C. § 862a(d)(1)(A) (denying food stamps and welfare benefits to felons for certain drug-related convictions); 42 U.S.C. § 608 (denying assistance to probation and parole violators); 42 U.S.C. § 13661(c) (2020) (allowing public housing agencies to deny admission to individuals who they have determined engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents); *Houston v. Williams*, 547 F.3d 1357, 1360 (11th Cir. 2008) (upholding the plaintiff's exclusion from a county's federally-funded weatherization assistance program because he was a convicted felon and listed sex offender); *Turner v. Glickman*, 207 F.3d 419, 423 (7th Cir. 2000) (upholding a statute making individuals convicted of certain drug offenses ineligible for food stamps and welfare benefits).

259. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 33 (2007).

260. See BRIDGES, *supra* note 251 (detailing how poor mothers receipt of public assistance and Medicaid compromises their privacy rights and activates punitive government surveillance); KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2012) (describing the blurring of the welfare and criminal justice system). See generally Laura I Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016) (examining criminal justice debt and its impact on poor people); Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363 (2016) (discussing the criminalization of Black motherhood); Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125 (2018) (exploring how the child support system punished Black fathers).

261. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); see also Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016).

262. See, e.g., ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).

263. Scott Colom & Miriam Aroni Krinsky, *Tragedy of COVID-19 in Prisons Shows Need for Decarceration*, S.F. CHRON. (July 1, 2020, 4 AM), <https://www.sfchronicle.com/opinion/openforum/article/Tragedy-of-COVID-19-in-prisons-shows-need-for-15378357.php> [<https://perma.cc/Y8QP-S79K>]; Rory Lancman, *Decarceration Is a COVID-19 New Normal We Must Stick With*, N.Y. DAILY NEWS (May 14, 2020, 5:45 PM), <https://www.nydailynews.com/opinion/ny-oped-decarceration-new-normal->

law enforcement partially involves managing the poor, particularly individuals who have either committed crimes of poverty or poor people who are simply awaiting trial and cannot afford bail.²⁶⁴ Meanwhile, calls to defund the police have drawn attention to how local and national governments uncritically bankroll law enforcement while seemingly underfinancing welfare and poverty prevention.²⁶⁵

Notwithstanding this general awareness, criminal justice and poverty law are often imagined as distinct fields. Poverty law focuses on the legal statutes, regulations, and cases that apply to poor people's lives.²⁶⁶ Poverty law casebooks and practice often cover a wide range of fields, including, but not limited to: consumer law, domestic violence, elder law, family law, health care law, housing law, and public benefits law. Civil legal aid attorneys are central to this enterprise. Oddly, with the exception of two texts—one casebook and one casebook length primer—criminal justice issues are often missing or incidentally engaged in substantive treatments of poverty law.²⁶⁷ On the other hand, criminal law and procedure occasionally acknowledge the role of poverty—most notably through the Sixth Amendment's right to counsel,²⁶⁸ or Eighth Amendment concerns about bail.²⁶⁹ Nevertheless, poverty law features minimally in the explicit design

20200514-74ca15edbbgu3mkifyp25eb2a-story.html [https://perma.cc/HD9N-NVX3]; Clark Neily, *Decarceration in the Face of a Pandemic*, CATO INST. (Apr. 30, 2020, 6:25 PM), <https://www.cato.org/blog/decarceration-face-pandemic> [https://perma.cc/9HSA-USJ8].

264. Jonathan Ben-Menachem, *The Public Health Risks of Jailing People for Poverty*, APPEAL (May 4, 2020), <https://theappeal.org/florida-coronavirus-bail-fines-fees> [https://perma.cc/8MRK-4DZV]; Simone Weichselbaum, *Can't Make Bail, Sit in Jail Even Longer Thanks to Coronavirus*, MARSHALL PROJECT (May 1, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/05/01/can-t-make-bail-sit-in-jail-even-longer-thanks-to-coronavirus> [https://perma.cc/GNH6-TKQF].

265. Christopher Ingraham, *U.S. Spends Twice as Much on Law and Order as it Does on Cash Welfare, Data Show*, WASH. POST (June 4, 2020, 5:54 AM), <https://www.washingtonpost.com/business/2020/06/04/us-spends-twice-much-law-order-it-does-social-welfare-data-show> [https://perma.cc/KH9T-5Q48].

266. There is no agreed-upon definition of what constitutes "poverty law." It could be safely said that there are two dominant approaches to this field. Both are historically inflected but coincide with the two most recent and leading casebooks in the field. One approach is more circumscribed and focuses specifically on public benefit programs for the poor, specifically New Deal and Great Society programs. This version, sometimes referred to as "social welfare law" or "public welfare law" is particularly concerned with welfare benefits (for example, previously AFDC and now TANF), Medicaid, food stamps, government assisted housing, and social security. See DAVID A. SUPER, *PUBLIC WELFARE LAW* (2016). Another approach, which could be called the poverty law approach, is historically specific and tied to the anti-poverty efforts of 1960s liberals. This version includes consideration of social welfare provisions, as well as areas of law that do not necessarily entail public benefits but detrimentally impact poor people such as housing and consumer issues. See JULIE M. BRODIE, CLARE PASTORE, EZRA ROSSER & JEFFREY SELBIN, *POVERTY LAW, POLICY AND PRACTICE* (2014); WALD, *supra* note 3. This paper follows the latter approach.

267. BRODIE ET AL., *supra* note 266; HELEN HERSHKOFF & STEPHEN LOFFREDO, *GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME* 803–809 (2019).

268. U.S. CONST. amend. VI.

269. U.S. CONST. amend. VIII.

of criminal justice administration. Criminal legal aid attorneys are central to this enterprise. Accordingly, the gap between criminal justice and poverty law—and the corresponding division between the legal aid attorneys who advocate for poor people in both fields—are taken-for-granted, assumed as natural, and bereft of historical context supplied in the previous Parts. These clefts are consequential for poor people, practitioners who work in poverty law and criminal justice, and scholars who write and train students in these areas.

For poor people, the civil-criminal legal aid divide does not map onto their lived experiences and can serve as a superimposed categorization that undermines how they navigate their legal worlds. Empirical evidence is increasingly supporting this claim. Sara Sternberg Greene’s study of civil litigants found that most respondents did not know the difference between the criminal and civil justice systems.²⁷⁰ For the interviewees, the distinction had less meaning. For them, Greene explains, “[c]ourt is court. The law is the law. Lawyers are lawyers. Judges are judges.”²⁷¹ Lauren Sudeall and Ruth Richardson’s study of public defender clients, which looked beyond the collateral consequences of criminal convictions and focused on civil problems unrelated to criminal cases, found that respondents’ were unaware of civil legal resources despite having experiences where such assistance would have been useful.²⁷² This Article’s interrogation of the civil-criminal legal aid divide supplies some historical heft to these findings and gesture toward a reimagination of how legal services are delivered. To be sure, barriers abound: some include real resource constraints, deficiencies in subject matter expertise, and legal restrictions on the kinds of work some legal aid organizations can perform. But the path-dependent, historically contingent nature of the civil-criminal divide counsel against an uncritical embrace of these categories. Instead, considering existing barriers, scholars and practitioners must rigorously examine how legal assistance can be best delivered to poor people who are sometimes regulated by the civil system, criminal justice system, or both.²⁷³ As Anthony Thompson has suggested, robustly meeting poor people’s needs might require experts and practitioners in both areas to redefine what constitutes a “case” as well as rethink the

270. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1289 (2016).

271. *Id.* at 1290.

272. Lauren Sudeall & Ruth Richardson, *Unfamiliar Justice: Indigent Criminal Defendants’ Experiences with Civil Legal Needs*, 52 U.C. DAVIS L. REV. 2105, 2109 (2019).

273. Rosen-Zvi & Fisher, *supra* note 38, at 88 (“It is critical, in other words, not to essentialize legal categories or accept them as givens but rather to engage in an ongoing process of reexamination in which the values underlying these categories are identified and taxonomies that best promote these values are sought.”).

concept of “representation.”²⁷⁴

Fortunately, some legal services providers have been working for more than a decade to dissolve the civil-criminal boundary, and there have been some successes. Civil and criminal legal aid organizations that previously moved with caution due to resource constraints and uncertainty about government restrictions on civil legal representation of ex-offenders have entered the areas of expungement and reentry.²⁷⁵ Although expungement is fundamentally about a criminal offense, and can sometimes be part of granted relief, it is typically a separate civil action.²⁷⁶ The growth of this work represents a recognition of the ways people transitioning back into society are often saddled by the same problems that might independently bring them to a civil legal aid organization: unemployment, housing insecurity, and mental health issues to name a few. These issues can keep people trapped in the poverty that civil legal aid organizations hope to mitigate, or cause people to end “up on the docket of the same public defender who helped them on the very offense for which they were originally incarcerated.”²⁷⁷ Of course, expungement is a back-end intervention that only scratches the surface of economic inequality and mass incarceration, but it is also socially-beneficial process that few people are able to avail themselves of in part because they do not have access to lawyers that would help them navigate procedural hurdles.²⁷⁸ The expungement efforts of criminal legal aid attorneys who traditionally did not advise their clients about expungement eligibility until years down the line, coupled with the work of civil legal aid attorneys who generally refrained from engaging criminal justice matters, represents a rejection of the historically-determined distinctions in poverty lawyering and should be replicated wherever possible and appropriate.

274. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 294 (2004); see also Alan W. Houseman & Linda E. Perle, *Representing Individuals with Criminal Records Under the LSC Act and Regulations*, 41 CLEARINGHOUSE REV. 173 (2007) (clarifying the ambiguity around whether Legal Services Corporation funded civil legal aid organizations could represent ex-offenders and confirming that they could represent individuals in civil matters who had criminal records and were no longer incarcerated); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

275. Margaret (Peggy) Stevenson, *Expungement: A Gateway to Work*, CLEARINGHOUSE REV., Mar. 2015, at 1, 8 (noting that “until recently legal aid programs had not been involved in expungement”).

276. Amy Shlosberg, Evan Mandery & Valerie West, *The Expungement Myth*, 75 ALB. L. REV. 1229, 1229 (2012).

277. Cynthia Works, *Reentry—The Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REV. 328, 330 (2003).

278. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2505–06 (2020) (finding that people who obtain expungements have subsequently low crime rates and increases in their wage and employment trajectories but are often unable to get legal representation to help them with the process).

The emergence of holistic defense is a related practice development that is challenging the civil-criminal legal aid divide. This mode of legal representation has garnered much scholarly attention and many institutional supporters. It is premised on the idea that legal aid providers should not just focus on a discrete legal issue (that is criminal defense or civil representation).²⁷⁹ Instead, providers must look expansively at the social and legal needs of their clients and take an interdisciplinary approach that blends civil and criminal practices with social work and social services. This Article provides historical context for why practitioners are laboring across a divide that has some rationales, but also has a fair amount of arbitrariness, and precludes fuller understandings of the legal worlds poor people inhabit. By offering some historical insights on the civil-criminal legal aid divide, this account provides a different set of justifications for the boundary-crossing, holistic defense practices that some have proposed and adopted. These include identifying gaps in services in both fields and attending to them, establishing formal arrangements and referral processes, developing continuing legal education about issues on the other side of the divide, and collaborative programming by criminal and civil legal aid organizations that is geared toward their overlapping client communities and focused on the hybrid issues they face.²⁸⁰

In addition to questions involving the delivery of legal services, there is also an internal and possibly hydraulic financial relationship between civil and criminal legal aid that this account prompts inquiry into that rarely gets addressed. Funding streams can look different for specific legal aid organizations in both areas. Most generally, financing comes from some combination of private philanthropic sources, local and state governments, and in some instances, the federal government.²⁸¹ Yet it remains unclear how funding choices are animated by some of the various assumptions that underlie the division between civil and criminal legal aid. Writing about the United Kingdom, which has experienced its own access to justice crisis, British legal scholar Hazel Genn explains how, “in a fixed justice budget that has to accommodate both the rising cost of criminal justice and the civil justice system, it is civil justice that gets squeezed.”²⁸² Here in the United States, one might reasonably ask: is the rationing of legal services for the

279. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 *FORDHAM URB. L.J.* 1067, 1067-1083 (2004).

280. Prescott & Starr, *supra* note 278, at 336; Smyth, *supra* note 2.

281. See ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* 128-46 (2013); Albiston & Nielsen, *supra* note 42, at 74; BRYAN FURST, *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY* 6 (2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf [<https://perma.cc/F8P9-623A>].

282. HAZEL GENN, *JUDGING CIVIL JUSTICE* 39 (2009).

poor happening *across* fields of civil and criminal legal aid by funders?²⁸³ Are legal aid organizations and public defender offices getting money from the same sources in ways that are synergistic or understood by donors as a zero-sum game?²⁸⁴ Like their predecessors more than a century ago, are private donations predetermined by assumptions about which kind of legal aid is “more important”?²⁸⁵ If so, what does this mean in a world where the civil and criminal legal systems intersect more than their underfunded legal aid analogs are designed to handle? Whether a civil *Gideon* is achieved, or the status quo remains, these are the kinds of issues that this Article’s inquiry hopes to prompt. Explicating the legitimacy and arbitrariness of the civil-criminal legal aid divide can open up new vistas and create space to examine previously unasked questions that do not fit within partitioned categories but may help better address the legal needs of poor people.

Besides academics and practitioners, this Article tees up policy issues that could be shaped by the broader electorate, especially in light of a newfound, popular recognition of the relationship between poverty and crime. The identifiable entry point coheres around campaigns to defund the police. While more complex than its naming suggests, a fundamental and relevant goal of this movement is to shift funding from law enforcement to

283. See generally Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907 (2010) (analyzing the politically contingent nature of indigent defense funding); I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221 (2013) (describing the scarcity of criminal and civil legal services and using bioethical models to propose a system of rationing); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389 (2016) (describing public defender triage strategies); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453 (2011) (discussing the support for the unbundling of legal services to the poor due to the scarcity issues); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 974 (2004) (“Providing low-income people with lawyers will mitigate the harms they might face in the legal system. Nonetheless, given the market distribution of legal services, proposals for providing lawyers to the poor will never eradicate inequality.”).

284. *Compare Funding*, LEGAL AID FOUND. L.A., <https://lafla.org/who-we-are/funding/#:~:text=empty%20by%20default.,Funding,established%20by%20Congress%20in%201974> [<https://perma.cc/5UFN-58DN>] (describing how the office is funded primarily by LSC as well as the County of Los Angeles and several other sources), *with Services*, L. OFF. L.A. COUNTY PUB. DEFENDER, <https://pubdef.la.county.gov/services> [<https://perma.cc/39FS-BTLP>] (describing how the office is funded by the County of Los Angeles).

285. This is not farfetched considering the mismatch between private donors and the public interest organizations they support. See Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035 (2020) (describing how large law firms support public interest organizations through pro bono and financial resources, but often have different priorities and interests than legal aid organizations and their clients); Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 116 (noting that the preferences of elite supporters can lead to the stratification of civil legal services where “the ‘deserving’ and sympathetic poor, such as children or the elderly, may benefit, while vulnerable but less socially appealing clients, such as prisoners, immigrants, or welfare recipients, may be slighted”); Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43 (2017) (describing the tensions between individual donor preferences and the organizational priorities of public interest organizations).

social services that address the conditions of poverty (which sometimes lead to offending or is itself effectively criminalized).²⁸⁶ Like the division between civil and criminal at the heart of this Article, and the gap between poverty law and criminal justice mentioned in the beginning of this Part, supporters of defunding the police recognize the relationship between poverty and criminalization. The enduring reality of criminal and civil legal aid underfunding, along with the poverty-buffering functions of both areas, suggest that they are relevant to the “social service” side of this reform aspiration despite rarely being articulated in this category.²⁸⁷

At the same time, this Article has underlined how the civil-criminal legal aid divide has been buoyed by issues that people can have reasonable disagreements about because of the complexity of this area. The longstanding issue of resource constraints might mean widening the base of funding sources for an expanded legal aid regime (that is taxes) or require thorny but transparent political choices about where to allocate scarce legal resources.²⁸⁸ The fact that the civil-criminal legal aid divide has been influenced by the policy preferences of judges and politicians suggests that state level advocacy may be optimal sites for reform.²⁸⁹ These kinds of reform efforts would have to grapple with deeply-held and compelling beliefs about criminal legal aid being more important than civil legal aid, and vice-versa.²⁹⁰ The bar’s history of protecting its economic self-interests may counsel toward more serious confrontations with alternatives to lawyering (for example technology, reforming unauthorized practice of law rules, and

286. See Amna A. Akbar, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [<https://perma.cc/466M-5QM6>].

287. Alexandra Natapoff, Gideon’s *Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015) (describing the social service function of indigent defense); Weissman, *supra* note 29, at 743 (describing civil legal services “as a welfare benefit subject to the same norms that shape welfare programs generally”).

288. Stephen Wizner, *Rationing Justice*, 1997 ANN. SURV. AM. L. 1019, 1019–20 (observing that “[i]n a world where the availability of legal services for the poor is severely limited, only a small percentage of economically disadvantaged individuals can have the assistance of lawyers in resolving their legal problems” and arguing that “we need to analyze the legal needs of the poor and develop rational plans for allocating what is in fact a scarce resource”).

289. Rulli, *supra* note 15, at 685 (describing how much of the efforts in civil legal aid reform occur “largely in state and local legislatures, state courts, bar sponsored pilot programs, and in the court of public opinion”); Drinan, *supra* note 183 (discussing state-level developments in criminal legal aid); Peter Edelman, *Creating a Good Casebook on Poverty Law*, 48 CLEARINGHOUSE REV. 174, 174 (2014) (arguing that professors and clinical instructors need to teach law students legislation and policy advocacy given political changes in courts).

290. Compare Barton & Bibas, *supra* note 7, at 970, 972 (stating “[c]riminal cases are more important and more complex, and there is less of a role for lawyers in many civil cases,” and “[i]t is far more important to fund appointed lawyers in serious felony cases than it is to provide them in, say, housing court”), with Brito et. al., *supra* note 187, at 226 (“Civil cases can be as consequential, complex, and adversarial as criminal cases, implicating basic human needs such as housing, safety, health, and child custody.”).

pro se reform) that may be seemingly against its interest, but better serve the needs of the poor people, and in some instances, make legal aid attorneys' jobs easier.²⁹¹ These issues, against the colossal background task of shifting funding from policing, illustrate the many challenges and trade-offs involved in improving civil and criminal legal aid. While there are no easy answers, identifying the utility and unhelpfulness of legal categories that impact poor people is critical to optimizing the delivery of legal aid.

CONCLUSION

In 1911, before any locally-funded public defender office opened, social scientist Maurice Parmelee published an article advocating for the institutionalization of this position.²⁹² In the last two paragraphs of the article, Parmelee made a pitch for publicly-funded civil legal aid, which he believed “would prevent a good deal of crime which is now caused by the lack of financial resources.”²⁹³ He admitted that there would likely be cost concerns, but suggested that states would be “be more than recompensed in the long run for this expenditure by the marked diminution in the amount of crime.”²⁹⁴ More than a century later, the form in which such legal aid should take shape—as a right or through philanthropic or legislative beneficence—is still up for dispute, as is Parmelee’s empirical claim that more funding for civil legal aid would reduce crime. The recent recognition that poor people’s social and legal needs exceed convenient legal categories suggests that, at bare minimum, Parmelee identified a relationship between poverty and crime that has seemed obvious to scholars and practitioners, but is betrayed by how legal services are delivered. Although legitimate explanations partially support the civil-criminal legal aid divide, the history of its structure, along with its contemporary limitations, lead to the conclusion that practitioners, scholars, and legislators might be served by reimagining how organized legal aid can better serve poor people.

291. See, e.g., Barton, *supra* note 43; James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241 (2012); J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).

292. Parmelee, *supra* note 72, at 747.

293. *Id.*

294. *Id.*