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The People's Champ?: Legal Aid from Slavery to Mass Incarceration

By

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A dissertation submitted in partial satisfaction of the

requirements for the degree of

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in

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in the

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University of California, Berkeley

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Abstract

The People's Champ?: Legal Aid from Slavery to Mass Incarceration

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This dissertation project explores the historical development of legal aid—a woefully underexplored topic in the deluge of scholarship on criminal justice and social welfare. Most literature tracks the beginning of legal aid to the 1876 development of the Deutscher Rechts-Schutz Verein (German Legal Aid Society) in New York City. The Society was designed to protect German immigrants from unscrupulous employers, landlords, and loan sharks. It evolved into the New York Legal Aid Society in 1886 and provided a template for cities across the country. Standard treatments of legal aid either remain mum on the issues of race and ethnicity or suggest that legal aid offices provided services to individuals irrespective of social identity.

My project uses a variety of sources to reconsider the historiography on legal aid. By identifying a variety of unacknowledged legal aid institutions—from the Pennsylvania Abolitionist Society of the antebellum era to the ethnic mutual aid societies of the Progressive Era—my project demonstrates how legal aid is not just about class, as common orthodoxy suggests, but is deeply woven in the social divisions of race, gender, ethnicity, and citizenship. This revised interpretation of legal history challenges assumptions about public defenders and drives the theoretical contributions of my project.

The People's Champ advances the theoretical terrain by looking at indigent defense as a crucial, but underappreciated component of the welfare state. Like welfare, criminal legal aid often entails a lukewarm commitment to social justice by the federal government that establishes entitlements to services while devolving responsibility to the local and state level, which results in wildly different expressions of social inequality. I argue that indigent defense has always been and continues to be animated by competing interests and motivations that include: serious investments in egalitarianism and the rule of law; intraprofessional and societal contestation around lawyers' ethical obligations to the poor; the pesky persistence of racialized, classed, and gendered social control; the political economy of punishment; and efforts to create the symbolic appearance of justice in order to legitimate the legal system. I also explicate the importance of ethical motivations that cross the conservative-liberal divide, the role of fiscal austerity, and the populist ambivalence toward the rights of individuals accused of crimes.

Since the government has the power to prosecute and punish, and because most trials between the state and the average defendant are inherently unequal, indigent defense is an

important index of how the government and the legal profession manage their ethical responsibilities for the criminally accused. Taken as whole, I argue that the historical and contemporary study of public defenders offers critical insights into social welfare policy, the ebb and flow of penal changes, and mass incarceration.

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INTRODUCTION

The poor man cast into prison, no matter how innocent, is helpless and hopeless. He cannot cry out to justice, for nobody hears his cry. He is the prey of policeman, the captive of the jailor, the butt of the prisoners, the plaything of young lawyers...His protestations of innocence are drowned by the ribald jeers of hardened criminals... He dares not assert his innocence for fear of a double sentence at the end of a trial—a trial, which he knows will be a travesty. Therefore he pleads guilty and disappears from human view.” W.O. Howard in Mayer C. Goldman’s (1919) *The Public Defender: A Necessary Factor in the Administration of Justice*.

In 2008, a repugnant story rocked Pennsylvania headlines and garnered national media attention. Dubbed as the “kids for cash scandal,” this legal outrage occurred in Luzerne County, and harks back to the Gilded Age days of overt, unadulterated political corruption. A federal court convicted the two culprits, former judges Michael Conahan and Mark Ciavarella Jr., of various crimes related to a kickback scheme. The scheme entailed \$2.6 million in payment from a privately-run juvenile detention center, PA Child Care, in exchange for harsh sentences that would bring sentenced youth into the facility. In his capacity as president judge of the Court of Common Pleas for Luzerne County, Conahan ended funding to the local youth detention facility and had juveniles sent to PA Childcare while Ciavarella imposed unusually harsh sentences on minors for petty behavior between 2003 to 2008. Ciavarella sentenced approximately 5000 juveniles in that time frame. Much of the discourse on this egregious injustice revolved around seemingly abstract ideas about legal ethics, judicial immunity, and analogies to the “prison industrial complex.” But a particularly under-discussed theme in this railroading of youth into the penal system was legal aid. An estimated half of the juveniles sentenced in the county appeared without legal counsel by choice, coercion, or circumstance.¹

In some instances youth waived their right to an attorney out of intimidation, ignorance of the legal consequences of that decision, or unawareness of Ciavarella’s heavy-handed disposition. In other instances, youth appeared in court without counsel because the Luzerne County Public Defender was simply under-resourced or outright negligent, depending on who you ask. The Juvenile Law Center, a non-profit child welfare legal aid organization, was responsible for initially highlighting the irregularities in Ciavarella’s courtroom. This attention led to an FBI and IRS investigation and helped with the subsequent expungement of more than 2200 youth who were convicted by the disgraced judge.²

This incident illustrates some of the many paradoxes of legal aid in a flawed criminal justice system. The mix of dedicated public interest attorneys, under-resourced and/or negligent public defenders—along with routine violations and disregard for due process—all influence the United States’ current penal disaster. As the opening comments suggest, the unfortunate reality is that unless it impacts a loved one or the self, most people do not care about criminal legal aid for the indigent. Of course, like most public policy interests there is a small cadre of activists, practitioners, and scholars who have substantive commitments to this issue. But the overall the scholarly, public, and policy attention on legal aid pales in comparison to other forms of social welfare such as

¹ The most complete analysis of this scandal is offered in Ecenbarger (2012).

² Id.

medical services, education, food and shelter programs, and social insurance programs (e.g. public assistance, social security). Legal aid is a social welfare provision but has not figured prominently into discussions on the welfare state. It is a fringe topic for socio-legal experts and largely out of the purview of penal scholars. Despite a rich assemblage of historiographical literature, primary sources, and archival data, historians have left the topic virtually untouched for three decades.³ And even as students of Foucault and scholars of race, class, gender, and ethnicity have fruitfully pointed out the thorny issues confronted by bureaucrats and clients in the “helping professions,” the role of legal aid for the indigent has continued to be woefully understudied.⁴ The legal regime, specifically law schools and the powerful private bar have ghettoized legal aid as a profession and as a scholarly area of inquiry. Simultaneously, the media often depicts public defenders as either incompetent, acquiescent bureaucrats, or as unscrupulous weasels who search for legal loopholes and technicalities to secure undeserved acquittals. It is not that this dichotomy is not an empirical reality. The problem is that thoughtful and careful considerations of this position are often sparse.

In the pages that follow, I argue that legal aid has been and currently is an essential plank in the American criminal justice machinery. While this project is concerned with and invested in various inquiries, it is primarily prompted by two questions. What can the history of legal aid tell us about the development of the criminal justice system, as well as its general and unique properties? What is the role of public defenders in a criminal legal system that has been acknowledged as imperfect at best and grossly unequal at worst? From its unacknowledged roots in the antebellum era to its current manifestation as an overburdened bureaucracy tasked with the duty of providing legal counsel to society’s marginalized, legal aid is a perfect illustration of the intricate tensions between reformist ideals and social control imperatives. While legal aid has been understood as a service that is ostensibly about class, a closer reading of history and a thicker qualitative description of this line of work reveals that its development and existence is linked to the empowerment and subjugation of groups along the lines of race, ethnicity, gender, and nationality. Notable constituencies for legal aid lawyers discussed in this dissertation include the post-civil war freedman and woman, the southern and eastern European immigrants of the Gilded and Progressive Age, the “deserving” and “undeserving” poor of the Depression and post-New Deal era, and the black and brown mosaic that has constituted the clientele of public defenders since the 1960s. As a crucial component to criminal justice operations, I contend that legal aid offers insight into five important areas: the changing nature of social welfare; the kinds of expectations citizens should have of the state; discursive associations of particular groups with criminality and morality; marginalized groups’ fraught relationship with institutions of punishment; and the force of the law as both an equalizing institution and as a symbolic charade meant to

³ Recent additions on this topic come from Batlan (forthcoming) and Johnson (2013) but the last substantive historical treatment of legal aid is presented in McConville and Mirsky (1987).

⁴ On the knotty issues faced by female bureaucrats of color in the medical system and welfare system see Bridges (2011) and Watkins-Hayes (2009), respectively. For a similar, but broader discussion on the intricacies of street level helping bureaucracies, specifically police, teachers and counselors see Maynard-Moody and Michael Musheno (2003). For Foucaultian takes on the multifarious nature of help, empowerment and the state see Cruikshank (1999), Li (2007), Sharma (2008), and Fairbanks (2009).

protect the status quo. Consequently, I contend that a historical description of criminal legal aid has much to offer scholars of law and society, African American Studies and critical race theory, legal and social history, sociology, and social welfare.

Thematic Significance

Roscoe Pound's (1910) notable distinction between "law on the books" and "law in action," is a central concern to law and society research. As a federal entitlement that is intimately connected to both the philosophical and practical issue of due process, legal aid provides useful insight into this field of scholarship. As areas of inquiry concerned with domination and the intersections of race, class, gender, and nationality, African American Studies and critical race theory should find indigent defense important because of its direct impact on marginalized groups. Poor, black and Latino men constitute a disproportionate percentage of legal aid clients, whereas women and racial minorities comprise a disproportionate number of legal aid attorneys (facts that also offer additional insight into the distribution of resources and the stratification of the legal profession). Historians benefit from this discussion because, as I consistently point out, the current historiography on legal aid is not only imprecise but it is silent on a host of issues that have been vital to the legal system. From the work of Karl Marx to William Julius Wilson, the interface of individual agency and social structure has been a central feature in sociology. The fraught relationship between genuinely-intentioned legal aid advocates and a legal system that relies on class, race and gender subordination has much to offer the discipline. Finally, legal aid is important to social welfare not only because it entails a social welfare good, but also because of its crucial role in the criminal justice system, which many scholars have rightfully categorized as a de-facto poverty management program and form of governance (e.g. Beckett and Western 2001; Simon 2007; Wacquant 2009; Soss et al 2011). A deeper appreciation of legal aid can enrich our understanding of a social institution, which in theory, is supposed to serve as a safety net for the criminally accused.

Scholarly Significance

The Weberian observation that the "monopoly on violence" is a core feature of the state and essential to governance signals toward criminal legal aid's *theoretical importance*. This monopoly is legitimated by a legal system that gives the state the power to prosecute and punish. This authority deserves careful scrutiny given the inherently unequal nature of criminal trials. The average citizen accused of a crime is poor (Western 2007) and their financial and legal resources pale in comparison to the government's. This point is so indisputable that the federal government required that states furnish indigent criminal defendants with legal counsel fifty years ago in the landmark case *Gideon v. Wainwright* (1963). Thus, legal aid offers insight into a social welfare provision that is essential to the criminal justice system. From its charitable roots to its currently public manifestation, criminal legal aid is *historically* important because it played a key role in development of the modern administrative penal state and as a result, can tell us about the current crises of incarceration.

Legal aid is *empirically* important because it entails the distribution of resources and as the torrent of wrongful DNA and death penalty convictions demonstrate, entails the lives and deaths of real people. Perhaps less fatally, but equally tragic is the fact that

competent and incompetent public defenders can play key roles in incarceration, which is shown to have deleterious consequences on prisoners families.⁵ In 2007, \$2.3 billion was spent on public defender programs, with state and county-based programs handling 5.5 of the approximately 5.6 million cases nationwide (Langton and Farole 2010; Farole and Langton 2010). Put succinctly, the majority of people who are accused of a crime receive publicly funded legal aid and they are typically poor whites, blacks and Latinos. An inquiry into legal aid sheds light on a key intermediary between the accused and the state.

Finally, criminal legal aid is important on a *practical and policy level* because of the current economic, political, and social environment. The government's economic imperative of fiscal austerity combined with the political predisposition toward shrinking social welfare entitlements, which many have dubbed as central features of neoliberalism, could be disastrous for future "clients" of public defenders. Of course many of these individuals have been and will continue to be factually guilty of the crimes they are accused of committing. But many of them are wrongfully convicted and ensnared by the criminal justice system not by factual guilt, but because they are unfortunate enough to: be arrested because of arbitrary banishment practices used to remove "disorderly" people from certain public spaces; be subject to police departments' corrupt use of duplicitous "snitches" or coercive interrogation practices; encounter overzealous prosecutors; or have mounting financial debt from legal sanctions.⁶ Many of these innocent people rely on public defenders, and if they are fortunate, they do not encounter the overburdened, underresourced, plea-bargain compliant attorneys that sometimes constitute another stage in the criminal justice system's gauntlet of errors (Bach 2010). In sum, a better comprehension of legal aid is crucial to understanding one of the key institutions of inequality in the United States.

Chapter Breakdown and Arguments

This dissertation consists of primary sources, government documents, archival materials, legal cases, and secondary sources. I argue that legal aid has and always will be animated by competing interests and motivations that include: investments in the rule of law; the pesky persistence of classed, racialized, and gendered social control; the political economy of punishment; serious commitments to egalitarianism; and desires to offer the symbolic appearance of justice to legitimate the criminal legal system. Chapter One challenges the conventional wisdom that institutionalized legal aid began at the eve of the Progressive Era, and instead provides a different historical point of departure. I locate the origins of American organized legal aid in the antebellum era. This chapter contends that abolitionist efforts to provide legal assistance to "fugitives" who escaped enslavement—the historical analogues to today's indigent poor—constitute an embryonic moment in legal aid schemes. Rather than suggest that the institution of slavery *caused* the

⁵ The extra-penological consequences of incarceration are explored in Braman (2004), Comfort (2008), Foster and Hagan (2009).

⁶ The reader interested in these issues should consult Beckett and Herbert (2009) on banishment; Leo (2008) on police interrogations; Natapoff (2009) on the use of criminal informants; and Harris et al (2010) on legal debt. There is also a healthy "wrongful convictions" literature that looks at the "errors" in justice. For historical and geographical range see Borchard (1932) and Brandon and Davies (1973).

development of legal aid, I make a much more modest, albeit bold claim that it is in these abolitionist organizations, most notably the Pennsylvania Abolition Society (PAS), that we see the genesis of some of the productive and problematic anxieties of legal aid advocates. The second part of this chapter highlights the criminal legal aid efforts of the Freedman's Bureau, another iteration of legal aid that was identified by a few insightful historians in the 1970s and 1980s only to be underappreciated in much of the subsequent scholarship on criminal legal assistance.⁷ Much like the PAS, the Freedman's Bureau also offers insights into the precarious and complicated nature of legal aid. Here I explicate the meaning and consequences of the federal government's lukewarm and at times perfunctory commitment to equality for marginalized groups. I describe how this larger ethos influenced the administrative impulses and tendencies of Bureau workers that included, but is not limited to genuine concern for the plight of freed men and women, naive investments in legal rhetoric and ideals, and outright paternalism. Taken together, the proclivities and attitudes of the PAS and Freedman's Bureau legal sectors provide important preludes to subsequent legal aid schemes as well as the current state of legal assistance.

Chapter Two moves to the north and the cognate period of the Gilded Age as well as the subsequent Progressive Era. Building on the work of feminist legal scholars, I highlight the gendered origins of legal aid by discussing the Working Women's Protective Union (est. 1863) and the Protective Agency for Women and Children (est. 1883), both of which were absorbed by Legal Aid Societies of New York and Chicago, respectively, and undervalued in the scholarship on charitable legal assistance. Integral to this discussion is the fact that women in both of these organizations conducted a range of legal assistance (investigations, court watching, legal advice) that became spurned as "social work" with the professionalization and masculinization of legal practice. It is here that we see the development of two schools of thought on what lawyers do. The first is a more conservative perspective that sees a lawyer's job as confined strictly to legal work. The other is a more expansive approach that sees legal labor as constituting concern for the juridical *and* social consequences of the indigent. Again, these are themes that are quite prevalent today in public defense work as some public defenders deride the notion that their labor is a form of social work while other actively embrace this idea.

Chapter Three focuses on the Progressive Era and continues where the historiography on the "legal aid movement" begins. It focuses on how the institutionalization of public defender and legal aid offices was undergirded by seemingly genuine criminal justice reform efforts but garbed in alarmist, nativist rhetoric. Criminal justice reformers and the elite members of the bar were concerned about the mass immigration of Jews, Irish, Catholics, and Italians as well as these groups' subsequent difficulties with the legal system. Reformers and philanthropists saw institutionalized

⁷ This connection is explicitly made by Westwood (1970), Nieman (1979), and Rapport (1989). A much more common connection is made by scholars interested in understanding the Bureau's civil legal work as well as its broader social welfare imperatives. For some interesting recent takes see Penningroth (2003) on freed people's interaction with Bureau Courts for civil proceedings and matters, Goldberg (2008) on the Bureau's grudging forms of social assistance and its social closure of blacks, and Farmer-Kaiser (2010) on the intersection of race, gender and citizenship as well as the Bureau's profound impact on black women.

legal aid as an instrument of Americanization, a solution to the administrative inefficiency, and more importantly, as a palliative that would curb the prospect of anarchist and Bolshevik revolution. For these reformers, legal aid initiatives legitimized a legal system that was sullied by the corporate and political corruption of the Gilded Age and threatened by the anarchist activity of the early twentieth century. Contrary to some of the ahistorical perspectives on the criminal justice system that describe plea-bargaining, efficiency, and the state's ambivalent commitment to legal aid as unique to today, I show how non-adversarialism and Taylorist efficiency were embedded into the design of legal aid in ways that alter fundamental theories of punishment, jurisprudence, and penal inequality.

Chapter Four similarly explores the Progressive Era, but explodes the historiographical myth that legal aid societies were open to all irrespective of race and ethnicity. It theorizes the archival and discursive absence of racial minorities from legal aid discourse despite the historically indisputable connection between ethnoracial identity and indigence. The chapter highlights how African Americans, Chinese immigrants, Chinese Americans, Mexicans, and Mexican Americans developed their own legal aid schemes in the context of exclusion from mainstream organizations. Some of these legal aid strategies included benevolent associations, mutualistas, churches, consulates, and legal advice columns in the ethnic press. Concomitantly, it shows how intra-racial tensions, particularly in the areas of class and citizenship, sometimes blunted their goals and led them to privilege “respectable” issues of segregation and education. These biases led them to cautiously and sometimes outright ignore issues of criminal justice inequality in ways that are eerily similar to the policy preferences of some contemporary minority civil rights organizations.

The fifth chapter highlights the ideological, jurisprudential, and practical currents that have influenced legal aid from the 1930s to the 1960s. Ideologically, I describe how communist fears and unfavorable characterizations of legal aid schemes as “socialized law” hampered the movement's development until the 1960s. I offer a parallel jurisprudential discussion on the implications of the famous Scottsboro Boys (1932) case (*Powell v. Alabama*) as well as subsequent landmark Supreme Court cases, such as *Gideon v. Wainwright* (1963), which required that indigent criminal defendants be provided counsel at trial. The conclusion discusses the implications of post-*Gideon* developments and the contemporary landscape of aid. Much like the institutionalization of legal aid societies in the Progressive Era, I argue that legal elites and (in this case the High Court) created legal aid as a social welfare provision with the seemingly genuine intention of expanding civil liberties and due process protections, but also as a way to offer legitimacy to a legal system that was being inundated with rising street crime, urban riots and social protest of the 1960s. On a practical level, I suggest that it is no coincidence that with the bureaucratization of public defender offices post-*Gideon* came rapid increases in incarceration. The tragic reality is that, despite the commendable efforts of progressive legal attorneys in the 1960s and 1970s, this bureaucratization made it easier for public defenders to plea bargain on a mass scale and was one of the unintended logics that aided in our current incarceration binge.

While I pay close detail to the theoretical implications and scholarly debates on particular themes, I subsume these discussions to the footnotes to avoid distractions and to make the text accessible to the reader who is unfamiliar with these important, but

sometimes obscure debates. Curious readers can make use of these extensive footnotes. The history offered here is far from definitive. But it does highlight some important omissions and trends that deserve closer historical and theoretical scrutiny. Moreover, this discussion does not describe the full social world of legal aid, but it does call attention to some important practices and perspectives that may help reframe discussions on the penal system's social and economic unsustainability. It is my hope that this project can contribute to a deeper scholarly and public comprehension of why this particular institution of inequality persists.

CHAPTER 1: LEGAL AID'S AMERICAN ORIGINS IN THE INSTITUTION OF SLAVERY

In 2013, the film *12 Years a Slave*, an adaptation of Solomon Northup's "slave narrative" of the same name, rocked the cinematic world. North was an African American man who was born in New York and lived in the state with his wife and three children as a free family. Northup was a skilled violinist and was approached in March of 1841 by entertainers who offered him temporary employment in Washington, D.C. Northup accepted the offer. While he was in the nation's capital, he woke up one day drugged, chained, and kidnapped. He was eventually sold into slavery in Louisiana. Northup spent twelve years on various plantations experiencing the cruelties and violence of human bondage. During this time period Northup told no one about his formerly free status but yearned for some way to reach his family and friends in New York. One day Northup found a pathway to freedom.

Solomon witnessed an argument between Edwin Epps, the cotton-planter that he toiled for, and Samuel Bass, a nomadic, Canadian-born white carpenter who contracted his services to Epps. Bass, whom Solomon described in his memoir as "liberal to a fault" argued with Epps about the inhumanity of slavery (Northup 1853: 265). Bass claimed that there was "no reason nor justice in the law, or the constitution that allows one man to hold another man in bondage...And what difference is there in the color of the soul? Pshaw! The whole system is as absurd as its cruel. You may own niggers and behanged, but I wouldn't own one for the best plantation in Louisiana" (Northup 1853: 268). After noticing these anti-slavery proclivities, Northup confided in Bass. Northup penned, "I spoke of my wife and children, mentioning their names and ages, and dwelling upon the unspeakable happiness it would [bring] to clasp them to my heart once more before I died. I caught him by the hand, and with tears and passionate entreaties implored him to befriend me - to restore me to my kindred and to liberty—promising I would weary Heaven the remainder of my life with prayers that it would bless and prosper him" (Northup 1853: 273). A sympathetic Bass agreed to send a letter to Solomon's family and friends in New York, an action that could only be completed stealthily by a white person. At this point in the film version of the story, attorneys come to the plantation, retrieve Solomon from the plantation, and he is happily reunited with his family in a few minutes. But there is a little more nuance at this point of Northup's tumultuous journey that has gone unexplored.

In Solomon's case, as was the case for many individuals who were able to escape slavery, attorneys were integral to his return to freedom. His letter informed his friends and family of his enslavement and requested his freedom papers. In its early treatment of this case, the *New York Daily Times* (1853:1) noted that Henry B. Northup, a white New York attorney whose family held Solomon's father in bondage and was akin to a "relative," was crucial to Solomon's legal assistance. Henry assisted by "procuring evidence" and "retaining counsel as were necessary to secure the freedom of Solomon" (*id.*). Henry Northup met with several government officials, including Supreme Court Justice Samuel Nelson. They provided him with "strong letters to gentlemen residing in Louisiana, urging their assistance in accomplishing the object of restoring the man to freedom" (*id.*). Future Supreme Court Justice Salmon P. Chase, who had a reputation for being an abolitionist lawyer who provided legal aid to people who were formerly in bondage, also

assisted in securing Solomon's freedom. The film's audience would know little about these details. Similarly, scholars who have familiarity with the book might underestimate the importance of this legal assistance. But the kind abolitionist legal aid that was provided by Henry Northup played a significant role in challenging the law of slavery and is important component of legal history. This type of legal aid is a central component to this chapter.

Pennsylvania Abolitionist Society

The Post-revolutionary moment, and the beginning of the American nation provide an excellent starting point for the development of legal aid in the criminal justice system. After the American Revolution assumptions about the nature of punishment began to change. The populist penal sentiment moved from physical punishment on the body to a focus on incarceration, which, up until then served a temporary purpose of housing the criminally accused until their sentencing. Criminal jurisprudence began to mature from its crude colonial context. The proliferation of lawyers and legal education helped buttress slave plantation discipline and informal justice while protecting the predominant labor interest of human property via chattel slavery for blacks and indentured servitude for poor whites (Meranze 2008).⁸ Indeed, some scholars have even argued that chattel slavery and the social control of blacks was the major impetus for the transformations in criminal justice administration as well as the development of the bar (Du Bois 1903:177; Flanigan 1974; Hadden 2001; Newman 2002: 28-29).

The most influential analyses of legal aid societies and associations tend to start during the Progressive era with the development of the *Der Deutsche Rechtsschutz Verein* (German Law Association) in 1876, which was designed to offer legal aid to German immigrants to New York City.⁹ While informative in nature, a closer look at cognate literature—specifically abolitionist scholarship and legal history—suggests that these examinations are a century late. I argue that The Pennsylvania Abolitionist Society (PAS) provides an earlier example of a documented American institution that offered organized legal aid. The organization focused its energies on offering assistance to free and “fugitive” blacks, as well as abolitionist sympathizers accused of helping “fugitives.” Twenty-four men, the majority of whom were Quakers, founded the *Pennsylvania Abolition Society for the Relief of Free Negroes Unlawfully Held in Bondage and for improving the Condition of the African Race* in 1775 in Philadelphia (PAS 1875). Up until this point, legal aid manifested itself through the individual work of lawyers and philanthropists.

What galvanized more organized effort in the Quaker community was the 1773 case of an Indian woman who declared that she and her children were free after traveling with her “master” from New Jersey to Philadelphia, a free territory (Turner 1912). A

⁸ The idea of that post-Revolutionary American jurisprudence sought to promote economic growth is presented in Morton Horwitz' (1977) classic legal history text *Americanization of the Common Law*. For a discussion on antebellum criminal law creation as it relates to poor whites and vagrancy laws see Merritt (2011). For an analogous discussion on blacks, slavery, and the criminal justice system see Schwarz (1998).

⁹ This includes the seminal studies of Smith (1919), Auerbach (1976), Katz (1982) and even Supreme Court Justice Ruth Bader Ginsburg (2001).

group of Quakers, led by Israel Pemberton, provided the woman's legal defense. Although they lost two years and the case, the incident had an impact on the group and created a template for future organized legal efforts. The outbreak of the American Revolution interrupted the development of the society and it suspended its regular meetings during the war. The Society's activity resumed in 1784, with Benjamin Franklin serving as president starting in 1787. Like many of the anti-slave societies that paved the way for (New York Manumission Society, Wilmington Abolitionist Society, Boston Female Anti-Slavery Society) PAS is typically noted for its anti-slavery legislative lobbying, dissemination of anti-slavery literature, investigations of anti-slave trade law violations, and advocacy of blacks' social, political, and economic interests."¹⁰ But an underappreciated aspect of their work was their legal aid efforts, much of which dealt with black freedom claims and kidnapping cases. This work represents an early instantiation of *cause lawyering*.¹¹ In the decades leading to the war the courtroom was an important battleground between the North and the South. Abolitionist legal aid and slavery were undeniably central features to this struggle. Understanding abolitionist lawyering adds complexity to lay and scholarly understanding of law and inequality, the origins of legal aid, the relationship between race and bondage, and the legal underpinnings of the Civil War.

This legal aid was particularly important because Pennsylvania was the first state to pass a substantive piece of anti-slavery legislation with its 1780 Gradual Abolition Act. Pennsylvania was flanked by two states that did not pass similar legislation until almost two decades later (New York in 1799 and New Jersey in 1804) as well as the state of Maryland, which did not end slavery until 1864. Consequentially, Pennsylvania's geographical position near these states and the Mason-Dixon Line made it a place of refuge for blacks who escaped bondage. African-American abolitionist and businessman James Forten proclaimed that Pennsylvania was "the only state in the union wherein the black man is treated equally to the white" (cited in Newman 2008:55).

At the same time, the Quaker State was also a primary destination for ravenous slave-hunters, traders, and owners seeking to retrieve "fugitives" or any other free blacks. This was especially true after the Fugitive Slave Act of 1793 and the 1808 prohibition on the international importation of slave labor. Kidnapping (or "negro stealing"—a term both abolitionists and slaveholders levied on each other) certainly created a culture of illegality, but Pennsylvania's relatively sympathetic position toward slavery and abolition allowed it to create legal mechanisms to protect fugitives and free blacks, which often led to intense litigation. PAS "hired more lawyers and represented more blacks in court at the close of the eighteenth century than any other abolitionist organization" and from 1800 to 1830, a third of PAS' cases were related to kidnapping (Newman 2002: 69; Newman

¹⁰ It goes without saying that advocacy had paternalist inclinations. More in depth discussions of the New York Manumission Society are found in Harris (2003). On abolition societies in Delaware and Boston see Essah (1996) and Hansen (1993), respectively.

¹¹ Cause lawyering usually connotes a form of legal practice where lawyers attempt to use their skills to promote a particular cause that they are invested in it and sees as part of the improvement of society (which is typically opposed to the traditional mode of lawyering which serves clients). Of course there are instances where the larger cause and immediate needs of the client are not necessarily opposed.

2008; 55). The Society developed a national reputation for providing legal aid to blacks formerly held in bondage. This service was crucial because much of the nation did not have empathy for blacks who escaped slave labor. In his discussion of kidnapping cases involving formerly enslaved and free blacks, Union Army officer Edward Needles (1848) notes:

In such cases, ignorance or inability to prosecute their claim to freedom, unable to plead for themselves, and perhaps, none to plead for them, their chance for redress was very uncertain. Funds also were requisite, of which they were destitute; legal characters in general were not over forward in pleading for them before magistrates. ‘They were only negroes’ - poor and despised - their cause unpopular, and nothing to be gained by advocating their rights, but the ill-will and malice of their surrounding enemies.

Indeed, as Needles comments suggest, despite the existence of abolition societies and some whites’ commitment to racial egalitarianism, anti-black attitudes did not have the geographical boundaries that the typical, antebellum North vs. South binary might suggest.¹² Accordingly, there was a generally unsympathetic environment for blacks’ legal woes.

This apathy was compounded by the relative absence of blacks from juries, as witnesses in cases where a white man was a party, from the bench and the bar—all of which essentially made voluntary legal aid the only hope for blacks. Moreover, as historian Leon Litwack (1961:95) has argued, blacks’ unequal access to the judicial process contributed to the disproportionate confinement of blacks to penal institutions. Northern free states often maintained penal populations that were wildly incommensurate with their general populations and created a legal climate where an accusation against a black person “was equivalent to a conviction” (Litwack 1961: 96). The empirical presence of blacks in the criminal justice system offered credence to biased beliefs that emancipation would curb disorder while providing more progressive northern whites with evidence for the need of a gentler form of racial subordination (e.g. segregation).¹³ All of this created an environment that required various forms of systematized legal aid in criminal law as well as other realms legal life.

The kind of assistance offered by PAS, as well as comparable organizations includes and arguably exceeds the kind legal aid offered in contemporary American law. For plaintiffs, abolitionist lawyers investigated violations of slave-trade (after the national 1808 prohibition) and aided black family members and friends attempting to liberate

¹² This geographical indifference at best and hostility at worst is also evidenced by the scores of antebellum race riots in free, northern and frontier cities (e.g. Philadelphia in 1834 and 1842, Cincinnati in 1836, 1841, and 1843). The populist sentiment of maintaining a system of racial domination of non-WASP’s existed across the ante-bellum country and was undergirded by a commitment to maintaining the economic status quo; in the South it was animated by a commitment to slavery whereas in the North it was driven by the prevention the economic competition from free blacks. See Litwack (1961), Fredrickson (1982), Pessen (1980), Slaughter (1994), Rael (2003).

¹³ Muhammad (2010) explains how similar assumptions ideas about black criminality along with racially animated statistics were central to the development of modern urban America. A broader discussion of the eugenic origins of statistics is examined in Zuberi (2001). For a more contemporary look at “bad statistics” and public opinion see Best (2001).

loved ones who were kidnapped. On the defense side, abolitionist lawyers for the PAS negotiated (and in a few instances outright bought) escaped slaves' freedom or bargained it down to indentured servitude. PAS bureaucrats also traveled to other states to deliver kidnapped person's freedom papers, as was the case in Salomon Northup's *Twelve Years a Slave*, and even created a collated master file of indentured contracts to protect black servants from masters who attempted to duplicitously break their agreements (Turner 1912; Winch 1987; Newman 2002). PAS also held manumission, birth and marriage certificates of free blacks and paid for the expenses of witnesses who were traveling to testify for blacks attempting to maintain their free status (Wilkinson 1944). More broadly, PAS lawyers espoused a more conservative approach to attacking racial inequality that varied from the immediate, "militant abolitionism" that characterized anti-slavery mobilization closer to the Civil War (Aptheker 1941). Indeed, in one case, a Pennsylvania court noted, "it was no part of the design or objects of this benevolent society, to protect or rescue runaway slaves from the claims of their masters.. So far as has come to our knowledge or information, this society has acted on the philanthropic principles of its institution, and none other, never interfering with the rights of property."¹⁴ Rather than push the limits of the law, these attorneys worked within legal frameworks, respected southern property rights and fugitive slave laws, and instead focused on "using loopholes, technicalities, and narrow legal opinions to liberate African Americans on a case-by-case basis" (Newman 2002:61).¹⁵ Along with the PAS, abolitionist societies in Delaware, Maryland, and Virginia helped address kidnapping by certifying that manumissions were appropriately documented. They also maintained their own records in case they were needed for future kidnapping cases and freedom suits. The society in Delaware publicly listed manumissions each month in the Wilmington newspaper, the *Mirror of the Times and General Advertiser* (Wilson, 1994: 86-87). While abolitionist lawyering had limited impact, it served as a crucial resource for blacks in need of legal assistance and helped lay the foundation for subsequent jurisprudential challenges to slavery as an institution and its corresponding web of laws.

Political Environment of Abolitionist Lawyering

The political environment encountered by abolitionist lawyers provides a deeper appreciation of antebellum legal aid. The peculiar legal identity of blacks, especially in the ante-bellum South, had a host of contradictory features. Civilly, although there were exceptions across states and localities, blacks generally could not make or enforce contracts, did not have their marriages recognized by the state, and could not be witnesses

¹⁴ *Johnson v. Tompkins*, 13 F. Cas. 840, (C.C.E.D.PA. 1833).

¹⁵ As we will see much later in the dissertation, this strategic operation *within* the law has different expressions and interpretations throughout history. In the Progressive and Gilded Ages, lawyers used a similarly conservative approach, attempting not to upset the legal regime. With the rise of the administrative state, and the bureaucratization of legal aid, these same strategies (e.g. focusing on technicalities and loopholes) led to negative characterization of public defenders' (along with criminal defense lawyers more generally) as shysters who get criminals off based of legal technicalities as opposed to factual innocence.

against whites in court;¹⁶ some even argue that blacks had no legal identity.¹⁷ Conversely, blacks had a full identity in criminal courts and were seen as agents with full volition and responsibility for their actions. Abolitionist William Goodell (1853: 309) famously lamented, “The slave, who is but ‘a chattel’ on all other occasions, with not one solitary attribute of personality accorded to him, becomes ‘a person’ whenever he is to be punished! He is the only being in the universe to whom is denied all self-direction and free agency, but who is, nevertheless, held responsible for his conduct, and amenable.”

Oddly enough it was this liminal status that created a loosely, *informal* right to counsel for some blacks held in bondage. Since individual plantation owners and southern slave societies had pecuniary interests in human bondage, special “protections” were made to offer black defendants a perfunctory modicum of due process (particularly in cases that did not fall into the egregious categories of murder or rape). Historian of southern criminal procedure Daniel Flanigan (1974: 554) notes that in capital cases, this right to counsel entailed informal arrangements with lawyers or forcing masters to hire a lawyer (with court liens being placed on the slaves of delinquent slave-owners) (also see Trexler 1914: 211 Taylor 1958: 235). This was significant because: this right to counsel was not offered to poor whites in some southern states. Moreover, there were “no statutory guarantees of the right to counsel, and constitutional guarantees were unheard of” (Flanigan 1974: 554). But this example of legal protection for blacks should not be read as a form of altruism. “It did not reflect any erosion of proslavery conviction in the South; for in protecting a slave's person one also protected a master's property, while at the same time offering refutation to the abolitionist indictment of slavery as totally unjust and inhumane” (Fehrenbacher 1981). This example is also important because it points to one the many contradictions in the development legal aid. In the few states where an informal right to counsel existed it was exclusively in the interest of the institution of slavery. As the country inched toward war blacks and abolitionists who challenged the institution became increasingly prohibited from bringing legal claims.

Similarly, legal aid offered to blacks in the antebellum era is unique, and perhaps underexplored because of fugitive law's existence at the awkward intersection of property rights and criminal law, with scholarly analyses focusing on these cases as principally about property. To explain this awkward intersection, as well as its impact on legal aid, a brief discussion of fugitive law is necessary. The Fugitive Slave Act of 1793, which initially proposed that “fugitive slaves and servants be delivered up like criminals” (McDougall and Hart 1891: 14) was a clause in the U.S. Constitution that created a legal guarantee that slaveholders could recover “runaways” across state borders and posed fines for individuals (black or white) who prevented the recapturing of a “fugitive.” The clause, along with the 1808 prohibition of the international slave trade, helped foment the domestic slave-catching industry by giving slave-owners the ability to go into to northern

¹⁶ There are exceptions. For or a discussion on property ownership and extra-legal customs of blacks in the antebellum South see Penningroth (2002); for a review on blacks knotty relationship with the law during this time see Edwards (2007).

¹⁷ There is up for dispute, as there is a healthy debate on the legal identity (or lack thereof) of antebellum blacks. For some representative takes see Wren (1985) and Higginbotham and Kopytoff (1989).

states to seize fugitives as well as free-blacks into slavery since the latter could not testify in court and had few opportunities to prove their freedom.

States responded by passing “personal liberty laws” which served three purposes: protecting free blacks from being kidnapped; insulating sympathetic abolitionists from legal liability; and perhaps most instrumentally, shielding northern states from southern, pro-slavery ideological encroachment into their territory. These personal liberty laws varied across states, but often included strict punishments for individuals who illegally kidnapped free blacks from the state (often imposing fines and/or incarceration); provided legal protections such as jury trials or writs of habeas corpus for people accused of being “fugitives;” prohibited state bureaucrats from enforcing the Fugitive Slave Act or using penal facilities for fugitive slave cases; and, created additional requirements for slave-owners who wanted to retrieve blacks. Abolitionist lawyers used these loopholes to their advantage in court cases (Parker 1861; Morris 1974). Despite being ostensibly about “property,” various constituencies were subject to the criminal justice apparatus. In states that did have personal liberty laws, kidnappers, who were “retrieving property,” were subject to criminal law. In states that did not have personal liberty laws, accused fugitives, along with their perceived enablers could be held in jails and prisons.

Northern defiance of the 1793 Fugitive Slave Law via personal liberty laws, exacerbated national discord and set the stage for the Supreme Court case *Prigg v. Pennsylvania*,¹⁸ where the Court held that the federal Fugitive Slave law superseded Pennsylvania personal liberty laws.¹⁹ Tension between the North and the South continued to fester after *Prigg* and led to the more punitive Fugitive Slave Law of 1850, which was part of the Compromise of 1850. The law essentially criminalized abolitionist behavior. One provision of the act that troubled whites was its seemingly undue infringements. For instance, the law made ordinary citizens susceptible to being summonsed to form a posse to assist in the capturing of suspected fugitives. Hence, if a formerly enslaved person was suspected of being in a certain territory, the local sheriff could summons white men in that area and force them to assist with retrieving the escapee, irrespective of the recruits’ personal positions on slavery. The act further exacerbated blacks’ access to due process. It prevented them from requesting a jury trial and testifying on their own behalf in court while placing an unreasonable burden of proof to demonstrate their free status. This made blacks especially reliant on voluntary aid as they existed in a legal limbo between the status of property and persons. Moreover, the intrusive nature of the act, which conscripted both indifferent whites and abolitionists into fugitive law, also influenced the nature of legal aid in the antebellum era.

Both Fugitive Slave Acts offer insight into the nature of indigent, abolitionist lawyering in the immediate years preceding the Civil War as well as future charitable legal aid. After the *Prigg* decision and passage of the 1850 Act, courts became less viable options for abolitionist legal organizing for four reasons. First, the relative ease in which slave-catchers could abduct blacks reduced a portion of lawyers’ client base—blacks and

¹⁸ 41 U.S. 539 (1842),

¹⁹ In this case a black woman named Margaret Morgan left Maryland for Pennsylvania where she was once enslaved by John Ashmore but never formally emancipated. The Ashmore family hired slave catcher Edward Prigg to retrieve her and he was convicted in a Pennsylvania court for violating a personal liberty law.

abolitionist sympathizers. Second, the more lax due process protections hampered their ability to successfully defend indigent clients. Next, like most voluntary institutions, insufficient funds were also a problem (Wilson 1994). Finally, the demise of legal aid for the formerly enslaved came with the advent of a more militant abolitionism that eschewed the earlier era's naive commitment to gradual change within a legal framework. Instead this brand of abolitionism advocated for an immediate end to slavery and used more aggressive social movement tactics to reach that goal (Newman 2002; Harrold 2004).

Ideological Motivations

As abolitionist historiography has shown, different concerns animated the desire to end the institution of slavery. The obvious explanations were genuine human altruism and a desire for racial and gender egalitarianism. But this also included the economic concerns around the supposed threats slavery posed to white workers in the North and the South. Ideological concerns about "slaveocracy" and the imminent political threat posed by the powerful, "conspiratorial" Southern slaveholding class were substantive motivations for anti-slave advocacy and corresponding legal aid. Self-interest was also an important ingredient for abolitionist legal advocacy. Legal aid tackled whites' concern around the fugitive slave laws' infringements on their own rights as well as their putative susceptibility to slavery. The fear of "slave power," along with the role of white rational self-interest influenced abolitionist lawyering and is best evidenced through the work abolitionist lawyer and eventual Supreme Court Chief Justice (1864-1873) Salmon P. Chase as well as the less known Robert Tharin. Chase, who was one of the attorneys who provided legal assistance to Solomon Northup, was nicknamed "Attorney General for Fugitive Slaves" and made a legal career defending blacks who escaped bondage as well as anti-slavery sympathizers.. But Chase's work was driven less by a concern for racial equality and was invested more in the rhetoric and materialization of "rights." In his biography of Chase, Hart (1899: 48) notes, "like thousands of other anti-slavery men...Chase was aroused not by the wrongs of the slave but by the dangers to free white men." After his brother-in-law became a victim of the mob violence directed toward the anti-slavery activists in Cincinnati, Chase decided to begin his crusade against the overreaching nature of fugitive slave laws and the malevolence of pro-slavery advocates. Chase proclaimed:

I was opposed at this time to the views of the abolitionists, but I now recognized the slave power as the great enemy of freedom of speech, freedom of the press and freedom of the person... From this time on, although not technically an abolitionist, I became a decided opponent of Slavery and the Slave Power: and if any chose to call me an abolitionist on that account, I was at no trouble to disclaim the name (Hart 1899:49-50).

In fact, in Chase's most notable Supreme Court case, *Jones v. Van Zandt*,²⁰ he defended white abolitionist John Van Zandt, who was accused of violating the 1793 Fugitive Slave Act.

Similarly, Alabama attorney Robert Tharin (1863) made his legal career in the indigent counsel world defending the "poor white trash of the south" who were accused

²⁰ 215 215 (1847).

of illegally consorting with blacks. Tharin's popular text *Arbitrary Arrests in the South* was an appeal to poor whites and was less interested with black freedom and more concerned "the rights of the poor white man, who owns no niggers, who owns no cotton, who owns no plantation, but in whose veins courses the same red stream which bled on the battle-fields of 1776" (Tharin 1863:75). While not as popular as Hinton Helper's (1857) *The Impending Crisis of the South*, it similarly indexed an almost counterintuitive, white supremacist critique on the institution of slavery and its impact on poor skilled and unskilled whites. While it is tempting to simply categorize both Chase and Tharin as *exclusively* self-serving, it must be remembered that irrespective of the actual motivations that pushed them toward indigent abolitionist lawyering, both men jeopardized their lives and lives of their families to conduct this work. Chase, who defended both fugitives and abolitionists, and Tharin, who counseled whites, worked with unpopular clients, risked their careers, and were susceptible to the mob violence that was often directed at anti-slavery supporters regardless of their race.²¹ So while self-interest was in play, so were other motivations.

In addition to the economic and political concerns held by abolitionist lawyers there was also the actual concern around "white slavery." Although much more common in British literature and scholarship, this trope is usually understood in the American historical literature to represent propagandistic views used by abolitionists who attempted to link chattel slavery in the South with wage inequality in the North. Reformers who attempted to address debt peonage and white prostitution in the late nineteenth century and early twentieth century also used this trope.²² The discursive juxtaposition of slavery with these other social practices influenced abolitionist legal aid and further demonstrated that indigent defense was sometimes not about the individual cases at hand, but about lawyering for broader causes, some of which were self-serving. The fear of white bondage stemmed from three sources. The first was through the aforementioned concern about slaveocracy, where not only poor whites, but also northerners saw themselves as potential "slaves" to southern hegemony. While seemingly exaggerated in hindsight, this white slavery discourse, along with a not so distant memory of an oppressive British government left whites very unsettled. This was compounded by the invasive Fugitive Slave Act of 1850 as well as perceived federal overreach and deference to the South.

Fear of white slavery also stemmed from accounts of "mistaken identity" as well as the chattel slavery of whites. The issue of mistaken identity typically entailed the

²¹ Tharin (1863:54-55) reflects on this in his book and discusses the case of Franklin Veitch, a poor white who was beaten by mob for allegedly selling liquor to blacks. He specifically mentions how the oath he took as lawyer demanded a concern for the powerless stating, "My oath, never, for considerations personal to myself, to neglect the cause of the defenseless and oppressed, returned to my recollection. I found that to keep that oath would subject me to great loss of popularity, because the ringleaders of the little mob were the most popular of the young men of the town." In his discussion on the aftermath of the case, he states, "I became the most unpopular man in Wetumpka. Lies had freely circulated pending the trial. *For keeping my oath in that case, I almost lost all*" (his emphasis).

²² A useful examination of this rhetorical maneuvering of "wage slavery" with "white slavery" in the antebellum is offered in Roediger (1991). For post-bellum discussions on "white slavery" and debt peonage see Keire (2001). The scholarship on prostitution as white slavery is robust; an incisive comparative historical take is offered in Donovan (2005).

kidnapping and enslavement of whites. The United States' peculiar rule of hypodecent (e.g. "one drop rule") and the concomitant difficulty of proving racial identity meant that just like some blacks "passed" for white, some whites were incorrectly classified as mulattoes and subject to kidnapping (Wilson and Wilson 1998). Relatedly, there was the actual chattel slavery of whites. This was transmitted via abolitionist propaganda, tales recounting the abduction of white girls, and photographic images of "white-looking slaves." Tales of white bondage created a population of anti-slave supporters while exploiting whites' ideas about feminine purity, juvenile innocence, and color (Mitchell 2008; Loughran 2009). These concerns about "mistaken identity" and white slavery are emphasized by William Chambers' in his 1857 text *American Slavery and Colour* where he opens by stating, "The prodigious and irregular amalgamation of races in the south, with the deterioration and helplessness of the less-affluent class of whites in the slaveholding states, has, as may be supposed, led to a pretty nearly pure, nay, absolutely pure breed of white slaves" (my emphasis; also cited in Wilson and Wilson 1998).²³

This web of interests served as key motives for the legal aid work conducted by abolitionist societies. As C. Wright Mills (1940: 912, 910) reminds us "motives are acceptable justifications for present, future or past programs or acts" and understanding them can often allow for deeper "sociological accounts of other theories (terminologies) of motivation." In the case of Tharin and Chase, and as we see throughout the dissertation, a host of motives influenced the providers of legal aid beyond beneficent concern for the downtrodden. While it is difficult to historically and sociologically determine "one source" of motivation, it is clear that a range of possibilities influenced the push for legal aid in ways that are unanalyzed in much of the scholarship.

Unexplored histories can be narratively interesting, but what are we to make of these labyrinthine connections between indigent defense and abolitionist legal aid and why are they important? Much of the scholarship and popular discussions on legal aid are anchored in imprecise history and assumptions. Amending this history can offer a more richly contextualized understanding of legal aid and the criminal justice system. This reorientation is also important because these inaccurate accounts are the scholarship that students of law and criminal defense use to understand the development of legal aid as well as some of the fundamental features of due process. As I will explain throughout this chapter, a revised interpretation of this history contradicts the stated and sometimes implied premises in which American indigent defense is understood: that it is primarily about class and ideology (while eschewing the importance of race, ethnicity, gender, political economy, and domination). Theoretically, it points to the moderate successes and failures of liberal reform as well as the variegated nature of (white) "benevolence" in the legal profession. This history can also show how legal aid can be animated by various motivations that run the gamut and include genuine altruism, paternalism, economic self-interest, and philosophical concerns about due process and rights as opposed to the immediate concerns of the defendant. Connecting this neglected history to the

²³ Scholars of white slavery also point to women's' rights activist and abolitionist Lydia Maria Child's (1834) text "Mary French and Susan Easton" which describes the kidnapping of two girls (one white one black) with the former child's hair being cut, and her body covered and dried in soot and grease. Also see Wilson and Wilson (1998).

contemporary context can help highlight trends that many legal scholars ahistorically understand as unique to today.

RECONSTRUCTION ERA

The post-bellum Reconstruction period is the next important juncture in American history for understanding indigent defense. Here I want to point specifically to the overlapping periods of Reconstruction (1865-1877) and the Gilded Age (1865-1896), which correspond to the economic, political, and penal environment of the former Confederate states of the South and Union states of the North and West, respectively. To be sure, Reconstruction was undoubtedly a national project, but a major component of this project dealt with restoration of the South and for this reason the discussion here focuses on that region.²⁴ It is important to remember that the history of legal aid and criminal procedure is far from linear. The country was still attempting to unify a set of states with disparate economies, cultures, and systems of governance and this consolidation became more purposeful after the war. Thus, the geographical and temporal juxtaposition of Reconstruction with the South and the Gilded Age with the rest of the nation as a whole emphasizes the different expressions of punishment, political economy, and indigent defense. Chapter Two discusses the Gilded Age.

While there is no shortage of scholarship on the Civil War and Reconstruction Era, the general consensus is that while it provided a modicum of access to formal equality and institutions, it was short-lived and failed to live to its potential.²⁵ As historians have shown, it was during this post-war period that the United States witnessed a sharp increase in imprisonment, matched only by the increase in incarceration the past few decades.²⁶ This post-bellum upsurge was partly a result of three important circumstances. The first was the South's new and purposeful use of incarceration as a regulatory tool of racial domination and as a substitute for slavery. The second explanation for this increase in the penal population was blacks' incidental, post-Emancipation movement from the sphere of mostly plantation justice to the formal legal system (and its adjunct of extra-legal mob violence).²⁷ Finally economic conditions were crucial to the increase in the

²⁴ For some specific discussions on Reconstruction outside of the South see Schwalm (2009) on the midwest, see Davis (2011) on the North and Taylor (1999) on the west.

²⁵ Pushing against the southern apologist Dunning (1907) school of Reconstruction (which emphasized the evils of the era, black inferiority, and the subsequent need for segregation), scholars have noted the social benefits of the Era while noting its many shortcomings. This reconsideration starts with Du Bois (1935) continues with Stamp (1965) and is picked up Foner (1988).

²⁶ There are some important works on the politics of punishment after the Civil War, many of which influenced my thinking on legal aid. This includes Hindus (1980), Friedman and Percival (1981), Ayers (1984), Waldrep (1998), Walker (1998), Lichtenstein (1996), Oshinsky (1996), Mancini (1996), Shapiro (1998), Curtain (2000), Blackmon (2008) and McLennan (2008).

²⁷ I must emphasize that that this is not to suggest that formal justice replaced informal justice. Extralegal violence was central to racial domination before and after the war (Waldrep 1998). What I am alluding to here is the increased presence of blacks in the criminal legal system after Emancipation. Prior to this, black incarceration as a disciplinary tool was incompatible with the political economy of slave labor.

penal population. These circumstances included the various national recessions that rocked the last three decades of the 19th century (especially the Long Depression of 1873-1877) as well as the seemingly simultaneous expansion of the railroad and coal mining industries and the convict leasing system that helped undergird their development.²⁸ During the Reconstruction Era, the premier legal aid institution that helped perpetuate and buffer against legal inequality was the Freedman's Bureau.

Before delving into the work of the Bureau, it is worth noting that the formal southern criminal legal system comprised only part of the regulatory criminal apparatus, with the other part consisting of unfettered informal violence. While pugnacity and belligerence certainly were not exclusive to the South or this period, it was acute, excessive and well-documented.²⁹ As Adamson (1983) notes, southerners preferred "vigilantism instead of professional police forces, dueling as an alternative for litigation, [and] the lash and the noose as much cheaper expedients than regular prison discipline," all of which limited the sheer amount of opportunities for prospective legal aid. Nevertheless legal assistance existed for some blacks in the South and it came from the Freedman's Bureau, which provided another form of legal aid that is appreciated in the scholarship on the Bureau operations but generally ignored in the American historiography on legal assistance. This is especially odd, since, unlike abolitionist lawyering, this form of legal aid was state-sponsored. The federal government assigned the Bureau with the daunting task of providing aid to freedmen and women. The Bureau helped with the provision of food, housing, clothing and education and also assisted in the supervision of labor contracts, the family reunification process, and in legal disputes.

The types of legal aid offered by the Bureau ranged widely in terms of structure and form. Institutionally, the federal government established Bureau courts, along with other adjunct provisional tribunals (e.g. provost courts, military courts) in some locales to adjudicate matters for freedmen and freedwomen. These spaces were considered to offer more just legal outcomes than their traditional southern counterparts. The legal aid offered by the Bureau and its attorneys was expansive and included assistance for freed peoples as plaintiffs and as defendants. In these courts Bureau agents "exercised an informal judicial function, acting as arbitrators, mediators, or mere diplomats to dispose of disputes" (Westwood 1970: 502). Bureau courts existed until local courts made the appropriate changes to their laws to make them more equitable and accessible to blacks. Bureau agents ceded control to the local courts after the southern states demonstrated that there was no more statutory discrimination (e.g. admission of black testimony, acknowledgement of blacks' civil rights) and by the prompting of President Johnson, who wanted to re-establish state jurisdiction over courts.

²⁸ Railroad development, coal mining and convict leasing all pre-date the war but were significantly expanded after it. See Mancini (1996) and (Shapiro) 1998.

²⁹ The pervasive violence in Chicago in the last quarter of the 19th century and the beginning of the 20th Century is explored in Adler (2006) whereas a similar, albeit broader historical sweep of violence in New York is offered in Monkkonen (2001). The prevalence of "frontier violence" is widely contested in western history but a useful intervention is offered in McKanna Jr. (2002). There is a similar niche genre in southern history on violence in that region see Hackney (1969), Rable (1984) and Nelson (1999).

After relinquishing control to southern governments, Bureau agents still observed judicial proceedings and acted as “watchdogs” to ensure that freed people’s rights were being upheld. In this context Bureau agents also served multiple roles. Paul Skeels Peirce notes in his 1903 monograph on the Bureau that “they acted as counselors and advisers of colored litigants and even appeared in court as free attorneys for such as were unable to procure counsel; in Mississippi and the District of Columbia the Bureau retained a lawyer to defend freedman in their suits” (Pierce 1903: 145). There are other documented examples of the Bureau paying for the legal assistance of freedmen and women in Maryland, South Carolina, Florida and Georgia while also helping bankroll the travel, rent, clerical expenses of these indigent lawyers in Washington D.C. (Westwood 1970). Administrators of the Bureau also offered direct legal assistance as “next friends” which sometimes posed problems, as these bureaucrats lacked knowledge of local law (Du Bois 1901; Pierce 1903; Nieman 1979).³⁰

The types of cases the Bureau supported ranged widely and included debt collection, criminal prosecutions, domestic violence, divorces and labor contracts. Like abolitionist lawyers, the Bureau also offered legal assistance in cases that existed at the intersection of child custody and kidnapping. However, instead of being veiled in the legalese of slavery, this intersection was defended under the guise of apprenticeship. Apprenticeship schemes existed before the Civil War across the country and like vagrancy laws served a social control purpose of supporting abandoned, orphaned, and delinquent boys by providing them with a skill (and work), while keeping them from destitution and regulating the sexuality poor or single mothers (Zipf 2005; Mitchell 2008).³¹ Already in vogue in the west with the routine kidnapping of Indian children (Smith 2013), southern courts favored apprenticeship schemes during Reconstruction as ways to shelter and feed black orphans and often held the stipulation that these children be provided with a skill, education, and shelter (Rawls 1986).

The problem, as historian Laura Edwards (1997:39) notes, was that, “when the court decided to bind out African-American children... ex-masters were given preference over everyone else,” including relatives, kin, and friends. In an attempt to hoard free black labor after the demise of slavery, many southern plantation owners manipulated apprenticeship laws as a tool of oppression. They “disingenuously dubbed black minors apprentices” by simply recording their ages as younger than what they were (Rappoport 1989:35; Nieman 1979) or by kidnapping freed children and arguing that their parents could not support them, which was an easier feat considering blacks’ relative economic insecurity as well as onerous vagrancy laws that required proof of employment. Moreover, in many states it was a criminal act for parents to attempt to retrieve their children. The Bureau was blacks’ *only* venue of legal recourse. Bureau agents investigated these claims, and freed hundreds of children who southern farmers illegally apprenticed. In three counties in Maryland and Virginia, 255 children were freed in one

³⁰ Next friend is an individual who represents another because the latter has a disability, does not have the legal capacity to do so or does not have a legal guardian.

³¹ Zipf (2005:1) puts it best when she states that the goals of apprenticeship schemes in the colonial and antebellum days were to “control the composition and character of families...control indigent populations, secure an alternate source of cheap labor, and enforce a patriarchal and, later, white supremacist social order.”

year (Fuke 1988). In Kentucky, Bureau agents closely reviewed apprenticeship contracts in an attempt to end discrimination and forced apprentice masters to comply with Bureau standards and terminated the contracts of those who did not, which led to the return of hundreds of children to their parents (Lucas 2003). In other instances, Bureau agents attempted to influence the unfair indenturing of children by publicizing and disseminating favorable judicial interpretations of apprenticeship laws to other Bureau agents “and urged them to use it to persuade probate judges to free children wrongfully apprenticed” (Nieman 1979: 81). Although their success was limited in these cases, Bureau agents were sometimes able to cancel the indenture and have the children returned to their parents; if the “owner” refused he/she could be arrested under the Civil Rights Act of 1866, or, in even rarer cases, the child would be physically removed by an armed force (Rapport 1989: 38).

Another set of cases Bureau officials dealt with had to do with intra-racial black legal conflict. The Bureau provided legal aid to freed people’s as both plaintiffs and defendants. These cases, like their inter-racial counterparts, spanned the legal gamut. For example, changes in post-bellum rape law removed statutory discrimination and provided black women with a newfound ability to charge black and white men with rape, which they did.³² The Bureau investigated these cases in the defense of black women, but also defended black men, whose guilt was sometimes dismissed as a byproduct of emancipation and the fact that slave rape was not previously prosecuted. Black women used the Bureau for legal assistance in regards to desertion, child custody, and spousal abuse (Farmer-Kaiser 2010). Despite the well-documented paternalistic ideology espoused by some Bureau agents as it related to gender and the family, it was the only source of legal aid especially for sensitive cases (e.g. black on white rape) as well as cases that were considered inconsequential to the larger southern populace (essentially any crime committed against blacks/black women). Similarly, the Bureau apparatus provided blacks with a legal forum and personnel to deal with cases against other blacks having to do with assault, property, non-payment of wages, and host of other civil issues (Penningroth 2003).

Discussion

Maxwell Bloomfield (1976: 346), one of the few legal scholars to recognize the Freedmen’s Bureau’s work, perceptively observes that, “For the first time the poor were recognized as having a right to legal services, and the power of government was used to help them gain access to courts and lawyers on equal terms with other social groups.” Accordingly, a few lessons can be culled from this often-unacknowledged form of legal aid. First, the short-lived life of the Freedmen’s Bureau marks the advent of the federal government’s lukewarm commitment to organized legal aid for the impoverished. As the remaining sections of the dissertation suggest, for almost a century after the Bureau’s demise, federal policy on legal aid as a social welfare provision was incoherent at best and non-existent at worst. The lack of resources provided to the Bureau to achieve its

³² Black women’s success in these specific cases was limited and tempered by the underreporting of these crimes due to fear of reprisal (in the case of white assailants) as well as a larger “culture of dissemblance” although they were much more vocal in other kinds of cases (e.g. wage disputes, domestic violence). See Hine (1989), Sommerville (2004), Farmer-Kaiser (2010).

legal goals is similar to the federal government's perfunctory dedication to substantive equality as well as its lack of careful thought on how both the transition from slavery to freedom as well as legal aid would be successfully accomplished. As Eric Foner (1988: 143) indicates in his classic text on Reconstruction, at the peak of its existence, the Bureau employed no more than 900 agents throughout the entire South, a figure that made it virtually impossible for the Bureau to address even a majority of freed people's legal needs. The example of the Bureau's legal aid suggests that contemporary critiques of the government's lack of support and insufficient resources for indigent defense is not just a byproduct of penal politics, but part of general pattern in American legal history.

Turning our attention to this underappreciated form of legal aid also offers ideological lessons. First, like early abolitionist lawyers who maintained a naïve preoccupation with law on the books and had a limited recognition of the quotidian manifestations of legal inequality, the Bureau's legal arm possessed a narrow ideological perspective that saw mere statutory changes (e.g. admitting black testimony, access to courts) as the consummation of black equality. One Bureau bureaucrat even stated, "If the government will only continue to stand by the freed people in their just rights simply, then, by the operation of laws infinitely more potential and certain in their execution than those of Congress, the negro is to be the master of the situation" (cited in Oakes 1979: 67). But as legal history as shown, and law and society and critical race theory scholarship consistently affirms, formal equality does not necessarily equate with substantive equality. While Bureau agents were undoubtedly integral to the push toward black equality and the development of a social safety net, they are a microcosm of the larger failures of well intentioned, but usually tempered liberal legal reformers and their inability to think beyond the narrow confines of the juridical field for solutions to socio-legal inequality.

The Freedmen's Bureau' assistance also offers an early example of how legal aid can be implicated in the same system of class, race and gender subordination that it seeks to confront. This occurs more insidiously through the common-sense assumptions of bureaucrats and directly through outright complicity. For example, in child custody and apprenticeship cases, historian Rebecca J. Scott (1978: 111) notes that oftentimes, "agents made inconsistent, subjective, ad hoc decisions, influenced by the 'reputation' of the parents and the 'prospects' of the children. Class, cultural, and racial assumptions impinged on all of these judgments." While Bureau agents "varied all the way from unselfish philanthropists to narrow-minded busybodies and thieves," the unfortunate reality is that biased, assumptive proclivities influenced even the most well-intentioned bureaucrats as well as their legal personnel (Du Bois 1901: 360). Notwithstanding the Bureau's admittedly sketchy directive of "help," many agents were actively complicit in blacks' conscription into egregious labor arrangements that were undergirded by the threat of criminal prosecution if violated. These arrangements usually took shape through sharecropping, apprenticeship schemes, and the convict-leasing system. Bureau agents helped set wage scales that paid women less for similar plantation labor and facilitated punitive apprenticeship schemes on mothers who were single and/or had multiple children and only voided contracts if women demonstrated middle-class values (White 1985; Farmer-Kaiser 2010). Oftentimes, when freed peoples sought legal assistance, agents often encouraged blacks to "abide by contracts with decidedly pro-planter terms," which historian Sam Rapport (1989:31) argues "lends credence to the view that the

Bureau facilitated the development, at least in part, of a repressive labor system in the post-bellum South.” Oakes (1979:70) similarly notes that, “by frequently invoking the Union Army's vagrancy orders (many of which were later incorporated into the Black Codes), many local agents openly collaborated with employers and, in effect, forced freedmen to work under undesirable conditions.” Indeed, the prejudiced sensibilities of the Bureau sometimes led them to reify the status quo. These examples of complicity resonate with contemporary commentaries on the seemingly collusive nature of plea bargaining in today's legal system as well as the paternalist attitudes that sometimes animate bureaucrat-client relationships in indigent defense, and “helping professions” more generally.³³

There is a final lesson that can be gleaned from the Bureau's legal assistance that has relevance to contemporary evaluations of legal aid. Despite the almost endless examples of mismanagement, negligence, and prejudice, the ‘New Freedmen's Bureau Historiography,’ as described by Harrison (2007), has moved scholars beyond the unflattering body of scholarship on this institution by providing greater sensitivity to context, successes, and bureaucratic constraints. Even if agents and the legal counsel they procured harbored unacknowledged assumptions about race, class, gender and deviance, many of them were genuinely sympathetic to the plight of their clientele but were impacted by the zeitgeist of that historical moment, institutional limitations, and resources. While my own project is far from a redemption or condemnation of early legal aid advocates, it is important to take a similarly balanced and attentive view when thinking about legal aid throughout history, and this project seeks to examine the full spectrum of failures, successes, and motivations of actors who provided this social welfare provision.

³³ This observation and critique of plea-bargaining and the institution as a whole is not new see Mirsky and McConville (2005) and Vogel (2007). The “new paternalism” is extolled in Mead (1997) and dissected in Wacquant (2009) and Soss. et al. (2011). Luban (1981: 460) examines the issue of paternalism in the legal profession and argues that it is important to differentiate between paternalistic structures (social arrangements that makes it highly likely that paternalistic activity will occur) and paternalistic actions, which occur at the individual level. Freed people's structural reliance on the Bureau, along with agents' individual actions makes both forms of paternalism relevant here.

CHAPTER 2: “NATURAL PROTECTORS?”: SEXISM AND MATERNALISM IN GILDED AGE LEGAL AID

Gilded Age Backdrop

On a chilly day in New York City, circa 1887, a poor woman arrived at the doors of the Working Women’s Protective Union (WWPU). New York reformers created the organization a few decades earlier to address the legal and employment needs of the burgeoning, post-Civil War, female industrial workforce. The office was about to close for the day, but the woman begged Martha W. Ferrer, the superintendent of the WWPU, for assistance. Ferrer recognized the woman’s despondence; it was quite familiar from her dealings with similar clients. The superintendent also admired the woman for her intrepid trek through the bone-chilling, pre-Global warming weather. The unnamed woman explained that she spent the previous night working in order to finish some work for her employer so she could obtain a payment to buy some food for her children for Sunday. This payment was a mere 50 cents. But this was the Gilded Age, a time in American history where employer dishonesty and corruption was unexceptional. The woman’s employer pretended like she did an unsatisfactory job and did not pay her. She let the employer know that her children were starving but the head honcho was unsympathetic and flippantly told her to come back next week and maybe she’d get paid. By the time she finished telling Ferrer the story, she was crying uncontrollably, partly because of the swindle, but also because of her financial insecurity and her starving children. Her situation was so dire and tear-jerking that Ferrer just advanced her the 50 cents and promised her that the WWPU would collect it from her employer. The organization eventually did collect that sum along with costs and expenses after a lawsuit. While seemingly petty, such cases were common in the Gilded Age, a period of flagrant economic inequality that was characterized by extreme poverty for most and an unprecedented level of wealth for a few. In fact, in the same article that this story was abstracted from, Ferrer, “Suits for fifty cents? Why we have lots of them. I told you didn’t know anything about the meanness of some employers. One of the hardest-fought cases we ever had was for fifty cents.” (*The Sun* 1887).

The fraud described above was common in the Gilded Age and integral to the development of legal aid. Coined by Mark Twain and Charles Dudley Warner in their novel of the same name, this era lasted from the end of the Civil War to the mid 1890’s and is distinguished for its political corruption, corporate hegemony, and erratic economic cycles. This chapter explores the gendered significance of legal aid during this era.

Like most historical periods there are different interpretations of the beginning and ending points. Many historians use the major presidential assassinations of Lincoln and McKinley (1865 and 1901) or the Civil War and Spanish American War (1865 and 1898) to neatly encapsulate the era. Others more messily start the Gilded Age with the rise of the Republican Party and big government (with Lincoln’s election in 1860) or begin with the end of Reconstruction (1877) (Upchurch 2009). Ultimately, although historical actors and events are real, general periodizations are often arbitrary inventions. Evidence can often be marshaled to provide justification for different starting and ending points. In this dissertation, the Gilded Age is understood to represent the period from 1865-1897 with a clear understanding that this overlaps with both the Reconstruction and

Progressive Eras. The accentuated role of four important features of the Gilded Age—the mass immigration of non-WASPs, industrialization, urbanization, and professionalization—are the primary reasons for the timeframe offered here, amongst many others.³⁴ First I will explain the importance of these four features to legal aid, then I will discuss two important, but underappreciated legal aid institutions that were developed during this era.

From 1866 to 1900, approximately 13 million identified immigrants entered the United States, representing the biggest immigration stream up until that point in American history (USDOC 1976). Before the Gilded Age, most immigrants came from Britain, Germany and Ireland. But late 19th century immigration consisted of geographic relocation by Italians, Greeks, Polish, Jews and other peoples from southern and eastern Europe, many of whom received a hostile embrace by domestic Americans. As it relates to legal aid, this immigration was important for a few reasons. First, since these newcomers were often unfamiliar with the American legal system, social customs, and sometimes the English language, they were often susceptible to various forms of economic exploitation such as disputes with employers and landlords or dealings with loan sharks. Secondly, this immigration helped with the creation of voluntary associations. Some of these organizations, such as the St. Bartholomew's Guild (for Chinese immigrants) and the Educational Alliance (for Jewish immigrants) provided various services while maintaining a legal aid branch. Others, most notably, the German Legal Aid Society that historians inaccurately identify as the first form of legal aid, focused primarily on providing legal aid services. Moreover, just like immigration helped propel legal aid, nativist concerns around immigrant assimilability, immorality and conspiratorial revolution helped sustain legal aid programs. Ethnic whites were granted access to some of the privileges of whiteness but they encountered discrimination that was anchored by brute xenophobia.³⁵ Religious suspicions and conspiracies, the

³⁴ 1865 is an important starting point because it marks the end of the sectional split, the formal end of slavery with the passage of 13th Amendment and the beginning of national reunification. On the other side of the era, 1897 is a useful ending point because it marks the end of the Panic of 1893. This panic was the worst economic depression the country encountered at the time and is an important point of reference because of serious labor unrest (e.g. the 1894 Cripple Creek Colorado Miner's Strike, May Day Riots of 1894, Pullman Strike of 1894) which, along with economic insecurity and political corruption, helped foment a burgeoning Progressive era and the beginning of the regulatory state.

³⁵ The scholarship on “whiteness” is in disagreement on this point. Roediger (1991; 2006) offers narratives that suggest that these often working-class ethnic groups occupied a confused racial status on their arrival and “achieved whiteness” primarily through the racial bigotry, the labor movement, state-sponsored prejudice (e.g. racially restrictive covenants, New Deal reform). Jacobson (1999) offers similar arguments and hones in on how civic assimilation for ethnic whites was primarily a project of “re-racialization” that sought to make them white. Ignatiev (1995) examines how the Irish attained the right to be considered white through violent subjugation of blacks. Guglielmo (2004) disagrees and uses the example of Italian immigrants to argue that although they faced obstacles and discrimination these immigrants were recognized as whites by most American institutions. Haney López (2006) takes a different path and focuses on how courts and the law used arbitrary reasoning to determine which groups were considered white.

presumed radical proclivities of European immigrants, anxieties about economic competition and social assimilability, and a host of other nativist dispositions also informed the prejudice these immigrants encountered.³⁶ For several reasons, this nativism is often uncritically examined in the history of legal aid or seen as a handmaiden of immigration as opposed to a constitutive feature.³⁷ But as I explain in the next chapter, in addition to being an important resource, legal aid served as a civilizing institution for ethnic whites (who were the primary recipients). Legal aid also operated as a mitigatory apparatus that sought to quell the possibility of radical activity and legitimate the administration of law.

At the same time as this large-scale immigration, a second period of industrialization took place. This industrialization included the proliferation of factories (e.g. meat, chemicals, steel, electricity) and the expansion of railroads and coal mining. These industries were all essential to the burgeoning American infrastructure and its imperialist ambitions. Immigrants and unskilled labor completed much of the labor required to fulfill these manufacturing needs. By 1870 one out of every three workers in manufacturing and mechanical industries was an immigrant (Higham 2002: 16). This created a host of legal issues due to these groups' economic and cultural vulnerability. These legal problems were rooted mainly in asymmetrical employment relationships as well as the shady and unscrupulous business practices that emblemize the Gilded Age. In fact, studies of legal aid societies show that about a quarter of cases taken on by early legal aid societies were such cases (Merkel 1990: 9). A "survival of the fittest" mentality, inspired undoubtedly by the Darwinist rhetoric of the time, led "industrialist and investors to justif[y] exploitation as legitimate" (Cowie 2011:22) and animated legal issues such as hazardous working conditions, employer negligence, and unpaid wages. These issues became the bread and butter of emerging legal aid societies. To be sure, single and widowed women received a large brunt of the aforementioned inequality.

As suggested above, with jobs come people. Of course, urbanization cannot be decoupled from industrialization and (im)migration. Industrialization and the proliferation of factories in cities created new spaces for production as well as new sources of labor. Migration and immigration led to more densely populated cities, which improved economic development and created new markets for consumers. As it related to legal aid, urbanization is important for a few reasons. First, the mass movement of immigrants, southern blacks, and displaced farmers to the city led to extremely congested

³⁶ Nativism is a common feature of societies, but it is also a constant thread in United States history and is as American as apple pie. Along with the aforementioned examples, this includes, but is not limited to Alien and Sedition of Acts of 1798 that sought to punish French sympathizers; distrust of German "forty-eighters"; the Chinese Exclusion Act of 1882; Gentlemen's Agreement of 1907 that banned Japanese immigration; to the dogged xenophobia exercised against Mexicans for the 20th century to today, Higham (2002) remains perhaps the seminal text on this issue, but his text is focused on 1865-1925. For an earlier take see Billington (1974) and for later take see Sánchez (1997).

³⁷ One explanation for these omissions is because of a lack of theoretical edifice of knowledge on this issue. Many of the histories of legal aid were written before the influx of more substantive discussions on race and ethnicity that came with the proliferation of critical race studies, whiteness studies, black feminism. Another explanation stems from the scholarly doxa on legal aid that focuses primarily on class.

slums and unsanitary living conditions. The new urban environment helped foment moral panics that imagined newcomers as harbingers of disease and vice and created a discursive terrain that equated otherness (e.g. poor, non-white, immigrant, homosexual, prostitutes) with criminality (Boyer 1978).³⁸ While responses to these demographic changes were tinged with alarmism, they were a byproduct of the palpability of urban poverty, crime, homeless, and prostitution during this time as well as the development of new media techniques that captured these changes.³⁹ Nevertheless, the noticeability of crime that came with such population increases required an expansion and refinement of the criminal justice machinery that included police and courts, and by default, legal aid. The increasing population created a larger volume of legal need for the poor in the civil context as well.

Urbanization also helped spur the bar to professionalization and specialization and fundamentally changed the legal bar. The new geography of lawyering, along with the legal profession's movement from largely agrarian areas to the city, helped cement law firms and corporate law into the urban economy. Some have argued that this movement, along with the valorization of rugged individualism, diverted aspiring lawyers' attention from pursuing more altruistic goals such as "justice for all" and toward more opportunistic, entrepreneurial endeavors (Auerbach 1977; Hobson 1984; Pinansky 1986). These members of the bar looked askance at public interest as they specialized and professionalized (mainly with the development of the American Bar Association in 1878). They worked to create "ethics" and "standards" that would exclude people from access to the bar (women and minorities) while privileging certain kinds of legal work. This had the affect of blunting the possibility of systematized legal aid in the broader legal field. Professionalization also stymied the development of ethnic niches within public interest law since "many of the lawyers who represented poor or working-class clients were products of unorthodox legal education, such as the YMCA night law schools that flourished in the era, or unregulated apprenticeships" Wiecek (1998:84). This legal professionalization also occurred at a time where courts and law enforcement were becoming more systematized. Such bureaucratization actually decreased ordinary individuals access to justice because it often prioritized business-related matters and

³⁸ Integral to this point is some important medical history scholarship that looks at the relationships between citizenship, ethno-racial identity, and disease. See Markel (1999) on Eastern European Jews in late 19th century New York City; for an analysis of the discursive and bureaucratic demonization of Chinese and Chinese Americans in San Francisco during the late 19th century to mid 20th century see Shah (2001); a similar account is offered by Molina (2006), who is interested in the same time frame but, in addition to Chinese, also focuses on Mexicans and Japanese in Los Angeles. The moral panic that came with urbanization and immigration was decidedly gendered and helped foment anxieties around sexuality – specifically in the areas of prostitution, sexual intercourse and sexual orientation (see Hatheway 2003; Wood 2005; Heap 2009). This led to perceived notions of social degeneracy that influenced legal aid advocates and reformers more generally.

³⁹ Especially important were developments in American visual culture (e.g. flash photography) that were emblemized by Jacob Riis' (1890) classic photojournalism text *How the Other Half Lives: Studies Among the Tenements of New York* as well as the popularity of the sensational magazine *National Police Gazette* and other forms of pictorial reporting that highlighted urban poverty and deviance. See Reel (2006).

disputes over those of regular citizens. It was this lack of access that spurred a more explicit movement toward institutionalizing legal aid. Perhaps most importantly, professionalization played a key role in the exclusion of women from the field of law.

This chapter takes a look at how these four issues—industrialization, immigration, urbanization, and professionalization—influenced the development of legal aid by focusing specifically on the historically underexamined issues of gender. In the first section, I discuss how women's entrance into the workforce after the Civil War and their concomitant exploitation helped spur the development of the New York City's Working Women's Protective Union (WWPU), a distinctly feminist brand of legal aid that predates earlier starting points for legal assistance organizations (Batlan 2010; Batlan 2011). I then discuss the Protective Agency for Women and Children, another legal aid organization that was developed in Chicago (Jordan 2011). Both organizations offer a glimpse into the gendered concerns (e.g. protection of female workers, fears that exploited women would slide into prostitution, unfair punishments against women accused of crimes) that animated legal aid and have lasting residue today.

FEMINIST PUBLIC INTEREST PRACTICE

The "Work" of the Working Women's Protective Union

Since the inception of the United States, women have always worked (Kessler-Harris 1981; Jones 1985; Glen 2002). The nature of their labor, of course, was and continues to be structured by gendered assumptions about the value of their work. Their labor has also been influenced by popular understandings of women's role in society; race and ethnicity; citizenship; class; geography; exclusionary educational practices; occupational closure; and a host of other issues.⁴⁰ But as mentioned earlier, the interface of immigration, urbanization and industrialization created a unique set of circumstances for women in the Gilded Age. More specifically, the rise of labor unions was distinct to this era. While there is a longer history of organized feminist labor activity (e.g. Foner 1979; Dublin 1981), this was a particularly formative era. Most trade unions excluded women. Male union members believed that women's inclusion would lead to a decrease in wages and potentially crowd them out from the workforce. Writing at the end of Gilded Age, labor movement supporter M.E.J. Kelley (1898: 413) argued that the confluence of women's entrance into the workforce and the changing nature of the economy encouraged exploitation and suggests that the "sudden outpouring from the home into the market of women unused to the ways of the business world was probably too tempting an opportunity to the unscrupulous to be allowed to pass." This eventually led to the creation of host of organizational initiatives designed to protect female workers' labor interests. These took shape through traditional unions, voluntary associations, and quasi-unions with legal aid arms. The development of the New York City's Working Women's Protective Union (WWPU), which took the latter form, is integral to understanding the gendered dimensions and origins of legal aid.

⁴⁰ See generally Kessler-Harris (1982); Ruiz (1987); Abramovitz (1988); Witz (1992); Hunter (1997); Glenn (2002); and Branch (2011).

With the exception of a few precious investigations by feminist and legal scholars,⁴¹ this organization, along with the gendered roots of legal aid have been disregarded in legal historiography and confined to the scholarship in women's and labor history. The WWPU was originally established in 1863 as the Workingwomen's Union, with an executive committee of five women and a male president (Batlan 2010). Subsequently, the acting chairman (a male) suggested that a draft be sent to a "committee of Presidents of Societies" and "other gentlemen" who contributed to the Working Women's Union. This committee changed the nature of the institution by: adding "Protective" to the name; prohibiting aggressive social movement tactics (e.g. strikes, collective action) for more acceptable forms of confrontation (e.g. litigation and lobbying); and reducing female agency in the institution by disposing the representative board of delegates and replacing it with an "advisory counsel" of twelve working women" (Kessler-Harris 1982:91-92; Batlan 2010:935-936). This patriarchal intrusion is important to keep in mind and was a thread throughout the institution's existence.

Nevertheless, the WWPU was still a multifaceted institution. It provided free legal aid to female laborers, acted as an employment agency, lobbied for laws to protect women workers, and dragooned employers into paying women fair wages and maintaining reasonable hour workloads. The main goals of WWPU were to "promote the interests of women who obtain a livelihood by employments other than household service, and *especially to provide them with legal protection from the frauds and impositions of unscrupulous employers*, to assist them in procuring employment, and to open to them such suitable departments of labor as are not occupied by them" (emphasis added) (WWPU 1868). As part of a longer continuum of American labor feminism, the organization developed at an opportune time. The aforementioned amalgam of industrialization, urbanization, and immigration, along with sexism, unscrupulousness and unfettered capitalism disadvantaged low-wage earning women. These women occupied the bottom rungs of the civic hierarchy and were often left with no recourse when cheated by employers. A description of the WWPU's work is provided in a June 1880 *Harper's Weekly* feature article on the organization:

The sewing machine frauds are pretty familiar. Every woman who lives by sewing must have a machine, and a machine is a costly article. But there are hosts of accommodating agents who supply the desideratum on easy, even generous terms. 'Here is a silent, lock-stitch, fully improved article. Take it home, madam, and pay for it in installments of five

⁴¹ Felice Batlan (2010; 2011; Forthcoming) is perhaps the foremost scholar to unravel this work. My own analysis of the WWPU's work is indebted to her scholarship. But there are some fundamental points of divergence. First, Batlan makes little mention of the role of race and ethnicity in the WWPU's operation, and as I show later in this section, both were integral to the exclusion of potential clients and trouble the celebratory narrative offered in her work. Batlan also makes an important argument about the how the WWPU's sanitization from history came with the masculinization of the legal profession. Here we agree, but Batlan offers no satisfying theoretical framework for why this happened and attributes it to gendered segregation and male take-over of the field of legal aid. I take cue from refined, neo-Weberian ideas of occupational closure to add some theoretical heft to Batlan's provocative argument. Finally, on the same issue of masculinization, I see this gendering of legal aid as a process that occurred not only through male domination and sexism but also through women's strategic use of maternalist ideology during the era.

dollars a week. Nine fives are forty-five; in nine weeks it will be yours. More than this, I will give you work to the amount of five dollars a week, and you need not put your hand into your pocket once.'

Who can say that it is a bleak, faithless, and merciless world when such men as these abound? The woman signs a paper, almost invariably without reading it, as, the greater part of it being printed, it has every appearance of authenticity; and the machine, with all its improvements is delivered to her. Not unlikely, unless she is shrewd, a worn-out article, rebuilt and refurbished, has been foisted upon her; and this she will be allowed to hold it when the installments are complete. But if it is a valuable machine, the intention of the agent is to eventually deprive her of it. Perhaps he assures her that he has the fullest confidence in her, that she need not be overpunctual with her installments, and she, perhaps, believing him, delays payment for two or three weeks, when she is within a few dollars of her last installment. On the pretext that she has not fulfilled her part of the contract, she is dispossessed of the machine; and when the document that she has unwittingly signed is examined, it is found to be so constructed that the seizure is legalized [sic]. In nearly all cases the price put upon the machine is more than its value, and the sum is increased if the woman pays for it by her own work, the employer deducting various amounts on the plea, before mentioned, that her work is not up to the standard.

It is against such mean swindles that the Protective Union exerts itself, and to prevent which it was founded. Left to themselves, the women imposed upon are often too ignorant to know how to seek the recovery of their machines, or too poor to prosecute. They appeal in vain for consideration, scold the agent, and then subside in the sympathy of their neighbors, unless they find the Union, which is an implacable litigant for them, carrying their cases from court to court, and employing the most capable counsel, if necessary, to secure justice. The mere fact of its existence represses much wrong and it has contested its cases with such persistence that few defaulting employers are willing to defend a suit brought by it.

As indicated in the description, the WWPU's work was animated by a sense of social justice and by ideas about deservingness that were crucial to its operation.

Who Deserved "Protection?"

Women's participation in the industrialized labor market and legal aid cued serious questions about "deservingness" and its relationship to work and legal aid. The tropes of the "deserving" and "undeserving poor" are typically used in public discourse and scholarship on poverty and the welfare state. These categorizations have been used to distinguish individuals who are poor because of circumstances beyond their control (deserving) from individuals who putatively languish in poverty because of moral deficiencies, laziness, and dependency on charity (undeserving) (Katz 1989). Scholars have shown that throughout history, these distinctions rest on assumptions about the causes of poverty (e.g. personal responsibility vs. economic structures and relationships) as well as problematic ideas about race, ethnicity, nationality, gender, sexuality, age, and ability.⁴² But this idea of deservingness also permeated legal aid. Feminist sympathizers, both men and women, used the rhetoric of innocence to secure support for legal aid. In an 1894 description of the organization, John H. Parsons, who served as Secretary and Attorney of WWPU, emphasizes the deservingness of women who used the organization's service stating, "though the institution is supported by private contributions, *it is in no sense a charity. It does not give away anything; it simply helps*

⁴² Lubiano (1992); Gordon (1994); Gilens (1999); O'Connor (2001); Hancock (2004).

those who desire to help themselves. Where wrongs are committed against the rights of working women which are susceptible of legal redress, it puts in motion the machinery of law necessary to secure it” (emphasis added) (Tolman and Hull 1894: 206). In most of the other representations of the organization, a point was made to emphasize the charity component of its work as well as the fact that it was organized for *working women*. Invariably, photographic representations of clients that appeared in annual reports and newspapers depicted them as worthy white women deserving of sympathy (see figure 1).

The WWPU only offered their services to women who labored outside of the domestic setting. This exclusion impacted black and Irish women, who had monopolies on domestic work, and prevented them from receiving legal protection (Batlan 2010). There are a couple of explanations for this exclusion. Mrs. M.J. Creah, who also served as superintendent of the WWPU incomprehensibly suggests that domestic workers are excluded from the Union's services because:

"The working women in stores, factories and offices need all the assistance the union can give, for they are the sufferers. Women who work as domestics may sometimes have reasonable grounds for complaint, but their condition is so far above that of the other workingwomen that they can always get along comfortably. They can get places whenever they want them, receive good wages, don't know what hunger is, and are well acquainted with the looks of a bank book. They don't need help. It is this poor saleswoman, the overworked factory girl and the sewing woman that has to be helped live" (*Wichita Daily Eagle* 1891).

Another justification is provided in an 1895 article in the *Omaha Daily Bee* on the WWPU, which argued, “The union refuses to take up the cases of women employed in household service, as not depending for immediate board and lodging on the receipt of their wages and having always, while employed, a roof over their heads and food to eat [sic]. As a rule, too, domestic servants have not the same difficulty as other women wage earners in obtaining what is justly due to them.” The rhetoric of “wage slavery” as illustrated in Figure 1 made women who worked in factories a much more sympathetic population. But we know from women’s and labor history that domestics did not “get along comfortably,” that all of them certainly did not receive “good wages” and many of them were well-acquainted with poverty. Domestics had very few labor protections. Although they participated in various forms of resistance they rarely created unions or went on strike; they often had employers who were indifferent to their well-being (even if they were provided with housing); suffered sexual abuse; and like their counterparts, similarly worked long hours for low wages (Dudden 1983; Kleinberg 1999; May 2011). This was the case not only in New York, as May (2011) describes, but throughout the country (Jones 1985; Hunter 1997; Wallis 2004). In her social science study *Domestic Service*, Lucy Maynard Salmon (1897: 121) notes many of the inequalities that domestic workers faced, stating, “Wages are too often regulated by the employer's bank account, hours of service by his caprice and moral questions by his personal convenience. The employer is too often the autocrat in his own home.” In fact, for Salmon, domestic work existed outside of the traditional employment arrangements, which would have made these workers especially deserving of legal protection. She continues her argument claiming, “domestic service is the only employment in which economic laws are so openly defied and all questions connected with it settled on the personal basis. No

manufacturer can...reduce unduly the wages of his employees without being held responsible” (Salmon 1897: 121).

Black domestics, only a few decades removed from slavery, worked in an occupational setting that paralleled that institution were also subjected to cruel treatment by their employers. In their analysis of 1890 census data Lorenzo Johnston Greene and Carter G. Woodson (1930:77) similarly noted the difficulties black women faced, stating, “the migration of Negroes to towns affected especially Negro girls and women who were brought in large numbers from the country to serve in domestic capacities. This increasing number of girls seeking employment as servants in the towns also gave rise to a grave social problem. The girls were forced to sleep outside the homes where they worked during the day.”



This picture, which appeared in an 1891 issue of *Cosmopolitan* on the WWPU attempts to capture the strains of factory work.

The logic of *economic* deservingness offers perhaps a partial explanation of domestic worker's exclusion from WWPU's services, but as whole it is unsatisfying. It is unpersuasive not only because of the benefit of historical hindsight, but also because of the well-documented studies of the degradation and inequality in domestic work that were conducted and/or published during the time of the WWPU's existence.⁴³ Batlan (2011) who has provided the most in-depth analysis of the WWPU locates the organization's exclusion of domestic workers in the same logic of economic deservingness, but also helpfully recognizes that domestic workers' exclusion helped insulate "the benefactors of the Union as employers whose own employment practices might be scrutinized" by WWPU's work (Batlan 2010: 939). While acknowledging the ethno-racial effects of this exclusion, specifically for black and Irish women, Batlan does not burrow deeper into to this exclusion. She notes that a WWPU official testified to a Senate committee "that although the Union did not discriminate on the basis of race, not many African American women came to the Union 'because colored women are more exclusively engaged in house-service'" (1885 Senate; cited in Batlan 2010: 939), but stops the analysis there. Historical lessons teach us that in the areas of social welfare provisions, legal protections, voluntary associations, and charity (whether provided by the state or private organizations) ideas about deservingness and subsequent exclusion have almost always been anchored by race and ethnicity, often to the detriment of minority women.⁴⁴

Moreover, rhetoric provided by WWPU leadership demonstrate an organizational incoherency as it relates to its service. This inconsistency, I argue was undergirded by race but self-satisfyingly couched in the language of work and deservingness. For example, in November 1887, *The Sun* newspaper of New York City ran a section titled "Gotham's White Slaves" that chronicled various forms of labor exploitation (recall in the earlier chapter that the trope of "white slavery" served as a discursive tool for abolitionist-reformers; also see figure 1). In one particular issue, the newspaper examined the sewing industry and how "the poor slaves of the needle go continuously in search of aid in collecting the hard-earned pittance, of which the slop-shop pirates and others of that ilk attempt to rob them." But what is particularly illuminating in this article are the comments of Martha W. Ferrer, who was superintendent and predecessor of Creah, the abovementioned superintendent of the WWPU who espoused anti-domestic worker views. Ferrer's comments exist in *direct opposition* to Creah's justification of domestic workers' exclusion from the WWPU's services. Ferrer' discusses the WWPU's embrace of seamstresses stating:

We get all kinds of complaints from all kinds of women here, and we learn of all sorts of petty tyranny and rascality on the part of employers, but the hardest tales of all are those hear from the poor women who take work to their homes from the slop shops and from manufacturers. You see, in a factory there are a good many women together, and they are able to stand up for their rights. Besides, there is a certain publicity about their work. If they have to work too long hours or for too poor pay, or if they are oppressed in any other way, somebody hears of it pretty quickly, and there is a fuss.

With the sewing women it is different. She works alone, and has no time to see others of her class, even if she knew them. She does her work in out-of-the-way rooms in

⁴³ See Campbell (1893), Campbell (1887), Wells (1893), Salmon (1897), Eaton (1899)

⁴⁴ See Lasch-Quinn 1993; Gordon 1994; Katznelson 2005; Ward 2005; Poole 2006; Fox 2012

the tenements. Nobody sees her or knows anything about her, unless they take trouble to search her out. Nobody's feelings are outraged by her having to work fifteen hour days, and take alms, besides, because it is all done in the seclusion of her own shabby rooms. She cannot combine with her fellow workers, or do anything else except take just what the slop-shop keepers offer her for the work and be thankful if she is not swindled out of that (The Sun 1887).

There are obvious contradictions here. Ferrer suggests that factory workers *can* stand up for their rights and are less vulnerable but Creah sees them as the real sufferers deserving of protection. Creah dismisses the spatial isolation that comes with domestic work, whereas Ferrer sees it as a central feature to why seamstresses need the Union's support. Ferrer recognizes the lack of organizing opportunities for seamstresses (because of the aforementioned isolation) while Creah does not afford domestic workers the same recognition. Something is wrong here.

A closer look at the demographic composition of these areas of work suggests that racial exclusion is part of this story. As mentioned earlier, black and Irish women had a monopoly on the domestic work that was shunned by the WWPU. While instinctive assumptions suggest that black women also worked as seamstresses, this was not the case in New York City, and was not the case at this specific moment. In Gotham, black women did not enter the sewing trades until decades later when new employment opportunities were created in factories and offices (opportunities, of course, that black women were excluded from). Sewing was considered one of the “genteel occupations for black women during this era” (Jones 1985: 123). In the Gilded Age New York City, black women worked predominantly as domestic servants, washerwomen, and cooks—all of which were the least paying occupations and unprotected by the WWPU (Dabel 2008: 67). In fact, Dabel's (2008) calculations show that in New York City, seamstresses constituted 11, 10 and 2 percent of the black labor force in 1860, 1870, and 1880, respectively. So despite existing in similar states of inequality, domestic servants (predominantly black and Irish) and seamstresses (everyone else) were discursively differentiated. Women's charities like the WWPU and urban writers responded, as Christine Stansell (1987: 110) points out, “by absorbing the figure of the seamstress into the traditional category of the ‘worthy poor’. Like other philanthropic constructions, the sentimental seamstress, solitary, pallid, and timid, embodied bourgeois aspirations and prejudices.”

This theme of deservingness continued to reverberate throughout history with other marginalized groups and is central to thinking about legal aid. Throughout the twentieth century, legal aid persisted as a service that was stingily provided based on the ethnoracial assumptions and hierarchies of the specific era. The WWPU marks this beginning of this in the legal aid context. As I explain in the following chapters, a few things happen with legal aid after the WWPU. On the *civil side* (e.g. disputes with employers, landlords) the demographic of the deserving poor corresponded with the groups described in other social welfare scholarship—those who worked and were ethnic whites. As I foraged through the archives, articles, newspapers, and annual reports of legal aid institutions for the next century, blacks, Latinos and Asian Americans as



COMPLAINT-DAY AT THE WORKING-WOMEN'S PROTECTIVE UNION.

This picture comes from an 1880 feature in *Harper's Weekly* on the WWPU and illustrates the typical interactions between distraught, sympathetic clients and the WWPU's attorney.

recipients appeared sporadically, which is odd since they all undoubtedly faced discrimination and the first two groups have dominated the ranks of the American poor. One could argue that the historically higher rates of minority unemployment may have excluded them from constituting the “worthy” or “deserving” component of the poor population, but that would ignore the sect of these populations who did work. Occupational considerations, as I explain above, along with racism and non-activation of available resources (because of lack of knowledge about institutions or because of fear of discrimination) all provide explanations for ethnoracial exclusions for legal aid. Blacks and Latinos have had a historic monopoly on poverty, but it was not until *a century later*, when Lyndon B. Johnson created the Office of Economic Opportunity (which established legal services programs across the country) did these groups become noticeable recipients of organized legal aid.⁴⁵ To be clear, their inclusion was not just about beneficence, but was about combating the social unrest of the 1960s and providing legitimacy to a reprehensible legal system. It was essentially about regulating the poor (Piven and Cloward 1971).

The *criminal side* is seemingly harder to postulate on since the WWPU did not offer these services. In fact, a skeptical reader might raise the criticism of “comparing apples with oranges.” But things can be gleaned on this issue as well. First, during this era and for decades later, organizations that *did* provide legal aid sparingly provided it in the criminal realm and this was because the criminally accused were assumed to be guilty

⁴⁵ The obvious exception is voluntary associations like the NAACP and MALDEF.

and generally undeserving of legal aid.⁴⁶ The WWPU may have made this distinction because of: its institutional focus on working women and female exclusion from male unions; organizational resources; mere adherence to the ethos about the criminally accused at the time. The examples of legal aid mentioned in the first chapter—the Pennsylvania Abolition Society and the Freedman’s Bureau—did not make these distinctions; the former because of the peculiar intersection of property law and criminal law, the latter because of its imperative to address the full legal needs of freedmen and women. Moreover, women of different racial and ethnic groups committed crimes in Gilded Age New York City (Gilfoyle 1992; Hicks 2010). Often times it was because of the same reason as the working women the WWPU sought to protect: low wages. Despite being invested in addressing discrimination against women, the WWPU prohibited a sect of women who faced legal hardships but were not in the circle of deservingness. This exclusion contributed to the distinction of civil and criminal legal aid as well as who was deserving of legal aid. The Protective Agency for Women and Children in Chicago, described below, tackled this exclusion and provided criminal legal aid for sex workers, but could not fully eliminate this distinction. Thus, with the WWPU we see the racialized and gendered ideas about deservingness that become mainstay features of social welfare protections, charity, and legal security for the next century.

“Standing Menace”: Occupational Exclusion and the Double Edged Sword of Maternalism

Despite only taking a small percentage of cases to court,⁴⁷ the symbolic significance of having legal assistance for working women, along with the real threat of litigation was enough to make the WWPU a meaningful institution. The organization was “a standing menace to the men, and women too, who are ready to engage in this nefarious business...In exciting the terror of the evildoers it fulfills its best purpose” (*The Sun* 1881). One 1878 report by the State Charities Aid Association of New York looked to it as a template for legal assistance and suggested that “no better argument can be adduced for the establishment of a department of legal aid, than to point to the existence and the work accomplished by the Working Women's Protective Union” (SSCA 1878:24). Another pamphlet on the organization describes the common encounters Union lawyers had with non-paying defendants:

“When their (female plaintiffs) stories are told, the lawyer places his estimate on them (defendants) remarking, ‘well are you going to pay this girl her dollar now, or shall I take the case to trial, and compel you to pay it with \$8 or \$9 costs added?’ The camps are nonplused. They offer to pay half; they say they will settle next week; the squirm in a variety of ways. But when the inexorable lawyer pressed them, the greasy wallet comes out and the dollar is paid—a dollar otherwise inevitable lost to the poor girl. (WWPU 1877).

⁴⁶ Indeed there are even traces of this logic today contrary to the legal fiction that individuals are innocent until proven guilty.

⁴⁷ For example, between the years of 1865 and 1867, there were approximately 6,000 first time applications for work in comparison to 466 applications for legal protection (WWPU *Fifth Annual Report*, page 35). Similarly from 1864-1870 there were 11,000 applications for work compared to 1300 applications for legal protection (WWPU, *Seventh Annual Report*, page 11).

For the particular set of women the WWPU served, it was successful in getting their claims recognized. But women were not only clients in the WWPU; they also conducted much of the legal work (e.g. interviewing clients and witnesses, determining whether women had a viable case, contacting employers) despite being generally excluded from the legal profession (Batlan 2010). Similar to advocates of women's suffrage and female inclusion into the burgeoning welfare state, WWPU workers and constituents adopted a language of maternalism to gain support for their cause. This maternalism, is defined by Koven and Michel (1990: 1077) as "ideologies that exalted women's capacity to mother and extended to society as a whole the values of care, nurturance, and morality." Indeed, a 1877 annual report of the Union described it as "a home where the story of fraud can be told in the ear of a kind and sympathizing matron; an office where the persecuted may seek competent and careful legal advice, 'without money and without price;' and a fund devoted to the defrayal of the otherwise fearful 'costs of prosecution.' In other words, it is the Working Woman's Court of Justice, as well as Court of Sympathy and Encouragement" (WWPU 1877). Understanding this particular aspect of legal assistance highlights the multivalent operations of gender during the inception of the legal aid movement as well as how the different strategies of exclusion, demarcation, and inclusion influenced the structure of the legal profession and legal aid.

First, as some feminist historians have highlighted (Muncy 1991; Gordon 1994; Ladd-Taylor 1994), there were limits to this maternalist ideology. In an attempt to carve out a space for lay female legal aid workers, supporters (both men and women) contributed the various strategies that undergird the patriarchal nature of professions. To be clear, the first and foremost strategy was *exclusionary*. Indeed, in the 1872 Supreme Court case *Bradwell v. State of Illinois*, where the petitioner Myra Bradwell challenged Illinois' denial of her admission to the state bar, the Court essentially upheld women's exclusion from the legal profession stating:

On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life...the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood...The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.⁴⁸

These exclusionary tactics existed for almost half of a century, until 1918 when women were finally accepted into membership in the American Bar Association and 1920 when the women were allowed to practice in every state (Abel 1989; Feinman 1994). But there were also strategies of *demarcation* that were utilized by both men and women.

This demarcation was a result of: men's delineation of women's work; women's resistant responses to a gendered division of labor as well as their attempts to shape the division of labor to their advantage (Witz 1992). But by relying on maternalist ideology and deploying ideas about putatively gender-specific attributes in the legal assistance context (e.g. care, sensitivity) female reformers unintentionally contributed to the "sex

⁴⁸ 83 U.S. 130, 141 (1872).

role” division of labor that permeated the legal aid environment for the following decades. Needless to say, ideals about female behavior, male control, and the lack of female institutional autonomy severely limited professional women’s strategic options. “Women thus endured unique conflicts in the professionalization process, devised unique strategies for coping with those conflicts, and often followed unique career paths as a result” (Muncy 1994: xiii). Men, whose sexist ideas about women’s role in legal aid were both independent of and piggybacked on maternalist ideology, had no problem delineating a gendered division of labor. This was key to what helped develop the field of social work (Batlan 2010). By defining women’s legal work as subsidiary, men in the profession utilized an *inclusionary* strategy, where “women workers may not just be excluded from certain jobs or grades of job, but also included in other adjacent or related jobs, usually graded lower or less skilled jobs. In a sense, it is a corollary of exclusion” (Witz 1992: 26).

These strategies were central to the feminization of social work and the masculinization legal work. The emergence of the German Legal Aid Society (discussed below), led it to go into direct competition with the WWPU. After widening its goals and expanding its clientele beyond Germans, it attempted to address the legal issues of working women (albeit through narrow legal means) while disassociating itself with the supposedly feminist practices of charity, philanthropy, and sentimentalism; it essentially deemed much of the labor done by lay female lawyers as marginal and as social work (Batlan 2010). Costello (2006: 48) describes this gendered divide best when she states, “in the ‘masculine profession’ of law...masculinity and professionalism are both associated with characteristics such as power, rationality, dominance, aggression and competence. But in the feminine profession of social work... femininity is associated with values such as affection, caretaking and attraction.” As we shall see later in this chapter and in the dissertation, this characterization of legal work done by lay practitioners (often because of their exclusion from the legal sector) plays an important role in why the historiography on legal aid is imprecise. The historiographical understanding of legal aid as a service performed only by credentialed lawyers during a time of exclusion and nascent professionalization is bound to lead not only to historical oversights, but also reinforce these same exclusions.

The WWPU offers a telling example of how the moralist and paternalist sensibilities that influence legal aid can be perpetrated by both out-group (men) and in-group members (women). One of the motivating forces for the WWPU’s legal aid program revolved around assumptions about the family, welfare, and sexual conduct. The Union aggressively pursued wage disputes because of its sheer unfairness, but also because unpaid women were thought to be susceptible to unhealthy reliance on public charity, pauperization, and prostitution (Batlan 2010). These concerns were shared by men and women of the middle and upper classes and influenced their support of some divorce cases (despite the general unpopularity for marriage dissolution). These anxieties correspond with the alarmist juxtapositions of prostitution and low-wage labor with slavery as well as the longstanding rhetoric of the (un)deserving poor (Roediger 1991; Stanley 1998)—all of which demonstrate how legal aid is often not just about assistance but also about more unrecognized ideological goals.

The Protective Agency For Women and Children

On the 19th of June, 1888, Nancy Harris, with her son and sister, all respectable and honest colored people, came from Atlanta, Georgia, to Chicago. The sister felt herself rich with one hundred and forty dollars, but Nancy got a place as a family servant. Too simple minded to conceal what she deemed the wealth of her sister, poor Nancy soon fell victim to the cupidity of her employers, who laid a trap, accused her of stealing thirty-five dollars, beat her with a rolling-pin, had both women arrested, and all the money taken from them. The case was railroaded through the courts, and on the 5th of July Nancy was sent to the penitentiary at Joliet, a little over two weeks from the day she first set foot in Chicago. The one hundred and forty dollars probably paid the pretended debt, and a good ground fee to the assisting constable. Would that our boodlers and anarchist could be so promptly cared for! We took a writ of error to the Supreme Court, and showed that there was absolutely no evidence against Nancy. When the case was tried in criminal court, she had no lawyer to defend her, and the judge had appointed one of the poor sort that hang around the lower courts hoping for a case. This man did not take the trouble to inquire into the facts, but advised Nancy to throw herself on the mercy of the court. She did not that this was to confess herself guilty and invite sentence. The facts were shown to the Supreme Court, the sentence of the lower court was reversed, and Nancy released from the penitentiary. This case was thus left exactly as if no trial had taken place, and the State's attorney could begin all over again; but the Supreme Court, seeing the entire lack of evidence against the accused, recommended the State's attorney to strike the case off the calendar, which he did. Poor Nancy could never have done this alone (Brown 1891).

The story above comes from an 1891 description of the Protective Agency for Women and Children (PAWC), a legal aid organization that was similar to the WWPU, but created two decades later in Chicago. It begs so many questions that are relevant to legal aid. Did Nancy get her money back, or did her freedom suffice (for her or PAWC)? Was her court-appointed attorney as incompetent as some of the court appointed lawyers in the criminal justice system 125 years later? If so or if not, how common is the incompetence? Similarly, how common was it for defendants to be so compliant? Considering the aforementioned discussion on black women's exclusion from legal aid and broader discussions on their exclusion from charity and social welfare provisions, is this example the model or the exception? Was it rhetorical device? Despite the temptation to answer all these questions, I narrow my discussion to the operations of PAWC (although the answers to many of these questions become apparent throughout the dissertation).

The idea for the Protective Agency for Women and Children (PAWC) sprung in the fall of 1885 and was actualized at meeting at the Grand Pacific Hotel in January 1886 that consisted of various representatives of Chicago women's societies. The Chicago Women's Club served as the main institutional leader and PAWC operated as its auxiliary legal aid arm.⁴⁹ While this organization has received much more attention in feminist scholarship, the same critique applies to the historiography on legal aid, which has generally understood the organization as a blip in history as opposed to an important institutional development. Nevertheless, this history is harder to ignore because PAWC was a direct predecessor to the Legal Aid Society of Chicago that exists today.⁵⁰

⁴⁹ Other organizations included the Illinois Humane Society, the Woman's Christian Temperance Union and the Cook County Suffrage Association.

⁵⁰ In 1905 PAWC merged with the bureau of Justice to create the Legal Aid Society of Chicago.

A few things need to be remembered to understand the nature of PAWC's work. First, the agents of the organization were "lay lawyers" or "women who were involved in providing legal advice but who did not have formal legal training in terms of either attending law school or clerking in a lawyer's office" (Batlan 2011: 185). This is significant because it is this liminal status that often prevents PAWC from being included in the history of legal aid. Put simply, occupational exclusion of certain groups of people often forecloses nuanced understandings of how these same groups may have participated in the profession. An unconvinced reader might have a mania for formal credentials to seriously consider these lay lawyers as providers of legal aid, but it is important to remember that this was an era of budding professionalization where the field of law was just beginning to create a semblance of organizational order and requirements for access to the occupation. What this meant was that although there were handful of female lawyers and a few opportunities for legal training, social mores and entrenched sexism pushed aspiring female attorneys to the fringes and the land of lay legal work. Moreover, if legal aid is understood the an organized provision advice and counseling as it relates to substantive and procedural legal issues for indigent clients, the under-recognized work of PAWC as well as other organizations (described in the next chapter) comes to the fore of the discussion. For readers still tethered to the idea of credentials, it is also important that the delivery of non-lawyer services has existed for about as long as bar associations themselves (Christensen 1980; Rhode 1981; Rhode 1990).

PAWC offered legal aid "by giving their clients legal advice, conducting investigations of their legal claims, accompanying them to court, and arguing on their behalf with state prosecutors, private attorney and judges" (Jordan 2011: 158). Like the WWPU, PAWC handled cases where employers were accused of cheating women out of their wages. PAWC shared some ideological similarities with the WWPU. Much like the WWPU, PAWC's legal work, along with its reputation and successes made it a formidable *symbolic* presence. Mary Allen West (1891: 512) notes in her description of the agency that "often the simple knowledge that their poor victim has such a backer, is sufficient to make a scamp disgorge his ill-gotten gains or the money out of which he was attempting to cheat a poor woman." It also used the rhetoric of maternalism and social purity that was common of the era to warrant its necessity. "The presence of a delegation of reputable women, women of social position and influence" one supporter argued, "changes the moral tone of a Police Court" (Boyes 1914: 3144). This feminist intervention was especially important considering the corruption and chaos that defined Chicago criminal justice during this time (Wilrich 2003).

But PAWC also had an agenda that was slightly different from the WWPU, which I will highlight here (while avoiding the ideological overlaps). One of its goals was to address gendered inequality in the legal system that took place through judicial lenience toward rape, as well as perpetrators of violence against wives and children (e.g. marital rape, wife-beating, molestation). As feminist and legal historians have amply demonstrated, despite some legislative protections and the social taint that came with domestic violence, wife beating and marital rape were often seen as husbands "prerogative;" full prosecution "to the extent of the law" was a rare occurrence (Pleck 1987; Gordon 1988; Sigel 1996). Violence against wives and uxoricide were especially common in Gilded Age Chicago (Adler 2006: 45-84). PAWC agents helped young women file complaints and assisted in the prosecution of cases (Odem 1995: 79). Equally

troubling was the apparent impunity child molesters faced. Boyes (1914: 3141) complained:

“Criminal assaults upon little girls are generally dismissed with a trifling fine for disorderly conduct’ while larceny sends a man to the penitentiary, and even vagrancy or carrying concealed weapons will generally land him in the bridewell [a jail for petty offenders accused of less serious crimes]. Assault with intent to kill or commit rape are classed together on the statute books, and incur the same penalty; but practically, the first is punished according to law, with imprisonment in the penitentiary, while testimony can hardly be brought strong enough to secure conviction for the second crime, and the course of justice is so tortuous and thorny that few will persevere to the end.”

In many of these cases, PAWC sent female bureaucrats to court to accompany survivors, recognizing that it would be difficult for victims to testify in a male-dominated courtroom or that they would be susceptible to uncomfortable questions about their character and/or sexual history (Conover 1898).

Another related issue of concern for PAWC was the unfathomably low age for sexual consent in Illinois (age ten). Through legislative advocacy PAWC helped change the age of consent to fourteen. PAWC also investigated the widespread issues of kidnapping and seduction that led to forced prostitution. Victims of these practices came from Chicago and outside the city, and in addition to investigating these cases, PAWC also made people in the Midwest aware of these cases. In 1893, the *News-Herald* of Hillsboro, Ohio (about 350 miles away, right outside of Cincinnati) sent out a warning about unsuspecting girls who were being lured to Chicago “for immoral purposes” and cautioned that, “No girl should be lured by advertisements of ‘light work and good wages.’ There are more than enough workers in Chicago for all legitimate purposes. Neither should she seek acquaintance in cars, depots or streets. Reliable information about wages, work, etc. will be furnished free by the Protective Agency for Women and Children” (*The News-Herald* 1893). An article in the same year was printed by *The Princeton Union* (published in Princeton, Minnesota about 450 miles from Chicago, right outside of Minneapolis) that sent similar cautions, stating that PAWC “have issued a circular, warning young women to beware of advertisements of ‘light work and good wages’ as thousands of girls are wanted for immoral purposes in that ungodly city” (*The Princeton Union* 1893).

PAWC also focused its energies on investigating and publicizing male bureaucrats’ discrimination against women in prostitution cases. This discrimination would often occur through arbitrary arrests of working class women and were part of Chicago’s century-and-a-half reputation for cronyism and political corruption. These women would be arrested with little evidence, fined or charged bail, and then rounded up again a few days or weeks later in a manner that allowed bondsmen, lawyers and judges to all get paid (Tax 1980: 70). In other instances many women were denied habeas corpus (the right to be brought before a judge or court) or arrested for solicitation; men that were accused patronizing sex workers would not be required to testify in court because an officer’s testimony was enough to convict (Flanagan 2002:41). In this sense, PAWC utilized the “courtwatching” technique that has become popular by contemporary quasi-legal aid and civil rights organizations like Chicago Appleseed and Southern Poverty Law Center. The organization confronted the exclusion of women from legal proceedings, which was undergirded by the patriarchal and Victorian idea that courts were not

appropriate venues for women (Pleck 1988; Jordan 2011). PAWC also worked in the areas of legislative reform and public education campaigns; provided lodging for homeless women and victims; and in “extreme circumstances” the organization helped women secure divorces from abusive husbands (Jordan 2011; Odem 1995; Pleck 1988; Flannigan 2002). This did not come without a cost. In addition to its solidarity with putatively “unchaste women” (primarily sex workers), PAWC and its lawyers received considerable backlash for its occasional support of divorce, which led them to advocate for child support laws and the criminalization of desertion as perhaps more politically palatable positions.

PAWC continued its work for about three decades and it eventually merged with another legal aid organization, the Bureau of Justice, which evolved in the Legal Aid Society of Chicago in 1905. Like the WWPU, PAWC offers important insights on the development of legal aid institutions. First, their work unveils the gendered *origins* of legal aid. Unlike the Pennsylvania Abolition Society and the Freedman’s Bureau, which were earlier examples of legal aid organizations, but did not have a direct impact on subsequent legal aid societies, WWPU and PAWC were direct predecessors that influenced the development of Legal Aid Societies in New York City and Chicago, respectively.⁵¹ PAWC demonstrates how legal aid as a practice entailed substantive elements of social work, but was disentangled with the professionalization and masculinization of the legal profession (Batlan, forthcoming).

But like the WWPU, PAWC agents were complicit in this gendering of work (albeit not equally). The social isolation of single mothers and working women along with the sexual vulnerability of young girls was deemed as a rationalization for “protective” services. Historian Elizabeth Pleck (1983: 486), who was one of the first contemporary historians to seriously probe PAWC, acknowledges that “the Chicago agency justified its work by arguing that women were the *natural protectors* of other women and children. It was women’s responsibility to protect these innocents from the ‘human brutes,’ or rapist, who preyed upon them” (emphasis added). I must emphatically state that I am not “blaming the victim” nor am I trying to suggest that women were the agents of their own subordination in the legal profession. Instead I am trying to point to the multidimensional operations of gender in the Gilded Age legal aid context. My unease with the insightful and profoundly provocative feminist work on legal aid (Batlan 2010; Batlan 2011; Jordan 2011) is that it locates the occupational demarcation of women in the legal profession as sole product of patriarchy and sexism. No doubt, these factors paramount to understanding to gendered occupational divisions. But to understate the role of maternalism to this demarcation would not only be a failure to fully capture the spectrum of legal aid, but it would also be a snub to a healthy body of feminist scholarship that has questioned the utility and variance of maternalist ideology in the tail-end of Gilded Age and Progressive Era (e.g. Muncy 1991; Gordon 1994; Ladd-Taylor 1994; Mink 1996; Wilkinson 1999). With PAWC, we see how legal aid can be complicit in the same system of gender subordination that it seeks to challenge.

⁵¹ The historical record does not show any linkages between the PAS, the Freedmen’s Bureau and subsequent legal aid organizations, but it does show influence from WWPU and PAWC.

CHAPTER 3: DESIGNING DISADVANTAGE: THE PROGRESSIVE ERA AND THE BUREAUCRATIZATION OF LEGAL AID

In February 1919, Arthur von Briesen, one most important figures in the Progressive Era legal community, sent an impassioned letter to newspaper tycoon William Rudolph Hearst, who was one of the wealthiest and powerful men in American journalism for the first half of the twentieth century. Much more is known in the historical record about Hearst. The media mogul, along with his main competitor Joseph Pulitzer, was responsible for the development of yellow journalism—a sensational form of reporting that used alarmist, hyperbolic rhetoric to attract readers. The protagonist for the popular film *Citizen Kane* is based off of Hearst (for readers who are film buffs). His Hearst Corporation still exists today and is one of the largest media conglomerates in the world, with ownership in companies that include *O*, *The Oprah Magazine*, *Esquire Magazine*, *Cosmopolitan*, *ESPN*, *A+E Networks*.⁵² Much less is known about von Briesen; with the exception of a park in Staten Island (which was his former estate) and some scattered references in legal history, he has a less recognizable legacy.

Von Briesen emigrated in 1858 from Germany to New York City at the age of 15 and emblemized the popular Horatio Alger trope of the late nineteenth century. He served the Union valiantly in the Civil War. During a furlough back to New York City, where he was assisting his increasingly ill father, he witnessed the devastation of the draft riots of 1863 (committed primarily by Irish-Americans and poor New Yorkers). A mob administered a brutal beating on a Union colonel in front of the drug store that von Briesen's father owned. His half-blind father attempted to offer the barely living soldier a drink of water, and for that, the mob turned on the druggist, set the store on fire and destroyed it. Both von Briesens barely escaped and the experience stayed with the young immigrant through his subsequent legal studies at New York University as well as his well-respected patent law practice.⁵³ Von Briesen's most important position was his two-decade post as president of the New York Legal Aid Society (1896-1916), the organization at the forefront of the legal aid bureaucratization during the Progressive Era. President and Chief Justice Taft called von Briesen "the philanthropic leader of the bar" (Maguire 1929: xi). Von Briesen's experience with ethnic upheaval, demonstrated compassion for the poor, and assimilationist views on Americanization influenced his legal aid advocacy and his communication to Hearst.

In the letter, which was written at the advent of the First Red Scare, von Briesen praises a series of columns that Hearst published in his newspaper *The New York American* on the threat posed by bolshevism and the specter of anarchism. Von Briesen mentions that as president of the Legal Aid Society, he has "had special opportunities to seek a solution" to these social threats. The Prussian philanthropist discussed how a

⁵² For treatments of Hearst see Nasaw (2001) and Proctor (2007); for an analysis on this sensationalist genre of journalism, as well as how it was developed through the rivalry between Hearst and Pulitzer, see Spencer (2007).

⁵³ There are slightly different versions of this events; for a snapshot on the von Briesen family tree starting with his ancestor Bruno (A.D. 880) to Arthur's son Fritz, see Schlegel (1917), especially pages 5-7 on the riots; see also, Cook (1974) and Bernstein (1991).

guiding principle for the Society was to “secure justice to rich and poor” and in discussing the aforementioned solution he states:

“We were fighting anarchism and communism and, as you now call it, bolshevism, not by harsh measures but with affectionate regard for the sufferings of men in all places, for we were satisfied that no individual will become attached to destructive, anarchistic movements if he knows that justice in all things is attainable and can be secured, and thus we converted, I believe, hundreds of thousands into good citizens who but for our work would have become dissatisfied and destructive individuals. We satisfied all classes, the oppressor and the oppressed, that justice was not a mere dream.”⁵⁴

Von Briesen’s comments are ripe with implications and emblemize some of the major motivations of the legal aid advocacy as well as the zeitgeist of the Progressive Era. This chapter highlights how Americanization, legitimization, bureaucratization, moralization influenced the Progressive Era development of legal aid organizations. Von Briesen’s letter highlights the importance of Americanization—the nationwide movement that thrived in the beginning of twentieth century and attempted to integrate white immigrants into the polity. His letter also underlines assumptions about legal aid institutionalization and the perceived legitimacy it could offer the legal system. Nevertheless, Von Briesen may have been naïve to believe that justice could be secured for *both* the rich and the poor in a time of unfettered class warfare and inchoate public bureaucracies.⁵⁵

The desire to placate the “worthy” poor and the wealthy was actualized through the *accommodationism* of legal aid reformers. In this era, accommodationism typically refers to the informal compact made in 1895 by African American spokespersons (mainly Booker T. Washington) and southern leaders. In the agreement, blacks would receive vocational education and work in exchange for acquiescence to southern rule of law (Harlan 1986). In the case of legal aid, accommodationism looked quite similar, as it entailed a loose-knit arrangement between the wealthy elite, middle class reformers, the bar, and academia. But this accommodationism was also layered by what philosopher Andre Gorz (1967) famously dubbed “non-reformist reform” which in this case, entails conservative transformation and fine-tuning of the legal system that maintains the political-economic order, as opposed to more substantive, radical transformations of the legal system (Barak 1980). This accommodationist approach smothered the radical possibilities of legal aid. It also helped establish a legal aid atmosphere that was selectively invested in challenging the jurisprudential status quo. The accommodationism of this era is an important demonstration of the failures of legal liberalism and has left indelible, but unrecognized marks on the contemporary contours of legal aid.

The other interesting and illuminating aspect of von Briesen’s letter was the idea that legal aid was a *solution* to the prospects of anarchism and bolshevism. Ethnic whites, or the “hyphenated Americans” were seen as most likely to succumb to political dissidence and became the primary objects of reformers’ critique and beneficence. In this sense, legal aid contributed to the Americanization project. Like other sections of this dissertation, I maintain that the development of institutionalized legal aid was

⁵⁴ Letter from Arthur von Briesen to William R. Hearst, February 10, 1919. Box 1 Folder 24, Arthur von Briesen Papers, Princeton University.

⁵⁵ See McGerr (2003) and Stromquist (2006) for explicit takes on class conflict in the Progressive Era and reformers’ unique positioning within this struggle.

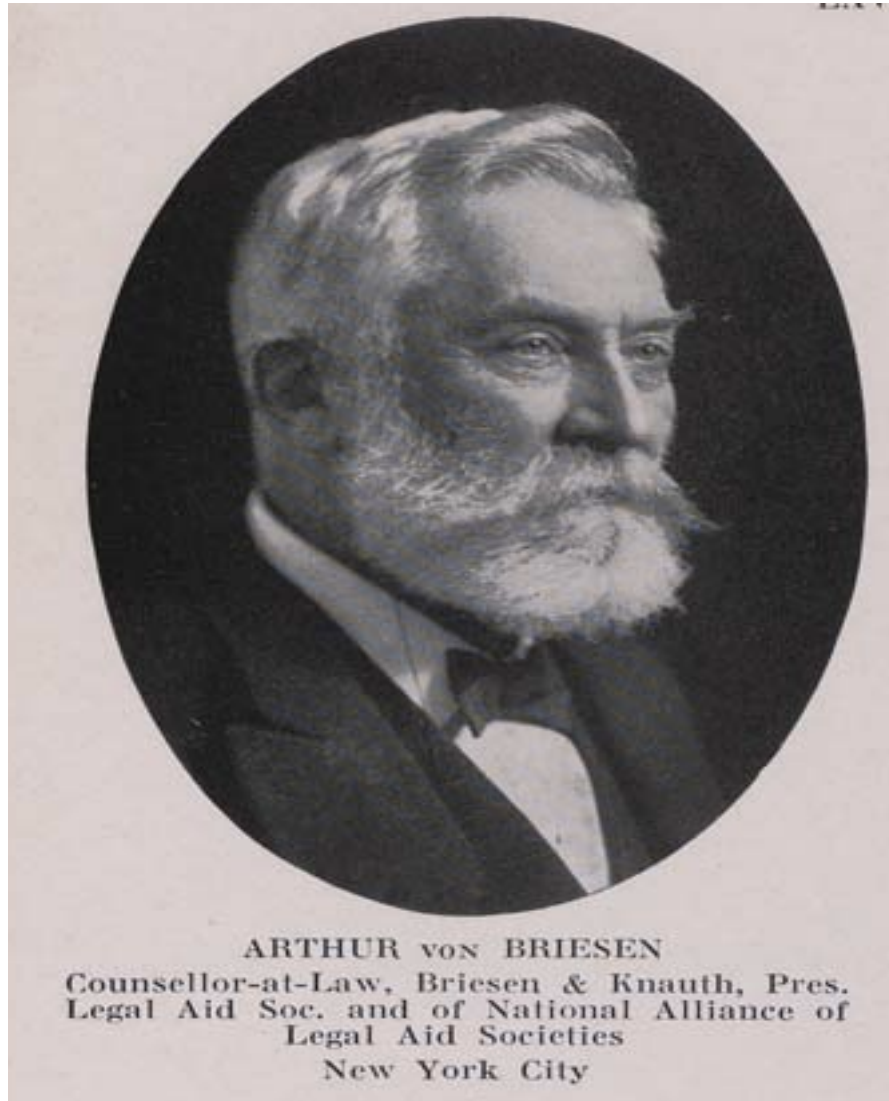
ideologically multi-faceted and impacted by legitimacy concerns, social control, and sincere commitments to fairness. Historians have discussed how schools, settlement houses, recreational facilities, and social welfare programs served as sites of institutionalization that helped with the Americanization process.⁵⁶ But legal aid is often left out of this narrative, despite law's importance to defining the boundaries of citizenship. By offering the more identifiable appearance of justice, which I describe as a *symbolic charade*, legal aid offered legitimacy to a legal system that was sullied by bureaucratic malfeasance and corporate corruption (Barak 1980; McConville and Mirsky 1986).⁵⁷ This appearance of justice was envisioned as being tangible for poor clients who went through the legal machinery and intangible to spectators. These onlookers included the social networks of clients, the legal profession, the journalistic field, and the general public. They were considered the vicarious recipients of justice as legal aid sought to pacify disgruntled white ethnics—von Briesen's "dissatisfied and destructive individuals"—who may have found sympathy with alternative political philosophies such as bolshevism and anarchism. This episode would reappear a few decades later with poor whites, blacks, and Latinos in the 1960s as the new objects of legal beneficence.

There are some other themes that are important to this era that do not surface in von Briesen's note. First is the issue of *bureaucratization*. This issue is not discussed explicitly in von Briesen's letter, but is alluded to in his description of the LAS as a novel and effective way to deal with problems of legal inequality and political dissidence. Von Briesen was writing in an important moment in American legal history. During this period of rapid bureaucratization, legal reformers and actors developed new strategies and institutions in an attempt to improve the criminal justice system (e.g. Odem 1995; Platt 1977; Rothman 1980; Simon 1993; Willrich 2003). These efforts led to a more expansive division of labor within the criminal justice system. In his important book on public administration and the administrative state, Dwight Waldo ([1948] 2007:19) argues that a "Gospel of Efficiency" undergirded these institutional reforms and claims that "efficiency grew to be a national catchword in the Progressive era as mechanization became the rule in American life." Integral to this discussion of bureaucratization is the contemporary analyses of indigent defense that see plea-bargaining, the neoliberal language of efficiency, and the lukewarm commitment to legal aid by the bar and the state as recent developments (Bach 2010; Houppert 2013). A closer look at the historical record, organizational rhetoric, and scholarly justifications for legal aid in the Progressive Era demonstrate that non-adversarialism and Taylorist efficiency⁵⁸ were central to the

⁵⁶ See Johnson and Talbot (1920) for an excellent primary source that captures the range of Americanization project. Classic texts on this issue include Hartman (1948) and Higham (2002). Ziegler-McPherson (2009) emphasizes the sympathy and well-intentioned nature of these reformers while Mirel (2010) challenges the coercive tenor of the scholarship on Americanization and highlights the agency of immigrants who participated in this Americanization process.

⁵⁷ In fact, exposing political and bureaucratic corruption were central to this era, as exemplified by the emergence of muckraking journalism. A classic account on this issue is offered in Filler ([1939]1993).

⁵⁸ Taylorism, which is also referred to as scientific management, is named after mechanical engineer Frederick Winslow Taylor. Taylor was an important figure in the "Efficiency movement" which was an essential plank of the Progressive Era. This movement sought to



Picture of Arthur von Briesen from *Empire State Notables*, Hartwell Stafford (1914: 136).

development in legal aid. In other words, the issues of plea-bargain compliant public defenders along with their shepherding of the criminally accused into the penal facilities is far from new; in fact, it was embedded in the design of legal aid. If interlocutors in contemporary legal aid debates, as well as scholars of law and crime recognized this, it could alter some of the fundamental assumptive theories of punishment, jurisprudence, and penal inequality.

Von Briesen's letter to Hearst is silent on the stratification of the legal profession. This stratification was related to bureaucratization and induced partly by the legal aid movement. The push toward organized legal aid and public defender offices was ostensibly concerned with benevolent ideas about "justice," but was also influenced by the administrative desire to replace the assigned counsel system (ACS) (Barak 1980). In

implement "best practices" and eliminate various forms of waste in society (economic, environmental, municipal, social and legal). See De Witt (1915); Haber (1964); Lee (2008).

this model, which is still used today in some places, judges would use their discretion to appoint attorneys to indigent defendants in criminal cases. But these assigned attorneys were often inexperienced in the practice of criminal law and inadequately compensated. Similar to the current legal aid environment, these factors hindered assigned attorneys' ability to effectively investigate cases and offered few incentives for them to zealously and ethically defend their clients. But on a symbolic level, these assigned counsel attorneys were often immigrants, ethnic whites, women and working-class individuals who toiled through part-time and night time law schools and imagined law as a route toward social mobility (Auerbach 1976; Abel 1989).⁵⁹ The unscrupulous methods of some of these attorneys, who were locked out of the profitable upper echelons of the legal professions, became conflated with immigrant lawyers in toto. This propelled the field of law to undergo a professionalization and accreditation process that sought to police the boundaries of the vocation and extricate itself from the socially undesirable groups (Smith and Rogers 1932; Hurst 1950; Auerbach 1976; Abel 1989; Wiecek 1998). So while the legal aid movement helped institutionalize the venerable goal organized assistance to the indigent, it also helped stratify the bar by removing a large source of clientele for marginalized attorneys, a reality that raises questions the altruistic intentions of legal reformers.

Finally, there was the *moralization* of legal aid. Similar to the gendered stratification of legal work mentioned in the second chapter, the Progressive Era marked a more explicit demarcation of which groups were deserving of legal aid as well as who could “reliably” and “nobly” perform legal practice. These distinctions rested in peculiar and often contradictory assumptions about ethnicity and vulnerability. This moralization was layered. First, some organizations and locales saw legal aid as a device that should only be for civil suits and imagined clients in these types of cases as deserving (e.g. debt collection, labor issues, consumer protection), while eschewing criminal defendants as underserving of legal aid. Within both sets of practice, attorneys used discretionary judgments to decide who was “worthy” of legal defense. Naturally, discretion is a component of most bureaucratic positions; but the significant point here is that this discretionary capacity was influenced by assumptions about race, class, gender, and vulnerability in ways that have been previously unacknowledged by scholars. These oversights fundamentally influence the historiographical edifice of knowledge on legal aid.⁶⁰

Overall, there are two overarching goals of the chapter. The first is to highlight overlooked continuities in legal aid that might help demystify this provision. The other objective is to examine some of the discomfiting aspects of legal aid during the Progressive Era that were fundamentally crucial to its development. Understanding these facets are crucial to breaking out of the conceptual and historical straightjacket that sometimes mires legal aid scholarship.

⁵⁹ Dorothy Finnegan (2005: 220) reminds us that many evening law schools initially limited access to men. These schools became coeducational with time and that was deliberate; some places opened their doors to women “to augment the dwindling numbers of male students due to enlistment in the war.”

⁶⁰ Notable exceptions in the areas of gender and class include Batlan (2010; 2011) and Jordan (2011).

MUTED THEMES IN LEGAL AID HISTORIOGRAPHY: RACE, ETHNICITY, AMERICANIZATION, AND POLITICS

It is important to discuss some contextual features of this period as well as some key points of significance that are either omitted or underdeveloped in the influential texts on legal aid. There are three interrelated key pitfalls that have gone unnoticed. First is the exclusively coercive tenor of this scholarship. Second is the limited scope in which politics is brought to the fore of these discussions, particularly as it relates to eugenics and Americanization. The final point is the failure to substantively explicate the relationship between legal aid and ethnicity as well as the outright omission of race. These issues have the potential to raise the stakes of inquiry as it relates to legal aid during this period and in contemporary American society.

Many of the notable accounts on legal aid have either an exclusively social control view or an emphasis on market control and lawyers' monopolization of this service. These accounts view legal aid primarily as a development that functioned to serve the needs of corporate capitalism and the elite members of the legal profession (Auerbach 1976; Barak 1980; McConville and Mirsky 1986). This is true, but only part of the story. The problem with analyses that focus on professional monopolization, social control, and corporations' capture of progressive social ideals, is that these assumptions rest "simply on a functionalist 'fit' between progressive policies and what seem in hindsight to have been the needs of corporate capitalism. Yet virtually all cultural systems, even starkly divided ones, 'function' in hindsight" (Rodgers 1982:81). Sociolegal scholar Terence Halliday (1987: xiv) similarly notes problems with such accounts stating, "with a particular thesis in hand, such as the monopolization argument, the public acts of professions attain a coherence, but only insofar as those acts pertain to that thesis. There is no attempt to grapple with all those public activities of associations that are not readily assimilated to monopolist theory." This chapter does not dismiss these functionalist arguments as they do have some traction, but it seeks to widen the scope of inquiry and grapple with these tensions.

Historiographical omissions and conceptual limitations have immediate implications on how we understand the history of legal aid and provide a point of reference for one-dimensional understandings of public defenders as mere cogs in the criminal justice machinery. Many descriptions of legal aid offer a limited glimpse of the intra-professional conflict in the legal community and scant attention to how reformers varied in their ideas of what legal aid should look like. Moreover, readers of these accounts get an exclusive focus on the predominant forms of legal aid (e.g. that which was provided by white-dominated bar associations, private organizations, and municipal governments) to the exclusion of ethnic mutual aid societies and organizations that provided legal aid because and in spite of segregation and racial discrimination.⁶¹ This is particularly important and leads to one of the next glaring oversights of legal aid scholarship—the narrow understandings of the political environment legal aid reformers encountered.

⁶¹ This is a point examined in detail in the next chapter.

In these accounts there are various levels of negligence to political currents that undoubtedly influenced the legal environment. Segregation does not come up at all. This strange elision exists despite the undoubted reality that segregation was a defining feature of social life during this era and was upheld by the same legal and political institutions that legal aid organizations worked in and confronted.⁶² While people typically assume that Jim Crow was southern in nature, its influence reached across the country. Echoing arguments made by scholars of African American and urban history, Diner (1998: 129) reminds us that, “Northern racism operated more by practice than by law. Unofficial segregation prevailed in parks and on beaches; YMCAs and social settlements had either a white or black clientele. Hotels, restaurants, and bars might or might not serve African-Americans, but they rarely posted signs indicating their practice.” Segregation was similarly pernicious in the Southwest, Midwest and west-coast (e.g. Drake and Cayton 1945; Orozco 2009; Taylor 1999). The ubiquity of government and privately imposed forms of segregation and discrimination cannot be understated. It occurred in libraries, parks, beaches, pools, public transportation, housing, education, hospitals, military service, unions, restroom facilities, movie theaters, hotels, churches, the restaurant industry, vice and entertainment districts, employment, real estate (steering), recreational facilities, mortgages (financial lending) and insurance. It is not unreasonable to believe that the tentacles of segregation had an impact on the provision of legal services. In fact, I argue that it was unrecognized forms of discrimination that contributed to ethnoracial minorities’ spotty appearance in the historical record of legal aid. But much of the scholarship on this issue almost seems to suggest that legal aid was politically insulated from this segregationist milieu.

Similarly, but perhaps not as egregiously, these accounts give little attention to the kissing cousins of eugenics and Americanization. The latter is often mentioned briefly, and with the assumption that legal aid reformers were only envoys for Americanization ideologues. Some were. But what was equally likely is that they were responding to the political environment of the time. Arguably, legal aid advocates offered a tempered program, especially when juxtaposed with the hybrid eugenicists-nativist views of the time espoused by individuals like Harvard professor and Immigration Restriction League leader Robert DeCourcy Ward. Ward (1910:64) claimed that Americans should “exercise the same care in admitting human beings as we exercise in relation to animals or insect pests or disease germs” and maintained that “there are certain parts of Europe from which it would be better for the American race if no aliens at all were admitted.” On the flipside, Progressive Era sympathizers offered adult education, recreation, labor market regulations, and a host of other reforms as positive alternatives for immigrants. (McPherson 2009). Clearly there was a range political possibilities, perspectives, and

⁶² The notable cases are: *Civil Rights Cases*, 109 U.S. 3 (1883), which held that Congress did not have the power to pass legislation that protected blacks from private discrimination; *Plessy v. Ferguson* (1896), which upheld the constitutionality of segregation; *Ozawa v. United States*, 260 U.S. 178 (1922), which held that Japanese individuals were not eligible for naturalization and, the Chinese Exclusion Act, which was established in 1882 and lasted until 1943 is also important. The Act restricted Chinese immigration and prospects for citizenship.

intentions in which legal aid reformers operated in, but students of legal aid do not get a sense of the diverse nature of eugenicists and Americanization efforts.

We do know that eugenic initiatives were upheld by law and complemented by reform efforts that were undergirded by what Michael Wilrich (2003) refers to as “eugenics jurisprudence.” This unique perspective percolated in the field of law during the Progressive Era and was emblemized by the Supreme Court case *Buck v. Bell* (1927), which upheld a Virginia compulsory sterilization law that led to the sterilization of the allegedly “feeble minded” plaintiff Carrie Buck.⁶³ Americanization was also integral to the rhetoric that was deployed to marshal support for legal aid. Overall, eugenicists, Americanization advocates, and legal aid reformers relied on the same funding streams, were interlocutors, and held similar ideas about what characteristics constituted the proper citizen. Many of them either explicitly or tacitly espoused a hierarchy of citizenship that ranged from prospective (for ethnic whites), to liminal (for blacks, Latinos, and Native Americans) to impossible (for Chinese).

In fact, John S. Bradway, who helped create legal aid clinics at Duke University and the University of Southern California (which evolved into the Los Angeles Legal Aid Foundation that exists today), was a notable eugenicist. Bradway served as Secretary (1922-1940) and President (1940-1942) of the National Association of Legal Aid Organizations. He also authored a 1933 North Carolina sterilization law that survived until 1974 and contributed to the state’s recent \$10 million restitution program for eugenic victims (Johnson 2013). He developed the bill “after considerable study” of the Virginia eugenics statute that was ruled constitutional in the Supreme Court case *Buck v. Bell* (Brown 1935). Bradway’s writings indicate that students in his legal aid clinic at Duke assisted in the legislative drafting of the sterilization bill. “In recent years,” he explained, “the writer’s office and the students have been interested in various phases of the preparation and presentation of certain projects designed to promote the general welfare. Along them are a modern bastardy procedure, an adoption practice [and] a sterilization routine” (Bradway 1938:191). In the article he cites the North Carolina Code (1935), Article 6, Section 2304(m), which was titled, “State institutions authorized to sterilize mental defectives.” This part of the code stated that the North Carolina government, along with charitable and penal organizations supported by that state, were “hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased, feebleminded or epileptic inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good.” The fact that a major leader in the legal aid movement was also a primary supporter of eugenicist legislation should not be given short shrift. Eugenicism and Americanization influenced the structure of organized legal assistance and whom legal aid reformers saw as worthy of salvation. W.E.B. Du Bois (1899: 387) addressed the segregated nature of altruism and Americanization projects stating, “the difference is that the ancestors of the English and the Irish and the Italians were felt to be worth educating, helping and guiding because

⁶³ 274 U.S. 200 (1927); This case, which has not been overturned, gave states the rubber stamp to establish similar eugenic laws or revise existing ones and led to approximately 60,000 involuntary sterilizations. In the post World War II Nuremberg trials, Nazi lawyers cited this case as precedent and influential to their sterilization of individuals during the Holocaust. See Lombardo (2003).

they were men and brothers, while in America, a census which gives a slight indication of the utter disappearance of the American Negro from the earth is greeted with ill-concealed delight.” As I demonstrate in the next chapter, this claim of exclusion is applicable not only to African Americans, but non-whites generally and shaped the contours of legal and legal inequality.

Finally, legal aid scholarship fails to meaningfully discuss ethnicity and race. From the general accounts on the topic, readers would be left with the false impression that non-whites were impervious to the fraud and corruption that legal aid societies sought to address. To be sure, ethnicity is discussed but almost superficially. Ethnicity is discussed because of its undeniable influence on the emergence legal aid organizations as well as legal aid reformers’ unabashedly explicit rhetoric about immigrants. One explanation of this omission could be timing. With the exception of one excellent book that focuses on legal aid in the 1960s South (Shepherd 2004), and some self-celebratory analyses of legal aid societies in Milwaukee and Cincinnati (Cannon 2011; Casey-Leininger 2008), there has been no historical, scholarly monograph on American legal aid institutions since McConville and Mirsky’s study (1987).⁶⁴ Most of the influential texts on legal aid were published before the institutional advent of critical race theory, ethnic studies and/or what some refer to “whiteness studies” (Auerbach 1977; Katz 1982; Abel 1989). All of these areas of inquiry, sought to offer alternative, and arguably more expansive accounts of the roles social divisions (e.g. race, class, gender) played in American law and society. Thus it is important to keep in mind the intellectual climate these authors conducted their scholarship.

Authors of the classics simply do not see legal aid reformers’ posturing toward ethnic whites as allowing access to the privileges of white citizenship in the same way people like Ira Katznelson (2005), Elizabeth Lasch-Quinn (1993), Mary Poole (2006), and Ian Haney Lopez (2006) see proto-affirmative action policies, settlement houses ingratiation, social security, and legal definitions of white identity as initiatives that regulated the contours of citizenship. Blacks are rarely discussed while Latinos, Asians and Native Americans are conspicuously absent from their accounts despite the historically documented reality that this period was one of unadulterated, unrepentant, and unashamed legal inequality. This inattention, along with authors’ historiographical reliance on select texts limits the insights into the ethnoracial elements of legal aid during this time period. The next chapter examines this more closely, whereas this chapter foregrounds our discussion in the general legal aid environment.

There are two other methodological explanations for this omission. First is the fact that most of the influential studies of legal aid have been conducted by social scientists, who sometimes pay less attention to historical nuance than historians (e.g. Garth 1980; Katz 1982; Rhode 2004). Relatedly, all of these studies rely exclusively on Reginald Heber Smith’s (1919a) *Justice and the Poor*, the earliest social science study of legal aid organizations. Although she misses some of the untouched history on race and legal aid, Batlan (2010; 2011) shows how this important book omitted an earlier history of legal aid performed by non-white men. As Graham and Koed (1993: 26) suggest, “The lessons of the past that are ignored often allow the misdirection of future policy... policy error comes from the influence of superficial and incomplete presumed lessons that are

⁶⁴ See Johnson (2013) and Batlan (forthcoming) for some recent changes.

hastily assembled from a single historical source, or worse yet, from individual or collective hazy memory.” Thus it is important to revisit this history and the common-sense assumptions that it has produced.

LEGAL AID VS. THE PUBLIC DEFENDER

Readers might be shocked to notice that the actual term “public defender” has come up sparingly in the dissertation thus far. This is because the term and the concept did not emerge until the Progressive Era, with the relentless activism of Clara Shortridge Foltz, the first woman admitted to practice in the state of California. Before the turn of the twentieth century, legal aid was actualized through non-profit, voluntary organizations, and briefly through the state via the Freedman’s Bureau. But the perceived excesses of the Gilded Age, widespread political corruption, bureaucratic inefficiency and the glaring gap between the haves and the have-nots spurred the Progressive Era (Haber 1964; McGerr 2003; Painter 1989; Wiebe 1967). It was during this period in American history where reformers attempted to sanitize corrupt sectors of government, modernize institutions that were deemed to be inefficient, purify the polity (via women’s suffrage and middle class-moralism), and replace the amateurism present in law, academia, medicine, social work and other fields with more “professional” standards.

During this period, legal practitioners contributed to the deluge of articles and books that attempted to address the plight of poor criminal defendants (e.g. Foltz 1893; Ferrari; 1912; Adelman 1914; Goldman 1919; Smith 1919a; Maguire 1928). While legal aid figured into progressive reform efforts, activists also focused on broader changes in the criminal justice system, including juvenile and municipal courts, prisons, parole, and probation (e.g. Odem 1995; Platt 1977; Rothman 1980; Simon 1993; Ward 2012; Willrich 2003). The historiographical scholarship on legal aid in the Progressive is more detailed than previous historical periods and the analytical takeaways from this era emerge less from pure omissions like earlier eras. Instead, closer readings of primary sources, along with traversals into uncharted archival corners, provide alternative interpretations of the development of legal aid institutions. Like most historical periods, scholars have different interpretations about the actual beginning and end dates of the Progressive Era, but it is typically understood as beginning approximately between 1893 and 1897, the years that marked the conclusion of the severe economic depression of 1893 and the realignment of political parties that came with the election of 1896. There is also disagreement about whether the Progressive Era ended with the United States’ entrance into World War I (1917), the ratification of 18th Amendment, which established Prohibition (1918), the ratification of the 19th Amendment, which established women’s suffrage (1920), or even as late as the beginning of the Great Depression (1929). This chapter focuses on the period between 1893 and 1929, which was a robust moment of activity for legal aid advocates. During this time, the predominant institutional forms of legal aid were the public defender model espoused by Clara Foltz and the legal aid society/bureau, epitomized by the work of the aforementioned Arthur von Briessen. Foltz is the seldom-acknowledged, but recently discovered “mother” of the public defender movement (Jacob 1993:5), whereas von Briesen is often considered the “father” of legal aid (Walz 1911: 112). The careers of these figures, along with the writings they left behind, feature some of the promising and perilous features of the legal aid movement.

Clara Foltz: The “Mother” of the Public Defender Concept

Around the same time Arthur von Briesen was turning the New York Legal Aid Society into a legal powerhouse in the 1890s, Clara Foltz proposed an arguably more radical version of legal aid. Foltz is a figure that fell through the cracks of history until recently. Several historians and scholars have uncovered her remarkable legal career and placed it at the center of American legal development (e.g. Schwartz et al 1975; Babcock 2011; Norgren 2013). Born in 1849 in Indiana and reared during a time where women did not have access to the legal profession, Foltz still desired to become an attorney. She moved to California with her husband Jeremiah and children in 1874 and shortly thereafter divorced him around 1879. As a single mother she struggled to make ends meet and when she applied to study law and apprentice under attorney Francis Spencer she was met with the following letter.

My dear young friend,

Excuse my delay in answering your letter asking permission to enter my law office as a student. My high regard for your parents, and for you, who seem to have no right understanding of what you say you want to undertake, forbid encouraging you in so foolish a pursuit,—wherein you would invite nothing but ridicule if not contempt. A woman's place is at home, unless it is as a teacher. If you would like a position in our public schools I will be glad to recommend you, for I think you are well-qualified.

Very respectfully,
Francis Spencer⁶⁵

Sexists ideas around women’s occupational roles were common around this time. Nevertheless, Foltz proceeded with her goal. Shortly after the case *Bradwell v. Illinois* (1873), where the Supreme Court upheld Illinois’ exclusion of women from the legal profession and left entry into practice of law to be determined by individual states, Foltz drafted and successfully lobbied the “Woman Lawyer's Bill” in 1878.⁶⁶ This California bill replaced the words “any white male citizen” with “any citizen or person,” which opened the legal profession beyond white men. Her next battle was at the University of California, Hastings, where she sought to attend school for law. She was denied by the school on the basis of her gender and eventually sued the university. This resulted in the Supreme Court of California case *Foltz v Hoge* (1878), where the court ruled in her favor and held that “females are entitled, by law, to be admitted as attorneys and counselors in all the courts of this State, upon the same terms as males.”⁶⁷ Although Foltz ended up being admitted into practice, she was still excluded from professional opportunities in the private sector because of her gender. She eked out a living lecturing and handling divorce and criminal law cases. Foltz witnessed the inadequate protections offered to the criminally accused through her work in the criminal courts. These observations were central to her proposal of the public defender.

⁶⁵ Cited in Schwartz et al (1975)

⁶⁶ 83 U.S. 130 (1873); Foltz’ bill was an amendment to Section 275 of the California Code of Civil Procedure.

⁶⁷ 54 Cal. 28, 35 (1879).

At the 1893 Chicago World Fair Foltz gave a speech on the public defender before the Congress of Jurisprudence and Law Reform and subsequently published it in the *Albany Law Journal*. Espousing social contract rhetoric, Foltz believed that the government's chief function was to protect the liberty and lives of citizens. "To support them," she argued, "each citizen surrenders his natural right to defend himself and pays his share for the support of the State, under the implied contract that for such surrender of right and contribution, the government will defend his life and liberty from unlawful invasion" (Foltz, 1893:250). Parts of the speech require detailed discussion because of its keen observations, thoughtful insights, and precise relevance to today's criminal justice system—all of which highlight the persistence of legal inequality. Integral to Foltz' argument was the role the public defender would play in protecting the citizens rights, staving off anti-patriotic sentiment, addressing prosecutorial misconduct, rectifying the problem of inadequate counsel, and establishing more exact justice. On the issue of prosecutorial and police misconduct she states:

Connected with the court is a public prosecutor, selected for his skill in securing convictions, strong of physique, alert of mind, learned in the law, experienced in practice and ready of speech. Around and behind him is an army of police officers and detectives ready to do his bidding, and before him sits a plastic judge with a large discretion often affected by newspapers and police officers to the injury of the prisoner. Not only is machinery for prosecution provided, but it is most effectively operated. *The prosecuting attorney is usually imbued with the idea that he must convict at all hazards, and this idea takes deeper root because, in many instances, the State pays him a money bonus for each conviction. He misrepresents the facts he expects to prove, attempts to get improper testimony before the jury, garbles and misstates what is allowed, slanders the prisoner and browbeats the witnesses, all from the mistaken notion that it is the duty of the State to convict whoever is arrested. A police, impelled by vanity to justify its arrests, and inoculated with the error that it is the State's desire and duty to convict in any event, aids in the prosecution by colored testimony and overawing presence...* Trials which should be calm and solemn, investigations unmarked by prejudice and untainted by rancor, degenerate into a legal battle in which the highest personal rights are subordinated and trampled under foot in the reckless desire to win. For the conviction of the accused every weapon is provided and used, even those poisoned by wrong and injustice. But what machinery is provided for the defense of the innocent? None. Absolutely none" (emphasis added, Foltz 1893: 248).

There are several important points here. First, Foltz comments demonstrate that prosecutorial misconduct has been an issue since the bureaucratization of the criminal justice system. Her point is buttressed by scholarship of the last century that highlight the problems and temptations that come with this public position (Lewis 1928; Hobbs 1949; Nedrud 1961; Alschuler 1971; Morton 1993; Davis 2007). This is important, because as I demonstrate throughout this chapter, many of the popular and scholarly complaints around the administration of justice are divorced from this historical context. Irrespective of one's views on the actual efficiency of indigent defense, it is an undisputed fact that prosecutors have often enjoyed a tactical, financial, and relational advantage over their indigent defense counterparts, regardless of the institutional configuration (e.g. assigned counsel, public defender). Police misconduct is also important, albeit more obvious because the historical salience of police brutality (e.g. Escobar 1999; Johnson 2004; Moore 2010). Nevertheless, Foltz' comments show that brutality is not the only expression of police malfeasance. The innately close relationship between police and

prosecutors and the incentivization to lie and/or convict have been a historical problems that have plagued the criminally accused and their counsel (e.g. Moss 1901; Bates 1930; Frank 1949; Foster 1968; Simpson 1977; Slobogin 1996; Zeidman 2004). Foltz argued for a public defender because of the assigned counsel system's abysmal state as well as the perceived dangers of individual injustice:

The 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. They have no money to spend in an investigation of the case, and come to trial wholly unequipped either in ability, skill or preparation* to come with the man hired by the State who marshals the evidence for the prosecution. The defense is at most a sort of perfunctory one...It is but a shadow of the substance sought for. The prisoner has asked for bread and received a stone...It works irreparable injury to the state by the wrong inflicted upon the individual. The accused, even if acquitted, comes from the court-house a changed man. He remembers a malicious arrest, an unjust incarceration, an expense that has impoverished him, a trial in which every court officer seemed doing his utmost for his conviction, the abuse of his witnesses and the slander of himself and possibly his family. He remembers all this, and then he thinks of the heavy taxes he has paid, the heavy burdens he has borne for the support of the State, and the dangers he dares in order to protect the flag of his country when it was assailed, he thinks of all this, and is it any wonder that his love of country turns to bitterness and his soul is filled with hatred at the thought that the men whom he lifted to position and the government he fought to defend had only persecution for him when he needed a defender? Henceforth his hand is against government and against man. Disgrace has crushed his manhood and injustice has murdered his patriotism (Foltz 1893: 248).

Here Foltz deploys two rhetorical strategies that were commonly used in support for institutionalization of legal assistance in both the public defender and legal aid form. First, she points to the inadequacies of the assigned counsel system to argue for a new configuration. For Foltz, these inadequacies cohere around resource constraints and inexperience, which have both been talking points in public defender discourse for decades (Smith 1919a; Goldman 1939; Silverstein 1965; Wice and Suwak 1974; McConnville and Mirsky 1986; Vick 1995; Bach 2010). The other rhetorical technique Foltz arguably relied on is a form of fear mongering. Forecasting a Rawlsian theory of procedural justice, Foltz suggested that the unfair administration of justice would lead to unpatriotic sentiments by aggrieved parties. This approach would become popular among legal aid reformers (most notably von Briesen, who some scholars attribute this strategy to). By situating a lack of patriotism with procedural fairness at the onset of the Panic of 1893 and amidst severe labor unrest, Foltz could make a stronger argument that the public defender was necessary to maintain social order and legal legitimacy. Concluding her speech, Foltz remarked:

The remedy for many of the evils of the present criminal court practice lies in the election or appointment of a public defender. For every public prosecutor there should be a public defender chosen in the same fund. Police and sheriffs should be equally at his command and the public treasury should be equally open to meet the legitimate expenses of the defense and the prosecution. With public defenders the injuries we have mentioned would be avoided, malicious prosecution would cease, the accused would have an adequate defense, trials would be judicial inquires, courts would be freed from the

squabbles that now disgrace them, the profession would be relieved from the burden of compulsory services and the expense would fall on the State at large, where it legitimately belongs, higher ideals of courts and government would be created, a deeper patriotism would be engendered and a deeper feeling of security would pervade the



Picture of Clara Foltz in The Day Book, June 21, 1913

community, by reason of the comforting knowledge that a court of justice was not so merely in name, and a chamber of torture in fact, but a court to which rich and poor might freely go and equally expect the justice to which the law entitled them (Foltz 1893: 249).

Foltz argument was both prescient and misguided. On the former, she essentially offered a model of public defense that was partially adopted two decades later and made due process protections in the criminal justice system more of a reality. Although the assigned counsel system persisted throughout the late 19th and early 20th century, indigent defense was not an entitlement like today. In this way, Foltz proposed a powerful concept. She

promoted the idea of the public defender in other speeches, lectures, and scholarly forums (e.g. Foltz 1897). At the time of Foltz' speech and decades thereafter, the right to counsel was understood more as the right to procure counsel. The state was not allowed to deprive individuals from receiving counsel, but this mandate did not entail a right to be *provided* counsel by the state. Indeed, the Assistance of Counsel Clause in the Sixth Amendment states, "in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense" (U.S. Const. Amdt. 6). This was lockstep with the laissez-faire jurisprudential ethos of "negative liberty" that focused on the kinds of things the government could not do or restrict people from doing (Currie 1986). For example, the government could not prevent freedom of religion or speech (First Amendment) and could not engage in unreasonable searches or seizures (Fourth Amendment). The alternative reading of the Sixth Amendment (and the constitution more generally), focused on "positive" or "active" liberty, which entailed the affirmative role the government should play in promoting full citizenship and promoting human flourishing. This approach was not adopted until the New Deal Era (1933-1938) and more firmly during the Warren Court (1953-1969) (Breyer 2006: 10).

In the mean time, indigent defense floundered. As late as 1930, the Supreme Court extolled the "humane policy of the modern criminal law" in *Patton v. US*, a 6th Amendment case involving the right to a jury trial.⁶⁸ The Court confidently declared, "the man now charged with crime is furnished the most complete opportunity for making his defense." Seemingly unaware of the torrent of scholarship that condemned the criminal justice machinery as well as the primacy of extra-legal violence (e.g. Wells 1892; Terrell 1904; White 1929), the Court maintained that the indigent clients received quality defense, stating "if he be poor, he may have counsel furnished him by the state, and...not infrequently he is thus furnished counsel more able than the attorney for the state, in short the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation." These comments were made by a Supreme Court in 1930, almost two decades after the bureaucratization of public defender office and three decades after Foltz' speech. The comments offer insight into the shortcomings of her powerful proposal and its subsequent adoption.

Arguably, Foltz' model was ill-considered because the public defender did not lead to the end of malicious prosecution and the legal profession was still saddled with the responsibility of indigent defense in cities that did adopt the model public defender model. Insights offered by attorneys who worked in public defender cities suggest that plea-bargaining continued to be a staple of the criminal justice system and thus it is empirically debatable whether adequate defense was received. In fairness to Foltz, her model was not truly adopted (Babcock 2006); instead a more diluted version of the public defender was implemented in cities, which had an effect on how these attorneys performed their jobs and how the criminal machinery operated.

ACCOMMODATIONISM AND THE MARRING OF A LEGAL EXPERIMENT: THE ADOPTION OF THE PUBLIC DEFENDER

⁶⁸ 281 U.S. 276, 308 (1930).

Efficiency and Controlling Shyster Lawyers?

Foltz translated her speech and into a statutory proposal, often referred to as the “Foltz Defender Bill” or the Foltz Bill, and introduced it in several states (Sacramento Daily Union 1897). Los Angeles was the first city to pick up the idea of the public defender, albeit with significant changes, in 1914.⁶⁹ The bill eventually passed in the California Legislature in 1921, and several other states followed suit. Since Los Angeles maintained the first municipal public defender office, it requires specific attention. The public defender office was funded by the County Treasury and staffed by Walton J. Wood. Before the office was established, candidates took an examination for the position and Wood received the highest score.⁷⁰ Interestingly, Foltz was appointed as the first female attorney in the Los Angeles District Attorney’s Office a few years earlier in 1910, although it is unclear whether she took the exam. Nevertheless, as the country’s first public defender, Wood was adamant about the necessity of the office. Like Foltz, he gave several speeches on the topic and actively published in legal and social science journals (Wood 1914; Wood 1916; Wood 1926).

Wood’s writings demonstrate a more moderate public defender when juxtaposed with Foltz’ proposal, as well as the larger scholarship on the female pioneer. Two important and intertwined distinctions emerge in thinking about what Babcock (2006: 1127) defines as the “Progressive Era model” and more radical Foltzian model of public defense: the emphases on cost-efficiency and collaborative efforts between public defenders and prosecutors. Efficiency and collaboration were seen as *operational* and *symbolic* benefits to the legal profession and society. As many have noted, a primary selling point for the non-Foltzian public defender model was its cost efficiency (Barak 1980; McConville and Mirsky 1987; Babcock 2006). Whereas Foltz was more concerned with issues of justice and equality, individuals like Wood insisted on its austerity. Consider comments from his 1926 article in *The ANNALS of the American Academy of Political and Social Science* (which devoted the entire March volume to legal aid):

“Reduction of expense to the tax-payers has followed the establishment of the office of public defender...A careful calculation has been made of the time actually consumed in handling the cases conducted by the PD in Los Angeles and those conducted by attorneys in private practice during the same period. The figures show that the *attorneys in private practice consumed much more time* on the average for each trial than PDs. *A higher percentage of pleas of guilty was interposed by PDs thus saving the expense of trial. A lower percentage of appeals was taken by PDs and a smaller number of demurrers and motions filed.* The expense of conducting the court is so much greater than the salary of the PD that the actual saving of expense by the creation of this new office is apparent” (Wood: 1926:72 emphasis added).

This quote is important for several reasons. First, it goes against the grain of some of the ahistorical understandings of public defenders that see them as in a state of crisis that leads them to uncritically plea bargain. They have always been in crisis! Relatedly, this quote also challenges a related line of popular thinking that emphasizes the role of plea-

⁶⁹ Los Angeles County Charter, Article 6, Section 23.

⁷⁰ Kraus, Phillip. 1937. “The Office of Public Defender in Los Angeles” (M.A. Thesis). University of California, Los Angeles. On microfilm at the Southern Regional Library Facility, Los Angeles, California.

bargaining in the criminal justice system as a distinctive feature of modern criminal justice administration as opposed to a technique that was central to the bureaucratic design.⁷¹ Finally, Wood's comments emphasize the importance of efficiency. The Taylorism and scientific management that was in vogue at the time undoubtedly influenced public defender advocates. In an article on the public defender office, American Institute of Criminal Law President J.B. Reynolds (1920: 283) noted this logic stating, "social justice demands legal justice, and be it noted that social justice in the twentieth century is pushing towards its end on a more intelligent and scientific basis than formerly." To be sure, efficiency was a concern of Foltz in her envisioning of the public defender office, but many supporters utilized this language as the primary selling point in their advocacy, while actual concerns about justice sometimes became tertiary to efficiency arguments and the benefits to the bar.

The logic at this time, was that the legal profession and society would benefit from the elimination of "shysters"— a derogatory term used to describe unethical attorneys. Other terms include "harpies," or "jail lawyers." These lawyers were often described as inexperienced and/or ethnic white attorneys who unscrupulously worked in the assigned counsel system; loitered around jail cells and courthouses for clients; and privileged dollars over justice. As Auerbach (1977) and Finnegan (2005) have argued, the anxiety of elite attorneys corresponded with the "overcrowding" of the legal profession by southern and eastern European attorneys, with a particular anti-semitic focus on Jewish professionals. Elite lawyers were not shy about these anxieties. In an article titled "The Overcrowding of the Bar and What Can Be Done About It" the deans of Columbia Law School and the University of Colorado complained about the part-time students' "lack of general education and culture" and believed that "social and economic conditions made it possible for large numbers of young men of limited capacity and education, with a smattering knowledge of law, to earn a competent livelihood in handling the legal business of the community which the better educated and more skilled members of the profession could not or would not handle" (Smith and Rogers 1932: 569-570). Operationally, attorneys at the bottom of the legal profession were easy scapegoats for a criminal justice machinery that was still bureaucratizing and getting adjusted to urbanization and rising crime. Much like today, these attorneys were often underpaid and did not have the resources to thoroughly investigate the cases of their clients, which led to them being pointed to as a proximate cause for wrongful convictions. Symbolically, it was not hard to point to the lower strata of the legal profession as a primary cause for inequality. With the exception of attorneys who represent "obviously" innocent people accused of crimes, lawyers who defend criminals are not popular. When coupled with the taint of being immigrants, these lawyers were seen as one of the root causes of criminal justice inequality and helped with the *stratification* of the bar. In the same article Wood discussed the benefits of the public defender (1926: 71), he also described how these shysters worked, noting that as soon as they got in contact with these attorneys:

The next step is to inform the accused that names of intimate friends and relatives are required for the purpose of establishing good records when applying for probation. The

⁷¹ This part is hardly new to serious scholars of plea-bargaining but is sometimes marshaled as a more recent feature of criminal justice trials. See Fisher (2003) McConville and Mirsky (2005), and Vogel (2007).

names of friends and relatives being obtained, letters are sent out by the attorney telling of the unfortunate condition of the defendant and soliciting funds for his release. It is not uncommon that widowed and impoverished mothers receive such letters. If no funds are forthcoming the case is abandoned. The lawyers who follow the practice outlined are entirely unfit to properly represent the accused either as a matter of ability or integrity. It is this class of attorneys that is being displaced by the creation of the office of public defender(Wood: 1926:70).

Reginald Smith (1919a:14), the leading researcher of legal aid in the early twentieth century and a staunch public defender advocate added, “for one whose conscience permits him to magnify the crime, the sureness of conviction (unless he is paid to defend), the severity of the judge, and the horrors of prison, the process is simple and produces results. They have procured fees in devious ways, ranging from compelling the mortgage to some shark of all the household goods to forcing the prisoner's wife to sell herself on the streets.” These attorneys were seen as the bane of the criminal justice system and were subject to critique within and outside of the legal profession. By advocating for the public defender, the legal profession sought to rein in the assigned counsel system and limit the occupational pathways for these “shysters.” This became particularly important as critiques of these lawyers and criminal justice system began to reverberate outside of legal discourse and into popular culture, folk commentary, and social science scholarship.⁷²

In his satirically titled *The Terrible Jews*, which sought to “disclose the full wickedness of the Jewish scheme” Tufts researcher Abraham Myerson (1922:11) criticized these depictions quipping, “American law never heard of corrupt courts or shyster lawyers, and American politics was the admiration of the world-before the Jew came on the American scene.” These stereotypes also stuck with non-Jewish southern and eastern European attorneys. Alluding to in-group immigrant legal assistance, Progressive Era reformer and National Americanization Committee director Frances Kellor (1909: 11) noted, “when the immigrant is brought into court charged with the commission of crime or with the infraction of one of the hundreds of city ordinances, of which in many instances he has never heard, his medium of justice is frequently the ‘shyster’ lawyer who speaks his language.” In her book *Our Slavic Fellow Citizens*, social reformer and eventual Nobel Peace Prize Emily Balch (1910: 418) wrote that immigrants’ helplessness make them “sought for as prey” by shysters as well as other swindlers. “As soon as he leaves the paternal care of Ellis Island they attack in force,” she complained. For Balch, “the litigiousness of the Slavs is exploited by ‘shyster’ lawyers till the immigrants learn wisdom by experience” (1910: 418-419). Even religious leaders chimed in, with Christian theologian Georgia Harkness (1921: 51) noting in her book *The Church and the Immigrant* that, “unfortunately, the immigrant very often fails to get justice in the courts...the injustice which he suffers is due most frequently to his ignorance of English, the lack of honest and competent interpreters, the activity of ‘shyster lawyers,’ and race prejudice. There is urgent need of public defenders, to take the places of those who prey upon the credulity of the migrant, extract exorbitant fees, and do nothing to help him.” The legal profession recognized the negative attention such

⁷² This was also a concern in the medical community, with “quacks” serving as the object of critique. See Davis (1921).

lawyers brought to its field and sought to quell this perceived inequality. Organized public defender offices, amongst other bureaucratic changes, were seen as part of the solution. In essence, the PDS was supposed to serve the two-fold purpose of extricating the profession of these attorneys while protecting ethnic white immigrants, often to the exclusion of other non-whites. In an impassioned article in the *Yale Law Journal* titled “The Shyster Lawyer” Arkansas Bar Association president Ashley Cockrill (1911) argued that these attorneys are “far more harmful to the profession itself than to the community in which he practices. He should be eliminated from the profession and banished from the bar...Two duties are upon us. The first to decrease the number of shysters by driving them from the ranks of the profession, and the second is by preventing their increase.” This occupational anxiety around immigrants as attorneys, coupled with seemingly genuine concerns about immigrants as clients was part of an Americanization project that perfectly illustrates the interface of altruism, paternalism, and xenophobia that defined the bureaucratization of legal aid during the Progressive Era. As we’ll see later in the dissertation, this xenophobia would be replaced by racial bias in the 1960s as the clientele of legal aid changed from predominantly ethnic white to a more colorful mosaic of poor black, brown, and white folk.

The Non-confrontational/Complaint Public Defender

This discussion of efficiency through Americanization and a uniform public defender office cannot exclude the benefits that such a position would offer the legal profession. One primary benefit of the public defender office was decreased adversarialism, which was seen as a corollary of the “efficiency” argument. Law is typically understood as an adversarial system, where parties confrontationally present evidence in support of their side in front of a neutral fact-finder (judge or jury) to determine just legal outcomes. Nevertheless, scholars and the general public believed that this adversarialism played a key role in unjust outcomes in the criminal justice system. Adversarialism fell under the broader umbrella of criminal procedure, which was rigorously criticized as being unnecessarily labyrinthine and as an avenue toward undue acquittals. In fact, between 1918 and 1928, scores of commissions, committees, and articles were dedicated solely to the topic of criminal procedure (see Conner 1930). While some “shysters” offered minimal legal counsel, if any to their clients, some provided defense through delays and procedural loopholes. Former New York District Attorney and legal novelist Arthur Train (1908: 78) explained this situation best in his book *The Prisoner at the Bar*, which proclaimed, “a favorite trick of shysters if they have an imprisoned client who refuses to ‘give up,’ is to plead ‘not guilty and not ready’ and thus have the case adjourned until they squeeze their victim dry. A defendant who has any money is never permitted to go to trial or even to plead guilty before his money is entirely exhausted” (Train 1908: 78). Private criminal defense attorneys used the same strategies, along with actually vigorous defense for their wealthy clients. Richard Lloyd Jones (1921: 5), editor of the *Tulsa Tribune* grumbled, “it is only the rogues in the profession of law who seek to upset justice through devotion to petty technicalities instead of trying to fulfill the clear intent of the law.” This questionable adversarialism was not just limited to the initial trial court proceedings. If a defendant was found guilty and appealed, more loopholes allowed for a potential reversal on the appellate level.

Rather than dealing with issues of fact and evidence, appellate courts typically review the trial court records, transcripts, and proceedings to determine whether laws and procedures were correctly applied. In essence, public defender advocates and the broader public criticized appellate courts for doing their jobs, often to the detriment of factual justice. University of Missouri Law School Dean John David Lawson (1910:14) expressed dissatisfaction stating, “it matters not that, on the trial, the proof against the prisoner was clear and incontrovertible; that to the minds of the judge, jury and spectators, the correct verdict had been arrived at, beyond the shadow of a doubt; he is allowed to appeal, even though there is nothing to appeal about, and to invent reasons which everybody knows do not exist.” The public defender office was seen as integral to the reduction of trial court and appellate level adversarialism that was imagined as being a cause of criminal justice inefficiency and acquittals of factually guilty individuals.

Indeed, an important feature of public defender bureaucratization in the first quote by Woods (1926:71) mentioned above was the fact that “a smaller number of demurrers and motions” were filed, which signaled to this decreased contentiousness. This collaboration offers an earlier example of the concept of the “courtroom workgroup” that was conceptualized by Eisenstein and Jacob (1977). Courtroom workgroups consist primarily of judges and attorneys (prosecutors and defense counsel) as well as other bureaucratic actors in the criminal justice system (e.g. bailiffs and clerks). As it relates to the attorneys and judges, the concept suggests that in lower courts, these actors maintain a collegial relationship that is premised on efficiency, speed, and the facilitation plea-bargaining. Robert Ferrari (1912:7), a New York attorney and prominent public defender supporter, advocated this adulterated version of Foltz’ model in much of his work. In a discussion on the privilege wealthy individuals maintained with the appeals process, he states, “whether the appeal is meritorious or not, it is made just so long as the defendant has money to use for that purpose. But under the system I am advocating frequent and unmeritorious appeals would not be taken. The public defender would be a quasi-judicial officer, and as such would use his discretion in matters of appeal as in other matters pertaining to his office.” While he admits that this would not attenuate the number of wealthy individuals using the appellate process, Ferrari, like other advocates, wrongly assumed that the bureaucratization public defender offices would cause appeals to fall into disfavor in the private criminal sector. Supporters were less attentive to the reality that bureaucratization would allow public defenders to have decision-making in the appellate process, which could create another discretionary roadblock that would be subject to the bureaucratic biases of individuals (e.g. class, gender, race, ideas about criminality, deservingness, etc.).

Of course, this vision of the public defender did not come without attacks from: conservative detractors who believed it would bureaucratize the use of loopholes; moderate opponents who thought the public defender was pure mimicry of the district attorneys office; and liberal critics who believed the office would be dangerously co-opted. The conservative perspective is best represented in the comments of individuals like New York attorney Henry Forster Jr. (1916: 594), who believed that the establishment of the office would require the public defender “to give every red handed murderer, professional criminal, as well as every one charged with any crime, misdemeanor or ordinance violation a strenuous and technical defense and avail himself of any possible technicality to defeat the people's representative, the District Attorney.”

Forster was concerned that an institutionalized public defender office would exacerbate criminal procedure by giving the criminally accused a lawyer who would be required to offer a vigorous defense, even if meant utilizing loopholes.

Harvard Law School Dean Roscoe Pound (1922:76), known for his sociological jurisprudence, offered a more moderate critique and attributed the perceived need for a public defender to the poor organization of prosecutors offices and contended, “lack of modern organization in prosecution and in courts calls for a remedy, and, as usual, the remedy is sought in adding another functionary instead of dealing with the difficulty at its source.” For Pound, prosecutorial offices in big cities needed improvement, which led him to confidently claim, “I suspect that after the novelty wears off the defender's office will begin to show the same phenomena as those shown by the prosecutor's office throughout the country. If prosecution and courts are properly organized, I suspect that no further official need be provided” (Pound 1922:76). This critique proved to be false, but received heavy traction during this period.

Finally, the liberal view was presented in an unnamed editorial in the *Bench and Bar*, a popular magazine for lawyers. The writer blasted, “the whole public defender scheme seems to be based upon the assumption that the incumbent of the office will always be a sort of superman, gifted with an infallible faculty for discovering the truth in all cases, compared with which the intelligence of a Sherlock Holmes would seem little more than imbecility” (*Bench and Bar* 1915). The writer was pointing to issues of discretion and capability that were glossed over by public defender advocates and were the source of subsequent critiques throughout the decades. Moreover, the writer highlights the conflict of interests between the client and attorney while channeling Pound’s moderate critique of the public defender as another functionary satirizing, “what is to happen to the unfortunate who declines to acquiesce in the public defender’s suggestion that he shall plead guilty, and insists upon having a defense presented? Will he reap the benefits of the claim of the advocates of this scheme that his case will be more honestly and ably presented, or must we provide for his benefit still another highly paid official to be known as the Public Jail Breaker?” While there was some support for the public defender office, these critiques shaped how the office developed in different cities, and how advocates framed this bureaucrat’s utility.

Henry L. Lyons was the first public defender in Portland in 1914 and commented on the conservative critique around how much zeal a public defender should have stating, “it was thought best, at least at first, that the public defender should limit his defense to assisting the court in bringing out the prisoner's side of the case, rather than making a vigorous fight on technical grounds, if necessary, to secure an acquittal” (Lyons 1914: 99). This was a popular posture for public defender supporters that allayed concerns around bureaucratic chicanery but left them susceptible to the liberal critique of discretion. If the public defender were to use her discretion in their work and only fought for clients who she believed were innocent, as the anonymous writer mentions, huge conflicts of interest could arise and test a public defender’s loyalty. Would it be to the client or to the legal system? Supporters often offered no satisfactory response to this liberal critique of loyalty or the conservative critique of public defenders zealously representing factually guilty people; these criticisms would be cornerstones of indigent defense discourse for the next century (e.g. Barak 1980; McConville and Mirsky 1986)

Instead, they addressed Pound's moderate critique of the public defender as an unnecessary bureaucratic. But public defender advocates had to tread carefully in their response to moderate concerns about bureaucratic excess. Although there were vibrant commentaries on prosecutorial misconduct and its contribution to legal inequality, public defender supporters after Foltz generally steered clear of evoking these discussions. Instead, advocates (typically practicing attorneys or academics) carefully suggested that district attorneys simply could not perform the two jobs of prosecution and protection of the innocent. Alvin Hersch (1922: 201) proclaimed that "it is not humanly possible" for the prosecutor to safeguard the interests of the criminally accused." Noting the practical difficulties in such work, Hersch (1922: 201) claimed, "the accused is afraid to talk freely with the prosecutor, so that he cannot get a complete view of the case. A Public Defender would have the accused's confidence and really be in a position to judge of the justice of his defense." Samuel Rubin (1927: 350), a Baltimore attorney, described this configuration neatly by suggesting that the public defender "would be the left hand of the court just as the State's Attorney is the court's right hand. There would be two hands instead of one." The strategy for these supporters was to meekly point to prosecutorial shortcomings, advertise the reduced responsibility this new office would provide prosecutors, and emphasize the collaborative spirit public defender bureaucratization would engender.

Practically, prosecutors were sometimes important allies in the public defender campaign. Highlighting prosecutorial failures would certainly antagonize and alienate them. Thomas Lee Woolivine, who served as a prosecutor during Walton Wood's tenure as public defender in Los Angeles, stated, "In my two terms as District Attorney of Los Angeles County, there at all times existed complete harmony between Public Defender Walton J. Wood and his force and myself and my official force" (cited in Hersch: 1922:201). By garnering the endorsements of fellow prosecutors, judges and academia—all of whom asserted their ideas in scholarly and popular print—public defender advocates were able to cobble together a squadron of supporters for the new office. Nevertheless, various critiques of the public defender model, along with political will prevented it from picking up steam nationally. By 1930, there were only a few municipally funded public defender offices—most notably in Los Angeles, Portland, San Francisco, New Haven and Hartford. This dormancy existed despite popular support for the idea as shown in Figure 3 and 4. Instead, the primary form of legal assistance came from voluntary organizations and the local bar through the legal aid model discussed below. The legal profession was not yet comfortable with the idea of a state-funded attorney—an idea that hinted of socialism and could potentially impact the economy of the legal profession (Auerbach 1976).

Overall, these responses offer important illustrations about the ebb and flow of legal aid in the twentieth century. First, they establish the importance of history and the not-so-novel problems in indigent defense. Indeed, many of the problems that plague the criminal justice system were present during the early process of bureaucratization. Secondly, this discussion demonstrates how the cooptation of ideas, especially when espoused by women like Foltz, can lead to unintended adaptations (Babcock 2006; Batlan 2010; Jordan 2011). Foltz' public defender was seemingly more radical, as it was premised on true adversarialism and would be available to everyone irrespective of

indigence (Babcock 2006). Nevertheless, it devolved into a much more modest office that certainly impacted individual lives but had limited effects on the national criminal justice

WHAT'S HE WORTH?
 Ever figure out how much that husband of your's is worth? Read the articles now running on the woman's page of The Times and maybe you'll open your eyes.

The Tacoma Times

THE ONLY INDEPENDENT NEWSPAPER IN TACOMA

VOL. XI, NO. 191. TACOMA, WASHINGTON, FRIDAY, JULY 31, 1914.

THE WEATHER
 Fair tonight and tomorrow—and it will also be some cooler tomorrow. If you are planning for a picnic Sunday, go ahead and plan. Very likely an ideal day is the promise.

30c A MONTH

HOME EDITION

JUST LOOKIN' ON

HAPPY DAYS!
 I am reminded! For the past two or three years I have been thinking that I am slipping into that circle where other folks, the youngsters, refer to me as being "middle-aged." Silver strands amongst the gold have kinder edged the hair further into my comb!

But I have had the worst luck. I am growing younger every day!

I know it because little Gertrude is growing younger. And my said day (near my birthday) was about the same as Gertrude's, so if Gertrude is growing younger every day, why ain't I doing the same? No reason at all. Whippersnapper I, I!

Long, long ago, Gertrude and I returned for Edward Everettson

RUSSIA MOBILIZING TROOPS

A PUBLIC DEFENDER---OUR PLAIN DUTY

Every honest, decent lawyer in this city is in favor of the immediate appointment of a Public Defender.

This Public Defender's duty would be to DEFEND the poor and unfortunate who are arrested and brought into the lower courts on petty charges. Too frequently, poor devils arrested for minor offenses, are railroaded to jail.

The Public Prosecutor tells his story, the judge is in a hurry and the defendant is punished and disgraced. He knows nothing of the workings of the law's machinery. He doesn't know his rights.

So he goes to jail.

We owe it to these unfortunates to DEFEND THEM. They

are entitled to TELL THEIR SIDE OF THE STORY.

In Los Angeles and in Portland the Public Defender has made good.

It is CHEAPER to hire a Public Defender than it is to choke up our jails with PRISONERS who are NOT CRIMINALS.

For \$150 the city and county could hire a GOOD lawyer for this job. They might split the expense of employing him.

There is no fair excuse for the county and city commissioners to dodge.

It is the duty of SOCIETY to PROTECT its members just as much as PROSECUTE CRIMINALS—ALSO IT IS CHEAPER if we happen to care nothing for the HUMANITY of the thing!

Austrian Force Repulsed With Heavy Losses

NISH, Servia, July 31.—That Austria's forces failed to capture the pass admitting them to the Morava river valley by which they planned to invade Servia, was announced by the war office today. It stated the fighting was desperate and losses heavy.

Front page advertisement for the public defender in July 31, 1914 issue of *The Tacoma Times*.

Cut This Out and Persuade Some Newspaper To Print It

PUBLIC DEFENDER

Great Success in Houston, Tex.

(We are indebted to Milton L. Morris, our esteemed correspondent at Houston, Tex., for the following.)

The following information should be of interest concerning the Public Defender in Houston. James Snowball, Public Defender, states that during the nine months' operation of his office he has handled 2,243 cases, of which 1,980 were found to be worthy. Of the 2,243 clients only 12 were nonresidents. In the criminal end the clients were unfortunates charged with a first offense for the most part. His ratio of acquittal and dismissal has exceeded 80 per cent, which bears out the claim that the clients were worthy of free assistance. Is this not a splendid showing for Houston, Tex.?

Mr. Snowball states public defense indubitably is a charity. The defender accepts no fees from the clients. He represents that class of unfortunates unable to employ counsel for defense of some criminal charge, or in getting one's rights in civil matters. The city of Houston, through the Mayor and Commissioners, is organizing a Houston Foundation, which will take the place of the Social Federation Charity organization heretofore operated, and it is the purpose to maintain the office of Public Defender under the new foundation, making the office of Public Defender on a more substantial basis than ever before. H. J. Dannebaum, one of Houston's leading lawyers, has been instrumental in creating and maintaining the office.

The Public Defender is a success wherever the idea is tried out. Not once has it failed.

Advertisement for the public defender in a March 27, 1915 issue of *The Billboard* (which exists today as *Billboard Magazine*). *Billboard* had a national circulation with branch offices in Cincinnati, New York, Chicago, St. Louis, and San Francisco.

machinery. Finally, these comments show how the implementation of bureaucracy can also lead to results that are alternative to initial proposals. One could take the view that this implementation was closely tied to ideological proclivities and struggles within the legal profession. Alternatively, one could take an agnostic perspective that sees the enactment of public defender offices as tied to the practical realities of criminal justice reform. Nevertheless, the reality was that the administrative outcomes of public defender bureaucratization led to the development of an office that was meaningfully committed to progressive change but bounded by the limits of a moderate legal liberalism as well as male and ethno-racial chauvinism. This is especially important to consider in the context of previous scholarship that has defined this era.

Patron Saint?: Arthur von Briessen and the “Legal Hospital” Model

Arthur von Briesen was a key leader and contributor to the New York Legal Aid Society. The organization initially began as the Der Deutscher Rechts-Schutz Verein (German Legal Aid Society), which was created on March 8, 1876 in New York City, under the supervision of Edward Salmon who was a Prussian lawyer and subsequently became the governor of Wisconsin. The organization changed its name to the Legal Aid Society in 1890. Its goal, according to its mission was to render “legal aid and assistance, gratuitously, to those of German birth, who may appear worthy thereof, but who from poverty are unable to procure it.” Rosalie Loew (1902:126), who served as the first female Attorney-in-Chief of the LAS in 1901 stated that the society’s “first work was to protect the immigrant from the thief who took his little hoard for railway tickets that were never delivered, or for property that never existed; or, worse still, who exchanged for him his good German coin into counterfeit American money.” A 1903 report in *The American Lawyer* similarly described the kinds of cases the organization handled:

“The servant turned out at the end of the month by a venal employer who withholds \$5 or \$10 for a bit of broken china; the immigrant whose last cent is taken by a sharper dealing in worthless railroad tickets; the ‘greenhorn’ victimized by a bogus employment agent; the tenant, hard pressed for the rent that must be paid on the pain of eviction at a given date, who borrows \$10 by mortgaging his salary for \$50 to one of the many unscrupulous loan companies—in short, every victim of every rascal who snaps his fingers and says ‘He can’t possibly sue me; no lawyer would take so small a case’” (*American Lawyer* 1903: 202).

This description coincides well with Figure 5, which pictures the Legal Aid Society as protector of poor white men, women, and children from big-stick “swindlers.” This representation is insightful because New York City was imagined as key site for American political corruption; the Tweed Ring scandal emblemized the problems of fraud and political malfeasance that were routine during the Gilded Age.⁷³ This chicanery existed in

⁷³ The Tweed Ring refers to one of the biggest political scandals in American history. The scheme was operated by William Tweed who was a boss of Tammany Hall, the Democratic Party's

A RECORD LAW PRACTICE—40,000 CASES A YEAR

Legal Aid Society of New York City, Acting as Counsel for the Poor, Is Doing Great Work.

Episodes Showing How Keen-Fanged Wolves Are Driven Away from the Helpless Sheep.

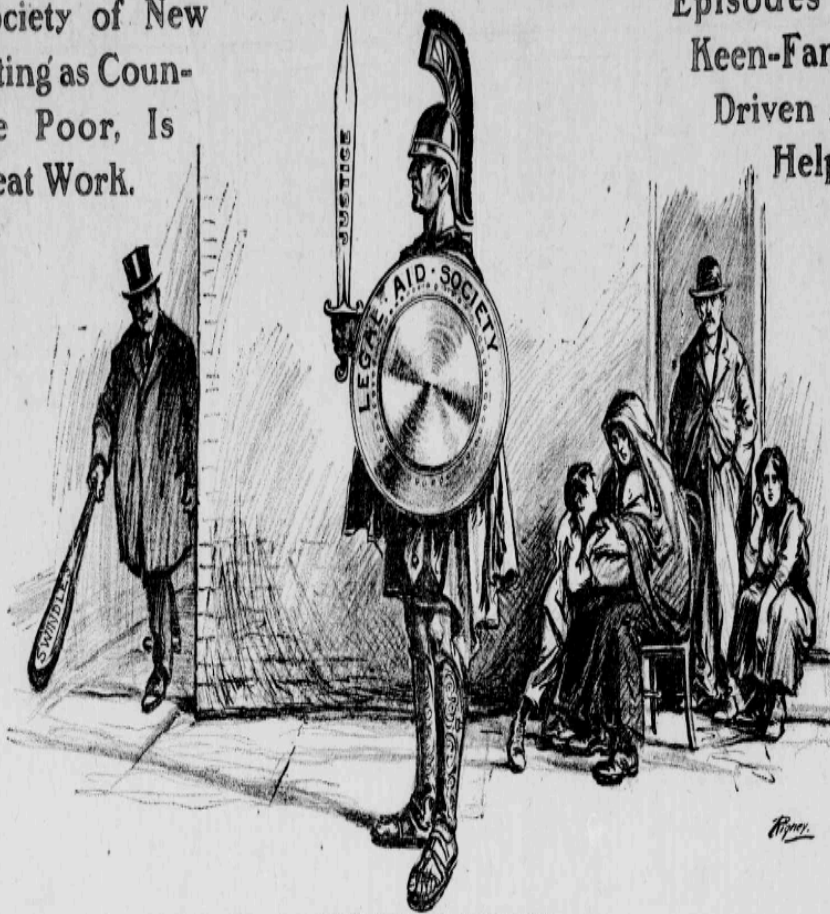
By GEORGE S. KAUFMAN.

A MAN whose earning capacity was \$1.50 a day worked seven days on a railroad construction job in Jersey. The railroad was and is one of the biggest in the country; its working day is ten hours long and the kind of work it pays \$1.50 per for is accomplished mainly with a pick. At the end of the seventh day the man was fired and given an order on the paymaster for \$10.50. When he handed it in at the little window the paymaster took note of the number of the order, ran his finger down a page of the ledger and announced that that particular order had been paid.

There was an argument. It was brief, because the railroad had the numbers and the power of persuasion—and the workman nothing but an order for \$10.50. He hung around all of the next day, trying to collect, but he failed to get within fifty feet of the paymaster. He needed that \$10.50. He had never owned more than \$20 at one time in his life and there was a family in a Chrystie st. tenement. So he came over to New York and told his story at the office of the railroad. After passing through the hands of half a dozen persons he was informed that the railroad would "investigate."

RED TAPE IN WHICH THE BUSINESS MUMMY IS WRAPPED.

After several trips to the office the railroad admitted that there had been a mistake—the money had been paid to the wrong man, or it hadn't been paid at all, or something of the kind. It looked to the laborer as though that were the end of his troubles, but, as a representative of the road explained to him, there



DEFENDER OF THE POOR AND THE IGNORANT.

letter from the Legal Aid Society, however, accomplished the return of the picture.

THE TEMPORARY DEPOSIT BECOMES PERMANENT.

The great fraud known as "business brokerage" has now been taken in hand by the District Attorney and the postal authorities, but for four years the Legal Aid Society fought it practically alone. The method of operation is to notice the small storekeeper to the office of the "business broker" by representing that the broker has a buyer for the business. The would-be seller is obliged to make a temporary deposit of five, ten or twenty-five dollars, presumably as a guarantee of good faith. He is told that the deposit will be returned to him at the end of a week if the business is not sold.

The broker gives the storekeeper a temporary receipt, which asserts that the deposit is a payment for advertising purposes. The storekeeper is then asked to sign an application—a long, formidable document printed in fine type. This, of course, he never reads; in a majority of cases, in fact, he is unable to read English. The paper is a contract providing that "the deposit is to be returned to the vendor by being deducted from the broker's commission in case a sale is effected and not otherwise."

The society recovered numerous judgments, but discovered that the brokers were judgment-proof. The civil courts, furthermore, refused to sustain actions for fraud and deceit; hence body executions could not be secured. With the postal authorities and the District Attorney now interested, however, criminal prosecutions are in order.

SECURITY CASES—A LITTLE GAME WORKED BY EMPLOYERS.

Article on the New York Legal Aid Society in the December 20, 1914 issue of the *New York Tribune*.

various levels of government and in different sectors of society, particularly within personal relations and in private transactions. The ubiquity of fraud in one the world's most important financial capitals and immigrant destinations presented a unique opportunity for the German Legal Aid Society. From 1876 to 1890, the organization ran a small-scale operation. It was funded by: a larger, but separate voluntary association, the German Society; membership dues from a host of elite German and German-American

political machine in New York City. Tweed and his associates controlled the city's municipal finances and defrauded New York City taxpayers of millions of dollars with contemporary estimates to translating into billions, when adjusted for inflation (Reyns 2010). Dennis Hale (2002: xi) argues that the Tweed Ring "helped to shape a powerful theory of political reform. It was in truth one of the formative events of Progressivism, that multi-faceted doctrine that has evolved into the modern American creed. In this sense, the Tweed Ring was to Progressives what Shay's Rebellion was to Federalists: an event which produced not only deep misgivings about the existing regime, but an insight into how it should be reformed."

lawyers and businessmen; and a small retainer fee that varied depending on the award summary. This was an important difference between the public defender model that Foltz advocated. The legal aid model was often funded through private organizations or through local bar associations, but not through the public. While the New York Legal Aid Society was a Gilded Age development, it cemented itself as an institutional powerhouse at the dawn of and during the Progressive Era. Moving from director in 1889 to president in 1890, von Briesen made the organization an influential body in the legal profession and amongst poor and working-class New Yorkers. First, in 1890, the organization eliminated its German focus and opened its services to individuals regardless of ethnicity. This change was part-cosmetic, part-strategic. It was cosmetic because up until this point, the society was already assisting non-Germans. For example in 1889, of the 3500 clients the Society served, approximately 2400 were German natives, and the remainder were Russian Poles, Hungarians, Austrians, Frenchmen, Dutch and Americans (Smith 1919a: 137). The change was strategic because there was a cloud of suspicion around the society. In the first full-length analysis of the organization, Macguire (1928:23) describes this skepticism stating:

Judges could scarcely believe that the Society was entirely disinterested and without bias. Had it purported to act for all poor men with just claims or defences, impartiality might have been convincingly asserted. But when the Attorney acted only for poor clients of German birth, there was probably a tinge of suspicion that he must unduly favor the chosen racial group in opposition to other racial groups. And of course the Germans' opponents in litigation were often or usually non-Germans. This situation was unavoidable at the beginning, because of the Society's origin. It cramped the development of the legal aid idea.

In 1896, the organization widened its clientele and it changed its name from the German Legal Aid Society to the Legal Aid Society. This is the year when things started to percolate. Besides the name change, 1896 was also important because it was the year the organization began to receive support from the political and legal elite, most notably statesmen Elihu Root and Joseph H. Choate, journalist and reformer Jacob Riis (of *How the Other Half Lives* fame) and future president Theodore Roosevelt—all of whom served in various capacities including director and vice-president. Moreover, after the resignation of the LAS' part-time attorney Charles K. Lexow (who had served for 13 years and left for financial reasons) von Briesen made the lawyer position full time and hired a more complete staff of assistants, which allowed the organization to take in more clients. Even von Briesen (1905: 53) recognized the seminal changes of the Society in 1896 and admits that, “from that time on its principal growth dates.”

The Society offered a template for other cities, which soon followed suit, albeit in different forms. The Legal Aid Society model took shape through privately funded volunteer organizations, with a varying range of assistance coming from local bar associations. Boston (1900), Philadelphia (1902), Cleveland (1905), Cincinnati (1907), Pittsburgh (1908) and Detroit (1909) followed this model. Several law schools such as the Harvard, Yale, Minnesota, and George Washington developed smaller “legal aid clinics” that allowed law students the opportunity to gain experience and provide legal assistance. Generally, legal aid institutions were popularly referred to as “legal hospitals,” a trope that emerged from a novel by Frank Stockton (1899: 414) where the protagonist “found a law hospital, where those persons who were unable to pay for legal protection

should receive it as freely as the ailing poor receive medicine and treatment in hospitals of the other kind” (see also Maguire 1928: 71; Riis 1899). The Detroit Legal Aid Bureau claimed that, “verily the offices of the bureau have become a legal hospital, which cures, or attempts to cure, the pecuniary, domestic and general social ailments of patients from all sources, of all races and creeds, and of all temperaments” (cited in Maveal 2006: 160). In a journalistic account of the NYLAS titled “A Law Hospital” Jacob Riis (1899: 27) writes:

Few places, even in the metropolis, possess the human interest of the three little dingy rooms in which the Legal Aid Society is at home on the top floor of a Broadway office building just across from the City Hall Park. Not without good cause has its office been called a “law hospital.” The stream of persons acutely suffering by reason of injustice and wrong flows through it all day long, craving and receiving redress. Thousands of the wrecks of New York life are borne in on it, and the misfits of the great crowds come sooner or later to be tinkered there. The society employs in its service the highest legal skill, and brings it as promptly and readily when the claim is for two or three dollars as if a fortune were involved, if a principle is at stake, or some right to be restored.”

Despite fashioning themselves as legal hospitals, these institutions were specific about the kinds of cases they managed. Many of these cities did not take on criminal cases until much later, for a host of different reasons. The alternative explanations for why legal aid offices did not take criminal cases are particularly important because they illuminate some of the enduring features of legal aid and social welfare provisions more general: the moralization of clients and the idea of “deservingness.”

Bureaucratization, Moralization, and Deservingness

Legal aid organizations offered different rationales for not handling criminal cases. Some were operational and entailed financial limitations as well as concerns that bringing on a criminal practice, along with their civil aid work, would overwhelm their offices. Some of these offices did not take criminal cases because they thought this practice required different skills set, equipment, and personnel (e.g. expert investigators) (Smith 1919a: 156). The *Cleveland Foundation Survey of Criminal Justice in Cleveland*, one of major crime surveys of the early 20th century (directed and edited by legal luminaries such as Supreme Court Justice Felix Frankfurter and Roscoe Pound), highlights the ambivalence toward criminal legal aid in the legal profession. When queried about their reasons for refusing to accept criminal cases only 19 of the 138 respondents used “feelings of incompetence” as an explanation. The remainder of the respondents’ explanations cohered around issues of ethics (17), aesthetics and a matter of taste (22), financial reasons (28) or a mere preference for civil work (52) (Pound et. al 1922: 219).

As benign as it appears, this undoubtedly signifies a normative and policy preference toward victims of injustice in the civil realm as opposed to the field of criminal justice. Individuals who fell “prey” to corporate illegality and swindlers were seen as more worthy recipients of legal aid because their cases often involved wage-earning individuals and the transfer of capital (e.g. wages, loans/debt, rent, desertion and child support). Criminal cases may have involved wage-earning individuals or the transfer of funds, but more often than not, it was the poor and unemployed (or illegally employed) who were enmeshed in the criminal justice system. The policy preference here is that the market and unscrupulous businesspersons were more of a threat than the state

(despite the latter's absolute authority to prosecute and punish). This distinction is especially peculiar when juxtaposed with the segment of the legal aid community that actively advocated for public defender offices in the criminal realm. Some offices, like the Legal Aid Society in Boston rarely pursued criminal cases because of dogmatic investments in legal orthodoxy or what I call *naïve legalism*. In a 1903 article in the *Legal Aid Review*, Arthur Dehon Hill (1905: 2), counsel for the Boston Legal Aid Society assuredly proclaimed, "Generally speaking, however, the high character of the police officials and the prosecuting officers in Massachusetts leaves little need of charitable work either in the prosecution or defense of criminal cases." This naïve legalism was compounded with the same kind of assumptions about poverty that welfare scholars have shown to be inextricably and detrimentally linked to social policy (e.g. Katz 1989; O'Connor; 2001). In a letter to Grace Humiston, a former LAS clerk and New York City detective-lawyer who was admirably, if not problematically, referred to as the "feminine Sherlock Holmes," von Briesen's ideas about "poverty" and deservingness come to the fore. On the word poor he states:

People have come to confused...erroneous ideas with reference to that term. Now a person who works for wages that enable him or her to lead an upright and decent life, cannot be termed 'poor.' Many of those who have little money are far richer in all the grand gifts which Providence bestows upon them than those whose coffers are filled with gold that is besmeared with the sweat of the laboring multitude. But such a wage earner becomes 'poor' whenever his well-earned pay is refused him or her and when, therefore, the justified expectation for the immediate future in the enjoyment which will recompense gives is destroyed. The Legal Aid Society...seeks to secure justice to the poor and the helpless, *meaning those who have been temporarily impoverished by the greed of their employers, their neighbors or false friends. These are not people who are always poor but only people who have been made poor for the time being by the wrongful acts of other.* I am sure, Ms. Humiston, you can define the ideas of undeserved poverty" (emphasis added).⁷⁴

Von Briesen's comments highlight the multi-layered aspects of deservingness. Here, the nationally recognized leader of the legal aid movement is drawing a sharp distinction between the kinds of people who should be afforded legal services. The real poor, in his analysis, are individuals who have been temporarily stifled by other private parties and thus deserving of legal aid. The criminally accused (who are not mentioned in his letter) and people who were trapped in poverty were not considered part of the ambit of legal aid. In addition to the civil/criminal law divide, Von Briesen's remarks highlight another dimension of legal aid deservingness *within* the field of civil law: the stigma of charity and working with paupers.

The fear of pauperization, or dependency on public assistance and charity, has its roots in the Anglo-American poor law tradition of creating statutes and policies that regulate the conduct and provisions of aid to poor people.⁷⁵ The logic that was

⁷⁴ Letter from Arthur von Briesen to Grace Humiston, February 14, 1919. Box 1 Folder 24, Arthur von Briesen Papers, Princeton University.

⁷⁵ The Poor Law of 1388 is often an important starting point for considerations of poverty legislation. This act sought to address the labor shortages of the bubonic plague of 14th century that decimated almost half of England's population. Poor relief and legislation developed throughout the centuries (e.g. Vagabonds and Beggars Act 1495, Act for the Relief of the Poor of

transported from 14th century British law to the American Progressive Era (and arguably beyond) was an acute concern about enforcing work ethic and preventing poor people's reliance on the state and civil society. In the first quarter of the 20th century, these imperatives were animated by the bureaucratization of the welfare state on one side and the institutionalization of social work on the other (Ehrenreich 1985; Wenocur and Reisch 2001). In a time where poverty was generally understood as a byproduct of personal shortcomings as opposed to economic configurations, state and civil-society poverty management cohered around a scientific approach to charity that had a eugenic flavor.⁷⁶ Paupers, who were reliant on the state or civil-society because of their inability to provide for themselves, were stigmatized and the institutions that provided them with help were seen as inheriting their social taint.

Von Briesen's comments are indicative of a larger tendency of legal aid discourse of the time, which sought to show that only upstanding and deserving people were being provided with legal services. As legal aid was continuing to be institutionalized and sought financial and ideological support, it was important to show that people who were putatively draining society of resources were not being helped. To this end, legal aid societies implemented perfunctory legal fees that were often waived at the discretion of attorneys. In New York City, the fee was 10 cents. Fritz von Briesen (1899: 209), the son of Arthur von Briesen wrote, "payment of this small retainer helps the applicant to realize that in asking the assistance of the Society's lawyers he is claiming a right, and is not altogether an object of charity. It also tends to discourage the bringing of frivolous suits; ten cents is a great deal of money for the very poor." In its 1903 annual report, the Philadelphia Legal Aid Society similarly noted, "To avoid pauperizing its applicants and to place them in the dignified position of clients instead paupers, the Society charges a nominal consultation fee of twenty-five cents, and if the amount collected exceeds the sum of ten dollars a collection fee of ten per cent is charged, which sums go toward the expenses of the Society" (Scoville Jr. 1903: 5) As in New York, waiver of the fee was at the discretion of the attorney, but the Philadelphia organization highlighted that "less than one half of the cases pay any fee whatsoever" (Scoville Jr. 1903: 5). Fees certainly played a role in helping support the actual operations of legal aid societies, but they also served the symbolic role of communicating to the public, potential donors, and paupers that legal aid would only be provided to the deserving.

Proponents were adamant about presenting legal aid as a right as opposed to charity. This was particularly important at a time where legal aid was attempting to shed itself from its putatively feminine social work orientation (Batlan 2010; Batlan 2011). The New York Legal Aid Society noted, "Legal aid obtains for the client money to which the law entitles him. It is a practical, physical help to the distressed; it is better than charity, for it gives only what is due. And, above all, the assistance which it gives is no humiliation to the recipient" (Legal Aid Society 1903: 1). I would add that legal aid also sought to avoid humiliation to its providers too. In the context of civil law, pauperization

1597, Elizabethan Poor Law of 1601, Poor Law Amendment Act 1834). American colonies mimicked British poor laws, which ended influencing the development of the American welfare state. See Trattner (1974), Handler and Hasenfeld (1991), Katz (1996), Quigley (1996).

⁷⁶ A useful recent study on this charity emphasis on scientific precision is offered in Ruswick (2013).

was to be avoided at all costs. In criminal law, the same kind of reliance was seen as almost unfathomable. This is not to suggest that the concern with pauperism was distinct from the institutional hesitancy to provide criminal legal aid. As Michael Katz (2009: 17), has noted, “crime and poverty, in discussions of the time, did not constitute two distinct problems. Rather, the terms criminal and pauper overlapped and merged into synonyms for deviant and antisocial behavior that stemmed from individual moral failure.” Thus, the provision of both civil and criminal legal aid was fundamentally influenced by a hodgepodge of assumptions about human behavior, deservingness, morality, citizenship, economic arrangements, class, and the supposedly hereditary nature of poverty. The overall moralization of legal aid during a key part of its bureaucratization delimited the scope of this service to a specific set of individuals (working, ethnic whites) and laid the ideological grounds for making an argument that legal aid would help solve the specter immigrant unrest and anarchy.

Political Poison, Fears of Insurrection, and the Legal Aid Pill

One could easily argue that the perspectives of von Briesen and LAS constituents only represented a slice of the legal profession. As other parts of this chapter demonstrate, this is the case. But the ideological dominance of this perspective cannot be understated. In 1911, when fifteen legal aid societies convened in Pittsburgh to form the National Association of Legal Aid Societies, they elected von Briesen as the president.⁷⁷ Reporting the next year on the Second Annual Convention held at the Waldorf-Astoria in Manhattan, a *New York Times* article discussed how “the delegates joined in giving credit to Arthur von Briesen, President of the New York Society as father of the Legal Aid idea. They related how his work here had inspired them to begin work in their own cities, and of the instantaneous support they had received” (*New York Times* 1912). In what is perhaps the most influential study on legal aid, Reginald Heber Smith (1919a: 36) discusses von Briesen’s impact claiming, “no history of legal aid work could be complete if it failed to pay tribute to his courageous vision, his faithful leadership, and his untiring labors in bringing justice within the reach of the poor, whom he knew and loves.” In an unpublished report, Smith (1961: 2) further aggrandizes von Briesen as the “George Washington of Legal Aid, and professes, “He should be canonized as the Patron Saint of Legal Aid; the International Legal Aid Association should prepare a medal in his honor and it should be presented from time to time to those in every nation who promote the cause of justice between and among the peoples of all countries.”⁷⁸

As a key figure in the legal aid movement, von Briesen had serious consternations about the prospect of ethnic upheaval, labor unrest, and social disorder. He witnessed it in the Draft Day Riots saga mentioned in the introduction, and this was a general concern for reformers during the Progressive Era. But what is most unique is that he saw legal aid

⁷⁷ Other cities included Baltimore, Boston, Buffalo, , Chicago, Cincinnati, Cleveland, Colorado springs, Kansas city, Newark, Philadelphia, Pittsburgh, Rochester and St. Louis.

⁷⁸ Smith, Reginald Heber. 1961. "History of the National Legal Aid and Defender Association.", Box 1, Folder 2, Legal Aid Society (Philadelphia, Pa.) Records, Urban Archives, Temple University. The NLADA has a Biennial award called the “Arthur von Briesen Award” which honors an attorney who does not work in a legal assistance organization, but has made significant contributions to that field.

as a buffer against these dangers. The notion that legal aid could serve as a social and political elixir to immigrants and the poor was central to the rationalization and justification of legal aid societies, and von Briesen was a top dog in this line of thought. This idea became a justification for other members of the legal profession, the bar, von Briesen's successors at the powerful NYLAS, and other leaders of legal aid organizations in other cities.

Before delving into some of their comments, it is worth contextualizing the pandemonium that characterized the first quarter of the twentieth century, lest these individuals be read as savage xenophobes. To be clear, some were. But some of their fears were anchored by unprecedented historical events in the United States and larger geopolitical changes. First, the labor strife of the previous decades was still salient in the American historical memory.⁷⁹ This strife, coupled with the legal profession's perceived role in facilitating class inequality casted law quite negatively. Figure 6 is a 1907 illustration created by political cartoonist John S. Pughe titled "The Return of Rip Van Winkle" that describes some of the populist sentiment among working-class individuals and immigrants during the first quarter of the twentieth century. In the picture, various individuals who represent capitalist interests (e.g. beef, railroads, oil, and coal trusts) have a merry time at the "Jolly Grafter's Inn." The big offender pays off the handy judge and receives a glass of "judicial favors;" the railroad entity sips on "rebate brew;" and most important to this discussion, the corporation lawyer serves rounds "legal aid" to the bunch. An old feeble man, which represents the law, is inept and unable to regulate these figures with his ineffectual weapon (fines) while facing a dog, which represents the "subsidized press." Conveyed in this photograph is the problematic state of law and the legal profession, some of which the legal aid movement sought address through its advocacy.

Similarly salient was the international "decade of regicide," a period between 1892 and 1901 where an unprecedented number of political leaders were assassinated across the world (Jensen 2004).⁸⁰ In the first decade alone there was the attempted 1900 assassination of Prince Edward of Wales by Belgian anarchist Jean-Baptiste Sipido as well as the 1900 assassination of King Umberto of Italy by Gaetano Bresci, an Italian-American who operated out the largely Italian-American community of Paterson, New Jersey (a supposed hotbed of anarchist activity). In 1901 a Polish-American anarchist,

⁷⁹ Some of this strife includes the Homestead Strike of 1892, the labor unrest in Coeur d'Alene, Idaho in 1892 and 1899, the Great Southwest Railroad Strike of 1886, the 1886 Bay view Massacre of Milwaukee, the 1897 Lattimer Massacre in Hazelton, Pennsylvania, the 1894 Pullman strike, the 1894 Bituminous Coal Miners' Strike that occurred from the Rocky Mountains to the midwest to Appalachia, and several other labor conflicts.

⁸⁰ Jensen (2001:16) calculates that during this time "more monarchs, presidents and prime ministers were assassinated than at any other time in recorded history, before or since. The 1890s also became the era of the terrorist bloodbath, as anarchists hurled deadly explosive devices into crowded cafes, religious processions and opera audiences. During that decade, in France, Spain, Italy, Portugal, England, Switzerland, the Ottoman Empire, and the United States, real or alleged anarchists killed about 60 and injured over 200 people with bombs, pistols and daggers (during the entire 'golden age' of anarchist terrorism, 1880–1914, about 150 succumbed and over 460 were injured)." On this particular era, also see

who claimed to be influenced by the aforementioned assassination, murdered President William McKinley. Then there was the Immigration Act of 1903, also known as the



Cartoon titled "Return of the Rip Van Winkle" by J. S. Pughe (1907)⁸¹

⁸¹ The return of Rip Van Winkle. February 13, 1907. Prints and Photographs division. Library of Congress. <http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o285713>. Theodore Roosevelt Digital Library. Dickinson State University.

Anarchist Exclusion Act, which excluded anarchists from entry into the United States. Of course, political violence was not new to the American public. At this point in history, violence was essential to achieving political objectives, mainly with the enslavement of Africans and African Americans, the genocidal implications of “Manifest Destiny” for Native Americans and Mexicans, as well as American imperial ambitions in the Atlantic and Pacific. The key difference, as Jensen (2001:16) observes, is that “at the time terrorism on this scale was still unheard of and made all the more frightening by its successful assault on powerful symbols of authority and stability.” If political leaders were susceptible to political violence, then it could happen to anyone, and in the next decade, that is precisely what happened. The next decade commenced with the infamous dynamiting of the Los Angeles Times building in 1910. It continued with a series of bombings across major cities that were attributed to Galleanist anarchists that are too numerous to mention. These incidents led to the Immigration Act of 1918 (which explicitly defined anarchists and bolstered the 1903 act) and culminated with the devastating bombing of Wall Street in 1920. There was also the Bolshevik Revolution of 1917, which prompted the First Red Scare. The overall onslaught of presumed anarchist activity gnawed away at public’s confidence in American exceptionalism as well as the United States presumed immunity to socio-political currents and tensions in Europe. The problem was a triple conflation of political violence with anti-statist and anti-capitalists ideologies (e.g. anarchy and communism), and immigrants. In short, most political violence was attributed to immigrants and their supposed alternative political programs; they became the face of disorder and members of the legal profession saw legal aid as a gentle alternative to the more punitive recommendations offered by nativists. Consider some comments made by various members of the legal profession, all of which echo the preventative rhetoric espoused by von Briesen. In his discussion of the NYLAS, Judge Frank J. Coleman Jr. (1919:1) of New York City, believed that legal aid bureaucratization was “necessary for the protection of society itself. With the spread of bolshevism and of general dissatisfaction with our institution of government, there is an increased necessity to furnish the same legal protection to rich and poor alike: and as a measure of self preservation the public should support the association which is doing that service.” In discussing the advantages of legal aid bureau (funded by government and not a private organization) Pennsylvania statesman, Ernest L. Tustin (1920: 240) declared that:

“A municipal bureau located in the city hall or the very center of the justice-dispensing agencies brings them to the very portals of the force which they dread. They go very unwillingly to the municipal court building or the “Hall,” where is represented all that is hostile, unknown and untried, and to their surprise they find a department that patiently hears the case and defends the cause. At first they are moved with wonder that what they feared as a menace and as a forum where justice could only be purchased by the rich, proves a place of sympathy and help. *Their minds gradually receive the astonishing impression that the Government is not wholly represented by the police, the jail, and a hostile judiciary, but that it possesses a co-operating agency and that they themselves are in some way a part of the very Government itself. In this way the municipal legal aid bureau is becoming one of the greatest influences ever presented to our people for the Americanization of the ignorant and the foreigner. It is the connecting link between them and the Government which they have been taught to fear and avoid (emphasis added).*”

Romain C. Hassrick (1926:42), Chief of the Legal Aid Bureau of Philadelphia claimed that:

Unquestionably, the signal benefit derived from the municipal bureau is its effect upon foreign-born applicants. *Persons of foreign birth often view their government as an organization that restricts their liberties and that exerts a menacing influence upon them.* This mental attitude is quite natural with a great number of foreign-born, *because their only contact with their government has been through the police department or through the prosecuting agencies.* The municipal bureau of legal aid *extends a protecting arm around the foreign-born and this has been especially true in Philadelphia, where cases of persons of foreign birth are given unusual attention.* They find in the Bureau, therefore, an organization which will fight their legal battles to the limit and insist that they shall receive protection from unscrupulous persons, many of whom are frequently of their own race who endeavor to victimize them. *The direct result of this effort is better Americanism in the minds and hearts of the persons who obtained the benefit of such a person”* (emphasis added).

Finally, there were the comments of Reginald Heber Smith who worked as an attorney at the Boston Legal Aid Society for four years and moved into private practice while still maintaining a heavy involvement in the legal aid movement. If von Briesen was the “father of legal aid” Smith was undoubtedly the “prince.” In fact, Smith picked up the legal aid mantle of leadership at the end of 1910’s as von Briesen ended his legal career and was pushed out of the NYLAS because of his German heritage at a time of increasing xenophobia. Smith’s Carnegie Foundation-funded study *Justice and the Poor* (1919a) meticulously examined indigence in the judicial system and legal aid institutions across the country. It was and continues to be a standard referent for discussions on legal aid. Moreover, it picked up on the theme of legal aid as an institution with the ability to preempt and prevent social unrest. A précis of the study appears in the book *The Social Unrest: Capital, Labor, and the Public in Turmoil* and in it Smith (1919b: 499) candidly states:

The man who is unable through the courts to enforce his rights or secure redress when he is wronged, feels a keen sense of injustice, it is pointed out. He is apt to believe — and this is particularly true of the immigrant — that American justice consists only of laws that punish and not of laws that help. The next step is for him to be against the law, because he thinks the law is against him. *He is then ready to listen to the forces of sedition and anarchy* (emphasis added).

In many ways, these comments represent the bizarre admixture of benevolence and nativism that was typical of this time period. Students of the Progressive Era might wonder what makes legal aid reformers unique? What makes them different from settlement house leader Jane Adams, Americanization proponent Frances Kellor, or the scores of reformers who advocated education, playgrounds, libraries, recreational facilities, professionalization, municipal reform, and a host of other proposals as Americanizing influences that would purify the polity and serve as social glue? Or what distinguishes legal aid from other Progressive Era jurisprudential reforms?

There were probably more in common than in difference, and it probably had to do with the political environment as opposed to personal politics. The party realignment ushered in by the election of 1896, along with changes in voting, and the weakening of political machines during the Progressive Era helped foment a “political opportunity structure” where voluntary organizations, municipal agencies and bureaus, and special-

interests groups vied for attention, power and policy influence. Legal aid reformers were in the mix and often occupied different positions in this arena. They were effectively, what Detroit Legal Aid attorney Otto C. Wismer (1928) called “lobbyists for the poor” and they shared many of the same jumbled bag of characteristics as other reformers in this era.

In May 1919, at the height of First Red Scare, the Department of the Interior and Bureau of Education held a conference aptly titled “Americanization.” At this conference, the aforementioned Smith (1919c: 270) took his show on the road, and attempted to explain what made legal aid different from other Americanization efforts, stating, “Education, social service, community work are all splendid. They can carry the immigrant a long distance, but not the final distance. The last part of the road can be covered only by experience. You can labor unceasingly to teach the immigrant respect for our institutions, but your entire effort will amount to nothing if the immigrant, when he comes into personal contact with our institutions, finds that they do not deserve respect.” The difference for legal aid reformers was the role of law as a regulatory tool that governed norms of conduct. For legal reformers, law’s importance lay in providing safety, dispute resolution processes, and social order. Taken one step further, these reformers unknowingly echoed Durkheimian legal theory that stressed the importance of law as an indication of the moral foundation and fabric of society. The interface of reformers’ overlapped benevolence and moralism, coupled with the double edged sword of law as a tool of injustice and social uplift offers important insights into this period of bureaucratization as well as the historical development of legal aid institutions.

The Bite of Benevolence

There are two important pitfalls to avoid when understanding the bureaucratization of legal aid during the Progressive Era and beyond. First, it is important to understand the development of legal aid in ways that are not grossly functionalist and focus *exclusively* on political developments and societal “needs” (e.g. capitalism, white supremacy). Similarly, it is also important to avoid the instrumentalist view that imagines human action as wedded only to practical ends and not in terms of ideals. Such views “presume that actors continuously calculate and economize, and are guided only technical rather than moral considerations” (Waters 1994: 154). These are tendencies that are present in some of the scholarship on legal aid during this era. In McConville and Mirsky’s (1986:582) groundbreaking study on criminal defense for New York City’s poor they argue, “to achieve efficient processing of defendants (and to legitimate a system that fails constitutional and statutory mandates to provide effective assistance of counsel), defense providers ally themselves with courts, prosecutors, local government, and the organized bar rather than with indigent defendants.” Barak (1980:86) in his equally stimulating, but less referenced book on indigent defense proclaims, “PDS (the public defender system) has always been celebrated as a progressive reform, despite the fact that this reform has never served to benefit as a whole that group of legal offenders for which it was intended.” Skeptical of due process, equal protection, and efficiency arguments, he maintains, “PDS served the needs of the growing corporate order and not the ideals of social justice” (Barak 1980). Such arguments are compelling. Indeed, they inform my own analysis. But they do not tell the whole story. What is often left out of these kind of accounts of legal aid is the agency of reformers.

As I have discussed, these activists were far from faultless; many of them harbored nativist, sexist, and alarmist sentiments. But many of them were not bureaucratic patsies or “adjunct prosecutors” as some of the legal aid scholarship might suggest. Along with the aforementioned Clara Foltz, who advocated for a radical version of the public defenders office, many reformers genuinely wanted to improve criminal justice operations and had strong, albeit misguided beliefs about the rule of law. A 1915 article in *The American City* discusses the work of Cecil J. Randall, who was the first public defender of Columbus, Ohio:

Since the establishment of this office, the Defender has sought to listen to the stories of the prisoners and making investigations of their truth. The judge in many cases accepted the public defender's opinion in court, and has been able to deal much more intelligently with defendants. Aside from the actual work accomplished by the PD, the mere fact that the office is in existence has had a moral effect on the police in causing greater care in making arrests...[Because of the public defender] there are cases of positions being kept open for prisoners by their employers through the efforts of his office; of *stretching the law in favor of leniency where such leniency was by far the best policy*; of suspended sentences where imprisonment would bring starvation to a family; and of *cooperation with charitable societies in aid* of those who had suffered from the harsh hand of the law, whether innocently or not (emphasis added) (*American City* 1916).

These comments demonstrate that some legal aid reformers were concerned about their clients beyond the confines of the courtroom. There is ample historical evidence that suggests that the notions of justice and fairness animated the work of legal aid reformers. Some of these notions were philosophical, as articulated in Hannon's (1917: 572) “Humanizing the Law,” which contended that “a public defender is defensible on the same theory that our system of ‘checks and balances’ under the Federal Constitution is. In a democracy every public officer should have some sort of check upon him.” Other concerns were practical. For example, legal aid advocates were bothered by the prevalence of the “third degree,” or the infliction of physical pain by police to extract confessions from the criminally accused. This practice existed throughout the country despite a variety of Supreme Court cases that deemed involuntary confessions unconstitutional.⁸² Reformers believed that legal aid would no longer allow the criminally accused to exist in a silo where they would be susceptible to such violence. One Los Angeles public defender commented, “prisoners cannot be kept incommunicado...[they] are more humanely treated, because they have a person to whom they can complain, and the Defender has always made it a point to investigate bruises, cuts and other injuries observed on the persons of prisoners” (Orfilia 1928: 150). An account of legal aid that focuses strictly on class domination is incomplete. An important theme of Progressive Era scholarship is the unstable position of the middle class as arbiters, associates, and adversaries of the wealthy and the poor (Gaines 1996; Gilmore 1996; Johnston 2003; McGerr 2003). Although there has not been a meaningful scholarly discussion of race vis-à-vis legal aid a same argument could be made about avoiding an analysis that focuses strictly on racial domination. Richard W. Hale, who served in various leadership capacities in the Boston Legal Aid Society, linked lynching to the

⁸² E.g. *Bram v. United States*, 168 US 532 (1897); *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924).

problems in criminal procedure and legal aid. Hales' colleague Moorfield Storey was a Boston attorney who fought vigorously for the Dyer Anti-Lynching Bill that would have made lynching a federal felony.⁸³ Storey was appointed to the National Committee on Legal Aid Work in 1921 and convinced Charles Evans Hughes, von Briesen's successor at NYLAS and future Chief Supreme Court judge, to offer financial and symbolic support to his anti-lynching efforts. Storey was also the first president of the NAACP.

In fact, legal aid advocates generally did not practice the outright racial bigotry that was common during the nadir of race relations. Instead, they engaged in a form of *racial discounting*. Barbara Ehrenreich and Arlie Russell Hochschild (2003: 3) introduce this powerful, but underdeveloped term to describe the erasure of women of color who work as domestics. In the context legal aid, racial discounting entailed a two-fold disengagement of non-whites' socio-legal issues. One manifestation of racial discounting was nominal and symbolic. It typically entailed acknowledgements of racial disparities in the absence of substantive commitments. For example, in a 1902 letter to President Roosevelt, von Briesen mentions that his son Fritz (who worked in Washington D.C.) alerted him to the need of a Legal Aid Society for African Americans in the capital and maintained, "Washington needs a Legal Aid Society much more than New York. Especially the colored people in Washington, who have no vote, no political power, no means of making themselves heard, are so completely subdued and at the mercy of the ill-will of neighbors, police officers and the like, that they are very frequently deprived of liberty and property without an opportunity of being heard."⁸⁴ Such comments in a private setting such as letter (as opposed to more public venue) demonstrate the absence of race-based animus. But also highlight the inattention given to blacks and Chinese von Briesen's own backyard of New York City, where the Legal Aid Society provided them with little support despite their ensnarement in New York's criminal justice system around the same time his letter was written (McIlwain 2004; Hicks 2010). For example, in Volumes 1-27 of the NYLAS' *Legal Aid Review* (which span the years of 1903-1924), sixteen cases are discussed that involve African Americans and one case involving a Chinese individual as opposed to the much more frequent discussions about Hungarian, Italian, Irish, Norwegian, Russian, Polish, and other European clients. Each volume typically contained a discussion of fifteen to eighteen cases, a total of more than 300 cases. The Legal Aid Societies of Philadelphia and Boston also made sparing references to African Americans that did not seem to correspond with legal inequality that was present in those cities (e.g. Du Bois 1899; Schneider 1997). Thus, while many legal aid societies did not exclusively preclude non-whites from receiving legal service, they certainly did not offer rhetorical or administrative attention to these groups. The archival evidence of purposeful outreach to non-whites is thin when compared to actual legal aid needs of these groups. Moreover, these efforts pale in comparison to what was offered to southern and eastern Europeans during the same time period. Overall, this version of racial discounting is important because discrimination is sometimes not the product of race-based animus but white self-interest.

⁸³ Letter from Moorfield Storey to Charles Evans Hughes, 1918, Box 4, Cataloged Correspondence, S-Z, Charles Evans Hughes papers, 1914-1930, Columbia University.

⁸⁴ Letter from Arthur von Briesen to Theodore Roosevelt. June 9, 1902. Theodore Roosevelt Papers, Manuscripts Division. Library of Congress. Theodore Roosevelt Digital Library. Dickinson State University.

The other form of racial discounting entailed a pure lack of consideration that may have been due to racial bigotry (e.g. ideas about non-whites inherent criminality and deservingness) or based on contextual assumptions about certain groups' unrealistic prospects for full citizenship. Many legal aid institutions, along with scholarship on legal aid, provided detailed demographic data on clients that focused almost exclusively on whites' ethnicity and nationality. This leads to three propositions. First, that non-whites were simply collapsed into the "American" category in these studies and descriptions. This is perhaps likely for blacks, questionable for Mexicans and Mexican Americans considering their second class citizenship in the southwest and midwest, and unlikely for Asian Americans considering the Chinese Exclusion era. Secondly, it could be argued that these groups were helped, but that this assistance was not publicized. Perhaps this non-publicity occurred because legal aid reformers did not want the public or donors to see that they were helping these disreputable groups? This is possible, but unconvincing considering the vital importance print culture and rhetoric played in making potential clients aware of their services. Finally, there is the possibility that these groups were not substantively provided legal help at best and ignored at worse. Irrespective of these three potential explanations, the undisputed fact remains: non-whites received little attention from the legal aid campaign of the early twentieth century. This inattention occurred because of a variety of dispositions that ranged from animus to racial discounting and existed in ways that cannot be explained by functionalist and instrumentalist accounts.

One could consider the Americanization effort within legal aid, along with socialist-anarchist fear-mongering, as a marketing strategy. Given the widespread popularity of Americanization efforts in government, and perhaps more importantly with the funding institutions legal aid reformers sought to curry favor with (e.g. Carnegie Foundation, Rockefeller), this is quite plausible. During the first quarter of the twentieth century, there were only a small amount of organizations that controlled the millions of dollars flowing into the various Progressive Era reforms, which made competition stiff (Sealander 1997). In his classic book, Auerbach (1976: 55) suggests that appeals toward Americanization were "doubtlessly salesmanship mingled with conviction;" notwithstanding these reformers' partisan preference toward ethnic whites, he contends that their idealism appears to be as genuine as their "passion for stability." The problem with this perspective is that it minimizes the consequences of such salesmanship, which included the erasure of non-whites as well as the intra-racial ramifications for vulnerable European groups during and after World War I. As it relates to ethnic whites, the last few years of von Briesen's career are instructive.

Despite being a German-American, his heritage was rarely an issue for most of his legal career. Indeed, in a 1902 letter to von Briesen, President Theodore Roosevelt commended the NYLAS leader stating, "pardon my coupling you with Jacob Riis—you know how fond I am of him. I always hold you two up to all our young men, whether they be Harvard graduates or workers in a machine shop, as the types of what true Americans should be." By 1917, the same year the United States entered the war, von Briesen was forced to resign from the Society. The same American nationalism that he sought to engender through this "salesmanship," led to his resignation. In a letter to wealthy New York banker J. Kennedy Tod, von Briesen attributes his resignation to a desire to avoid disturbing the Society's cash flow. "I resigned," he explained, "mainly because the interest of the society make it essential that a non-German be at its head,

otherwise the funds necessary for its support and for its needful enlargement will not come forward.”⁸⁵ In short, the Americanization emphasized by legal aid reformers along with related “wartime nationalism” helped create “a feverish sentiment” against presumably disloyal “hyphenated Americans,” which was aimed primarily at German Americans, but “provided a popular base of support for the restrictionist movement against eastern and southern Europeans” that resulted in the Immigration Restriction Act of 1921, which introduced numerical restrictions and a quota to immigration, and the more enhanced Immigration Act of 1924 (Ngai 2004).

Immigration restriction during the interwar years (1917-1941), and especially after the start of the Great Depression (1929) changed the demographic make up of the United States, while shifting the make-up of legal aid clientele and concerns. Mexicans became the “new face” of immigration and with the development of immigration bureaucracies and the deportation regime, “legal aid to immigrants became a much more controversial endeavor in this restrictionist America, where a poor immigrant might no longer be a ‘ward’ to be protected, but an illegal alien hunted by the U.S. government” (Heeren 2011: 632). Consequentially, legal aid institutions continued to focus their attention on whites, albeit without the language of immigration. As Babcock (1990: 853) notes in her discussion of the anti-Chinese sentiments of Clara Foltz and her contemporaries, “no rhetoric of historical relativism can justify their failure to recognize the common humanity” of non-whites. Thus, while it is important to properly situate these progressive reformers within the context of the virulently ubiquitous prejudice of their time, it is also important to keep them historically accountable and not chalk up their moral shortcomings to zeitgeist.

In conclusion, I have argued a few points. First, I have demonstrated how legal aid reformers existed in an ideological continuum and vacillated between altruism and social control imperatives in ways that have not been fully captured in previous scholarship. Relatedly, I highlighted how this continuum was influenced by common-sense assumptions about morality and deservingness. I have also demonstrated how many of the current features and problems of institutionalized legal assistance (e.g. a heavy reliance on plea-bargaining, the focus efficiency and processing, the lack of adversarialism) are not unique to today, but were part of the initial design of legal aid bureaucracies. Finally, I have highlighted the unacknowledged role of race in public and scholarly understandings of legal aid during the Progressive Era. While previous literature has acknowledged the importance of ethnic divisions, it has paid little attention the role of race and eugenics during this time period. All of the above helped set the context for an alternative legal aid environment for African Americans, Chinese Americans, and Mexican Americans in the beginning of the twentieth century.

⁸⁵ An article defending Germany in the *New York Times* did not help either. See von Briesen (1914).

CHAPTER 4: ILLUSIONS OF EQUALITY: RACE, NATIONALITY, AND ALTERNATIVE CONFIGURATIONS FOR LEGAL AID

The scant attention to race and ethnicity in the historiography of legal aid is painfully obvious to the close observer. To be sure, these were not major objects of inquiry for the authors of legal aid classics.⁸⁶ Nevertheless, the historically indisputable connection between ethnoracial identity and indigence—both of which were key determinants in legal aid provisions—calls for more sharpened analyses. As groups that were neglected by burgeoning legal aid bureaucracies, individuals of African, Chinese, and Mexican descent took matters into their own hands and used a variety of predictable as well as less obvious routes to provide and obtain legal aid—both of which have been unattended to by students of legal aid. This chapter briefly examines these diverse forms, which include: the ethnic press, churches, ethnic mutual aid societies, civil rights organizations, and public interest groups. These organizations sought to provide a safety net and legal protection for their constituencies in a time where the developing welfare state and legal aid environment was inattentive to their needs. I emphasize how legal aid looked different at this time for particular groups because of the inadequate and sometimes non-existent set of procedural protections offered to these people.

Similar to my discussion on gender and legal aid in Chapter 2, I demonstrate how the occupational exclusion of racial minorities from the legal profession often forecloses nuanced understandings of how these same groups participated in the legal system. Counterintuitively, it is important to understand that in a time period where legal aid was not a right and where race, ethnicity, nationality, and gender determined access to the legal profession, there were many individuals providing competent, albeit unauthorized legal assistance. This is particularly significant because members of these excluded groups, who often constituted the “undeserving poor,” sometimes relied on in-group, unlicensed experts for legal aid. And this is far from new, as the existence of non-lawyer services has existed for about as long as professional bar associations (Christensen 1980; Rhode 1981; Rhode 1990). This section moves beyond the valorization of the liberal-democratic idea that incipient legal aid societies helped everyone. While some scholars (e.g. Auerbach 1976; McConville and Mirsky 1987; Rhode 2005) do acknowledge that legal services were afforded primarily to the “deserving poor,” the ethno-racial and gendered distinctions that determined “deservingness” are often understated or underexamined. This issue of deservingness and legal aid is especially pronounced when juxtaposed with the related scholarship on welfare provisions.⁸⁷ Non-whites’ exclusion from social welfare arms and adjuncts (e.g. settlement house, welfare entitlements, social security, GI Bill, labor unions, housing, education, law enforcement) should give pause to the idea that legal aid institutions uncritically and unwaveringly supported individuals of all backgrounds and nationalities. The presumably democratic nature of legal aid, along with the relative scarcity of scholars who have studied this topic has allowed this service

⁸⁶ Smith (1919), Maguire (1928), Johnson (1974), Garth (1980), Katz (1982), Abel (1984), McConville and Mirsky (1987), Rhode (2005).

⁸⁷ Gordon (1994), Katznelson (2005), Lasch-Quinn (1993), Poole (2006) Levenstein (2009) Ward (2005).

to evade critical examinations of inclusion, exclusion, and privilege. This chapter seeks to rectify these shortcomings, among others.

Finally, this chapter is undergirded by a commitment to comparative ethnic studies, an approach that is often missing in legal history as well as in the often-compartmentalized analyses of legal subjugation. This is not necessarily a criticism of works that take this approach. Indeed, this chapter and my larger work build on this scholarship. The depth of specific groups' relationship to racial subjugation, along with specificity of research questions and the institutional politics of Black, Chicano/a, Asian American and Native American Studies can sometimes preclude more expansive analyses. But this project heeds Juan Perea's (1997: 1213) sagely reminder that although slavery and white racism against blacks is at the core of American history and society, "the omissions that emerge from the black-white paradigm of race relations is extraordinarily damaging, since it distorts history and contributes to the marginalization of non-Black peoples of color." Thus this work seeks to offer a preliminary sketch of what legal aid looked like for blacks and non-blacks to gain a more robust understanding of this social welfare service.

CHINESE EXPONENTIAL EXCLUSION

At the tail end of the Gilded Age and during the Progressive Era, Chinese immigrants and Chinese Americans developed legal aid arrangements to deal with rising Sinophobia. This prejudice was a primary byproduct of Chinese labor competition but was also undergirded by assumptions about: Chinese social isolation and their prospects for assimilation; criminality (particularly in the areas of sex work and opium use); and the traditional hybrid of nativism and racial domination that are hardwired into the fabric of American society.⁸⁸ James J. Ayers, one of the founders of the *San Francisco Call*, conveyed the anxiety, alarmism, and prejudice of anti-Chinese xenophobes and a large section of the American public. In an 1878 speech that was published as a short book, he describes the "threat" posed by Chinese to Americans as an "injustice of a tremendous scope" that required governmental intervention.

[The power of exclusion] is a discretionary power to be exercised according to the judgment of the party possessing it. The State could alone exercise this power with discretion, for it would feel and know whether any particular class or description of persons is likely to produce discontent *or taint the morals of its citizens, or increase their burthens* [sic], or *(as in the case of the Chinese evil) wipe out American labor and reduce the State to the condition of a Chinese province...*The Chinese iron is burning into the souls of the toiling masses, who find themselves outcasts at home to make room for the *conquering strangers*. The evil has already passed its first stage of encroachment. *It has supplanted white labor in all the humblest fields of industry...*In its insidious progress *it will invade every trade and every business, and even American commerce itself may fall...**It is as impossible for our own people and the Chinese to exist together, as it is for fire to burn in water* (Ayers 1878: 9, 11) (emphasis added).

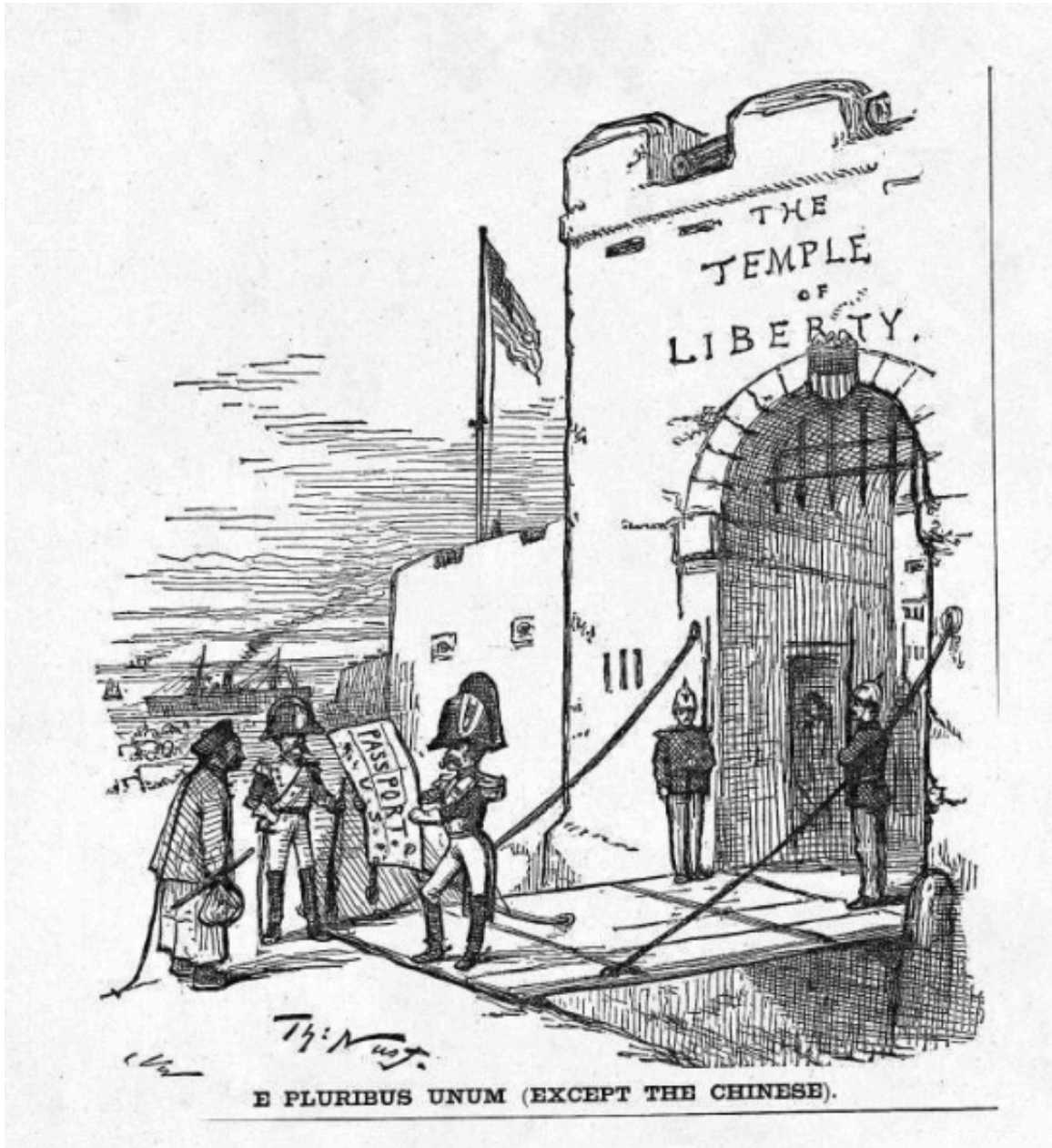
⁸⁸ Chinese immigrants were crucial to the industrial development of western America and a crucial target for disaffected white workers and unions, which made them "the Indispensable Enemy" as Alexander Saxton's (1971) aptly titled book indicates.

codified in law.⁸⁹ What made the act unique was that it was the first piece of legislation to criminalize “illegal” immigration for a particular group while facilitating easier discursive associations of Chinese with illegality (Lee 2003; Torpey 2000). For some, the mere existence of a Chinese immigrant on US soil was cause for suspicion. The act created an environment that made this group susceptible to both *de jure* and *de facto* inequality that included, but was not limited to: harassment from immigration bureaucrats; extortion (by criminals and government officials); biased taxes aimed at Chinese laborers (e.g. miners taxes, laundry taxes); mob violence and subsequent government inaction; and anti-Chinese juridical sentiment (Wundler 1983; Lee 2003). Figure 2, also a picture from *Harper's Weekly*, published just a few weeks before President Arthur signed the Chinese Exclusion Act into law, captures the ideological essence of this piece of legislation. The American motto of “e pluribus unum” (one out of many) that is currently on most American coins, simply did not apply to Chinese immigrants and Chinese Americans. This hostile socio-political climate, along with the Exclusion Act's Byzantine documentary requirements (which are not captured in the figure), created a substantial demand for legal assistance. The Act allowed relatively privileged folk (merchants, teachers, students and travelers) to immigrate and many of them were able to pay for legal services. But a few organizations were developed that assisted documented and undocumented Chinese immigrants. The St. Bartholomew's Chinese Guild (*Bao Niang Hui*), established in 1889 in New York City, is another association that gets lost in the historiography of legal aid.⁹⁰ While other organizations sought to improve the legal environment for Chinese and Chinese Americans, most notably the Chinese Consolidated Benevolent Association (also referred to as Six Companies),⁹¹ I focus on the Guild because of its understudied nature and the lessons it offers about legal aid.

⁸⁹ “No variety of anti-European sentiment has ever approached the violent extremes to which anti-Chinese agitation went in the 1870s and 1880s. Lynchings, boycotts and mass expulsions still harassed the Chinese after the federal government yielded to the clamor for their exclusion in 1882” (Higham 2002: 25).

⁹⁰ To be fair, part of the explanation of this dearth may be the typical historical culprits, but part may result from the 1906 San Francisco Earthquake, which decimated San Francisco, which was most important hub for Chinese settlement. As Charles McClain Jr. (1994) mentions in his important work on Chinese discrimination, the 1906 San Francisco Earthquake and the resultant fire destroyed all of Chinatown, much of the city's municipal buildings and more than three-fourths of the city, essentially destroying important legal documents and correspondence - leaving historians to rely on a hodgepodge of Chinese-language newspapers as well as federal and state files.

⁹¹ Six Companies was an alliance of smaller organizations that challenged the Chinese Exclusion Act through litigation and lobbying and acted as a voice for the Chinese American community. Most studies of Chinese exclusion and discrimination discuss the organization and more in depth analyses are offered in Hoy (1942), McClain Jr. (1994), Lai (1987), Qin (2009).



St. Bartholomew's Chinese Guild

The Guild emerged out of an Episcopalian church of the same name,⁹² and its primary projects included missionary work, social welfare services, and legal advocacy for the Chinese community in New York. Several of the New York City social service directories listed the organization under their “Legal Aid and Advice” sections, and even

⁹² St. Bartholomew's Episcopal Church was founded in 1835 “in the then-fashionable Bowery section of Manhattan” and by 1888 it was a “major force for social welfare in the city” that served a diverse immigrant community (St. Bartholomew's Episcopal Church 2013).

they were late to the scene.⁹³ In fact, in the 1903 edition of the *New York Charities Directory*, the Guild is described curtly as an organization that “renders legal aid and advice to Chinamen” (Charity Organization Society 1903:82). Moreover, in this same directory, the Guild is directly flanked by the Working Women's Protective Union explored in Chapter 2 and the New York Legal Aid Society discussed in Chapter 3. This evidence is a perfect example of the historiographical oversights of legal aid scholarship. Nevertheless, historian Mary Ting Yi Lui (2005: 125), one of the few scholars to seriously examine this institution, describes how their work entailed “interviewing landlords and agents, interpreting in courts, engaging stores, drawing up leases, settling disputes, writing letters, health department cases, corporation cases, visiting the sick, looking up scholars for teachers, translating, procuring police protection and many other minor matters.” Like the Working Women's Protective Union, members of the Guild provided legal aid and advocacy despite not having law degrees. Most notably, Guy Maine (Yee Kai Man), who led the Guild, but did not have a law degree, was crucial to its legal operations. Maine served as an interpreter, legal advocate, and liaison between the Chinese community and bureaucrats in the New York City legal system. In addition to his work with the Guild, Maine, who newspapers effusively described as a “Christian” who spoke “English without a trace of Chinese dialect,” was a missionary, lectured across the country, and served as the official interpreter for the Chinese government when the constitutionality of the 1892 Geary Act was being tested (*The Evening World* 1892; *The Conservative* 1900; *Hawaiian Gazette* 1888).⁹⁴

In the Guild's first year, it maintained a membership of 466 people. The annual dues were two dollars, and this covered a third of the organization's expenses, while the church covered the balance (Bonner 1996). In 1891, under the aegis of the Guild, Maine saught “justice in the courts in 217 cases of crimes against Chinese—everything from thirty-six assaults-and-batteries, to eighty-seven laundry windows smashed, to eighty-five instances of boy annoyance in various ways” (Hall 2002: 94). Such a caseload is quite impressive considering Maine's lack of formal credentials. Chinese American lawyers were a rarity at this time. In fact, the first Chinese American lawyer, You Chung Hong was not granted admission into the bar until 1924,⁹⁵ which pales in comparison to other minority groups' entrance into the legal profession and highlights the gross exclusion of Chinese from the legal system.⁹⁶ Maine's 1891 caseload is also noteworthy because 15 years earlier, during the German Legal Aid Society's first year of operation, it handled roughly the same amount of cases (212) with a staffed attorney and a board of

⁹³ E.g. Charity Organization Society (1901:132); Charity Organization Society (1903:82); Charity Organization Society (1911:112).

⁹⁴ The 1892 Geary Act extended and added to the Chinese Exclusion Act by adding more requirements for citizenship.

⁹⁵ Seid Gain Back Jr. of Oregon (and the son of a merchant) became the first person to practice in 1907, but he was born in China and naturalized as a citizen. See Wong (2004).

⁹⁶ For example the first black man to practice law was Macon Bolling Allen in 1848. The first woman to be admitted into the legal profession was Arabella Mansfield in 1869 while the first black woman, Charlotte Ray, admitted to practice in 1872.

that included various German elites.⁹⁷ In 1897, Maine documented what his typical day looked like:

7:10 A.M. To Brooklyn to settle business dispute between two members.
9:30 A.M. Got transcript of judgment of \$105 for member.
10:15 A.M. Filed transcript in court and placed in hands of sheriff.
11:30 A.M. Took member to Governor Hospital for dressing of wound
12:45 P.M. Took two wounded men to Police Station to have assailant apprehended.
1:30 P.M. Went to Delancy Street to see landlord about lease.
2:40 P.M. Went to corner of 44th Street and 2nd Avenue about alteration of store.
3:30 P.M. Went to 57th Street police court for warrant of arrest of man who broke window of member.
4:40 P.M. Went to West 48th Street to see landlord about having water meter installed.
5:15 P.M. Went to 43rd Street and 8th Avenue to see member ordered by Health Department to have trap connections in store (cited in Bonner 1996: 124).

Indeed, Maine was a busy man and this schedule demonstrates the variety of activities he participated in as a fierce advocate for Chinese residents in New York. This timetable also highlights an important thematic thread that runs throughout this chapter. Marginalized groups like the descendants of Chinese and Mexicans, along with African Americans did not have the privilege of running strictly legal aid organizations. Often deprived of human capital (e.g. higher/professional education), saddled by financial limitations, and constrained by the ubiquitous nature of racial discrimination, these groups had to run multipurpose organizations that provided legal aid as well as a host of other social services. This is perhaps why such groups are ignored in the history of legal assistance, but also why their history and operations are important to document.

In January 1905, President Roosevelt sent special officers to New York City to investigate cases of Chinese extortion. The investigation was prompted by Maine, who encouraged his supervisor Dr. Rev. Leighton Parks to contact Roosevelt. Parks, who served as the rector of St. Bartholomew's Episcopal Church, the parent organization of the Guild, was well-connected due to his leadership at the popular church. He was able to get a mutual friend to introduce him to Roosevelt (who had previously served as governor and police commissioner of New York) and schedule a meeting with the President. During the meeting Parks served as a conduit for Maine and complained about the consistent harassment and blackmail of Chinese residents in New York City by immigration inspectors, with superintendent Guy Maine serving as the “chief informant concerning the matters complained of” (Congressional Serial Set 1906: 132). Especially disturbing to Parks was the harassment of Chinese members of the Guild who were prevented from going to meetings and Bible study because of such harassment. Years later in a eulogy for Roosevelt, Parks (1919:9) described his complaint more fully and how members would be “held up after dark by federal officers or men pretending to be federal officers, their papers were demanded, and in case they did not have them with them were threatened with deportation unless they paid twenty to one hundred dollars. In one case three hundred dollars was extorted. Complaints to the police had no effect as

⁹⁷ More generally, attorney William C. Beecher served as the Guild's lawyer, where he handled 1014 cases in the same year. See Bonner (1996: 23)

they had no authority. The federal officers denied all knowledge.” Roosevelt subsequently sent an inspector to talk with Maine.

During this meeting Maine “indulged in a lengthy harangue with regard to the injustice of the Chinese exclusion laws in general, and the discrimination and hardships to which his countrymen were in consequence subjected” (Congressional Serial Set 1906: 132). What the inspector and Roosevelt wanted was tangible evidence and witnesses. Maine produced two people, laundrymen Ah Quan and Ah Fong, who were accosted by the extortionists. Unfortunately, like many people who are victimized by criminals, Quan and Fong refused to make an affidavit out of a fear of retaliation (either from the allegedly malfeasant immigration bureaucrats or third party extortionists). This eventually stymied the investigation. More positively, the federal involvement seemed to have a positive affect that made these blackmailers cease their activity at best, and at the worst, think more cautiously about such illegal coercion. As Parks (1919: 11) explains in his Roosevelt tribute, “It was now known in Chinatown in the 'underworld' and among the federal officials that the President was personally interested in the poor Chinese” enough to intervene, and from that day “these harmless people have been unmolested.” When judged by typical legal standards, this might seem like a minor victory, but it is important to remember that the interpretive grid that legal aid advocates used to understand success is different than lay understandings. Something as simple as preventing people from being harassed can go a long way, and this was one of the many tasks that Maine dutifully embraced as a legal advocate. It is important to remember, as Lisa Rose Mar (2010:52) notes, that “Chinese-Anglo relations continued to be uneven.” Moreover, Chinese legal interpreters’ informal power brokerage was less representative than the conventional Anglo legal career. This is one reason why few Chinese Americans became lawyers during the Exclusion Era, and why the efforts of individuals like Maine are particularly important.

In addition to actual physical violence against Chinese residents, a consistent problem was the vandalism of Chinese businesses in New York City. Juveniles as well as adults would often smash the windows of these businesses and the proprietors often had little recourse. Maine would post signs in businesses offering rewards for the arrests and convictions of these crimes, and would also investigate these cases and help with the prosecution. Maine’s work was so valued by the Chinese American community and business sector that he was presented with a gold medal by merchants of Chinatown. That same year, after more than two decades of voluntary legal assistance, he was appointed as an official interpreter for former police commissioner of New York City and magistrate Judge William McAdoo. In his explanation for the hiring of Maine, McAdoo indicated that he oversaw “an average of seventy Chinese cases a month” and claimed:

Frequently...a police man will arrest a rough-neck as he rushes out of a chop suey restaurant. He makes an investigation which discloses [that] the restaurant has been wrecked and the Chinaman who runs it has received a black eye. When the policeman undertakes to question the Chinaman he finds the latter cannot speak English. Because the policeman was unable to obtain sufficient evidence against the disorderly person usually the prisoners must be discharged (*New York Times* 1915).

These comments, along with the work of the St. Bartholomew’s Guild highlight an important contradiction that is relevant to analyses on legal aid. First, McAdoo’s comments raise further questions about the beneficence of the New York Legal Aid

Society. Despite having an official population of roughly 8,000 to 9,000 Chinese inhabitants, and McAdoo's supervision of approximately "seventy Chinese cases a month" there is little to no mention of Chinese immigrants in the annual reports of the New York Legal Aid Society. In fact, between the years of 1903 and 1920, Chinese immigrants come up three times. Now there are a few interpretive routes that readers can take.

The first explanation of this absence can be a reflection of statistics. The Society never specifically counted ethno-racial groups outside of Austrians, British, Germans, Russians, French, and Americans, which is odd given its ideological obsession with curbing southern and eastern European dissidence. Thus, Chinese immigrants could have just been lumped in the "other" classification, a category that consistently averaged around ten percent during this time period. There also could have been personnel issues and a lack of interpreters. This is unsatisfying though since the society had attorneys and translators that spoke Czech, French, German, Italian, Moravian, Magyar, Slavonian, and Yiddish (Maguire 1928). If there was a personnel issue, this probably reflected organizational preference. Perhaps more likely is that Chinese immigrants may not have sought assistance from mainstream organizations out of a distrust or unfamiliarity with the legal system and its institutions, or in an attempt to avoid surveillance from the state due to their tenuous citizenship status and/or covert migration in the exclusionary era (e.g. Gyory 1998; Lau 2007; Lee 2003; Ngai 2004).

Equally conceivable is the possibility that legal aid bureaucrats did not conceive of Chinese as priorities; they certainly did not devote the rhetorical attention to these immigrants like they did newcomers from Europe. This lack of prioritization may have come from ideas about the putative racial inferiority as well as beliefs about Chinese prospects for citizenship (whether innocuously rooted in the realpolitik of the Chinese Exclusion Act or ideologically undergirded by eugenic ideas).⁹⁸ Regardless of the explanation, the observable reality is that Chinese immigrants did not figure into the discourse and operations of the New York Legal Aid Society. This form of racial discounting occurred despite the legal vulnerability of Chinese newcomers, as well as their immigrant status—two of the important metrics used by the LAS in the provision of their services! This episode should lead students of legal aid to cautiously consider proclamations of equal access in legal aid, whether present in primary sources or the secondary historiography that uncritically rely on these materials.

PROTECTING THE NEGRO

The Black Press

On April 5, 1900, *The Christian Recorder* published a letter from an unidentified inmate⁹⁹ titled "An Appeal to the General Public" that stated:

I am an unfortunate prisoner now serving out a sentence illegally placed upon me by a prejudiced judge. My case is briefly stated, leaving off some humiliating experiences, as follows: On March 22nd 1895, I together with three white men were

⁹⁸ Nyan Shah's (2001) work explores how similar ideas about citizenship and eugenics played out in public health bureaucracies during the same time period in San Francisco.

⁹⁹ Oftentimes when individuals wrote letters to newspapers they asked not to have their names published out of fear of retaliation. See Washburn (2006: 94-95).

brought into court and charged with an offense which if convicted would sentence us to give years imprisonment. The white men pleaded guilty, I did not. Here the judge asked the prosecutor if the main prosecuting witness could be had, to which the county attorney and chief of police said “no.” The judge bulldozed me and entered a plea of guilty, and then to four years and four months imprisonment; within three hours he had me in the penitentiary with strict orders for me not to be allowed to communicate with anyone. To verify my statement the Minneapolis papers of the 22nd, 24th, and 25th of March 1895 can be consulted.

I appeal earnestly to all friends of humanity to hear me and assist me with funds to enable me to employ a lawyer so that I may have a legal hearing in an unpleasant case. All donations will be thankfully received if sent to Editor of the *Christian Recorder*, 631 Pine St., Phila., Pa. For information write also to A.L. Weiss, Manager, *Duluth, Minn., Evening Herald*.

Writing at the end of the Progressive Era, Maurice Mays, an African American man who was accused of murdering a white woman (an accusation that led to Knoxville Race Riots of 1919), penned a poetic plea to the *Chicago Enterprise* (1921).

Doomed to die without a crime
My hope is Public Aid
Who will volunteer, and help
To save me from the Grave?

Oh, listen to my tender cry
I am dying in despair
Please wont you lend a helping hand
To Save me from the chair¹⁰⁰

Both of these letters evocatively illustrate the *continuity* of blacks’ woes as it relates to legal aid as well as the methodological alternatives black newspapers offer for thinking about this service. On the first point, as I have endeavored to highlight throughout this manuscript, blacks, and ethnoracial minorities in general, have often had to trek circuitous routes to receive legal aid, especially in criminal justice matters. The face of legal aid, like other social welfare provisions and services, has changed over time. What has remained constant is the reality of inadequate and ineffective counsel in the criminal justice system. Both have been hallmark features of wrongful convictions in the United States as well as state-sponsored and extra-legal executions. Regrettably, this is still the case and both letters are eerily similar to the kinds of written requests received by wrongful convictions centers and clinics across the country today.¹⁰¹ Current legal aid historiography has little to say about this though and a goal of this section is fill this gap.

Both letters also highlight the methodological and substantive insights black

¹⁰⁰ Also cited in Detweiler (1922: 112).

¹⁰¹ In an *Annals of the American Academy of Political and Social Science* article, sociologist Guy B. Johnson (1941: 97) perfectly describes a similar reality. “The faults and the weaknesses of our courts are well known, particularly with respect to the functioning of juries and prosecutors and the existence of class differentials in the disposition of criminal cases. It is further well known that the Negro's chance of access to bail, to efficient legal counsel, to payment of cash fines instead of jail terms, to appeals, and to all other legal advantages, is on the average very much lower than the chance of the white man.” For discussions on wrongful conviction advocacy, scholarship, and education see Siegel (2005).

newspapers offer on African Americans' legal experiences, particularly in the first three decades of the twentieth century when the literacy rate increased in the black population and the black bar and middle class began to expand despite professional exclusion.¹⁰² The role of newspapers in historical research is well-documented (e.g. Franzosi 1987; Earl et al 2004; Ortiz et al 2005). But the seminal texts on legal aid scarcely refer to black newspapers (or the ethnic press at all) despite the fact that this group had a deluge of unmet legal needs. Instead, they rely on almost exclusively on mainstream newspaper outlets, governmental documents, and annual reports of legal aid organizations—all of

A NICE BIG UMBRELLA—BUT NO PROTECTION



Editorial cartoon from *The Chicago Defender* describing the constitutional environment for African Americans. Feb 11, 1928, pg. 1.

¹⁰² For example black illiteracy dropped from 70 percent in 1880 to 30 percent in 1910. See McHenry (2002:4).

which have their own shortcomings.¹⁰³ This is not to suggest that black newspapers are methodologically superior, they have a host of problems too.¹⁰⁴ But these newspapers highlight how blacks utilized alternative institutional configurations to seek out legal assistance. They were also integral to the institutional building of organizations that provided legal assistance. Overall, black newspapers are an unexplored terrain as it relates to legal aid and provide subtle insights into these less notable forms of legal assistance. Coincidentally, the first form was through the newspapers themselves.

For three years (1914-1917) the *Chicago Defender*, which was one of the most widely circulated black newspapers during first quarter of the 20th century, ran a “Legal Helps” column in its newspaper.¹⁰⁵ The types of cases in the newspaper varied and included criminal justice matters, labor, housing, real estate, child support, tort claims, veterans benefits, consumer debt, employment, dealings with lawyers and contracts. In the first article that introduced the column, the editors for *Defender* wrote:

To the Readers of the Chicago Defender: Owing to the many letters of inquiry being received each day by the editor, concerning many legal questions, and as we are giving our readers the best information every week as to the best methods for the preservation of health, we have arranged to devote each week in our paper answers to the many legal questions, and in co-operation with the Universal Legal Protective Association to assist the poor and needy with free legal advice and such other assistance as the circumstances of each case may warrant.

There having been many cases brought to our attention of discrimination and injustice being done to those unable to secure the necessary advice and assistance for their own protection, and it is our aim to assist everyone applying to our Legal Department without fear or favor, until the time will come when all men shall have the equal protection of the laws without regard to their financial condition and that justice will be freely given and not bought by the highest bidder. Our Legal Department will endeavor to answer all questions from which the public as well as the individual will be benefited and we invite questions and offer to our readers all assistance that each case warrants (*Chicago Defender*, Feb. 7, 1914).¹⁰⁶

A cursory glance at this section, might lead it to be understood simply as a legal advice column. A more complicated reading would understand the column not only as a

¹⁰³ Annual reports are often self-congratulatory while mainstream newspapers and government documents typically offer mainstream or status-quo representations (which at this time were often patently racist).

¹⁰⁴ These newspapers often offered their own propaganda, oozed of black bourgeois respectability, and served their own intraracial social control purposes.

¹⁰⁵ See Ossei-Owusu (in preparation).

¹⁰⁶ The Universal Legal Protective Association was actually the “Universal Legal Protective League.” Like the Legal Department of the *Chicago Defender*, it was run by Richard E. Westbrook an African American attorney who helped create the Cook County Bar Association in 1914 as an alterative to the Chicago Bar Association, which barred black lawyers from membership. Historical evidence seems to suggest the Protective League was separate adjunct from the *Chicago Defender* that would shield the newspaper of being accused of ethical conduct violation, particularly Cannons 27 and 28 of the American Bar Association’s 1908 Canons of Professional Ethics, which regulated the advertisements of legal services as well as “stirring up litigation.” See ABA (1908).

contributor to legal consciousness, or how people understand the law, but as a venue for blacks' seeking legal assistance. As Nousiainen (1980) notes in a study of the Finnish press and indigent clients, if a person can clearly present his or her problem in a legal advice column, then it can operate as an easy and cheap method of obtaining legal advice. This is important to consider, especially in the first three decades of the twentieth century where the black bar was still relatively small and blacks had low levels of human and social capital as it relates to the field of law.¹⁰⁷ Richard Abbott, the founder of the *Chicago Defender* was undoubtedly influenced by his legal education at Kent College of Law. He left the legal profession because he was "a little too dark to make any impression on the courts in Chicago" (Lochard 1947: 124). This departure also influenced his politics. He imagined the newspaper's moniker of the "Defender" figuratively and literally and dubbed it the "Mouthpiece of 14 million people" that would express and address the social, political, and in this case, the legal needs of black Americans. In his pioneer study *The Negro Press in the United States*, University of Chicago sociologist, and Robert Park mentee Frederick Detweiler (1922: 65) noted that the *Chicago Defender*:

"seeks to live up to its title of *Defender*. Colored people from all over the country turn to it when in trouble; the staff interests itself in securing legal aid and justice for individual Negroes. In its role of champion of the common people in its aggressive advocacy of Negro rights the press has found in recent years a pronounced welcome from its people...When Negroes have trouble of any sort they write to the paper, sometimes, merely to utter their cry for justice" (original emphasis).

Detweiler points to the significance of black newspapers on multiple planes. On a symbolic level, these outlets provided a forum for readers and writers to express their testimonies of racial violence and legal inequality, particularly in a context where mainstream print culture and legal institutions were generally unsympathetic to their plight. This is a theme that other scholars have fruitfully explored.¹⁰⁸ On a material level, these venues provided legal advice as well as basic, but instructive legal information. In

¹⁰⁷ At the turn of the century Du Bois (1899: 114) examined the climate for black lawyers and suggested that the "failure of most Negro lawyers is not in all cases due to lack of ability and push on their part. Its principal cause is that the Negroes furnish little lucrative law business, and a Negro lawyer will seldom be employed by whites. Moreover, while the work of a physician is largely private, depending on individual skill, a lawyer must have co-operation from fellow lawyers and respect and influence in court; thus prejudice or discrimination of any kind is especially felt in this profession. As late as 1936, he continued to complain about the dire occupational environment black lawyers encountered, stating, "To defend twelve million Negroes, we have in the United States today only one thousand two hundred Negro lawyers, and the chief reason that we do not have more is because under present conditions, Negro lawyers cannot earn a living. The white lawyer who makes fabulous salaries is paid for by corporations. The great white criminal lawyers are paid for by rich malefactors or voluntary contributions. The Negro criminal lawyer has to eke out a living by methods which do not appeal to self-respecting men." For expansive examinations of black attorneys during the first few decades of the twentieth century see Hine (1995), Smith (1999), Mack (2012).

¹⁰⁸ The emotional heft, symbolic significance, and material usefulness of African American testimonies in black newspapers is captivantly explored in Williams (2012) and Williams (2012).

an era of bureaucratic chicanery and black vulnerability such basic advice could be pivotal. The *Defender* offered “legal warnings,” which were common themes in the advice column. The following excerpt demonstrates how the newspaper sought to offer legal information and warn readers about malfeasance in Chicago courts:

[Question]: I was arrested, charged with disorderly conduct and the trial in the Municipal Court at 35th street (sic). Now before my case was reached or the court had opened, a policeman brought me a paper and stated that if I wished to have my trial at once I should sign the paper: I signed the paper, and when court opened and my case was called, I demanded a jury, but the judge said that I had made the demand too late as I had waived my right to a jury trial. Now please explain the law concerning jury trials in the state of Illinois.

[Response]: We have noticed the actions of the police and others connected with the Municipal Court, at the place you mention and other places where said Municipal Courts are held, and such practice is very common and our readers are warned not to sign any paper presented unless you fully understand the contents of same. The paper no doubt was a formal waiver of a jury trial, but you should have then and there explained to the judge why you signed the paper and circumstances connected therewith. No person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi-criminal or qui tam action except upon conviction by a jury; provided, that the defendant or defendants in any such action may waive a jury by executing a formal waiver in writing and when such waiver of jury is made, imprisonment may follow the judgment of the court without conviction by the jury. This section shall not apply to fines inflicted for contempt of court. Ch 79, Sec. 175, Hurds Revised Statutes of Illinois (*Chicago Defender* March 7, 1914)

Consider this column from February 1915, which offers some specific legal advice:

QUESTION: I took out an insurance policy with a certain insurance company. After I received my policy they wrote me a letter to give them some more information regarding my experience with any other insurance companies in order that they might pass upon my policy. They stated unless I have the requested information that they would cancel my policy. Am I obliged to give any further information and can they cancel my policy for my failure to do so?

ANSWER: You are not obliged to give any further information. Any information desired by the company should have been obtained before the issuance of the policy. They cannot lawfully cancel your policy unless some false representations have been made, and if they do you need only tender your premiums and upon any injury or sickness and they fail to pay you, you may sue and recover upon your policy (*Chicago Defender*, Feb. 27. 1915).

Another column, published also in 1915, offers legal advice about marriage law:

To the Defender's Legal Department: - My husband was convicted of a felony in the state of Indiana about one year ago. Three months ago I was married again in this state (Illinois). My former husband annoys me by saying that I am still his wife under the laws of this state and that he intends to prosecute me for bigamy because he tells me that we have never been legally separated. Please advise me as to the law in this case.

ANSWER: The general rule is that the domicile of the husband is also that of the wife. When your husband was convicted of a capital crime or of a felony his domicile ceases and determined by the act of the law and you were left without a home. If the records of the state of Indiana show that he was convicted of a felony in that state, in an action for a divorce in this state you would be able to obtain a legal separation. Also, proof of a conviction of a felony in another state is a good defense to a charge of bigamy committed in this state (*Chicago Defender*, June 19, 1915).

Thus, these legal advice columns offered a resource not only to readers in Chicago, but also to the *Defender's* larger audience. Recall that the federal government did not get into the business of legal aid until the 1960's. Legal aid societies and municipal public defenders existed in some of the large cities (e.g. New York, Chicago, Boston, Philadelphia), but this was the exception and not the rule. Such offices were virtually non-existent in the South, where a sizeable amount of the black population lived until the middle of the 1910s. The bar was slow to respond to the legal needs of the poor more generally but the void had to be filled and the *Chicago Defender* operated as an alternative dispensary for basic legal information. Considering the *Defender's* impact on the more large scale Great Migration,¹⁰⁹ its influence on black's legal experiences cannot be underestimated. In his analysis of Chinese legal advice columns in the 1990s, sociologist Ethan Michelson (2008: 44) argues that "by virtue of its greater popular exposure through newspapers and other mass media, public legal advice has a wider and more politically significant impact than private legal advice." While such a claim is empirically debatable, it points to how legal advice columns offer assistance to people "navigating new and unfamiliar terrain" as well as how "in a context of social dislocation, social transplantation, or social transformation, newspaper columns provide a channel not only for the acquisition of practical advice, but also for the expression of complaints, grievances, and heartache" (Michelson 2008: 45). Isaac (1971) has offered a similar argument, in his book on the *Jewish Daily Forward*, a national newspaper founded in 1897. This periodical maintained a column that provided advice on social, familial, economic and legal issues to Eastern European immigrants attempting to adjust to American life. At stake here in considering the *Chicago Defender* is not only actual provision of legal information, but also educative efforts that black elites used to demystify the law.¹¹⁰ These legal consciousness-raising techniques were similar to legal aid reformers' attempts to Americanize and positively politicize European immigrants.

On a more macro level these newspapers were often run by individuals with legal degrees and/or training¹¹¹ and were important to the institution building of organizational

¹⁰⁹ The *Defender* was a consistent critic of Southern racism and offered portrayals of the North, and Chicago specifically, as haven for employment and respite from Southern-style racism. The newspaper's message annoyed Southerners so much that it was banned in many places and had to be distributed through a surreptitious network of African American Pullman porters. Helpful analyses of the *Chicago Defender's* recruitment of southern blacks are offered in Marks (1983), Grossman (1985) and DeSantis (1998).

¹¹⁰ For an interesting discussion on this demystification of law and "latent legal markets," specifically in the context of online legal services and women's magazines see Gies (2004).

¹¹¹ In addition to the aforementioned Abbott, who headed the *Chicago Defender* and graduated from Kent College of Law there was: Robert Lee Vann, who ran the *Pittsburgh Courier* and graduated from law school at the University of Pittsburgh; Ferdinand Lee Barnett who was the husband of social activist Ida B. Wells-Barnett (and the lead attorney for Wells-Barnett mutual aid organization discussed below), the founder of the *Chicago Conservator* (Chicago's first black newspaper) and graduated from Chicago's College of Law; and William Calvin Chase, who was the editor of the *Washington Bee* throughout its existence (1882-1922) and attended Howard University Law School.

units that ended up developing legal aid arms. Some of these groups include various local mutual aid societies, the well-studied National Urban League and the National Association for the Advancement of Colored People, and the latter's institutional predecessors—The National Afro-American League, The National Afro-American Council and the Niagara Movement. Black newspapers advertised these groups' services, covered their legal efforts, and assisted with fundraising campaigns for these groups. Although there were a host of civil rights organizations before the NAACP, its direct predecessor was the National Afro-American League. A brief description of these organizational antecedents is necessary since they substantively influenced NAACP's legal strategies and how it conceptualized legal aid.

National Organizations

Timothy Thomas Fortune conceived of the NAAL in 1887 and helped coordinate a national convention in Chicago where the organization was officially established in 1890. The organization was covered extensively and endorsed by black journalism outlets.¹¹² Fortune was a feisty African American writer and editor for the black newspaper *New York Age*. He was considered the “dean of African American journalism,” and consistently wrote about on racial inequality, leading President Theodore Roosevelt to reportedly complain, “Tom Fortune, for God’s sake, keep that pen of yours off me” (Alexander 2008; Cox 1982). As a law student at Howard University, John Langston Mercer, who served as a professor and dean of the school, substantively influenced Fortune. Mercer, a black attorney and statesman, witnessed many of the iterations of legal aid discussed thus far in this dissertation. He apprenticed with a white abolitionist lawyer, worked as an inspector for the Freedmen’s Bureau, and participated in various African American civil rights organizations. Although the NAAL and Fortune were interested in a wider set of issues that included taxation, lynching, fair distribution of school funds and segregation, they valued the role of courts. The NAAL continued an earlier jurisprudential trend of conducting “test cases” to challenge the constitutionality of legal discrimination.¹¹³ In this instance, Fortune was the plaintiff in an 1890 case where he was ejected from a New York pub (Carle 2009). Although Fortune and the NAAL won the suit, it had little immediate impact and the organization languished in 1893 due to lack of mass support and inadequate funding. The league was revived as the National Afro-American Council, in 1898 and most of its legal work consisted of small test cases that were clandestinely funded by Booker T. Washington (Alexander 2011; Jones 2011; Justesen 2008; Meier 1963). Many of the members of the NAAL left to form the Niagara Movement in 1905, which won a few symbolic judicial victories that put them in debt (Jones 2011; Rudwick 1957). The issue of funding continued to be crucial. In a 1909 report Fredrick McGhee, who served as legal counsel for the Niagara Movement,

¹¹² Some of these outlets that contributed to the institutional-building of the organization through circulars and positive promotion included the *Augusta Sentinel* (Georgia), *Lexington Soldier*, the *Plaindealer* (Detroit), *New York Age*, *Southwestern Christian Advocate* (New Orleans), *Pittsburgh Spokesman*, *Philadelphia Tribune*, and the *Philadelphia Sentinel*. See Penn (1891).

¹¹³ Test cases are legal cases that seek to challenge existing jurisprudence or set a new precedent. For examinations of test cases and the legal protest tradition pre and post *Plessey* see McGuinn (1939), Bogen (2004), and Kelley (2010).

complained, “During the past year the department has been unable to do anything owing to the lack of funds, except to offer advice and assistance in the preparation of briefs that have come to us... The one thing we most need is a fund so we may prepare cases and present them under the best and most favorable conditions” (McGhee’s emphasis, 1909). The exclusively African American Niagara Movement soon folded and some of the members left to form the biracial NAACP.

At first glance, the NAACP and its predecessors are difficult to place in the larger spectrum of legal aid, because of how it is described historiographically as well as the organization’s own rhetoric. Scholars of African American history, politics, social movements, and legal history typically describe the NAACP as an organization that was deeply invested securing equal rights for blacks.¹¹⁴ Although they were beset with constraints and internal divisions, the NAACP and its antecedents are understood as groups that used a variety of tactics to attain this goal, with litigation serving as one tool in a larger political arsenal that also included lobbying, propaganda, education, and fundraising. Legal history perspectives on the early NAACP magnify its unique “test case” litigation approach. Although technically a form a legal assistance, what is often emphasized is how their legal defense was more of a litigation campaign, “a carefully orchestrated program of specialized cases that would fundamentally change the law as it stood following the 1896 U.S. Supreme Court decision allowing ‘separate’ but equal facilities between the races” (Sartain 2007: 26). The NAACP itself was more ambiguous about what it did.

The organization certainly saw itself as an organization that provided legal aid. It claimed that, “it is our purpose to investigate and to report the result of our investigations, *to secure proper legal aid* to maintain and defend the colored man's rights, to promote the education of the race, and in every possible way to remove the obstacles which retard its progress” (*The Crisis* 1911) (emphasis added). The organization vaguely boasted in advertisements about annually receiving “400 to 500 appeals for legal aid and assists many in need of it” (Locke 1925: 705). But the NAACP had conditions on its legal aid that were first articulated by William M. Wherry Jr., a white corporation lawyer who served as an original member of the NAACP's legal committee. He maintained that the NAACP’s work should consist of cases where the facts could be obtained, with the committee subsequently determining “whether to handle the cases and do what is necessary. This committee *should lay down a general policy, namely, that cases which do not specially involve the Negro question but come to you simply because a Negro is involved*, should not be handled by the association, but should be referred to the legal-aid societies or other charitable institutions” (*The Crisis* 1912: 157) (emphasis added). Layman’s translation: “just because you’re black does not mean we are not going to help you.” People would not receive legal aid because they were black but specifically because of identifiable racial discrimination. The organization used this as a template in how they responded to cases. The criteria, as stated later in the Tenth Annual report included: “First, is the case one in which race prejudice has undoubtedly prevented a colored person from receiving justice? Second, will active participation by the N.A.A.C.P. and the gaining of a favorable decision establish a principle or precedent in that

¹¹⁴ Some popular works on this issue continue to be Kellogg (1967), Morris (1984), McAdam (1982), Kluger (1977) Tushnet (1987) and Klarman (2004).

community which will raise or strengthen the civil status of the colored people” (NAACP 1919; 13)? In the eyes of the legal committee, “the impression that it is a ‘legal aid’ society for the purpose of defending any colored person who gets into the clutches of the law, regardless of the circumstances, is erroneous” (ibid). Interestingly, much like legal aid societies that shunned the stigmatized characterization of their work as “charity,” the NAACP disavowed descriptions of their efforts as synonymous to those of legal aid societies.

Undoubtedly, their decisions to provide legal assistance were influenced by some of the same currents that molded the kinds of support provided by legal aid societies. These included financial restraints, tactical limitations, and socio-political ideologies—all of which cohered around well-intentioned, but often problematic ideas about how to best achieve racial uplift. Gunnar Myrdal (1944: 831) and his colleagues put it best in the extremely influential *An American Dilemma*, which stated, “Both for strategic and for financial reasons the Association cannot afford to be a legal aid society for Negroes. The cases pursued are selected because of their general importance. The NAACP does not, therefore, substitute for institutions to enforce the laws and to aid poor people...the tactics of the NAACP are 'opportunistic' though within the framework of a long-range policy to reach full equality for Negroes.”¹¹⁵ Clearly, the organization learned from its earlier institutional configurations and was tight-fisted about where it would invest its resources as well as the kinds of cases it would handle.

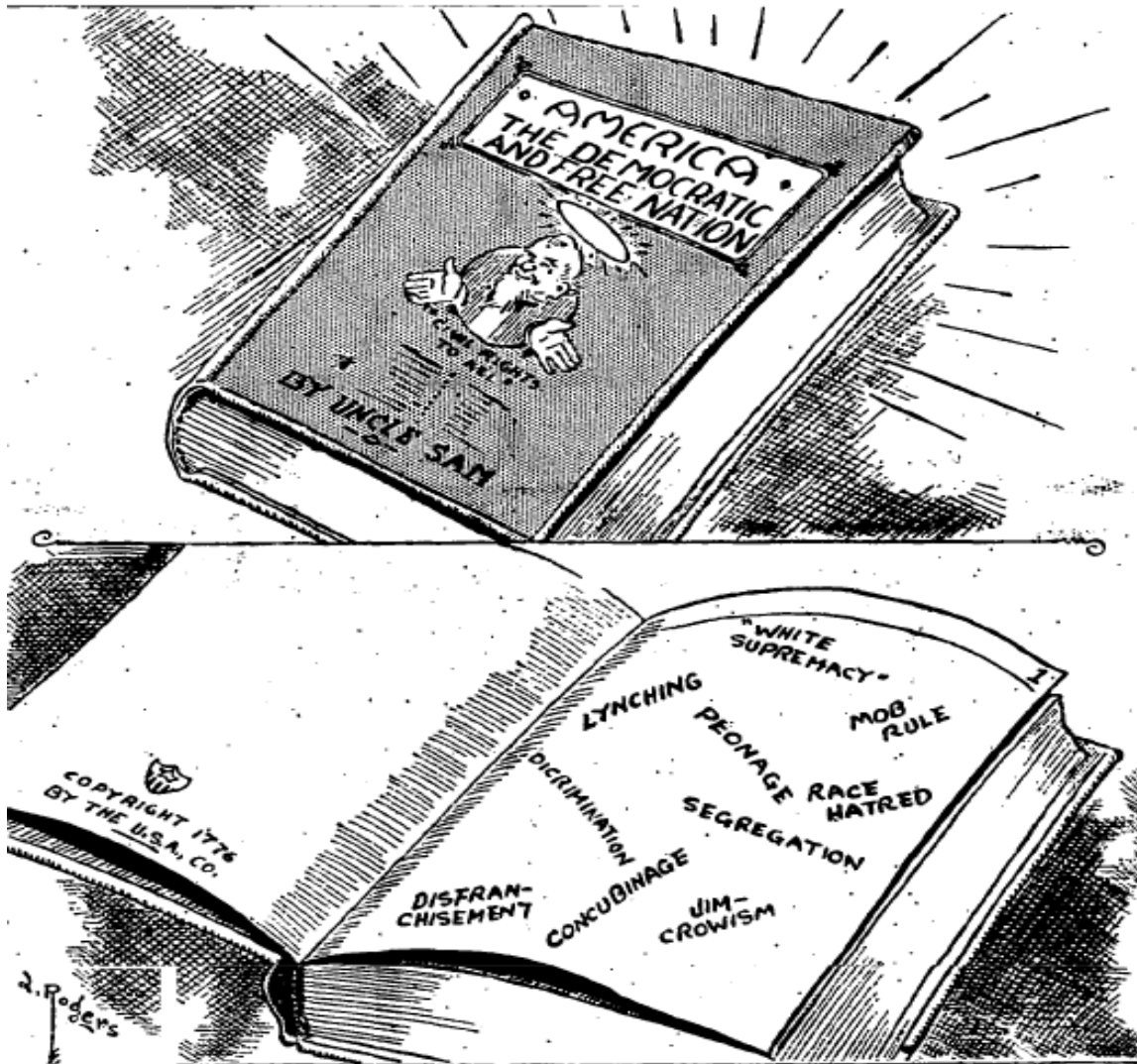
Despite the limitations as well as the rhetoric espoused by the NAACP, it did provide legal aid and falls within the purview of this study, although in-depth analyses of its early legal work are explored much more fruitfully elsewhere (e.g. Kluger 1977; Tushnet 1987; Klarman 2004). As it relates to this study, their legal assistance work offers a few insights on legal aid more generally. First it highlights the role of financial and human resources. Earlier iterations of the NAACP did not achieve more substantive success because of funding; it was not until the organization became a biracial coalition and began to procure financial support from white philanthropy (mainly the American Fund for Public Service) did it begin to flourish. Unlike fledging legal aid societies and public defender offices that received philanthropy dollars, government support, and backing from the local bar, black legal aid reformers had to rely on meager resources and pool of black lawyers that ranged in talent, but did not have the social networks and educational prestige that their white counterparts maintained. All of these things influenced the volume, nature, and frequent absence of legal assistance available to blacks at this time.

Relatedly, the nature of the NAACP’s legal aid also offers insight into how the organization had its own ideas about deservingness. It was not immune to the classist ambiance of the Progressive Era and later years. While lynching and juries were on the forefront of its agenda, the organization was quite circumspect in its approach toward blacks accused of crimes. Lisa Lindquist Dorr (2003: 182) describes this risk aversion in

¹¹⁵ It worth noting that black diplomat and NAACP leader Ralph Bunche was Myrdal’s main collaborator on this project and he was decidedly against the NAACP’s legal approach and preferred a more economic based campaign, a perspective that filtered through Myrdal’s comments as well as the organization’s strict criteria for legal aid. For a discussion of this ideological tension see Tushnet (1987) especially pgs. 8-16. A portrait of Bunche’s life, work with the NAACP, ideological vantage point is offered in Henry (1999).

her study of early twentieth century rape, and suggests that the NAACP “avoided cases in which the inflammatory nature of a crime, in white eyes, would overshadow any constitutional claims it might make,” an approach that “had the unfortunate effect of sacrificing individuals who were the targets of specific discrimination.” Of course, no one organization can fulfill all of the needs of its target population. But the NAACP’s approach toward cases reflected a policy preference that was influenced by the bourgeois

YOU CAN'T JUDGE A BOOK BY ITS COVER



An editorial cartoon from *The Chicago Defender* about the rhetoric of democracy as it applies to African Americans and racial minorities more generally. Observe how the various tenets of inequality appear before the Table of Contents. Oct 13, 1928, pg 1.

black perspectives on crime and the search for “respectable litigants” (e.g. Rosa Parks, students, people seeking to vote) as well as tactical and financial considerations.¹¹⁶ As we

¹¹⁶ The standard works in African American history that examine this bourgeois ideology and “politics of respectability” are Gaines (1996) and Higginbotham (1993), respectively.

will see later in the discussion, intraracial ideas in the African American legal community become crucial to the contemporary provision of legal aid. Finally, the NAACP's legal assistance offers insight into Michelle Alexander's (2009) recent critique of civil rights lawyering more generally, which she sees as avoiding the issue of mass incarceration with the responsibility of defending the criminally accused (who are often black and brown) being devolved to the unreliable state.

Mutual Aid Organizations

Finally, there were local legal aid schemes in black communities, most of which relied on intraracial networks and solidarity. The first was the "Black Church," a metonym that refers to black religious institutions that often served as a one-stop shop for social services and as a mechanism for legal and political protest. As Drake and Cayton (1945: 428) relevantly observed years later in their magisterial study *Black Metropolis*, black religious institutions and their leaders were often involved in "wide range of secular activities-political action, protest against discrimination, advice on securing jobs and legal aid." Du Bois (1899: 207) similarly suggests that, "All movements for social betterment are apt to be formed here; secret societies keep in touch; cooperative and building associations have lately sprung up...considerable charitable and relief work is done and special meetings held to aid special projects." On that note, both "secret societies" and "charitable organizations" were also instrumental to the provision of legal aid. The former operated primarily through fraternal organizations. These institutions consisted of a vast network of lawyers that provided legal aid for its members as well as their national organizations, which were under legal attack by their white fraternal organizations that challenged the former's associational incorporation; in fact this fraternal litigation is where many of these lawyers cut their teeth before moving on to the NAACP (Skocpol et. al 2006).

The work of the latter group mentioned by Du Bois, charitable mutual aid societies, has been well-documented. Like much of the incipient legal aid and social work organizations, these societies were driven by women (e.g. Davis 1933; Terrell 1940; Scott; 1990; Shaw 1991; Hine 1994; Knupfer 1996; White 1999). Activist Ida B. Wells-Barnett established one such organization, the Negro Fellowship League in 1910. Overshadowed by her larger oeuvre and political activities, this organization's work has been documented primarily by her many biographers (e.g McMurray 1998; Schecter 2001; Giddings 2008; Bay 2010). The league served as an employment bureau, a settlement house, and a social service agency while offering a reading and recreational room for children and adults. But the organization was particularly invested in addressing legal discrimination and inequalities in the criminal justice system, no doubt a vestige from Wells-Barnett's well-documented anti-lynching advocacy. Although she was able to secure some start-up funding for the organization through *Chicago Daily News* owner and philanthropist Victor Lawson, this sponsorship ceased after three years, which forced her to look elsewhere for financial support. Fortunately, Wells-Barnett had an amiable relationship with Judge Harry Olson, a Swedish American who was a head honcho in Chicago's Municipal Court and supported her social service work with the League. Olson offered her a job as an adult probation officer for the Municipal Court of Chicago in 1913.

She was the first African American to occupy this position and she used her \$150 a month salary to fund the organization.

In her work with the League, she helped raised funds and procure counsel in high profile cases of black men accused of killing whites as well as several smaller cases. This led the *Chicago Defender* (1910: 1) to dub her the “watchdog of human life and liberty.” One notable situation was the Steve Green case. Green was an Arkansas black tenant farmer who worked for a white landlord, Will Seidle. Unsatisfied with his wages, Green informed Seidle that he would be working for someone else. Seidle threatened Green and after finding him at work for another neighbor shot Green multiple times. The wounded Green managed to fire back and killed Siedle. Knowing the typical fate for blacks accused of killing whites (whether in self-defense or not), Green fled Arkansas and went into hiding, but was eventually located by authorities by way of a black informant and arrested in Chicago. Wells-Barnett learned about the case and while Green was on a train being extradited back to Arkansas (where mob violence was almost certain), she raised money to increase the reward for Green's arrest and contacted sheriffs along the train's route with the offer (Duster 1970; Giddings 2008). This was successful and Green was returned to Chicago. In her autobiography, Wells (1970:336) asserts that once Green was brought back to Chicago, he slept at the Negro Fellowship League's lodging office “hidden away while we waited to hear what action would be taken by the deputy sheriff,” and recounts a meeting with leading attorneys where “a collection was taken and placed in my hands, and I was ordered to get Green out of town.” The advocacy and media attention brought to the case by Wells (and subsequently by the NAACP) led to a successful disposition for Green and highlights the multifarious nature of legal aid before its bureaucratization.

Further exploration into the work of black mutual aid organizations might offer similar insights into legal assistance. One problem with these smaller organizations is that they sometimes did not label their work as “legal aid” but as part of larger racial uplift and solidarity projects. Moreover, as Wells (1970: 330) explains about the NFL and its legal and social assistance, “We were so busy doing the work that we kept no record of the number of persons who were aided.” Nevertheless, these mutual aid organizations, along with larger civil rights groups and the black press, played key roles in altering the legal environment for blacks. Their activities, rhetoric, and legal assistance force us to confront an American history that is both embarrassing and encouraging, and demonstrates how traditional categories like “legal aid” are much more capacious than previously considered.

DEFENDING AND AIDING LA RAZA: MEXICANS, MEXICAN AMERICANS, AND LEGAL AID

Latinos are also conspicuously absent in the scholarship on legal aid for the first quarter of the century, despite their historically documented experiences with legal subjugation during this period, as well as for the majority of American history.¹¹⁷ This

¹¹⁷ Some useful takes on the period discussed in this chapter are offered in Escobar (1999), Rosales (1999) and Orozco (2009) where as broader strokes are offered in Acuña (1972), Mirandé (1987) and Gutiérrez (1995).

omission is especially bizarre considering the rhetoric of immigration and Americanization that reformers used to garner support for the institutionalization of legal aid (although probably unsurprising to students of Chicano/a history). In an odd way, it is predictable that mainstream organizations would not have been accommodating to African Americans, particularly since they already possessed formal citizenship (despite its second-class nature). But if we take legal aid reformers' rhetoric of Americanization at face value, one would expect Mexicans to fall under their purview given their "immigrant" status and ambiguous, but closer proximity to whiteness.¹¹⁸ Of course this was not the case. Although the Treaty of Guadalupe Hidalgo (which ended the Mexican-American War) classified Mexican Americans as racially white in the census, this group, along with their Mexican counterparts were not treated as such. They certainly were not afforded the privileges of whiteness offered to ethnic white immigrants in the northeast and Midwest. As the Honorable Lupe S. Salinas (2013: 60) aptly states, they were "Legally White, Socially Brown" and subjected to second-class citizenship.

We know for sure that Latinos, specifically Mexicans and Mexican Americans (who are the focus of this section),¹¹⁹ encountered land displacement through legal and illegal mechanisms, entanglement with nascent deportation bureaucracies, unregulated vigilante violence, and enmeshment in the criminal legal system as both victims and offenders—all of which would have at least invited opportunities for legal assistance (e.g. Hoffman 1974; Mirandé 1987; Escobar 1999; Carrigan and Webb 2003). One could conceivably argue that attorneys, who were crucial to the swindling and land displacement of Mexicans a few decades earlier did just as much harm as hurt (Mirandé 1987: 40-42). Moreover, the flagrantly asymmetrical employment relationships Latinos encountered, along with their presumed criminal proclivities are particularly significant, since legal aid has typically revolved around labor and crime. The added layers of nationality and citizenship helped structure the legal environment for Latinos and produced slightly different legal experiences, needs, and institutional building that deserve specific attention. This was particularly the case in courtroom proceedings where the intricate language of the law, coupled with the lack Spanish translators often produced a double whammy for Mexicans. As Dennis Valdés (2000: 60) indicates in his study of Mexicans in the Midwest, "Mexicans went to court with few interpreters, and those who appeared were commonly unqualified or biased to the point of consciously distorting testimony in translation."¹²⁰ After conducting years of research in the late 1920s for the Herbert Hoover-established Wickersham Commission (officially referred to as the National Commission on Law Observance and Enforcement), researcher Paul

¹¹⁸ Helpful examinations of Mexicans' tenuous relationship to whiteness are offered in Foley (2001), Haney López (2003), and Gómez (2005).

¹¹⁹ I focus on this group of Latinos because they were the largest and most predominant group at this time. While other groups, mainly Puerto Ricans, were migrating to the United States in the late 19th and early 20th century, more robust migration and associational activity occurred after World War II. See Sánchez Korrol (1983).

¹²⁰ But see Gómez (2000) for a notable and counterintuitive exception. Gomez documents a "regime of racial power-sharing" where Mexicans occupied a surprisingly substantial number criminal justice administration positions.

Warnshuis (1931: 292) similarly found that of the 98 Mexican prisoners he interviewed, “only 27 had sufficient command of English to understand what was going on and to speak for themselves at their trial. In 9 of the 20 cases of men who had an interpreter, the service was considered incompetent or unsatisfactory.” One might easily assume that this would have been the case for all non-English speaking individuals. Nevertheless, as Warnshuis also points out and later scholars have verified, ethnic white immigrants had municipal jobs under lock and key (via patronage and the spoils system). This monopoly created interpreter positions for ethnic whites in government institutions like courts, but did not benefit Latinos (Clark 1975; Erie 1988; Waldinger 1993).

Latinos are also important to consider because their relationship to citizenship and “immigrant status” tells us about the contradictions in legal aid during this period and in subsequent decades. The eventual incorporation of ethnic white immigrants, the devastation of the Great Depression, and the enlargement of immigration bureaucracies all helped change the tenor of legal aid. Legal scholar Geoffrey Heeren (2011: 634) correctly identifies how starting in the mid 1920s and continuing into the 1930s “Legal aid to immigrants became a much more controversial endeavor in this restrictions America, where a poor immigrant might no longer be a ‘ward’ to be protected, but an illegal alien hunted by the U.S. government.” But this shift cannot be understood in the one-dimensional ways in which legal aid has been described historiographically (as devoid of ethno-racial considerations), nor can it be understood in the traditional black-white dichotomy in which race relations are typically understood. Thus, the legal aid environment for Latinos requires specific attention.

The Three Forms of Defense and Aid: Mutualistas

Much like other stigmatized ethnoracial groups, Mexicans and Mexican Americans, relied on mutual aid societies or *mutualistas* for the provision of legal services. It is important to note at the outset that like their ethnoracial counterparts, these mutualistas were buoyed by the often-unrecognized day-to-day labor of women (Orozco 1995; Ruiz 1998). Mexicans and Mexican Americans also relied on the Mexican consulate when American legal aid institutions refused or was unable to provide them with legal services, a route that further highlights their exclusion from the body politic and formal channels to the legal process. Finally, they relied on large civil rights organizations, most notably League of United Latin American Citizens (LULAC). Although this organization was created at the tail end of this chapter’s time period (in 1929), its development is indebted to mutualistas, as well as events and actors of the 1910s and 1920s (Orozco 2009). Instead of offering a catalog of mutualistas or delving too closely into debates around the political intentions of the Consulate and LULAC (all of which have been done more capably elsewhere),¹²¹ I intend to use the career of Manuel C. González to offer a sketch of legal aid for Latinos. González was a pioneer Chicano attorney and civil rights activist who labored in all three forms of legal aid institutions. His work offers instructive insights on the legal environment for Mexicans in the first few decades of the twentieth century.

¹²¹ LULAC is probed in Marquez (1993) and Kaplowitz (2005) whereas the Mexican consulate is investigated in Balderrama (1982), Pahissa (1989) and González (1999). The classic work on mutualistas is Hernandez (1983). Orozco (2009) productively engages all three.

González was born in 1900 in Hidalgo County, Texas, located at the southern most tip of Texas. He was advanced well beyond his years and received early mentorship from Francisco Chapa, a Mexican-Texan statesman who owned a drugstore where González worked at as a young boy. While in Austin, González learned stenography and typing at Nixon Clay Commercial School. He subsequently worked as a secretary for the law firm of white lawyers A.M. Love and B.F. Patterson in 1917. The debonair (see below), bilingual González sought to leverage the capital he had to benefit the Mexican American community and in 1917 he convinced his employers, Love and Patterson, to provide organized legal assistance for Mexican Americans (Pycior 1979; Pycior 1999). This emerged into *La Liga Protectora Mexicana* or the Mexican Protective League, which provided legal assistance between 1917 and 1921. While working for the League, González “advised members of Texas’ tenant laws, labor contracts, interest rates for loans, constitutional rights of assembly and free speech, workers’ compensation, and due process” (Chávez 2006). La Liga existed in a larger continuum of mutualistas that have been described more fully by Chicano/a Studies scholars. These organizations stretched as far back as 1894, with the creation of *Alianza Hispano-Americana* in Arizona. Membership in La Liga increased from 73 in 1917 to 500 in 1920, with members paying one dollar in their first year and five dollars annually thereafter (Pycior 1975). The nature of the legal assistance offered by the league was primarily advisory and informational, although they occasionally provided legal representation and lobbied for legislative changes in laws that would benefit land tenants.

Much of the legal advice offered by the league mirrored what was offered by mainstream legal aid organizations. Mexicans and Mexican-Americans encountered the similar forms of contract fraud experienced by working women discussed in the second chapter and ethnic white immigrants examined in the third chapter. Most of the members were farmworkers. The contractual problems they faced typically dealt with labor contracts and land tenure and the league encouraged “members to send a copy of labor contracts to the league before putting their signature on any agreements” (Pycior 1979: 149). They also “dispensed hundreds of individual letters advising members on issues such as interest rates for loans, the right of an alien [sic] to organize and speak publicly, workmen’s compensation, and due process” (*id.*). Mutualistas like La Liga helped buffer Mexicans and Mexican Americans from a hostile labor market with exploitative employment practices. The importance of these organizations increased with the development of Border Patrol in 1924, which was created under the auspices of the Department of Labor. The unique threat of deportation and detention “presented a new dimension to the disadvantage of the Mexican worker. Since anyone can turn in an ‘illegal,’ such a threat began to narrow down the social contacts which the Mexican worker might establish” and significantly influenced how wages and working conditions were structured (Ríos-Bustamante 1978: 269). This made mutualistas especially important in the late 1920s and in the post-Depression 1930s, an era marked by hyper-deportation and repatriation schemes (Carreras de Velasco 1974; Hoffman 1974; Balderrama and Rodriguez 1995). The vulnerability created by the development of deportation regimes and what Nicholas De Genova (2004) calls the “legal production of illegality” shaped: *if* and *how* Mexicans sought legal aid; and the nature of legal assistance offered by mutualistas.



Manuel C. González circa 1930. Nettie Lee Benson Latin American Collection,
University of Texas.

La Liga also melded legal advice and education. Throughout the organization's existence, it maintained a legal advice column in the newspaper *El Imparcial de Texas* (which was published by Gonzáles' aforementioned mentor Francisco Chapa). The column provided information "on tenant rights, school laws, adoption, and personal loans" (Orozco 2009: 72). Like African Americans and the *Chicago Defender's* legal advice column, this medium was particularly important considering Latinos' occupational exclusion and lack of access to the legal process, as well as the unique literacy, civic and linguistic issues that they encountered. The league also published a small compendium titled *Leyes de Texas, Civiles y Criminales, Traducidas al Español (Texas Law, Civil and Criminal, Translated Into English)*, which offered a wealth of legal information on issues that included adoption, divorce, fraud, suffrage, vagrancy, labor and naturalization. In Spanish, the authors indicated that their many years of experience "has convinced them that there is an urgent need for such a compilation, as a guide to Mexicans living in Texas for easy knowledge and understanding of their legal rights" (Patterson and Love 1920: 5) (my translation). The book was aimed especially toward landowners, merchants, and employees. The authors believed that a close reading of the book would help Mexican residents avoid "a world of trouble, strife and discomfort that now, by their ignorance of its contents are exposed" (Patterson and Love 1920: 5) (my translation). The book represents a remarkable, early attempt by Mexicans to provide legal information in a more accessible form.

Gonzáles left La Liga for a year in 1918 to serve as a military attaché for the United States in Spain and France (working as a secretary and interpreter) and returned to the League in 1919, but by the time he returned things changed. For reasons that are unclear, La Liga changed its focus from legal aid and advice to citizenship, and created *La Liga Instructiva Mexicana* (the Mexican Instructive League) in 1920. The new organization's aim was to "teach and instruct Mexican residents of Texas of the laws and customs of the State and also give instructions for qualifications of citizenship in the United States" with a specific focus on the citizenship test (*San Antonio Evening News* 1920; also see *El Paso Herald* 1920). Gonzáles left the organization in 1920, and in an apparent attempt to revive the legal aid offered by La Liga, created *Asociación Jurídica Mexicana* (The Mexican Legal Association) "to familiarize mexicanos [sic] with the origin, goals, substance, and social effect of the laws and customs of the State of Texas...and if required will give personal attention to cases" (Pycior 1979: 150). Unfortunately, like many of the mutualistas and defense networks that existed before the 1920s the organization lasted shortly and folded after a year. He then left to study at the University of Texas Law School and passed the bar in 1924.

Consular Legal Aid

In 1926, Gonzáles took his talents to the San Antonio Mexican consul, which "often asked him to serve as a friend of court in trials of policemen who killed Mexicans" (Rosales 1997: 82) Gonzáles would work with the consulate until 1958. The role of the consulate in the provision of legal services cannot be understated. Rosales notes that as early as 1903, the Mexican consulate in Los Angeles had "a special fund for assisting Mexicans who encountered difficulties with the legal system" and by 1928 there were more than 60 consuls in cities across the country. (Rosales 2000: 134; Rosales 1999: 44).

Across the Southwest, consuls in major cities such as San Antonio, Tucson and Los Angeles “prepared legal briefs, assessed the impact of American laws or proposed legislation on the colonia and Mexico, defended Mexican nationals who lacked funds, submitted petitions for pardons or paroles for Mexicanos serving jail sentences, reviewed requests of victims or criminal offenses, and presented claims from industrial accidents to appropriate authorities” (Balderrama 1982: 9). While the consul was certainly guided by its own ideological intentions, it was an important line of defense for Mexicans in need of legal assistance.¹²²

These consuls often worked in tandem with local mutualistas or autonomously (Ruiz 1998). But the lawyers who worked for the consulate in various cities were not all Mexican-Americans like Gonzáles. On the supply side, there simply were not enough Mexican-American attorneys to meet the legal needs of that community but they also were not in popular demand. Like blacks, some Mexican-Americans were decidedly against procuring in-group legal assistance. They understood that Latino attorneys were discriminated against in court and that such prejudice could influence their own legal proceedings. Latinos sometimes opted for white attorneys, continuing a larger historical trend of minorities’ suspicion of the effectiveness and motives of in-group attorneys. Samuel Pereyra was the consulate of Eagle Pass, a border-city in Texas, and said that he would not hire Mexican American attorneys because of the legal profession’s bias against Latino attorneys. (Hidalgo 1940: 53; also cited in Rosales 1999: 199). In addition to Latinos’ racial exclusion from the legal profession, the linguistic challenges for attorneys (translating complex legal concepts from English to Spanish, and vice versa) substantively influenced the availability of Latino attorneys. In a recent biography on David C. Marcus, a Jewish American attorney who worked regularly with the consulate in Los Angeles, Carpio (2011: 5) mentions how consulates “routinely retained legal aid from individual attorneys or firms for Mexican nationals who were unable to afford their own attorney or did not speak English well enough to navigate the US legal system.” Consular legal aid was not restricted to the Southwest. Zaragosa Vargas (1999:121) similarly notes, “In one year Detroit lawyer Charles Benjamin (a Panamanian) helped the Mexican consul with over 400 cases involving work-related accidents.” The New York City consulate also retained legal services for Mexicans due to high demand. The remaining consulates in smaller cities acquired legal aid on the case-by-case basis after receiving approval from the Ministry of Foreign Relations (Aguila 2007).

These forms of consular legal activity highlight the interracial and geographical diversity of legal aid for Latinos in this time period. Despite the predominance of white racism, well-intentioned Caucasian attorneys were crucial to the provision of legal aid for Latinos in ways that are similar to the NAACP’s development as well as the abolitionist legal assistance described in the first chapter. Despite the heavy population of Mexicans and Mexican Americans in the Southwest, this group lived and had legal needs outside of border states. This legal need was often in some of the same cities where legal aid societies were burgeoning, a fact that further highlights their exclusion from mainstream

¹²² Sánchez (1993) illustrates how reinforcing loyalty (in an attempt to counter Americanization efforts), fostering patriotism (to encourage the goal of return migration) as well as monitoring Mexican and Mexican American radicals were all goals of the consulate.

legal organizations.¹²³ Again, what is important here is the seemingly circuitous routes Mexicans and Mexican Americans had to take to receive legal services. While legal aid reformers were bending over backwards to provide deluxe legal assistance to ethnic white immigrants in the northeast and the midwest, Mexican Americans essentially had to rely on *another country* to receive some semblance of due process in the United States. Even sociologist Emory Bogardus (1930: 74), who founded one of the first sociology departments at the University of Southern California and was a scholar of immigration, recognized the strength of consuls when he stated “the Mexican can secure justice from the Mexican consul more easily than in the courts of the United States.” While scholars vary in their appraisal of consulates’ political motivations and effectiveness, most agree that they were an important legal resource for Mexicans and sometimes Mexican-Americans.

LULAC

The next institution that was important to the provision of legal services for Mexican-Americans was The League of United Latin American Citizens (LULAC). But before delving into their work, a few things should be noted. First, while an important aim of this discussion is to highlight the unrecognized ways in which Mexicans and Mexican Americans sought and were provided legal aid, this is not to suggest that they were adequately protected. This was especially the case in criminal proceedings. As one respondent told Paul Taylor (1931: 230), a Berkeley social scientist who also studied Mexican crime for the Wickersham Report, “The Mexicans get little protection in the courts. The Mexicans are now learning that you must buy justice... The Mexican is in the same position as the Negro in the South. He is always wrong unless there is a white man to speak for him.” So while this work seeks to disrupt the historiographical fairy tale of equal provision of legal services, it would be incorrect to believe that these institutional forms came close to the getting the job done. The unfortunate reality is that Mexicans and Mexican-Americans were enmeshed in a web of legal prejudice and unsatisfactory due process protections.

Nevertheless, LULAC stepped in and attempted to fill in the void of legal aid organizations for Mexican Americans. The organization was founded on February 17, 1929 at Salon Obreros y Obreras in Corpus Christi, Texas. LULAC was essentially a consolidation of smaller fraternal and self-help organizations that served the Mexican American community (Martinez 2009:32). González served as the organization’s first Vice-President and was a member of two of the major institutional players that contributed to this unification. The first was *La Orden Hijos de America*, or The Order of the Sons of America (OSA), an early Mexican-American civil-rights organization that was founded in 1921 and had some moderate success with discrimination and desegregation cases in the area of in housing, public facilities, and employment. The other was *Orden Caballeros de America*, or the Order of Knights of America (OKA), which was established in 1927 and was an offshoot group of the OSA. There were earlier attempts to merge these organizations during the 1920s, most notably at the Harlingen Convention in 1927, which was held in the city of the same name and was close to the

¹²³ The idiosyncratic experiences of Mexicans and Mexican Americans outside of the southwest are productively explored in Arredondo (2008); Cardenas (1976); Vargas (1999); Valdés (2000).

Texas-Mexico border. But a consistent point of contention was the relationship between Mexicans and Mexican-Americans. In a 1979 interview with Cynthia Orozco, González told the latter that “The heated debate at Harlingen was whether or not we were going to work together with Mexican citizens or work exclusively for Mexican Americans. That created friction, dissension, and it broke up the meeting” (Orozco 2009: 120). Eventually, the organizations reconvened in 1929 and created LULAC while making the decision to extend membership only to Mexican-Americans, a route that influenced its legal aid and highlights some of the strengths and weakness of LULAC’s work.

First, the decision to focus on Mexican-Americans influenced how they attacked racial discrimination and segregation. LULAC leaders “did not criticize segregation itself, but rather its automatic application to Mexicans. In effect, they argued that Mexican-Americans were just like other white Americans, and deserved equal opportunity to thrive in American society” (Kaplowitz 2007: 97). This of course was tactical and corresponds with Gayatri Spivak's (1988) concept of strategic essentialism, a method of action where ethno-racial and minority groups offer simplified or essentialized versions of group identity to achieve specific goals. Ian Haney López (2006: 153) similarly



All male LULAC members at the Convention held on May 18, 1929. Nettie Lee Benson Latin American Collection, University of Texas.

explains how elite Latinos have historically clutched white identities to “take advantage of their liminal position,” and argues that from 1930s through the 1950s “Mexican community leaders in the United States challenged segregation not on the grounds that it was wrong per se, but by arguing that they were White, thereby initiating a persistent trend in which certain Latinos seek assimilation through claims of Whiteness.” What this led to was a patriotic, bourgeois program of racial uplift that was deeply invested in assimilation and naively tethered to working within the confines of the law to achieve racial equality.

This commitment was undoubtedly influenced by the fact that like Gonzáles, many of the LULAC founders were middle-class, Mexican-American attorneys who served in World War I. Some of these members included Alonso Perales (a primary writer of LULAC's constitution who served as the second president) and José Tomás Canales (the first Latino graduate of the University of Michigan Law School and the organization's fourth president). Because of these leaders' legal background, "they had a natural affinity for due process, a belief that individuals should be ruled by their consent, and that society could be changed by educated persons...While they both had a passionate desire for equal rights and social justice, they preferred the controlled atmosphere of courts, legislatures, and schools for their battlegrounds, avoiding direct protests" (Buitron 2004:20, 35). LULAC's strategy of action was premised on the noble, but spurious belief that "American free enterprise system was normatively acceptable and that Anglos would eventually accept Mexican Americans as their social equals;" moreover, a key difference between this organization and the aforementioned Mexican consuls and mutualistas was LULAC's "celebration of industrial capitalism and its potential to reward the best qualities of their people: intelligence, hard work, and perseverance" (Benjamin and Jennings 2000: 542). In the organization's history book *All For One And One For All: A Celebration Of 75 Years Of The League Of United Latin American Citizens* the author puts it flatly:

LULAC is set apart from its peer organizations in the Hispanic community by its political ideology. The founders of LULAC respected the precepts on which the United States was established, including the writings of the country's founding fathers, and in an effort to imbue LULAC with the same spirit of purpose and opportunity that is the foundation of American democracy and free enterprise, they praised the nation in well-crafted written statements and speeches. This deference toward the American way of life was done largely, in the beginning, to placate the American public's suspicion of the organization's motives and to satisfy the personal beliefs and political preferences of the League's membership. Officers and members of LULAC were required to take an oath swearing their loyalty to the government of the United States and their support of its Constitution and laws. The organization would adopt "America" as its official song, English as its official language, and "George Washington's Prayer" as its official prayer. The League's constitution was modeled after the U.S. Constitution (Yarsinke 2004: 8).

These ideological perspectives and concerns limited the legal aid LULAC offered and led them to focus on "safer" issues such as housing and education while leaving criminal justice issues to individual efforts Mexican-American attorneys and their allies, mutualistas, and the Mexican consulate. Nevertheless, LULAC's limitations and suggestively problematic ideological stance should not take away from their accomplishments.

LULAC's legal assistance efforts in education seemingly hark back to the rhetoric of conservatives like Booker T. Washington, but this approach was crucial to the blunting of Mexican American inequality especially considering the idiosyncratic linguistic and literacy issues they encountered. LULACers saw quality education as a crucial part of their Americanization objectives. They considered education to be an important prerequisite for developing Mexican-American leadership, while viewing inferior education as a mechanism that "reproduced a low-skilled work force and kept Mexican Americans in a state of economic underdevelopment." (Garcia 1991: 53). Moreover, they believed educational efforts would help expand the professional middle class, particularly

lawyers, who could help challenge legal inequality. On this specific issue, the University of Texas history professor Carlos E. Castañeda told Gonzáles, “This is essential to the best interests of our Latin American citizens...What we need most of all in this state is a group of well trained and representative Latin-American lawyers to whom our people can go for legal advice and who can defend their rights when these are trampled upon” (ibid). LULAC’s legal campaign privileged education as a potential remedy to voter disenfranchisement, unemployment, wage discrimination and social immobility, and led them to direct their energies and focus on education.

One year after the organization’s founding, LULAC assisted in a class-action school desegregation effort in the border-town of Del Rio, Texas. In this test case, Gonzáles and Canales, the aforementioned LULAC lawyers, as well as private Del Rio attorney John L. Dodson assisted Jesus Salvatierra and other parents seeking to prohibit the Del Rio District from building new facilities that would further exacerbate the already gross segregation of Mexican American children.¹²⁴ In Del Rio there were three elementary schools and one high school all on one plot of land. On the east side stood two elementary schools and high school, all of which served white students. In the middle of the property was an athletic field and on the west end was the two-room elementary school that housed Mexican-American children up to the “low-third grade.”¹²⁵ The District secured some bond money for this construction, but Salvatierra and allied parents sought an injunction that would stop the development. To raise money for the cause, the organization converted their monument fund for World War I veterans into a School Defense Fund and raised more than \$1000 via local LULAC chapters, mutualistas, women's clubs, and Spanish-speaking parent-teacher associations who “sponsored dances, baseball games, meetings, interviews, and benefits to raise money for the cause” (Orozco 1999). The plaintiffs argued that Mexican American children were being segregated despite being legally categorized as “other white” (Valencia 2008: 16) and the District Court ruled in their favor.

But the school district appealed and used disingenuous explanations to justify the segregation (while not categorizing it as such). Both of their explanations paternalistically cohered around instruction and pedagogy. First, they argued that segregation benefitted non-English speaking children by providing them with a language environment that would cater to their specific needs and allow them to learn English at their own pace. Secondly, they maintained that non-English speaking children entered the school year late (after harvest) by way of their migrant parents and would be at a disadvantage if they started with white students. Despite the district’s confession that white students who started the school year late were not segregated into the Mexican school, as well as the absence of any testing that would have demonstrated that Mexican children were less proficient in English (Martinez 1993: 576), the appellate court believed (or consigned) this subterfuge and ruled in favor of the school district. LULAC lawyers appealed to the Supreme Court, but unsurprisingly the Court refused to hear the case.¹²⁶ Segregation would remain and LULAC would not pursue legal action for another 15 years.

¹²⁴ *Independent School District v. Salvatierra*, 33 S.W.2d 790 (Tex.Civ.App.1930).

¹²⁵ This physical description of the space is described in Valencia (2008: 18).

¹²⁶ Spann (1994) cogently illuminates how the Supreme Court is key institution for minority subjugation and bastion of majoritarian preferences.

Nevertheless, the case not only renewed earlier desegregation efforts by Mexican-Americans, but it also provided a template for future legal action. David Gutiérrez (1995: 78) recognizes the case as an “opening salvo in what proved to be a long legal struggle in which LULAC and other groups successfully argued that discrimination violated the equal protection and due-processes clauses” of the Fourteenth Amendment, with later LULAC and NAACP efforts building on this attack of the separate-but-equal doctrine.

When considering LULAC’s work, it is important again to think beyond traditional conceptions of legal aid. As demonstrated with the *Salviaterra* case, this was a time where courts were generally inhospitable to the legal claims of Mexican Americans, which caused LULAC to seek an alteration of Mexican American's legal condition outside of courts. In his historical examination of the organization, Kaplowitz (2005: 32) informs his audience that “LULAC leaders used their standard practice of negotiation with local leaders to bring change. If negotiation failed, they encouraged community pressure, investigated and documented charges brought by parents, brought evidence to the attention of higher authorities and publicized the differences between facilities for Mexicans and those for Anglos.” So while LULAC’s litigation efforts subsided until 1946,¹²⁷ it was an important political player in the Mexican American community that sought to buffer Mexican-Americans from legal inequality.

CONCLUSION

The aforementioned sketch of alternative legal aid highlights a few things. First, students of legal history would benefit from widening their methodological and conceptual lens when thinking about legal assistance. Asians, African Americans, and individuals of Mexican descent were victims of a legal system that was bereft of due process protections and access to courts. Therefore, they often utilized non-traditional and often circuitous routes to receive legal assistance and protect themselves from a callous judicial system. This chapter challenges the historiographical myth that legal aid—specifically assistance offered by charity organizations, the bar and municipalities—was readily available to everyone. This simply was not the case as evidenced by the absence of minority groups from organizational rhetoric, scholarly discourse, and annual reports of legal aid organizations. Ideologically, the history of large civil rights organizations, specifically LULAC and NAACP, illuminate their tenuous relationship to criminal legal aid. With their origins rooted in middle-class respectability and racial uplift, these organizations generally shied away from criminal justice issues. Excluding their protests against unfettered racial terror (lynching, state-sanctioned violence) they sometimes avoided cases where blacks and Latinos were accused of crimes, leaving such work to local mutual aid societies. This preference still resonates today and is evidenced by the lack of prioritization of criminal justice issues in both organizations. Finally, the case of Chinese and Mexican-Americans demonstrates the importance of language services in the provision of legal aid, a point that is contemporarily salient considering the sharp increase in deportations as well as recent Supreme Court jurisprudence that has highlighted the importance of public defenders informing their immigrant clients of rights

¹²⁷ The 1946 suit evolved into the case *Westminster School Dist. of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

and risks.¹²⁸ These themes of access, quality of legal aid, language, and middle-class respectability, which trace their significance to the early twentieth century reappear later in the manuscript with similarly illuminating insights.

¹²⁸ Notable here, and discussed in further detail later is *Padilla v. Kentucky*, 559 US 356 (2010), which held that lawyers have a constitutional obligation to tell their clients that guilty pleas carry the risk of deportation.

CHAPTER 5: THE JURISPRUDENTIAL BRIDGE: CRIMINAL LEGAL AID FROM THE GREAT DEPRESSION TO THE WAR ON POVERTY, 1931-1969

March 25, 1931 was an important day in African American history and American legal history. In Chicago, suffragist, journalist, and African American reformer Ida B. Wells-Barnett died of kidney disease at the age of 68. Wells-Barnett is an important historical figure for a variety of reasons, most notably for her journalistic exposes that highlighted how interracial rape accusations and lynch law were central to the enforcement of racial hierarchies. The day of her passing, several youth boarded an Alabama freight train in search of employment during one of the most depressed times in economic history. A fight ensued during the ride between a group of white youth and black youth, with the former being ejected off the train. These young men subsequently reported the confrontation to a local sheriff who had the train stopped and found nine black teens and two young white women. There are a few interpretations of what happened from here.

The first interpretation triggered the legal machinery and relied on the females' assertion that they were gang-raped by the black youth. Victoria Price, testified that one of the young men revealed his genitals and said "when I put this in you and pull it out you will have a negro baby" ([1969]2007: vii). The rape accusation inflamed Southern white supremacist passions and led to a series of rushed court cases. The teens had no legal defense. They were guarded by the military at every stage of the legal proceedings and tried by an all-white jury that systematically excluded blacks.

Another interpretation suggested that the accusers were not raped. This claim was supported by the testimony of one of the doctors who examined the young women as well as pre-rape shield law comments about Price's reputation as a prostitute.¹²⁹ Ruby Bates, the other accuser, retracted her accusation and claimed that they fabricated in an effort to avoid a potential morals charge.¹³⁰ Nevertheless, Price's rape accusation would lead to a series of important Supreme Court decisions in American history typically referred to as the Scottsboro Boys cases.

The first half of the twentieth century is littered with cases involving black males in the South accused of raping white women.¹³¹ To be sure, the legal record is misleading since the inter-racial rape of non-white women, along with intra-racial rape of all of women, was not vigorously prosecuted and punished like black-on-white sexual

¹²⁹ Rape shield laws were developed by states in the 1970s and attempted to prevent invocation of sexual assault survivors' character to damage her credibility. Such invocations were common during this period. See Spohn and Hurley (1992).

¹³⁰ Bates stated "I told it just like Victoria did because she said we might have to stay in jail if we did not frame up a story after crossing a state line with men" *New York Times* (1933). Bates was referring to the Mann Act, which was a vague federal law that made it a felony transport a female for an "immoral purpose". This law was upheld in *Caminetti v. United States*, and expanded the law to noncommercial, consensual sexual liaisons. 242 U.S. 470 (1917).

¹³¹ *State v. Armstrong*, 167 Mo. 257 (1902); *State v. Flemming*, 130 N.C. 688, 41 S.E. 549 (1902); *Beard v. State*, 81 Ark. 515 (1907); *Vickers v. United States*, 1 Okla. Cr. 452 (1908); *Lane v. State*, 140 Ga. 222 (1913); *Hart v. Commonwealth*, 131 Va. 726 (1921); *State v. Brady*, 104 W. Va. 523 (1927); *State v. Floyd*, 174 S.C. 288 (1934); *Pew v. State*, 172 Miss. 885 (1935); *White v. State*, 137 Tex. Crim. R. 481 (1939).

violence.¹³² Indeed, NAACP field secretary Walter White (1948: 126) may have been correct when he claimed that Price's rape accusation "ordinarily would have been an interracial clash of no uniqueness." Qualitatively unfair legal proceedings were also common during this time. Years after the Scottsboro Boys incident, Guy Johnson (1941: 97), a white scholar of race relations and University of North Carolina sociologist, aptly described the legal environment of such cases. "When a Negro goes into court," he claimed, "he goes with the consciousness that the whole courtroom process is in the hands of the 'opposite race'-white judge, white jurors, white attorneys, white guards, white everything, except perhaps some of the witnesses and spectators." The procedural defects of the initial proceedings—ineffective counsel, hasty trials, a mob atmosphere, and tenuous evidence—were common mainstays in high-stakes criminal cases. But a few things made the Scottsboro cases unique: the specter of socialism, media attention, altruistic concerns, and symbolism. These four features are important components of the landmark legal aid jurisprudence from the 1930s to the 1960s, and are integral themes to this chapter.

The intervention of the International Labor Defense (ILD), the legal arm of the Communist Party USA, was an important aspect of the Scottsboro Boys cases. The ILD cut its teeth by providing legal assistance in high profile cases involving labor leaders, political activists, and anarchists in the late 1920s. After the initial kangaroo court proceedings, the ILD managed the boys' defense in the subsequent appeals process. The NAACP, the organization expected to be at the front lines of such a high profile case involving African Americans, dragged its feet. Dan T. Carter ([1969]2007:52), author of the most definitive study of the case, suggests that this hesitance was due to reputational issues. "The last thing they wanted" he explains, "was to identify the Association with a gang of mass rapists unless they were reasonably certain the boys were innocent or that their constitutional rights had been abridged." If Wells-Barnett were still alive, it is almost certain that she would have galvanized black leadership more quickly around the boys, especially considering her scholarship on rape and her documented advocacy for black men accused of crimes (see Chapter 4). Nevertheless, the NAACP's hesitancy allowed the ILD to swoop in quickly.

Communists were already flirting with African Americans across the country, especially in Depression-era Alabama (Naison 1983; Kelley 1990; Solomon 1998; Howard 2008). At the same time, many African Americans were disillusioned by the durability of racial violence, the grinding poverty of the Great Depression, and the second-class citizenship that Black participation in World War I was supposed to rectify (Lentz-Smith 2009; Williams 2010; Reed 2011). Consequently, many blacks experimented with communism. In the 1910s and 1920s, legal reformers focused their attention primarily on southern and eastern Europeans because they were seen as the primary targets of anarchism and communism. Blacks and Latinos were imagined as threats to individuals (e.g. in the context of rape, robbery, murder), whereas Asian Americans were excluded from citizenship and Native Americans were scattered and sequestered on reservations. Ethnic whites, however were seen as threats to the polity. The decline of anarchist activity, along with immigration restriction legislation (e.g. the

¹³² See Hine (1989); Hodes (1997); Dorr (2004); Sommerville (2004); McGuire (2011) Williams (2012).

Immigration Act of 1924), tempered the concerns around southern and eastern Europeans' putative proclivity for subversive political ideologies. But communism and African American dissidence remained a possibility and the Scottsboro Boys case highlighted this concern. Accordingly, *the first argument of this chapter is that fears of socialism lurked in the legal background and influenced the slow development of federal legal aid schemes.*

The interface of African American protest and Communism led the Scottsboro cases to get unprecedented levels of national and international publicity. Black newspapers, national media, and international publications all followed the story closely, with multiple interests groups acting as dispensers of information to these outlets (Murray 1967; Miller et al. 2001; Miller 2009; Pennybacker 2009). The NAACP, which unsuccessfully attempted to wrestle legal representation from the Communist Party's ILD, was one important player. The Communist Party had money and resources for its own publication efforts. In addition to legal defense and its own periodical, the *Labor Defender*, the Communists used mass mobilization tactics such as fundraising, protesting, petitions drives, and telegrams to established authorities to garner attention (Miller 2006). The mothers of the Scottsboro boys, who campaigned internationally, were active in the press and situated between the Communists and the NAACP; many of them were more concerned about their children the ideological battle between the two organizations. As Figure 1 demonstrates, the Communists, much like the NAACP, utilized images of the boys' mothers to create sympathy and pity as well as evoke emotive responses to idea of a mother losing her child (Raiford 2011).¹³³ Finally there were black internationalists in the United States and abroad who helped with the cause. African American and diplomatic historians rightfully point to World War II developments such as anti-colonial struggles and Cold War posturing as integral to civil rights victories in the United States (Plummer 1996; Von Eschen 1997; Dudziak 2002; Horne 2009). An argument could be made for a firmer placement of the Scottsboro Boys within this history. The case is as an early iteration of international coalescence around African American constitutional rights. This leads to the second argument of this chapter, which maintains that *media scrutiny, coupled with America's increasing presence as a geopolitical power played an integral role in the adjudication of important Supreme Court legal aid cases.* Scrutiny on a maturing United States certainly preceded this case. But the Scottsboro case added fuel to European propaganda that highlighted American hypocrisy in the midst of proclamations of democracy, liberty, and freedom. Figure 2, which comes from the cover of the Russian magazine *Bezbozhnik*, portrays the lynching of a black body from the Statue of Liberty with a capitalist Uncle Sam laughing and an observant Jesus in the background.

The Scottsboro Boys incident led to three Supreme Court decisions. *Patterson v. Alabama* and *Norris v. Alabama* held that the systematic exclusion of African Americans because of racial considerations was unconstitutional.¹³⁴ Accordingly, such negative international publicity forced the American judiciary to have more fidelity to the ideals

¹³³ In her discussion on African American photography and activism, Raiford (2011: 53) notes, "these visual strategies were not based on shock value...but on the creation of sympathy and pity for a grieving mother and of anger for the outrageous violation of sacrosanct motherhood. The use of images of the mothers aim to embody the loss of the male victims, best understood as a mother's loss of her male child."

¹³⁴ 294 U.S. 587 (1935); 294 U.S. 600 (1935).

LABOR DEFENDER

NOVEMBER, 1934

10c

'HELP US SAVE OUR BOYS'



November 1934 issue of the *Labor Defender* with mothers of the Scottsboro boys.



The translated caption reads, "In God's country, that is, the United States of America. The lynching of negroes, the basest and most abominable form of expression of race hatred, has thrived under the Christian religion which exploits and is manhating through and through. For the bourgeoisie and the clergy lynching is the highest expression of culture and Christian morals, and act pleasing in the sight of God."

in Supreme Court legal aid cases.¹³⁵ These cases were important constitutionally but were a mere affirmation of a principle established more than fifty years earlier in *Strauder v. West Virginia*.¹³⁶ The lead case, *Powell v. Alabama*, changed the landscape of legal aid.¹³⁷ It held that in cases involving capital punishment, the court is constitutionally required to assign counsel to the criminally accused. In *Powell*, the Supreme Court, led by former New York Legal Aid Society president and Chief Justice Charles Evans Hughes, initiated an important shift in jurisprudential thought. The High Court went from thinking about assigned counsel as a right that could not be infringed upon by the state to an entitlement that must be provided by the state if it attempts to take an individual's life and liberty. More generally, *Powell* foreshadowed the Supreme Court's more expansive reading of the Constitution, which coincided with the New Deal ethos and the state's interest in promoting human flourishing. This chapter *examines landmark legal aid cases and maintains that many of them operated as a symbolic theater where the various entanglements of racial inequality, class, altruism, self-interest, and abstract notions of justice played out. This chapter further contends that these decisions were often animated by the protection of majoritarian interests but punctured by altruism and political economy concerns.*

The first section of the chapter examines the pre-Scottsboro Boys cases that influenced the decision in *Powell* but are rarely discussed in legal aid historiography. The chapter proceeds with a discussion on post-Scottsboro Boys cases that have also been under-discussed, but played an important role in the formation of criminal procedure and legal aid rights. The second section of the chapter looks at the thirty-two year period between *Powell* (1932) and the next landmark legal aid case *Gideon v. Wainwright* (1963). While scholars sometimes discuss decisions within this phase of legal aid development, it is often described as a period of dormancy or simply glossed over. This section explicates the jurisprudential uncertainty and flip-flopping that occurred during this time period, and links it to the final section, which describes *Gideon* and some of its implications. Overall, the dissertation makes two moves. First it moves from looking at individuals and reformers and begins to look at how the Supreme Court shaped the contours of legal aid during an era where the federal government finally began to weigh in on the question of legal aid. Second, while previous chapters examine both civil and criminal legal aid, this chapter, and the remaining discussion focuses squarely on criminal legal aid due to *Powell v. Alabama's* initial emphasis on the state's responsibility to provide legal aid to the criminally accused. These cases signal toward the under-theorized aspects of the welfare state and the penal state, which is explored more fully in the conclusion.

Lynchings, Mob Rule, and Legal Aid

¹³⁵ Thomas Emerson (1951: 3), who served on the Scottsboro boys' defense team and subsequently taught at Yale Law School, commented on how international scrutiny influenced American racial egalitarianism noting, "we profess to believe in racial equality and in recent years, contrary to the general trend, we have made some progress in achieving this goal. This is due in part, no doubt, to the fact that the attention of the outside world has been focused upon our conduct in this area."

¹³⁶ 100 U.S. 303 (1880).

¹³⁷ 287 U.S. 45 (1932).

There are three cases that often fall in the cracks of histories of legal aid and the African American civil rights movement. These cases often involved questions around mob-influenced trials, an issue that has often been imagined by scholars as separate from the right to counsel. But as some of these cases demonstrate, they are quite intertwined. A mob-influenced trial might influence the readiness of an attorney to aggressively advocate for their client during trial or during the appeals process out of fear for their future practice, and more importantly their lives. Consequentially, these kinds of cases often led to a perfunctory form of assigned counsel that was struck down in *Powell*. The Court handled a few cases involving mob pressure in racially tinged criminal proceedings but their handling of these cases was timid at best and botched at worse. A few words on this issue are in order.

The Supreme Court first heard the issue of mob-influenced litigation and lynching in the 1909 case *U.S. v. Shipp*.¹³⁸ This case is typically understood as one that concerns contempt of court issues and federalism (e.g. Palmer 2002; Curriden and Phillips 2009); but it offers some insights into the Court's silence on legal aid and the criminally accused. On January 23, 1906, Nevada Taylor, a white woman who lived in Chattanooga, Tennessee, was attacked and sexually assaulted. Local sheriff Joseph Shipp managed the search for the assailant, which led to Ed Johnson, a local African American man. The accusation sparked outrage amongst white Chattanoogaans, who called for "speedy justice." Concerns about a mob invasion of the local jail led Sheriff Shipp to send Johnson approximately 130 miles away to Nashville. Shipp's intuition was correct. On January 25, two days after the attack, a mob of more than 1,500 men stormed the county jail to no avail (*New York Tribune* 1906). The court appointed local attorneys for Johnson's defense. Despite their efforts and questionable evidence that linked him to the crime, Johnson was convicted.

His attorneys did not appeal the case because they feared social unrest. They believed that Johnson's life "could not be saved" and that an appeal "would so inflame the public that the jail would be attacked and perhaps other prisoners executed by violence" (*Shipp* at 408). After weighing the costs of an appeal against the potential for mob violence, the attorneys concluded, "in the opinion of all of us a case was presented where the defendant, now that he had been convicted by a jury, must die by the judgment of the law, or else, if his case were appealed, he would die by the act of the uprising of the people" (*id.*). Johnson was fortunate to receive legal assistance from Noah Parden and Styles Hutchins, two black attorneys who appealed his case. They argued that blacks were unconstitutionally excluded from the jury in Johnson's case. Johnson's appeal focused on how the fear of mob violence inhibited his counsel in the initial proceedings. The appeal also stressed the fact that Johnson's initial attorneys failed to ask for "a change of venue to secure an impartial trial" or a postponement that would have allowed "the excitement to subside."¹³⁹ For Parden and Hutchins, the mob violence fundamentally influenced the previous attorneys' ability to effectively perform their jobs.

After a failed appeal to the Tennessee Supreme Court, and a petition to the federal district court of Tennessee, Parden was able to meet with Supreme Court Justice John Marshall Harlan and convince him to order a "stay of execution," which temporarily

¹³⁸ 214 U.S. 386, (1909).

¹³⁹ *U.S. v. Shipp*, 203 U.S. 563, 571 (1906).

suspended the death sentence and would give the Supreme Court time to review the case.¹⁴⁰ This stay was ordered on March 17th. News of the stay got back to Chattanooga and it simultaneously enraged and concerned citizens. The *Chattanooga News* protested:

“It will be thirty to sixty days before Johnson can be legally executed, as we understand the case. All of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty, and that he ought to suffer the penalty of the law as speedily as possible. If by legal technicality the case is prolonged and the culprit finally escapes, there will be no use to plead with a mob here... such delays are largely responsible for mob violence all over the country” (*Chattanooga News* 1906).

Sheriff Shipp knew about the possibility of a lynching through these kinds of newspaper reports by having a sense of the public sentiment and because he had similar intuition months earlier when he sent Johnson to Nashville for the same reason. Nevertheless, on March 20th, one day after the *Chattanooga News* informed locals about the stay, Shipp left only one guard in the jail. This could be read as a blatant or careless invitation for an invasion and lynching. That same night, a mob entered the jail and kidnapped Ed Johnson. When Shipp found out about the mob he went to the jail but admitted, “I did not attempt to hurt any of them, and would not have made such an attempt if I could.”¹⁴¹ Sheriff Shipp believed that the Supreme Court’s intervention into local matters is what led to the kidnapping and maintained, “the people of Hamilton County were willing to let the law take its course until it became known that the case would not probably be disposed of for four or five years by the Supreme Court of the United States. The people would not submit to this, and I do not wonder at it” (*id.*). Johnson was eventually shot and lynched a few hours later.

Before hanging him from the Walnut Street Bridge, the lynch mob demanded that Johnson confess to the crime. Johnson’s response and last dying words were “I am not guilty and that is all I have to say. God bless you all. I am innocent.” After hanging and shooting his body several times, the mob left a note on Johnson’s body that stated “To Justice Harlan: Come get your nigger now” (*Chattanooga Times* 1906; Curriden and Phillips 2009: 214). Federal officials in Washington D.C. were incensed at what appeared to be a flagrant dismissal of federal authority. This led Shipp, and eight other participants to be prosecuted and convicted of contempt in the only criminal case to be heard directly by the Supreme Court. The Court ruled that Shipp and the sole guard in protection of the jail, “made no effort to prevent the mob from taking Johnson from the jail...were in sympathy with the mob while pretending to perform their official duty of protecting Johnson... [and] aided and abetted the mob in prosecution and performance of the lynching.”¹⁴² Shipp was eventually sentenced to 90 days in jail. Despite this admittedly trivial punishment, Curriden and Phillips (1999: 347) see this case as important because it marked “the first glimpse of the federal-court system’s exercising its power to protect an individual’s rights from wayward state authorities” whereas Ely (1995: 186) claims the

¹⁴⁰ Parden’s co-counsel, Styles Hutchins, was a friend of Emmanuel D.M. Hewlett, one of the few black members of the Supreme Court bar. Hewlett helped facilitate the meeting between Paden and Harlan. See Leif and Caldwell (2006).

¹⁴¹ *Shipp* at 417, (1909).

¹⁴² *Shipp* at 414, (1909).

case “helped publicize the unsavory practice of lynching at a time when many government bodies looked the other way.”

Such symbolic advancements are debatable. One might argue that Shipp’s light punishment is indicative of the lenience that the American government offered to lynch participants and their abettors during the late nineteenth century and early twentieth century (see Holden-Smith 1996). Similarly, one could contend that the Court missed an opportunity to offer a more authoritative statement about mob-dominated trials—which it did not do for another fourteen years in *Moore v. Dempsey* (1923). During these years—often considered the nadir of race relations and a period of numerous lynchings—a firmer ruling about the consequences mob-dominated trials and lynchings could have possibly saved hundreds of lives. This is especially true during an era where: the Southern dominated legislature repeatedly struck down anti-lynching bills; presidents were often mum on the issue (out of fears of losing Southern votes); and kangaroo courts proliferated throughout the country.

Nevertheless, one reason why *Shipp* tends to fall out of the purview of legal aid scholarship is because history often focuses on why things happen as opposed to why things do not happen. But this case is important for a few reasons. First, it was a missed opportunity for the Court to comment more substantively on legal aid, the right to counsel and fair trials, all of which it acknowledged played a role in the case. This was typical of the laissez-faire acquiescence the Supreme Court had to states rights—a deference that allowed local racism and inadequate legal assistance to persist in the South. The case is also important because if the lynching had not occurred, there is a strong possibility that Johnson’s case may have been the first to address the right to counsel as well as the right to fair trials that are uninfluenced by mobs. In later decisions the Supreme Court subsequently affirmed all of the arguments offered in Johnson’s appeals (Curriden 2009). Ultimately, the Supreme Court ignored these issues for years as people continued to encounter mob-influenced trials that hindered their attorneys’ ability to zealously advocate for their clients, and in turn, jeopardized the possibility of fair trials.

This problem of courts, mobs, and legal counsel reappeared a few years later with not-so-different results. In *Frank v. Mangum* (1915), the Court denied the appeal of Leo Frank, a Jewish American factory manager who was accused of murdering a 13-year-old girl who worked in his pencil factory.¹⁴³ Frank’s counsel offered several arguments—all of which were rebuffed by the Court. The most relevant contention emphasized Frank’s unfair and impartial trial. Frank’s attorneys argued that his initial conviction was a byproduct of disorder in the courtroom and a hostile public sentiment that was undergirded by fierce anti-Semitism. These features, Frank argued, were substantive enough to influence the jury. The Court agreed that mob intimidation *could* unconstitutionally interfere with jury deliberations, but they did not find that to be present in Frank’s initial trial. Such a conclusion was questionable. In his dissent, Chief Justice Oliver Wendell Holmes noted that on the day of the decision the trial judge had a private conversation with Frank’s attorney and was concerned that there would be a “probable danger of violence” and that it would “be safer for not only the petitioner but his counsel to be absent from court when the verdict was brought in” (*id.* at 346). Frank left and when the verdict was rendered there was an applause so loud that the judge could not

¹⁴³ 237 U.S. 309 (1915).

hear the jurors (who were about ten feet away) and order had to be restored in the court. After the Supreme Court upheld Frank's death sentence, John Slaton, who was ending his term as Georgia governor, commuted the sentence to life imprisonment on June 21, 1915. The anti-Semitic public sentiment then turned to Slaton whose career was effectively ended by the commutation. He required protection from the Georgia National Guard, was forced to leave the state for years, and had an effigy of his likeness burned which contained the inscription "John M. Slaton, King of the Jews and Georgia's Traitor Forever" (*The Advocate* 1915: 699). Less than one month after Frank's commutation, the same mob-influenced public hostility was directed toward Frank in prison. On July 17, 1915, William Creen, a fellow prisoner, slashed Frank's throat with a butcher knife. Creen pointed to the public sentiment that was present in Georgia and ignored in Frank's Supreme Court proceedings. Creen believed this hostility would come to the prison via lynch law. During this time period, as was the case in *Shipp*, lynch mobs routinely invaded jails in search of their victims. Fellow inmates who were not involved in the crime that inspired the mob were sometimes casualties of these invasions. (Recall that in *Shipp*, this was precisely the reason why the defendant's attorneys did not appeal: due to the fear that a mob would invade the jail and kill other inmates). Frank's assailant thought the attack would "rid the Georgia State Prison of a man whose presence would result in the attack by a mob on the prison and loss of lives in a battle with the guards" (*New York Times* 1915: 16). Frank's attacker was morbidly prescient. A month after Frank's almost-fatal slashing, a lynch mob broke into a Milledgeville, Georgia prison, kidnapped, and lynched Leo Frank. Like many lynchings, photographs of the hanging were sold along with pieces of the rope. No one was charged.

Frank v. Mangum, is a perfect example of courts' simultaneous willingness to rhetorically acknowledge the unconstitutionality of mob-inspired trials and its blindness to actual evidence of such proceedings. These kinds of proceedings were common for black and Latinos in the South and often impacted the nature of their legal assistance. The difference is that, unlike Leo, they rarely had the resources to appeal their cases to higher levels of court like Frank. Jewish Studies scholar Leonard Dinnerstein ([1968] 2008:134) aptly notes, "certainly, a poor man would have been unable to hire additional investigators to discover new information or stimulate enough newspapers to publicize his alleged injustice. Especially when injustice was not atypical - a man condemned for a crime that he claimed not have committed." Nevertheless, the money for counsel was not enough to insulate Frank from the mob-inspired bigotry that influenced criminal law during the first few decades of the twentieth century, and in turn, impacted the nature of legal aid. The *Frank* case also illustrates the deference the Supreme Court gave to states in their handling of the criminally accused during this time period—a deference that only began to wither during the 1930s.

Eight years and several lost lives later, the Court finally addressed the issue of mob-inspired trials in *Moore v. Dempsey*.¹⁴⁴ This case emerged out of the 1919 Elaine Race Riot, which occurred in Elaine, Arkansas. The riot began after African American farmers unionized and hired a white attorney to represent their interests and combat the exploitative sharecropping regime that was popular in the South (*New York Times* 1919; Woodruff 2003). Indeed, one newspaper suggested that the sharecroppers planned to

¹⁴⁴ 261 U.S. 86 (1923).

develop “a legal aid society through which they planned to take action through the courts to end vicious economic exploitation,” a description that underscored the importance of organized legal aid (*New York Amsterdam News* 1923). One night the farmers held a meeting at a church. Two whites—a deputy sheriff and a special agent, along with a black “trustee,” came to “investigate” but were refused entrance. They shot into the church and the some of the meeting participants shot back, killing the special agent. News of the incident got back to the county sheriff and the general public. Various posses of whites organized and began to terrorize the black community in Elaine. Federal troops were called in to tame the situation but their intervention eventually contributed to the massacre. The death toll is unclear and ranges from the twenties to almost a thousand; many individuals were tortured into confessions (Stockley 2001). One of the defendants in the case discussed his abduction from his home and said, “I was taken to Elaine and put in the schoolhouse and I was there about six days. I was brought to Helena jail and whipped near to death to make me lie on myself and the others. I was whipped three times in jail, also [I] was put in an electric chair in Helena jail and shocked. I have the scars on my body to show now” (Wells-Barnett 1920: 15). During the massacre in Elaine, the phone lines were cut. Mainstream media, along with Governor Charles Brough and various white businessmen, controlled the presentation of the events. The unionizing was framed as an “insurrection” and O.S. Bratton, the lawyer hired by the black farmers was “alleged to have been preaching social equality among negroes” (*New York Times* 1919). Six blacks were eventually arrested and charged with murder of the special agent.

Lynch mobs attempted to take over the jail and lynch the detainees, but were prevented by federal troops and local officials who ensured them that “they would execute those found guilty in the form of law.”¹⁴⁵ The trial was hasty and prejudiced. The court and the surrounding neighborhood were “thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result” (*id.*). The accused were appointed counsel, but this defense was almost perfunctory. The Supreme Court noted that the defendants’ attorney “did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand” (*id.*). The proceeding lasted less than an hour and the men were convicted. But, as Michael Klarman (2000: 49) has noted in his important discussion of southern criminal procedure cases, “the simple fact that these defendants enjoyed the formalities of a criminal trial, rather than being lynched, represented a significant advance over what likely would have transpired in the pre-World War I era.” In the first quarter of the twentieth century, a formal trial for a black accused of violence against a person was luxury.

Walter White, a mixed-race field secretary for the NAACP who could pass for white, posed as a reporter for the *Chicago Daily News* and went to Elaine to investigate. Passing as white allowed him to interview mob participants and Governor Brough, who called him “one of the most brilliant newspapermen” and provided him with a written endorsement that gave White entrance into the white community and unfettered details about the event. (White 1948: 50). White eventually published his findings—specifically the torture, sham proceedings, government complicity, and actual causes of the

¹⁴⁵ *Id.* at 266.

massacre—in the *Chicago Daily News* (1919), the *Chicago Defender* (1919), *The Nation* (1919), and *The Crisis* (1919). African American activist Ida B. Wells-Barnett engaged in her own surreptitious investigation of the massacre and focused her attention on black victims. She met with the wives and mothers of the detainees and was able to sneak in the jail. The mother of Frank Moore, the lead defendant in the case, claimed that Wells-Barnett (1970: 472) was her “cousin” from St. Louis. Along with “a group of insignificant looking colored women who had been there many times before,” Wells-Barnett was able to get their accounts of how they were tortured and published her findings in a pamphlet titled *The Arkansas Race Riot*. White’s account of government malfeasance, along with Wells-Barnett’s account of state-sanctioned violence spread across the country and made this case a cause célèbre. As White mentions in his autobiography, “the country was shocked and donations for the defendants poured across the country” (White 1948: 52). White noted that the NAACP’s “empty treasury began to be replenished by the contributions of both white and Negro Americans who were shocked by the story and wanted to aid in appealing the conviction” (*id.*). Moorefield Storey, a white attorney who served on the National Committee on Legal Aid Work and was the first president of the NAACP argued the case in front of the Supreme Court and was able to get the convictions reversed.

Moore v. Dempsey is another case that is typically understood for its importance to federalism as opposed to legal aid. The case marked an important moment in judicial history that established federal oversight of state criminal convictions. The case allowed the criminally accused to collaterally attack sham state court proceedings through claims of federal constitutional violations, which became important for African American criminal defendants living in the south. Justice Clark McReynolds, known for his conservatism, grumbled, “if every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are ‘true to the best of his knowledge and belief,’ and thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment.” This analysis is correct, but missed part of the story. *Moore v. Dempsey* represents another blown opportunity for the court to offer substantive guidance on the right to counsel. This right to counsel was one of the primary claims in the appeal and was discussed at length in the court transcript. Nevertheless, the court limited its scope to mob-dominated trials and simply ruled that such proceedings were unconstitutional. It took seven more years, a Great Depression, and a shift in jurisprudential thought for the Court to recognize the importance of indigent defense.

Torture and Legal Aid

Cases that involve police torture also are neglected in discussions on legal aid. These cases took place after the Scottsboro cases, but were important to constitutional criminal procedure and the development of legal aid. *Brown v. Mississippi*, a 1936 case involving confessions that were coerced through police violence is a case that is often overshadowed in mainstream legal accounts.¹⁴⁶ In African American history, *Brown* is eclipsed by the more recognized *Brown v. Board of Education*, which struck down Jim

¹⁴⁶ 297 U.S. 278 (1936).

Crow segregation.¹⁴⁷ *Chambers v. Florida* is a 1940 case that entailed confessions that were elicited through police pressure.¹⁴⁸ *Chambers* is similarly seen as a case related to confessions as opposed to legal aid. Since this case was one of Thurgood Marshall's many victories in the Supreme Court, it is similarly overshadowed by *Brown v. Board of Education*. Nevertheless, these cases offer important insights on how American jurisprudence began to shift during the 1930s in the areas of legal aid and constitutional protections for the criminally accused—particularly at a time where the Court was becoming more amenable to claims made by racial minorities.

Justice Virgin Griffith aptly described the background of *Brown* when he stated in the appellate proceedings, “it is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.”¹⁴⁹ On March 30, 1934, Raymond Stewart, a white planter, was murdered. Three black tenant farmers, Ed Brown, Yank Ellington, and Henry Shields, were arrested for Stewart’s murder and tortured into confessions. The Court noted that when Ellington was first confronted about the crime he denied participation in the murder and upon his denial:

they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. *The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial* (emphasis added) (*id.*).

Moreover, during cross-examination one of the sheriffs acknowledged that Shields “was limping when he came into the room where the confession was made,” and stated that “he could not sit down for the reason that he had been strapped pretty hard.”¹⁵⁰ Despite overwhelming evidence that the confessions were involuntary and thus unconstitutional, the men were convicted in the trial court. In the first appeal to the Supreme Court of Mississippi, the court affirmed the convictions and upheld the confessions as proper and voluntary. Justice Anderson, the only dissenting judge, complained that “the court had staring it in the face this incompetent testimony without which there could be no conviction” (*id.*). The case eventually reached the Supreme Court, which reversed the conviction and remanded the case back to state court.

First, the Supreme Court was concerned with the flagrant disregard for criminal procedure in the original proceedings. This flippancy was manifest through the lower court’s blind-eye to admitted tortures. It noted, “the facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the

¹⁴⁷ 347 U.S. 483 (1954).

¹⁴⁸ 309 U.S. 227 (1940).

¹⁴⁹ *Brown v. State*, 161 So. 465, 470, (1935).

¹⁵⁰ *Brown v. State*, 158 So. 339, 340 (1935).

Injustice Balked



"Injustice Balked," *Chicago Defender*, Feb 29, 1936, pg. 16.

trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding."¹⁵¹ This was an affront to the higher notions of liberty and justice valued in the legal system. This judicial irreverence was especially egregious during the interwar years, where the United States was establishing itself as a beacon of democracy. Accordingly, the Court acknowledged, "coercing the supposed state's criminals into confessions and

¹⁵¹ *Brown*, 97 U.S. 278, 285 (1936).

using such confessions so coerced from them against them in trials has been the curse of all countries” (*id.* at 287). The decision represents a Court that was continuing to think more expansively about due process protections and the 14th Amendment, as well as an institution in which blacks might be able to reliably bring their claims and appeals, as evidenced in Figure 3. At the same time, the negative global publicity of the Scottsboro Boys cases—two of which occurred one year before (*Norris v. Alabama* and *Patterson v. Alabama*)—provided a backdrop for the decision. Although not as publicized as the Scottsboro Boys, *Brown’s* similarity to those cases (kangaroo courts, hasty proceedings, black exclusion from juries, inadequate legal defense) had important implications for the American presentation of democracy. Despite the accused crime being murder and not rape, *Brown* was tied prominently to Scottsboro. At the time, it was referred to as the “Scottsboro of Mississippi” in the same ways that other cases were referred to as the “Scottsboro of,” with states like California, Virginia, Oklahoma, and New Jersey having their own version (Cortner 1986; Rise 1995; Freeman 2013: 257). In addition to reaffirming the importance of the right to counsel, *Brown* represented the admixture of symbolism and actual concerns about justice that animated legal aid jurisprudence after the 1930s.

Chambers v. Florida extended the Court’s posture on coerced confessions. On May 13, 1936, Robert Darcy, an elderly white man was robbed and murdered in Pompano, Florida, about twelve miles from Fort Lauderdale. Local law enforcement arrested between twenty-five to forty African Americans without warrants and subsequently took the four defendants (Isaiah Chambers, Jack Williamson, Charlie Davis and Walter Woodward) to a Miami jail due to concerns about mob violence. From Sunday, May 14, to Saturday, May 20 the defendants were individually confined, deprived of sleep, and questioned by four to ten white men that included the county sheriff, officers, and general citizens. The Court noted that, “the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative” (*id.* at 231). The defendants also claimed that they were tortured, although the police denied this claim. Nevertheless, the Court isolated the issue of torture and held that the absence of legal counsel, along with coercive pressure, led to “sunrise confessions” almost a week after their arrests (*id.* at 235). NAACP lawyers Leon A. Ransom and Thurgood Marshall provided legal assistance for the defendants in this case. On February 12, 1940, the birthday of Abraham Lincoln, they were able to convince the Court to overturn the convictions and reaffirm the unconstitutionality of the coerced confessions, which is what the case typically noted for accomplishing.

But the case is notable because of the Court’s willingness to meaningfully recognize the vulnerability of the criminally accused as it relates to coerced confessions in the absence of legal counsel. Writing for a unanimous Court, former Klan member Justice Hugo Black criticized coercive interrogations stating, “tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny (*id.* at 236). This remark was undoubtedly a commentary on political history but also a reflection of geopolitical currents at the time. As Klarman (2000: 228) notes, “*Chambers* arose at a time when Americans generally, and the justices specifically, were trying to identify distinctions between U.S. democracy, on the one hand, and German fascism and Soviet communism,

on the other.” Chambers also occurred at a time when the Supreme Court was also beginning to address class issues (a byproduct of a New Deal) and racial inequality. The Court added, “they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless” (*Chambers*, at 237). By 1940, when this case was decided, the Court scrutinized criminal procedure in the South and used cases like *Chambers* and *Brown* to offer more national standards in the area of due process protections for the criminally accused. The problem, however, was a deep ideological split within the Supreme Court on a related issue. For decades, the Court struggled with the issue of incorporation and the Bill of Rights.

Federalism and the relationship between states and the central government have been issues since the country’s inception. In fact, concern about federal intrusion into state matters is one of the main reasons why the practices in *Brown* and *Chambers* were common in the South. In American jurisprudence, this anxiety reflected itself in the issue of incorporation. For most of the 19th century, the first ten Amendments (the Bill of Rights) were only applied to the federal government and not to states. For example, the First Amendment right to assembly only applied to the federal government and not to states; thus, a state was left to its own devices and could curtail that right.¹⁵² The Fourteenth Amendment, which was ratified after the Civil War and designed to be a check on southern states, was understood by some to “incorporate” the Bill of Rights and ensure that states recognized the same rights as the federal government (Amar 1992). Through the doctrine of incorporation, the Bill of Rights was applied to states beginning in the 1920s. But this incorporation did not occur without a legal battle in the High Court and in society. In fact, the same states’ rights arguments that undergirded southern segregation also prevented a nationalization of indigent defense and criminal procedure. This fear of federalism—coupled with already burgeoning suspicions of socialism that morphed into McCarthyism—substantively impacted the Court’s criminal jurisprudence as well as cases that dealt squarely with the right to counsel.

JURISPRUDENTIAL AMBIVALENCE: LEGAL AID AND THE SUPREME COURT FROM THE GREAT DEPRESSION TO THE EARLY COLD WAR, 1932-1954

Federalism, Incorporation, and the Reigning in of Powell

The 1932 Scottsboro case *Powell v. Alabama*, which required counsel for individuals accused of capital crimes, seemed to open up the door for the nationalization of criminal procedure and legal aid schemes. This expansion seemed more promising after the 1938 case *Johnson v. Zerbst*.¹⁵³ In 1935 John Johnson was convicted of possessing and circulating counterfeit money in a South Carolina federal court. In one day, Johnson was given notice of indictment, arraigned, tried, convicted, and sentenced to a four and half-year prison term. All of these stages occurred without the assistance of legal counsel and Johnson was sent to an Atlanta penitentiary the next day. During this time South Carolina did not appoint counsel to defendants unless they were charged with

¹⁵² *United States v. Cruikshank*, 92 U.S. 542 (1876).

¹⁵³ 304 U.S. 458 (1938).

a capital crime, which was in full compliance with *Powell*. Justice Black, writing for the majority, acknowledged the social inequality and professional asymmetries that were present when the criminally accused did not have legal counsel. He noted that the Sixth Amendment acknowledges “the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty...that which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious” (*id.* at 462). The effect of the ruling in this case was to expand the right to counsel from crimes that could lead to capital punishment to *all* federal crimes. For legal aid reformers, the Supreme Court’s jurisprudence on the right to counsel seemed promising.

In the 1940’s the Supreme Court heard cases that could have potentially expanded and fine-tuned the right to counsel. Nevertheless, the Court was unwilling to widen the scope of this right and apply it to states. The departure of Chief Justice Charles Evans Hughes—who served as second president of the New York Legal Aid Society and was attuned to the importance of indigent defense—along with other changes in the Supreme Court’s composition did not help matters. The Court’s overall disinclination to expand the right to counsel reflected a morass of ideological issues that included, but were not limited to its: general conservatism; typically incremental approach to social change; law-and-order proclivities; deference to federalism; and sincere concerns about punishing crime while protecting constitutional liberties. These tensions would hinder the development of legal aid for two decades and are the core concerns of section.

For example, in a the 1940 case, *Avery v. Alabama*, the petitioner, Lonnie Avery was convicted of first-degree murder, but his appointed attorney only had three days to prepare a defense.¹⁵⁴ Justice Black’s majority opinion recognized that denying the criminally accused an opportunity confer counsel and prepare their defense “could convert the appointment of counsel into a sham” and maintained that “the Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment” (*id.* at 446). Despite this symbolic recognition, the majority oddly upheld the conviction and peculiarly reasoned that three days was enough time to pass constitutional muster. The Court confidently claimed that the “petitioner has thus been afforded the assistance of zealous and earnest counsel from arraignment to final argument in this Court” (*id.* at 450). In this sense, *Avery* is important for a few reasons. First it represented a regression from *Powell* and *Zerbst*. By rhetorically acknowledging that the official appointment of attorneys could be misleading while accepting an appointment three days before trial as constitutional, the Court explicitly displayed its vacillation between symbolism and meaningful commitments to constitutional protection. Moreover, the Court hedged on the right to counsel in *Avery* and punted on the issue of whether such appointment was *effective*—which undermined its own critique of formalities. The issue of effective counsel was not substantively engaged until decades later.

Two years later in *Betts v. Brady* (1942), the court continued to rein in the right to counsel.¹⁵⁵ In this case, Smith Betts was indicted for robbery in a Maryland state court but could not afford an attorney. He requested one from the court but was denied because state practice only provided counsel for indigent defendants accused of murder or rape (in

¹⁵⁴ 308 U.S. 444 (1940).

¹⁵⁵ 316 U.S. 455 (1942).

compliance with *Powell* and *Zerbst*). Betts, who was a forty-three-year-old “farm hand, out of a job and on relief” conducted his defense and unsurprisingly lost. (*id.* at 474). Despite this obviously inadequate legal counsel, a six-person majority court upheld the conviction and essentially dismissed Justice Black’s important and identical reminders in *Powell* and *Zerbst* about the average person’s inability to conduct their own legal defense.¹⁵⁶ The Court offered a few explanations for upholding the decision—most of which coincide with the themes in this chapter. The first explanation cohered around federalism and incorporation concerns. To be sure, this reflected a longstanding debate between Justice Hugo Black and Justice Felix Frankfurter—a split that mapped on to the rest of the Court.

Hugo Black was an advocate of incorporation and believed all of the Bill of Rights protections should be applied to states. For Black, the issue was simple. If a person has a particular right in a federal court, in this case of the right to counsel, there is no reason why she should not have that same right in a state court. Frankfurter took the more conservative position and did not believe that the Fourteenth Amendment’s Due Process clause mandated that the whole Bill of Rights should be applied to states. Instead, he advocated judicial restraint and believed that states should be left to their own devices and not be infringed upon by the federal government. By advocating *selective incorporation*, Frankfurter believed that the only amendments in the Bill of Rights that should be applied to the states were the ones that were important to “the very essence of a scheme of ordered liberty.”¹⁵⁷ For Frankfurter, the right to counsel was not a fundamental right. This tension between Black and Frankfurter led the Court to look at right to counsel infringements on a case-by-case basis until 1963, as opposed to offering a national standard. This selective incorporation approach prevailed in *Betts* and the court did not require counsel for this state proceeding. Writing for the majority, Justice Owen Roberts—who cut his teeth as a district attorney and should have been aware of the distinct advantages that prosecutors have over individuals who represented themselves—highlighted the importance of federalism. Roberts pointed out the diversity of state practices in the area of indigent defense when the Bill of Rights was created and at the time *Betts* was heard. In both instances, some states required counsel and some did not, which led Roberts to conclude that “the states should not be straight-jacketed in this respect” by a national standard (*Id.* at 472). This stringent inherence to states rights, whether buoyed by conservatism or genuine concern about federal overreach, continued the Supreme Court’s theme of symbolic guarantees. While such gesturing was crystal clear in the Court’s earlier racial jurisprudence it was becoming more noticeable in its handling of criminal matters.¹⁵⁸

¹⁵⁶ “Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.” *Id.* at 475.

¹⁵⁷ See also, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁵⁸ E.g. the *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Thirteenth and Fourteenth Amendment did no authorize Congress to protect blacks from private acts of discrimination).

The Court's opinion also highlighted the naïve faith in legal procedure that was present with the abolitionists discussed in the first chapter as well as Progressive Era reformers described in the third and fourth chapters. In *Betts*, the Court attempted to balance between federalism on the one hand and the fairness of trials on the other. While certainly a veritable goal, the problem with judging fairness on a case-by-case basis as opposed to creating minimum standards in the area of indigent defense is that it offered no uniformity and made legal protections subject to the whims of judges. For the majority, Betts' guilt was not in question. The state of Maryland provided evidence that identified Betts as the perpetrator. Betts only provided witnesses who offered alibis. The Court's reasoning hinged on the idea that Maryland's evidence was better, and therefore he should lose. This of course, ignored the fact that if Betts had proper legal training he may have been able to produce more than just alibis. As Justice Black indicates in his dissent, without legal counsel, an unrepresented party could be innocent but face "the danger of conviction because he does not know how to establish his innocence" (*id.* at 474). Nonetheless, the Court took Betts' legal defense as competent, and citing Judge Bond (who handled the lower proceedings), stated, "the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue" (*id.*). Incredulously, the Court maintained that Betts experiences in the criminal justice system made him well-suited for preparing his own legal defense noting that he "had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure" (*id.* at 472). Such comments epitomize the implicit assumptions of guilt for the criminally accused and the subsequent problems these assumptive biases can have on case-by-case analyses that focus on "fairness."

Finally, the Court's holding in *Betts* relied on a slippery-slope argument that alluded to the concerns of socialism that would pick up steam in the legal profession a few years later with the Second Red Scare. The Court was concerned that if it applied the right to counsel to state cases, that it would evolve into a right for all criminal cases irrespective of the consequences or seriousness of the offense. Citing the lower state court, Justice Roberts worried that petty crimes "would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it" (*id.* at 473). Roberts did not stop there and continued the parade of horrible rhetoric by noting that extending the right to counsel "would require the furnishing of counsel in civil cases involving property" (*id.*). For the majority, legal aid for a capital offense, or in a federal court was fine. Outside of that, legal aid that was *mandated* by the state, especially in civil cases like housing or employment was preposterous.

At this point, most narratives on the right to counsel mention the Supreme Court's dormancy in the 1940s and 1950s and jump ahead to the landmark 1963 decision *Gideon v. Wainwright*.¹⁵⁹ But the important issues of federalism, symbolism, geopolitical posturing, and socialism during this period require deeper discussion. By only acknowledging a limited right to counsel, the postwar court decided cases with contradictory rulings—some of which reversed decisions where there was no appointment of counsel, while others denied relief due to the belief that lack of counsel did not lead to a fair trial.

¹⁵⁹ 372 U.S. 335 (1963).

The Court's Troublesome Test: Determining "Fairness" from the 1940s-1950s

The postwar-Court continued to quarrel about the right to counsel years after *Avery* and *Betts*, which led to cases being decided on their perceived level of egregiousness and some of the judges' own understandings of fairness as opposed to a national legal standard. In *Foster v. Illinois* (1947), the petitioners offered a Fourteenth Amendment challenge to their guilty pleas to burglary and larceny and claimed they were not provided counsel.¹⁶⁰ In his majority opinion Justice Frankfurter continued to push his federalist stance and rejected the idea that the Constitution required states to provide legal counsel. Frankfurter offered a searing critique of the Fourteenth Amendment's Due Process clause as a "historical product" that should "not to be turned into a destructive dogma in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption" (*id.* at 139). With continued deference to states and their own legal traditions, Frankfurter continued arguing that incorporation, "would furnish opportunities hitherto un contemplated for opening wide the prison doors of the land" (*id.* at 139). Frankfurter and the majority were worried about the potential consequences of applying a right to counsel to states, which they thought could lead to more challenges to convictions, overwhelm judicial resources, and potentially allow factually guilty individuals to be released due to procedural technicalities. These concerns would continue to percolate for next two decades.

Justice Black's dissent maintained his position that the Fourteenth Amendment made the Sixth Amendment applicable to states. Black was especially critical of the Court's conservativeness. Black disparaged the majority's rigidity, stating, "A system so callous of the rights of men...is in my opinion wholly contrary to the scheme of things the nation's charter establishes. Courts and judges, under that plan, owe something more than the negative duty to sit silent and blind while men go on their way to prison" (*id.* at 144). Nevertheless, the Court continued to stand silent, as scores of individuals were wrongfully convicted for decades. The next year in *Uveges v. Pennsylvania* (1948) Justice Black's position prevailed.¹⁶¹ In a case where Elmer Uveges challenged a conviction that was made while he was seventeen and without counsel, the Court reversed the decision. In his dissent Justice Frankfurter condemned the "disregard for the distribution of judicial power between this Court and the highest courts of the States" and blasted, "after all, this is the Nation's ultimate judicial tribunal, not a super-legal-aid bureau" (*id.* at 442, 449). This ideological divide continued into the 1950s. The Court was only able to agree on this issue in a few instances and reversed decisions due to a lack of counsel on other grounds such as prosecutorial errors¹⁶² or evidentiary problems.¹⁶³

Some cases demonstrate that the Court's case-by-case focus on fairness led to outcomes that were at least procedurally just. In *Palmer v. Ashe* (1951), the Court reversed a Pennsylvania state robbery conviction against a mentally ill Stanley Ashe, who

¹⁶⁰ 332 U.S. 134 (1947).

¹⁶¹ 335 U. S.437 (1948).

¹⁶² *Townsend v. Burke*, 334 U.S. 736 (1948).

¹⁶³ *Gibbs v. Burke*, 337 U.S. 773 (1949).

pled guilty to a crime while having no legal counsel.¹⁶⁴ The majority held “incarceration as a boy for imbecility, followed by repeated activities wholly incompatible with normal standards of conduct, indicates no qualities of mind or character calculated to enable petitioner to protect himself in the give-and-take of a courtroom trial” (*id. at 137*). In *Massey v. Moore* (1954) the court similarly reversed a Texas State robbery conviction of O’Neal Massey, who spent several months in a “psychopathic” hospital months before and after case.¹⁶⁵ Massey participated in a trial that occurred four days after he was removed from a straightjacket and had no legal counsel. The majority rightfully recognized that “no trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court. Even the sane layman may have difficulty discovering in a particular case the defenses which the law allows” (*id. at 108*). Unfortunately, it took egregious cases involving youth or mentally ill individuals for the court to recognize the right to counsel, whereas in other areas there was not as much generosity.

In September 1949, a few years before “Operation Wetback” and in the middle Bracero program, the United States Immigration and Naturalization Service authorities in El Paso, Texas detained a 38-year-old undocumented Mexican beet field worker named Agapita Gallegos. Texas immigration officials held Gallegos for eight days without an arraignment, filing charges, or bringing him front of any magistrate. During that time period he offered a confession to the murder of his common-law wife in Nebraska, where he was subsequently extradited to and held for another thirteen days without being charged of crime or offered legal counsel. After twenty-five days of detainment, a Nebraska court finally charged and subsequently convicted Gallegos of manslaughter. The court records indicate that during his detainment Gallegos was kept in an 8x8 cell with no windows (referred to by Texas officials as the “dark room” or the “punishment room”) despite being a “docile” and compliant prisoner.¹⁶⁶ He was offered little food, and threatened with deportation. He challenged the conviction on the grounds that he was coerced into the confession because of an unlawful detainer and was not provided legal counsel. Using its “fairness test” the Supreme Court affirmed the conviction in *Gallegos v. Nebraska*. The majority claimed that they “carefully weighed the circumstances of the petitioner’s lack of education and familiarity with our law, his experience and condition in life, his need for advice of counsel as to the law of homicide and the probable effect on such a man of interrogation during confinement,” but maintained that they did not believe that Nebraska “violated standards of decency or justice in this conviction” (*id. at 67*). Considering the anti-Mexican xenophobia of this period, the augmentation of the border patrol regime, and the second class citizenship experienced by Mexican Americans and undocumented Mexicans, it is unsurprising that the Court did not disapprove of his detainment and confession (Garcia 1980; Orozco 2009; Lytle Hernandez 2010). In their eyes, his uncounseled and sequestered confession was a by-product of guilt and not coercion.

But again, that is the problem with a fairness test: it rests on subjective notions of sympathy that can be tempered by the general suspicions people have of the criminally

¹⁶⁴ 342 U. S. 134 (1951).

¹⁶⁵ 348 U. S. 105 (1954).

¹⁶⁶ 342 U.S. 55, 74 (1951).

accused and exacerbated by having a marginalized, racially-loaded identity (in this case, being an undocumented Mexican in an anxious, border-control tightening Cold War America). While also alluding to his own concerns about fairness, Justice Black pointed to the international tensions of the time stating, “Americans justly complain when their fellow citizens in certain European countries are pounced upon at will by state police, held in jail incommunicado, and later convicted of crime[s] on confessions obtained during such incarceration. Yet in part upon just such a confession, this Court today affirms Nebraska's conviction of a citizen of Mexico who can neither read nor understand English” (*Gallegos* at 152). Black's reference to certain European countries was a reference to Robert Vogeler (1952), an American accused of espionage and held as a prisoner for seventeen months by Communist police in Hungary. In Black's opinion, it was hypocritical to condemn the illegal detainment and coerced confessions of Americans abroad, while turning a blind eye to same practice on United States soil. After World War II, American democracy was on display and *Gallegos* provided an unsavory example of America's jurisprudential hypocrisy. As the 1950s continued, the Court continued its “fair trial” approach, which produced inconsistent results. The proliferation of McCarthyism, which magnified the already half-century concern of socialism, did not improve matters.

Legal Aid and the Socialist Scare in the 1950s

In the 1950s concerns around socialism were not new, but the Cold War, along with its McCarthyist strands, deeply influenced how the legal profession imagined legal aid as a social welfare provision. The early Cold War legal profession had a deep concern that *undesirable politics* (e.g. communism) would infiltrate the field of law (Auerbach 1977). During this period, the American Bar Association (ABA) made loyalty tests—affirmative pledges of allegiance to the American government and denunciations of virtually any form of political dissent—an important prerequisite for admission into the legal profession (Brown and Fassett 1953; Countryman 1953). At the same time, elite members of the ABA, a professional organization that was comprised of the most powerful American attorneys, were particularly adamant about their disapproval of a federally funded legal aid. This is unsurprising considering the organization's conservative ideology, rigidly scientific ideas about law, and its opposition to many of the New Deal reforms approximately one decade earlier (Ronen 1995). For these critics, promotion of government-run legal aid reeked of dissidence and many characterized such a scheme as “socialized law.” The juxtaposition of legal aid with communism presented a tricky issue for legal reformers.

Advocates who believed in the utility of legal aid risked being accused of socialist sympathies, which may have led many of them be silent on the issue. After World War II, there were two primary framings of legal aid vis-à-vis socialism. The first was *legal aid as socialist*, which focused on presenting the nationalization of legal aid as a step toward socialism. This perspective was offered by individuals who were genuinely concerned about threats to democracy as well self-serving attorneys who feared government intrusion into their profession. The other perspective, *legal aid as a solution*, framed the nationalization of legal aid as a process that would stave off the prospect of socialism and uphold the democratic ideals of justice and fairness. The former interpretation prevailed during this time period and provides important insights into the history of legal aid as

well as the years leading up to the civil liberties expansion of the 1960s. With the post-War development of the American welfare state, the 1950s “saw a continued challenge to the bar's autonomy over the control of the market for legal services, as signs of expanded government support for legal services developed” (Solomon 1992: 162). In the end, communist hysteria, coupled with an unworkable “fairness test” and a conservative Court stymied the prospect of a national right to legal aid until the 1960s.

The most vociferous and well-cited characterization of legal aid as a communist provision came from Robert Storey. Storey's impressive background gave him a measure of authoritative license to comment on this issue. He served in World War I and II; was a regent at the University of Texas; held leadership positions in local, national and international bar associations; worked as executive trial counsel in the prosecution of Nazi officials in the Nuremberg trials; was the dean Southern Methodist University's law school; and worked with top government officials such as General (and future President) Dwight Eisenhower, Associate Supreme Court Justice Robert H. Jackson, and Winston Churchill. In an essay in the *American Bar Association Journal*, the leading monthly news outlet for lawyers at the time, Storey commented on the ideological state of the legal profession and stated, “to me, the greatest threat, aside from the undermining influences of Communist infiltration, is the propaganda and campaign for a federal subsidy to finance a nationwide plan for legal aid and low-cost legal service” (Storey 1951:103). Importantly, Storey would end up serving as President of the American Bar Association one year after the publication of this article and helped set the political agenda for the largest American professional organization for lawyers. Storey believed that legal aid was a necessary service for all, but he wanted this service to be performed exclusively by the legal profession, with no interference from government. He implored his readers to “oppose any legal assistance plan created and financed by the Federal Government” and proposed that “all legal assistance plans should be sponsored and administered by the legal profession” (Storey 1951:103). This was the dominant viewpoint among communist-fearing attorneys who supported legal aid. But this perspective was often self-serving and focused on the legal profession and not on individuals who needed the service. A 1952 piece in the *Los Angeles Times* neatly synopsised this view in its coverage of a luncheon for Los Angeles lawyers. At the meeting, Edwin F. Franke, attorney for the Los Angeles Legal Aid Foundation complained, “the average income today...is slightly over \$2000 and with today's prices and cost of living, *there isn't much left for the lawyer*. The lawyer is going to have to do something about that group or we are going to lose our way of life” (my emphasis). Notably, Franke's comments focus on how legal need would impact attorneys and not the administration of justice. This chief concern about attorneys, along with the fear of communism, successfully fended off a national legal aid scheme.

But some members of the ABA argued that a national legal aid scheme that was devoid of government funds and controlled exclusively by lawyers would be a *solution* to socialist prospects. These individuals were ideologically close to individuals who scorned government-run legal aid *as* socialist but the key rhetorical difference was their co-optive use of socialist discourse and their framing of legal aid as something that would prevent communism as opposed to succumbing to it. In an article published one month after the end of World War II and at the eve of the Cold War, John S. Bradway, captured this co-

optive sentiment. Bradway (1945: 14), discussed in chapter 3, was one of the most important figures in the legal aid community from the 1920s to the 1970s and stated:

We should assume, if we are ordinarily prudent, that a substantial number already are not too favorable to the existing system [of legal aid]. Perhaps the most fruitful step for us to take would be to head off an attack, to disarm our critics, and, by our own improvements to the present system, place ourselves in a position to provide statistical answers...Establishment of organized legal aid work in every county in the United States would be a complete answer to this most persuasive basis for socialized law. *If we succeed in doing the very thing our critics claim we are not doing, we shall have disarmed them* (my emphasis).

The idea here is that legal aid should be embraced, but it should be in the full domain of the legal profession, a dominion that would quell the prospect of communism and government capture of attorney work. New Jersey judge Richard Hartshorne described how his state's legal aid plan of assigned attorneys helped "forestall this threat to the independence of the profession." Some members of the American Bar Association also utilized this logic in the organization's 1951-1952 Annual Report where it described legal aid as the "shield and sword of the profession." New York attorney Orison S. Marden and his colleagues argued that legal aid protected the integrity of the bar "by blunting the attacks of those who would make us servants of the State" and argued that the legal profession's control of legal aid would "dissolve the only tenable argument advanced by those who argue for socialistic measures to correct present conditions" (American Bar Association 1951: 218). In this report—which discussed the legal aid environment in the southeastern part of the country without discussing the bubbling cauldron of legally sanctioned racial inequality—Marden and company highlighted the primary motivation of support for legal aid: professional autonomy. Concerns about justice and equality were secondary, and these concerns were selective.¹⁶⁷ Of course, there were also individuals who were completely opposed to legal aid and public defender organizations controlled by the state or the legal profession,¹⁶⁸ but as legal aid became more of an undeniable need,

¹⁶⁷ Batlan (Forthcoming: 9) argues that legal aid leaders "shared a fear that African Americans would flood legal aid organizations and bring claims against whites," and that the establishment of legal aid organizations in the South "could have had the potential of destabilizing racial hierarchies and challenging African Americans' everyday oppression."

¹⁶⁸ Edward J. Dimock (1956: 220), a federal judge in New York judge, believed public defender schemes would be a "step toward a police state" and maintained "arguments made in its favor make my blood run cold." He opined, "put yourself in the place of a poverty-stricken Puerto Rican who does not speak English and who, though innocent, has been identified by bystanders as the man who fatally stabbed a government narcotics agent who was attempting to make an arrest in an East Harlem street crowd. How would you like to be told that another government official would act as your representative? How would you like to see this government official hobnobbing with the district attorney as they together answered the calendar, the district attorney presenting the indictments and this so called accused's counsel arising beside him for the entry of a plea bargain in most of the cases? Even in the ordinary case, the accused finds it hard to believe that his lawyer is really striving mightily on his behalf when he is so obviously on good terms with the government officials. If the accused, in addition to seeing that his lawyer and the government are friends, knows that they are both government officials, he will be in despair."

many attorneys capitulated to the idea of the legal assistance that was controlled by the profession.

Fierce proponents of government-funded legal aid were on the other end of the ideological spectrum. The National Lawyer's Guild (NLG) was arguably the most representative institution that embodied this vision. The NLG began in 1937 due to disillusionment with the ABA's corporate disposition, opposition to the New Deal, and segregationist membership practices. The NLG prominently featured women and African Americans in its leadership and protested the ABA's "emotional" and "irresponsible attack on the President of the United States for his earnest efforts on behalf of the underprivileged of the country" (Daveny 1937: 1) Unlike the ABA, the NLG was in full support of social security, collective bargaining provisions, child labor laws, and minimum wage laws. Naturally, the NLG was also in support of a national legal aid scheme. In direct opposition to the views advocated by Storey and many leaders of the ABA, the NLG contended in a 1950 study and statement that "the responsibility to assure the availability of legal aid and advice, and full access to the judicial processes to those who cannot financially provide it for themselves, belongs to the government. The fulfillment of this responsibility is an essential part of the government's function to administer justice in our land" (*National Lawyers Guild* 1950: 21). The NLG was unsatisfied with the patchwork of legal aid societies, public defender offices, and assigned counsel configurations. Noting the ABA's inattention to issues of identity, the NLG also noted elsewhere that legal aid "should be administered without discrimination in regard to race, creed, color or sex" (*Lawyers Guild Review* 1950a: 38) For the Guild, the logical conclusions were simple: "the administration of justice is a governmental function, the responsibility for seeing that it operates fairly and justly is one which falls upon the community as a whole, which, in our democratic society, means the government" (*Lawyers Guild Review* 1950b: 9) As egalitarian as it may have sounded, this was not a politically palatable idea during the early Cold War. Months after the NLG published this report, the House Committee on Un-American Activities (an investigative body of the House of Representatives) published a damning fifty-page report titled "The National Lawyers Guild: Legal Bulwark of the Communist Party" that accused the NLG of being front organization, highlighted the communist dispositions and relationships of NLG members, and recommended that the NLG be placed on a "subversive list and that it be required to register as an agent of a foreign principal." At a time where the welfare state was burgeoning, the primary organizational advocate of government-funded legal aid was vilified, and in turn, so was any semblance of state-funded legal assistance scheme.

Legal reformers like Bradway may have been overstating the case by suggesting that "the legal aid movement is a front line trench in the present global cold war," but he was accurate to suggest that "what we are able to demonstrate as to its relative effectiveness in comparison with the performance of foreign ideologies speaks louder than words." During the 1950s, legal aid could have become a staple of social welfare programs, especially since England, the US' closest ally and source of legal tradition, passed its own civil legal aid scheme.¹⁶⁹ Nevertheless, communist hysteria and the legal

¹⁶⁹ Cold War politics and the development of a national legal aid scheme was complicated by the England's passage of the Legal Aid and Advice Act 1949, which created a national structure for civil legal aid. This piece of legislation was established three years after England passed the

profession's monopolistic interests nixed this prospect. It would take another decade and a change in judicial composition to usher in national right to legal aid.

The Warren Court: Legal Aid and the Civil Liberties Expansion

Around the same time that the United States was swept by McCarthyism, more subtle changes occurred in the Supreme Court's composition. During the 1950s, the elevation of California progressive Earl Warren to Chief Justice in 1952, along with the 1956 introduction of Justice William Brennan (considered one of the Court's most liberal judges in American history) helped shift the Court's ideological position to the left. In fact, Warren and Brennan helped curb McCarthyism by striking down practices that the government used to identify and punish Communists.¹⁷⁰ The additions of Warren and Brennan, along with the appointments of JFK-insider Arthur Goldberg in 1962, Abe Fortas in 1965, and civil rights attorney Thurgood Marshall in 1967 helped initiate one of the most vibrant moments in American jurisprudence. From 1953 to 1969, the Warren Court issued numerous landmark decisions on issues such as racial segregation, voting, free speech, the right privacy, and criminal procedure.¹⁷¹

Although McCarthyism subsided in the 1960s, the Warren Court still faced two interrelated legal obstacles. The first was the "fairness doctrine" that the Court used to determine whether the right to counsel was unconstitutionally foreclosed in criminal cases. This doctrine cohered around "special circumstances"—specifically when a defendant was illiterate or a juvenile—and was usually the only time the Supreme Court overruled a conviction where an individual was not provided counsel. This unworkable principle emerged out of the 1942 *Betts* decision, which did not require counsel in non-capital state cases. In one case, Justice Black, who voted in favor of *Betts*, criticized the decision and stated "twenty years' experience in the state and federal courts with the *Betts v. Brady* rule has demonstrated its basic failure as a constitutional guide. Indeed, it has served not to guide but to confuse the courts as to when a person prosecuted by a State for crime is entitled to a lawyer."¹⁷² In essence, local courts were tasked with the responsibility to decide whether it was appropriate or not to appoint counsel, and risked being overruled in the appeals process if they did not, which caused judicial uncertainty and inefficiency as opposed to having a more bright line rule. This problem was layered by Black's correct observation that "all defendants who have been convicted of crime

National Health Service Act 1946 (which provided free, "cradle to the grave," universal health care and posed additional problems for the American legal profession).

¹⁷⁰ Some representative cases include *Yates v. United States*, 354 U.S. 298 (1957) (requiring encouragement of government overthrow as opposed to simply holding beliefs to violate the Smith Act); *Watkins v. United States*, 354 U.S. 178 (1957) (limiting the power of House Committee on Un-American Activities); *Kent v. Dulles*, 357 U.S. 116 (1958) (overturning the practice of denying passports to individuals suspected of having Communist affiliations). For a history of the Supreme Court's treatment of McCarthyism pre and post 1953 see Lichtman (2012).

¹⁷¹ E.g. *Brown v. Board of Education*, 347 U.S. 483 (1954) (striking down separate but equal public schools); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that electoral districts that were created to disenfranchise African Americans violated the Fifteenth Amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting freedom of the press); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (ruling that the Constitution created a right to privacy)

¹⁷² *Carnley v. Cochran*, 369 U.S. 506, 518 (1962).

without the benefit of counsel cannot possibly bring their cases to us” due to financial resources or knowledge about the appeals process. Black's opinion in this case, *Carnley v. Cochran* signaled the Court's willingness to overturn *Betts* and mandate the right to legal aid in state felony cases, but it was not the opportune moment. First, Justice Frankfurter (the fierce protector of states' rights who would have dissented) suffered a stroke and did not participate in the decision. Justice White also did not take part in the decision, which led Chief Justice Warren to believe that it would be unwise to overrule an important precedent by a bare majority in a seven-person Court (Schwartz 1996: 111). Moreover, the details of *Carnley* were not appealing; it involved a defendant who was accused of molesting and having incestuous sexual intercourse with his 13-year-old daughter. Issuing a landmark ruling with such abhorrent accusations in the background would have been a public relations nightmare for a Supreme Court that was already receiving flak for its ruling in *Brown v. Board of Education* and would continue to be criticized for being too lenient on the criminally accused (Flamm 2005). Instead, the Court wrote a narrow ruling in *Carnley* that focused only on the merits of the case.

Gideon v. Wainwright did not pose these problems.¹⁷³ Indeed, Supreme Court biographer Bernard Schwartz (1983: 458) claims that one of Chief Justice Warren's former clerks was instructed by a former clerk to “keep your eyes peeled for a right to counsel case. The Chief feels strongly the Constitution requires a lawyer.” Clarence Earl Gideon was a white man in his early fifties who was an eighth-grade dropout and spent the majority of his adult-life drifting between prison and poverty. In the early summer of 1961 Gideon was charged with feloniously breaking and entering into the Bay Harbor Pool Room in Panama City, Florida. Change and alcohol were stolen from the poolroom and one witness claimed to see Gideon walk out of the establishment with wine and pockets bulging with coins; both of these claims were not favorable accusations against an individual with a criminal record littered with petty crimes. Gideon could not afford an attorney due to his impoverishment, and asked the court to appoint attorney for him. This request was denied because Florida only appointed attorneys for indigent clients in capital cases where the defendant might be executed. Gideon was forced to conduct his own defense, and lost. While incarcerated, Gideon studied the law and appealed to the Florida Supreme Court but was denied assistance. He subsequently mailed a hand-written petition (filled with grammatical and legal errors) to the Supreme Court, which agreed to hear his case and assigned future Supreme Court Justice Abe Fortas to the case. The Court directed the attorneys for Gideon and the state of Florida to consider the following question in their legal briefs and their oral arguments: “Should this Court's holding in *Betts v. Brady* be reconsidered?”¹⁷⁴

A unanimous Court reversed the decision in Gideon's case and overturned *Betts* while reasoning, “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him... this seems to us to be an obvious truth. 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” (*id.* at 344). Gideon's case was sent back to the lower court where he was retried and found not guilty. At the time of the decision,

¹⁷³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁷⁴ *Gideon v. Cochran*, 370 U.S. 908 (1962)

it was generally understood as a success within the field of law. The removed restraints of McCarthyism in the early 1960s arguably led the legal profession to push more forcefully for a national right to counsel in ways that would have been professionally suicidal in the 1950s. Between 1956 and 1962—the time period where McCarthyism subsided and liberal justices Warren and Brennan were appointed—legal journals were stocked with articles that recognized the right to legal aid (e.g. Trebach 1956; Schilke 1959; Brennan 1961; Kamisar 1962). Richard Ervin, who was the Attorney General of Florida, the state opposing *Gideon*, solicited briefs from other state attorney generals with the hopes of convincing the Court to rule against a national right to counsel. This request failed miserably. Florida was only able to get a supporting brief from Alabama and North Carolina; these states characterized a national right to legal aid as “socialism” and stubbornly believed that “even he who appears in court for the first time and is unattended by counsel, though not understanding it, usually can negotiate the ‘labyrinth’ of a criminal prosecution.”¹⁷⁵ Conversely, twenty-two states filed a brief in support of *Gideon*.¹⁷⁶ Such support was unprecedented; leading criminal law professor Yale Kamisar (1990: 345) remarked, “I know of no other instance where so many of the states’ chief law enforcement officers asked the Court to expand the rights of the accused...I think it fair to say, however, that it occurs about as often as the appearance of Halley’s Comet.” The supporting briefs unequivocally urged the Court to require counsel in all state felony cases and indexed the shift in the legal profession toward support of a national right to counsel.

Media and popular opinion was mixed. In one sense, the decision in *Gideon* was popular because it represented the American story of “rugged individualism” and “the David-and-Goliath plot that we Americans love, [where] the under educated common man takes on the fancy-pants bigwigs at the Supreme Court” (Huppert 2013: 63) Unlike earlier cases that involved black defendants, people accused sexual violence, and/or mentally incompetent individuals—all of whom exist in groups that broader public might not readily identify with—Clarence Earl Gideon was seen as more sympathetic figure. He was a poor, old, white man who was denied justice. His triumphant narrative, along with the Court’s ruling in the case resonated with many Americans’ idea of fairness and equality. The story was documented in the award winning book and movie *Gideon’s Trumpet*, and invoked the Judeo-Christian narrative of Gideon, which entailed a similarly unlikely victory by an unmatched opponent.¹⁷⁷

But the case also provoked the ire of a portion of the American populace because it was applied retroactively to cases decided before it and led to the release of hundreds of prisoners. When *Gideon* was decided the majority of states regularly appointed counsel in criminal cases and the decision simply institutionalized that practice. At least fifteen states did not appoint counsel in non-capital state cases. The retroactive application of *Gideon* meant that convicted prisoners tried in cases where they were not appointed counsel could appeal their convictions, and that is what happened. Retrials of cases were

¹⁷⁵ Amicus Curiae Brief for the Respondent at 11, *Gideon v. Cochran*, No. 155 (U.S. Dec. 20, 1962).

¹⁷⁶ Brief for the State Government Amici Curiae, *Gideon v. Cochran*, No. 155 (U.S. Nov. 23, 1962).

¹⁷⁷ Lewis (1966); Collins (1980).

difficult since witnesses and evidence may have disappeared. Many convicted prisoners were released to the chagrin of some Americans. The exact number of prisoners released is unknown since many states did not keep these records but was purported to be in “the thousands” (Jaffe 1964). Notably, an article in *Los Angeles Times* titled “Legal Escape” exploited this ambiguity and represents some of the alarmist responses to *Gideon*. The article features a caption of prisoners being freed from their cells and began by stating, “the greatest prison break of all time has quietly been going on...hundreds of prison-hardened criminals are walking out of their jail cells scot-free” (Jaffe 1964). Thus, while some saw *Gideon* as an important decision that upheld American notions of equality, many others imagined the decision as another instance of judicial impropriety and the Court being soft on crime. This latter perspective would only harden as the tumultuous 1960s continued and the public face of criminality began to change (Scheingold 1984; Beckett 1997).

Of course, racial minorities have always been representatives of urban criminality. But this symbolism intensified in the 1960s with the mushrooming of the civil rights movement, the various riots during the decade, the rise in civil disobedience tactics, and actual increases in crime. The Warren Court’s due process revolution—which expanded the rights of the criminally accused—was understood as something that principally benefitted unruly, inner-city minorities. Although Jim Crow cases like the Scottsboro Boys, *Brown*, and *Chambers* involved racial minorities, these cases were sequestered in the Deep South and understood as instances of obvious injustice, even by northern and western liberals who had their own unchecked biases.¹⁷⁸ As the 1960s continued, the defendants in many of the Supreme Court criminal procedure cases lived in more metropolitan areas and their innocence seemed more doubtful to the general public. Thus, in the same ways that welfare has been misunderstood as a social welfare provision that is exclusive to blacks and Latinos, due process protections like legal aid began to be similarly understood as solely advantageous to racial minorities despite a century long history of mainstream organizations catering primarily to whites. Post-*Gideon* cases like *Escobedo v. Illinois*¹⁷⁹ and *Miranda v. Arizona*¹⁸⁰ only strengthened these assumptions.

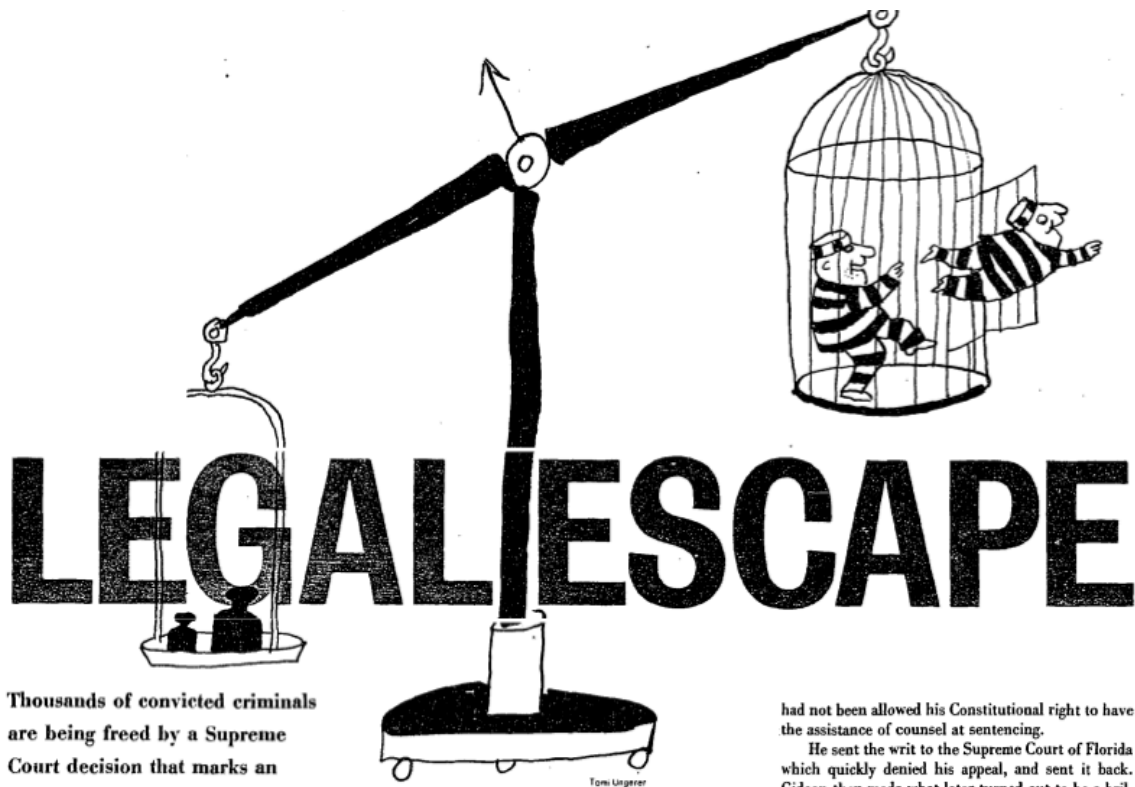
In January 1960, the Chicago Police Department arrested Danny Escobedo, a “22-year-old of Mexican extraction.”¹⁸¹ Escobedo was detained for allegedly killing his brother-in-law Manuel Valtierra because of the latter’s domestic abuse toward his wife Grace Valtierra, Escobedo’s sister. While in police custody, officers attempted to prod Escobedo into confessing to the crime and told him that another suspect identified him as the shooter. Escobedo refused to confess and repeatedly asked to see his attorney but was denied by the police who told him that although he was not formally charged, “he was in custody” and “couldn’t walk out the door” (*id.* at 469). Simultaneously, Escobedo’s attorney was at the police precinct and demanded to see his client, but was also refused and told he could not see him until the police finished their questioning. During the interrogation, Officer Montejano, who was also Latino and grew up in Escobedo’s

¹⁷⁸ For discussions on north racial tensions in the North during this time period see Biondi (2006); Countryman (2007); Sugrue (2009); on the West see Sides (2003); Murch (2009).

¹⁷⁹ 378 U.S. 478 (1964)

¹⁸⁰ 384 U.S. 436 (1966)

¹⁸¹ *Escobedo*, at 482.



Thousands of convicted criminals are being freed by a Supreme Court decision that marks an important but costly milestone in Constitutional liberty

By **GEORGE J. JAFFE**

† A man, 24, sentenced in 1961 to 20 years for armed robbery.

How hundreds like these four have been released

had not been allowed his Constitutional right to have the assistance of counsel at sentencing.

He sent the writ to the Supreme Court of Florida which quickly denied his appeal, and sent it back. Gideon then made what later turned out to be a brilliant decision. Usually, when the Florida Supreme Court bounced such appeals back the prisoner forgot about any further appeal. Gideon, however, decided to follow the one course remaining to him: an appeal to the U.S. Supreme Court.

This Gideon did. The rest of the story is legal

Article from the February 16, 1964 edition of the *Los Angeles Times*

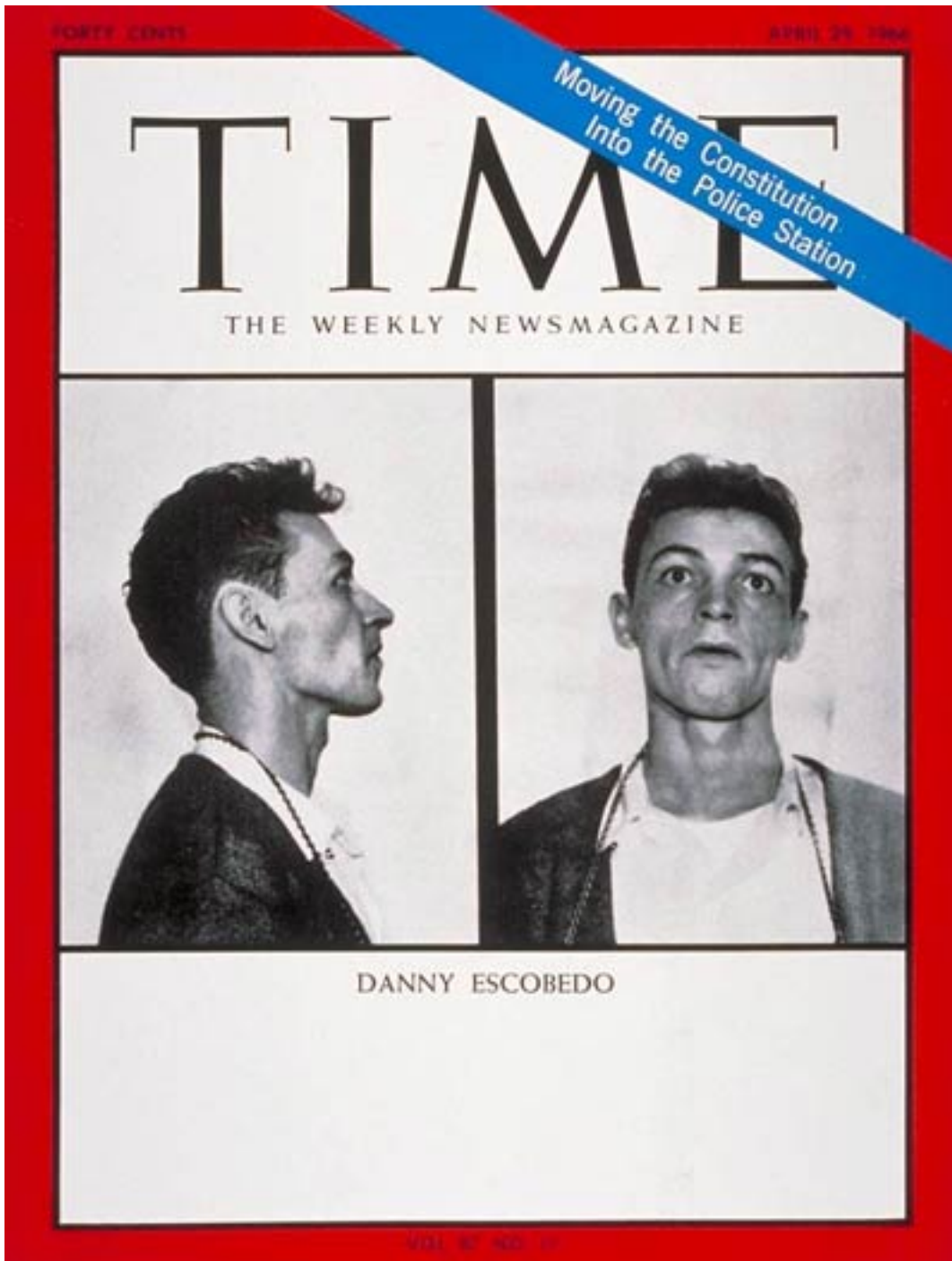
neighborhood, conferred with Danny alone for about fifteen minutes in Spanish and told him that his sister, who was also arrested, would be able to go home if he made a statement. Unaccompanied by counsel, Escobedo made incriminating statements that implicated him in the alleged murder-for-hire and was sentenced to twenty years in prison. He eventually appealed to the Supreme Court and argued that his statements to the police, after he affirmatively requested counsel, should have been excluded. A slim 5-4 majority on the Court agreed. Unlike the unanimous *Gideon* decision a year before, the American public considered the *Escobedo* decision a miscarriage of justice. In a terse dissent Justice Harlan wrote, "I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement" (*id.* at 493). Interestingly, Harlan made these comments as a jurist that was either unfamiliar with the Chicago Police Department's historically questionable practices or aware but undisturbed with such conduct (Harland 1912; Kohn 1953). Nevertheless, public opinion agreed with Harlan's dissent. One writer penned, "the public, the police, and the press viewed him [Escobedo] simply as a convicted killer released by

a meddling Supreme Court on a ‘mere technicality’... five justices on the nation's highest court simultaneously slipped on a stray banana peel and were enveloped in the fog of libertarian idealism” (Kroll 1974: 10). Critics generally believed that the decision irresponsibly hampered law enforcement efforts and brought defense lawyers “into an important police workshop—the interrogation room” (Dowling 1965: 143). A 1966 cover of *Time* magazine corroborated this point and prominently featured Escobedo’s mugshot on its cover with the caption, “Moving the Constitution into the Police Station.” Constitutional protections for racial minorities in the Jim Crow South were one thing; but extending such protections in the racially fraught inner cities of the 1960s was a completely different animal. Overall, the Escobedo case affirmed the right to counsel, particularly in the context of police interrogations. This affirmation provoked the ire of an American populace that equated race with criminality.

No case in criminal jurisprudence caused as much of a split in public opinion as *Miranda v. Arizona*, a case that has been ranked as the third most controversial Supreme Court case behind *Brown v. Board of Education* and *Roe v. Wade* (Sanburn 2010). *Miranda* consisted of four consolidated cases that addressed police interrogations and the notification of constitutional rights for the criminally accused. The lead case involved the Phoenix Police Department’s 1963 arrest of Ernesto Arturo Miranda for the kidnapping and rape of an 18-year-old woman. After two hours of interrogation, the Phoenix police produced a written confession that was signed by Miranda. The document acknowledged that the confession was made voluntarily and without any threats. Miranda was later convicted of kidnapping and rape in the lower court and sentenced to twenty-three years on each count. He unsuccessfully appealed to the Supreme Court of Arizona, and argued that his confession was unconstitutionally obtained because he was not informed about his right to an attorney.

Despite admitting that “the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies,” (*id.* at 456) another narrow 5-4 majority agreed with Miranda and overturned his conviction. In the process, the Court created a new standard for police arrests and interrogations that further impacted the legal aid environment and tightened the relationship between the Fifth Amendment right against self-incrimination and the Sixth Amendment’s right to counsel. The Supreme Court’s ruling produced what are commonly known as “Miranda rights” or “Miranda warnings,” which require law enforcement to inform individuals in police custody about their right to remain silent; their right to consult an attorney before speaking to police; the state’s provision of an attorney if the suspect cannot afford one; as well as the possibility that anything the suspect says or does may be used in court, amongst others. In a lengthy dissent, Justice Harlan again complained about the majority's decision and highlighted the fact that Miranda’s confession was not coerced, occurred during day time, and did not entail the gruesome details that Supreme Court cases entailed only a few decades before. Harlan deplored how “responsible” police practices were being “sacrificed” for “the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country” (*id.* at 519). At this point in American history, Harlan’s assumptions about public opinion were right.

Gregory A. Caldeira’s (1986) well-cited quantitative study demonstrated that as the Warren Court continued to expand the rights of the criminally accused, public confidence in the Court continued to decrease; others have shown that by 1970, 77% of



April 29, 1966 cover of *Time* magazine

individuals polled believed that the Supreme Court's decisions made it too easy for criminals to escape punishment. Public dissatisfaction with crime helped foment the "law and order" platform that helped Richard Nixon prevail in the 1968 election (Persily et al 2008: 54). Nixon voiced the outlook of a large section of the American populace in a May 1968 position paper titled "Toward Freedom from Fear." This piece emphasized to voters that the Supreme Court's "barbed wire of legalisms" were "erected to protect a

suspect from invasion of his rights” but “effectively shielded hundreds of criminals from punishment” (Nixon 1968: 13). Nixon pointed specifically to *Miranda*, *Escobedo*, and similar decisions, which he argued “set free patently guilty individuals on the basis of legal technicalities,” hampered police efforts, and “strengthened society’s criminal forces” (*id.* at 12). Thus, while *Gideon* was seen as less controversial, the decisions that it helped spawn led to negative responses from the media, the American public, the executive office, and the legislative branch. Nixon’s subsequent appointment of four conservative judges, the passage of conservative legislation, and augmentation of criminal justice administration all changed the landscape of legal aid at a time where it finally became a federal entitlement. In the same ways that the advances of the civil rights movement were quickly truncated by the conservatism of the 1970s and 1980s, the prospective benefits of legal aid bureaucratization post-*Gideon* was limited by a general public that was less concerned with the criminally accused and more concerned with punishment. It was at this point that mass incarceration picked up ideological and administrative momentum.

Judicial Motivation and Legal Aid Development from Early to Mid-Twentieth Century

Overall the Supreme Court’s criminal legal aid jurisprudence offers a few socio-legal lessons. In the first two decades of the twentieth century, the Supreme Court was virtually unwilling to meaningfully engage how racial animus impacted criminal proceedings in the South. The Court continued to sanctify federalism and looked the other direction while southern states engaged in sham court proceedings. It took a Great Depression, a 1931 international scandal featuring nine black boys falsely accused of rape, two young white women, and involvement by the Communist Party for the Court to take substantive steps in the sphere of legal aid. This Court, which was inspired by the New Deal’s rejection of *laissez-faire* ideology, took a more activist approach toward providing constitutional protections during the 1930s. But states’ rights remained a concern throughout the 1940s and forced the Court to juggle its concerns about federal overreach while in the post-World War II limelight. During this time, a key question sat in the geopolitical background: how could a country that fashioned itself as a global leader be rife with accounts of barbaric police practices? How would the country provide the aura (or reality) of legitimacy to the general and international public?

The Court continued to struggle with this question and McCarthyism complicated the answers. Judicial reticence in the area of federalism, coupled with the juxtaposition of government-funded legal aid with communism stifled a national right to legal counsel in the 1950s. The 1954 entrance of Chief Justice Earl Warren and a solid bloc of Supreme Court judges throughout the 1950s and 1960s (the first since the New Deal), helped generate a host of decisions in the area of criminal procedure that solidified the right to counsel and government funded legal aid in criminal cases. The Warren Court’s jurisprudence—animated by a hodgepodge of altruistic concerns about the rights of society’s most vulnerable, societal turmoil, and social control interests—all highlight the complex nature of criminal legal aid’s development. Despite what was in hindsight valiant efforts in judicial activism for the marginalized, the Warren Court’s advances in criminal law would be disemboweled by later decisions handed down by the conservative Burger Court in the 1970s and the hyperconservative Rehnquist Court of the 1980s and 1990s. This jurisprudential atrophy, discussed in the conclusion, is a reminder of the temporal brevity of liberal phases in American history, most of which coincide with legal

aid's development (e.g. abolitionism, the Freedmen's Bureau, Progressive Era, New Deal, Warren Court). The emaciation of liberal, legal doctrines is also a reminder of the generally conservative posture of the American legal field—a posture that still haunts the American court system and the public defender system today.

Conclusion: Legal Aid and Mass Incarceration

“A lot of black cats end up in prison solely because they didn’t have someone to really present their cases in court. They’re left with the public defenders, who prison inmates quite accurately call “penitentiary deliverers.” I’ll tell you what usually happens. Its the common practice of the police to file ten or so charges on you, and then the public defender comes and says, ‘Look, we can’t beat them all, so the best thing you can do is plead guilty on one count. If you do that, I can get the other dropped.’ So a black cat is sitting there without real legal help, without money and he knows if he’s convicted of all ten counts, he’ll get a thousand years. He’s in a stupor of confusion and winds up taking the advice of the public defender. He doesn’t know the law. He doesn’t know how to make legal motions. He doesn’t really know what’s going on in the courtroom.” Eldridge Cleaver (2007: 155) 1968 Interview with Playboy Magazine.

The advent of the nationalized public defender scheme that emerged from *Gideon v. Wainwright* invited penal promise and peril. Amidst increasing social unrest, the Supreme Court continued to develop criminal jurisprudence in the 1960s and 1970s in a manner that offered an ostensible legal safety net for the criminally accused. The right to counsel was extended to juveniles and misdemeanants in *In re Gault* (1967) and *Argersinger v. Hamlin* (1972), respectively.¹⁸² During the same time period, the possibilities for legal aid on the civil side seemed similarly encouraging. In 1964 the federal government established the Office of Economic Opportunity (OEO) as part of Lyndon B. Johnson’s Great Society program. In addition to initiatives like Head Start, Job Corps, Community Action Programs, AmeriCorps VISTA, and National School Lunch Program, OEO developed neighborhood legal services offices that assisted poor urban residents in legal matters. The “poverty lawyers” who worked in these neighborhood offices played key roles in shaping law, and by default, poor peoples’ lives. These attorneys went to the Supreme Court and won legal cases that involved state restrictions on welfare benefits to citizens who resided in the state for at least a year,¹⁸³ welfare denials to families who had non-biological fathers living in homes,¹⁸⁴ and terminations of public aid without evidentiary hearings.¹⁸⁵ As Martha Davis (1993:10) describes in her book on welfare rights lawyering, these attorneys appealed an astounding 164 cases to the Supreme Court between 1965 and 1974, a number that outstrips any other decade, as well as the history of legal aid up until that point.

Nevertheless, conservative forces quickly undermined the legal aid gains of the poor in the 1970s and 1980s in ways that are quite similar to the Freedman’s Bureau discussed in the first chapter. On the civil side, where there is no constitutional entitlement to legal aid, the Nixon administration and Republican supporters eviscerated the program due to concerns around the seemingly political nature of neighborhood law services and their repeated lawsuits against the government (which they saw as inefficient, wasteful, and ideologically problematic) (Hoff 1994; Teles 2008). The Legal Services Corporation (LSC) picked up the work. Congress created LSC in 1974 with the purpose of dispensing federal funds to nonprofit civil legal aid organizations across the country. This newly formed organization had more specific restrictions on the kind of work

¹⁸² 387 U.S. 1 (1967); 407 U.S. 25 (1972).

¹⁸³ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁸⁴ *King v. Smith*, 392 U.S. 309 (1968).

¹⁸⁵ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

lawyers could perform. These restrictions intensified throughout the 1980s with Ronald Reagan's attempted dismantling of the program, which was part of larger efforts to reduce the volume and scope of government. LSC survived the severe budget cuts of the Reagan era and limped into George H.W. Bush era. LSC saw budget increases under the Clinton administration (a byproduct of a thriving economy as well as Hillary Clinton's close relationship with the organization as a former board of director). Nevertheless, the organization was unable to address the unmet legal needs of the American poor at the turn of the twenty-first century (Rhode 2004). The economic downturn of 2007 and congressional gridlock on legal aid funding (and social welfare spending more generally) has led to a current civil legal aid environment that is markedly different from its 1964 iteration.

On the criminal side, legal aid has not fared much better. Since *Gideon*, criminal legal aid has emerged as an often-unacknowledged component of the welfare state and an underappreciated component of the penal state. In 2007, the American government spent \$2.3 billion on public defender programs, with state and county-based programs handling 5.5 of the approximately 5.6 million cases nationwide (Langton and Farole, 2010; Farole and Langton, 2010). In short, most people who are accused of a crime received some form of state-funded legal aid. The problem with legal aid, like other social welfare services (e.g. welfare benefits, education, public housing, food assistance), is that the level of support is sometimes so inadequate that it is almost perfunctory, which harkens back to the Freedmen's Bureau underfunding. A particularly salient issue is the *quality* of defense, an issue that has plagued legal aid since the days of the Progressive Era assigned counsel system.

Quality of legal defense is usually framed under the two-pronged trope of "ineffective counsel." The first form typically deals with egregious cases of incompetent attorneys. In the 1984 case *Strickland v. Washington*, David Leroy Washington pled guilty to three capital murder charges that had death penalty consequences.¹⁸⁶ Washington admitted to committing a string of robberies, but noted that he had no significant criminal record. He also argued that he was considerably stressed when he committed the illegal acts due to his inability to support his family. Washington's lawyer did not request a psychiatric examination or character witnesses—both of which are seen as important tactical moves in such cases. In absence of such evidence, the trial court was unmoved and sentenced Washington to death. He appealed to the Supreme Court who ruled against him. The Court also developed a standard for future consideration of ineffective counsel claims. For such cases, the Court required that defendants must first show that his counsel's representation was defective and fell below "an objective standard of reasonableness" (*id.* at 669). While acknowledging that courts should have high deference to the latitude of attorney performance ("to eliminate the distorting effects of hindsight"), the Court then required that defendants show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different" (*id.*). In a blistering response, Justice Thurgood Marshall, the only dissenter, critiqued the majority's "unhelpful" and "unacceptable standards" (*id.* at 707). Marshall highlighted how the Court's standard was almost akin to a guessing game and noted that "it is often very difficult to tell whether a defendant convicted after a trial in which he was

¹⁸⁶ 466 U.S. 668 (1984).

ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel” (*id. at 710*). Marshall also recognized the ambiguity that could come with the Court’s reasonableness standard as it related to compensated attorneys. After highlighting the difference between paid-for and state-sponsored legal counsel, he questioned, “is a ‘reasonably competent attorney’ a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?” (*id. at 707*). Thirty years after *Strickland*, Marshall’s skepticism appears well placed. Since the decision, conservative jurisprudence has disemboweled the spirit of *Gideon* via generous if not ludicrous interpretations of what constitutes “effective counsel.” Indeed, there have been a host of cases where counsel has been considered effective despite: sleeping through parts of the trial; using heroin and cocaine during the trial; and coming to trial drunk, with one attorney being arrested for driving to court with a .27 blood alcohol content (Cole 1999, 76-81).¹⁸⁷

Perhaps less egregiously, but similarly troubling is the reality that the mere volume of cases public defenders handle can easily induce occupational burnout and compassion fatigue. Liberal and conservative opponents of federally funded legal aid predicted this. Russell Sage Foundation researcher Esther Lucille Brown (1938: 257) warned that, “the defender would become so hardened to the stories of defendants that he might become indifferent to the justice of each case...as the result of indifference and lack of enthusiasm, he would likely recommend pleas of ‘guilty’ be entered.” Brown was not alone in portending such undesirable consequences of public defender bureaucratization. As described in chapters three and five, radical progressives who desired a more fundamental reformation of the criminal justice system, along with skeptical conservatives who were concerned about governmental largesse were both worried about the kinds of cooptation that public defender expansion would invite. Autobiographical and journalistic accounts of indigent defense seem to suggest that such burnout and cooptation is the case for public defenders in some parts of the country (e.g. Feige, 2006; Bach, 2010).

Ineffective counsel is also a result of the financial limitations and organizational constraints legal aid attorneys inherit. These attorneys are often unable to perform adequately due to the lack of institutional and political independence. Legal aid is often tethered to and regulated by politicians and judges (through tightfisted funding from legislators and judicial control of approval for investigators and expert witnesses). Indigent defense attorneys are overworked and typically exceed the national standard caseload. They are also under-resourced, with most offices not having enough attorneys or personnel to meet caseload guidelines. Government research confirms this tragedy.

In the United States, public defense is funded through states (in 22 states) or counties (in 28 states). Department of Justice data show that “more than 7 in 10 county-based offices had an insufficient number of attorneys to meet the professional guidelines,”

¹⁸⁷ It is worth noting that a year before *Strickland*, the Court ruled in *Morris v. Slappy*, that the Sixth Amendment right to counsel does not give defendant right to “meaningful relationship” with her attorney. 461 U.S. 1 (1983).

whereas “15 of the 19 reporting state programs exceeded the maximum recommended limit of felony or misdemeanor cases per attorney” (Farole and Langton, 2010; Langton and Farole, 2010). As of 2013, the fifty-year “anniversary” of Gideon, United States Attorney General Eric Holder described the pitiful state of indigent defense as “unacceptable” and “unworthy of a legal system that stands as an example for all the world” (Cohen, 2013). Across the country from Nevada to Missouri, New York City to Miami, attorneys are carrying more than twice their recommended caseloads on meager budgets and work in in backlogged criminal bureaucracies where the accused linger in jail for months and sometimes years awaiting trial (Baxter, 2012; Dandurand, 2011; Giovanni and Patel, 2013; Glaberson, 2013; Houppert, 2013; McAlister, 2009). These organizational restraints often temper the abilities of the many committed, hardworking legal aid attorneys working across the country and lead many of them to be perceived as the “public pretenders” that Eldridge Cleaver laments about in the beginning of this conclusion, or be perceived that way by their clients irrespective of their legal efforts. Overall, the expansion of public defender offices has been a mixed bag of success. In one sense, it has offered more constitutional protections to the criminally accused. On the other hand, the protections have been so minimal that what might be thought of as a safety net almost mimics a dragnet, with plea-bargain friendly public defenders serving as important bureaucrats in the criminal justice system.

Unfortunately, public opinion of indigent defense is not encouraging. Despite majoritarian, abstract support of quality indigent defense, most Americans do not want to spend money on legal aid. In response to the query “do you think the government should be spending more or spending less on legal defense for people who cannot afford a lawyer, or should the government keep the funding about where it is now,” more than half respondents in the last notable study on legal aid believed that funding should be the same (Belden 2001). Although there is bipartisan agreement on the need to address our current penal disaster, fiscal austerity measures suggest that improving the quality of legal aid might not fit into this endeavor. Misguided public opinion on who benefits from social welfare spending and who commits crime arguably plays a meaningful role in the United States’ willingness to substantively fund legal aid.¹⁸⁸

This brings us back to the key argument that has driven each chapter in this dissertation, as well as the overall project. Legal aid has and always will be animated by competing interests and motivations that include investments in the rule of law, self-interest, the pesky persistence of classed, racialized, and gendered social control, the political economy of punishment, serious commitments to egalitarianism and desires to offer a symbolic appearance of justice to legitimate the criminal legal system. Actual concerns about egalitarianism, rule of law, and justice for the accused have always been important features of legal aid developments. Abolitionists lawyers who provided legal aid to people formerly in bondage were influenced by these noble ideas. Gilded Age and Progressive Era reformers who were concerned about working womens’ and newly-

¹⁸⁸ Quillian and Pager’s (2001) research demonstrates how an increase in a neighborhood’s black male population is positively associated with perceived crime among residents despite any real association between race and crime, while Martin Gilens (1999) illustrates how the media has been the primary culprit in misrepresenting the racial/ethnic representation of welfare rolls as well as fomenting whites’ negative ideas toward welfare and their belief that blacks constitute “the undeserving poor.”

arrived immigrants' susceptibility to chicanery also believed in fairness and equality. The same could be said about a Warren Court that played an important role in expanding constitutional interpretations of legal aid.

But self-interest and symbolism always lurked in the background and was manifested through abolitionist concerns about "slave power," working women's interest in offering legal protections to white women to the exclusion of black women, and political consternation around the United States' global image amidst state-sponsored legal inequality at home. In a contemporary sense, this hodgepodge of self-interest, symbolism, and altruism reveals itself through public defenders who enter this line of work because they believe in helping the poor and downtrodden, whereas other attorneys do it for themselves.¹⁸⁹ This occurs against a backdrop of symbolic, constitutional guarantees that the United States has admitted have gone unfulfilled (Farole and Langton 2010; Langton and Farole, 2010).

Political economy, along with racialized, classed, and gendered social control has also influenced the development of legal aid. The federal government developed the Freedmen's Bureau with the explicit purpose helping African Americans transition into citizenship in a post-slavery economic world. Interestingly, the Bureau performed double-duty in its social control capacities. First, in its role as a protector of black rights, it regulated the behavior of poor southern whites as well as whites who formerly profited from human bondage—both of whom looked with resentment and hostility at their new civil peers. Second, the Bureau protected blacks in some instances, much like criminal legal aid attorneys today, but they were also complicit in coercing blacks into slavery's replacements (e.g. convict-leasing, sharecropping, apprenticeship) in ways that are eerily similar to some public defenders' uncritical plea bargaining.

The working women's protective unions of the Gilded Age developed in response to white women's entrance into the post-Civil War workforce as well as their steady push for inclusion into the polity. In this context, social control efforts were simultaneously benign and harmful. These unions productively monitored women's presence in the marketplace and served as a check against the male-on-female physical and economic violence that was common during this time period. Nevertheless, unions' exclusion of domestic workers, the majority of whom were black and Irish, denied them of legal protections that were important to attaining some semblance of human dignity and citizenship. Relatedly, in the beginning of the twentieth century, social control efforts of legal aid reformers focused on southern and eastern Europeans who were seen as the primary candidates for communism. Legal aid served as a palliative that curbed what was at that time, unprecedented levels of social unrest. Paradoxically, blacks, Latinos, and

¹⁸⁹ This is best explored in one of the few, recent empirical studies on public defenders. One of Weiss' (2005: 66) respondents hints towards this selfishness when he states, "there's a selfishness to criminal practice. Litigation in general. Most litigators in general. But for defense attorneys because of the way you showboat your cases- a little bit more. It's more prevalent, I've found, with criminal defense lawyers. There comes a point where your clients' needs, in a lot of ways, are secondary. Yes, you're trying to win the case for your client. And obviously, I don't want this person to go to jail if I can get them off. But to some extent, it is: "I don't want them to go to jail, because I want to win my case. And this becomes, my fight. My case. Which I'll do my way. To please me." Pleasing myself by how good a time I have in court. And as a lucky side effect of that, it happens to be good for the client as well."

Asian Americans were not under the social control purview of legal aid reformers; police and vigilante violence fulfilled that role. The immigration restriction of the 1920s, the Great Depression of the 1930s, along with World War II and the Cold War reduced the social control importance of legal aid. But in the 1960s legal aid re-emerged through the constitutional efforts of the Warren Court. At this point, legal aid was rolled out again during a period of social unrest, except this time the audience consisted of poor blacks and Latinos. To be sure, the *Gideon* decision occurred during the modern civil rights movement and before the various riots of the 1960s. It would be difficult to suggest that racial turmoil impacted the *Gideon* decision (especially since the petitioner was a white man). The same, however, cannot be said about *Gideon's* progeny, which was undoubtedly influenced by racial unrest as well as actual increases in crime and crises in legitimacy—all of which were buoyed by economic inequality.

There have been different interpretations of our current penal disasters that focused on post 1970s developments. Mass incarceration has been described as a mode of governance (e.g. Simon 2007), as a poverty-management program (Soss et al 2007), as another stage racialized social control (Alexander 2009), as a tool of regulating labor markets (Western and Beckett 1999) and as way to deal with the excess labor of the deindustrialized, post-Fordist, post-Keynesian state (Gilmore 2007; Wacquant 2009). Irrespective of one's analytical starting point, one thing remains true, public defenders play a crucial role in this development. Legal aid sheds light on a key intermediary between the criminally accused and the state. Although the conservative Burger and Rehnquist Courts did little to improve the role of legal aid as a constitutional provision, there are glimmers of hope. A solid majority of Justices have recently ruled in decisions that suggest room for expanding and improving legal aid. In *Padilla v. Kentucky*, the Court ruled that attorneys must inform undocumented clients that guilty pleas could lead to possible deportation—a decision that is undoubtedly in conversation with immigration law's infiltration into criminal law, as well as the current legal crises at the border involving undocumented, unrepresented youth.¹⁹⁰ In *Turner v. Rogers*, a South Carolina family court sentenced Michael Turner to one year in jail for failure to pay child support.¹⁹¹ Turner provided evidence of his inability to work but he was not provided an attorney. Despite carrying the possibility of incarceration, child support proceedings were considered family law matters and not a under the realm of criminal law. Consequently, Turner had no constitutional entitlement to an attorney. The Court reversed the decision and although it did not require the state to provide counsel to parents, it instructed states to “have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question.” Notwithstanding the Court's careful phrasing (which was an attempt to avoid the appearance of a constitutional right to civil proceedings), the Court seemed to acknowledge the pervasive nature of incarceration, and how it can stem from civil proceedings. Arguably, the right case and right plaintiffs might help change the jurisprudential landscape of legal aid.

In the meantime, the unacknowledged racial and gendered histories of legal aid highlight how the development of this service is deeply political and tied to crucial social justice movements as well as coercive statecrafting imperatives. As durable inequality

¹⁹⁰ 559 U.S. 356 (2010).

¹⁹¹ 131 S.Ct. 2507 (2011).

continues to persist and various constituents attempt to address the deluge of bodies entering the criminal justice machinery, the role of legal aid attorneys will be crucial, whether they are plea-bargain compliant bureaucrats or zealous champions of the criminally accused. As the only allies of criminal defendants (at least in theory), these advocates and social workers, along with their institutional history and empirical context, offer unique insights into incarceration and the management of marginalized populations. At best, their work might offer partial solutions to the country's imprisonment problem, and at least, they provide an alternative institutional and conceptual perspective on our penal status quo—one that differs from the steady chorus of explanations that point to indifferent or callous politicians, hardened criminals, crooked cops, overzealous prosecutors, and discretion-less (or overly-discretionary) judges.

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