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Black on Black Representation

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BLACK ON BLACK REPRESENTATION

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When it comes to combating structural racism, representation matters, and this is true for criminal defense as much as it is for mental health services and education. This Article calls for the expansion of the Sixth Amendment right to counsel of choice to indigent defendants and argues that such an expansion could be of particular benefit to indigent Black defendants. Extending choice to all indigent defendants reinforces the principles underlying the Sixth Amendment right to counsel and can help strengthen the attorney-client relationship. Because an expansion would grant defendants the autonomy to request counsel who they believe would best represent them, Black defendants who prioritize racial congruency and cultural competency may select Black counsel. Empowering indigent Black people to select, should they desire, Black and/or culturally competent public defenders has the potential to offer a range of benefits, including mitigating anti-Black racism in the criminal legal system.

Methodologically, this Article takes multiple approaches. First, it connects indigent representation to existing literature from other fields—clinical therapy and education—both of which recognize the benefits of racial congruency, to support the argument that Black public defenders may benefit Black clients. To explore how same-race representation functions in practice, this Article also relies on qualitative interviews with Black public defenders regarding communication and trust, factors that the American Bar Association identifies as integral to criminal defense. Together, these approaches highlight how expanding choice to indigent defendants might impact Black defendants, something that past choice of counsel literature does not examine. The Article concludes that recruiting more Black public defenders and training culturally competent lawyers are critical next steps regardless of whether the Court expands the right to counsel of choice to people who qualify for appointed counsel.

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INTRODUCTION

In interpreting the Sixth Amendment's assistance of counsel provision, the United States Supreme Court recognized multiple rights, including the right to counsel,[1] the right to conflict free counsel,[2] the right to effective counsel,[3] the right to represent oneself,[4] and the right to counsel of choice.[5] However, the Court's Sixth Amendment jurisprudence limits only one of these rights based on an individual's ability to afford representation: the right to counsel of choice.[6] The Court has repeatedly recognized that the right to counsel of choice "does not go beyond 'the individual's right to spend [their] own

[1] Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (finding that the Sixth Amendment guarantees all indigent defendants the right to counsel when facing criminal prosecutions).

[2] *See* Wheat v. United States, 486 U.S. 153, 159–60 (1988) (describing conflict free counsel as an unwaivable right).

[3] Strickland v. Washington, 466 U.S. 668, 686–87 (1984) (recognizing that the right to counsel includes the right to effective counsel, and establishing the cause and prejudice standard to determine effectiveness).

[4] Faretta v. California, 422 U.S. 806, 819 (1975).

[5] Powell v. Alabama, 287 U.S. 45, 53 (1932).

[6] *Wheat*, 486 U.S. at 159 ("The Sixth Amendment right to choose one's own counsel is circumscribed in . . . [that] a defendant may not insist on representation by an attorney he cannot afford . . . .").

money to obtain the advice and assistance of . . . counsel.'"[7] According to the jurisprudence, an indigent person's right to counsel is satisfied so long as appointed counsel is competent and capable of rendering adequate services.[8] Thus, if an indigent person is dissatisfied with counsel for some reason, unless counsel is incompetent or their conduct is constitutionally ineffective, the individual has no other options. In short, beggars can't be choosers.

The Court's income-based distinction in counsel of choice cases does not comport with the principles underlying the Sixth Amendment. Autonomy, which cuts across income levels, is one such principle.[9] For instance, the Court recognized that "a defendant must be allowed to make [their] own choices about the proper way to protect [their] own liberty."[10] This should include the selection of counsel, as defense counsel is central to protecting a person's liberty interests in the face of criminal charges.[11] Similarly, in *McCoy v. Louisiana*, the Court reaffirmed that the defendant has the "right to make the fundamental choices about [their] own defense."[12]

Central to representation is a trusting relationship.[13] As Justice Brennan explained, "crucial decisions . . . can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence."[14] An attorney-client relationship lacking trust can be corro-

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[7] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) (citation omitted); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) ("[A]n element of [the Sixth Amendment] is the right of a defendant who does not require appointed counsel to choose who will represent him.") (citing *Wheat*, 486 U.S. at 159); Luis v. United States, 136 S. Ct. 1083, 1089 (2016) (plurality opinion) ("[A]n indigent defendant, while entitled to adequate representation, has no right to have the Government pay for his preferred representational choice.").

[8] *See Caplin & Drysdale*, 491 U.S. at 624 (finding that indigent defendants "have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts").

[9] *See Faretta*, 422 U.S. at 819 (explaining that the Sixth Amendment "grants to the accused *personally* the right to make his defense" (emphasis added)); *see also* Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting) (identifying autonomy and dignity as central to a criminal defendant's Sixth Amendment rights).

[10] Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017).

[11] *See Powell*, 287 U.S. at 69 ("Left without the aid of counsel [the defendant] . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.").

[12] 138 S. Ct. 1500, 1511 (2018).

[13] *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 16–24 (2020) (describing the central importance of the lawyer-client relationship to the client's decisionmaking regarding their case).

[14] Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan, J., concurring) (citing Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) ("[B]asic trust between counsel and client . . . is a cornerstone of the adversary system.")).

sive to representation and amount to the denial of counsel.[15] Yet, where a relationship of trust between counsel and the defendant is paramount to effective representation, an indigent defendant can only hope for a trusting, communicative relationship with appointed counsel.[16] In instances where trust fails to form and a breakdown in communication occurs, indigent defendants run the risk of being stuck with what they *could not* pay for.[17]

Differences in race, ethnicity, and culture between counsel and an indigent defendant can create barriers to relationship building, communication, and trust formation.[18] It is at this junction—the right to counsel of choice and race—where this Article resides. This Article calls for the Court to expand the Sixth Amendment right to counsel of choice to indigent people and argues that the expansion could be of particular benefit to Black indigent defendants.

Black people are overrepresented in the criminal legal system, the majority of whom are indigent and qualify for public defenders or appointed counsel.[19] Given the lack of racial diversity in the legal pro-

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[15] *See* Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (finding that defendant's complete loss of trust in his attorney amounted to denial of counsel).

[16] Luis v. United States, 136 S. Ct. 1083, 1089 (2016) (plurality opinion) (recognizing that the "close working relationship between lawyer and client" requires "confidence" and "trust"); *see also Daniels*, 428 F.3d at 1198–200 (granting habeas relief where defendant was effectively denied counsel due to complete breakdown in communication and trust between defendant and appointed counsel).

[17] *See* McKee v. Harris, 649 F.2d 927, 932 (2d Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) (finding that defendant's loss of trust and lack of confidence in appointed counsel did not constitute denial of defendant's right to counsel); Shaw v. United States, 403 F.2d 528 (8th Cir. 1968) (finding lack of rapport and breakdown in communication between defendant and appointed counsel insufficient to constitute ineffective representation where counsel was otherwise skilled and competent); Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985) (holding that "defendant's general loss of confidence or trust in his counsel, standing alone, is not sufficient" to justify substituting defense counsel). *But see* Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970) (granting habeas relief for denial of right to counsel where trial court forced defendant to trial, over defendant's motions for substitute counsel, with appointed counsel with whom there was a complete breakdown in the relationship).

[18] *See, e.g.*, Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42 (2001) ("Lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur."); Christopher Campbell, Janet Moore, Wesley Maier & Mike Gaffney, *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCIS. & L. 751, 764 (2015) (finding that differences in class and race between defendants and public defenders contributed to distrust); CLAIR, *supra* note 13, at 74 (noting that cultural mismatch between lawyer and client "tends to be grounds for mistrust").

[19] In 1996, court appointed counsel represented 82% of defendants in felony cases in state courts in the nation's largest counties, and in 1998, they represented 66% of defendants in federal court. CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000). In 1997, appointed counsel represented 76.6% of

fession, the system overwhelmingly appoints white lawyers to represent indigent Black clients.[20] For instance, over 70% of assistant federal public defenders are white, with white men making up the largest subgroup at 40.5%; among Criminal Justice Act attorneys who federal courts appoint to represent indigent defendants, approximately 80% are white.[21] The existence of anti-Black bias among defense counsel is well-documented.[22] Anti-Black bias in the attorney-client relationship can lead to distrust and misunderstanding, corrode representation, and further reinforce anti-Black racism within the

incarcerated Black people in state court and 64.7% of Black people in federal court, a higher percentage relative to white and Hispanic defendants in both state and federal courts. *Id.* at 9. *The New York Times* noted that "[r]oughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers." Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html. In federal court, for fiscal year 2016, the ethnic breakdown of defendants was 53.3% Hispanic, 20.4% Black, and 22.3% white. U.S. SENT'G COMM'N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT: FISCAL YEAR 2016, at 6 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2016_Quarterly_Report_Final.pdf. Notably, Hispanic defendants are overrepresented in federal criminal cases because they comprise 96% of immigration cases. *See id.*

[20] AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 33 (2020) ("In 2020, 86% of all lawyers were non-Hispanic whites, a decline from 89% a decade ago."); *id.* ("Nearly all people of color are underrepresented in the legal profession . . . . For example, 5% of all lawyers are African American . . . but the U.S. population is 13.4% African American."); *see also* CLAIR, *supra* note 13, at 113 (noting that 75% of public defenders in Boston are white); NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 17 (2016) (finding that 69% of Cook County's public defenders are white, whereas 80% of the indigent clients were either Black or Hispanic).

[21] 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 179–80, 181 (2018), https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf ("[R]oughly 80 percent of responding [Criminal Justice Act] panel attorneys identified as white and male, and more than 60 percent report being 50 years of age or older.").

[22] *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2634–41 (2013) (recognizing that implicit bias impacts the way public defenders evaluate evidence, interact with clients, and accept punishment on behalf of clients); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004) (describing an empirical study in which lawyers more readily identified white faces with "good" and Black faces with "bad"); Joseph J. Avery, Jordan Stark, Yiqiao Zhong, Jonathan D. Avery & Joel Cooper, *Is Your Own Team Against You? Implicit Bias and Interpersonal Regard in Criminal Defense*, J. SOC. PSYCH. 1 (2020) (finding in a study of criminal defense attorneys in forty-three U.S. states that criminal defense attorneys harbor significant implicit bias for white defendants and against Black defendants in ways that impact interpersonal relationships between the client and attorney).

criminal legal system.[23] In one study exploring bias in the legal system, the authors mused: "If police, prosecutors, jurors, judges, and defense attorneys all harbor anti-[B]lack preferences, then the system would appear to have limited safeguards to protect [B]lack defendants from bias."[24]

As a solution, this Article calls for the expansion of the Sixth Amendment right to counsel of choice for all indigent defendants. Extending choice to indigent defendants reinforces the principles underlying the Sixth Amendment right to counsel and can help strengthen the attorney-client relationship. Given the focus of this Article, the expansion would also grant a defendant the autonomy to request counsel who shares their race and/or to select culturally competent counsel[25] if they believed that lawyer could best represent them. Empowering indigent Black people to select, should they desire, Black and/or culturally competent public defenders also has the potential to help mitigate anti-Black racism in the criminal legal system. Current choice of counsel literature does not explore the impact an expansion could have on indigent Black defendants, nor does indigent defense literature address the potential benefits of racial congruency in representation.

Black lawyers often have the experiential knowledge of what it is like to move through the world with the social meaning attached to Blackness and thus, firsthand knowledge of the corresponding treatment and dangers.[26] I call this "embodied empathy."[27] As a result, many Black public defenders have a greater ability to understand and empathize with the stressors and circumstances that resulted in the criminal charges their clients face, and to recognize the humanity in their clients. This embodied empathy enables many Black defenders to build rapport more readily with their clients and to establish trust, both of which can contribute to improved representation. Constitu-

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23 *See* CLAIR, *supra* note 13, at 74–75; GONZALEZ VAN CLEVE, *supra* note 20, at 169–73 (explaining that appointed counsel often perpetuate and participate in the court's racist framework when determining for which clients to zealously advocate).

24 Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1222 (2009).

25 Defined here as a lawyer's ability to recognize the impact that race, ethnicity, and culture have on the client and the client's experiences, combined with the self-awareness of the significance race, ethnicity, and culture have on the lawyer. *See, e.g.*, Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 886–87 (2008).

26 A central tenet of Critical Race Theory is that people of color have "a presumed competence to speak about race and racism" given "their different histories and experiences with oppression." RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 11 (3d ed. 2017).

27 *See* discussion *infra* Part III.

tionally effective representation depends upon a trusting attorney-client relationship.[28] And as this Article demonstrates, Black clients tend to form a more trusting relationship with Black counsel given the shared social meaning assigned to race in this country.[29]

Although indigent defendants from other non-dominant ethnicities and cultures can benefit from culturally competent representation, this Article focuses on the potential impact expanding counsel of choice may have on indigent Black people facing criminal charges. The overrepresentation of Black people in the criminal legal system reflects longstanding structural racism born from slavery and the racial hierarchy that resulted.[30] It also stems from the strength of anti-Black bias that stereotypes Black people as dangerous and criminal.[31] These stereotypes are direct descendants of slavery, which produced a racialized caste system. In her book, *Caste*, journalist Isabel Wilkerson explains: "What people look like, or, rather, the race they have been assigned or are perceived to belong to, is the visible cue to their caste."[32] The public then relies on caste as an "historic flash card" to determine "how [people] are to be treated, where they are expected to live, . . . [and] whether they may be shot by authorities with impunity."[33] Historian Khalil Muhammad calls it "racial criminalization: the stigmatization of crime as '[B]lack'" while simultaneously

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[28] *See* United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (explaining that "mutual trust" between the attorney and client is "necessary to effective representation"); *see also supra* note 14 and accompanying text.

[29] *See* discussion *infra* Part IV.

[30] *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53 (2008) ("Beginning in the late 1860s, and accelerating after the return of white political control in 1877, every southern state enacted an array of interlocking laws essentially intended to criminalize [B]lack life."); SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 126–30 (1997) (describing the criminalization of Black idleness as a tool for the nation to transition away from slave labor into punitive free labor).

[31] *See* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004) (exploring the myth of Black men as "animalistic, sexually unrestrained, [and] inherently criminal" that began during Reconstruction and persists in the criminal legal system); *see also* Buck v. Davis, 137 S. Ct. 759, 776 (2017) (finding ineffective assistance of counsel where defense counsel injected the "powerful racial stereotype—that of [B]lack men as 'violence prone'"—into trial for jury's consideration (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion))).

[32] *See* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 18 (2020); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350–51 (1987) ("The social meaning of racial segregation in the United States is the designation of a superior and an inferior caste, and segregation proceeds 'on the ground that colored citizens are . . . inferior and degraded.'" (citing Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting))).

[33] WILKERSON, *supra* note 32, at 18–19.

"masking . . . crime among whites as individual failure."[34] Studies show that police stop and question Black people at higher rates;[35] prosecutors file more serious charges when the suspect is Black and the victim is white;[36] defense attorneys are more likely to recommend plea bargains for Black clients that impose longer sentences than those they would recommend for similarly situated white clients;[37] and judges and juries impermissibly consider race when determining whether to convict and what sentence to impose.[38]

Foundationally, to support the argument that Black public defenders can offer potential benefits to Black clients, this Article relies on existing literature from other fields—clinical therapy and education—both of which recognize the benefits of same-race representation. To explore how same-race representation functions in practice, this Article relies on interviews with Black public defenders

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34 KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3 (2010).

35 *See* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020) (reporting, based on a study surveying data on approximately 255 million police stops, that "among state patrol stops, the annual per-capita stop rate for [B]lack drivers was 0.10 compared to 0.07 for white drivers; and among municipal police stops, the annual per-capita stop rate for [B]lack drivers was 0.20 compared to 0.14 for white drivers"); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002) (describing why Black men are likely to be stopped by police at higher rates, even in a racially integrated neighborhood).

36 *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796–97, 822 (2012) (concluding that implicit racial bias likely impacts prosecutor decisionmaking at multiple points, including whether to charge or release someone, determining what crime to charge, bail determinations, disclosure of exculpatory evidence, plea bargaining, jury selection, and closing argument). For a general discussion on the role race plays in a prosecuting attorney's exercise of discretion, see Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

37 Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 422 (2011). Interestingly, the study found that attorneys did not necessarily see their Black clients as more guilty when recommending a plea with a longer sentence—they actually perceived their white clients as more guilty. *Id.* When asked about likeliness of the client having committed the crime (and after the study made race salient) attorneys may have been compensating "to appear *un*biased and egalitarian." *Id.*

38 *See* Justin D. Levison, Huajian Cai & Danielle Young, *Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO STATE J. CRIM. L. 187, 204 (2010) (finding significant association between Black and guilty among participants in implicit association test study); Rachlinski et al., *supra* note 24, at 1221 (administering the implicit association test to state court judges and finding that they harbor implicit racial bias, that it impacts their decisionmaking, but that when prompted about racial bias, the judges were motivated to suppress their bias and appeared to do so).

regarding communication and trust[39]—factors that the American Bar Association identifies as integral to criminal representation.[40]

Existing choice of counsel scholarship does not examine how expanding choice to indigent defendants might impact Black defendants. Most of the literature questions the appropriateness and legality of an income-based distinction, and, based on different theories, argues that the Court should extend choice to indigent people.[41]

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[39] In partnership with the Black Public Defender Association (BPDA), I disseminated a brief online survey to BPDA members inquiring about public defender racial demographics, cross-cultural representation training, recruitment efforts for ethnically diverse attorneys, and whether subjects would be willing to receive follow up contact. I followed up with a subset of Black public defenders who answered in the affirmative, and I conducted individual web-based video interviews with them. I asked each subject open-ended questions about their perception of the relevance of their race in representing Black clients, the formation of the attorney-client relationship, communication, and the development of trust. I conducted these interviews with the approval of Columbia University's Institutional Review Board and the financial support of Columbia Law School. Citations to these recordings will be marked as "Defender No. __," numbered in the order in which the interviews took place.

[40] *See* CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION, Standard 4-3.1(a) (AM. BAR ASS'N 2017) [hereinafter ABA STANDARDS] ("Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client."); Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1005 (2003) [hereinafter *ABA Death Penalty Guidelines*] (Guideline 10.5.C: "Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case . . . ."); *see also* Morris v. Slappy, 461 U.S. 1, 21 & n.4 (1983) (Brennan, J., concurring) ("[C]ounsel's duties [are] most effectively discharged, if the attorney and the defendant has a relationship characterized by trust and confidence." (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.1(a) (2d ed. 1980) (stating that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence")).

[41] *See* Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 87–99 (1974) [hereinafter Tague, *Right to Attorney of Choice*] (advancing an equal protection argument for extending right to counsel of choice); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 76 (1993) (recommending "free market for defense services" where indigent defendants can choose their lawyers to address inherent conflict of interest of state-funded indigent defense); Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 224–29 (1998) (suggesting reimbursement system to extend counsel of choice to poor people to advance constitutional values); Peter W. Tague, *Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England*, 69 U. CIN. L. REV. 273, 277 (2001) (advocating for adoption of England's voucher scheme, enabling indigent defendants to hire a lawyer of their choice to "better align the lawyer's incentives with the defendant's"); Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505 (2015) (explaining theoretical underpinnings of indigent client choice and conventional objections, discussing client-choice model in practice, and suggesting expansion); Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25 (2015) (relying on agency theory to help balance control

For instance, thirty years ago, David Friedman and Stephen Schulhofer argued that extending the right would likely improve the attorney-client relationship, both because the client would be able to exercise agency and the lawyer would have "a self-interested reason to value the satisfaction of his client."[42] Although this Article agrees that extending choice could improve representation, it takes the analysis a step further by elevating the importance of the attorney-client relationship when examining the doctrine. It also argues that extending choice may be particularly beneficial to indigent Black defendants should they choose a Black and/or culturally competent lawyer. In those instances, there is potential to mitigate anti-Black racism in the system. Conversely, existing scholarship makes brief mention of how race may impact the attorney-client relationship and representation.[43]

This Article proceeds as follows. Part I examines the history and principles underlying the Sixth Amendment right to counsel, which are tied to Black people and indigency, arguing that the Court must extend the right to counsel of choice to make good on the constitutional guarantee. Part II asserts that representation matters, exploring same-race relationships in clinical therapy and education to provide a framework for advancing Black on Black representation in indigent defense. Part III defines embodied empathy, the unspoken familiarity among Black people given their shared experience with the social meanings assigned to race. Through firsthand accounts from Black public defenders, Part IV explores how Black on Black representation can impact the formation of the attorney-client relationship, including the quality of communication and the development of trust. This Part also argues that same-race representation may help mitigate anti-Black racism in the criminal legal system and identifies some of the limitations of same-race representation. The Article concludes with a recommendation that recruiting more Black public defenders and

between indigent client and appointed counsel and to help improve indigent defense services); John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 SUP. CT. REV. 117, 118 (2016) (arguing that counsel of choice for poor people should not be justified as advancing autonomy or fairness, but "as a weak, system-level safeguard against socialization of the criminal defense bar"); Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1705 (2016) (arguing that the Supreme Court's "no-choice" language is dicta and that the Court should extend the right to poor people to promote democracy).

42 Schulhofer & Friedman, *supra* note 41, at 104.

43 *See* Tague, *Right to Attorney of Choice*, *supra* note 41, at 80 n.41 (mentioning that indigent defendants likely place greater trust and confidence in attorneys they choose, which is "particularly true in cases involving . . . racial issues if the indigent feels the attorney identifies in some way with him"); Schulhofer, *supra* note 41, at 534 (noting that a "defendant may feel that he will be most comfortable . . . with an attorney of his own race [or] ethnicity").

training culturally competent lawyers are critical next steps regardless of whether the Court expands the right to counsel of choice to people who qualify for appointed counsel.

I
THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE

The Sixth Amendment contains seven procedural protections for those accused of committing a crime.[44] This Article focuses on the right to counsel, derived from these words: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[45] Although today we view the right to counsel as a central component of a fair trial and due process,[46] the legal system did not hold counsel in high regard until the 1920s and '30s, when the Court began invalidating state criminal convictions for violations of defendants' constitutional rights.[47] Many of these cases involved indigent Black defendants in the South,[48] including *Powell v. Alabama*, which established the right to counsel and the right to counsel of choice in 1932.[49] The Court later elucidated that "[t]he right to select counsel of one's choice," though not explicitly mentioned in the Amendment's text, is part of "the root meaning" of the Sixth Amendment right to counsel.[50] Relative to other aspects of the Sixth Amendment, the counsel of choice doctrine is "young and undertheorized."[51] Thus, it is instructive to examine the social and historical context of *Powell v. Alabama* to help identify the Court's moti-

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[44] Including the right to a speedy trial, a public trial, trial before an impartial jury, to notice, of confrontation, to compulsory process, and to the assistance of counsel. U.S. CONST. amend. VI.

[45] *Id.*

[46] *See, e.g.*, United States v. Cronic, 466 U.S. 648, 653 (1984) ("An accused's right to be represented by counsel is a fundamental component of our criminal justice system.").

[47] *See* LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 243 (1939) (discussing the increase in federal cases applying the Due Process Clause of the Fourteenth Amendment).

[48] *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (explaining that the Court's intervention in Black defendant cases involving egregious Jim Crow "justice" in the South helped shape criminal procedure in ways that would not have occurred had the cases involved marginal unfairness); *see also* A. Leon Higgenbotham, Jr. & William C. Smith, *The William B. Lockhart Lecture: The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099, 1121–22 (1992) (discussing the "Hughes Court's growing sensitivity to the plight of [B]lacks in southern courts").

[49] 287 U.S. 45, 53, 68–71 (1932).

[50] United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 (2006). In 2016, the Court reaffirmed counsel of choice as part of the Sixth Amendment right to counsel. *See* Luis v. United States, 136 S. Ct. 1083, 1088 (2016) (holding that "pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment").

[51] Rappaport, *supra* note 41, at 120.

vation in recognizing the right and to support an expansion of the right to counsel of choice to indigent people.

A. The Development of Indigent Defense

The prominence of defense counsel in securing and protecting the rights of the accused came on the heels of the Progressive Era when municipalities started delivering criminal defense services to low-income people. Beginning in the 1910s, these efforts included government-funded public defender offices[52] and privately funded volunteer defense services.[53] Although each model provided legal services to indigent people charged with crimes, the underlying philosophies differed. Government-funded defender systems represented democracy and a necessary element of due process, a concept just beginning to take form.[54] The rationale behind providing privately funded counsel was to enable lawyers to operate independently of the state, with a singular focus and loyalty to the client. The assumption was that a government-funded defender system could not operate in the best interest of low-income people because the government also funded the prosecution.[55] What was clear about both models was that the delivery of criminal defense services to low-income people was to enable "equality before the law," relative to defendants who could afford counsel.[56] The insistence on equal footing between indigent defendants and those with means cuts against the contemporary class-based distinction in the right to counsel of choice.

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[52] *See* Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 602 (1986–87) (describing the establishment of institutional public defender offices in Los Angeles in 1914, and in Portland, Oregon, Columbus, Ohio, and Omaha, Nebraska in 1915–16); LAW REFORM COMM., THE ASS'N OF THE BAR OF THE CITY OF N.Y., THE NECESSITY AND ADVISABILITY OF CREATING THE OFFICE OF THE PUBLIC DEFENDER 4–5 (1915), https://archive.org/details/necessityadvisab00asso [hereinafter NECESSITY & ADVISABILITY] (discussing newly created public defender agencies in Oklahoma and Los Angeles to determine whether New York City should create one).

[53] *See* SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 50 (2020) (noting that elite lawyers in Philadelphia and Boston operated privately funded voluntary defender systems); *see also* NECESSITY & ADVISABILITY, *supra* note 52, at 6 (describing privately funded defense services in Portland, Oregon and Houston, Texas).

[54] *See* MAYEUX, *supra* note 53, at 7 (arguing that the public defender and the right to counsel as part of due process formed in tandem during the twentieth century).

[55] *See* NECESSITY & ADVISABILITY, *supra* note 52, at 16–17 (discussing the inherent conflict between the prosecution's goals and the goals of the accused). This same conflict of interest concern serves as the contemporary rationale for extending counsel of choice to indigent defendants. *See supra* note 41.

[56] NECESSITY & ADVISABILITY, *supra* note 52, at 22.

New York City was one example of a municipality engaged in the debate over how best to deliver criminal defense services to low-income people. Members of the New York City and New York State Bar Associations constituted the primary voices in these conversations.[57] In 1917, Charles Evans Hughes was elected president of both the New York State Bar Association and the Legal Aid Society.[58] His leadership in the development of indigent defense in New York City helped shape his views in *Powell*, which the Court decided during his tenure as Chief Justice.[59] Hughes firmly believed in providing "expert legal advice" to the poor; without it, he argued "it is idle to talk of equality before the law."[60] During his tenure leading the New York State Bar Association, Hughes helped develop the Voluntary Defenders Committee,[61] a privately funded indigent defense service, which later merged with the Legal Aid Society, creating a permanent criminal division to represent indigent people charged with crimes.[62]

A decade and a half later, the Hughes Court (1930–1941) was the first to focus on the rights of criminal defendants, helping to establish and shape modern criminal procedure.[63] The Court's actions in these cases also signaled an awareness of the unique experiences of Black people in the criminal legal system. Jurist and scholar A. Leon Higgenbotham, Jr. observed that these decisions demonstrated an awareness that the legal system "treated [B]lack criminal defendants far more harshly than their white counterparts, and that this harsh treatment was not a figment of [B]lacks' imaginations."[64] During the 1930s, the Court overturned multiple criminal convictions in cases involving Black defendants and blatant injustices. These included cases involving a trial judge refusing to allow defense counsel to ques-

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[57] *Id.*

[58] MERLO J. PUSEY, CHARLES EVANS HUGHES 367–68, 623 (1951) (noting that Hughes also served as president of the New York City Bar Association).

[59] Chief Justice Hughes "took the lead in reversing the [Scottsboro Boys'] convictions." *Id.* at 724 (explaining that Hughes, "[i]n line with his policy of asking conservative judges to write liberal opinions," assigned the decision to Justice George Sutherland).

[60] *Id.* at 383 (citing *Hughes Calls Law Best Americanizer*, N.Y. TIMES, Aug. 28, 1920, at 6).

[61] The Voluntary Defenders Committee was an experimental program that offered private lawyers to indigent defendants through the financial support of wealthy donors, primarily John D. Rockefeller. *See* MAYEUX, *supra* note 53, at 50 (describing program). Colloquially, these volunteer lawyers became known as "Rockefeller lawyers." *Id.*

[62] *Id.*

[63] *See* A. LEON HIGGENBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 160 (1996) ("The Supreme Court's new direction in criminal justice matters became apparent shortly after Hughes became Chief Justice in 1930.").

[64] Higgenbotham, Jr. & Smith, *supra* note 48, at 1112.

tion jurors about racial bias;[65] a coerced confession;[66] the exclusion of Black people from juries;[67] and the denial of the right to counsel.[68] The Court later extended the right to counsel to defendants facing federal criminal charges.[69]

B. Curtailing Legal Lynching

The Court's recognition of the right to counsel for the poor coincided with its recognition of the right to counsel of choice in *Powell v. Alabama*.[70] The case involved nine poor Black youths, falsely accused of raping two white women in rural Alabama.[71] The trial judge technically appointed counsel, but counsel lacked the time and expertise to provide adequate representation. After brief proceedings that could be described as "trials" in name only, all-white juries sentenced all but the youngest to death.[72] By the early 1930s, capital punishment had largely replaced extrajudicial lynchings of Black people.[73] Lynchings, which often occurred in public and with local law enforcement's tacit approval or even participation,[74] traumatized entire Black communi-

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[65] Aldridge v. United States, 283 U.S. 308, 311 (1931). Chief Justice Hughes wrote the opinion overturning the defendant's conviction and death sentence. *Id.* at 309, 315.

[66] Brown v. Mississippi, 297 U.S. 278 (1936). Chief Justice Hughes wrote the scathing, unanimous opinion, holding that "[t]he rack and torture chamber may not be substituted for the witness stand." *Id.* at 285–86. He further explained that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 286; Chambers v. Florida, 309 U.S. 227, 228, 242 (1940) (overturning the convictions where law enforcement officials procured the coerced confessions).

[67] Norris v. Alabama, 294 U.S. 587, 589 (1935) (holding systemic exclusion of Black people from grand and petit juries violated the Fourteenth Amendment); Hale v. Kentucky, 303 U.S. 613, 616 (1938) (per curiam) (same).

[68] Powell v. Alabama, 287 U.S. 45, 68–71 (1932).

[69] Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

[70] *See Powell*, 287 U.S. at 53, 68–71 (granting constitutional right to counsel in criminal trials and right to counsel of choice).

[71] *Id.* at 48–52; Klarman, *supra* note 48, at 51 (noting that the youths ranged in age from thirteen to twenty). For a detailed account of the legal proceedings, see generally DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (2d ed. 2007).

[72] *See Powell*, 287 U.S. at 50, 74 (challenging convictions based on the state's systematic exclusion of Black people from the juries).

[73] *See* GLENDA ELIZABETH GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919–1950, at 126 (2008) (describing "[a] trial" as "a lynching in disguise"); James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRITISH J. POL. SCI. 269, 284 (1998) (explaining that capital punishment, "a more palatable form of violence[,]" replaced lynching).

[74] *See* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 77–84 (2007) (describing instances where "police officers determined whether a [B]lack man would face a trial or a lynch mob"); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 434 (Henry Steele Commager & Richard B. Harris eds., Harper Collins Publishers 2014)

ties and spurred the Great Migration.[75] External pressure, including from abroad, contributed to the sharp decrease in this so-called "mob-justice" by the late 1930s and early 1940s.[76]

Lynchings, and the hasty trials that replaced them, frequently began with the alleged rape of a white woman by a Black man—or groups of Black men, such as in *Powell*.[77] In reality, these allegations frequently stemmed from an economic dispute, a perceived social transgression, or a consensual interracial relationship.[78] The state's criminal legal system treated Black indigent defendants charged with

("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it."); *see also* United States v. Shipp, 203 U.S. 563, 571–72, 575 (1906) (finding Hamilton County, Tennessee Sheriff Shipp, among other officials, in contempt of court for enabling the mob to lynch a Black defendant in the sheriff's custody).

[75] EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 3 (3d ed. 2017), [hereinafter LYNCHING IN AMERICA] ("Terror lynchings fueled the mass migration of millions of [B]lack people from the South into urban ghettos in the North and West throughout the first half of the twentieth century."); ISABEL WILKERSON, THE WARMTH OF OTHER SUNS 533 (2010) (noting that the number of lynchings declined with each decade of the Great Migration as the number of Black people leaving the South increased).

[76] *See* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 407–11 (2002) (showing that a combination of factors contributed to the decline, including international opinion of America's hypocrisy of decrying human rights abuses abroad while condoning human rights abuses at home); *see also* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 39–40 (1996) (explaining that the decrease in lynching was not due to any state or federal intervention).

[77] *See, e.g.*, DRAY, *supra* note 76, at 4–5 ("Stories of sexual assault, insatiable [B]lack rapists, tender white virgins, and manhunts led by 'determined men' that culminated in lynchings [filled] . . . the South's daily newspapers . . . . The cumulative impression was of a world made precarious by Negroes."); GILMORE, *supra* note 73, at 125 (describing the rape myth perpetuated by "upper-class white men [to] destroy[] the populist coalitions between white and [B]lack working-class men by arguing that such interracial alliances put white women at the mercy of [B]lack men's lust"); ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 89–103 (2013) (arguing that the racialization of rape—casting Black men as rapists and white women as victims—began to solidify in the 1880s, becoming a powerful tool to deny Black civil rights, reinforce white supremacy, and justify the brutal execution of Black men for decades).

[78] *See* GILMORE, *supra* note 73, at 98–99 (describing that "the first step in a lynching was an African American's argument with a landlord or boss over earnings"; that "established members of the [B]lack community" were also lynched for "run[ning] afoul of white elites over some commercial transaction"; and that "poor [B]lack transients looking for work often found themselves accused of crimes by people they had never met"); LYNCHING IN AMERICA, *supra* note 75, at 29 ("Through lynching, Southern white communities asserted their racial dominance over the region's political and economic resources—a dominance first achieved through slavery would not be restored through blood and terror."); DRAY, *supra* note 76, at 7 (explaining that Ida Wells-Barnett, the antilynching crusader and journalist, found that "in the majority of cases the charge of rape was untrue, and had either been added to a complaint about a [B]lack suspect in order to incense local white or, . . . to obscure [interracial] . . . consensual sex" between a Black man and white woman).

non-capital offenses just as swiftly.[79] These quick, seemingly lawless adjudications were not exclusively a Southern problem.[80] However, after slavery, the region relied heavily on the criminal legal system to facilitate Black people's virtual re-enslavement and to repopulate a forced labor system through convict leasing and other exploitative measures.[81]

Given weak federal oversight, local officials needed only to provide defendants with the appearance of due process.[82] The federal judiciary did not insert itself to enforce individuals' constitutional rights in state criminal cases with regularity until the Hughes Court.[83]

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[79] *See, e.g.*, Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165, 176 (1973) (noting that Black defendants "fared measurably poorer than their white counterparts" in criminal courts and that "cases involving [B]lack defendants were generally heard in less time than those involving whites").

[80] *See id.* ("[A] Detroit study . . . found that a significant number of defendants were not advised of their rights. Black defendants were more likely than whites to have received no proper indication of their charge, the right to testify, or the right to call and cross-examine witnesses."); *id.* at 177 (describing a Boston study revealing "shocking practices" in criminal trial courts where the majority of defendants were Black and other ethnic minorities, including that "defendants were not being adequately advised of their right to counsel; . . . bail was set by reference to the charge and the defendant's prior record" instead of relevant factors like "family ties, length of residence in the community and job and financial resources").

[81] *See* BLACKMON, *supra* note 30, at 57 (describing how "convict leasing adopted practices almost identical to those emerging in slavery in the 1850s").

[82] *See* GILMORE, *supra* note 73, at 126 (describing the threat to "[B]lack safety" in the South as the appearance of "lawfulness"). For instance, consider the trial of Jesse Washington, a Black teenager accused of murdering and sexually assaulting a white woman in Waco, Texas. DRAY, *supra* note 76, at 216. The judge allowed the angry white mob inside the courtroom. *Id.* at 217. The court-appointed attorney "failed to exploit the most glaring weakness in the prosecution's case," and the jury swiftly sentenced Washington to death. The mob immediately snatched Washington from the courtroom, placed a chain around his neck, and strung him up on a tree near city hall. *Id.* at 217–18. Participants lowered his lifeless body, lit him on fire, and later cut off his fingers, toes, and penis as souvenirs. *Id.* at 218. Then, "a man on a horse lassoed the charred remains and dragged them through town, followed by a group of young boys. The skull eventually bounced loose and was captured by some of the boys, who pried the teeth out and offered them for sale." *Id.*; *see also Taken from the Court Room and Burned*, EVENING TIMES-REPUBLICAN, May 15, 1916, at 1 (describing the lynching of Jesse Washington).

[83] *See* ORFIELD, *supra* note 47, at 243 (describing the Court's "develop[ing]" actions "to insure a fair trial in the state courts" as "a vigorous and orthodox application of the [D]ue [P]rocess [C]lause of the Fourteenth Amendment"). Notable exceptions included *Moore v. Dempsey*, 261 U.S. 86, 87, 92 (1923) (reversing state court proceedings, which, "although a trial in form, were only a form, and that the [five Black] appellants were hurried to conviction [for murder] under the pressure of a mob without any regard for their rights and without according to them due process of law") and *Strauder v. West Virginia*, 100 U.S. 303 (1880). In *Strauder*, the Court reversed a state criminal conviction, holding that the state's exclusion of people from jury service on account of race violated the Fourteenth Amendment. *Id.* at 310. However, the Court's prohibition of excluding Black people from juries was largely symbolic until the mid-twentieth century, when small

Without protection from the federal courts, an indigent person, especially an indigent Black person, had little hope of retaining their constitutional rights against the state's power. When the state prosecuted death eligible offenses, the trials occurred before all-white and all-male juries,[84] and often resulted in a conviction, death sentence,[85] and rapidly scheduled execution.[86] Unquestionably, the defendant's access to effective representation would have thrown a wrench in these kangaroo court proceedings. In fact, on appeal, indigent defendants often raised claims challenging the appointment or effectiveness of counsel, but "more shocking legal infractions such as mob-dominated trials and coerced confessions" overshadowed them.[87]

Yet, the Southern bar, with few exceptions, was unwilling to provide quality defense services to poor Black people charged with crimes, let alone capital crimes.[88] Community sentiment was such that any local lawyer attempting to uphold the constitutional rights of

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numbers of Black people began regularly serving on state and federal juries. *See* Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 62–65 (2020).

[84] EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 12 (2010) (explaining that all-white juries continued to sentence Black defendants to death into the 1980s, even after the Supreme Court outlawed systemic exclusion of Black people from juries due to the discriminatory use of peremptory strikes); *see also* Hoag, *supra* note 83, at 62–65.

[85] *See, e.g.*, *Moore*, 261 U.S. at 89; Norris v. Alabama, 294 U.S. 587, 588 (1935); Brown v. Mississippi, 297 U.S. 278, 279 (1936); Hale v. Kentucky, 303 U.S. 613, 615 (1938).

[86] Between 1930 and 1972, 455 people were executed for rape. Of those, 405 (89.1%) were Black. Moreover, 443 of the 455 of those executed were in former Confederate states. Brief for ACLU et. al. as Amici Curiae in Support of Petitioner, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), at 10 (citing U.S. DEP'T OF JUST., BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS BULLETIN NO. 45: CAPITAL PUNISHMENT 1930–1968 (1969)).

[87] *See* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1191–92 (2019). For example, in *Moore*, 261 U.S. at 90–92—which stemmed from the 1919 Elaine, Arkansas massacre, in which white mobs killed several Black people over a labor dispute—the Black defendants included a claim of ineffective assistance of counsel in their writ of habeas corpus. Without giving the claim any weight, the Court overturned the murder conviction of the Black defendant based on the mob-dominated proceedings instead. Likewise, the Court overturned the murder conviction for a Black defendant in *Brown v. Mississippi*, 297 U.S. 278, 281–87 (1936), due to a coerced confession even though the defendant also raised ineffective assistance of counsel for counsel's failure to exclude the confession after the state introduced it.

[88] *See* U.S. COMM'N ON CIV. RTS., LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 184–88 (1965) [hereinafter U.S. COMM'N ON CIV. RTS. 1965 REPORT] (describing lack of local counsel in the South to represent Black people in criminal and civil proceedings); *see also* David S. Mann, *Not for Lucre or Malice: The Southern Negro's Right to Out-of-State Counsel*, 64 NW. U. L. REV. 143, 144 (1969) ("The southern Negro's inability to obtain competent and vigorous counseling is primarily attributable to a single phenomenon—the abdication by the southern bar of its obligation to serve a disfavored minority.").

Black defendants would likely have been met with violence or professional and social rejection.[89] Given the pervasive anti-Black racism in the region, the Court's recognition of the right to counsel of choice in *Powell* considered the defendants' particular need for counsel who could elevate their humanity beyond the salacious criminal charges, counsel who could provide meaningful and effective representation, counsel who could *see* them.[90] The Court's decision indicated that for a fair trial to occur, the defendant needed to be empowered to select their own lawyer, a lawyer who could provide effective representation in the face of threats of violence from a "tense, hostile, and excited" public.[91] The opinion repeatedly mentioned that the boys, all from out of state, had neither friends nor relatives nearby to assist them.[92] In short, there were no Black people around to come to their defense.

At the time, none of Alabama's law schools would accept, let alone graduate, a Black student.[93] By the late 1930s, there were only four Black lawyers in the entire state.[94] In 1925, the need for lawyers willing to represent Black Alabamians was so great that Black people formed the Protective National Detective Association.[95] For an annual membership fee, the Association provided Black Alabamians free legal services in criminal and civil court until 1937, when the Association ended.[96] The first Black lawyer in the Birmingham Bar

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[89] *See, e.g.*, Mann, *supra* note 88, at 145 (explaining that the few southern lawyers willing to represent Black people could be subjected to "a wide range of adverse responses including social ostracism, loss of clients, loss of employment, trumped-up criminal charges, the threat of disbarment, and physical violence" (citation omitted)).

[90] Ava DuVernay named her Netflix series *When They See Us*, based on the true story of five Black and brown teenagers falsely accused of raping a white woman in Central Park in 1989, to force viewers to recognize the boys' individual humanity rather than lumping them together, nameless, as "The Central Park Five," which is how the media, at best, referred to them. *See* Charles R. Lawrence III, *Implicit Bias in the Age of Trump*, 133 HARV. L. REV. 2304, 2342–50 (2020) (reviewing JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019)). Countless comparisons have been made between the Central Park and Scottsboro wrongful convictions. *See, e.g.*, Duru, *supra* note 31.

[91] Powell v. Alabama, 287 U.S. 45, 51 (1932).

[92] *See id.* at 52–53.

[93] *See UA Law School to Commemorate 45th Anniversary of First African-American Graduates*, UNIV. OF ALA. NEWS CTR. (Mar. 27, 2017), https://www.ua.edu/news/2017/03/ua-law-school-to-commemorate-45th-anniversary-of-first-african-american-graduates (reporting that in 1972, Michael Figures, Booker Forte, Jr., and Ronald E. Jackson were the first Black graduates of University of Alabama Law School); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 271–75 (1993) (noting that the few Black lawyers practicing in Alabama between 1871 and 1944 graduated from Howard Law School, University of Michigan Law, Boston University School of Law, LaSalle Extension University in Chicago, and Yale Law School).

[94] SMITH, JR., *supra* note 93, at 274.

[95] *See id.*

[96] *See id.*

Association graduated from Howard Law School a decade and a half later in 1947,[97] and the first Black lawyer in Selma, also a Howard graduate, started practicing in 1958.[98] In fact, there was a dearth of Black or friendly counsel anywhere in the region.[99] Over three decades after the first of the Scottsboro trials, the U.S. Commission on Civil Rights reported that Southern lawyers and state officials "continue[d] to distort the processes of public power so that Negro citizens may not enjoy the legal equality promised them or exercise the liberties assured them by the Constitution."[100] The report noted that the Southern bar's abdication of upholding and protecting the rights of Black people in the justice system was "by no means exclusively a southern problem."[101]

With respect to the lack of Black representation, the Court focused on the critical importance of counsel to a fair trial, referring to defense counsel as "vital and imperative" to "due process within the meaning of the Fourteenth Amendment."[102] This was a relatively new concept at the time. Although the trial judge had appointed counsel in the case, the appointment was meaningless without the defendant's "fair opportunity to secure counsel of his *own choice*" and sufficient time for counsel to adequately prepare a defense.[103] The Court's insertion of choice in recognizing the right to counsel signaled that autonomy was a significant part of actualizing the Sixth Amendment right. Without autonomy to select their own lawyers, the defendants in *Powell* were beholden to the trial court's selection, which in this

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97 *See* Holcomb B. Noble, *Oscar Adams, 72, a Pioneer As Alabama Top Court Justice*, N.Y. TIMES (Feb. 18, 1997), https://www.nytimes.com/1997/02/18/us/oscar-adams-72-a-pioneer-as-alabama-top-court-justice.html (Oscar Adams later served as the first Black judge of the Alabama Supreme Court, appointed in 1980 and elected in 1982, becoming the first Black person to be elected to a statewide office).

98 *See* Bruce Weber, *J.L. Chestnut Jr., Early Leader in Civil Rights Movement, Is Dead at 77*, N.Y. TIMES (Sept. 30, 2008), https://www.nytimes.com/2008/10/01/us/01chestnut.html (describing the life of J.L. Chestnut, a Black lawyer who fought for civil rights and practiced in Dallas County).

99 *See* Richard Hammer, *'Yankee Lawyer Go Home,'* N.Y. TIMES, Mar. 12, 1967, at 8E (explaining that "[t]here are too few Negro lawyers to handle the thousands of cases that might have required counsel under the Sixth Amendment and *Gideon*" and that most Southern white lawyers refuse to accept civil rights cases for fear of "social ostracism"). The dearth of Black lawyers was due to the lack of opportunity to attend graduate school, which "meant that Black people were hard-pressed for justice in the courts." ADAM HARRIS, THE STATE MUST PROVIDE: WHY AMERICA'S COLLEGES HAVE ALWAYS BEEN UNEQUAL—AND HOW TO SET THEM RIGHT 85 (2021) (noting that there were only 1,230 Black lawyers compared to 159,375 white lawyers in 1934, meaning one Black lawyer per 9,667 Black people relative to one white lawyer for every 695 white people).

100 *See* U.S. COMM'N ON CIV. RTS. 1965 REPORT, *supra* note 88, at 184.

101 *Id.* at 187–88.

102 Powell v. Alabama, 287 U.S. 45, 65 (1932).

103 *Id.* at 53 (emphasis added).

instance "amount[ed] to a denial of effective and substantial aid."[104] The decision indicated that in some instances, the trial court could not be trusted to appoint counsel to adequately protect defendants' rights; however, the defendant, whose life and liberty were at stake, could.[105]

C. *Choice of Counsel Is a Central Component of the Right to Counsel*

In the decades following the Court's acknowledgement of the right to counsel in *Powell*, there was no question that the defendant's autonomy in selecting counsel was part of the constitutional guarantee. Even in reserving counsel of choice for those with means, the Court reaffirmed that the right was firmly ensconced in the Sixth Amendment's right to counsel. In *United States v. Gonzalez-Lopez*, the defendant sought to reverse his conviction after the trial court erroneously denied his counsel of choice.[106] Although the government conceded that the trial court's denial was erroneous, it disputed the appropriate method of evaluating the violation. The government argued that the violation was incomplete unless Gonzalez-Lopez could show substitute counsel's performance was deficient and that he was prejudiced by the deficiency under *Strickland v. Washington*'s two-prong ineffective assistance of counsel standard.[107] Gonzalez-Lopez had not made such a showing, but it did not matter: The Court disagreed with the government's position.

In reversing Gonzalez-Lopez's conviction, the Court reasoned that "[t]he right to select counsel of one's choice . . . has been regarded as the root meaning of the [Sixth Amendment] constitutional guarantee."[108] Therefore, the denial of the right to counsel of choice constitutes a denial of the right to counsel, which is a structural error requiring reversal, so no *Strickland* prejudice showing was necessary. The Court further explained that when the right to counsel is disregarded, it does not matter that the trial—with substitute counsel—was otherwise "fair." The right to counsel of choice "com-

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104 *Id.*

105 *See* Martinez v. Ct. of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring) ("Our system of laws generally presumes that the criminal defendant . . . knows his own best interests and does not need them dictated by the State.").

106 548 U.S. 140, 143–44 (2006).

107 *Id.* at 144–45 (citing Strickland v. Washington, 466 U.S. 668, 691–96 (1984) (defining effectiveness)).

108 *Id.* at 147–48 (2006) (citing Wheat v. United States, 486 U.S. 153, 159 (1988)); *see also* Kaley v. United States, 571 U.S. 320, 336 (2014) (reasserting that the right to counsel of choice "separate and apart from the guarantee to effective representation, [is part of] 'the root meaning' of the Sixth Amendment").

mands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[109]

In applying the structural error doctrine to counsel of choice, the Court placed it firmly in the company of other "certain basic, constitutional guarantees that . . . define the framework of any criminal trial."[110] Therefore, the right to counsel of choice is one that "'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'"[111] In so holding, the Court elevated the right to counsel of choice to a foundational component of fairness in criminal adjudications. The Court reaffirmed as much in *Kaley v. United States* a decade later: "[W]e have held that the wrongful deprivation of choice of counsel is 'structural error,' immune from review for harmlessness, because it 'pervades the entire trial.'"[112]

That the right to counsel of choice is firmly positioned within the Sixth Amendment right to counsel invites the question of why indigent defendants do not enjoy the same right. Upon learning that they do not have the same right to choose their own lawyer as defendants with means, Chief Justice Roberts asked: "Why not?"[113] The Court has yet to fully answer that question.

D. Beggars Cannot Be Choosers

Since deciding *Powell*, the Court has expressed limitations and qualifications on the right to counsel of choice; principal among them is that the defendant must be able to afford counsel.[114] Other limitations, such as judicial efficiency and adequacy of appointed counsel, exist concurrently with poverty. Despite the Court's assertion that the right to counsel is a necessity and not a luxury,[115] the right to counsel of choice is a luxury for those who can afford it. According to the Court, beggars cannot be choosers.

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109 *Gonzalez-Lopez*, 548 U.S. at 146.

110 Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017). Other examples of structural error include using the defendant's coerced confession against the defendant in a criminal trial, depriving the defendant of counsel, trying the defendant before a biased judge, and denying the defendant a public trial.

111 *Id.* (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (alteration in original)).

112 *Kaley*, 571 U.S. at 336–37 (2014) (citing *Gonzalez-Lopez*, 548 U.S. at 150).

113 Transcript of Oral Argument at 33–34, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352).

114 *See Gonzalez-Lopez*, 548 U.S. 140; *Wheat*, 486 U.S. at 153; *Morris*, 461 U.S. 1 (Brennan, J., concurring).

115 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

1. *Limited Time*

Much of the right to counsel of choice jurisprudence is concerned with avoiding delay in the criminal adjudication process.[116] A line of cases caution that the defendant's right is not absolute, and that a trial court must weigh the right to counsel of choice "against the public's interest in the orderly administration of justice."[117] However, efficiency over due process is in direct conflict with the reasoning in *Powell*: Although the Court commended and encouraged prompt dispositions of criminal cases, it also cautioned that "a defendant . . . must not be stripped of his right to have sufficient time" to prepare for trial with counsel of choice.[118] Shortly after *Powell*, the Court again acknowledged that the trial court must give appointed counsel sufficient time "to confer, to consult with the accused and to prepare his defense"; otherwise, it "could convert the appointment of counsel into a sham and nothing more than formal compliance with" the Sixth Amendment.[119]

Efficiency and autonomy came to a head in *Linton v. Perini*.[120] There, the trial court forced the defendant to proceed to trial with appointed counsel after defendant's retained counsel requested a continuance to adequately prepare for trial. The reviewing court acknowledged that the two issues—"the right of choice of counsel" and "the right to adequate time to prepare for trial"—were related.[121] However, in reversing the conviction, the Sixth Circuit prioritized choice, holding "[i]t is axiomatic that in all criminal prosecutions the accused enjoys the right to have assistance of counsel for his defense, and

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116 *See, e.g.*, Lee v. United States, 235 F.2d 219, 221 (D.C. Cir. 1956) (the right to counsel of choice "cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same"); Lofton v. Procunier, 487 F.2d 434, 435 (9th Cir. 1973) (holding that a trial court may refuse defendant's counsel of choice when "the attempted exercise of choice is deemed dilatory" and may "compel a defendant to proceed with designated counsel").

117 Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) *superseded on other grounds by statute*, 28 U.S.C. § 2254, *as recognized in* Burton v. Renico, 391 F.3d 764 (6th Cir. 2004); *see also* United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978) (same); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) ("The right to counsel of one's choice is not absolute. A court need not tolerate unwarranted delays, and may at some point require the defendant to go to trial even if he is not entirely satisfied with his attorney."); *United States v. Saldivar-Trujillo*, 380 F.3d 274, 277 (6th Cir. 2004) (finding that the "public interest[] in the prompt and efficient administration of justice outweigh[ed defendant's] right to counsel of his choice").

118 Powell v. Alabama, 287 U.S. at 45, 59; *see also* House v. Mayo, 324 U.S. 42, 46 (1945) (trial court failed to give defendant "a reasonable opportunity to consult with" defense counsel), *overruled by* Hohn v. United States, 524 U.S. 236 (1998).

119 Avery v. Alabama, 308 U.S. 444, 446 (1940).

120 656 F.2d 207.

121 *Id.* at 209.

implicit in this guarantee is the right to be represented by counsel of one's own choice."[122] To be clear, Mr. Linton could afford his lawyer of choice, underscoring that the right to choose is still only reserved for those with means.

The Sixth Circuit's reasoning in *Linton* makes clear that for a defendant with means, the right to exercise autonomy outweighs judicial efficiency. The reviewing court's assigned weight also speaks to the defendant's differing avenues for relief when a trial court encroaches on either of the defendant's Sixth Amendment interests. When the trial court forces substitute counsel on a defendant, the defendant can allege that the court violated their right to counsel of choice. However, when the trial court forces defense counsel to proceed without adequate preparation, the defendant's only recourse is alleging that counsel's lack of preparation amounted to a violation of the defendant's right to effective counsel. As discussed elsewhere, relief under the latter challenge—that counsel's conduct was ineffective—is substantially more burdensome for the defendant to obtain.[123]

The pedestal on which reviewing courts place a defendant's autonomy should extend equally to defendants who qualify for appointed counsel. Without the right to counsel of choice, an indigent defendant is forced to go the second, more difficult route: challenging counsel's conduct as ineffective. Few defendants, regardless of financial means, prevail on ineffective assistance of counsel claims.[124] Given this reality, the Court's refusal to extend counsel of choice could have more to do with the Court's desire to quickly dispose of such cases, a sort of doubling down on efficiency. Otherwise, reviewing courts would be forced to grant new trials any time a trial court denied an indigent defendant's right to counsel of choice. But if the legal system is genuinely concerned with upholding the Sixth Amendment's principle of autonomy,[125] we should welcome those corrections.

2. *Adequacy of Substitute Counsel*

If a trial court seeks to force substitute counsel upon an indigent defendant after the defendant has refused appointed counsel, substi-

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[122] *Id.* at 208 (citing *Powell*, 287 U.S. 45).

[123] *See* Buck v. Davis, 137 S. Ct. 759, 775 (2017) (describing the "high bar" that a defendant challenging counsel's performance must meet under *Strickland*).

[124] *See* Ossei-Owusu, *supra* note 87, at 1228–30 (describing the difficult and high burden defendants face in winning claims of ineffective assistance of counsel, which "ha[s] been and continue[s] to be particularly acute for [racial] minorities").

[125] *See* McCoy v. Louisiana, 138 S. Ct. 1500, 1507 (2018) (recognizing that the Sixth Amendment protects defendants' "right to make . . . fundamental choices about [their] own defense").

tute counsel's adequacy eliminates any potential constitutional violation, thereby removing it from the sacred realm of structural error. Whereas, for defendants with means, it makes no difference that replacement counsel is adequate; the trial court's denial of the right to choose is absolute. As discussed in *Gonzalez-Lopez*, the denial of the right constitutes structural error warranting reversal.[126] However, for indigent defendants, when they seek redress for the violation, reviewing courts generally use the harder to satisfy *Strickland* deficient performance-prejudice standard.[127] And because courts rarely find adequate counsel deficient—let alone prejudice resulting from any deficiency—an indigent defendant's alleged violation is dead on arrival.[128] Meaning that so long as appointed counsel is adequate, indigent defendants cannot demand another lawyer, even—in most cases—when the relationship and representation sour.[129] In other words, the Court holds the right to counsel of choice for defendants with means in higher regard than the right to counsel of choice for indigent defendants.

The Court made the adequacy of counsel limitation on the right to counsel of choice plain in *Caplin & Drysdale v. United States*.[130] There, the Court explained that the Sixth Amendment right to counsel of choice "guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented . . . ."[131] And yet, indigent defendants have all sorts of valid reasons to complain about otherwise adequate

126 *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48.

127 This depends on the nature of the alleged violation. The court will apply *Strickland* if the defendant raises an ineffective assistance of counsel claim for appointed counsel's conduct, which may have prompted the defendant to unsuccessfully move for substitute counsel. However, if the defendant raises a denial of the right to counsel—because the court refused to substitute counsel—the reviewing court will determine if defendant had "good cause" for substitute counsel and if the trial court abused its discretion in denying substitute counsel. *See* United States v. Marrero, 651 F.3d 453, 464 (6th Cir. 2011).

128 *See* Ossei-Owusu, *supra* note 87, at 1228–30.

129 *See, e.g.*, Shaw v. United States, 403 F.2d 528, 529 (8th Cir. 1968) (finding vague allegation of "lack of 'rapport' [and] . . . 'communication'" between defendant and appointed counsel insufficient to constitute ineffective representation where counsel was otherwise "competent and skilled in the law"); Perez Goitia v. United States, 409 F.2d 524, 527 (1st Cir. 1969), *cert. denied*, 397 U.S. 906 (1970) ("[L]ack of rapport between attorney and client does not automatically mean that there has been inadequate representation.").

130 491 U.S. 617 (1989).

131 *Id.* at 624. At issue was whether the defendant could seek an exemption from the forfeiture statute to pay for counsel of his choosing. The Court declined to recognize an exemption, meaning that the defendant had no money to pay for counsel. *Id.* at 631.

appointed counsel, such as a breakdown in communication,[132] failure to take a desired course of action,[133] taking a course of action over defendant's protest,[134] and outright hostility toward the defendant.[135]

Defendants' complaints about counsel usually come before a reviewing court as ineffective assistance of counsel claims and/or as an improper denial of defendant's request for substitute counsel. When an indigent defendant requests substitute counsel, the trial court has a duty to inquire about the source of defendant's dissatisfaction.[136] If the trial court fails to find good cause for the substitution, the indigent defendant is stuck with appointed counsel so long as there is no conflict of interest,[137] a complete breakdown in communication,[138] or an irreconcilable conflict.[139] Instances of these exceptions must be extreme.

However, if the defendant had means, they could simply hire a new attorney so long as the substitution did not unduly delay the proceedings. And if the trial court prevented the defendant with means from substituting counsel, a reviewing court would deem the error structural, warranting reversal. This is not so for indigent defendants. Instead, they must suffer through representation by defense counsel with whom they are experiencing discord. And for an indigent defen-

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132 *See, e.g.*, United States v. Porter, 405 F.3d 1136, 1141–42 (10th Cir. 2005) (affirming denial of habeas relief where defendant alleged, but did not prove, "a total breakdown of communication" with counsel due to counsel's inattention and lack of time spent on sentencing hearing).

133 *See, e.g.*, United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir. 1995) (affirming denial of defendant's request for substitute counsel where counsel failed to file "a host of motions that Goldberg insisted be filed," and trial court failed to find good cause for substitute counsel).

134 *But see* McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018) (granting new trial based on violation of the Sixth Amendment right to counsel where defense counsel admitted defendant's guilt over defendant's express and repeated objections).

135 *See, e.g.*, Osborne v. Terry, 466 F.3d 1298, 1316 (11th Cir. 2006) (denying ineffective assistance of counsel claim as procedurally defaulted where white trial counsel referred to Black client as a "little n[***]er [who] deserves the chair," and failed to disclose the plea offer of life to client).

136 *See* Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008) (holding that a trial court has an obligation to inquire into source of dissatisfaction between defendant and counsel and may grant motion to withdraw or substitute counsel if there is a showing of good cause).

137 *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (establishing that a defendant must show "an actual conflict of interest adversely affected his lawyer's performance" to establish Sixth Amendment violation).

138 *See, e.g.*, United States v. Powell, 847 F.3d 760 (6th Cir. 2017) (finding that trial court abused its discretion by not allowing defendant's counsel to withdraw after total breakdown in communication).

139 *See* Stenson v. Lambert, 504 F.3d 873, 886 (9th Cir. 2007) (holding the Sixth Amendment to protect against "forcing a defendant to go to trial with an attorney with whom he has an irreconcilable conflict").

dant, there is no justiciable remedy for discord short of *Strickland*-level ineffectiveness. Indigent defendants are stuck between a rock and a hard place: The aspirational goals the Court articulated in *Gideon*,[140] and the nearly impossible-to-meet standard the Court established in *Strickland*.[141]

Extending counsel of choice to indigent defendants could potentially dislodge them from this untenable position between *Gideon*'s unfulfilled promise and *Strickland*'s effective roadblock. Had the Court adopted Justice Marshall's dissenting opinion from *Strickland*, the Court would be in a better position to extend counsel of choice to low-income people. There, Justice Marshall suggested that if a defendant could demonstrate that counsel performed deficiently, the reviewing court must grant them a new trial, no showing of prejudice would be necessary.[142] Thus, defendant's mere showing that counsel was incompetent would be enough. Again, we should welcome these corrections. Perhaps, if the Court could no longer rely on *Strickland*'s difficult standard to prevent indigent defendants from regularly receiving new trials, the Court would be more apt to extend choice to indigent defendants. Because a denial of that right would also mean a new trial, states would also need to be more aggressive about providing high quality counsel for indigent defendants.

3. *Parity for Poor People*

That the Court has placed indigent defendants on par with defendants with means in other areas of criminal defense casts further doubt on why the Court draws the line at counsel of choice. Relying on the Fourteenth Amendment, the Court has held that due process and fundamental fairness require the state to provide poor defendants with a trial transcript if the state gives the defendant an opportunity to appeal their case;[143] prevents the state from charging an indigent defendant a fee to file a notice of appeal;[144] requires the state to pay for defense counsel;[145] and requires the state to provide indigent

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140 *See* Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963) (requiring states to provide defense counsel to low-income people charged with crimes).

141 The defendant in *Strickland*, David Leroy Washington, an indigent Black man, did not even obtain relief from his lawyer's failings under the legal standard Mr. Washington's case created. Strickland v. Washington, 466 U.S. 668, 700 (1984). The state of Florida executed Mr. Washington in 1984. Jesus Rangel, *Confessed Murderer of 3 Executed in Florida*, N.Y. TIMES, July 14, 1984, at 24.

142 *See Strickland*, 466 U.S. at 711–12 (Marshall, J., dissenting).

143 *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (entitling petitioners to a trial transcript).

144 *See* Burns v. Ohio, 360 U.S. 252, 258 (1959) (stating that financial barriers restricting appellate review had "no place in our heritage of [e]qual [j]ustice").

145 *See Gideon*, 372 U.S. at 342–44.

defendants with a fair opportunity to present a defense, including funding for expert services.[146] In *Gideon v. Wainwright*, the Court made plain that the assistance of defense counsel in the face of criminal charges is a "necessit[y], not [a] luxur[y]."[147] With all that is at stake—liberty and, at times, life[148]—exercising choice in selecting counsel should not be a privilege reserved for only those who can afford it.

II
REPRESENTATION MATTERS

By relying on literature from other fields—clinical therapy and education—this Part lays the foundation for Black on Black representation within indigent defense.[149] These fields have long recognized the unique insights and contributions people from non-dominant racial and ethnic groups can offer, and the benefits that same-race representation can provide racially marginalized and maligned clients and pupils. Scholarship from these fields has examined the benefits of racial diversity to better understand the populations they serve. As explained more fully below, Black therapists and teachers—much like Black public defenders—are more likely to have an awareness and an understanding of the social meaning assigned to Black people and can use that embodied empathy to the advantage of their same-race clients and pupils. Research shows that their very presence can put clients and pupils at ease, ultimately improving Black patient utilization of counseling services[150] and Black student performance.[151]

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146 *See* Ake v. Oklahoma, 470 U.S. 68, 76–81 (1985) (requiring that the State provide a competent psychiatrist where the defendant's psychiatric state is a significant factor at trial).

147 *Gideon*, 372 U.S. at 344.

148 *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("Assistance of [c]ounsel . . . is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.").

149 CLAIR, *supra* note 13, at 76 ("[T]he attorney-client relationship is quite similar to many other professional-client relationships, such as that between a doctor and patient or a teacher and student. These relationships often require trust if they are to function to the benefit of clients.").

150 *See, e.g.*, Darryl L. Townes, Shannon Chavez-Korell & Nancy J. Cunningham, *Reexamining the Relationships Between Racial Identity, Cultural Mistrust, Help-Seeking Attitudes, and Preference for a Black Counselor*, 56 J. COUNSELING PSYCH. 330, 331 (2009) (noting that some studies suggest Black patients do not utilize mental health resources in part because of distrust towards white counselors).

151 *See, e.g.*, Anna J. Egalite, Brian Kisida & Marcus A. Winters, *Representation in the Classroom: The Effect of Own-Race Teachers on Student Achievement*, 45 ECON. EDUC. REV. 44 (2015); Thomas S. Dee, *Teachers, Race, and Student Achievement in a Randomized Experiment*, 86 REV. ECONS. & STATS. 195 (2004).

That these conversations are not already occurring in legal scholarship about indigent defense is problematic, particularly given the demographics of the client and attorney populations.[152] However, this Article can begin the conversation and spur additional research recognizing that Black public defenders may help better serve Black people facing criminal charges and more effectively challenge anti-Black bias in the criminal legal system.

A. Someone Who Understands: Black Therapists for Black Patients

Research on the relationship between Black patients and therapists offers valuable insight into the dynamics that can exist between a Black person charged with a crime and appointed counsel. The clinical therapy community has widely accepted that in order to improve mental health services for people of color, patients should be matched with same-race counselors when possible.[153] Research shows that Black therapists are able to provide more culturally congruent treatment given "their more nuanced understanding of Black communities"[154] and that Black therapists are more likely to feel personally invested in their Black patients.[155] Most relevant for our purposes, research shows that white counselors, relative to Black counselors, have a harder time obtaining their Black patients' trust.[156] In a study examining Black therapists who work with Black families, researchers found that Black patients experience "positive outcomes when [their]

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152 Sociologists Matthew Clair's and Nicole Gonzalez Van Cleve's books on indigent defense, racism, and inequality in criminal courts are notable exceptions. Each contains extensive qualitative research. *See* CLAIR, *supra* note 13 (describing Boston's criminal courts); GONZALEZ VAN CLEVE, *supra* note 20 (examining Chicago's criminal courts).

153 *See, e.g.*, Raquel R. Cabral & Timothy B. Smith, *Racial/Ethnic Matching of Clients and Therapists in Mental Health Services: A Meta-Analytic Review of Preferences, Perceptions, and Outcomes*, 58 J. COUNSELING PSYCH. 537, 537 (2011) (noting that there was a decades-old presumption that clients should be matched with a therapist of the same race or ethnicity for better therapeutic care); HANDBOOK OF MULTICULTURAL COMPETENCIES IN COUNSELING AND PSYCHOLOGY (Donald B. Pope-Davis, Hardin L.K. Coleman, William Ming Liu & Rebecca L. Toporek eds., 2003) (containing chapters addressing the practice of multicultural competency in counseling).

154 David T. Goode-Cross & Karen Ann Grim, *"An Unspoken Level of Comfort": Black Therapists' Experiences Working with Black Clients*, 42 J. BLACK PSYCH. 29, 30 (2016) (citation omitted).

155 David T. Goode-Cross & Suzette L. Speight, *But Some of the Therapists Are Black* (describing shared dynamics related to being Black that increase Black therapists' identification with and investment in Black patients), *in* HANDBOOK OF RACE-ETHNICITY AND GENDER IN PSYCHOLOGY 329, 331 (M.L. Miville & A.D. Ferguson eds., 2014).

156 *See* C. Edward Watkins, Jr., Francis Terrell, Fayneese S. Miller & Sandra L. Terrell, *Cultural Mistrust and Its Effects on Expectational Variables in Black Client-White Counselor Relationships*, 36 J. COUNSELING PSYCH. 447, 448–49 (1989).

therapists have an understanding of the history or experiences African Americans have had to endure."[157]

There are multiple parallels worth noting between clinical therapy and indigent defense. Relative to white patients, Black patients' entry into mental healthcare counseling is more likely to exist under emergency circumstances and/or "under coerced or mandated conditions rather than" being voluntary or self-referred.[158] This parallels Black people's entry into the criminal legal system in which individuals experience a highly stressful event (often an arrest followed by criminal charges) and the court often appoints defense counsel, rather than the individual electively retaining counsel. Like the overrepresentation of Black people in the criminal legal system, Black people are overrepresented in populations with mental healthcare needs,[159] but disproportionately underrepresented in the mental healthcare profession. Only 6.4% of social workers are Black, slightly less than 4% of counseling professionals are Black, less than 2% of doctoral-level psychologists self-identify as Black, and there are even fewer Black psychiatrists.[160] Akin to the way white public defenders' anti-Black racial bias can negatively impact representation of Black defendants, research suggests that white counselors' racial biases and stereotypes may account for mental healthcare disparities in Black patients, including spending less time with Black patients, giving more severe diagnoses to Black patients relative to identically presenting white patients, and overmedicating Black patients.[161]

The robust research on the experiences of Black patients in therapy has helped improve counseling for Black patients. The research shows that Black patients with strong ethnic and cultural ties to their race derive the greatest therapeutic benefits when they receive "culturally congruent mental health services."[162] However, the

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157 LaVerne Bell-Tolliver, Ruby Burgess & Linda J. Brock, *African American Therapists Working with African American Families: An Exploration of the Strengths Perspective in Treatment*, 35 J. MARITAL & FAM. THERAPY 293, 304 (2009).

158 Townes et al., *supra* note 150, at 331 (citation omitted).

159 *See, e.g.*, U.S. DEPT. OF HEALTH & HUM. SERVS., MENTAL HEALTH: CULTURE, RACE & ETHNICITY—A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 1, 61, 68 (2001) [hereinafter HHS MENTAL HEALTH], https://www.ncbi.nlm.nih.gov/books/NBK44243 (finding that African Americans are overrepresented in high-need populations, have less access to mental healthcare services, and are less likely to receive treatment for their mental healthcare needs).

160 Townes et al., *supra* note 150, at 330 (citation omitted).

161 *See* Arthur L. Whaley, *Racism in the Provision of Mental Health Services: A Social-Cognitive Analysis*, 68 AM. J. ORTHOPSYCHIATRY 47, 51 (1998); HHS MENTAL HEALTH, *supra* note 159, at 66–67 (explaining that clinician bias may contribute to inaccurate mental health diagnoses for Black patients).

162 Cabral & Smith, *supra* note 153, at 546.

availability of Black therapists cannot meet the demand. As early as 2001, the Surgeon General recognized that "[t]he supply of African American clinicians is important," in part because Black patients tend to underutilize services given "[f]eelings of mistrust and stigma or perceptions of racism or discrimination."[163] Like in the legal profession, there remains a dearth of Black therapists. Unlike the law, clinical therapy has responded by embracing the need for all therapists who work with patients of color, particularly Black patients, "to apply multicultural competencies" to improve patient utilization, retention, and outcomes.[164] To this end, the clinical therapy community has been producing robust scholarship, training, and assessment on multicultural counseling competency for decades.[165]

B. A Teacher Who Looks Like Me

The unfortunate parallels between the public-school system and the criminal legal system abound, particularly given the well-documented funneling of Black and brown children from the former to the latter.[166] This has become increasingly true for Black girls.[167] However, this Article leaves the discussion of the school-to-prison pipeline to others. Instead, this Section will explore the impact of same-race teachers on student performance and use it as a reference point for examining same-race representation in the criminal legal system. Policymakers, educators, and researchers have long discussed the benefits same-race teachers can have on students, particularly Black students.[168] In 2010, relying on this association, the U.S.

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163 HHS MENTAL HEALTH, *supra* note 159, at 63, 68.

164 Cabral & Smith, *supra* note 153, at 546 (citing Derald Wing Sue, Patricia Arredondo & Roderick J. McDavis, *Multicultural Counseling Competencies and Standards: A Call to the Profession*, 70 J. COUNSELING & DEV. 477 (1992)).

165 *See, e.g.*, Charles R. Ridley & Amy J. Kleiner, *Multicultural Counseling Competence: History, Themes, and Issues*, *in* HANDBOOK OF MULTICULTURAL COMPETENCIES IN COUNSELING & PSYCHOLOGY 3 (Donald B. Pope-Davis, Hardin L.K. Coleman, William Ming Liu & Rebecca L. Toporek eds., 2003).

166 *See, e.g.*, AJMEL QUERESHI & JASON OKONOFUA, LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE (2017); CARA MCCLELLAN, OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY & REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE (2018).

167 *See* MCCLELLAN, *supra* note 166, at 1 ("Black girls are the fastest growing demographic affected by school discipline, arrests, and referrals to the juvenile justice system.").

168 *See, e.g.*, Seth Gershenson, Cassandra M. D. Hart, Constance A. Lindsay & Nicholas W. Papageorge, *The Long-Run Impacts of Same-Race Teachers* (IZA Inst. Lab. Econ., Discussion Paper No. 10630, 2017), https://ftp.iza.org/dp10630.pdf (finding that race matching in a Black child's primary school years "significantly reduces" the chance that they will drop out of high school, "particularly among the most economically disadvantaged [B]lack males"); Egalite et al., *supra* note 151, at 50 (finding that lower performing Black and white students experience the greatest benefit from being assigned

Department of Education launched a national teacher recruitment campaign, calling specifically for more minority males and acknowledging that "more than 35 percent of public school students are [B]lack or Hispanic, but less than 15 percent of teachers are Black or Latino. Less than two percent of our nation's teachers are African-American males."[169]

Before parsing this literature, there are a few notable similarities between the public education and public defense systems worthy of discussion. Like in the criminal legal system, there is an overrepresentation and concentration of Black people in many public schools relative to the population in the community. These demographic trends are especially true in cities that experienced white flight to suburban communities and private schools after court-ordered school desegregation.[170] Like with indigent defense counsel, there is an underrepresentation of teachers of color, particularly Black teachers, relative to the populations served in public schools.[171] Again, like the negative impact public defenders' anti-Black bias has on their Black clients, teachers' anti-Black bias contributes to Black children being suspended and expelled at higher rates than their non-Black classmates;[172] research shows these disparities begin as early as pre-

same-race teachers); Dee, *supra* note 151, at 195 (noting that it was "conventional wisdom among educators" that minority students performed better academically when taught by minority teachers).

169 Press Release, U.S. Dep't of Educ., US Dep't of Educ. Launches Nat'l Teacher Recruitment Campaign (Sept. 27, 2010), https://www.legistorm.com/stormfeed/view_rss/68444/organization/69539/title/us-department-of-education-launches-national-teacher-recruitment-campaign.html.

170 *See, e.g.*, Brad Bennett, *Weekend Read: 66 Years After* Brown v. Board, *Schools Across the South Still Separate and Unequal*, S. POVERTY L. CTR., (May 16, 2020), https://www.splcenter.org/news/2020/05/16/weekend-read-66-years-after-brown-v-board-schools-across-south-still-separate-and-unequal ("After the *Brown* decision, many Southern states established publicly funded private school voucher schemes to get around court-ordered integration. Today, voucher programs persist . . . ."); EDBUILD, $23 BILLION, at 2 (2019) (noting that the "place-based racial divide . . . in America" results in "students attending racially concentrated school districts" where half are enrolled in districts that are more than "75% nonwhite" and the other half are enrolled in "75% white" districts).

171 *See* Egalite et al., *supra* note 151, at 44; *see also* Madeline Will, *65 Years After 'Brown v. Board,' Where Are All the Black Educators?*, EDUC. WEEK (May 14, 2019), https://www.edweek.org/ew/articles/2019/05/14/65-years-after-brown-v-board-where.html ("Today, many scholars say the persistent lack of [B]lack teachers in the profession can be traced to the aftermath of the *Brown* decision. 'We decimated the [B]lack principal and teacher pipeline, and we've never rectified that.'" (quoting Leslie Fenwick, a professor at Howard University School of Education)).

172 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 1, 4 (2018), https://www.gao.gov/assets/700/690828.pdf.

school.[173] This can result in distrust of the very individuals whom the student should be able to rely upon for guidance and support.

Given these troubling observations, it is no surprise that students of color, particularly Black students, can benefit from receiving instruction from teachers who share their race.[174] These benefits include improved attendance, academic achievement, less frequent suspension and expulsion (likely reflecting Black teachers' different treatment and different interpretation of behavior), and increased chance of obtaining higher education.[175] Most researchers explain the positive impact that same-race teachers can have on Black students in one of two ways: passive or active.[176] Passive teacher effect means that the student derives a benefit from the teacher's mere same-race presence, potentially viewing the teacher as a model for success.[177] Researchers also note that passive teacher effect can help mitigate stereotype threat—the situational predicament where an individual fears confirming a negative stereotype about their social group.[178] In educational settings, stereotype threat can result in a Black student's lower academic performance in the face of a teacher's lowered expectations.[179] Conversely, active teacher effect refers to proactive conduct on the teacher's part, such as spending more time interacting with students of their same race, or in designing more culturally relevant (and thus, potentially more engaging and relevant) course materials.[180]

These descriptive observations of same-race teachers' impact on Black students provide helpful insight into the dynamics between a Black defender and indigent defendant. Borrowing the active/passive effect framework allows us to form opinions on why and how the relationship can be beneficial. With regard to the active effect, a same-

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173 Walter S. Gilliam, Angela N. Maupin, Chin R. Reyes, Maria Accavitti & Frederick Shic, *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsion and Suspensions? A Research Study Brief*, YALE CHILD STUDY CTR. 1, 2 (2016).

174 *See, e.g.*, U.S. DEP'T OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE 1, 2 (2016).

175 Gershenson et al., *supra* note 168, at 19 ("Exposure to at least one [B]lack teacher in grades 3–5 also increases the likelihood that persistently low-income students of both sexes aspire to attend a four-year college.").

176 *See, e.g.*, Egalite et al., *supra* note 151, at 45, 51; Dee, *supra* note 151, at 196–97; Thomas S. Dee, *A Teacher Like Me: Does Race, Ethnicity, or Gender Matter?*, 95 AM. ECON. REV. 158, 159 (2005).

177 Dee, *supra* note 176, at 159.

178 *See id.* at 159, 164; *see also* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 797 (1995).

179 *See* Dee, *supra* note 176, at 159 (citation omitted).

180 *See id.* at 197.

race defender may be more likely to feel personally invested in a Black client's case, and as a result, spend more time with the client and on the case, or be more aware of challenging race-based issues that occur in the client's case than a different-race defender. The findings in Parts III and IV support these hypothetical scenarios, as does existing research examining the opposite trend: Public defenders who harbor anti-Black bias can have a detrimental impact on their clients' cases because they tend to spend less time on these cases and fail to raise potentially meritorious issues.[181] With regard to the passive effect, as discussed in Section IV.B, a Black lawyer's mere physical presence in court proceedings may mitigate stereotypes of criminality and culpability that judges, jurors, and prosecutors subconsciously apply to Black defendants who come before them.[182] As described in Part IV, Black lawyers may also more readily engender trust in their clients, enabling their clients to disclose facts and information in support of the defense that the clients may otherwise avoid or be more hesitant to disclose to non-racially congruent counsel. Thus, the active/passive framework provides a helpful lens through which to measure and test the impact of racially congruent representation.

III
EMBODIED EMPATHY

In this Part, I define "embodied empathy"—the unspoken familiarity between Black people given their shared experience with the social meaning assigned to Black people in this country. While I identify a shared experience among Black people in this country, I also recognize that same-race representation has limitations given the multitude of differences among Black people and that some Black defendants may not want a Black lawyer.[183]

Differences in class, gender, country of origin, and other coexistent identities can have varying degrees of impact on the way Black people experience their race and ethnicity in this country.[184] American-born Black people who can trace their ancestry to slavery

181 Richardson & Goff, *supra* note 22, at 2641 (explaining that anti-Black implicit bias may result in defenders spending less "time, effort, and scarce resources" on cases with "stereotypically '[B]lack' feature[d]" clients).

182 *See, e.g.*, Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2261–68 (2017) (explaining that jurors often consider and rely upon racial character evidence—essentially the race of the parties and witnesses—when deciding civil or criminal liability and witness credibility, even though the parties rarely introduce such evidence and the court does not subject it to evidentiary scrutiny).

183 *See infra* Section IV.C.

184 *See* DELGADO & STEFANCIC, *supra* note 26, at 63–66 (discussing essentialism and antiessentialism).

in America[185] may experience their race differently than Black people who recently immigrated from one of over fifty countries in Africa, Latin America, the Caribbean, or elsewhere in the world.[186] In turn, first-generation Black people may have different experiences than both American-born descendants of enslaved people and recent immigrants.[187] Black people who are racially mixed may have an altogether different experience than any of the previously identified subgroups.[188]

Each of these differences can impact the experience and identity formation of a Black person, which in turn, can factor into how they relate to another Black person within the attorney-client relationship context. These differences make clear that Black people and experiences are not monolithic; nevertheless, there is a unifying Black experience in this country given the institution of slavery and the racial hierarchy that resulted—a hierarchy that is woven into the nation's social fabric and impacts all who reside here.[189] This shared

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185 *See* Farah Stockman, *'We're Self-Interested': The Growing Identity Debate in Black America*, N.Y. TIMES (Nov. 8, 2019), https://www.nytimes.com/2019/11/08/us/slavery-black-immigrants-ados.html (describing differences between Black American descendants of slavery, Black immigrants from Africa and the Caribbean, and that a small emerging group, American Descendants of Slavery (ADOS) "who embrace its philosophy point to disparities between [B]lack people who immigrated to the United States voluntarily, and others whose ancestors were brought in chains").

186 *See* Monica Anderson, *A Rising Share of the U.S. Black Population Is Foreign Born*, PEW RSCH. CTR. (Apr. 9, 2015), https://www.pewsocialtrends.org/2015/04/09/a-rising-share-of-the-u-s-black-population-is-foreign-born (explaining that the Black immigrant population in the U.S. has quadrupled since 1980 and that foreign-born Black people are more likely to have a college degree, less likely to live in poverty, on average, have higher average incomes, and are more likely to be married than American-born Black people).

187 *See Being Black in America and Being African Aren't Mutually Exclusive*, NPR: ALL THINGS CONSIDERED (Feb. 11, 2017), https://www.npr.org/2017/02/11/514732232/being-black-in-america-and-being-african-arent-mutually-exclusive (describing potential challenges in identity formation American children born to African immigrants experience as they navigate African and Black American identities).

188 *See* Arnold K. Ho, Nour Kteily & J.M. Chen, *How Are Black-White Biracial People Perceived in Terms of Race?*, KELLOGG INSIGHT (Dec. 6, 2017), https://insight.kellogg.northwestern.edu/article/how-are-black-white-biracial-people-are-perceived-in-terms-of-race (examining how Black and white people view Black-white biracial people, finding that both groups viewed them as slightly more Black); Jasmine Norman, *The Racial Identities Multiracial People Adopt May Depend on How Others Treat Them*, SOC'Y FOR PERSONALITY & SOC. PSYCH. (Jan. 22, 2020), https://www.spsp.org/news-center/blog/norman-multiracial-people-identities (finding "that other peoples' comments and questions about appearance, as well as perceived discrimination from certain racial groups, relate to how strongly mixed-race people identify as multiracial").

189 *See* WILKERSON, *supra* note 32, at 33 (explaining that after "African captives [were] transported to build the New World and to serve the victors, ... [t]here developed a caste system, based upon what people looked like, an internalized ranking, unspoken, unnamed, unacknowledged by everyday citizens even as they go about their lives adhering to it and acting upon it subconsciously to this day").

understanding—or embodied empathy—in the legal context may help establish trust and improve communication between Black indigent defendants and their lawyers, and may give Black public defenders opportunities to mitigate anti-Black bias their clients face within the criminal legal system.

A. I See You. I Hear You. I Understand.

Eye contact and the subtle lift or dip of the chin, exchanged from across a crowded room, or while walking past one another. It is the universal gesture among Black people, signaling recognition, communicating: *I see you; I hear you; I understand.* I too experience the social meaning assigned to Black people. Without uttering a word, this simple gesture can offer greeting, reassurance, validation, and affirmation. It communicates empathy. Among and between Black people, I call this exchange "embodied empathy." Although the term embodied empathy exists in psychotherapy,[190] I use it here to mean the shared knowledge of experiencing this country as a Black person.

This nation, built upon the backs of enslaved Black people, is still stained with slavery's legacy. Many of this nation's institutions are direct descendants of slavery: our system of capitalism,[191] the organization of our communities,[192] our education system,[193] and our criminal legal system.[194] As Nikole Hannah-Jones explained in her

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190 *See* Ilaria Minio-Paluello, Simon Baron-Cohen, Alessio Avenanti, Vincent Walsh & Salvatore M. Aglioti, *Absence of Embodied Empathy During Pain Observation in Asperger Syndrome*, BIOLOGICAL PSYCHIATRY 55, 55, 59–60 (2009) (finding that people with Asperger Syndrome (AS), often defined by "reduced empathic abilities," have difficulty registering pain that they observe in others, and thus concluding that people with AS lacked "embodied empathic reactivity to the sensations experienced by another person").

191 *See* JOSHUA D. ROTHMAN, FLUSH TIMES AND FEVER DREAMS: A STORY OF CAPITALISM AND SLAVERY IN THE AGE OF JACKSON (2012) (detailing America's culture of speculation that drove up cotton production, resulting in the Panic of 1837 and eventually the Civil War, and which would eventually become a defining characteristic of American capitalism).

192 *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (describing local, state, and federal laws that established and promoted racially segregated housing, beginning in the 1920s, as millions of Black people fled racial terrorism in the South and encountered racial subordination in the North, a direct holdover from slavery).

193 *See, e.g.*, Robert L. Reece & Heather A. O'Connell, *How the Legacy of Slavery and Racial Composition Shape Public School Enrollment in the American South*, 2 SOCIO. RACE & ETHNICITY 42, 42 (2016) (arguing that the legacy of slavery shaped Southern local social structures in ways that resulted in white disinvestment from public schools, white attendance at private schools, and racially resegregated public schools); Stephen Smith & Kate Ellis, *Shackled Legacy: History Shows Slavery Helped Build Many U.S. Colleges and Universities*, AM. PUB. MEDIA REPS. (Sept. 4, 2017), https://www.apmreports.org/episode/2017/09/04/shackled-legacy.

194 *See supra* note 30.

opening essay of *The 1619 Project*, "Anti-[B]lack racism [derived from slavery] runs in the very DNA of this country."[195] In *Policing the Black Man*, Bryan Stevenson describes "a narrative of racial difference that contaminates the thinking of most Americans. We are burdened by our history of racial injustice in ways that shape [how] we think, act, and enforce the law."[196] Thus, to exist as a Black person in this nation can be a uniquely unifying experience. To better understand this shared experience among Black people that can convey empathy based on this shared understanding, I turn to two contemporary authors who write about navigating America while Black.

In *Heavy: An American Memoir*, Kiese Laymon charts the pain, joy, and danger of growing up in Jackson, Mississippi as a Black person, and later, as a professor in upstate New York.[197] His Blackness is never not relevant, and the precariousness of his safety is most acute relative to white people. Fresh from high school basketball practice, Laymon and his teammates, also Black, congregate at the local Red Lobster to watch a game.[198] The news interrupts with footage of a group of white police officers watching another group of white police officers beat a Black man.

> We watched the news replay the video four times. We all had cops rough us up, chase us, pull guns on us, call us out of our names. We all watched cops shame our mamas, aunties, and grandmamas. We all floated down I-55 creating lyrical force fields from the police and everything the police protected and served, rapping, "A young n[***]a got it bad 'cause I'm brown." But here we were, in one of our safe spaces, watching white folk watch white police watch other white police destroy our body.[199]

In that moment, Laymon and his friends are reminded that their Blackness renders them vulnerable. Laymon's white girlfriend then arrives to pick him up, ignorant to the local news.[200] He is tense and different, failing to give her the greeting to which she is accustomed.[201] She senses something is off, but Laymon refuses to elaborate and she drops him at home, angry about what she does not know,

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195 Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False when They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html.

196 Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 3, 5 (Angela J. Davis ed., 2017).

197 KIESE LAYMON, HEAVY: AN AMERICAN MEMOIR (2018).

198 *Id.* at 95.

199 *Id.*

200 *Id.*

201 *See id.* at 95–96.

what he cannot explain, and what she cannot understand.[202] Although Laymon could tell the girl with whom he is intimate, the girl he says he loves, what transpired and where his head is at, something stops him.[203] To do so, he would have to explain too much, expend too much effort, and expose himself. Worse, her response might come from a place of pity instead of understanding. Laymon's girlfriend lacks an experiential awareness of being Black.

Ta-Nehisi Coates writes about the uniqueness of existing in the world—specifically America—as a Black man in *Between the World and Me*. In the book, a longform letter to his fifteen-year-old son, Coates considers American-made racism and the violence and constraints it renders upon Black people. He muses: "[H]ow do I live free in this [B]lack body?"[204] After identifying a string of unarmed Black men and boys killed by police officers, Coates warns his son:

> The destroyers will rarely be held accountable. Mostly they will receive pensions. And destruction is merely the superlative form of a dominion whose prerogatives include friskings, detainings, beatings, and humiliations. All of this is common to [B]lack people. And all of this is old for [B]lack people. No one is held responsible.[205]

Although "the destroyers" are law enforcement, the law routinely fails to hold them legally accountable for their misconduct toward Black people, even when lethal.[206] In the book's opening pages, Coates observes his son quietly retreat to his bedroom, crying at the news report that Michael Brown's killers will not be held accountable for their actions.[207] To dull any future pain his son will experience when another unarmed Black person is killed at the hands of police, Coates explains that such occurrences are ordinary, expected even. To be Black is to know that such things predictably reoccur. This is the lesson Coates must teach his son in America.[208] As Bryan Stevenson explains: "People of color in the United States, particularly young [B]lack men, are burdened with a presumption of guilt and dangerousness."[209]

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202 *Id.* at 96.

203 *Id.*

204 TA-NEHISI COATES, BETWEEN THE WORLD AND ME 12 (2015).

205 *Id.* at 9.

206 *Id.* at 11; *see* Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html; Matt Apuzzo & Michael S. Schmidt, *U.S. Not Expected to Fault Officer in Ferguson Case*, N.Y. TIMES (Jan. 21, 2015), https://www.nytimes.com/2015/01/22/us/justice-department-ferguson-civil-rights-darren-wilson.html.

207 COATES, *supra* note 204, at 11.

208 *See also* IMANI PERRY, BREATHE: A LETTER TO MY SONS (2019).

209 Stevenson, *supra* note 196, at 4.

Embodied empathy is born from the shared experience of navigating the social meanings attached to Black people in America. The joys, the indignities, the celebrations, and the violence. It is intimate, lived familiarity with experiencing America's racial hierarchy that formed during slavery, the impact of which is felt by Black people regardless of whether one's ancestors were held in bondage or immigrated voluntarily. Within the context of clinical therapy, Black "therapists often see themselves as being culturally connected to their [Black] clients, and having a shared cultural heritage and history can lead to a unique therapeutic alliance between [Black] therapists and [Black] clients."[210]

This understanding and lived experience can add a greater and necessary depth to the attorney-client relationship. One Black defender described her exposure to certain life experiences as enabling her to form deeper connections with Black clients: "Being a child of parents who were incarcerated; . . . [I'll share] whatever I have to pull from my background."[211] Doing so communicates to her clients that she understands, or at least has the ability to understand, what they are experiencing. And like in clinical therapy, this knowledge and experience can benefit Black defendants by engendering greater embodied empathy on the part of same-race defenders.

B. Extending the Right

What if the law empowered indigent defendants to choose counsel who they believed could best represent them? Some federal appellate courts have concluded that the right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship."[212]

For many defendants, quality representation includes how well counsel hears, believes, and understands them; and how well counsel tells their story.[213] Whether counsel is competent and has the capacity to provide adequate representation—factors trial courts consider when defendants request to substitute counsel—misses the mark. Further, the Court frames these factors as a negative—the floor that counsel should not fall below. Instead, a defendant may prioritize positive factors, such as a lawyer with the ability to overcome the pre-

210 Goode-Cross & Speight, *supra* note 155, at 331 (citation omitted).

211 Defender No. 9.

212 Slappy v. Morris, 649 F.2d 718, 720 (9th Cir. 1981), *rev'd*, 461 U.S. 1, 13 (1983).

213 *See* Chelsea Davis, Ayesha Delany-Brumsey & Jim Parsons, *'A Little Communication Would Have Been Nice, Since This Is My Life': Defendant Views on the Attorney-Client Relationship*, 40 CHAMPION 28, 29–31 (2016) (describing a study of client interviews which reveals how important communication is to attorney-client relationships).

sumption of dangerousness and criminality that society and the legal system assign Black defendants. In fact, "[o]ur system of laws generally presumes that the criminal defendant . . . knows his own best interests and does not need them dictated by the State."[214]

These ideas are not unprecedented. In a 2008 article, Shani King advocated for Black lawyers to represent Black clients in civil legal service cases.[215] King recommended that "[g]iven the fundamental importance of the attorney-client relationship in securing favorable outcomes for clients, legal services organizations . . . that serve large populations of African American clients should employ staff attorneys who are most likely to engender trust and facilitate communication with their clients. . . . [That is,] African American staff attorneys."[216] Two decades after Stephen Schulhofer and David Friedman recognized that extending the right would likely improve the attorney-client relationship,[217] their arguments led a small community in Texas to enable indigent defendants to select counsel of their choosing among a list of court approved lawyers.[218] The one-year pilot program, the first of its kind in the nation, appeared to work.[219] Relative to non-choice defendants, client choice defendants were more likely to perceive that their lawyer treated them with respect.[220] With regard to outcomes, although most cases involved the defendant pleading guilty, significantly more choice defendants pled to lesser charges, more choice defendants went to trial than non-choice, and choice defen-

214 Martinez v. Ct. of Appeals of California, Fourth App. Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring).

215 Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1 (2008).

216 *Id.* at 3–4.

217 Schulhofer & Friedman, *supra* note 41, at 104.

218 Schulhofer, *supra* note 41, at 544–57 (describing Comal County, Texas's pilot program implementing counsel of choice for indigent defendants); *see also* Catherine Burnett, *Choosing Choice: Empowering Indigent Criminal Defendants to Select Their Counsel*, 60 S. TEX. L. REV. 277, 310–24 (2019) (same).

219 The program's small sample size limits meaningful extrapolation. Burnett, *supra* note 218, at 321.

220 M. ELAINE NUGENT-BORAKOVE, FRANKLIN CRUZ & NORMAN LEFSTEIN, JUST. MGMT. INST., THE POWER OF CHOICE: THE IMPLICATIONS OF A SYSTEM WHERE INDIGENT DEFENDANTS CHOOSE THEIR OWN COUNSEL 34 (2017), https://www.jmijustice.org/wp-content/uploads/2017/04/The-Power-of-Choice_29-MAR-2017.pdf. The program's evaluation did not consider race when analyzing the attorney-client relationship. Comal County, Texas is approximately 67% white (alone, not Hispanic), 28% Hispanic, and less than 3% Black. *QuickFacts: Comal County, Texas*, U.S. CENSUS BUREAU (2019), https://www.census.gov/quickfacts/comalcountytexas.

dants were more likely to receive a sentence of community service rather than incarceration.[221]

These benefits to the outcomes of choice defendants' cases demonstrate that there may be something more at stake than merely exercising agency, which by itself is still a worthy priority. These benefits suggest that when a defendant is able to exercise choice, it fosters trust; and with trust comes an improved attorney-client relationship, which can offer multiple benefits, including better case outcomes. As discussed below, enabling choice-driven racial congruency between the defendant and counsel can also facilitate trust. And given the racialized criminal legal system, trust within same-race representation may provide significant improvements to the outcomes of Black indigent defendants' cases.

IV
BLACK ON BLACK REPRESENTATION

Should the law extend counsel of choice to indigent defendants, it would enable low-income people charged with a crime the autonomy to select the lawyer that they believe would best represent them.[222] This Part explores why a Black indigent defendant might prioritize racial congruency and cultural competency when selecting representation. The desire to match Black defendants with Black advocates for improved representation is not a new concept. In the 1960s, the sentiment in under-resourced communities of color was that "there was something unseemly about large numbers of [B]lack defendants being appointed [white] lawyers who seemed to have little understanding of their lives."[223] In 1978, Judge John D. Fauntleroy, one of Washington, D.C.'s first Black judges, chastised the esteemed Public Defender Service for its failure to hire Black lawyers: "When you're dealing with these community problems (in Superior Court) you need people who understand the community."[224]

As discussed in Part III, Black public defenders may be better situated to represent their client's humanity before the court given their shared understanding of the social meanings attached to Black people in this country. Research demonstrates that Black public

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221 Burnett, *supra* note 218, at 317–18 (citing NUGENT-BORAKOVE ET AL., *supra* note 220, at 32–33).

222 *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (finding that the right to counsel of choice "commands . . . that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best").

223 MAYEUX, *supra* note 53, at 160.

224 Laura A. Kiernan, *Public Defender Unit Accused of Bias*, WASH. POST, Oct. 13, 1978, at C3.

defenders harbor less anti-Black bias than do their non-Black colleagues.[225] Black public defenders, more often than their white colleagues, have direct or indirect exposure to communities similar to those their clients are from and exposure to similar life experiences.[226] In a criminal justice policy recommendation to the Biden Administration, the Black Public Defender Association explained that Black public defenders who "come from communities most disproportionately impacted by the criminal legal system" are "necessary to fight against racism and end mass incarceration."[227] Sameness, whether stemming from race, sexuality, or some other shared identity, can inspire connection, often helping people "establish rapport, trust, and engagement."[228]

This Part presents firsthand accounts from Black public defenders about how they perceived their shared race with their clients—given the social meanings assigned to race—impacted the formation of the attorney-client relationship, improved representation, and mitigated anti-Black bias. As demonstrated below, same-race representation may lead to more thorough investigation, more robust case theory development, and better development and presentation of mitigating

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225 *See* Eisenberg & Johnson, *supra* note 22, at 1553 (finding that, among capital defense attorneys who underwent implicit association testing, "[B]lack subjects ha[d] an automatic preference for [B]lack [faces], but [the effect was] significantly smaller than the preference white and Asian subjects have for white [faces]"); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072 (2006) (noting that anti-Black bias is significantly higher for white people than for Black people).

226 *See* Defender No. 5 ("Unfortunately, for a lot of our [non-Black] lawyers, the only experience they have with Black people is as clients."); *id.* ("I'm from the same neighborhood as my clients. When they mention a place, I know exactly what they're talking about. When they slip into some slang from the Southside, I know what they mean."); Defender No. 10 ("I know . . . what that experience is like. I've . . . had cousins who [were] arrested and their moms is calling me to help, or family members of my own. And I know . . . what's going through . . . [my clients'] heads and particularly when I reach out to [their] family members. I'm aware."); Defender No. 9 ("When your client knows that you understand what it's like to visit a loved one, a parent, a sibling in custody, in lock up. To be patted down, searched. To write letters. To put money on someone's books. To accept a collect phone call. When [your client] knows that you've been there, that you have a shared experience with them, you can't put a value on that."); *see also* CLAIR, *supra* note 13, at 74 ("[R]acially marginalized defendants have the . . . disadvantage of being less likely to share everyday cultural experiences with their defense attorneys, who are mostly white and middle class. Sharing cultural experiences, tastes, or worldviews . . . tends to facilitate trust, whereas not sharing these qualities . . . tends to be grounds for mistrust." (footnotes omitted)).

227 BLACK PUB. DEF. ASS'N, DISRUPTING CARCERAL SYSTEMS: BPDA'S RECOMMENDATIONS TO THE BIDEN-HARRIS ADMINISTRATION 3 (2021), http://blackdefender.org/wp-content/uploads/2021/04/bpda-biden-harris-report.pdf.

228 Alexis Anderson, Lynn Barenberg & Carwina Weng, *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 340–41 (2012).

evidence at sentencing. These factors are critical to effective representation under the Sixth Amendment.

A. *The Attorney-Client Relationship*

The initial meeting is a critical moment in the formation of the attorney-client relationship that can set the stage for the remainder of representation. This meeting is often brief, stressful, and transactional given counsel's immediate need to obtain information about the case against the client. However, it is critical for defense counsel to lay the foundation for an effective attorney-client relationship during this first interaction.[229] When a Black defendant is paired with a non-Black defense lawyer, it is necessary to first break through a cross-racial barrier to develop the relationship.[230] By contrast, a same-race defender can immediately begin to establish a deeper professional connection.[231] The head of one public defender office explained that when she establishes an initial bond with a same-race client, they can jump right into discussing the substance of the case.[232]

For some Black defendants, simply laying eyes on a Black defender can put them at ease. One defender described the district courthouse she practices in as "overwhelmingly white. [It] has a negative reputation with [defendants] of color, especially Black people . . . [T]he judges are all white, the prosecutors are all white, the sheriffs are all white, the courtroom personnel is all white . . . my personnel in the public defender office is mostly white."[233] Thus, "when they see me . . . I'm the only voice that [they] have that can identify with [them]."[234] A federal defender from a major metropolitan jurisdiction explained the impact her appearance and slight Caribbean accent have on her clients, many of whom are Black Caribbean. "[T]hey feel more comfortable."[235] She notices her clients observe that she wears

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229 *See* ABA STANDARDS, *supra* note 40, at Standard 4-3.3(a) ("In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality [and] establishing trust . . . .").

230 *See* Bryant, *supra* note 18, at 42 ("Lawyers and clients who do not share the same culture face special challenges in developing a trusting relationship in which genuine and accurate communication can occur.").

231 *But see* Defender No. 10 ("My Blackness, my womanness, my relative appearance of youth, gets them more concerned in some ways. [They think]: 'She's young, she's Black, she's a she. She doesn't know what she's doing. She's going to let the judge run all over her.' And so I'm aware that's probably what they're coming to the table with [and that I have to address these concerns in my advocacy.]").

232 Defender No. 12 ("[I]t makes me more efficient.").

233 Defender No. 5.

234 *Id.*

235 Defender No. 3.

her hair naturally, in locs.[236] "[Their thinking is:] If you have some understanding of where I come from, then this is going to be something that you care about and pay attention to, and are invested in. As opposed to you thinking that I am someone so different from you, and forgettable in some way."[237] Research shows that the inverse is true, anti-Black bias can result in a defender being less invested and spending less time on a Black defendant's case, which can then impact a defendant's willingness to share information that could help advance the defense.[238]

In these examples, the lawyers' mere presence engendered trust with their same-race clients. Race in these instances acted as a lifeboat amid potentially hostile, biased waters. This lifeline—the initial connection—can then translate into meaningful differences in representation. As discussed below, the bond can help open the lines of substantive communication that may otherwise remain closed to or misunderstood by non-Black or less culturally aware counsel.

1. Quality of Communication

Communication is a key aspect of the attorney-client relationship and a central feature of the Sixth Amendment right to effective counsel. One of defense counsel's core duties is "to communicate and keep the client informed and advised of significant developments and potential options and outcomes."[239] Yet, problems with communication are the most frequent basis of bar complaints against lawyers.[240] Within criminal defense, a breakdown in communication can result in the deprivation of the right to counsel.[241] It can also serve as good cause for the court to grant a defendant's motion to substitute

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236 *See* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO L.J. 1079, 1080 n.2 (2010) (describing locs or locks as "sections of hair that are 'permanently locked together and cannot be unlocked without cutting'" (citation omitted)).

237 Defender No. 3.

238 *See* Richardson & Goff, *supra* note 22, at 2636–38 (explaining that anti-Black bias causes white defenders to "unconsciously exhibit hostility" that "adversely affect[s] the attorney's triage decisions," which, in turn, makes clients less likely to be forthcoming with information helpful to the case).

239 ABA STANDARDS, *supra* note 40, at Standard 4-1.3(d).

240 Stephen E. Schemenauer, *What We've Got Here . . . Is A Failure . . . To Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 645–46 (2007) (surveying the fifty states and D.C. and finding that "[t]he most common nationwide complaint is a 'failure to communicate'").

241 Brown v. Craven, 424 F.2d 1166, 1169–70 (9th Cir. 1970) (granting habeas relief for denial of right to counsel where trial court forced defendant to trial over defendant's motions to substitute appointed counsel with whom there was a complete breakdown in the relationship).

counsel.[242] This Subsection demonstrates how same-race representation can ease communication between the attorney and client and substantively benefit the client's case.

The few studies that measure indigent defendant satisfaction reveal that communication problems abound.[243] Research shows that differences in race, gender, class, and other cultural identities can create barriers to communication.[244] To compensate for race-based barriers in communication with their clients, some lawyers rely on non-white colleagues, often non-lawyers, to act as cultural translators. One public defender was the only Black lawyer in her office when hired, despite practicing in a jurisdiction where approximately ninety percent of her clients are Black.[245] "I've had situations, right before a trial, [where] my white colleague [asked]: There's no way we should be going to trial. All the evidence is against us. I can't get through to my client. Can you talk to them?"[246] Although she often agreed to speak with her colleagues' clients in these instances, she lamented that those situations can be difficult because she does not know the facts of the case, the investigation, nor the viability of the case for trial.[247] A supervising defender with whom I spoke shared an example from her practice:

> There was someone in lockup and one of my [supervisee] attorneys, who was white, was having a difficult time communicating [to the Black client] what the judge had just said during conference. He asked me . . . to help him explain it to the client because the client thought that my attorney was "selling him out" . . . . All he was doing was relaying what the judge told him to inform his client. By me coming back there, I was like, "look, no one is trying to sell you out. We're not working with the system. We're not working with the judge. We are here to help you." . . . [M]e being there; the tension just went down. [I was able to bring a sense of] familiarity.[248]

However, there is something lost between the lawyer and the client when the lawyer is unable to serve as the primary source of

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242 Benitez v. United States, 521 F.3d 625, 632 (6th Cir. 2008) (noting trial court has an obligation to inquire into source of dissatisfaction between defendant and counsel, and may grant motion to withdraw or substitute counsel if there is a showing of good cause).

243 *See, e.g.*, Campbell et al., *supra* note 18, at 761–63 (finding common themes among defendants' complaints, including perception that their public defenders did not listen to them, spent little and low-quality time with them, did not inform them about what would happen during upcoming court proceedings, and did not inform them about certain rights).

244 *See supra* note 18 and accompanying text.

245 Defender No. 1.

246 *Id.*

247 *Id.*

248 Defender No. 5.

information about the case. This barrier can corrode trust and disrupt the relationship.

Same-race representation can negate the need for a cultural translator and allow the attorney and client to establish trust more readily. The head of a state office, who is Black, discussed a case she worked on with co-counsel who were white. She shared an anecdote from the client's perspective who described a shift in representation when she joined the team: "He was often told 'that doesn't make sense' or 'you shouldn't say that,' when it was things I picked up on automatically and said: 'well no, that makes perfect sense. I get it.'"[249] Her presence on the team and the information she gathered from the client helped shape the theory of defense.[250]

2. *Development of Trust*

Another foundational component of the attorney-client relationship is trust. The ABA Standards instruct criminal defense attorneys, "[i]mmediately upon appointment . . . to establish a relationship of trust and confidence" with the client.[251] The Court has recognized that crucial "decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence."[252] Just as cross-racial representation can create a barrier to communication, it can also serve as an obstacle to establishing trust.[253] Conversely, same-race representation provides the potential for lawyers and clients to develop a trusting relationship based on a perception of shared experiences and understanding.

Many of the Black public defenders with whom I spoke explained that their same-race clients perceived them to be less a "part of the system" and thus more trustworthy than their white colleagues.[254]

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249 Defender No. 4.

250 *Id.*

251 ABA STANDARDS, *supra* note 40, at Standard 4-3.1(a); *see also* Janet Moore & Andrew L.B. Davies, *Knowing Defense*, 14 OHIO ST. J. CRIM. L. 345, 362 (2017) ("Meeting new clients, and winning their trust and respect, is a crucial part of defenders' daily activity.").

252 Morris v. Slappy, 461 U.S. 1, 21 & n.4 (1983) (Brennan, J., concurring) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-3.1(a) (2d ed. 1980)).

253 Campbell et al., *supra* note 18, at 764 (finding distrust between public defenders and clients due to the influence of racial and class differences); Bryant, *supra* note 18, at 42 (explaining that differences in culture between the lawyer and client can create challenges in developing trust).

254 Former public defender and current law professor, Kenneth Troccoli wrote about the common pairing of Black indigent defendants with white public defenders in his 2002 article, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1 (2002).

This reflects the fact that many Black indigent defendants racialize the system as white. Thus, when Black defenders and their Black clients appear together amidst the overwhelmingly white demographics of the courtroom—where the judges, prosecutors, and court officers are often all white—it creates a sense of solidarity between them.[255] "There is a different relationship that's built [between my Black clients and me] . . . . They trust me [because] they see nothing but white . . . in the courtroom."[256] This perceived distance between Black public defenders and the "system" enables Black indigent defendants to more readily develop trust with their same-race defenders. One defender described the currency her race plays when interacting with her clients over the phone. Given the nature of her practice—in court daily—she often "meets" her clients for the first time over the phone. "Over the phone, they think I'm a white girl [so] I have to let them know, I have to identify myself [as a Black woman], because it definitely changes the tone and tenor [of the conversation]."[257] After revealing her race and referencing a shared experience, she immediately hears a shift in her clients' voices and notices that they tend to be more open and forthcoming with information after the disclosure.[258]

B. Black Defenders Can Mitigate Anti-Black Bias

As set forth below, Black public defenders may be able to more readily see, hear, and understand their Black clients and, as importantly, Black clients tend to more readily see, hear, and understand their Black lawyers.[259] At each turn in the system, a Black indigent defendant faces potentially hostile decisionmakers whose anti-Black bias may cloud judgment and detrimentally impact the defendant's case.[260] Public defenders, like all of us, harbor anti-Black bias.[261] Such

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In it, he described the common sentiment of Black clients that the system is racist and rigged against them, which includes white public defenders "'whether racist or not, [who] are part of that system.'" *Id.* at 17; *see also* Johnathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4, 6 (1971) (revealing that many indigent defendants viewed their appointed lawyers as affiliated with the prosecution or as "an agent of the prosecution").

255 *See* Defender No. 5; Defender No. 9.

256 Defender No. 1.

257 Defender No. 9. An appellate defender explained that she also regularly "meets" her Black clients over the phone and that when they later meet in person, she could tell that "[t]hey were so happy that I wasn't white. 'She's one of us!' [The client's mood shift] was remarkable." Defender No. 8.

258 Defender No. 8.

259 *Cf.* DELGADO & STEFANCIC, *supra* note 26, at 11 (discussing the concept of a "unique voice of color," which holds that minorities have a presumed competence to speak about race and racism that their white counterparts do not have).

260 GONZALEZ VAN CLEVE, *supra* note 20, at 17–39 (describing the racialized culture of Cook County, Illinois criminal courts, including that defense counsel, who are

bias can manifest in small or large ways, such as defense counsel mistaking another Black person in a courtroom for their client,[262] or in negotiating a less favorable plea agreement on behalf of a Black client relative to an otherwise similarly situated white client.[263] However, research shows that Black defenders harbor less anti-Black bias than do their non-Black counterparts.[264] Moreover, Black defenders may be more likely to recognize racism and raise race-based challenges by virtue of their experience as Black people. In this way, Black defense counsel are particularly well-situated to challenge anti-Black racial bias whenever it arises in the client's case.[265] This Section argues that Black public defenders can serve as a safeguard against anti-Black racial bias in the criminal legal system.

Given their intimate understanding of the social meaning assigned to Black people in this country, Black defenders may have both the legal *and* experiential awareness to challenge anti-Black racism in their client's case. Conversely, "a white attorney who represents a client of color may not be prepared to fully relate to the client if she approaches the client with a set of assumptions that do not apply beyond her dominant culture."[266] Black public defenders with whom I spoke shared examples where they believe their shared race helped their advocacy on behalf of Black clients. For instance, a defender now serving as the executive director of an office recalled a case involving a young Black client facing serious felony charges. The defender joined two white lawyers who the court had already appointed. There was a "difference in how [the client] felt when he had lawyers who were not his same race, and then . . . that changed

overwhelming white, often perpetuate the court system's racial abuses when interacting with their indigent clients, who are overwhelmingly Black).

261 Richardson & Goff, *supra* note 22.

262 CLAIR, *supra* note 13, at 75 (observing instances of mistaken identity where white lawyers approached groups of Black people "looking questioningly" for their client or "assuming" that some other Black person was their client).

263 *See* Edkins, *supra* note 37 (finding that defense attorneys are more likely to recommend plea bargains for Black clients that impose harsher sentences than plea bargains they would recommend for similarly situated white clients).

264 Eisenberg & Johnson, *supra* note 22, at 1553.

265 *See* Gonzales Rose, *supra* note 182, at 2258 (explaining that people of color have the competency to recognize and speak about race and racism).

266 Roland Acevedo, Edward Hosp & Rachel Pomerantz, *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 18–19 (2000); *see also* Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 149 (2018) (proposing abolitionist approaches to individual client representation but acknowledging that "[b]ecause the majority of defense lawyers have not been incarcerated and are not people of color, . . . they may be ill-equipped to effectively identify and address systemic racial inequities in our systems of imprisonment").

when I came into the picture. . . . Some of that was me feeding [new] information [back to the team] to build our theory [of defense]."[267] She recalled that her representation "allowed [the client] to open up more. It allowed him to feel heard and understood."[268] As a result, the defense team had a more robust picture of the client, the defense, and mitigation. Just as significant, the client felt better represented.

Black defenders' mere presence in the courtroom may also mitigate the impact of or dissuade the prosecution and/or trial judge from engaging in anti-Black racism. As discussed above regarding the benefits of same-race representation in education, this is known as passive effect, where the mere presence of a teacher—or public defender—of the same race can render a benefit.[269] A Black lawyer's presence may provide a powerful antidote to the presumption of criminality and dangerousness that society, including jurors, judges, and prosecutors assign to Black people. Professor and legal historian Kenneth Mack observes that Black civil rights lawyers had the power through their "brilliant" performances in Southern courts to transform the thinking of white observers.[270] Research on race in the legal profession and its impact on criminal cases shows that "more persons of color making decisions in the justice system" can "mitigate disparities in justice outcomes."[271] A study on sentencing indicated that when "consciousness and awareness of racial discrimination [are] elevated" among "decision makers [who are] members of underrepresented groups," it can have a positive outcome on defendants of color.[272]

When facing a Black defense attorney, prosecutors may also be less likely to rely on race when exercising peremptory strikes to remove prospective jurors. In response to a Black defender's *Batson v. Kentucky* challenge,[273] trial judges may think more critically about a prosecutor's purported race-neutral reasoning for removing a nonwhite juror. Black defenders may also be more likely to object to a

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267 Defender No. 4.

268 *Id.*

269 *See* Egalite et al., *supra* note 151, at 45; Dee, *supra* note 151, at 196–97; Dee, *supra* note 176, at 159.

270 KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 83, 105–08 (2012) (providing detailed account of Charles Houston's defense of George Crawford, a Black man charged with murdering a wealthy socialite and her maid in Virginia, where "[o]ne upper-class local woman reportedly confessed that '[a]fter hearing that brilliant man, I can no longer hold the views I previously held of the Negro'" (alteration in original)).

271 Ryan D. King, Kecia R. Johnson & Kelly McGeever, *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC'Y REV. 1, 26 (2010).

272 *Id.*

273 *See* 476 U.S. 79, 96 (1986) (establishing three-part test to determine whether counsel unlawfully relied on race when exercising a peremptory strike on a prospective juror).

prosecutor's use of racially coded and dehumanizing language, whereas a non-Black defender may remain silent because such language may not register as offensive or unlawful.[274] The impact defense counsel's race may have on the prosecutor's and judge's actions regarding racial discrimination in jury selection is an area ripe for additional research.

Black defenders may also be more attuned than white defenders to recognizing their client's humanity beyond the criminal charges.[275] This can impact counsel's temporal investment and performance throughout the case.[276] One appellate defender whose client population is exclusively Black men explained that she observes a difference between the way her Black clients interact with her and with her white colleagues.[277] For example, one client "is very open with me and tells me the truth, and when he is speaking with [my white colleague] he is stern, reserved, and professional . . . [and] he's [no longer] forthcoming."[278] She recognizes that the client's openness is beneficial to her as an advocate, and more importantly, to the case because the information from her client informs the issues in the appeal and the way she presents the client's narrative before the court.[279]

Investigation and presentation of mitigating evidence during a client's sentencing hearing—in both capital and non-capital cases—is part of constitutionally effective representation.[280] The goal of such evidence is to humanize the client beyond the criminal conviction and secure a favorable outcome on behalf of the client. In a capital case, when the defendant is Black, the necessity to humanize the client is

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274 *See* Acevedo et al., *supra* note 266, at 15 ("The subjective experiences of people of specific backgrounds shape their worldviews in different ways. . . . [Accordingly], a set of circumstances can appear different to members of different identity groups.").

275 *Id.* (explaining that "whites may be unaware and unfamiliar with the lives of their clients of color to such an extent that failure to take racial differences into account may mean missing a large part of the client's story and problem").

276 *See* Richardson & Goff, *supra* note 22, at 2634–41 (explaining that racial bias can impact the amount of time defense counsel spends on a case).

277 Defender No. 8.

278 *Id.*

279 *Id.*

280 *See* Williams v. Taylor, 529 U.S. 362, 396 (2000) (finding that defense counsel in a capital case has an "obligation to conduct a thorough investigation of the defendant's background" to mitigate the offense during sentencing); Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41 (2013) (describing the utility of employing capital mitigation evidence development and presentation to non-capital cases); Hugh M. Mundy, *It's Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31 (2013) (explaining the importance and effectiveness of applying principles from capital mitigation development to non-capital cases after *United States v. Booker*, 543 U.S. 220 (2005), which allowed federal judges to depart from the sentencing guidelines).

heightened given the tendency for jurors—who are overwhelmingly white[281]—to rely on race to render harsher punishment to Black defendants.[282] In non-capital cases, such evidence is vital to help Black defendants combat presumptions of future dangerousness and to address the propensity for rehabilitation.[283] For Black clients, this means counsel must be able to investigate and understand the impact that race, ethnicity, and culture have had on the client's life.[284] To perform these tasks effectively, counsel must have cultural competency.[285] Given their experiential awareness of the central role that race plays in a person's life, Black defenders often have the baseline competency to perform this work well and effectively on behalf of their same-race clients.

C. Limitations

The argument that Black defenders could help improve representation for Black defendants raises concerns and questions. What would this mean for white indigent defendants who may want to choose a white defender? In short, the system is already well-situated

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281 *See* EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876, at 14 (2020), https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf (noting that "people of color are dramatically underrepresented on juries as a result of racially biased use of peremptory strikes" and that "[t]his phenomenon is especially prevalent in capital cases"); ELISABETH SEMEL, DAGEN DOWNARD, EMMA TOLMAN, ANNE WEIS, DANIELLE CRAIG & CHELSEA HANLOCK, BERKELEY L. SCH. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS, at v (2020) ("California prosecutors' use of peremptory challenges to exclude African Americans and Latinx citizens from juries is still pervasive.").

282 *See* Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006) (finding that the more phenotypically Black the defendant looked in white victim cases, the more likely jurors would vote for death); Jelani Jefferson Exum, *Should Death Be So Different?: Sentencing Purposes and Capital Jury Decisions in an Era of Smart on Crime Sentencing Reform*, 70 ARK. L. REV. 227, 243–44 (2017) (explaining that implicit racial biases may cause predominately white juries not to give effect to mitigating evidence when the defendant is Black and to inappropriately add weight to aggravating factors when the victim is white).

283 *See* Mundy, *supra* note 280, at 46 n.104.

284 *See ABA Death Penalty Guidelines*, *supra* note 40, at 1021–22 ("Counsel's duty to investigate and present mitigating evidence is now well established. . . . '[P]enalty phase preparation requires extensive and generally unparalleled investigation into personal and family history[,]' . . . [including the client's] experiences of racism or other social or ethnic bias; [and] cultural or religious influences . . . ." (footnote omitted)); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide*, 53 DEPAUL L. REV. 1557, 1580–81, 1587, 1589 (2004) (describing the need for capital defense attorneys to center Black clients' social histories and their race-based experiences, including structural racism and racial discrimination).

285 *See* Holdman & Seeds, *supra* note 25, at 883 ("[C]ultural competency is essential to the ability of capital defense teams to discover and reveal the humanity of the accused.").

to accommodate their requests for same-race representation given the demographics of the legal profession and public defenders. And what of women defendants, defendants who identify as lesbian, gay, bisexual, transgender, or queer, or defendants from any other non-dominant group who may want an attorney who shares their identity, or a heightened understanding of their identity, to represent them? They too should have the option to choose counsel with cultural competency, a lawyer who they can trust and who understands them. These are skills the Supreme Court should deem part of general competency and the ability to provide adequate defense representation. However, no other group of marginalized people has the same presumption of criminality, dangerousness, and irredeemability assigned to them as do Black people.[286] This is why this Article focuses on the experiences of Black indigent defendants and why same-race representation is critical.

That said, this Article does not assume that all Black indigent defendants would select Black lawyers if given the autonomy to choose counsel, nor does it assume that a Black defense lawyer would automatically better serve a Black client. Instead, pragmatically, a Black defendant may want a white lawyer because Black lawyers may face the very same anti-Black bias in the courtroom as Black indigent defendants.[287] One Black public defender in the South recalled a pre-arraignment meeting with a new client, who was Black. The client was older and had several contacts with the criminal legal system over the decades. Upon laying eyes on appointed counsel, the client yelled: "I want a Jew!"[288] A head of office conveyed the sentiments she witnesses coming from some of the Black indigent defendants in the Midwest jurisdiction where she practices.

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[286] *See* MUHAMMAD, *supra* note 34, at 35–87 ("When Hoffman announced that Chicago's 'Italians, Polanders and Russians' lived under conditions 'without question more severe' than [B]lacks, and [B]lacks still showed the 'most decided tendency towards crime in the large cities,' he unequivocally marked the [B]lack urban migrant as a criminal of exceptional measure." (quoting FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (1896))).

[287] *See, e.g.*, Meagan Flynn, *'Lawyering While Black': Maryland Deputy Accused Attorney of Being a Suspect, Complaint Says*, WASH. POST (Mar. 28, 2019), https://www.washingtonpost.com/nation/2019/03/28/lawyering-while-black-maryland-deputy-accused-attorney-being-suspect-complaint-says (reporting that a deputy sheriff detained a Black lawyer and required him to show proof that he was an attorney, after the lawyer appeared in court on behalf of his client who had failed to appear); Bell, *supra* note 79, at 196 (noting that Black lawyers have to "contend with courthouse racism"); BRYAN STEVENSON, JUST MERCY 165 (Spiegel & Grau 2014) (explaining that he, a bearded Black man, dresses "as conservatively as possible for court," so that he would "meet the court's expectation of what a lawyer looked like").

[288] Defender No. 13.

> Black clients are highly aware of the way white attorneys are treated by judges, court officers, [and] prosecutors. They get it. They get what white privilege is . . . they see it. And sometimes they want that kind of representation. Because they're making a calcul[ated decision] about [it] . . . "This is a court appointed lawyer, I'm already . . . screwed, but . . . is there a way that . . . this [white] person is gonna do [right] for me?" And even if they have doubts about whether or not . . . [a white] attorney . . . is really for them, they recognize that . . . whiteness lets that attorney do more than maybe a Black attorney [c]ould.[289]

Black defendants may also want a white lawyer because they view Black lawyers as less competent than white lawyers given their own internalized racism.[290] However, giving indigent defendants the autonomy to choose counsel addresses these concerns. The expansion of the Sixth Amendment right to counsel of choice would enable all indigent defendants to select the lawyer who they believe would best represent them. For a Black defendant, this may mean a non-Black defense lawyer.

Conversely, Black defendants may overwhelmingly want Black lawyers to represent them. The system is not equipped to handle such a demand due to the underrepresentation of Black people in the legal profession, and specifically in the indigent defense community. The high demand for Black representation could create a Black "tax," resulting in burdening Black public defenders with even higher caseloads beyond the systemic burdens of indigent defense work. A similar phenomenon occurs in academia where faculty of color are underrepresented. When hired, faculty of color "are often expected to occupy a certain set of [additional] roles: to serve as mentors, inspirations, and guides" and to serve as "the racial conscience of their institutions."[291] Those in higher education refer to these duties as "invisible labor,"[292] which can detract from faculty of color's ability to perform the primary duties for which the institution hired them. Likewise, even higher caseloads requiring more emotional investment could prove detrimental to the quality of work Black defenders are able to perform.

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289 Defender No. 10.

290 One Defender, describing initial meetings with indigent Black clients, remarked: "When I was a younger attorney, there was some skepticism. Everyone has a vision of what a lawyer looks like, and unfortunately, because we're already in the minority in the legal field and in the public defender field, people expect an older, white haired man to walk into the room." *See* Defender No. 3.

291 Patricia A. Matthew, *What Is Faculty Diversity Worth to a University?*, ATLANTIC (Nov. 23, 2016), https://www.theatlantic.com/education/archive/2016/11/what-is-faculty-diversity-worth-to-a-university/508334.

292 *Id.*

There may also be differences in class and education level between Black lawyers and their indigent clients.[293] Despite the unifying social meaning attached to Black people in this country, class- and education-level divisions can result in different experiential awareness. Professor Mack discusses the tension that Black civil rights lawyers experienced when thrust into a representative role for their clients.[294] However, one defender, acknowledging the obvious differences between herself and her Black clients, explained how their sameness trumped those relatively minor divisions.

> [T]hey know our backgrounds are different, they know that we didn't necessarily grow up in the same neighborhood, or they understand that I'm educated and maybe they're not, or we're from different regional places, but they also have the comfort that they don't have to explain their humanity to me. That part I get. Right? I have Black sons, so they don't have to explain to me that they are a man. We can just talk about the case.[295]

Instead of expending energy overcoming the presumption of criminality and dangerousness that society assigns to Black people,[296] the defender and her client can dive directly into the case. This is less likely to occur as seamlessly for non-Black defenders.

Black people's diverse experiences and the potential for a Black tax do not negate the utility of research and analysis on how counsel's race may impact indigent representation. Nor do these concerns eclipse the benefit that many Black defendants can derive from same-race representation. This research is more developed in other contexts, such as political science. In *Behind the Mule: Race and Class in African-American Politics*, Michael Dawson developed the concept of "linked fate" to describe Black people's political cohesion motivated by the perception that the individual's fate is linked to the shared identity group's interests when making political decisions, like voting.[297] Despite the myriad differences among Black people—

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293 *See* CLAIR, *supra* note 13, at 74–76.

294 MACK, *supra* note 270, at 4–5 ("[A] representative [B]lack person often had to be as unlike most members of the minority group as possible. Black Americans themselves often took great pride in the achievements of atypical members of their race."). Meanwhile, "both [B]lacks and whites often demanded that the representative be an 'authentic' [B]lack person—someone as much like the masses of [B]lack people as possible." *Id.* at 5.

295 Defender No. 12.

296 *See* Stevenson, *supra* note 196, at 4 (describing his own experience of being threatened at gunpoint by a police officer while parked outside his own apartment and reflecting that "young [B]lack men[] are burdened with a presumption of guilt and dangerousness").

297 MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 76–77 (1994) (describing "linked fate" as the "link[] between perceptions of self-interest [and] perceptions of racial group interests," as measured by the

Dawson closely studied economic difference—Black people "have displayed extraordinary political unity in their voting decisions" since the 1960s.[298]

Although Dawson recognized the diversity among Black people in America, he argued that "the strength of individuals' sense of responsibility to each other and to the community as a whole" trumped the differences.[299] Subsequent empirical analysis on identity group cohesion shows that Black people, relative to Hispanic people, non-Hispanic white people, and Asian people, demonstrate the greatest group cohesion.[300] Taken to a broader context, it is the phenomenon that one's prospects are linked to the success of the race. Dawson's theory is instructive here, where Black public defenders may be motivated to zealously represent their Black clients out of a shared sense of linked fate. As one Black public defender described it: "[I]t's me and you up here [in court]. We're standing together as a team. We are a united front against everything that's coming at us . . . ."[301]

D. Opportunity for Growth

Although the ideas in this Article may appear provocative and radical to some, they are not unattainable nor unreasonable. Examining the potential benefits that expanding choice could bring to Black indigent defendants helps advance discourse on undertheorized areas of the criminal law and practice.

The ideas in this Article make clear that more research is needed on racially congruent representation and on exercising choice of counsel from the client's perspective. As a general matter, there is a dearth of qualitative research on indigent defendants' experiences and perceptions.[302] Much of the existing research on indigent defense

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survey question, "Do you think that what happens generally to the [B]lack people in this country will have something to do with what happens in your life?"). I thank Kendall Thomas for introducing me to Dawson's work.

298 *Id.* at 130.

299 *Id.* at 98–99.

300 Gabriel R. Sanchez & Edward D. Vargas, *Taking a Closer Look at Group Identity: The Link Between Theory and Measurement of Group Consciousness and Linked Fate*, 69 POL. RSCH. Q. 160 (2016) (measuring three types of group consciousness—commonality, perceived discrimination, and collective action—and finding that Black people had the greatest overall level of group consciousness across the three dimensions).

301 Defender No. 9.

302 *See* Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 OHIO ST. J. CRIM. L. 431, 431 (2017) (describing the gap in indigent defense research from the client's perspective and presenting findings from a client satisfaction study from a rural public defender agency); Janet Moore, Ellen Yaroshefsky & Andrew L.B. Davies, *Privileging Public Defense Research*, 69 MERCER L. REV. 771 (2018) (noting lack of research on indigent defendant communication with counsel).

focuses on quantitative data regarding charging and sentencing. However, there is limited information and analysis on client perceptions of representation and on attorney-client relationships.[303] Such research could help advance the argument for expanding counsel of choice to indigent defendants and for increasing racial diversity among indigent defense providers.

The ideas in this Article also encourage greater attention to how jurisdictions might implement choice of counsel for indigent defendants. Even without a constitutional mandate, local jurisdictions can begin to explore this possibility.

Although the Comal County pilot program was small in scope, the results seemed to indicate defendants who chose their own lawyer experienced better case outcomes relative to their non-choice counterparts, including shorter sentences.[304] Enabling choice may be easiest in small and rural jurisdictions, where the court appoints counsel to indigent defendants from a list of private attorneys. As Schulhofer and Friedman theorized, appointed counsel would have incentives to offer higher quality services so that defendants select them.[305]

However, in larger jurisdictions where the local government and/or non-profit organizations provide indigent defense representation, extending choice would be more of an undertaking. In those settings, defendants might select counsel from a list of employees from a certain agency; such a list might include details about each lawyer's background, experience, and specialized training. With clients driving the selection process, indigent defense providers would need to conform their hiring, training, and services to better meet client demands. This would necessarily include cultural competency training and hiring public defenders from populations that are more reflective of the clients served.

CONCLUSION

Regardless of whether the Court extends the right to counsel of choice to indigent defendants, perhaps benefiting Black defendants, there is still a dearth of Black public defenders. The arguments in this Article require indigent defense providers to prioritize recruiting more Black lawyers and instituting cultural competency training to ensure that all lawyers can provide effective cross-cultural representation. Such training is largely absent from many public defender

303 Campbell et al., *supra* note 18, at 751–52 (describing the lack of qualitative data on indigent client experience and satisfaction and endeavoring to bridge the gap).

304 Burnett, *supra* note 218, at 317–18.

305 Schulhofer & Friedman, *supra* note 41, at 104.

offices. However, these priorities cannot *start* in practice. Law schools have an obligation to prioritize diversity in the profession and to prepare students for practice. Although cross-cultural lawyering has long been promoted in clinical legal education,[306] many law students graduate without ever having enrolled in a clinic.[307] Moreover, the relevant doctrinal courses—criminal law, criminal procedure, and evidence—fail to adequately prepare students for client-facing work.[308] In these ways, improving the representation options for Black indigent defendants will ultimately improve representation for all indigent defendants.

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306 *See, e.g.*, Bryant, *supra* note 18, at 40 ("By teaching students cross-cultural lawyering skills and perspectives, we make the invisible more visible and thus help students understand the reactions that they and the legal system may have towards clients and that clients may have towards them.").

307 DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 130 (2015) (noting that fewer than five percent of schools require students to undertake clinical training and a majority of students graduate without taking a clinic).

308 Shaun Ossei-Owusu, The New Penal Bureaucrats (U. Pa. Carey L. Sch., Working Paper, Nov. 4, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691671 (arguing that doctrinal criminal legal education is inattentive to racial and gender inequality, as well as to poverty, leaving graduates ill-prepared to combat these issues in practice).