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The Political Economy of Criminal Procedure Litigation

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THE POLITICAL ECONOMY OF CRIMINAL PROCEDURE LITIGATION

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INTRODUCTION

Has the right to counsel enabled poor and minority defendants to shape constitutional criminal procedure doctrine? In the afterglow of the 1963 decision incorporating the right, *Gideon v. Wainwright*,[1] some hoped that it would. A landmark article published in the wake of *Gideon*—an article which came to serve as the blueprint for the federally funded Neighborhood Legal Services program—argued that, by giving each indigent criminal defendant the right to a lawyer, the Court "in effect" gave those defendants "the power to change the law by objecting to and eliminating a body of improper practices by police officers, magistrates, and prosecuting attorneys."[2] The Warren Court sustained the hope that *Gideon* had given rise to a new era in which poor and minority defendants could help "change the law" of constitutional criminal procedure through decisions involving indigent defendants that expanded criminal procedure rights and interpreted those rights in ways designed to redress racial disparities in the administration of criminal justice.[3]

Since then, however, constitutional criminal procedure has taken a conservative turn that is difficult to reconcile with earlier hopes for how *Gideon* would impact constitutional lawmaking.[4]

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[1] 372 U.S. 335 (1963).

[2] Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1333 n.22 (1964).

[3] *Id.*; *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63 (1996) (noting the connection between poverty concerns and the Court's holding in *Gideon*); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) ("[C]riminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race."); Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 16 (Mark Tushnet ed., 1993) (describing the Court's concerns about poverty and race); *cf.* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998) ("Although rarely couched as such, the unmistakable premise of [the Warren and early-Burger Court criminal procedure] doctrines was the assumption that communities could not be trusted to police their own police because of the distorting influence of racism.").

[4] *See, e.g.*, THOMAS R. HENSLEY, THE REHNQUIST COURT: JUSTICES, RULINGS, AND LEGACY 146 tbl.3.9 (2006) (showing the liberal and conservative voting patterns of the Warren, Burger, and Rehnquist Courts in criminal procedure cases based on the data and metrics used in HAROLD J. SPAETH, THE ORIGINAL U.S. SUPREME COURT JUDICIAL DATABASE (2005), *available at* http://www.cas.sc.edu/poli/juri/sct.htm). The literature

Legal scholars seeking to explain this shift in criminal procedure doctrine have largely focused on changes in the Supreme Court's composition and on the confluence of social, political, and cultural factors that influence the Court's decisionmaking.[5] What emerges from these examinations is a familiar narrative, in which the criminal procedure innovations of the Warren Court have been eclipsed by the decisions of more politically conservative Courts.[6] Significantly less attention has been paid, however, to the economic and institutional considerations that have given the Court the freedom to implement a largely conservative criminal procedure agenda and to sever the historical linkages between constitutional criminal procedure and race.[7] One way of exploring these considerations, and thereby enriching our understanding of constitutional criminal procedure's doctrinal shifts, is to return to the question that intrigued scholars and activists in the wake of *Gideon*—whether the right to counsel can enable poor and minority defendants to shape constitutional criminal procedure

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examining the nature of this conservative shift—which is particularly pronounced with regard to the Fourth and Fifth Amendment rules regulating police activity, and the scope of the Sixth Amendment right to counsel—is vast, and a review of the subtleties of the shift is beyond the scope of this Article. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2467 n.5 (1996) (listing significant articles addressing criminal procedure's doctrinal shifts).

[5] *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 270–77 (2009) (describing criminal procedure's doctrinal development and the factors influencing it); FRED P. GRAHAM, THE SELF-INFLICTED WOUND (1970); Louis D. Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979, 989 (2005) (arguing that conservative cultural and political forces drove the decisionmaking in constitutional criminal cases); Klarman, *supra* note 3, at 63 (stating that attention to shifting historical attitudes toward poverty is needed to understand the criminal procedure revolution); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1429 (2004) (arguing that the Supreme Court is influenced by the same social and political currents that move society).

[6] The narratives some scholars offer are more nuanced than this sweeping summary would suggest. *See, e.g.*, Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1044–46 (2006) (showing that Rehnquist Court cases interpreting the Sixth Amendment's jury trial guarantee often involved unusual alignments between liberal and conservative Justices and arguing that the cases demonstrate "the power of law and legal methodology — and not simply politics — in Supreme Court decision making").

[7] *See infra* note 44 and accompanying text.

doctrine—and to identify the material and economic factors that inform the answer.

This Article examines how the political economy of criminal litigation—specifically, the material conditions that determine which litigants have the resources to raise novel criminal procedure claims, and which of those claims are presented to the United States Supreme Court—shapes constitutional criminal procedure. Although political scientists have offered general accounts of how the political economy of litigation affects constitutional lawmaking, these accounts do not engage with some of the basic realities of criminal litigation, including the fact that almost all criminal defendants are poor and must therefore rely on the services of court-appointed and state-funded attorneys.[8] Consequently, these accounts add little to our understanding of several of the major doctrinal shifts in constitutional criminal procedure, including the creation of a constitutional law of state criminal procedure in the 1920s and 1930s, and the conservative turn in criminal procedure following the Warren era.

This Article presents a new framework for understanding how changes in the political economy of litigation contribute to constitutional criminal procedure's doctrinal shifts. The premise of the framework is that litigators can influence the Supreme Court's criminal procedure agenda if they are able to present the Court with cases that frame a criminal procedure right in a light favorable to defendants, and can prevent the Court from considering cases that obscure the value, or foreground the costs, of the right.[9] Yet as the number of organizations representing indigent defendants increases, those organizations lose most of the power they once had to control which cases appear on the Court's criminal procedure docket and are thereby weakened in their ability to shape the Court's interpretation of a constitutional criminal procedure right. Thus, as the number of litigators

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[8] Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 398 (2007).

[9] *Cf.* James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 AM. POL. SCI. REV. 671, 672 (2004) ("Issue framing effects refer to situations where, by emphasizing a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations when constructing their opinions."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 897–98 (2006) (discussing how issue framing can distort judicial decisionmaking).

increases, the Court gains more freedom to select cases that present a constitutional question in a way that conforms to the ideological preferences of the Court's Justices and becomes less constrained by how supporters of a new constitutional right would like the right to be framed.

This framework suggests that, paradoxically, the right to counsel created in *Gideon*, though essential for indigent defendants to obtain a fair trial, may have weakened the ability of those defendants to shape constitutional criminal procedure doctrine. The Court's decision in *Gideon* contributed to an explosion in the number of organizations devoted to indigent defense.[10] Political scientists have credited this explosion with creating the conditions of possibility for the Warren Court's later decisions expanding constitutional criminal procedure rights.[11] These scholars have failed to consider, however, how the explosion simultaneously increased the Court's freedom to retrench those rights.

Before *Gideon* helped transform the political economy of criminal litigation, the Supreme Court's litigation landscape was of a type that, this Article argues, gave the criminal defense bar significant opportunities to shape the criminal procedure agenda of even a conservative Supreme Court. In the 1920s and 1930s, for example, the NAACP and a few other organizations could essentially control which criminal procedure cases involving Southern racial injustices appeared on the Supreme Court's docket, since no such cases reached the Court without their

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[10] *See infra* notes 128–34 and accompanying text.

[11] *See* Charles R. Epp, *External Pressure and the Supreme Court's Agenda*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 255, 256 (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter Epp, *External Pressure*] (arguing that constitutional litigation is dependent on a "support structure for legal mobilization"); *see also* VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 11 (2007) (asserting that the Court's capacity for creating legal change is affected by interest group litigation); CHARLES R. EPP, THE RIGHTS REVOLUTION LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 44–71 (1998) [hereinafter EPP, RIGHTS REVOLUTION] (describing the concept of a support structure for legal mobilization).

assistance.[12] These organizations presented four landmark cases during this period involving black defendants who suffered mistreatment in Southern criminal justice systems, and in each of these cases the Supreme Court reversed state court convictions and in the process created new constitutional law.[13] Although this era has recently been characterized as criminal procedure's "progressive past,"[14] the *Lochner*-era Court that decided these cases was famously conservative in two important respects.[15] First, prior to its 1923 decision in *Moore v. Dempsey*, which reversed a state court conviction where the trial was conducted under the threat of mob violence,[16] it was not expected that the Court "would jettison traditional federalism constraints on the Court's supervision of state criminal proceedings" to come to the aid of state court defendants.[17] Second, notwithstanding its criminal procedure interventions, the Court was one that, as Michael Klarman argues, "evinced little sensitivity to the plight of blacks generally."[18] In unanimous decisions, the Court of that era not only declined to strike down racially restrictive residential covenants,[19] but also upheld the constitutionality of public school

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[12] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 156–57 (2004) (noting that the NAACP "provided essential financial backing and skilled lawyering" for criminal cases).

[13] *See* Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (requiring exclusion of confessions extracted through torture); Norris v. Alabama, 294 U.S. 587, 589 (1935) (prohibiting intentional exclusion of blacks from petit juries); Powell v. Alabama, 287 U.S. 45, 71 (1932) (requiring appointment of counsel in capital cases); Moore v. Dempsey, 261 U.S. 86, 90–91 (1923) (holding that mob-dominated trials violate due process).

[14] Tracey L. Meares, *The Progressive Past*, *in* THE CONSTITUTION IN 2020, at 209, 209–13 (Jack M. Balkin & Reva B. Siegel eds., 2009).

[15] Lochner v. New York, 198 U.S. 45 (1905); *cf.* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876 (1987) (identifying the *Lochner* period as lasting from 1905 until the Supreme Court's decision in West Coast Hotel v. Parrish, 300 U.S. 379 (1937)).

[16] 261 U.S. at 90–91.

[17] KLARMAN, *supra* note 12, at 121; *see also* RICHARD C. CORTNER, A MOB INTENT ON DEATH 144–46 (1988) (discussing the *Moore* Court). Indeed, just eight years prior to its decision in *Moore*, the Court had rejected the mob-dominated trial claim of Leo Frank, a Jewish industrialist who was subsequently lynched. Frank v. Mangum, 237 U.S. 309, 338 (1915); *see also* KLARMAN, *supra* note 12, at 120–23 (discussing *Frank* and *Moore*).

[18] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53 (2000).

[19] Corrigan v. Buckley, 271 U.S. 323, 330 (1926). In keeping with its hostility during the *Lochner* period toward laws that restricted the right to buy and sell property, the Court invalidated laws formally requiring residential segregation. *See* Buchanan v. Warley, 245

segregation (despite the fact that the petitioners—who were attacking Mississippi law classifying Chinese students as black for race classification purposes—did not even raise such a challenge in their brief).[20] Each of the four criminal procedure cases involving Southern black defendants during this era, however, presented the Court with horrific and high profile instances of racial injustice, visited upon defendants who were likely innocent.[21] Thus, by constructing the Court's criminal procedure agenda through the cases it selected, impact litigation organizations were able to influence the creation of new constitutional law by a Court that was typically conservative with regard to race and federalism issues.

The litigation conditions that have existed since the Warren era, however, have given such organizations considerably less power to counterbalance the ideological preferences of Supreme Court Justices in criminal procedure cases. Accompanying the post-*Gideon* explosion in the number of litigation organizations available to represent indigent defendants was a boom in the number of certiorari petitions raising constitutional criminal procedure claims.[22] This combined growth in the number of organizations and certiorari petitions weakened the ability of impact litigation organizations to coordinate with other attorneys representing indigent defendants, thus rendering them unable to assume control of cases involving sympathetic criminal defendants. Moreover, the increase in certiorari filings left the Court with a vast array of criminal procedure cases to consider for

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U.S. 60, 82 (1917); *see also* KLARMAN, *supra* note 12, at 143 (noting that segregation ordinances did not survive legal challenge). These formal rights offered little protection to blacks, however, given the ubiquity of racially restrictive covenants. *See id.* at 144–46, 261–64 (discussing the success of racially restrictive covenants in systematically excluding blacks from residing in white neighborhoods). Similarly, although the Court invalidated laws formally excluding blacks from election primaries, Nixon v. Condon, 286 U.S. 73, 89 (1932); Nixon v. Herndon, 273 U.S. 536, 541 (1927), it also held there was no state action when blacks were excluded from Democratic Party primaries because the party limited its membership to whites. Grovey v. Townsend, 295 U.S. 45, 53 (1935). This state action limitation effectively ensured that blacks in the South would remain disenfranchised. *See* KLARMAN, *supra* note 12, at 158 (assessing *Grovey* and its significance).

[20] *See* Gong Lum v. Rice, 275 U.S. 78, 85–87 (1927); KLARMAN, *supra* note 12, at 146–47 (describing the context surrounding the *Gong Lum* case).

[21] *See infra* notes 94–99 and accompanying text.

[22] *See infra* notes 133–37 and accompanying text.

review,[23] and has thus given the Court freedom to select those cases that frame a criminal procedure claim in ways that reinforce the Justices' preconceived understandings of the issues at stake.[24] Consequently, in constitutional criminal procedure, individual Justices' preferences determine which cases appear on the Court's agenda to an even greater degree than in other areas of constitutional law, where the political economy of litigation gives impact litigation organizations more control over the certiorari filing process.[25]

In short, the post-*Gideon* political economy of criminal litigation has allowed for a Supreme Court criminal docket dominated by noise. This docket gives the Court's members a freedom they once lacked to choose cases that obscure the consequences at stake for sympathetic suspects and defendants when the Court narrows the scope of a criminal procedure right.[26] Accordingly, to a greater degree than in the years preceding *Gideon*, the Court's interpretations of the Constitution's criminal procedure guarantees are now developed through, to borrow a phrase of Justice Frankfurter's, "sordid little case[s]" that are "apt to obscure the implications of the generalization to which [they] give[ ] rise."[27] Thus, to the extent the Court's decision in *Gideon* deserves credit for the birth of the criminal procedure revolution, it must also be faulted for contributing to its demise.

Part I of this Article presents the background necessary to reexamine the political economy of criminal litigation. It reviews the contributions political scientists have made toward illuminating how the political economy of litigation shapes constitutional lawmaking, and explains why the framework these scholars offer is inadequate to address the realities of criminal defense litigation. Part II then presents a new framework that reflects these realities, developing three propositions concerning the role impact litigation organizations play in advancing constitutional claims on behalf of poor and minority defendants.

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[23] *See infra* note 138 and accompanying text.

[24] *See infra* notes 143–70 and accompanying text.

[25] *See infra* Part II.C.

[26] *See infra* notes 175–78 and accompanying text.

[27] United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting).

As Part III illustrates by tracing how *Gideon* helped enable the conservatism of the current doctrine, these propositions have considerable explanatory value when they are brought together and applied to analyze doctrinal shifts in constitutional criminal procedure. For those who accept that the current doctrine should be changed (or, regardless of the fairness of the existing doctrine, think that the Court should be more responsive to the interests of litigators), this framework sheds light on how to ameliorate the harm caused by the structural factors underlying these doctrinal shifts. Accordingly, Part IV illustrates the sort of solutions that reformers may wish to explore in order to better enable litigators to influence the Supreme Court's constitutional criminal procedure agenda.

I. THE LANDSCAPE OF CRIMINAL LITIGATION

Our understanding of constitutional criminal procedure's doctrinal evolution can be enriched by examining the allocation of resources available for criminal defense litigators to advance particular constitutional arguments. This is because developments in constitutional doctrine are to a large extent dependent on the range of cases available for the Supreme Court to accept for review and on the nature of the arguments litigators choose to present in those cases. Scholars who have challenged this view emphasize that the Supreme Court is free to select from among a seemingly unlimited number of cases raising a federal constitutional question and to manipulate the arguments presented in those cases to such a degree that the Court may, for all practical purposes, "create" a constitutional issue out of thin air, regardless whether any litigator chose to raise the issue.[28]

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[28] The term for this concept is "issue fluidity." Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 87 AM. POL. SCI. REV. 691, 691 (1995); *see also* S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 319, 322 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (discussing the existence and application of issue fluidity). The concept is sometimes illustrated by *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), where the Court incorporated the Fourth Amendment exclusionary rule even though none of the parties raised the argument. McGuire & Palmer, *supra*, at 692. It should be noted, however, that in *Mapp* the ACLU submitted an amicus brief that, in passing, asked the Court to examine the incorporation issue. Brief Amici Curiae on Behalf of American Civil Liberties Union &

This argument disregards, however, the extent to which Supreme Court Justices consider themselves bound by institutional norms concerning the issues they are willing to address and the circumstances under which they are willing to address them.[29] Among these behavior-constraining norms is a reluctance on the part of the Justices to tackle a novel constitutional issue before it has "percolated" in the lower courts.[30] The Justices will, in other words, generally wait until the lower courts have been given sufficient opportunity to address an issue before they grant certiorari to address it.[31] Often, then, there must be sustained lower-court litigation by individuals motivated to raise an issue before the Supreme Court will accept it for review. Accordingly, as Charles Epp has argued, the choice of cases that the Supreme Court may accept for review is constrained by the cases that litigators have the resources to bring.[32]

For most constitutional issues, the market typically does not offer sufficient incentives for any single individual to pursue such sustained litigation. The creation of a new constitutional right is a public good, the benefits of which are enjoyed by a large population, but the costs of which are borne by individual litigants.[33] Often, the costs of pursuing a constitutional litigation strategy that could introduce the Supreme Court to a new understanding of a constitutional right will substantially outweigh

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Ohio Civil Liberties Union at 20, *Mapp*, 367 U.S. 643 (No. 236); *see also* STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 246 (1995) (discussing how the ACLU and the Ohio Civil Liberties Union raised the exclusionary issue as one of their arguments).

[29] *Cf.* Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 606–07 (2000) (book review) (discussing the extent to which "ideological preferences" and the "attitudinal model" influence judicial decisionmaking).

[30] H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 230–31 (1991).

[31] *See id.* at 230–34 (describing the norm of "issue percolation"); Epp, *External Pressure*, *supra* note 11, at 259 ("[J]ustices have developed an institutionalized reluctance to decide issues that have been the subject of little sustained litigation in lower courts . . . .").

[32] Epp, *External Pressure*, *supra* note 11, at 260; *cf.* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 1–2 (1977) (demonstrating that, given positive transaction costs, markets will systematically under-provide public goods).

[33] Epp, *External Pressure*, *supra* note 11, at 260–61.

the benefits that are gained by any single individual.[34] Accordingly, in order for such strategies to be pursued, there must exist "institutional mechanisms that overcome cost barriers" to individual litigants.[35] Therefore, "constitutional litigation typically is dependent on a *support structure for legal mobilization*, consisting of lawyers, organizations, and sources of financing, that makes sustained litigation possible."[36]

The realities of criminal defense litigation, however, complicate the general account that political scientists have offered of the political economy of constitutional litigation. Three features of criminal litigation, in particular, render the prevailing account of the political economy of constitutional litigation inadequate to explain how criminal procedure claims come to be litigated. First, compared to plaintiffs who bring cases in other areas of constitutional law, the benefit that an individual defendant stands to gain from a Supreme Court victory—release from prison—is substantial. These individual defendants will therefore be willing to spend whatever resources are available to them in order to pursue a constitutional claim that will allow them to gain their freedom.[37]

Second, unlike any other area of constitutional litigation involving individual rights, the market for criminal defense litigation is largely under the control of the states. The vast majority of criminal defendants are poor and, for the most part, must rely on state-appointed counsel to pursue arguments on their behalf.[38] These attorneys are typically underpaid and

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[34] *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–104 (1974) (explaining that actors with the financial and organizational capacity to "play for rules," rather than victories in individual cases, are likely to prevail over time).

[35] Epp, *External Pressure*, *supra* note 11, at 261.

[36] *Id.* at 256.

[37] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 31 (1997) ("At least in the many cases where conviction may mean prison, the stakes in criminal litigation have two critically important characteristics: They are both extremely large and nonmonetary. The result is a huge wealth effect. If a given defendant has a million dollars in the bank, he might well find it worthwhile to spend it all to achieve a successful outcome . . . .").

[38] *See* Garrett, *supra* note 8, at 398 ("[A]lmost all criminal defendants are indigent and represented by institutional and repeat player public defenders, who often have severe resource constraints and thus are incentivized to plea bargain their cases."); *see also*

overworked,[39] and even in the best of circumstances are given fewer resources to litigate a single case than the defendant would wish to spend.[40] Given their resource constraints, coupled with their role as repeat players who must maintain their credibility for the sake of future clients, these attorneys often must ration the number of arguments they choose to raise in any given case,[41] choosing to pursue some arguments at the expense of others that, though meritorious, have a lower chance of prevailing.[42]

Third, compared to other areas of civil constitutional litigation, the number of defendants who have an immediate personal interest in having their rights vindicated is staggeringly high. We live today in what sociologists have described as an era of mass imprisonment, where the rate of incarceration is markedly above any historical norm.[43] If even a fraction of the more than 1.6 million individuals currently imprisoned have some judicially cognizable constitutional grievance concerning the circumstances

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CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf (finding that roughly 82% of state defendants and 66% of federal felony defendants are represented by government-appointed counsel).

[39] *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52–70 (2009), *available at* http://constitutionproject.org/pdf/139.pdf (discussing the insufficient resources and heavy workload burdening public defenders); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 7–28 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (discussing the lack of funding, resources, and excessive caseload for indigent defense).

[40] *See* Stuntz, *supra* note 37, at 32 ("For the roughly eighty percent of defendants who receive appointed defense counsel, the[ir] case is 'worth' whatever price the state sets.").

[41] *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 810 (2004) (noting the need to limit the service provided to individual criminal defendants due to overall scarcity of resources).

[42] *See id.* at 810–14 (discussing the rationing of available resources for indigent criminal defense); Stuntz, *supra* note 37, at 33–34 (describing shortage of litigation due to lack of compensation per case and too few resources).

[43] *See* David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1–2 (David Garland ed., 2001) (noting the dramatic increase in imprisonment rates since 1973); *see also* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 24–30 (2006) (surveying data on imprisonment rates).

of their arrest and trial, a thriving market for criminal procedure litigation would—and does—exist.[44]

Many of these defendants might have an incentive not only to raise constitutional claims that are cognizable under the current doctrine, but also to push for new interpretations of the Constitution's criminal procedure guarantees that account for race and class disparities in the administration of criminal justice.[45] Not only are most criminal defendants poor,[46] but sociologists have identified something approaching the systematic imprisonment of a segment of the national population: young, black males in urban centers.[47] These race and class disparities intersect to concentrate

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[44] *See* HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf (stating that 1,613,740 sentenced prisoners were incarcerated in state or federal prison at year-end 2009).

[45] There is a vast literature addressing the respects in which both contemporary equal protection and criminal procedure doctrine fail to protect against race and class discrimination in the criminal justice system. *See, e.g.*, DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2003); Stuntz, *supra* note 37, at 50–51 (describing racially disparate impact of criminal justice law and policies). For example, the Fourth Amendment, as it is currently interpreted, permits law enforcement officers to make racially motivated decisions about whom to stop, search, and arrest, provided that the government can later demonstrate that, irrespective of the officer's intent, the action was objectively reasonable. Whren v. United States, 517 U.S. 806, 813 (1996). Likewise, the current doctrine's definition of what constitutes a "reasonable" privacy expectation on the part of a suspect extends considerable protection to educated and middle-class suspects, but systematically undervalues the privacy rights of the poor. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 798 (2006) ("Expectations are deemed reasonable when they conform to existing social arrangements — people in houses enjoy more Fourth Amendment protection than apartment dwellers (who in turn enjoy more than the homeless), suspects in cars are better protected than suspects who use public transportation, and the list goes on."); *see also* Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1125 (2003) (noting a lack of protection for suspects in police custody); David Cole, *Scalia's Kind of Privacy*, NATION, July 23, 2001, at 6–7 (discussing extent to which Fourth Amendment doctrine privileges home owners); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 400–01 (2003) (noting that the Court's definition of "expectation of privacy" accords greater protection for individuals who are more well-off); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1269–71 (1999) (describing the disparate impact of Fourth Amendment doctrine on the less wealthy).

[46] *See supra* note 38 and accompanying text.

[47] *See* WESTERN, *supra* note 43, at 24–30 (disaggregating rates of incarceration based on race, sex, and education levels); Garland, *supra* note 43, at 1–2 (arguing that imprisonment is "normalized" for young black males in urban centers). Current prison statistics powerfully illustrate the extent to which African-Americans, and especially poor African-Americans, are more likely than whites to become defendants in the criminal justice

the burdens of incarceration among the most socially disadvantaged groups of individuals.[48] The effects of these disparities in incarceration rates are not exclusively borne by convicted defendants, since the disparities reinforce stereotypes that lead law enforcement officers to disproportionately target young, black males for stops and searches.[49]

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system. According to the Bureau of Justice Statistics for 2009, black men in the United States are about 6.4 times more likely to be incarcerated than white men. *See* WEST ET AL., *supra* note 44, at 28 app. tbl.15 (documenting the number of black prisoners per 100,000 black persons in the United States general population and the number of white prisoners per 100,000 white persons in the general population, for prisoners serving more than a year behind bars under state or federal jurisdiction). The discrepancy is even wider among men under forty. For example, about 7.7% of black men aged 30 to 34 were serving at least one year behind bars in 2009, compared to approximately 1.2% of white men in the same age group. *Id.* Overall, black Americans constitute only about 12.9% of the general population, and blacks and Latinos together constitute about 28.4%. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 10 tbl.6, *available at* http://www.census.gov/prod/2011pubs/11statab/pop.pdf (showing a total population of 307,007,000 and, counting individuals who identify as only one race, a black population of 39,641,000, and Hispanic population of 47,655,000). However, 38.2% of convicted felons serving more than a year behind bars are black, and 58.9% of convicted felons serving more than a year behind bars are either black or Latino. WEST ET AL., *supra* note 44, at 27 app. tbl.12.

These discrepancies cannot entirely be explained by differences in crime rates among different racial groups. For example, approximately 45.3% of those incarcerated in state prison for drug offenses in 2008 were black and about 27.2% were white. *See id.* at 30 app. tbl.16c (showing total number of inmates incarcerated under state jurisdiction for drug offenses as 251,400, the number of black inmates as 113,900, and the number of white inmates as 68,300). The racial makeup of American drug *users*, however, was relatively balanced at 9.6% black and 8.8% white. *See* 2 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH, at tbl.G.11 (2010), *available at* http://www.oas.samhsa.gov/NSDUH/2k9NSDUH/2k9ResultsApps.htm#TabG.1 (documenting respondents over twelve years of age who had used illegal drugs in the previous month). Admittedly, this data provides an incomplete picture of the extent of racial bias in the enforcement of drug laws. *See, e.g.*, William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1976 (2008) ("[W]e know, at least roughly, the number of black and white drug users, but no one knows the numbers and locations of black and white drug *dealers* . . . ."). It does illustrate, however, tremendous racial disparities in who is most likely to require criminal procedure protections.

[48] For example, almost 60% of black men born in the late 1960s who had dropped out of high school had served time in prison for a felony before they were thirty-five years old. WESTERN, *supra* note 43, at 26–27 fig.1.4. By contrast, among men of the same age cohort, just over 11% of white men who had dropped out of high school, and less than 5% of college-educated black men, had served time in prison before age thirty-five. *Id.*

[49] In New York City, for example, approximately 80% of the police stops that occurred between 2005 and 2008 were of blacks and Latinos (who together comprise 53% of the city's population), while only 10% were of whites (who comprise 40% of the city's population).

Speculating from these demographics of incarceration, one might presume there exists a robust marketplace for novel constitutional arguments on behalf of poor and minority defendants, including arguments intended to reshape constitutional criminal procedure doctrine so that it provides a meaningful check on racially discriminatory law enforcement practices. Under the account of the political economy of litigation that other scholars have offered, the conditions necessary for such a marketplace to exist would seem to be present within the current landscape of criminal defense litigation—a landscape populated with a vast number of defendants who might wish to advance such arguments and a wide (albeit underfunded) "support structure for legal mobilization," consisting of legal aid organizations across the country to litigate on those defendants' behalves.[50] This Article suggests, however, that this vast (but not deep) support structure for legal mobilization may actually weaken the market for such novel arguments.

CTR. FOR CONST'L RIGHTS, RACIAL DISPARITY IN NYPD STOP-AND-FRISKS: THE CENTER FOR CONSTITUTIONAL RIGHTS PRELIMINARY REPORT ON UF-250 DATA FROM 2005 THROUGH JUNE 2008, at 4 (2009), *available at* http://ccrjustice.org/files/Report_CCR_NYPD_Stop_and_Frisk_0.pdf. Moreover, blacks accounted for 85% of all individuals who were frisked during that period, while whites accounted for just 8% of these individuals. *Id.* Of all the stops that were made during this period, only 2.6% resulted in the discovery of a weapon or contraband. *Id.*

Although young black men in urban centers are the group most likely to be targeted for such racial profiling, the burdens of this practice are not exclusively borne by the educationally disadvantaged—a group whose lifetime risk of imprisonment increased in the last decades of the twentieth century. WESTERN, *supra* note 43, at 27. The burdens are also borne by better educated black men, whose lifetime risk of imprisonment actually declined during that period. *Id.* at 28. As David Cole has observed, "[m]any people cannot tell whether an African-American is a dropout or college-educated — or, more relevant, a burglar or a college professor, as Harvard professor Henry Louis Gates found in July 2009 . . . ." David Cole, *Can Our Shameful Prisons Be Reformed?*, N.Y. REV. BOOKS, Nov. 19, 2009, at 41. Thus, "[t]he correlation of race and crime in the public's mind reinforces prejudice that affects every African-American." *Id.*; *see also* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 19 (2009) (offering an African-American law professor's first-hand account of the stigma he suffered when arrested and tried for a crime he did not commit); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265 (1999) (documenting instances in which middle-aged African-Americans are targeted for racial profiling).

[50] Epp, *External Pressure*, *supra* note 11, at 256 (emphasis omitted).

II. THE POLITICAL ECONOMY OF CRIMINAL LITIGATION

Generalizing from the realities described above, this Part presents a theoretical framework for understanding the political economy of criminal litigation and the role it plays in shaping constitutional criminal procedure doctrine. The framework proceeds in three steps, each of which fleshes out a separate proposition about the nature of criminal defense litigation on behalf of poor and minority individuals (who, as explained above,[51] constitute the vast majority of criminal defendants). First, impact litigation organizations,[52] by virtue of their resources and institutional missions, are better positioned than most state court attorneys who represent indigent defendants to raise novel constitutional arguments on those defendants' behalves. Second, by virtue of their ability to choose clients whose cases frame a constitutional claim in the best possible light, impact litigation organizations have an advantage over even paid criminal defense attorneys in persuading the Supreme Court to accept novel constitutional arguments. Third, the extent to which an impact litigation organization can influence the Supreme Court's constitutional criminal procedure agenda—as opposed to simply present cases that provide the Court with an opportunity to advance a preexisting agenda—depends on the number of other litigants in the field.

A. IMPACT LITIGATION AND CONSTITUTIONAL STRATEGY

In a world of limited resources for indigent defense services, impact litigation organizations play an important role in generating new understandings of constitutional criminal procedure that might not otherwise get litigated. Two reasons, one obvious and one subtle, account for this role. The obvious reason is that, as addressed above, the vast majority of criminal

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[51] *See supra* note 47 and accompanying text.

[52] For purposes of this Article, an "impact litigation organization" may be understood as an organization that uses litigation to "seek systemic relief applied to many people." Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1130 n.268 (2001).

defendants are poor.[53] They therefore cannot self-finance a constitutional litigation campaign likely to capture the attention of the Supreme Court, much less coordinate with other defendants to pursue a strategy across a number of cases pushing for a new understanding of a right. In 2004, for example, the Court granted 3% of the 2,041 certiorari petitions that litigants filed through their attorneys.[54] This success rate, while low, is stunning when compared to the mere 0.2% of the 6,543 certiorari petitions filed in forma pauperis that the Supreme Court granted that year.[55]

The second, and subtler, reason is that, without the resources necessary to coordinate with others, attorneys representing indigent defendants and acting in the defendants' best interests have little incentive to advance novel constitutional arguments on their clients' behalves.[56] The principal aim of most defendants is to avoid a conviction, not reshape constitutional doctrine.[57] Arguments that have the best chance of achieving this goal are ones that a defendant's counsel can frame squarely within existing precedent, thus allowing a trial court judge to rule in the defendant's favor on the most doctrinally conservative ground.[58] Assuming that the defendant's attorney is constrained in the number of constitutional claims practical to raise,[59] it is in the defendant's interest to forgo novel doctrinal claims in order to pursue more conventional ones (provided that conventional claims are not foreclosed by the facts of the case).[60] Accordingly, even

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[53] *See supra* note 38 and accompanying text.

[54] LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 75 tbl.2-6 (4th ed. 2007).

[55] *Id.*

[56] *Cf.* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1208–23 (2005) (documenting the array of concerns that motivate criminal defense attorneys in reality).

[57] For simplicity's sake, this statement leaves aside plea bargaining considerations.

[58] *See* KLARMAN, *supra* note 12, at 460–61 (contrasting the incentives of black defendants in the 1950s to "rais[e] the narrowest possible objections" with the NAACP's broader goals in representing the defendants).

[59] *See supra* notes 41–42 and accompanying text.

[60] It is also likely in the interest of the defendant's attorney to pursue the more conventional strategy. As repeat players in the judicial system, public defenders are interested in preserving their credibility in the eyes of judges and prosecutors, and do not want to be seen as making gratuitously frivolous claims. *See* Etienne, *supra* note 56, at

when a class of poor defendants would benefit from advancing a novel constitutional claim, none of the defendants is likely to bring that claim on an individual basis.

These defendants may each be better off, however, if an impact litigation organization enabled them to overcome their coordination problems and raise the novel claim. To illustrate: imagine that 100 indigent minority defendants are each arrested following pretextual traffic stops. In each case, the officer objectively could have had reasonable suspicion to conduct the stop; but in reality, each of the stops occurred only because the officer engaged in racial profiling. In each case, the officer questioned the defendant for some time and, after eventually eliciting statements that provided probable cause, arrested the defendant, searched the vehicle, and discovered contraband.

Assume that any one of the defendants in this stylized hypothetical can allocate his scarce resources (the time and energy of his lawyer) to pursuing one of two strategies.[61] In "Strategy A," which has only a 1% chance of success, the defendant argues that, irrespective of whether the officer engaged in profiling, the traffic stop was objectively unreasonable in its duration.[62] In this strategy the defendant is presenting a claim that is weak, but fits within existing precedent. The small chance of this approach succeeding lies with the trial court's assessment of the facts, and there is no chance of reversing an adverse trial court decision on appeal.[63] In "Strategy B," the defendant argues that racially motivated traffic stops violate the Fourth Amendment. This argument is foreclosed by *Whren v. United States*, which held that a law enforcement officer's subjective intentions in pulling over a suspect "play no role in ordinary, probable-cause Fourth

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1245 (describing the daily balance public defenders must make between their clients' interests and their own).

[61] For simplicity's sake, this hypothetical is framed from the perspective of a decisionmaking defendant. It is irrelevant, however, whether it is the defendant or (more plausibly) the defendant's attorney who is pushing a particular course of action.

[62] *See* Terry v. Ohio, 392 U.S. 1, 25–27 (1968) (holding that a stop to search for weapons, without probable cause, must be narrowly tailored to the exigencies of the situation); Illinois v. Caballes, 543 U.S. 405, 407 (2005) (holding that an initially constitutional seizure can become unlawful if prolonged unreasonably).

[63] *See* Ker v. California, 374 U.S. 23, 33 (1963) (holding that trial courts should determine the reasonableness of a search based on the facts of the case).

Amendment analysis."[64] Imagine, however, that *if* the Supreme Court granted certiorari in the case, there is a 45% chance it would decide to overrule *Whren* and hold that racially motivated traffic stops violate the Fourth Amendment.[65]

Consider which of these strategies a defendant would wish to pursue under two different scenarios. In the first scenario (SCENARIO 1), the defendant is represented by appointed counsel. While the appointed counsel is willing to zealously represent his client before the trial court, and even through a frivolous appeal,[66]

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[64] 517 U.S. 806, 813 (1996).

[65] This 45% probability is stipulated in order to emphasize the potential that impact litigation organizations have to influence the Supreme Court in close cases. The probability is not, however, intended to be fanciful. Although the Court's holding in *Whren* was unanimous, the consensus among the Justices concerning the relevance of racial profiling to Fourth Amendment analysis appeared to later dissolve in ways that cannot be reliably traced along any simple ideological axis.

Specifically, one year after *Whren*, Justice Kennedy dissented from an opinion holding that an officer may order a passenger who is not suspected of a crime to exit a vehicle for the duration of a traffic stop. Maryland v. Wilson, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting). In doing so, Justice Kennedy wrote that "[w]hen *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police," and further cautioned that "[i]f the command to exit [that the Court majority sanctioned] were to become commonplace, the Constitution would be diminished in a most public way." *Id.* at 423. Later, however, Justice Kennedy joined a 5–4 opinion written by Justice Souter holding that the Fourth Amendment permitted the warrantless arrest of a woman for failing to wear a seatbelt, a misdemeanor offense punishable only by a fine. Atwater v. City of Lago Vista, 532 U.S. 318, 322–23 (2001). Dissenting from that opinion, Justice O'Connor (joined by Justices Stevens, Ginsburg, and Breyer) argued that, "as the . . . debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual." *Id.* at 360, 372 (O'Connor, J., dissenting). Moreover, in *Arkansas v. Sullivan*, Justice Ginsburg authored a concurrence joined by Justices Stevens, O'Connor, and Breyer expressing concern with the *Whren* rule that an officer's subjective motivations for conducting a stop are irrelevant for Fourth Amendment purposes, and suggesting a willingness to revisit that holding. *See* Arkansas v. Sullivan, 532 U.S. 769, 772–73 (2001) (Ginsburg, J., concurring) (expressing reservations about unduly broad police discretion). Throwing any effort to vote-count an overruling of *Whren* into further confusion, Justice O'Connor later joined an opinion for the Court written by Justice Kennedy holding that the suspicionless questioning of bus passengers does not violate the Fourth Amendment, while Justice Souter joined Justices Stevens and Ginsburg (but not Justice O'Connor) in dissent. United States v. Drayton, 536 U.S. 194, 196 (2002). Given these voting alignments, there were, at least prior to the appointments of Chief Justice Roberts and Justice Alito, possibly three potential swing votes for a case with attractive facts in which the petitioners urge the Court to overrule *Whren*.

[66] *Cf.* Anders v. California, 386 U.S. 738, 744 (1967) (permitting an attorney to file a motion to withdraw from a case if there are no meritorious issues to appeal).

the attorney is unwilling to file a certiorari petition on the defendant's behalf.[67] Therefore, if the defendant decides to pursue Strategy B up to the Supreme Court, he will be required to file an in forma pauperis certiorari petition that (consistent with the current statistical trends) would stand only a 0.2% chance of being granted.[68] Accordingly, the overall odds of success for a defendant who wishes to pursue Strategy B is 0.09%.[69] Therefore, as illustrated in the table below, the defendant must choose between Strategy A, which has a 1% chance of success, or Strategy B, which has less than a 0.1% chance of success. Given this choice, any rational defendant with complete information would accept his lawyer's advice to pursue Strategy A.

SCENARIO 1

Strategy A	Strategy B
Conventional constitutional argument; no certiorari petition.	Novel constitutional argument; certiorari petition must be filed in forma pauperis.
1% Chance of Success	0.09% Chance of Success

Now imagine an alternative scenario (SCENARIO 2) where the 1% chance of success for Strategy A remains the same for each defendant, as does the 45% chance that the Supreme Court would reverse *Whren* if it granted the certiorari petition of a defendant pursuing Strategy B. In this scenario, however, an impact litigation organization comes along and—before any of the

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[67] This could happen for a number of reasons. The attorney may, for example, be forbidden by the state's public defender statute or policy from filing a certiorari petition, or may not be compensated for doing so. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 39, at 80–83 (discussing the underfunding of appellate defenders). Or the attorney may simply choose not to file a frivolous certiorari petition due to resource constraints. *See* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 251, 255–56 (2008) (noting that certain states prohibit public defenders from filing certiorari petitions or do not provide funding for those attorneys who do and listing the states that exercise such practices). *See supra* notes 41–42 and accompanying text.

[68] *See supra* note 55 and accompanying text.

[69] That is, the probability that the defendant's petition will be granted (0.002), times the probability that the Supreme Court will rule in the defendant's favor (0.45) equals 0.0009.

defendants have committed to either Strategy—announces that it is willing to represent one of the 100 defendants who wishes to pursue Strategy B. Although the odds of success before the Supreme Court on the merits remain 45%, assume that (again, consistent with current trends) there is now a 3% chance that the Supreme Court will grant the defendant's certiorari petition, which is now filed through counsel.[70] The odds of such a defendant prevailing in Strategy 2 are now (again drawing from current statistical trends) 1.35%.[71] As the table below illustrates, the defendant's odds of success are now greater by pursuing Strategy B. Accordingly, it would be in any of the 100 defendants' interest to pursue Strategy B and agree to have an impact litigation organization pursue a novel constitutional argument on his behalf.[72]

SCENARIO 2

Strategy A	Strategy B
Conventional constitutional argument; no certiorari petition.	Novel constitutional argument; in forma pauperis certiorari petition.
1% Chance of Success	1.35% Chance of Success

B. IMPACT LITIGATION AND HEURISTICS

This only tells part of the story, however. Thus far, the hypothetical shows only that a defendant who can afford to hire an attorney would have an incentive to pursue a novel constitutional

[70] *See supra* note 54 and accompanying text. Although this hypothetical stipulates that the odds of the petition being granted will mirror the actual grant rates of certiorari petitions in 2004, this is merely a simplifying assumption. The assumed odds fail to reflect the likelihood that, in reality, the certiorari petitions that are filed through counsel contain a greater percentage of meritorious claims than the petitions filed pro se. Accordingly, the assumed odds may overstate the extent to which the claims raised in a typical pro se certioari petition would be granted review if they were presented in a petition filed through counsel.

[71] That is, the probability that the defendant's petition will be granted (0.03), times the probability that the Supreme Court will rule in the defendant's favor (0.45) equals 0.0135.

[72] In this hypothetical, it is assumed that each defendant will learn whether he will receive the organization's assistance *before* having to commit to pursuing either Strategy A or Strategy B. Otherwise, the probability of a defendant succeeding by pursing Strategy B would have to be discounted by the likelihood that the organization will decide not to represent him.

strategy, while an indigent defendant does not. An impact litigation organization, however, is typically *better* positioned than a paid attorney to present novel arguments to the Supreme Court, because it has more control over the facts in which it frames its arguments. Simply put, this is because impact litigation organizations can select sympathetic defendants.

More specifically, impact litigation organizations can choose cases and facts that best frame the argument they are trying to make. Like any decisionmaker trying to assess the consequences of creating a new rule based on limited information, the Supreme Court's assessment will be skewed to some degree by the availability heuristic, which may be defined as "the tendency of individuals to overestimate the likelihood that an event will occur when an example of that event comes readily to mind."[73] When a court is deciding whether to create a new constitutional rule, the facts that will come most readily to the judges' minds will, in all likelihood, be the facts of the case before them.[74]

An impact litigation organization can harness the availability heuristic by selecting the case whose facts best frame its claim. In our hypothetical, the impact litigation organization would try to use the most sympathetic defendant to reshape the doctrine. If each of the 100 defendants in our hypothetical acts in his self-interest and offers to pursue Strategy B in exchange for receiving the organization's assistance, the organization will have 100 defendants from which to choose. Perhaps the organization will choose a defendant whose crime carries low social stigma (say,

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[73] Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1341 (2007); *see also* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163, 163–65 (Daniel Kahneman et al. eds., 1982) (explaining how the availability heuristic shapes public perception); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 712 (1999) (analyzing the role of the availability heuristic in the public's perception of loss); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 771 (1990) (noting that the availability heuristic causes policymakers to overweigh low probability events). For example, a record snowstorm that recently hit a city may leap into the mind of a city manager trying to decide how much to invest in snow removal equipment and lead the manager to spend more than the data would warrant.

[74] *See* Schauer, *supra* note 9, at 885–86 (discussing heuristic biases that lead the facts of particular cases to influence judges' articulations of generally applicable legal rules).

marijuana possession) and reject a defendant whose crime is widely condemned (say, possession of child pornography). The organization may instead decide to take the case of a young, first-time offender with a promising academic record, or perhaps it will choose an accomplished, middle-aged professional whose biography defies any negative racial stereotypes that the Justices might (perhaps subconsciously) hold. Whomever the organization chooses, its victory will create a precedent that will ultimately benefit each of the 100 defendants (or, at least, future defendants of the same race who are the targets of racial profiling), and it is therefore in almost everyone's interest to have the organization choose the most sympathetic defendant.

The organization's selection of a sympathetic defendant, it is safe to assume, will increase the likelihood that the Supreme Court will rule in the defendant's favor should it choose to grant certiorari.[75] Perhaps these intangibles will be so crucial to the success of the case that they would boost the defendant's chances above 50%, making the litigation an attractive investment from the organization's perspective. More importantly, the freedom to

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[75] One could argue an impact litigation organization's use of sympathetic defendants would distort the Supreme Court's regulatory decisionmaking by causing the Court to overvalue those defendants' rights over the interests of law enforcement. *Cf.* Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases* 20 (Nat'l Bureau of Econ. Research, Working Paper No. 15279, 2009), *available at* http://www.nber.org/papers/w15279 (discussing availability heuristic bias caused by use of sympathetic plaintiffs in civil cases). In the context of adjudicating criminal procedure rights, however, the use of a sympathetic defendant may serve two important functions. First, insofar as the structure of criminal procedure litigation causes judges to overestimate reliability of police officers' judgments, *see* Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 137 n.114 (1999) ("[T]he structure of criminal procedure law creates an availability heuristic . . . by exposing courts primarily to criminal cases in which police intuition proved accurate . . . ."), sympathetic defendants might serve a debiasing function. By using a sympathetic defendant, a litigator can harness the availability bias to make a judge overvalue the defendant's interests to the same degree that the judge overvalues law enforcement's interests. *Cf.* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 199–201 (2006) (discussing the availability heuristic's potential as a debiasing device). Second, to the extent that criminal procedure rights such as the right to counsel are predicated on the inherent dignity of the individual, *see* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) (arguing this point), there may be cognitive value in considering the importance of these rights from the perspective of the most sympathetic defendant, knowing that more unsavory individuals are to be accorded the same level of respect.

select among its clients leaves the organization better positioned than a profit-maximizing attorney to urge the Court to adopt a new constitutional interpretation.

C. IMPACT LITIGATION AND AGENDA CONTROL

As the first two steps of this framework establish, impact litigation organizations are well-positioned to litigate cases that present the Court with information concerning poor and minority defendants. The ability of these organizations to actually get their cases *heard* by the Court is a different matter.[76] Although the Supreme Court is dependent on litigants to raise certain constitutional arguments, this constraint means very little if there is a large set of litigants (and litigation organizations) raising almost every imaginable argument, framed in almost every imaginable way.[77] Since the passage of the Judiciary Act of 1925,[78]

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[76] With respect to the political economy of criminal procedure litigation, this point has largely been overlooked. Tracing the political economy of litigation from the 1930s through the 1960s, Charles Epp has persuasively argued that the Warren-era criminal procedure revolution is, in large part, attributable to the growth in the number of organizations litigating on behalf of defendants. *See* EPP, RIGHTS REVOLUTION, *supra* note 11, at 44–71. This account of the political economy of litigation does little to explain, however, what role (if any) these organizations played in later eras, when the Supreme Court's criminal procedure jurisprudence had, on the balance, gotten more conservative. *See supra* note 4 and accompanying text.

More recently, a political scientist has argued that, between 1953 and 1995, Supreme Court litigants brought cases in response to language that Justices slip into their opinions that signal their interest in deciding certain issues. BAIRD, *supra* note 11, at 55–56. Significantly, however, the regression analyses that Baird uses to support this claim fail to show a statistically significant relationship between the independent variables she uses ("indicators" or "signals" of the Supreme Court's priorities) and the number of criminal justice cases brought in the years following the indicator. *See id.* at 100 fig.4.4 (showing lower bound of a 95% confidence interval at zero at year four, falling below zero at all other years). Furthermore, the R-squared for Baird's regression of criminal justice cases is far lower than that for any other area of law except federalism. *Id.* at 100–01 fig.4.4. Compare, for example, the variance explained by judicial signals in the outcomes of economic regulation cases ($R^2 = .59$) or First Amendment cases ($R^2 = .55$) to the variance explained by judicial signals in the outcomes of criminal justices cases ($R^2 = 0.16$). *Id.* Such disparities make sense, however, when one steps back to consider the resources and coordination abilities of litigants in these different areas of law.

[77] This is the insight underlying "attitudinalist" judging models in political science, which hold that Supreme Court decisionmaking is influenced by little beyond the ideological (or "attitudinal") predispositions of the Justices. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). While this Article neither defends nor endorses the attitudinal model, this scholarship highlights reasons to

before most of the landmark constitutional criminal procedure cases reversing state court convictions,[79] the Supreme Court has had the power to control its own docket through the certiorari process and the freedom to accept whatever cases it chooses.[80] The cases it accepts are typically ones where each side can offer plausible legal arguments, and the Justices are free, if they are so inclined, to accept whichever arguments that conform to their ideological preferences,[81] institutional interests,[82] or whatever other factors motivate them.

Thus, in order to reshape the Supreme Court's constitutional understandings, an organization must operate in an area of law where the number of arguments being presented to the Court is limited.[83] As explained above, constitutional litigation is a public good, and therefore requires the existence of institutions with the

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be skeptical that the Supreme Court's decisionmaking agenda is constrained by the arguments raised by litigants irrespective of the political economy of litigation.

[78] Pub. L. No. 68-415, 43 Stat. 936 (1925).

[79] *Cf.* Moore v. Dempsey, 261 U.S. 86, 90–91 (1923) (holding that a trial dominated by a "mob" such that there was "actual interference with the course of justice" is without due process). Prior to *Moore v. Dempsey*, the Court had reversed state criminal convictions only a few times, each on account of racial discrimination in the jury selection. *See* Rogers v. Alabama, 192 U.S. 226, 229, 231 (1904) (reversing a state murder conviction where African-Americans were systematically excluded from the grand jury on account of race); Carter v. Texas, 177 U.S. 442, 448–49 (1900); Neal v. Delaware, 103 U.S. 370, 397 (1880); Strauder v. West Virginia, 100 U.S. 303, 312 (1879).

[80] Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1644 (2000). In 1988, Congress largely eliminated the Supreme Court's mandatory appellate jurisdiction. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; *see also* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 50–53 (2009) (describing the historical scope of the Court's mandatory appellate jurisdiction).

[81] *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983) (suggesting that lawyers "minimize significant bodies of conflicting or complicating evidence in service of their partisan goals"); SEGAL & SPAETH, *supra* note 77, at 86 (introducing and defining the attitudinal model). In claiming that Supreme Court Justices have the *power* to decide cases according to their ideological preferences, I am not suggesting that the Justices inevitably choose to exercise that power. *Cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1766 (1976) (arguing that because of the indeterminacy of legal principles "there is simply no way for the judge to be neutral").

[82] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994) (discussing the role of institutional interaction in Supreme Court decisionmaking).

[83] *Cf.* WASBY, *supra* note 28, at 157–61 (describing control over the cases being filed as a necessary feature of planned litigation).

resources and organizational capacity to overcome coordination problems.[84] If one organization has a monopoly over a particular subarea of constitutional litigation, then that organization will be responsible for at least half of the arguments that are presented to the Supreme Court in that subarea (with the parties it litigates against being responsible for the other half). The Supreme Court Justices will doubtless receive information from other sources, such as the media, law clerks, scholars, and amici curiae, that will shape their constitutional understandings in that subarea.[85] The monopoly organization, however, will dominate the most important channel for raising arguments: the litigation process itself. Similarly, if there exist only a few organizations that coordinate with one another, and thus form an oligopoly with respect to an area of litigation, those organizations will be able to control how constitutional arguments are presented to the Court in the litigation process. If, however, there are a multitude of organizations that are active players in a subarea of constitutional litigation, then the sources of information available to the Supreme Court Justices will be multitudinous. Accordingly, if countless organizations supply the Court with a virtually unlimited array of constitutional understandings, then whatever influence any single organization had on the Justices' constitutional understandings will likely be displaced by a range of other norms and constraints that influence constitutional decisionmaking.

In criminal cases, moreover, an increase in the number of litigation organizations will not only diminish those organizations' influence over the Supreme Court's agenda, but also strengthen the Government's influence. First, more organizations available to represent poor and indigent defendants will, it is assumed, result in more victories for those defendants at the trial and intermediate

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[84] *See supra* notes 32–36 and accompanying text.

[85] *See, e.g.*, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 33–34 (2005) (discussing role of media and other elite opinion in shaping judges' constitutional understandings); Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of* Amici Curiae, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES, *supra* note 11, at 215 (assessing the influence of amici curiae on Supreme Court decisionmaking).

appellate levels. Accompanying such an increase is a rise in Government opportunities to file certiorari petitions in cases that, notwithstanding an adverse decision below, frame a criminal procedure question in a manner favorable to prosecutors. Second, while the number of organizations devoted to representing defendants may swell in response to political and economic shifts, the number of federal and state governments is relatively stable. Hence, as the number of organizations increases, states (and the federal government) will be relatively better positioned to coordinate with each other to control which Government petitions will be filed. Finally, for a prosecutor, the professional duty to zealously represent one's clients does not entail an obligation to file appeals that, in the prosecutor's estimation, will make bad law.[86] Accordingly, prosecutors may have greater discretion than their defense-attorney counterparts to file only those certiorari petitions that are likely to advance a broad constitutional agenda.[87] In summary, an increase in the number of organizations representing defendants will increase the Government's opportunities to file certiorari petitions without significantly impairing its ability to control which petitions are filed.

Thus, in order to reshape the Supreme Court's constitutional understandings, an organization should try to dominate that subarea of constitutional litigation. Accordingly, if an organization seeks to pursue a sustained litigation strategy to advance a new interpretation of the constitution, the organization must be able to control the litigation process.[88] There are two interrelated,

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[86] *Cf.* MODEL RULES OF PROF'L CONDUCT scope, cmt. 18 (2010) [hereinafter MODEL RULES] (discussing scope of government attorneys' authority to appeal under the Model Rules of Professional Conduct).

[87] *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 480 (1996) ("By paying close attention to the facts of the cases they select as vehicles for novel statutory readings, federal prosecutors can highlight the benefits and suppress the costs of the interpretations that they favor.").

[88] *See* WASBY, *supra* note 28, at 157–61 (describing control as an element of "planned litigation"). A strategy of planned litigation can be broadly defined as a strategy that "entails focus on a particular area of law; pursuit of many cases in sequence and thus the choice of cases to bring; control of development and progress of those cases; and strategy, at least in a general sense." *Id.* at 144–45. The exemplar of a planned litigation strategy is, unsurprisingly, the NAACP-LDF's school desegregation campaign which led to the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). WASBY, *supra* note 28, at 142–43.

structural prerequisites for an organization to have the ability to maintain such control. First, there must be a manageable number of cases being filed in the area of law that the organization is seeking to change, so that the organization is one of the few voices that the Supreme Court Justices hear.[89] Second, the organization must be able to coordinate its efforts with any other organizations or individuals involved in the litigation "to assure that only the *best* cases — in the most advantageous order — reach the high Court."[90]

Ultimately, this framework does not purport to expose a grand causal link between the nature of criminal litigation and the shape of constitutional doctrine. However, to the extent that it is rooted in assumptions that do more to reflect the realities of modern criminal procedure than to distort it, the framework can enrich our understanding of the influences that shape constitutional criminal procedure.[91] It sheds light, for example, on the extent to which the

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[89] The paucity of cases brought in the area of school desegregation before the NAACP began its school desegregation campaign, for example, enabled the organization to control the cases it chose to bring. *See* JAMES PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 15–16 (2006) (explaining that the NAACP's desegregation efforts between 1936 and 1938 were focused on Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938) (holding, in the first school desegregation case brought before the Supreme Court by the NAACP, that University of Missouri Law School had to admit a black student's law school application where it had no separate law school open to black students), and discussing basis of NAACP's litigation decisions). Prior to *Gaines*, the Supreme Court had only decided one case involving race and education during the interwar period. *See* Gong Lum v. Rice, 275 U.S. 78, 87 (1927) (upholding Mississippi's decision to categorize Chinese-Americans as "colored" for the purposes of school segregation).

[90] KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 26 (1980); *see also* WASBY, *supra* note 28, at 160–61 (discussing how intergroup coordination is important at every step of litigation process).

[91] In order to present a theoretical framework sufficiently simple to be used as an analytical tool, this Article elides historical considerations such as the extent to which certain organizations carry special influence with Supreme Court Justices in excess of their market power over an area of law. An account of the political economy of criminal litigation that responsibly accounted for such nuances would require a detailed historical investigation into the extent to which the Supreme Court has historically relied on the expertise of certain litigation organizations to determine the merits of certain constitutional positions. *See, e.g.*, Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1487 (2008) (examining the influence of the current Supreme Court bar); *see also* Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. (forthcoming Apr. 2011) (exploring the effect of the

political economy of criminal litigation and constitutional lawmaking exist in a mutually constitutive relation to one another. A constitutional decision made by the Supreme Court may cause changes in the political economy of criminal litigation that dramatically alter the extent to which impact litigation organizations can control the market for a given set of constitutional claims. Such changes in the political economy of criminal litigation can, in turn, catalyze shifts in criminal procedure doctrine that the Court may not have anticipated at the time of its earlier decision. By accounting for this inter-dynamic process, the framework presented here can shed light on aspects of constitutional criminal procedure's doctrinal development that are otherwise puzzling.

III. UNDERSTANDING DOCTRINAL SHIFTS

This Part applies the framework presented above to examine how changes in the political economy of litigation—precipitated in part by *Gideon*—influenced the post-Warren Court shift toward a conservative criminal procedure doctrine that has narrowed the protections accorded to suspects and defendants, and severed the historical link between criminal procedure and race.[92] To contextualize these doctrinal shifts, this Part reviews the role organizations such as the NAACP played in the criminal procedure cases in the 1920s and 1930s in which the Supreme Court created new constitutional rules governing state procedure. This Part then addresses a phenomenon that other scholars have

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Supreme Court pro bono bar on public interest litigation strategies). Also required would be a discussion of the relevance of an organization's cultural and political influence to its power to transform the Supreme Court's agenda. *Cf.* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1366–76 (2006) (exploring how the National Organization of Women shaped popular constitutional understandings). The assumptions underlying the framework presented here, however, reflect the realities of contemporary criminal procedure litigation with sufficient accuracy to enrich our understanding of the influences that shape constitutional criminal procedure. For example, while interest groups such as the ACLU and the NAACP may have once had influence with the Supreme Court that extended beyond their market power, those organizations are no longer members of the elite Supreme Court bar that, according to Richard Lazarus, disproportionately influence the agenda of today's Supreme Court. Lazarus, *supra*, at 1530–31.

[92] For sources documenting the conservative shift, see *supra* note 4.

documented—the extent to which the proliferation in legal service organizations caused by *Gideon* catalyzed the criminal procedure revolution—and identifies a separate phenomenon those scholars have overlooked—the extent to which the proliferation of these organizations limited the power of any one organization to guide the Supreme Court's criminal procedure agenda.

A. EARLY DOCTRINE

The structural conditions that enable public interest organizations to shape the Supreme Court's agenda were once features of the criminal procedure landscape. As discussed above, the ideological leanings of Supreme Court Justices in the 1920s and 1930s would not, at first blush, make them amenable to brushing aside federalism concerns to reverse state court criminal convictions.[93] During this period, the NAACP, in conjunction with the ACLU and other public interest organizations, impelled the Court to create new rules of constitutional criminal procedure by presenting it with four cases involving horrific and high-profile instances of racial injustice.[94] The defendants in each case were appointed attorneys on either the day of their trials or the day before.[95] The trials in these cases took place shortly after the alleged crimes occurred and were conducted under the threat of mob violence if the defendants were not sentenced to death.[96] In two of the cases, *Moore v. Dempsey* and *Brown v. Mississippi*, the defendants had been tortured into giving confessions.[97] There was, at the very least, serious doubt in these cases—"not just with the aid of historical hindsight, but at the time of the trial—as to

[93] *See supra* notes 15–20 and accompanying text.

[94] *See supra* note 13 (listing cases); *see also* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2202–06 (2002) (discussing the idea that the NAACP was pushing "a *constitutional code of national criminal procedure*"). For a detailed description of each case and events leading to it, see DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 3–50 (rev. ed. 2007) (delving into the Scottsboro cases); CORTNER, *supra* note 17, ch. 1 (exploring *Moore v. Dempsey*); RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* ch. 1 (1986) [hereinafter CORTNER, *BROWN*] (discussing *Brown v. Mississippi*).

[95] Klarman, *supra* note 18, at 52.

[96] *Id.*

[97] *Id.*

whether any of the defendants was in fact guilty."[98] The innocence of the defendants in the Scottsboro cases, *Powell v. Alabama* and *Norris v. Alabama*, was especially apparent (at least from the perspective of Northerners and Southern blacks), and the trials in those cases drew the sustained attention of the national press.[99]

The political economy of litigation of the 1920s and 1930s partially accounts for why these cases were the ones that framed the Court's decisions concerning what evidence is necessary to establish that blacks were unlawfully excluded from juries,[100] whether due process forbids mob-dominated trials[101] or confessions obtained through torture,[102] and whether due process requires the appointment of counsel in capital cases involving ignorant defendants.[103] During this period, there were few criminal procedure petitions being filed, and even fewer challenging state court convictions. Prior to 1932, when the Supreme Court held in *Powell v. Alabama* that the due process clause guaranteed indigent defendants the right to counsel in capital cases,[104] only one state (Nevada) had a policy in place to provide counsel to defendants in felony cases.[105] In this era, an impact litigation organization with the resources to litigate a constitutional

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[98] *Id.*

[99] *See* CARTER, *supra* note 94, at 135 ("During the summer of 1931, for many Americans, the Scottsboro Case became almost a talisman, a symbol of the daily injustice Southern whites inflicted upon the Negroes of the region."); JAMES GOODMAN, STORIES OF SCOTTSBORO, at xi–xii (1994) (noting differing opinions as to the Scottsboro defendants' innocence between Southern whites and the rest of the population); *id.* at 87–89, 147–51 (discussing press coverage of Scottsboro cases); Klarman, *supra* note 18, at 52 n.13 (discussing obvious innocence of Scottsboro defendants); *see also* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 122 (2006) (noting that an editor of the progressive *Montgomery Advertiser* "had taken up the cause of the Scottsboro Boys").

[100] *See* Norris v. Alabama, 294 U.S. 587, 599 (1935) (finding a "violent presumption" of unlawful exclusion when African Americans were uniformly disqualified from juries based on intelligence, experience, or moral integrity).

[101] *See* Moore v. Dempsey, 261 U.S. 86, 91 (1923) (finding a right to a habeas petition when verdict is produced by mob domination).

[102] *See* Brown v. Mississippi, 297 U.S. 278, 287 (1936) (holding that murder convictions cannot rest solely on confessions obtained by officers of the state through torture).

[103] *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) (finding a duty under due process to assign counsel when, in a capital case, the defendant is incapable of finding counsel himself).

[104] *Id.*

[105] Epp, *External Pressure*, *supra* note 11, at 273 tbl.12.1.

criminal procedure case stood an excellent chance of capturing the Supreme Court's attention, no matter what case it chose to take. During the October 1931 term, when the Supreme Court accepted the certiorari petition in *Powell*,[106] only 738 certiorari petitions were filed; only 44 of those petitions involved claims of due process or equal protection "Relating to Procedure," such as the claim at issue in *Powell*, and only 6 of those petitions were granted.[107] So uncommon was the Supreme Court's intervention on behalf of the Scottsboro Boys in *Powell* that it prompted the following caveat by (then-professor) Felix Frankfurter and James M. Landis: "However reassuring is such an invocation of the Fourteenth Amendment to protect outcast or unpopular minorities, it is an assertion of a power at best intermittent, remote, and adapted only to redress violations of the minimum decencies of judicial procedure."[108]

Second, during that era, only a few organizations sought to occupy the field of constitutional criminal procedure, and they were able (and, generally, willing) to coordinate with each other. In the 1920s and 1930s, there were a handful of prominent civil rights organizations that dominated the area of constitutional criminal procedure, one of which—the NAACP (and then the NAACP-LDF)—strove to use constitutional criminal procedure to redress racial inequality.[109] As one of the only organizations with

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[106] *See* CARTER, *supra* note 94, at 160 (noting that the Supreme Court agreed to hear *Powell* in May 1932).

[107] Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1931*, 46 HARV. L. REV. 226, 243 tbl.VII (1932). An additional forty-one petitions involved "Bill of Rights" claims according to Frankfurter's and Landis's classification system, and could have thus included criminal procedure claims arising out of federal cases. *Id.* at 242 tbl.VII.

[108] Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 277 (1933).

[109] The NAACP Legal Defense & Education Fund (LDF) was established in 1939 as the litigation arm of the NAACP after the IRS refused to grant tax deductibility to NAACP contributions because of its lobbying activities. The LDF served as the NAACP's litigation arm, and the distinctions between the two entities were merely formal ones during the years discussed here. *See* WASBY, *supra* note 28, at 61 (recognizing that the LDF and NAACP "were located in the same building, had interlocking boards of directors and shared staff, and LDF was the NAACP's litigation arm"). This Article treats the organizations as a single entity in discussing events that occurred prior to 1957, when the organizations separated their boards of directors. *Id.* at 62.

the resources and will to advance this understanding of criminal procedure, the organization was free to select the most sympathetic defendants to advance the cause. Accordingly, the organization selected cases involving defendants it believed to be innocent.[110] The ACLU was perhaps even more prominent a player in the area of criminal procedure, having undertaken an "aggressive plan of expansion" beginning in 1929.[111] These organizations, however, coordinated with one another so as not to undermine their respective agendas. In the 1920s, the head of the ACLU, Roger Baldwin, and the executive secretary of the NAACP, James Weldon Johnson, were both directors of the American Fund for Public Service (colloquially, the "Garland Fund"), and in this capacity had committed themselves to the common aim of mobilizing the working class around a civil rights agenda.[112] The organizations worked together so closely that, by the 1940s, Baldwin had developed an "unwritten rule" of referring all "negro cases" to the LDF, and in 1944 met with Thurgood Marshall to discuss the division of work between the organizations and ensure that the ACLU would not interfere with the NAACP-LDF's desegregation strategy.[113]

The extent to which the NAACP-LDF's cooperation with other organizations enabled it to inform the Supreme Court's view of criminal procedure is illustrated by the Court's early self-incrimination cases. In *Brown v. Mississippi*, the Supreme Court

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[110] *See* KLARMAN, *supra* note 12, at 156 ("The NAACP, to preserve its credibility, would not take criminal cases unless it was convinced of the defendants' probable innocence."); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 51 (1994) (noting that NAACP litigators believed the defendants they represented were "innocent of all charges"). In the 1940s, Thurgood Marshall, stressing the NAACP-LDF's policy with regard to criminal cases, would ask his staff: "How can we justify taking hard-earned nickels and dimes to defend a vicious killer?" *Id.* at 40.

[111] STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 28 (2008); *see also* WASBY, *supra* note 28, at 65 (acknowledging that the ACLU was perhaps most recognized for its engagement in civil rights litigation); Epp, *External Pressure*, *supra* note 11, at 266 (discussing the ACLU's significant impact on the Court's constitutional litigation agenda in the 1920s and 1930s).

[112] *See* TUSHNET, *supra* note 110, at 11–12 ("Garland[, John, backer of the Garland fund] and Baldwin combined interest in mobilizing the working class with an interest in civil liberties and civil rights, mainly because they believed that agitation to secure civil rights was a useful organizing technique.").

[113] *Id.* at 44.

reversed the convictions of three black sharecroppers who had been tortured into falsely confessing to the murder of their white landlord.[114] The defendants' torture was so severe, and the evidence of their innocence so compelling, that the NAACP was able to quietly finance the litigation in conjunction with a liberal, Southern organization,[115] and a former Mississippi governor argued the case before the Court.[116] The case posed a significant doctrinal challenge, since in 1908 the Court held that the Fifth Amendment's self-incrimination privilege did not extend to the states.[117] But if the law was difficult, the equities were not: the record included a deputy sheriff's horrific response during cross-examination to the question whether he beat the defendants: "Not too much for a negro; not as much as I would have done if it was left to me."[118] The Court was, according to observers, "visibly shocked" as the defendants' attorney spoke of torture used to extract their confessions.[119] Moved by these facts, the Court significantly modified its prior interpretation of the Fifth Amendment and held that admission of the confessions would offend a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[120]

Thus, by funding a case that it did not litigate, and by coordinating with a white, Southern organization, the NAACP was able to propel a case to the Supreme Court that reshaped the self-incrimination clause to confront the realities of racially discriminatory policing. The Court soon expanded *Brown* in

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[114] 297 U.S. 278, 279, 287 (1936); *see also* CORTNER, *BROWN*, *supra* note 94, at 136 (summarizing the significance of the Court's holding); KLARMAN, *supra* note 12, at 129 ("Incredibly, the deputy sheriff admitted torturing the defendants to confess . . . . Moreover, the convictions of the defendants depended almost entirely on their confessions.").

[115] This organization was the Commission on Interracial Cooperation (CIC). *See* CORTNER, *BROWN*, *supra* note 94, at 94 (recognizing the NAACP contributed $690 for litigation through the CIC).

[116] *See id.* at 65, 128 (noting that ex-Governor Earl Leroy Brewer argued the case in front of the Supreme Court on January 10, 1936).

[117] *See* Twining v. New Jersey, 211 U.S. 78, 117 (1908) (Harlan, J., dissenting) (summarizing the holding of the Court that "a State can *compel* a person accused of a crime to testify against himself" without violating the Constitution).

[118] CORTNER, *BROWN*, *supra* note 94, at 28.

[119] *Id.* at 128.

[120] Brown v. Mississippi, 297 U.S. 278, 285 (1936) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

another case litigated by the NAACP-LDF, *Chambers v. Florida*, where it held that four black defendants' confessions to the murder of a white man were unconstitutionally coerced regardless whether the defendants had been physically abused.[121] As in *Brown*, the confession in *Chambers* was the only evidence of the defendants' guilt, and there was strong suspicion that the defendants were innocent.[122] These cases involved facts that not only elicited the Justices' sympathies, but also spared them from confronting the difficult question of whether the Constitution forbade coercive interrogations because they were unreliable or because they violated the defendant's dignity.[123] Accordingly, by coordinating with other actors and selecting cases with the most attractive facts, the NAACP-LDF was able to reshape the self-incrimination privilege and, at least for a time, make the privilege interwoven in the Justices' minds with the need to protect minorities against systemic abuse.[124]

On the occasions where the NAACP-LDF failed to coordinate with other organizations, it was often due to strategic competition between them, which impelled the organizations to push the Court even more aggressively. In the Scottsboro Boys cases,[125] for example, the NAACP was initially reluctant to intervene on behalf of the defendants, whose innocence was not initially apparent to the organization.[126] The International Labor Defense (ILD), which was affiliated with the Communist Party-USA, seized on the NAACP's reticence, served as counsel for the defendants, and

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[121] *See* 309 U.S. 227, 239 (1940) (applying *Brown v. Mississippi* to find compulsion in obtaining the confessions).

[122] KLARMAN, *supra* note 12, at 228.

[123] *See id.* at 229 (discussing the Justices' concerns about coerced confessions and describing the defendants' interrogations in which they were denied food, sleep, and contact with family and lawyers). The Court would soon confront this issue in a series of more divided cases that cannot easily be reconciled. *See id.* at 229–30 (analyzing Lyons v. Oklahoma, 322 U.S. 596 (1944) and Betts v. Brady, 316 U.S. 455 (1942)).

[124] *See Chambers*, 309 U.S. at 241 ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[125] Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

[126] The NAACP chapter closest to where the defendants were being tried had collapsed the previous year, and the organization thus lacked on-the-ground intelligence about the case and had to rely on reports of Southern newspapers. *See* CARTER, *supra* note 94, at 52.

launched a vigorous publicity campaign on their behalf.[127] Stung with criticism for their impassiveness, the NAACP, in cooperation with the ACLU, struggled to take over the defendants' representation.[128] Although they initially failed in these efforts, their sustained interest in the case kept it in the public eye, and the ILD agreed to allow an eminent ACLU-affiliated lawyer, Walter Pollak, argue the case before the Supreme Court.[129] What's more, competition from left-wing organizations reinvigorated the NAACP's and ACLU's efforts to control the litigation of defendants in other cases.[130]

B. ECONOMIC AND DOCTRINAL SHIFTS

Neither close coordination nor strategic competition in criminal procedure cases was easy to maintain in subsequent decades, however. Following the Court's 1932 decision in *Powell*, states went beyond the Court's holding to guarantee court-appointed counsel to indigent defendants in all felony cases. By the late 1950s only six states (four of them Southern) made counsel available only in capital cases.[131] In addition to these state-driven

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[127] ROBIN D.G. KELLY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 78–79 (1990) (observing that "Communist-led ILD" gave the Scottsboro defendants unsolicited assistance with the intention of gaining international attention).

[128] *See* CARTER, *supra* note 94, at 71–72 (describing the NAACP's meeting with the defendants and their promise to provide "the best attorney in Alabama"); GOODMAN, *supra* note 99, at 37 ("The Communists couldn't do better than [attorney Clarence] Darrow, but the NAACP couldn't defend the boys without their consent, and by the late fall of 1931 the boys all backed the ILD."); KELLEY, *supra* note 127, at 80–81 ("[T]he paralyzed state of the NAACP in Alabama and the overall timorousness of Birmingham's black elite precluded any local intervention.").

[129] *See* CARTER, *supra* note 94, at 160 ("Despite their outspoken disdain for the legal processes, ILD officials retained Walter Pollak, one of the nation's most eminent constitutional attorneys."). Following the victories in *Powell* and *Norris*, the NAACP took over representation of several of the defendants. *See id.* at 411–13 (discussing the NAACP's representation of some of the Scottsboro defendants while in front of the Alabama Parole Board).

[130] *See, e.g.*, KELLEY, *supra* note 127, at 83–91 (describing the NAACP's and ILD's competition over the representation of Willie Peterson, a black man accused of rape and murder); Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916–1939*, 77 FORDHAM L. REV. 1731, 1747–52 (2009) (discussing the ACLU's and ILD's roles in Mooney v. Halohan, 294 U.S. 103 (1935) (per curiam)).

[131] Epp, *External Pressure*, *supra* note 11, at 272–73 & tbl.12.1. The four Southern states were Alabama, Florida, Mississippi, and South Carolina. *Id.* at 273 tbl.12.1.

initiatives, the Ford Foundation began to offer extraordinary support to a number of legal aid organizations beginning in the early 1950s.[132] Just three months before the Court's decision in *Gideon*, the Foundation approved a $2.4 million grant to the National Legal Aid and Defender Organization to create model defender services and establish new defenders officers in major cities.[133] A year after the Court's decision, the Foundation "invested an additional $2 million to 'take full advantage of the tide of interest in defender services resulting from the Gideon case.' "[134] Complementing this massive investment of resources, the American Bar Association immediately responded to *Gideon* by setting up a committee to survey legal aid services in each state,[135] and in 1964 issued a declaration insisting that state and local bar associations should make it a priority to train lawyers for indigent defense.[136] Between 1957 and 1966, government-appointed lawyers represented a significant proportion of criminal defendants before the Supreme Court.[137] Moreover, during this same period, the number of certiorari petitions in criminal cases increased by approximately 88%.[138]

This expansion of support for indigent defense in the early 1960s provided the structural underpinnings for Warren Court

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[132] *See id.* at 272 (categorizing the Ford Foundation's contributions to numerous civil liberties organizations, totaling over $47 million); TELES, *supra* note 111, at 34–35 (noting the Ford Foundation's grants).

[133] TELES, *supra* note 111, at 34.

[134] *Id.* (quoting FORD FOUND., FORD FOUNDATION ANNUAL REPORT 23 (1964)).

[135] *Id.* at 31.

[136] *Id.* at 32.

[137] EPP, RIGHTS REVOLUTION, *supra* note 11, at 60.

[138] *See* GERHARD CASPER & RICHARD A. POSNER, THE WORKLOAD OF THE SUPREME COURT 36 tbl.3.3 (1976) (showing that the number of criminal cases on the Supreme Court's docket grew from 908 in 1957 to 1,708 in 1966); *cf. id.* at 32–33 (defining the Supreme Court's docket as "consist[ing] of those applications for review . . . in which the applicant submits a printed petition for certiorari (or its counterpart in appeal cases, a 'jurisdictional statement') in accordance with the usual requirements of the Supreme Court's rules, which include a filing fee," or where "the requirement of a printed submission and filing fee is waived because of the applicant's poverty"). Moreover, by 1973, the number of certiorari petitions filed in criminal cases had increased by about 83% since the Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See* CASPER & POSNER, *supra*, at 36 tbl.3.3 (showing that the number of criminal cases on the Supreme Court's docket grew from 1,399 in 1963 to 2,566 in 1973); *see also* Epp, *External Pressure*, *supra* note 11, at 258, 273 tbl.12.1 (representing the Court's high percentage of criminal procedure cases, generally over 20%).

decisions expanding criminal procedure rights.[139] The proliferation of organizations committed to representing poor defendants substantially decreased the likelihood, however, that any single organization could significantly constrain the Supreme Court's criminal procedure agenda.[140] Consistent with this development, many of the significant Warren-era criminal procedure cases were not litigated by public interest organizations, but were instead "the unintended by-product of the activities of attorneys who provided the Court with occasions to make policy but who were themselves relatively uninterested in policy."[141] Impact litigation organizations were involved in only three of these cases prior to the Court's decision to grant certiorari in them, and only two of those cases were brought by lawyers affiliated with impact litigation organizations.[142] The remaining cases were not

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[139] *See* EPP, RIGHTS REVOLUTION, *supra* note 11, at 65–69 (noting that the increase in state right-to-counsel policies allowed government sponsored attorneys to reach the Supreme Court in criminal procedure cases that the Court would never have previously heard).

[140] This analysis, it should be noted, does not account for the extent to which, perhaps because of its expertise or credibility, the NAACP-LDF was more successful than other litigants in the field at filing certiorari petitions that received the Court's attention. *Cf.* DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 98 (1980) (stating that between 1945 and 1957, the Court granted certiorari in over half the cases where Thurgood Marshall was the attorney of record).

[141] JONATHAN D. CASPER, LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS 7 (1972). Casper interviewed attorneys who argued in eighty-two cases before the Warren Court, twenty-eight of which were criminal procedure cases. *Id.* at 96 tbl.6. His study revealed that, in contrast to the vast majority of cases in other subareas of constitutional law, criminal procedure cases were predominately argued by attorneys who were not affiliated with an impact litigation organization and who were primarily motivated by winning a victory for their client without regard to the broader policy ramifications of the case. *See id.* at 96, 105–07 ("[T]welve [attorneys] were appointed to represent indigent defendants, eight received their cases by referral from another attorney, one was representing a previous client, three received cases as a result of their affiliation with institutions or groups, and four had social or friendship ties with their clients.").

[142] The ACLU filed an amicus brief in support of the petition for certiorari in *Terry v. Ohio*, 392 U.S. 1 (1968). Brief of Amicus Curiae, American Civil Liberties Union of Ohio in Support of Petition for Writ of Certiorari, *Terry*, 392 U.S. 1 (No. 67). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), Richard Sobol of the Lawyers Constitutional Defense Committee (LCDC) represented the defendant from the trial phrase through oral argument in the United States Supreme Court. *See id.* at 145; *see also* Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries, in* CRIMINAL PROCEDURE STORIES 261, 267 (Carol S. Steiker ed., 2006) (stating that Richard Sobel joined the New Orleans office of the LCDC after taking a leave of absence from Arnold and Porter in Washington, D.C.). In *Miranda v. Arizona*, 384 U.S. 436 (1966), after the lead

test cases brought to reshape the Court's criminal procedure interpretations, but were instead litigated pro se,[143] or by lawyers for whom the basis of the Court's holding was incidental to the objective of reversing their clients' convictions.[144] The Court's composition during the Warren era, and the overall liberalism of its criminal procedure decisions during that period, thus appear to have obscured the extent to which its decision in *Gideon* diminished the ability of impact litigation organizations to shape the Court's agenda.[145]

As the Court's composition began to shift in the coming decades, and Justices with more conservative ideological formations took the bench, impact litigation organizations appear to have had little control over the litigation of significant Supreme Court criminal procedure cases. The NAACP-LDF, for example, remained an active player in areas of criminal procedure with obvious racial dimensions, but remained so primarily by filing amicus briefs in cases the Court had already accepted for review.[146] There are also

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petitioner unsuccessfully attempted to file a pro se certiorari petition, the ACLU secured a lawyer for him who filed a new petition on his behalf. *See* LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 61–63 (1983) (discussing the ACLU's search for counsel and the organization finding John J. Flynn to represent Miranda).

[143] *See, e.g.*, *Gideon*, 372 U.S. at 335 (indicating Court appointment of attorney for petitioner).

[144] *See, e.g.*, *Terry*, 392 U.S. 1; Katz v. United States, 389 U.S. 347 (1967); *Miranda*, 384 U.S. 436; *Gideon*, 372 U.S. 335; Brady v. Maryland, 373 U.S. 83 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); *see also* CASPER, *supra* note 141, at 96, 105–07 (stating that criminal advocates are typically more concerned with a favorable decision for their client); *cf.* WASBY, *supra* note 28, at 30–35 (acknowledging that litigation groups have multiple goals which might prevent a litigation organization from undertaking some cases).

[145] *Cf.* Lain, *supra* note 5, at 1378 & n.97 (noting that the Warren Court became "decidedly liberal in composition" following Justice Goldberg's appointment in 1962).

[146] *See, e.g.*, Brief *Amici Curiae* of the Brennan Center for Justice et al. in Support of Petitioner, Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) (No. 07-440) (addressing when right to counsel attaches); Brief *Amicus Curiae* of the NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner, Kimbrough v. United States, 552 U.S. 85 (2007) (No. 06-6330) (addressing sentencing court's consideration of Guideline disparities between sentences for crack and cocaine); Brief for the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent, Illinois v. Wardlow, 528 U.S. 119 (2000) (No. 98-1036) (contending that flight from police does not in itself establish likelihood of criminal activity); Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc. et al., Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263) (arguing that use of peremptory challenges to exclude blacks from jury violates the Sixth Amendment and Equal Protection Clause); *cf.* WASBY, *supra* note 28, at 178 (noting that during the late 1980s and early 1990s the NAACP-LDF "slate[d] the criminal justice area for particular concern").

cases in recent decades in which the organization represented criminal defendants before the Supreme Court, but only assumed this role *after* the Court had granted certiorari.[147] In contrast to its role in earlier decades, however, the NAACP-LDF has, in recent decades, represented criminal defendants in only a few cases in which the organization has filed a successful certiorari petition. All but one of these cases, moreover, involved issues unique to the litigation of death penalty cases.[148] Numerous factors no doubt played a role in the NAACP-LDF's relative inactivity in contemporary Supreme Court criminal procedure litigation, including the organization's reluctance to pursue cases that would make bad precedent with a Supreme Court generally regarded as conservative with regard to criminal issues.[149] Notwithstanding these factors, the NAACP-LDF's lack of control over the Supreme Court's criminal procedure cases illustrates that the organization no longer operates in a litigation environment

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[147] *See, e.g.*, House v. Bell, 547 U.S. 518 (2006) (challenging procedural bar to federal habeas relief with evidence of actual innocence); Enmund v. Florida, 458 U.S. 782 (1982) (challenging imposition of death penalty on aider and abettor to robbery in course of which murder is committed by another).

[148] *See* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) (holding that study showing racial disparity in imposition of death penalty does not indicate that jury in defendant's case acted with discriminatory purposes); Lockhart v. McCree, 476 U.S. 162, 173 (1986) (holding that "death qualification" of a jury does not violate the fair cross-section requirement of the Sixth Amendment or the right to a fair and impartial jury); Zant v. Stephens, 462 U.S. 862, 878–79 (1983) (holding that invalidation of one statutory aggravating circumstance does not require death penalty to be vacated when jury expressly found two other valid statutory aggravating circumstances); Zant v. Stephens, 456 U.S. 410, 416 (1982) (certifying question to Georgia Supreme Court to explain premises behind state law that the invalidity of one among plurality of statutory aggravating circumstances found by jury does not impair imposition of death penalty); Estelle v. Smith, 451 U.S. 454, 462 (1981) (holding that examining doctor's testimony of defendant's future dangerousness violated Fifth Amendment privilege against compelled self-incrimination when testimony was based upon pretrial psychiatric examination and defendant had not been informed that statements made to doctor could be used against him in subsequent capital sentencing proceeding); *cf.* Tennessee v. Garner, 471 U.S. 1, 3 (1985) (holding in civil case that use of deadly force to seize fleeing suspected felon is unreasonable unless necessary to prevent escape and there is probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others). For an account of the NAACP-LDF's and ACLU's coordinated strategy in the 1960s and the 1970s to eliminate capital punishment, see Michael Meltsner, *Litigating Against the Death Penalty: The Strategy Behind* Furman, 82 YALE L.J. 1111 (1973).

[149] *Cf.* WASBY, *supra* note 28, at 30–31 (discussing the effect of perceived shifts in the Court's ideology on NAACP-LDF litigation strategy).

where it can coordinate with other organizations to control which cases will find themselves on the Court's docket.[150]

This diminished control has allowed a Court that is uncomfortable with the connection between criminal procedure and race to sidestep the issue when addressing criminal procedure questions that have significant racial dimensions. In *Atwater v. City of Lago Vista*, for example, the Court held that the Fourth Amendment permits police officers to make warrantless arrests for minor criminal offenses, including misdemeanors punishable only by a fine.[151] The case involved a white, middle-aged mother, Gail Atwater, who was pulled over in a suburb of Austin, Texas, while driving her children home from soccer practice.[152] But by granting certiorari in this case, the Court took up a racially fraught question; as the ACLU and the National Association of Criminal Defense Lawyers took pains to emphasize in amici briefs, a wealth of evidence documented police officers' use of minor offenses as a pretext for racially-targeted arrests for the purpose of searching suspects (and their vehicles) for drugs.[153] The dissenting opinion

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[150] This shift in the political economy of litigation does not, of course, entirely explain why the Court was attentive to the equal protection dimensions of modern criminal procedure in the 1920s but no longer is today. The Court's early criminal procedure interventions to address the worst abuses of criminal justice systems in the South were, as scholars have shown, consistent with popular opinion. *See* KLARMAN, *supra* note 12, at 133 ("Most Americans did not endorse farcical proceedings in which southern blacks, possibly or probably innocent of the charges against them, were tortured into confessing and sentenced to death after mob-dominated trials without the effective assistance of counsel."). Moreover, in contrast to the racial segregation of social life, discrimination against blacks in the criminal justice system was not a prerogative that white supremacists in the South highly valued, and the Supreme Court's early criminal procedure interventions did not meet with nearly the level of resistance as its desegregations decisions. *See id.* at 134 ("Many southern whites intensely committed to segregation and opposed to interracial marriage did not endorse the unfair treatment of black criminal defendants. For that reason, eminent white lawyers represented black defendants . . . on appeal, when they never would have taken cases challenging school segregation or disenfranchisement."); 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 60–61, 526–29, 534, 555–56 (7th ed. 1944) (describing the differences in racial discrimination in Northern and Southern American societies and proffering a "rank order of discriminations" against blacks in Southern society).

[151] 532 U.S. 318, 323 (2001).

[152] Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1373 (2002).

[153] *See* Brief Amici Curiae of the National Ass'n of Criminal Defense Lawyers & the Ass'n of Federal Defenders in Support of the Petitioners at 10–14, *Atwater*, 532 U.S. 318 (No. 99-1408) ("The incentive to search cars for drugs has further led officers to disproportionately

emphasized the impact the majority's holding would have with regard to this racial profiling practice.[154] The facts of Gail Atwater's arrest, however, obscured the racial dimensions of the case to a degree that permitted the majority to dismiss the dissent's concern as "speculative" and to assert that "there simply is no evidence of widespread abuse of minor-offense arrest authority."[155]

The political economy of litigation thus helps explain why a generally conservative Court was moved to create new constitutional criminal procedure rights in the 1920s and 1930s, while another conservative Court was reluctant to do so from the 1970s onwards. Compare, for example, the genesis of the 1932 case that gave rise to the right to counsel, *Powell v. Alabama*,[156] with that of the 1984 case that undermined it, *Strickland v. Washington*.[157] In *Powell*, the ILD, acting through a respected civil rights lawyer, presented the Court with sympathetic defendants whom the Northern press—and, to some extent, the Southern—

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stop and search minority motorists with no suspicion of wrongdoing beyond an ordinary traffic violation."); Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Petitioners at 6–11, *Atwater*, 532 U.S. 318 (No. 99-1408) ("Courts across the country are increasingly recognizing claims based on the practice of racial profiling, as that issue moves to the forefront of national consciousness.").

[154] *See Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) ("[A]s the . . . debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.").

[155] *Atwater*, 532 U.S. at 353 n.25; *cf. Leading Cases*, 115 HARV. L. REV. 306, 342 n.63 (2001) ("[A]s a white, middle-class woman, Gail Atwater was a particularly poor example of the harms of unchecked police discretion.").

[156] 287 U.S. 45 (1932).

[157] 466 U.S. 668 (1984). For accounts of how *Strickland* has undermined the right to counsel, see William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 114–61 (1995) (discussing the line of cases following *Strickland* to demonstrate the "illogical and unworkable framework for evaluating whether the performance of defense counsel had fallen below a constitutionally required minimum"); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 72–83 (1986) (arguing that *Strickland*'s "strong presumption" of attorney competence and failure to set minimum standards for defense counsel "virtually mandates that reviewing courts find that most defense attorneys, no matter what they have done or failed to do, are competent"); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 441–46 (2004) (discussing cases in which the "assumption of competence" led courts to deem effective defense lawyers who had no jury trial experience, little time to investigate and prepare for trial, and slept in the courtroom).

thought to be innocent.[158] These defendants were far more attractive candidates for judicial solicitude than David Leroy Washington, whose conviction the Court upheld in *Strickland*. On a two-week crime spree, Washington stabbed a minister to death, kidnapped a twenty-year-old student and stabbed him to death after two days, stabbed a woman while forcing her three elderly sisters-in-law to watch, and finally bound up and shot the sisters-in-law in the head.[159] He was represented by an attorney whom the judge presiding over the post-conviction proceedings called "one of the leading criminal defense attorneys in Dade County," and he consistently disregarded that attorney's advice.[160] Washington argued that he received ineffective assistance at his sentencing proceeding.[161] All of the lower courts held that Washington received effective assistance of counsel.[162] The courts disagreed, however, as to the standard of review for ineffective assistance claims, and the Eleventh Circuit ultimately remanded for the district court to review Washington's claim under a more demanding standard than the State of Florida preferred, prompting it to petition the Supreme Court.[163] Strickland's case thus provided Florida with an excellent vehicle for advancing a narrow understanding of the right to effective counsel, and it is unsurprising that, when considering Washington's predicament,

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[158] *See supra* note 99 and accompanying text.

[159] Washington v. Strickland, 673 F.2d 879, 907–08 (5th Cir. Unit B 1982), *rev'd en banc*, 693 F.2d 1243 (5th Cir. Unit B 1982), *rev'd*, 466 U.S. 668 (1984). For a more detailed account of the facts, see David Cole, Gideon v. Wainwright *and* Strickland v. Washington: *Broken Promises*, *in* CRIMINAL PROCEDURE STORIES, *supra* note 142, at 101, 108–09.

[160] Cole, *supra* note 159, at 108–09.

[161] *Strickland*, 466 U.S. at 675.

[162] Cole, *supra* note 159, at 110.

[163] *See* Brief for the Petitioner at 67–84, *Strickland*, 466 U.S. 668 (No. 82-1554) ("The reexamination of counsel's performance must therefore rest upon only fundamental fairness and not upon a list of potential errors."); Cole, *supra* note 159, at 110 ("The Florida state courts and the federal district court adopted one standard, a panel of the U.S. Court of Appeals for the Fifth Circuit set forth a different standard, and the Fifth Circuit en banc imposed still a third test."). The Eleventh Circuit held that defense counsel must provide "reasonably effective assistance given the totality of the circumstances," Washington v. Strickland, 693 F.2d 1243, 1250 (Former 5th Cir. 1982) (en banc), *rev'd*, 466 U.S. 668 (1984), and that if this standard is met the defendant has the burden of establishing prejudice by showing that the ineffective assistance "worked to his *actual* and substantial disadvantage." *Id.* at 1258 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)) (internal quotation mark omitted).

the Court was unmoved to adopt a strongly pro-defendant standard for assessing ineffective assistance claims.[164]

If civil libertarians were seeking a poster child for the right to counsel, David Leroy Washington would not be their first choice. Certainly the Supreme Court could have chosen a case with a more sympathetic defendant "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."[165] The same year the Eleventh Circuit decided *Strickland*, for example, it applied the same ineffective assistance standard in another death penalty case, *Goodwin v. Balkcom*, where it held in the defendant's favor.[166] The defendant in that case, Terry Lee Goodwin, was black, borderline mentally retarded, and eighteen years old at the time of his crime.[167] His defense attorney refused to investigate jury selection procedures in the county where the defendant was tried, even though "[s]uch an examination would have revealed glaring disparities in racial and gender representation,"[168] and testified that he chose not to challenge the racial compositions of the grand and petit jury pool because he felt "community pressure" not to do so.[169] On top of this, Goodwin's attorney referred to him as a "little old nigger boy"

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[164] The Supreme Court likewise held that Washington received effective assistance of counsel, and in doing so set forth a "highly deferential" standard for determining whether an attorney's assistance is constitutionally adequate. *Strickland*, 466 U.S. at 689–90. In addition, the Court held that even if an attorney's assistance is ineffective, the defendant has the burden of showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This two-pronged test for prevailing on an ineffective assistance claim has proved exceedingly difficult to satisfy. *See* Weaver, *supra* note 157, at 441–46 (recounting the facts of United States v. Cronic, 466 U.S. 648 (1984) and Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000), to illustrate the difficulty of overcoming the "assumption of competence" that *Strickland* requires in determining ineffective assistance claims); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 811 (2009) ("A claim of ineffective assistance of counsel in trial or appellate proceedings was raised in about half of the 2384 noncapital cases the Vanderbilt-NCSC study assessed. Only one of those claims was granted; that grant was later reversed.").

[165] *Strickland*, 466 U.S. at 684.

[166] 684 F.2d 794, 820 (11th Cir. 1982).

[167] *Id.* at 796–97 & n.1.

[168] *Id.* at 817.

[169] *Id.* at 806–07.

during his closing argument.[170] Unsurprisingly, the Eleventh Circuit concluded that Goodwin did not receive effective assistance of counsel and was prejudiced by his attorney's performance.[171] Surprising from a strategic standpoint, however, is that—like the State of Florida in *Strickland*—the State of Georgia petitioned the Supreme Court to overturn this decision.[172] The Supreme Court rejected Georgia's petition in April 1983,[173] and went on to accept the State of Florida's petition just two months later.[174]

One need not be a legal realist to conclude the ineffective assistance standard might be different today if, in 1984, the Court had been considering Terry Lee Goodwin's representation rather than David Leroy Washington's. Nor does one need to be a legal realist to conclude that a conservative Supreme Court would not have mandated the right to counsel in capital cases in 1932 if the defendants whose lives were at stake were people like Washington rather than the Scottsboro defendants. If one accepts these premises, then one of the most constitutionally significant differences between the *Powell* era and the *Strickland* era is the ability of litigation organizations to use sympathetic cases to shape the Court's jurisprudence. As explained above, the certiorari petition in *Powell* stands out as an anomaly among the 738 petitions filed during the October 1931 term, and it was sure not to escape the Court's attention.[175] By contrast, there were 5,062 petitions the term the Court agreed to hear *Strickland* and declined to hear *Goodwin* (2,352 of them filed pro se), a large number of which concerned criminal justice issues,[176] and some of which—like those in *Strickland* and *Goodwin*—were filed by

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[170] *Id.* at 805 n.13.

[171] *Id.* at 820.

[172] *See* Goodwin v. Balkcom, 684 F.2d 794, 794 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (Apr. 18, 1983) (No. 82-1409).

[173] *Id.*

[174] Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982), *cert. granted*, 462 U.S. 1105 (June 6, 1983) (No. 82-1554).

[175] *See supra* notes 106–08 and accompanying text.

[176] EPSTEIN ET AL., *supra* note 54, at 74 tbl.2-6; *see also* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 760–61 (2001) (noting that of the 1983–1985 Court terms, the vast majority of in forma pauperis cases concerned criminal or habeas issues).

states.[177] In such a situation, public interest organizations have very little control over whether the defendants who appear before the Supreme Court, and who thereby influence the course of constitutional criminal procedure, look like David Leroy Washington or Terry Lee Goodwin.

C. LITIGATION TODAY

The present-day political economy of litigation continues to place poor and minority defendants at a disadvantage in pushing for changes in constitutional doctrine.[178] First, the number of cases filed each year in the Supreme Court—8,159 in the 2009 Term (6,576 filed in forma pauperis)—would almost render futile any attempt to shape the Supreme Court's criminal procedure agenda by manipulating the sort of cases it is presented for review.[179] Second, the organizational support for criminal defense

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[177] *See supra* notes 163, 172 and accompanying text.

[178] This Article argues that the increase in supply of legal aid is a significant cause of practitioners' diminishing influence over the Court's criminal procedure agenda. Counterintuitively, it seems less likely that the breathtaking increase in *demand* for legal aid—that is, the explosive growth in the incarceration rate over the past several decades—is a complementary reason for practitioners' decrease in power. In a detailed analysis of the "explosive growth" in the Supreme Court's criminal procedure docket between 1956 and 1973, Gerhard Casper and Richard Posner showed that the rising incarceration rate had little to do with the rise in the number of certiorari petitions filed. *See* CASPER & POSNER, *supra* note 138, at 42 ("[T]he growth of the Court's criminal docket . . . . cannot be attributed, save in small part, to the growth in the crime rate."); *id.* at 35–46 (explaining that the growth in the criminal procedure docket was the result of the number of *federal* criminal petitions, while the federal conviction rate had grown far slower than the state conviction rate). *But see* Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861, 867 (2008) (erroneously citing Casper and Posner for the proposition that there are "historical links between increases in criminal convictions and increases in certiorari petitions from criminal defendants"). More recently, two scholars have shown that, during the October 2006 Supreme Court term, state court convictions counted for only 31% of the criminal certiorari petitions filed through counsel, and only 17% of criminal certiorari petitions filed pro se. Shay & Lasch, *supra* note 67, at 249–50. However, prisoners in state prisons and county jails accounted for all but 208,118 of the more than 1.6 million individuals who were incarcerated in 2009. WEST ET AL., *supra* note 44, at 2 & tbl.1. (This figure "[i]ncludes prisoners under the legal authority of state or federal correctional officials with sentences of more than 1 year, regardless of where they are held." *Id.*)

[179] *See* John Roberts, *2010 Year-End Report of the Federal Judiciary*, 9 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf (describing the composition of the Supreme Court's docket).

litigation is as diffuse as ever. In 2007, there were 957 public defender offices across the nation, employing more than 15,000 full-time equivalent litigating attorneys, most of which are funded at the state and county level.[180] While such disparities in funding sources and organizational structures would make coordination difficult under the best of circumstances, most of these organizations operate under the worst of them. Most of these organizations are underfunded,[181] and thus have strong disincentives against spending their resources on filing certiorari petitions.[182] Even when public defenders do decide to petition the Supreme Court, their resource constraints preclude the option of pursuing a risky and resource-intensive strategy of moving forward a set of cases designed to reshape the Court's criminal procedure agenda.[183]

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[180] LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 1–2, 5 tbl.1, 6 tbl.2a (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf.

[181] *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 39, at 52–70 (surveying a variety of problems stemming from inadequate funding); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 39, at 7–28 (describing lack of funding among other problems with indigent defense in America).

[182] *See* Shay & Lasch, *supra* note 67, at 254–62 (surveying the variety of reasons defenders do not file certiorari petitions).

[183] Although it is a separate consideration from the resources available for criminal procedure litigation, it bears noting that the shifting standard of federal habeas review is potentially another significant factor limiting the ability of impact litigation organizations to control the Court's criminal procedure agenda. The Warren Court's expansion of the scope and availability of habeas review created a wealth of opportunities for public interest organizations to bring cases to the Court that would have otherwise escaped its attention. *Cf.* Fay v. Noia, 372 U.S. 391, 399 (1963) (holding that a state prisoner's failure to raise federal constitutional claim in state appeal does not bar subsequent habeas review unless the prisoner fails to exhaust remedies open in the state forum at the time an applicant files for habeas relief); Hoffman & King, *supra* note 164, at 800–05 (discussing the Warren Court's expansion of habeas review). The Court eliminated these opportunities with respect to Fourth Amendment claims in 1976, *see* Stone v. Powell, 428 U.S. 465, 493 (1976) (holding that a state prisoner cannot get federal habeas relief based on an unconstitutional search when the state provided full and fair litigation), and severely curtailed them with respect to other federal claims in the ensuing years. *See* Teague v. Lane, 489 U.S. 288, 309–10 (1989) (noting that the Sixth Amendment requires a fair cross-section for petit jury, but that this did not apply retroactively to petitioner's case); Coleman v. Thompson, 501 U.S. 722, 748 (1991) (holding that failure to file timely notice of appeal in state proceedings may bar federal habeas relief); Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) (holding that state procedural defaults bar federal habeas relief absent showings of "cause" and "prejudice"). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.), now prevents federal

Unsurprisingly, given the limited legal aid resources available in most states, a disproportionately large number of criminal certiorari petitions involve federal cases.[184] Thanks to a laborious survey that two scholars have recently published, we know that, for the October 2006 Supreme Court term, federal criminal convictions accounted for 50% of certiorari petitions that were filed through counsel, and a startling 70% of the petitions that were filed in forma pauperis.[185] At the same time, inmates in federal prisons accounted for less than one percent of those currently incarcerated in this country.[186] There is little reason to think that the criminal procedure issues raised by these federal defendants are representative of those that arise in state cases. Federal prosecutions are frequently the product of a resource-intensive investigation that involves "sustained cooperation between"

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courts from overturning state court decisions that are not "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2006). Except perhaps in the narrow area of ineffective assistance claims in death penalty litigation (and only then by tacit circumvention of the statutory standard), federal habeas no longer provides a forum for impact litigation organizations to advance novel constitutional interpretations. *Cf.* Shay & Lasch, *supra* note 67, at 228–46 (analyzing the barrier AEDPA has imposed on doctrinal development through habeas).

Nevertheless, the current doctrine leaves open several other avenues for state court litigants to present the Court with novel criminal procedure claims. The Supreme Court has in the recent decade made new constitutional law, unbound by AEDPA's constraints, both in reviewing direct appeals, *see, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (forbidding execution of the mentally retarded), and in directly reviewing state post-conviction proceedings. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (forbidding execution of individuals for crimes committed when they were minors); *see also* Shay & Lasch, *supra* note 67, at 262–65 (discussing opportunities that direct state court appeals and state post-conviction proceedings provide for creation of federal constitutional law). As the framework presented in this Article demonstrates, however, the current political economy of criminal litigation prevents impact litigation organizations from using these procedural avenues to constrain the Supreme Court's criminal procedure agenda.

[184] Shay & Lasch, *supra* note 67, at 249–50. Shay and Lasch argue that, in addition to the resource constraints addressed above, there is a "cultural disconnect between state criminal practice and certiorari practice in the Supreme Court" that accounts for the disproportionately small number of petitions filed in state criminal cases. *Id.* at 252; *see also* Lazarus, *supra* note 91, at 1560–61 (suggesting that the criminal defense bar is culturally resistant to accepting expert assistance in cases before the Supreme Court).

[185] *See* Shay & Lasch, *supra* note 67, at 249.

[186] *See* WEST ET AL., *supra* note 44, at 2 tbl.1 (showing that federal prisoners constitute only 208,118 of the more than 1.6 million sentenced prisoners incarcerated as of 2009).

prosecutors and law enforcement officers.[187] The run-of-the-mine prosecutions of state law enforcement agencies, by contrast, do not involve such investigations; the norm is instead for the police to make their arrest, and then "to hand [the] case off to prosecutors."[188] Accordingly, the aspects of policing that are most likely to have disparate impacts on the most politically vulnerable—snap judgment calls about when to conduct a stop or when to perform a search, for example—are less likely to be salient in a federal case.[189] The disproportionate number of federal criminal cases on the Supreme Court's docket is therefore likely to skew the institution's understanding of what's at stake for most defendants when it expands or narrows a criminal procedure right.

IV. THE SHAPE OF REFORM

The theoretical framework presented in this Article has two significant implications with respect to proposals to re-shift the doctrinal foundations of criminal procedure. The first, and most troubling, implication concerns the extent to which litigation can be counted upon as a means of shaping judicial understandings of constitutional criminal procedure. The second implication, which offers more cause for optimism, is the possibility that structural reforms may enable litigation organizations to influence the Supreme Court's agenda even within the current political economy of litigation.

A. THE PROBLEM OF LITIGATION REFORM

The understanding of constitutional criminal procedure's doctrinal shifts that emerges from Parts II and III of this Article exposes a potential weakness in proposals to reform criminal procedure through new litigation strategies. Part III.A reviews a

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[187] Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 615 (2005).

[188] *Id.* at 602.

[189] *Cf.* Shay & Lasch, *supra* note 67, at 242–43 ("Because the vast majority of criminal cases in the U.S. are prosecuted in state courts, certain kinds of important federal constitutional issues may arise more frequently — or nearly exclusively — in state court criminal proceedings." (footnote omitted)).

period during which impact litigation organizations had considerable influence over the Court's constitutional criminal procedure decisions. This influence is evidenced by the Court's concern during that period with issues of racial equality and class disparity in the administration of criminal justice. The current political economy of litigation, however, cautions against drawing too many hopeful lessons from that history.

Scholars have recently argued that state criminal defense attorneys could better influence the shape of constitutional criminal procedure by more frequently filing certiorari petitions from direct appeals and state post-conviction proceedings.[190] These scholars acknowledge that indigent defendants' attorneys may lack the resources to file effective certiorari petitions, but they also identify a "cultural gap" between Supreme Court practice and local criminal practice that discourages state criminal defense attorneys from filing certiorari petitions as frequently as they could.[191] This insight is valuable; reform in state criminal attorneys' certiorari practices could serve as an important first step in shifting the Court's focus toward constitutional criminal procedure issues that do not arise as frequently in federal cases.[192]

However, in terms of reshaping the doctrinal foundations of constitutional criminal procedure in ways that will benefit the most disadvantaged defendants, the limits of any reform in the cultural practices of state criminal defense attorneys, absent deeper structural reforms, are significant.[193] First, it is likely that the only state criminal defense attorneys with the resources to meaningfully reform their certiorari filing practices are those who

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[190] *See id.* at 262–63.

[191] *Id.* at 261.

[192] *See supra* notes 188–89 and accompanying text.

[193] Richard Lazarus has identified one cultural practice, however, that if reformed, might significantly affect the evolution of constitutional criminal procedure doctrine. Lazarus asserts that the criminal defense bar is generally resistant to offers by experienced Supreme Court litigators to assist in the preparation and argument of cases that the Supreme Court accepts for review. *See* Lazarus, *supra* note 88, at 1560–61 (discussing defense counsel's resistance to expert assistance); *cf.* Shay & Lasch, *supra* note 67, at 253 (noting that Lazarus offers no citation for his assertion and suggesting that "[w]hether this assertion is true, whether it applies uniformly to all Supreme Court experts, and whether there is any legitimate basis for defenders' reluctance to surrender control of their clients' cases are all questions that may be debated").

represent paying clients.[194] Thus, the new cases the Supreme Court would confront as the result of a cultural reform in state court filing practices may not be ones that draw the Court's attention to how its constitutional decisionmaking affects poor and minority defendants. Second, if a reform in certiorari filing practices leads to a proliferation in petitions from state court judgments, the Court will have even more opportunities to select cases that conform to its ideological preferences. A boom in the number of state court certiorari petitions will not only give the Supreme Court more opportunities to accept the cases of sympathetic defendants, but it will also increase the Court's opportunities to select the cases of defendants who are obviously guilty and whose crimes are particularly heinous. This is not to say that the Court will always rule against the defendant in such cases,[195] but it does mean that the influence of litigants over future Supreme Court decisionmaking will be limited compared to their influence at the inception of the state law of constitutional criminal procedure.

B. THE POTENTIAL FOR STRUCTURAL REFORM

The current political economy of litigation offers little cause for hope that individual litigants will be able to radically transform judicial understandings of constitutional criminal procedure. As the framework presented in this Article demonstrates, a proliferation in the number of litigation organizations creates coordination problems that frustrate the ability of litigators to constrain the Supreme Court's agenda.[196] The framework presented in this Article may, however, shed light on possible structural reforms that would enable litigators to partially overcome their coordination problems. For a solution to achieve this reform goal, it must empower state criminal defense attorneys to pool information about cases they are litigating that involve federal constitutional claims. The solution must also create the

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[194] *See supra* notes 37–40 and accompanying text.

[195] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (forbidding imposition of the death penalty for child rape).

[196] *See supra* Part III.B.

possibility for litigators to choose which of those cases would have the best possibility of pushing the Supreme Court toward a new understanding of the constitutional right in question. As the examples offered below illustrate, such solutions could emerge from the decisions of courts or legislators, but may also be initiated by private organizations.

1. Lawmaker-Driven Solutions. As explained above, the political economy of criminal litigation and constitutional lawmaking are inter-dynamic.[197] The political economy of litigation can, as shown above, shape the trajectory of Supreme Court decisionmaking.[198] At the same time, however, the Supreme Court can effect significant changes in the political economy of litigation through decisions such as *Gideon v. Wainwright*.[199]

Both the Court and legislatures can also impact the political economy of criminal litigation by creating—or eliminating—procedural opportunities for victims of constitutional violations to pool their resources to redress rights. Current doctrine sharply limits the opportunities for victims of criminal procedure violations to use civil class actions as a means of redressing law enforcement officers' violations of their criminal procedure rights,[200] and essentially forecloses any civil opportunities to vindicate violations of trial rights for those who have not been acquitted or had their sentences vacated.[201] Any judicial or (insofar as it is constitutionally permissible[202]) legislative decisions that broaden these opportunities could have a significant effect on the political economy of criminal litigation. Similarly, as Brandon Garrett has drawn to scholars' attention, courts could permit

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[197] *See supra* Part II.

[198] *See supra* Part III.A.

[199] 372 U.S. 335 (1963); *see supra* Part III.B.

[200] *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1226–28, 1235–41 (discussing doctrinal barriers to civil class actions and suits for equitable relief for criminal procedure violations).

[201] *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (barring civil suits challenging conviction unless there has been an acquittal or vacatur); *see also* Younger v. Harris, 401 U.S. 37, 53 (1971) (requiring federal courts to abstain from enjoining state prosecutions except in extraordinary circumstances); Garrett, *supra* note 8, at 401 (discussing doctrinal barriers to vindicating violations of trial rights).

[202] *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (limiting injunctive relief for civil rights violations under Article III standing doctrine).

defendants to aggregate criminal procedure claims through techniques such as consolidating habeas corpus petitions.[203] Such procedural aggregation techniques, if the Supreme Court were to sanction them, would allow defendants to "pool information about the existence and causes of recurring [criminal procedure] violations" and thus enable them to overcome coordination problems to raise novel constitutional issues.[204] At the moment, however, the idea of lawmaker-driven efforts to empower defendants to push for new judicial understandings of criminal procedure rights smacks of political fantasy.

2. Litigator-Driven Solutions. Even if such reforms are politically unrealistic, it may nonetheless be possible for organizations to develop grassroots solutions to overcome the coordination problems caused by the political economy of litigation.[205] Reformers could, for example, create a centralized, information-sharing network—beginning with the construction of a database—that would allow state criminal defense attorneys to share information concerning the cases they are litigating which raise federal constitutional issues.[206] Such a database could categorize these cases by constitutional issue and include basic, nonprivileged information concerning the facts of each case. Use of such a database would allow attorneys to assess the relative

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[203] *See* Garrett, *supra* note 8, at 422–23 (discussing the Second Circuit's consolidation of habeas petitions in Rudenko v. Costello, 286 F.3d 51 (2d Cir. 2002), and the circuit's subsequent reversal of that decision).

[204] *Id.* at 388.

[205] The activism of organizations representing the criminal defense bar—including the National Association of Criminal Defense Lawyers, the American Bar Association, the National Association of Federal Defenders, and the National Legal Aid & Defender Association—demonstrates that cooperation and networking among criminal litigators is socially and economically feasible.

[206] I am indebted to Daniel Richman for this suggestion. It should be noted that, while a database of the sort proposed in this Article does not exist and does not seem to have been publically proposed, the Center for Law and Social Policy and the National Legal Aid & Defender Association have copublished a report, funded by the Open Society Institute and the Ford Foundation, exploring more modest ways to use technology to improve legal aid organizations' service to their clients. JULIA GORDON, CTR. FOR LAW AND SOC. POLICY & NAT'L LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE AND THE DIGITAL REVOLUTION: USING TECHNOLOGY TO MEET THE LEGAL NEEDS OF LOW-INCOME PEOPLE (2002), *available at* http://www.nlada.org/DMS/Documents/1036107299.97/digital_divide.pdf. Such initiatives show that further studies exploring how to enhance coordination and information-pooling among criminal litigators may garner financial support from private foundations.

strength of one of their cases as a vehicle for raising novel constitutional arguments.[207] If an attorney had a case that presented particularly promising facts for constitutional reform, other lawyers could, if they chose, offer to support that attorney's efforts to file a certiorari petition.[208]

More controversially, an indigent defendant's attorney could decide to ration the resources she is willing to invest raising a constitutional claim in her own case if other cases exist that present better opportunities for shaping the law. Such decisionmaking would, however, raise two significant ethical questions. First, it is unclear whether, consistent with a lawyer's duty to zealously advocate on her client's behalf, a lawyer may forgo arguments with a poor chance of success on the merits in order to raise those arguments in the future.[209] Second, an attorney's decision to ration arguments on behalf of one client in order to better shape the law on behalf of future clients suggests that the attorney has impermissibly allowed herself to be "materially limited by the lawyer's responsibilities to another client."[210]

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[207] *Cf.* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2532 (2004) (proposing the creation of a database of past trial and plea bargain outcomes to increase prosecutors' and defense attorneys' access to information relevant to plea negotiations).

[208] This support structure for criminal defense lawyers litigating before the Supreme Court may have a useful model in the National Association of Attorneys General's Supreme Court Project, which was founded in 1982 to help state attorneys general present cases effectively before the Supreme Court. *See* DAN SCHWEITZER & ANDREA M. HAMPTON, OYEZ OYEZ OYEZ: SERVICES OF THE NAAG SUPREME COURT PROJECT 6 (1996) (on file with author) (describing the NAAG Supreme Court project's purpose and scope).

[209] *See* MODEL RULES R. 1.3 cmt. 1 ("A lawyer must . . . act . . . with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .").

[210] MODEL RULES R. 1.7(a) (providing, with exceptions that are irrelevant for purposes of this decision, that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," and defining such a conflict to include cases where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"); *see also* Etienne, *supra* note 56, at 1253, 1256 (concluding that rationing of arguments to aid future clients constitutes an ethical conflict under Model Rule 1.7(a)).

Although a full exploration of these ethical questions is beyond the scope of this Article, they should not necessarily inhibit the consideration of litigator-driven efforts to overcome the coordination problems posed to the criminal defense bar. As many scholars have observed, the rationing of arguments on behalf of indigent criminal defendants is an inevitable product of the structure of criminal defense representation.[211] Given the resource constraints of lawyers representing indigent defendants, and those lawyers' statuses as repeat players in a system where they must retain their credibility, they often must make difficult decisions about whether to raise a complex constitutional argument in a particular case.[212] Indeed, this sort of strategic rationing is arguably built into the constitutional standard for ineffective assistance claims, which requires courts to accord considerable deference to the strategic decisions of attorneys concerning whether to pursue a claim.[213]

A database documenting the nature of state criminal cases involving federal constitutional claims would allow defense attorneys to make these decisions on an informed basis, instead of resorting to snap judgments. This is not to suggest that the ethical issues raised by proposing such a database are insignificant, or that they would not need to be untangled if the database were to be implemented. But the central ethical question

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[211] *See* Brown, *supra* note 41, at 810 (stating that underfunding of criminal defense leads to rationing); Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 BRANDEIS L.J. 207, 207 (2003) [hereinafter Brown, *Defense Attorney Discretion*] (asserting that defense attoneys commonly give priority to some clients); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762–66 (1993) (discussing how resource constraints require public defenders to triage which clients they aggressively defend).

[212] *See* Brown, *supra* note 41, at 813–14 (describing the process by which indigent defendants' attorneys make rationing decisions regarding expert assistance); Etienne, *supra* note 56, at 1212–13, 1228 (reporting that some federal criminal defense attorneys adopt an "impact litigation" approach to deciding which argument to raise and that they ration arguments out of credibility concerns); *see also supra* notes 41–42 and accompanying text.

[213] *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (holding that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "must indulge a strong presumption that . . . under the circumstances, the challenged action 'might be considered sound trial strategy' " (citation omitted)); Brown, *Defense Attorney Discretion*, *supra* note 211, at 214 (arguing that defense attorney rationing is "the sort of professional discretion *Strickland* strongly protects").

that the database would pose is not whether the technology encourages defense attorneys to ration the arguments they make on behalf of their clients, but whether the *type* of rationing that it encourages is more problematic than other rationing principles that have been suggested, such as the actual innocence of a particular client.[214] Even if limits were set on its use, however, the database would nonetheless create the potential for criminal defense attorneys to overcome some of the coordination problems endemic to the current political economy of criminal litigation.

Such litigator-driven structural reforms represent only partial solutions to the systemic coordination problems caused by the political economy of criminal litigation. For example, even if the criminal defense bar magically were able to ensure that only the most sympathetic defendants filed certiorari petitions, the Supreme Court would retain the discretion to select cases like *Strickland v. Washington* in which the State files a certiorari petition.[215] These reforms could, however, ameliorate the worst effects of the current litigation landscape on litigators' ability to influence criminal procedure doctrine.

CONCLUSION

The current doctrinal foundations of contemporary criminal procedure present a disturbing puzzle to scholars concerned with racial and class disparities in the criminal justice system. Incarceration is now the defining institutional experience of a generation of economically disadvantaged black and Hispanic men, while (statistically speaking) those who are either economically advantaged or white face little serious prospect of imprisonment.[216] As the population of socially disadvantaged individuals caught within the criminal justice system has grown, however, their influence in the process of constitutional lawmaking has waned.

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[214] *See* Brown, *Defense Attorney Discretion*, *supra* note 211, at 215 (giving priority to factual innocence over likelihood of success as the criteria for rationing).

[215] *See supra* note 163 and accompanying text.

[216] *See supra* notes 43–49 and accompanying text.

As this Article shows, providing each indigent defendant the right to an attorney has not, as scholars once hoped, enabled those defendants to reshape judicial understandings of the Constitution's criminal procedure guarantees. This is not, of course, an indictment of the right to counsel, which is undoubtedly "fundamental and essential to a fair trial,"[217] and perhaps one of the Supreme Court's greatest constitutional achievements. But the right to counsel has exacted at least some costs in terms of allowing litigants to influence the Supreme Court's understanding of constitutional criminal procedure. By exposing these costs, the political economy framework presented in this Article can point reforms toward developing ways to reduce them.

[217] Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)).