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Ringing the Bell: The Right to Counsel and the Interest Convergence Dilemma

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I. INTRODUCTION

I tell my law students that we are gladiators. We slay injustices while protecting liberty. We battle other gladiators, incapacitate violent criminals, and watch over those without a voice. When the people ring the bell signaling the need to restructure the functions of institutions and practices, lawyers enter the arena ready for combat. In America, the inimitable skills of counsel are constitutionally recognized and celebrated. The Framers considered the right to counsel so critical to the republic that it is enshrined in the text of the Sixth Amendment. Whether majorities of the Supreme Court have held this right in such high esteem is debatable. The Court's jurisprudence has erratically expanded and restricted the right to counsel, leaving its scope far from certain.

Beginning in 1932 with *Powell v. Alabama*,[1] the U.S. Supreme Court has grappled with defining the constitutional contours of the right to counsel. While both *Powell* and *Gideon v. Wainwright*[2] spurred a hope that criminal

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1. Powell v. Alabama, 287 U.S. 45 (1932).
2. Gideon v. Wainwright, 372 U.S. 335 (1963).

justice – particularly in the South – would change, *Strickland v. Washington*[3] suppressed any existing optimism that such change would be meaningful. Nevertheless, recent cases such as *Padilla v. Kentucky*,[4] *Missouri v. Frye*,[5] and *Lafler v. Cooper*[6] have reinvigorated the discourse concerning the constitutional boundaries surrounding the Sixth Amendment guarantee, offering a hint that the Court may be redirecting its jurisprudence. These new cases not only present an opportunity to re-examine the substantive doctrine, but also to furnish an occasion to review and build upon existing theories of judicial decision-making.

In constructing theoretical frames used to evaluate judicial decision-making, scholars wrestle with opinions that do not rest on neutral constitutional principles but provide socio-politically acceptable outcomes. This phenomenon is constantly evaluated and rationalized in a myriad of ways, producing a rich literature that may be utilized to explain and resolve vital questions regarding the status of fundamental rights. This Article aims to add to this existing literature by analyzing judicial decision-making within the context of the right to counsel. While it is arguable that these cases rest on neutral principles, a closer examination reveals that the Court's fidelity to an underlying principle of equality is changeable, ebbs and flows, and may be influenced by considerations outside of doctrine – namely American political culture. Through the application of interest convergence theory, this Article hopes to explain the Court's fluctuating jurisprudence by identifying and examining eras of convergence and divergence through surveying the domestic and international climate at the time of a given decision.

"Interest convergence," a theoretical frame developed by the late Professor Derrick Bell, contends that the jurisprudential interests or "rights" of minority groups are only judicially recognized when they support the values and interests of the dominant group.[7] I argue that Professor Bell's theory, while intensely criticized,[8] provides a kernel of truth that may help competing sides

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

4. Padilla v. Kentucky, 559 U.S. 356 (2010).

5. Missouri v. Frye, 566 U.S. 133 (2012).

6. Lafler v. Cooper, 566 U.S. 156 (2012).

7. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) [hereinafter Bell, *Brown*].

8. The following articles apply, assess, or critique interest convergence: Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 157 (2011); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 939 (2007); Richard Delgado, *Rodrigo's Roundelay,* Hernandez v. Texas *and the Interest Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 63 (2006); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1114–18 (2006); Bryan L. Adamson, *The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 174 (2006); Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1510 (2005); Sheryll D.

in the justice system find a way to work together. Having roots in "rational choice" models of decision-making, Bell's theory posits that a confluence of interests determine judicial decisions.[9] For him, judges, traditionally members of the dominant group, bring values and interests into the judicial decision-making process.[10] In deciding cases, judges tend to issue decisions with an outcome that maintains the status quo, as well as language that mirrors the political culture, instead of offering a meaningful remedy that may disrupt the social order.[11] With doctrinal periods of expansion and retrenchment, the jurisprudential sway of the Court's "contradiction closing cases" concerning the right to counsel appear to reflect the political culture at the time the case was litigated. This Article will demonstrate the way in which external considerations may have influenced the Court with first recognition and expansion of the right to counsel in *Powell* and *Gideon*, the Court's subsequent restriction of the right in *Strickland* and *Hill*,[12] and the Court's slight expansion of the right in recent cases such as *Padilla*, *Frye*, and *Lafler*. In this Article, I argue that interest convergence helps explain the Court's trend on the issue of right to counsel. With the emphasis on seeing "the world as it is rather than how we might

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Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 271 n.67 (2005); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1474 (2005); Maria Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond* Plyer v. Doe, 35 SETON HALL L. REV. 1373, 1377 (2005); Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1505 (2004); Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 827 (2004); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 678 (2004); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1612–13 (2004); Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT. 191, 213 (2004); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1764 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002)); Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2284 (2001); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2539 (2001); Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 871–72 (1996); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 283–84 n.41 (1996); Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613, 630–33 (1995); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988).

9. Bell, *Brown*, *supra* note 7, at 521.

10. *Id.* at 523.

11. *Id.* at 526–27.

12. Hill v. Lockhart, 474 U.S. 52 (1985).

want it to be," the interest convergence paradigm may be a tool in addressing critical issues that continue to linger in American society by allowing for contemporary socio-political realities to enter the analysis.

In applying interest convergence, I do attempt to follow Bell's model of analysis in that I only provide a general overview of major occurrences and events, as opposed to offering a comprehensive evaluation of each specific external variable. The purpose of this Article is to utilize the frame to identify *eras* of convergence and divergence by highlighting many seminal cases, as opposed to analyzing one specific era or case.

I do not adopt the black-white binary paradigm of race. Instead, I propose that the two constituent groups consist of the "dominant" group and the "subordinate group." The dominant group comprises upper class and wealthy, primarily white, constituents with political capital and influence. The subordinate group includes the working poor and minority groups who lack political capital and influence. Who, or which group, should count as "dominant" or "subordinate" may vary somewhat according to the context or issue. Sometimes overall group wealth or group size is crucial, but in other contexts, the ability to organize efficiently at low cost may count more than sheer wealth or numbers of mere aggregates with less individually at stake. I do, however, recognize the differences inherent in grouping racially diverse interests in one category and also realize the limitations it may place on the receptivity of my thesis. Where appropriate, I do acknowledge and discuss the divisions within the subordinate group and potential causes. This, or any other binary, obviously sacrifices descriptive adequacy for the sake of a better combination of simplicity and explanatory power. However, in the quest to formulate a pragmatic analysis on the topic of right to counsel jurisprudence, I think it appropriate to cluster constituents that share a similar interest at a similar time in one category for this limited purpose.

In addition, the understanding of the "equality principle" in this Article differs from that of Bell. For Bell, the equality principle is manifested in the Equal Protection Clause of the Fourteenth Amendment, specifically guaranteeing racial equality.[13] The equality principle in this Article refers to a more basic and abstract notion of equality in the vein of John Rawls and Ronald Dworkin.[14] The cases reviewed below were primarily decided pursuant to the Sixth Amendment right to counsel, as opposed to Fourteenth Amendment equal protection, although there is some variation.[15] In Sixth Amendment jurisprudence, the notion of equality appears more fluid. It includes not only an equality of treatment under the law, but also an equality of opportunity. While it does include a racial equality component, the jurisprudence has evolved to discuss equality more in terms of opportunity and equality among the social

13. Bell, *Brown*, *supra* note 7, at 522.

14. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1068 (1975); *see also* JOHN RAWLS, A THEORY OF JUSTICE 81 (1971).

15. U.S. CONST. amends. VI, XIV.

classes. Equality also, at times, includes an element of fairness, making it difficult to separate the two substantive concepts. In analyzing the development of the constitutional right to counsel, the equality principle must be flexible enough to reflect an accurate doctrinal interpretation of the concept in the construction of the Sixth Amendment. For purposes of this Article, the equality principle is thus understood to encompass more than racial equality.

Part II provides a brief and basic overview of existing theoretical models of judicial decision-making and examines Bell's interest convergence theory in depth. This Part not only explains the interest convergence framework and "contradiction closing cases," but also reviews the application of this theory by other scholars in different contexts. Parts III to V examine eras of convergence and divergence throughout the development of right to counsel jurisprudence by employing the interest convergence frame. Cases chosen for study were selected based on prominence in political culture and doctrinal parallels. Through the evaluation of key U.S. Supreme Court cases, Part III aims to demonstrate that when the values and interests of the dominant group converge with those of the subordinate group, as in *Powell* and *Gideon*, civil liberties are theoretically extended, granting concessions to the subordinate group. However, when dominant interests diverge from those of the subordinate group, the interpretation of fundamental rights is constrained as manifested in *Strickland* and *Hill*. Part III reviews the decisions in *Powell* and *Gideon*, finding an era of convergence allying interests on the principle of equality. Part IV focuses on *Strickland* and *Hill*, uncovering a commonality between the decisions and the political culture: a retrenchment from the equality principle. Part V discusses *Padilla*, *Frye*, and *Lafler*, concluding that a confluence of factors, namely mass incarceration and a concern with the effectiveness of criminal justice administration, worked to align the interests of the dominant group with the subordinate group. Part VI concludes with a review of the thesis and comments to consider moving forward.

II. JUDICIAL DECISION-MAKING AND THE INTEREST CONVERGENCE PARADIGM

Firmly entrenched in our democratic system of government, the exercise of judicial review continues to be utilized by the U.S. Supreme Court. As an academic genre, judicial decision-making remains a vibrant and rigorous topic of debate, offering an abundance of fresh critiques and innovative theories within every generation of scholars. The numerous paradigms and frames employed to explain both the exercise of judicial review and outcomes in specific cases demonstrate the doctrine's complexity and changeability. This Article aims to build upon this practice and offer a new application of a highly influential and often criticized theory of judicial decision-making: interest convergence.

A. Overview of Existing Models

Since *Marbury v. Madison*,[16] the Court, through the power of judicial review, has wielded constitutional authority to issue binding decisions premised on uncertain, and often criticized, bases. Judicial review is understood to establish a union between the theoretical principles admired in the Constitution and actual practices in American political culture.[17] The doctrine itself is premised upon the idea of constitutionalism, requiring "that legitimate governmental power is limited by fundamental principles contained in a source of higher law that supersedes policies adopted through the ordinary political process."[18] In the United States, this higher law is the Constitution, and it is enforced through the exercise of judicial review.[19] *Marbury v. Madison* thus established a counter-majoritarian force in the Court, with the constitutional power to invalidate legislative action that it determined violated fundamental constitutional principles.[20]

Scholars have long struggled with understanding judicial decision-making.[21] "Formalists" contend that judges should decide cases by employing traditional modes of interpretation, including surveying case law, statutes, and constitutions.[22] For formalists, judicial decision-making requires an assessment of only facts and law.[23] Normative concerns, such as morality and politics, are irrelevant to exercises in legal analysis.[24]

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16. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

17. Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557, 557 (2011) [hereinafter Spann, *Hypocrisy*].

18. *Id.* at 559.

19. *Id.*

20. *Id.*

21. This Article is only concerned with four theories: formalism, legal realism, interpretivism, and critical race studies. *See, e.g.*, H. L. A. HART, THE CONCEPT OF LAW (1961); JOHN HART ELY, DEMOCRACY AND DISTRUST*:* A THEORY OF JUDICIAL REVIEW (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 432 (2005) (citing Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999)).

22. *See* Dworkin, *supra* note 14, at 1057–58; Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 438 (1985); SUPREME COURT DECISION–MAKING: NEW INSTITUTIONALISTS APPROACHES 57–61 (Cornell W. Clayton & Howard Gillman eds., 1999).

23. Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111 (2010), http://doi.org/10.1017/S1352325210000121; RICHARD A. POSNER, HOW JUDGES THINK 41 (2008).

24. Leiter, *supra* note 23.

In strict contrast to the position taken by formalists, legal realists argue that when jurisprudence fails to explain judicial decision-making, social science will.[25] This school of thought maintains that judicial interpretation mirrors the individual values and biases of judges.[26] For legal realists, there is more to judicial determinations than a mechanical application of constitutional principles.[27] One can never truly know the actual reasons for a judge's decision.[28]

An extension of realist philosophy, interpretivists argue that moral principles and established institutional practices play some role in judicial decision-making.[29] For interpretivists, the process through which institutional practices determine rights follows from some moral principle that gives the institutional practice itself the role to make those decisions.[30] Thus, the rights so determined have legitimate moral force.

As an outgrowth of the realist and interpretivist movements, critical race and critical legal studies began to take shape.[31] Critical race and critical legal theorists stressed that judicial interpretations of constitutional doctrine often tipped the outcome in favor of the dominant group.[32] By emphasizing that such outcomes were both neutral and needed, judges could claim that decisions were appropriately detached from external influences.[33] For example, Professor Girardeau Spann believes "legal doctrine is unable to provide determinate answers to particular disputes."[34] He contends that the Supreme Court is akin to a third policymaking branch within a tricameral legislature, more likely to reflect the values of American political culture than the guardian of principles espoused in the Constitution.[35] With this, Professor Spann declares judicial review should be abolished.[36] While not calling for the wholesale removal of judicial review, interest convergence seeks to rationalize decisions in those "hard cases" where doctrine and case outcome fail to align.[37]

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25. *See* ELY, *supra* note 21, at 44–48.

26. *See* JEFFREY A. SEGALL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 231–35 (1993); *see also* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784 (1983).

27. *See* ELY, *supra* note 21, at 44–48.

28. *See id.*

29. *See* Dworkin, *supra* note 14, at 1060, 1103–05.

30. *See id.*

31. Spann, *Hypocrisy*, *supra* note 17, at 560.

32. Robin West, *Critical Legal Studies – The Missing Years*, *in* NORMATIVE JURISPRUDENCE: AN INTRODUCTION 107, 166 (2011).

33. *See id.*

34. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007 (1985). *See also* Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 528 (1984) [hereinafter Spann, *Veto*].

35. Spann, *Veto*, *supra* note 34, at 516.

36. *See id.* at 526.

37. *See* Bell, *Brown*, *supra* note 7, at 523.

B. Interest Convergence

As a theoretical frame, interest convergence has a fascinating history and an even more interesting evolution as a paradigm transcending the bounds of its initial application. Coined and crafted by the late Professor Derrick Bell in 1980, interest convergence continues to be both celebrated and criticized, all the while remaining a highly debated and controversial theoretical model.[38] Used and evaluated by dozens of scholars in a variety of contexts, interest convergence remains relevant and influential, outlasting other theories.[39]

Inspired by Professor Herbert Wechsler's critique of the *Brown* decision,[40] Bell's article rolled out a theoretical framework much in line with Wechsler's need for a "principled appraisal" of government action.[41] Wechsler's analysis "emphasize[d] the world as it is rather than how we might want it to be," a tenet with which Bell very much agreed.[42] With this, Bell offered to resolve Wechsler's quandary regarding *Brown*, namely that the opinion failed to rest on principled reasoning.[43]

In his article, *Toward Neutral Principles of Constitutional Law*,[44] Wechsler criticized the *Brown* Court for deciding the case without a basis in neutral principles.[45] His primary criticism lay in the notion that courts "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[46] For Wechsler, courts are capable of engaging in a principled assessment of government action that exceeds a rigid historical interpretation of constitutional provisions without becoming an activist court.[47] Weschler concluded that this type of reasoning was notably missing from the *Brown* decision, thereby calling into question the opinion's legitimacy.[48] Wechsler reviewed and dismissed the prospect that *Brown* stood for the proposition that the Fourteenth Amendment prohibited racial line drawing in legislation.[49] He determined that the *Brown* Court must have supported its holding by finding that "racial segregation is, *in principle*, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved."[50] Wechsler

38. *See generally id.*

39. *See, e.g.*, *id.*

40. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22–23 (1959).

41. Bell, *Brown*, *supra* note 7, at 520 (citing Wechsler, *supra* note 40, at 16).

42. *Id.* at 523.

43. *See id.* at 523–24.

44. *See generally* Wechsler, *supra* note 40.

45. *See id.* at 15.

46. *Id.*

47. *See id.* at 16.

48. *See id.* at 21–22.

49. *See id.* at 29–30.

50. *Id.* at 33 (emphasis added).

found this reasoning untenable because it would require questioning the motives of the legislature.[51] He then posited that the legal issue with segregation was a question of associational rights. Wechsler reasoned that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."[52] Wechsler concluded his critique with a question:

> Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?[53]

In response, Bell suggested that the normative principle of racial equality "underlay" the decision in *Brown*.[54] However, because most Americans did not regard this equality principle as a widespread social or political goal, interest convergence was the primary motivation of the Court for handing down a racially egalitarian decision.[55]

1. The Theory

In his highly controversial and often-cited 1980 *Harvard Law Review* article, Brown v. Board of Education *and the Interest-Convergence Dilemma*, Professor Bell discussed the principle of "interest convergence" in depth.[56] The original intention in offering the theory was to advance a positivistic expression of a neutral principle that could explain U.S Supreme Court opinions in the school desegregation cases pre- and post-*Brown*.[57] In its purest form, interest convergence provides that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[58] Thus, Bell perceived the civil rights reforms of the 1950s and 1960s not as noble acts representative of the American equality principle, but as changes made because they held political value to the white power structure.[59] For Bell, "[W]hite elites will tolerate or encourage racial advances for blacks only when such advances also promote [their own] self-interests."[60] He concluded that the Fourteenth Amendment would not permit a judicial remedy

51. *See id.*
52. *Id.* at 34.
53. *Id.*
54. Bell, *Brown*, *supra* note 7, at 522.
55. *Id.* at 523.
56. *See generally id.*
57. *See id.*
58. *Id.*
59. *See id.* at 524.
60. CRITICAL RACE THEORY: THE CUTTING EDGE, at xvii (Richard Delgado & Jean Stefancic eds., 2000).

providing real racial equality for blacks if such a remedy would threaten the dominant status of whites.[61]

While acknowledging that there were whites motivated strictly by the equality principle, Bell explained the way in which the *Brown* decision reflected a convergence of interests.[62] He offered three specific occurrences in political culture that could have influenced the Court's ultimate decision.[63] First, Bell suggested that *Brown* helped bolster the international image of democratic values during the Cold War.[64] With communists choosing to highlight segregation in their propaganda, *Brown* helped legitimize the democratic rhetoric of equality and freedom.[65] By mandating desegregation in public education, *Brown* represented America's commitment to equality on an international stage.[66]

Second, Bell proposed that *Brown* supported America's effort to convince blacks they were a recognized segment of society.[67] At the time *Brown* was announced, blacks had fought in World War II against Nazi Germany.[68] With whites fearful that blacks would be reluctant to serve in future armed conflicts, *Brown* articulated America's promise of equality at home.[69]

Bell's third and final consideration was the potential economic gains from an industrialized South.[70] State-sponsored segregation was preventing the South from shifting from a rural society to a more industrialized and profitable region.[71] Whites interested in the potential gains from an industrialized South viewed segregation as an obstacle to economic progress.[72] These three concerns converged with the interest of blacks in achieving racial equality, coalescing around the ideas that segregation was a barrier to progress and a contravention of the equality principle.[73] Without the convergence of these interests, black interests would languish as they did for decades prior to *Brown*.[74] As Bell recognized, "[t]hese points may seem insufficient proof of self-interest leverage to produce a decision as important as *Brown*," however, they are cited "to help assess and not to diminish" the Court's decision.[75]

Bell found this era of convergence short-lived, with the Court "increasingly erect[ing] barriers to achieving the forms of racial balance relief it earlier

61. *See* Bell, *Brown*, *supra* note 7, at 523.
62. *See id.* at 525.
63. *Id.* at 523–25.
64. *See id.* at 524.
65. *See id.*
66. *See id.*
67. *See id.* at 524–25.
68. *See id.*
69. *See id.*
70. *Id.* at 525.
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.* at 523.
75. *Id.* at 525.

had approved."[76] He predicted retrenchment would likely follow an era of advancement.[77] First, *Brown II* failed to require prompt desegregation of the nation's public schools.[78] Furthermore, the Court's attitude seemingly changed. Citing the Court in *Dayton Board of Education v. Brinkman*[79] and *Columbus Board of Education v. Penick*,[80] Bell discussed the additional requirement that plaintiffs must also prove intentional discrimination by school officials and that relief granted is limited to the harm proven.[81] He also pointed to the decisions in *Swann v. Charlotte-Mecklenburg Board of Education*[82] and *Milliken v. Bradley*,[83] where the Court deferred to local government busing plans despite evidence of continued segregation.[84] These opinions "elevated the concept of 'local autonomy' to a 'vital national tradition.'"[85] In a later article, Bell contended that the Court's decision in *Brown* resulted in an interest divergence in subsequent *Brown* litigation.[86]

Bell also declared *Grutter v. Bollinger*[87] the "definitive example of [] [i]nterest-convergence."[88] With *Grutter*, a convergence of interests existed with both Fortune 500 companies and the military working to diversify their forces and the interests of racial minorities pursuing admission in elite law schools.[89] While the Court upheld the Michigan Law School's admission program on constitutional grounds, Bell posited that the Court may have done so because the plan "minimizes the importance of race while offering maximum protection to whites and those aspects of society with which she [Grutter] identifies, she supported."[90] For Bell, "Once again, blacks and Hispanics are the

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76. *Id.* at 527.

77. Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 13 (1976).

78. *Brown II* refers to Brown v. Bd. of Educ., 349 U.S. 294 (1955).

79. Bell, *Brown*, *supra* note 7, at 527 (citing Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977)).

80. *Id.* (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 499, 464 (1977)).

81. *Id.*

82. *Id.* at 530 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971)).

83. *Id.* at 526 (citing Milliken v. Bradley, 418 U.S. 717, 742 (1971)).

84. *Id.* at 526, 530.

85. *Id.* at 526 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

86. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 478 (1976).

87. Grutter v. Bollinger, 539 U.S. 306 (2003).

88. Derrick A. Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) [hereinafter Bell, *Distractions*].

89. *Id.* at 1623.

90. *Id.* at 1624. *See also* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 149 (2004) [hereinafter BELL, SILENT COVENANTS].

fortuitous beneficiaries of a ruling that can and probably will change when other priorities assert themselves."[91]

Over time, Bell developed a phrase for *Brown*-type cases: "contradiction closing cases":[92]

> That is, they narrow the gap between white and black rights that the framers wrote into the Constitution. These cases serve as a shield against excesses in the exercise of white power, yet they bring about no real change in the status of blacks. . . . A decision may benefit some, but more importantly, it provides blacks and liberals with the sense that the system is not so bad after all. The "contradiction closing" cases suggest that we can depend on the courts, if not for our salvation, then at least for the correction of racial outrages.[93]

Bell suggested that the decisions in such cases transformed the Court into a type of "judicial monitor," granting concessions depending on the "cost" to society.[94] During eras of convergence, decisions in contradiction-closing cases became key to reaffirming America's commitment to freedom, fairness, and equality.

Developed in the search of neutral principles that serve to explain judicial activity in the school desegregation cases, interest convergence proved flexible enough to apply to other contexts. It provides an assessment tool when trying to make sense of important constitutional decisions that lack principled guidance from the Court. However, the limitations of the theory do not go unnoticed.

2. The Critique

The *Northwestern Law Review* recently published one of the most comprehensive and stimulating critiques of interest convergence.[95] In *Rethinking the Interest-Convergence Thesis*,[96] Professor Driver argued interest convergence "is too often categorical where it should be nuanced and too often focused on continuity where it should acknowledge change."[97] In the article, he

91. BELL, SILENT COVENANTS, *supra* note 90, at 151; Bell, *Distractions*, *supra* note 88, at 1624 ("[W]e could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern.").

92. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985).

93. *Id.*

94. *Id.* at 33.

95. Driver, *supra* note 8, at 165.

96. *Id.*

97. *Id.* at 157.

presented "four analytical flaws" with the interest convergence paradigm, which he argued weakened the theory's "persuasiveness."[98]

Driver's first criticism is that the theory rests upon a far-reaching understanding of what exactly constitutes "black interest" and "white interest."[99] For Driver, the intra-racial complexities, conflicts, and nuances cannot be broken down into a singular "interest" in which that entire racial group concurs.[100] The failure of Bell to define these terms confuses the dialogue and debates regarding the meaning of the terms.[101] Second, Driver asserts that interest convergence fails to pay adequate homage to racial progress that has been made, such as the abandonment of "separate-but-equal" principles announced in *Plessy v. Ferguson*.[102] While he acknowledged that the "conditions are far from perfect," Driver contends that interest convergence does not consider that "as blacks and other people of color have received the dignitary effects traditionally reserved for whites, it follows that whiteness, on its own, has decreased in value."[103] Third, Driver argues that interest convergence confers "insufficient agency" to two of the most important actors in the debate – black citizens and white judges.[104] The theory "sharply discounts the capacity of black people to participate in their own uplift" and "diminishes the culpability of white judges who exercise their authority to maintain the existing racial hierarchy."[105] Finally, because interest convergence cannot be refuted, it supports judicial decisions concerning racial equality.[106] This is so because, according to Driver, the theory either argues that such decisions are essential compromises necessary to "maintain white racism," or the theory ignores the decisions altogether.[107] These flaws, in turn, lead to harmful consequences, such as limiting the menu of possible remedial strategies for black advancement[108] and reinforcing the racial paranoia and conspiracy theories already prevalent in black communities.[109]

Driver's critique is both thought provoking and valuable. However, it often over complicates the simplistic, while simultaneously simplifying the complex. For example, while emphasizing that Bell failed to define "black interest" and "white interest," Driver criticizes use of the terms as "overly

98. *Id.* at 156.

99. *Id.*

100. *Id.* at 166 ("Contrary to the notion advanced by the interest-convergence ideology, however, there is no singular black agenda.").

101. *Id.* at 156.

102. *Id.* at 170–73 ("While the goal of racial equality has certainly not yet been fully realized, the racial progress that has been made over the generations has dramatically elevated the racial status of blacks.").

103. *Id.* at 174–75.

104. *Id.* at 157.

105. *Id.* at 175.

106. *Id.* at 157.

107. *Id.*

108. *Id.* at 189.

109. *Id.* at 192–93.

broad conceptualization[s]," creating confusion in the discourse.[110] He further points to intra-racial differences to demonstrate that there is "no singular black agenda."[111] Bell, however, did describe and explain the interests to which he was referring when using the terms "black interest" and "white interest." In the article, Bell was clear in his understanding that the "black interest" was in that of racial equality.[112] Regarding "white interest," Bell identified the three above-mentioned contextual concerns (the Cold War, domestic racial considerations, and Southern industrialization) that formulated the "white interest" in reaffirming America's commitment to equality.[113] While Driver is surely right that there are critical and important intra-racial differences that preclude a consensus on what exactly constitutes the "black agenda," it is also surely right that racial equality, as a principle, is an interest of all blacks, as it serves as the constitutional foundation of their American citizenship.

Driver simplifies the complicated in his discussion, critiquing Bell's focus on racial problems as opposed to racial progress.[114] To Driver, Bell's failure to acknowledge racial gains diminishes the persuasiveness of the paradigm.[115] Driver points to *Dred Scott*[116] and *Plessy v. Ferguson*[117] in an effort to demonstrate that racial progress has been made.[118] It is, unfortunately, not that simple. While it is true that we, as a country, are not in the same place with race relations as we once were, it is also true that blacks are still lagging far behind their white counterparts in all areas of American life.[119] Thus, the "racial progress" that Driver discusses must be measured relative to the gains made by whites over time. Once that comparison is made, it is apparent that "[t]he difference in the condition of slaves in one of the gradual emancipation

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110. *Id.* at 156.

111. *Id.* at 166.

112. Bell, *Brown*, *supra* note 7, at 523.

113. *Id.* at 524–25.

114. Driver, *supra* note 8, at 171–75.

115. *Id.* at 156–57.

116. *Id.* at 173 (citing Dred Scott v. Sandford, 60 U.S. 393, 407 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

117. *Id.* (citing Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1956)).

118. *Id.* at 172–73.

119. Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REP.: DATA MINE (Jan. 28, 2015, 12:01 AM), http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal (surveying the education gap between black and white children, the education funding gap between black and white schools, higher poverty rates among black children, and the college admission gap between black and white college enrollment); *Racial and Ethnic Achievement Gaps*, STAN. CTR. FOR EDUC. POL'Y ANALYSIS, http://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/; Lindsey Cook, *Why Black Americans Die Younger*, U.S. NEWS & WORLD REP.: DATA MINE (Jan. 5, 2015, 12:01 AM), http://www.usnews.com/news/blogs/data-mine/2015/01/05/black-americans-have-fewer-years-to-live-heres-why.

states and black people today is more of degree than of kind."[120] Nevertheless, Driver's critique provides insight into possible ways to strengthen interest convergence as a theoretical frame.

3. Use of the Frame

The use of interest convergence as an analytical frame has since expanded beyond the realm of school desegregation. Scholars interested in the black-white binary continue to apply the frame to different legal developments.[121] Interest convergence is also utilized by nonblack racial groups, including Asian Americans[122] and Latinos.[123] For example, Professor Richard Delgado employed interest convergence to offer an explanation of the Court's decision in *Hernandez v. Texas*.[124] In *Hernandez*, the Court determined that the exclusion of persons of Mexican descent from jury service in a Texas county (where there was a substantial number of qualified people of Mexican descent) was a violation of equal protection.[125] In explaining the case within the interest convergence paradigm, Delgado pointed to three considerations that formulated the dominant interest, thus yielding a racially egalitarian decision in the case: the Cold War, dismal living conditions in Mexican communities, and communist threats in nearby Latin America.[126] In the article, he underscored American domestic concerns and international affairs, highlighting the rise of Fidel Castro and Che Guevara, Joe McCarthy's communist paranoia, and Latin American unrest as possible influences contributing to the interest of the dominant group.[127]

Interest convergence has frequently been applied in contexts outside of race relations, including the First Amendment and employment discrimination contexts.[128] For example, Professor Stephen Feldman utilized the frame to analyze religious power in America *vis-à-vis* Supreme Court precedent.[129] For

120. Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 16 (1979); *see also* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 211 (5th ed. 2004).

121. Morrison, *supra* note 8, at 1114–18; Wilig, *supra* note 8, at 1510; Cashin, *supra* note 8, at 254–55.

122. Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 908–09 (1993) (using interest convergence to explain Congress's favorable response to the Japanese-American request for reparations).

123. Delgado, *supra* note 8, at 31–43; Hernandez v. Texas, 347 U.S. 475, 476 (1954).

124. Delgado, *supra* note 8, at 31–43. The Court reversed Hernandez's conviction. *Hernandez*, 347 U.S. at 480–82.

125. *Hernandez*, 347 U.S. at 481.

126. Delgado, *supra* note 8, at 43–50.

127. *Id.* at 45.

128. *See* Carbado & Gulati, *supra* note 8, at 1764 (2003).

129. Feldman, *supra* note 8, at 871–72.

Feldman, the Court's jurisprudence concerning the Establishment Clause is predictably determined by the dominant group's favored religion: Christianity.[130] Only when the government attacks Christianity are "outgroup religions" able to receive concessions.[131] Professor Cynthia Lee used interest convergence as the lynchpin in establishing a "cultural defense" in criminal law that she coined "cultural convergence."[132] Cultural convergence is the idea that minority and immigrant cultural defense claims that are successfully introduced as evidence at a criminal trial "are more likely to receive accommodation when there is convergence between their cultural norms and American cultural norms."[133]

This Article employs interest convergence to gain a basic understanding of the Court's right to counsel decisions. In identifying eras of convergence and divergence, this Article will demonstrate the way in which interest convergence may be used to explain trends in the Court's jurisprudence on this topic. By understanding the prominent interests of the dominant group and the subordinate group at the times of these decisions, a parallel may be drawn between the trajectory of the Court's interpretive approach and the larger political culture.

III. CONVERGENCE: *POWELL* AND *GIDEON*

Powell and *Gideon* are both celebrated and firmly entrenched precedential cases.[134] The decisions are often analyzed and admired for their pronounced commitment to the principle of equality.[135] While they represent social and racial progress, it is important to consider the context in which they were decided. Application of the interest convergence paradigm reveals that these cases were contradiction-closing cases decided in times of great friction, both domestically and internationally.

In an era remembered for the Great Depression, the Ku Klux Klan ("KKK"), and the rise of communism, *Powell* was celebrated by those in the dominant group who found value in a national proclamation of fairness, as well as those in policymaking positions capable of understanding the political advances at home and abroad that would follow a reaffirmation of America's legal commitment to equality.[136] With the number of Americans in poverty growing each day and racial violence running rampart across the South, the

130. *Id.* at 871.

131. *Id.* at 871–72.

132. Lee, *supra* note 8, at 939.

133. *Id.* at 914.

134. *See* Nannette Jolivette Brown, *75th Anniversary of* Powell v. Alabama *Commemorated*, 56 LA. B.J. 19, 19 (2008); Donald A. Dripps, *Up from* Gideon, 45 TEX. TECH L. REV. 113, 115 (2012).

135. *See* Brown, *supra* note 134, at 19; Dripps, *supra* note 134, at 115.

136. *See* Brown, *supra* note 134, at 19.

country was in dire need of an official declaration reasserting America's fidelity to equality.[137] Thus, the outcome in *Powell* cannot be read without some thought of the decision's value to the dominant group.

In 1932, the Court decided *Powell v. Alabama*.[138] A consequence of the infamous Scottsboro Boys trials, this case was elevated to international status by communist propaganda, exposing American racism and further exacerbating racial tensions.[139] The facts of *Powell* are well documented.[140] In that case, nine black teenagers were charged with raping two white women in Alabama.[141] They were swiftly convicted and sentenced to death.[142] The convictions were appealed on the grounds that the defendants were deprived of a fair trial, counsel, and an impartial jury.[143] The U.S. Supreme Court granted certiorari and declared:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .[144]

The Court concluded that the trial court erred in its failure to provide the defendants with "reasonable time and opportunity to secure counsel," as well its failure to make an "effective appointment of counsel."[145] Because the Sixth Amendment only applied to the federal courts at the time, the Court decided the case on due process grounds.[146] It concluded that the defendants were not accorded the right to counsel and this, in turn, infringed upon the due process guarantee of a fair trial articulated in the Fourteenth Amendment.[147] Two of the most conservative Justices, Justices Butler and McReynolds, dissented.[148] They argued that the defendants received an adequate and fair trial, and, in the

137. *See id.*

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

139. The "Scottsboro Boys" is a famous American story. *See generally* JAMES HASKINS, THE SCOTTSBORO BOYS (1994); DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1979).

140. HASKINS, *supra* note 139, at 13–22.

141. *Powell*, 287 U.S. at 49.

142. *Id.* at 50.

143. *Id.*

144. *Id.* at 71.

145. *Id.*

146. *Id.* at 66.

147. *Id.* at 71. Six years later in *Johnson v. Zerbst*, the Court held that all defendants in a federal criminal prosecution, including those unable to secure or employ an attorney, have a right to counsel, unless specifically waived. 304 U.S. 458, 467–68 (1938). However, the Court first declined to incorporate the right to appointed counsel to the states in *Betts v. Brady*. 316 U.S. 455, 466 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

148. *Powell*, 287 U.S. at 73–77 (Butler, J., dissenting).

event they had not, the principles of federalism dictated the Court refrain from intervening.[149]

First, *Powell* demonstrated to the world that the United States was firm in its commitment to equality. Communism was encroaching on the natural order of the domestic political situation, and Joseph Stalin, with his brutal method of leading the communist movement, reigned supreme.[150] Additionally, the Great Depression brought with it a validation of the communist belief that the certain death of capitalism was gradually being realized through the creation of a class-conscious proletariat.[151] At this time, communists were extremely active on the civil rights front, and the Scottsboro case provided the perfect platform to expose the United States, and, therefore, capitalist societies, as offering its citizens only a shallow commitment to equality.[152] In the face of intense international and domestic scrutiny, *Powell* stood as a pronouncement that constitutional safeguards were granted to everyone, irrespective of class and race. The opinion was instantly hailed a landmark case in news outlets.[153] In effect, the decision gave America credibility in its demonstration that the democratic system of government promises to value the equality principle. Such a pronouncement by America's highest court satisfied the dominant group's interest in rehabilitating its image abroad.[154]

The decision also sent a message to the poor that the U.S. Constitution will protect the rights of citizens, regardless of wealth (and race). The New York stock market crashed in 1929, ushering in the Great Depression.[155] By 1932, U.S. manufacturing output fell to 54% of its 1929 level.[156] Much of the country was unemployed, with blacks complaining that they were "the last [to be] hired and the first [to be] fired."[157] The financial strain and intense despair suffered by the American poor would not begin to lift until well into President Franklin Delano Roosevelt's Administration. The declaration that everyone be afforded equal treatment under the law despite socio-economic standing buttressed the position that the United States remained loyal to the principle of equality.

Finally, *Powell* also offered a federal statement on the issue of race relations. During this era, racial anxieties increased with the expansion of white supremacy and Jim Crow policies.[158] Reaching its peak membership of five

149. *Id.*

150. CARTER, *supra* note 139, at 161–73.

151. *Id.* at 137–38.

152. *Id.* at 61–73, 133–73.

153. *Id.* at 163.

154. *See* Feldman, *supra* note 8, at 854.

155. *See* SHARON HALEY, THE AFRICAN AMERICAN EXPERIENCE: A HISTORY 246 (1992).

156. *Id.* at 234.

157. William A. Sundstrom, *Last Hired, First Fired? Unemployment and Urban Black Workers During the Great Depression*, 52 J. ECON. HIST. 415, 420 (1992). HALEY, *supra* note 155, at 246.

158. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 101–02 (1955).

million in the mid-1920s, the newly revived KKK terrorized the South and extended its aim to include racial and religious minorities.[159] Jim Crow was also in full effect during this time. Statewide prohibitions on race mixing permeated the South, with state and local ordinances requiring Jim Crow sports, parks, and modes of transportation.[160] For example, at the Democratic National Convention in Houston, Texas, in 1928, black attendees were restricted to the rear of the balcony, separated by chicken wire.[161] While often excluded from the dominant group, *Powell* symbolically ensured that poor, black Americans were not exempt from constitutional protection.[162] This served the dominant group's interest by demonstrating to the world that America was a country predicated upon the principles of equality and fairness.[163] Although the Scottsboro Boys ultimately suffered a decades-long battle for freedom, as a contradiction-closing case, *Powell* served to quell the sense that justice was different for the subordinate group, while simultaneously guaranteeing the right to counsel to the poor, albeit in capital cases.[164] For the dominant group, *Powell* stood as a symbol that America remained committed to egalitarian principles despite communist propaganda to the contrary.[165] In sum, the decision sent a broader message that the Court would step in during times of unequal treatment.

In *Gideon v. Wainwright*, the Court faced similar pressures. *Gideon* incorporated the Sixth Amendment right to counsel and further extended that right to indigent defendants in all criminal prosecutions, federal and state.[166] In overruling *Betts v. Brady*,[167] the Court set itself on a new trajectory in constitutionally ensuring that criminal prosecutions accord with due process.[168] In reaching its conclusion, the *Gideon* Court quoted *Powell* extensively.[169] The

159. *Id.*

160. *Id.* at 104.

161. *Chronology of Black Republicans and Democratic Leanings*, MINORITY OPPORTUNITY NEWS 21 (May 1998), http://northdallasgazette.com/wordpress/wp-content/uploads/2016/02/Vol.-7-No.-5-May-1998.pdf.

162. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).

163. *See* Feldman, *supra* note 8, at 854, 867.

164. *See* HASKINS, *supra* note 139.

165. *See id.*

166. Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

167. Betts v. Brady, 316 U.S. 455 (1942), *overruled by Gideon*, 372 U.S. 335. For the Court, the *Betts* opinion's refusal to extend the right to counsel to state court prosecutions was disingenuous at best. With plenty of prior precedent on the subject, the *Betts* Court should have discovered the critical nature of the right to counsel and the necessity of defense counsel during criminal prosecutions.

168. *Gideon*, 372 U.S. at 339.

169. *Id.* at 344–45 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both

Court recognized the need to yet again promote the equality principle in the right to counsel context.

The Court decided *Douglas v. California* the same day it decided *Gideon*.[170] In *Douglas*, the Court held that indigent defendants are entitled to representation in criminal appeals granted as of right.[171] However, the case was decided on equal protection grounds as opposed to right to counsel. The Court stated:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.[172]

With this, the Court further entrenched the relationship between the right to counsel and the equality principle. By explicitly acknowledging unfairness in a process that predicates the assistance and skill of counsel on an ability to pay, the Court insinuated that equal protection was an alternative constitutional conduit to indigent defense.[173]

The recognition of *Gideon* as a victory for the poor and minority communities is well deserved. It changed the procedural and substantive landscape of criminal prosecutions and is legally treated as a "watershed" decision with retroactive application.[174] But there is a different understanding of *Gideon*, which takes into account the socio-political context of the decision. Two primary issues confronted the United States at the time *Gideon* was litigated: the Civil Rights Movement and the right of communism. Together, these issues created the need for a pronouncement of the equality principle. *Gideon* served as a contradiction-closing case that promoted that interest.

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the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932))).

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

171. *Id.* at 357–58.

172. *Id.*

173. However, this intimation was short lived, with the Court finding no right to appointed counsel in discretionary appeals in *Ross v. Moffitt* in 1974. 417 U.S. 600, 610 (1974).

174. ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE INVESTIGATION 26–27 (2008).

Gideon was decided in March of 1963.[175] Described as the "high point of the Civil Rights Movement,"[176] the year commenced with an inaugural address by the Governor of Alabama, George Wallace, proclaiming, "In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say segregation now, segregation tomorrow, segregation forever."[177] Although *Brown* ordered the desegregation of public schools in 1954, only seventeen schools in the South were desegregated, demonstrating the South's disregard for the civil rights of blacks.[178] By 1963, it was absolutely clear that the complaints and protests of southern blacks had morphed into a mass social movement spanning across the country.[179] Martin Luther King, Jr. was touring the country promoting racial equality, while Malcolm X was emerging as a leader in the more militant Nation of Islam.[180] In 1963, the Civil Rights Movement was slowly morphing into the War on Poverty, linking the plight of blacks with poor whites.[181] In addition, President John F. Kennedy was considering the idea of delivering a civil rights bill to Congress.[182]

It was no secret that southern states used the criminal justice system as a vehicle for controlling the activities of civil rights activists at the time of *Gideon*.[183] While it is estimated that approximately twenty thousand people were arrested between 1961 and 1963, fifteen thousand of those people were arrested in 1963 alone.[184] Failing to explicitly incorporate the right to counsel and extend that right to the poor would continue to result in unreasonable arrests and kangaroo court convictions for not only the poor and black communities, but also activists and intellectuals. Without such protections, a mishap on the part of the South could potentially ignite the fury of the more militant and aggressive civil rights groups such as Malcolm X's Nation of Islam, adding a further taint to America's international image.

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

176. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 37 (2010).

177. *Wallace Quotes*, PBS, http://www.pbs.org/wgbh/amex/wallace/sfeature/quotes.html (last visited Mar. 28, 2017).

178. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 632 (1944).

179. ALEXANDER, *supra* note 176, at 37.

180. TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-1965 (1998) [hereinafter BRANCH, PILLAR OF FIRE]. *See also* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963 (1988).

181. ALEXANDER, *supra* note 176, at 39.

182. *Id.* at 38–39.

183. BRANCH, PILLAR OF FIRE, *supra* note 180, at 482–85 (discussing the jailing of Freedom Riders in Mississippi).

184. MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990, at 69 (1991).

In 1963, the United States was also intensely engaged in the Cold War.[185] The early 1960s marked the era of nuclear alarms testing, bringing with it a deep sense of fear of communism within the ranks of the American government.[186] The Cuban Missile Crisis brought the United States and the Soviet Union to the brink of nuclear war in the fall of 1962, demonstrating the strength and proximity of communism to America. Images of white police hosing down black citizens did not fare well for the United States.[187] News reports of outrageous racial injustices in the United States called into question the government's fidelity to espoused democratic principles. This served as communist ammunition in the Cold War battle for Third World ideological allegiance.

With *Gideon*, the Court was achieving more than just answering a constitutional question by extending Sixth Amendment protections to the poor. It was reaffirming its commitment to the equality principle, just as it had done in *Powell*. Equality was now constitutionally mandated through the abstract guarantee of counsel to the poor. The Court's opinion served the interests of the dominant power structure similarly to the way *Powell* served those interests; it provided the dominant group with legal backing for the political rhetoric it espoused of freedom and equality in Cold War battleground countries. It further demonstrated America's continued commitment to equal treatment across the socio-economic spectrum. *Gideon* thus added support and integrity to the idea that the country was confronting domestic social justice issues and seemingly making progress. Furthermore, the egalitarian values espoused in the opinion fell in line with America's stated position on fairness and equality. In the struggle to attract Cold War allies, such a pronouncement would be hard to ignore.

While these points may seem like inadequate evidence of a self-interested pull to produce the decisions in *Powell* and *Gideon*, they are significant to the assessment of the Court's statement on equality because Justices do not determine cases in a vacuum. Instead, they make decisions within the contemporary political culture and bring with them their own values and interests. *Powell* and *Gideon* are no doubt constitutional victories for the poor. However, they are also a study in judicial decision-making and represent contradiction-closing cases in that they are examples of how judicial outcomes coincided with the socio-political climate at the time. Both of these decisions were issued when the country was faced with domestic and international unrest threatening to disrupt the social order. The interests of the dominant group and the subordinate group converged on the issue of the right to counsel and indigent defense because it emphasized a value that supported both constituents' interests: the equality principle.

At home, *Powell* and *Gideon* demonstrated the Court's fidelity to equal treatment. While state legislatures and the Executive Branch were seemingly trampling on the rights of the poor and minorities, the Court served as the

185. TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE 137 (1987).
186. *Id.* at 63, 91.
187. *Id.* at 137–43.

keeper of civil liberties.[188] In the abstract, *Powell* and *Gideon* were understood as wins for social justice, implicitly planting a seed that meaningful gains were on the horizon. On the ground, equality for poor and minority communities meant that that they would be accorded the rights bestowed on all American citizens when facing the criminal justice system. Abroad, *Powell* and *Gideon* may have played a symbolic role in the reaffirmation of the equality principle necessary to attract allies during the Cold War and preserve national security. As the debate continues regarding whether the outcomes of these cases were realized, there can be no doubt that without them, thousands of indigent criminal defendants would be without lawyers for one of the most important events of an individual's life: a criminal prosecution. The convergence of the interests that led to *Powell* and *Gideon* soon faded with the arrival of the dominant group's backlash from the progressive policies and politics of the 1960s.

IV. RETRENCHMENT, DIVERGENCE, AND EFFECTIVE ASSISTANCE OF COUNSEL

Interest convergence understands that eras of convergence are short-lived and followed by a retrenchment manifesting itself in restrictive interpretations of reformist policies aimed at enforcing civil liberties.[189] After the social movements of the 1960s and early 1970s, American culture underwent a conservative revolution, which transformed the way constitutional freedoms and rights were understood. A doctrinal reading of the decisions in *Strickland* and *Hill* demonstrates a conservative approach to constitutional interpretation. Alone, these cases are a sound exercise in strict construction. Together, they represent a deviation from the Court's earlier right to counsel jurisprudence. Why the change? The decision to break with the Court's earlier interpretation of the right to counsel cannot be understood without considering the values and interests of the dominant group. The interest in stopping the encroaching civil rights of the poor and minority governed the ideology of the dominant group in the 1980s, as such gains could upset the social order. With Soviet Russia no longer an international threat, the dominant group was preoccupied with advancing the conservative agenda, which primarily consisted of promoting federalism and individual responsibility.[190] In this section, I argue that the conservative agenda prompted a divergence of interests between the dominant group and the subordinate group. While this divergence permeated American culture, the Court's jurisprudence adjusted its frame when analyzing right to counsel cases and moved away from the rights-centered language in *Powell* and *Gideon*.

188. *Id.* at 137.

189. Bell, *Brown*, *supra* note 7, at 526.

190. Elisabeth Zoller, *Citizenship After the Conservative Movement*, 20 IND. J. GLOB. STUD. 279, 298–299 (2013).

In May of 1984, the Court handed down *Strickland v. Washington*.[191] *Strickland* firmly established that the Sixth Amendment right to counsel guaranteed the right to effective assistance of counsel.[192] However, the two-step test the Court crafted to evaluate claims of ineffective assistance of counsel set an extremely high threshold for defendants to meet.

In *Strickland*, the respondent was indicted in Florida for kidnapping and murder.[193] Although he was appointed "an experienced criminal lawyer to represent him" and counsel advised him against confessing, the respondent confessed to the crimes, waived his right to a jury trial, pled guilty to three capital murder charges, and waived his right to an advisory jury at his capital sentencing hearing.[194] In preparation for sentencing, respondent's counsel conducted a minimal investigation, as he claimed to be experiencing a sense of "hopelessness" caused by respondent's failure to heed his advice.[195] The respondent was sentenced to death and subsequently appealed claiming ineffective assistance of counsel.[196] The Court granted certiorari and held that respondent's counsel was not ineffective within the meaning of the Sixth Amendment's guarantee to the right to effective assistance of counsel.[197]

Strickland provided the Court with an opportunity to craft a constitutional test by which lower courts could evaluate Sixth Amendment claims of inadequate representation. In the opinion, the Court set forth a two-pronged test used to evaluate ineffectiveness claims. The threshold question is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[198] The first prong of the test requires an assessment of attorney performance, while

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

192. *Id.* at 686–95. In the assessment of attorney performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Courts are to consider the totality of the circumstances using "[p]revailing norms of practice" to judge the performance at issue. *Id.* In *Strickland*, the Court looked to *ABA Standards for Criminal Justice*, with a specific focus on "Defense Function." *Id.* Present in the analysis is a strong presumption that counsel's conduct fell within the range of "reasonable professional assistance." *Id.* at 689. A court reviewing the case must adjudge counsel's performance at the time of the conduct at issue, with defendants pointing specifically to acts or omissions of counsel that were unreasonable. *Id.* at 690. The prejudice prong of the test requires that a defendant demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. There is also a presumption that the judge and/or jury acted in accordance with the law, and this prong, too, requires consideration of the totality of the circumstances. *Id.* at 694–95.

193. *Id.* at 671–72.

194. *Id.* at 672.

195. *Id.* at 672–73.

196. *Id.* at 678.

197. *Id.* at 700.

198. *Id.* at 687.

the second prong considers whether counsel's performance prejudiced the defendant.[199] Although *Strickland* was decided in 1984, the Court would not find a valid ineffective assistance of counsel challenge until 2000, demonstrating the difficulty in meeting the high threshold showing the Court established.[200]

One year after *Strickland*, the Court decided *Hill v. Lockhart*.[201] In *Hill*, the Court expanded the reach of *Strickland*, holding that the *Strickland* test was appropriate to evaluate ineffective assistance of counsel claims in the context of guilty plea challenges.[202] In *Hill*, the petitioner pled guilty to first-degree murder and theft.[203] The petitioner received the State's recommended sentence and signed a "plea statement" that included a provision whereby the petitioner asserted that he understood his rights and voluntarily pled guilty.[204] On appeal, the petitioner claimed that his court-appointed attorney provided ineffective assistance of counsel.[205] According to the petitioner, his attorney failed to inform him that as a second-time offender he would be mandated to serve half of his sentence before becoming eligible for parole.[206] Instead, petitioner claimed that defense counsel told him that he would have to serve one-third of his sentence before being eligible.[207] In assessing ineffective assistance of counsel, the Court concluded that petitioner failed to establish the prejudice prong of the *Strickland* test. First, although the advice itself was erroneous, it was not prejudicial.[208] Moreover, because petitioner did not claim that if defense counsel had accurately advised him of parole eligibility he would have insisted on trial and not pled guilty, the *Strickland* Court determined that petitioner failed on the prejudice prong.[209]

The decisions in *Strickland* and *Hill* offered proof that the Court was abandoning an expansionist interpretation of constitutional liberties and effecting a regression on its earlier emphasis of the significance of fairness and equality in constitutional jurisprudence. Neither in *Strickland* nor *Hill* was there any mention of equality, equal rights, or the principle of equality. While the 1980s witnessed a retrenchment from gains made during the earlier social movements, the equality principle was drowned out by calls for an end to affirmative action and tougher criminal laws.[210] Conservative principles provided a platform to encourage personal responsibility and accountability, translating into a phasing out of egalitarian policies. Conservatism manifested itself in a variety

199. *Id.*
200. Williams v. Taylor, 529 U.S. 362, 399 (2000).
201. Hill v. Lockhart, 474 U.S. 52, 55–60 (1985).
202. *Id.* at 58–59.
203. *Id.* at 53.
204. *Id.* at 54.
205. *Id.* at 54–55.
206. *Id.* at 55.
207. *Id.*
208. *Id.* at 60.
209. *Id.*
210. ALEXANDER, *supra* note 176, at 45–50.

of contexts, including higher education, socio-economic opportunities, and penal policy.

First, subtle conservative rhetoric framed race relations as a contest between hardworking whites and worthless blacks, spurring anti-affirmative action sentiment. *Regents of University of California v. Bakke*[211] exemplified the uncertainty within the political American body concerning the way race was to inform the current socio-legal order. In a 5-4 decision, the Court rejected U.C. Davis's affirmative action program, asserting that although the school's admissions program articulated a compelling interest in the need for diversity, it failed to narrowly tailor the method to achieve that interest.[212] Also at this time, big business and conservative lobbying groups advocating anti-affirmative action legislation successfully gained momentum, resulting in the later repeal of a number of affirmative action policies in the 1990s.[213]

Second, the country was experiencing a recession that included over seventy bank failures, the savings and loan crisis, and high unemployment due to corporate outsourcing of manufacturing jobs.[214] While the poor, as a whole, suffered devastating setbacks, urban black communities were more severely impacted.[215] Poor whites and blacks competed for manufacturing jobs, producing a further division within the subordinate group. In the 1970s, over half of all blacks working in urban areas held blue-collar jobs.[216] By 1987, the employment rate of black men in industrial occupations was 28%.[217]

Third, the introduction of crack-cocaine in the illicit drug market allowed conservatives the opportunity to gain support for the war on drugs. Crack was presented as a "black drug" with the potential to corrupt white suburbia, resulting in a further divergence of interests between the dominant group and racial minorities.[218] Finally, conservative propaganda birthed the "Welfare Queen."[219] Carefully framed in race-neutral terms, conservative rhetoric propagated images of poor, lazy, black women with multiple illegitimate children living off of hard working, blue-collar, white tax dollars.[220] The resulting backlash exacerbated the "us versus them" division not only between the dominant group and the subordinate group, but also within the subordinate group, pitting working whites against blacks.

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211. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

212. *Id.* at 314–15.

213. ALEXANDER, *supra* note 176, at 45–50.

214. *Id.*

215. *Id.* at 50.

216. *Id.* at 50–51 (citing WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 30 (1997)).

217. WILSON, *supra* note 216, at 30.

218. Roland G. Fryer et al., *Measuring Crack Cocaine and Its Impact*, ECON. INQUIRY 1, 6–7 (2006), http://scholar.harvard.edu/files/fryer/files/fhlm_crack_cocaine_0.pdf.

219. *See generally* KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011).

220. *Id.* at 36.

Strickland and *Hill* also advanced the conservative agenda by demonstrating that the Court would no longer provide constitutional refuge to the subordinate group in the context of criminal procedure. With the "tough on crime" strategy in full force, criminal defendants faced a conservative Court with little regard for Warren Court policies. On October 14, 1982, President Ronald Reagan declared a "War on Drugs" in an era where fewer than 2% of Americans believed drug use was the most important issue facing the country.[221] Having a Republican majority in the Senate and a Republican President, conservatives established a number of punitive penal measures, while simultaneously defunding or repealing social programs for the poor.[222] The ninety-ninth Congress passed the Comprehensive Crime Control Act of 1984.[223] The legislation was the first comprehensive overhaul of the federal criminal code since the 1930s.[224] The 1984 legislation included the Sentencing Reform Act[225] and the Armed Career Criminal Act.[226] Four years later, the Anti-Drug Abuse Act of 1988[227] would reinstitute the death penalty for major federal drug felonies and murder,[228] while simultaneously increasing criminal sanctions for marijuana-related offenses.[229] The legislation and the accompanying practices enacted during the War on Drugs substantially contributed to the establishment

221. Julian Roberts, *Public Opinion, Crime and Criminal Justice*, *in* 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 99, 129 (Michael Tonry ed., 1992).

222. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1762, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.A.); Housing and Urban-Rural Recovery Act of 1983, H.R. 1, 98th Congress (repealing the authorization of Section 8, the federal housing program subsidizing the majority of federal housing program recipients). *See also* David E. Rosenbaum, *Reagan Insists Budget Cuts Are Way to Reduce Deficit*, N.Y. TIMES (Jan. 8, 1986), http://www.nytimes.com/1986/01/08/us/reagan-insists-budget-cuts-are-way-to-reduce-deficit.html.

223. Comprehensive Crime Control Act, § 1762.

224. *See* Crime Control Acts, chs. 299–304, 48 Stat. 780, 780–83 (1934) (codified as amended in scattered sections of 18 U.S.C.A.). Congress codified a number of federal crimes, including crimes related to assaulting or killing federal officers, frauds committed against banks, interstate kidnapping, and crimes defined for the purpose of administration in the federal prisons. *Id.* The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 101, 82 Stat. 197 (codified as amended in scattered sections of 18 U.S.C.A.) did not focus on creating federal crimes. Recognizing that crime is primarily a "state and local" problem, the legislation provided funding opportunities for states that developed comprehensive crime plans in their jurisdictions. *Id.*

225. The Sentencing Reform Act included mandatory federal sentencing guidelines and severe penalties for drug-related offenses. Comprehensive Crime Control Act, § 1762.

226. 18 U.S.C.A. § 924(e) (West 2017). If a felon has two or more prior predicate felonies which constitute "a violent felony" or a "serious" drug crime, the minimum sentence is fifteen years in prison with a maximum of life imprisonment. *Id.*

227. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1001, 102 Stat. 4181 (codified as amended in scattered sections of 21 U.S.C.A).

228. *Id.*

229. *Id.*

of a criminal justice system with the highest incarceration rate in the world, with its prisons comprised of primarily poor and disproportionately minority people. To fund this "war," the budgets and spending of federal law enforcement skyrocketed. In the early 1980s, the Drug Enforcement Administration ("DEA") antidrug spending grew from $86 million to over $1 billion.[230] The FBI budget increased eleven times the amount provided for in 1980: from $8 million to $95 million in 1984.[231] *Strickland* and *Hill* helped ensure those dollars were well spent by closing doctrinal loopholes that would allow criminals constitutional relief.

Prior to Reagan's first presidential election, America was experiencing a conservative backlash to the progressive gains made during the Civil Rights Movement and the War on Poverty.[232] Electing Reagan represented the dominant culture's leaning toward more conservative values and interests. While actively resisting policies grounded in equality, specifically racial equality such as busing and affirmative action, conservatives reconstructed America's understanding of civil rights and the equality principle.[233] Issues regarding crime and cases concerning criminal procedure produced fruitful opportunities to employ conservative interpretations to otherwise progressive policies. *Strickland* and *Hill* represented retrenchment from the more liberal interpretative style of the Court in *Powell* and *Gideon*. In employing a narrow approach to interpretation and a seemingly strong fidelity to *stare decisis*, the Court was implicitly promoting conservative values and interests in personal responsibility and accountability. Equality was never mentioned in either opinion, thus removing the concept from the analysis and the idea from the jurisprudential vernacular in the Sixth Amendment context. Thus, equality, as a recognized constitutional principle, was neglected.

By assessing possible external considerations that factor into judicial decision-making, the interest convergence analysis reveals that the Court's retrenchment from emphasizing egalitarian principles paralleled the conservative backlash in the larger political culture. When considering the socio-political climate at the time, *Strickland* and *Hill* are to be expected. The break with the Court's strong fidelity to the principle of equality reflected in *Powell* and *Gideon* was noticeably absent in *Strickland* and *Hill*, with those cases focusing more on presumptions and definitions than the equality principle. This stark divergence of interests between the dominant group and the subordinate group continued into the twenty-first century, until problems in plea bargaining produced an opportunity to reconsider the understanding of the right to counsel.

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230. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 123 (1997).

231. *Id.* at 52.

232. *Id.*

233. *Id.* 50–51.

V. CONVERGENCE AND THE PLEA BARGAINING TRILOGY

The divergence of interests in the 1980s and 1990s played a significant role in shaping today's justice system. Conservative criminal policies from the divergence led to an explosion of the prison population, with the incarceration rate quadrupling between 1980 and 2003.[234] In 2008, one in one hundred adults in America was behind bars,[235] and one in thirty-one was under some form of custodial supervision.[236] While criminal courts across the nation experienced difficulty with the volume of criminal prosecutions, prosecutors and defense attorneys faced pressure to quickly resolve cases by plea bargain.[237] The practice of plea bargaining, which the Court had never constitutionally acknowledged as an official part of the criminal process, took on a life of its own, prompting new constitutional questions concerning the right to counsel.[238] No longer able to ignore the doctrinal questions related to the realities of plea bargaining, the Court granted certiorari in three cases: *Padilla*, *Frye*, and *Lafler*. In those cases, the Court issued arguably pragmatic decisions, providing a baseline understanding of the constitutional protections afforded criminal defendants during the plea process.[239]

Padilla v. Kentucky changed the landscape in that it shed light on the shadow system of plea negotiations. In *Padilla*, the petitioner pled guilty to drug charges related to the alleged transportation of a large amount of marijuana in Kentucky and was ordered to be deported.[240] The petitioner was a native of Honduras but was a lawful permanent resident of the United States for over forty years and served in the U.S. Armed Forces during Vietnam.[241] He contended that during discussions with defense counsel, he was assured that a conviction of the drug-related charges would not result in deportation.[242] He further claimed that had he known that such deportation consequences existed and

234. Vincent Schiraldi et al., *Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States*, JUST. POL'Y INST. 1, 2 (2000), http://www.drugpolicy.org/docUploads/PoorPrescription.pdf.

235. *One in 100: Behind Bars in 2008*, PEW CTR. ON STATES 1, 5 (2008), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf [hereinafter PEW, *One in 100*] (explaining that at the beginning of 2008 the national adult inmate count was 2,319,258).

236. *One in 31: The Long Arm of American Corrections*, PEW CTR. ON STATES 1, 8 (2009), http://www.pewtrusts.org/~/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf [hereinafter PEW, *One in 31*].

237. *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do with It*, 23 CRIM. JUST. 28 (2008).

238. *Id.*

239. Padilla v. Kentucky, 559 U.S. 356 (2010); Missouri v. Frye, 566 U.S. 133 (2012).

240. *Padilla*, 559 U.S. at 357.

241. *Id.* at 359.

242. *Id.*

were mandatory upon conviction, he would have insisted on going to trial.[243] With this, Padilla alleged a Sixth Amendment ineffective assistance of counsel claim based on the erroneous advice from his attorney.[244] Writing for the majority, Justice Stevens agreed with the petitioner, finding deficient performance but leaving the issue of prejudice resulting from the misinformation provided to petitioner by defense counsel to the lower courts to decide.[245]

In *Padilla*, the Court did two important things. First, the Court declared that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment," requiring the effective assistance of counsel.[246] Prior to *Padilla*, the Court refrained from recognizing a Sixth Amendment right to counsel during plea bargaining. The constitutional reach of the right to counsel during the plea process was premised upon a vague statement that there existed a general right to counsel prior to entering a formal guilty plea.[247] Problems concerning effective counsel were largely limited to issues concerning the waiver of constitutional rights in a plea agreement as opposed to the effective assistance of counsel during the plea negotiation process.[248] Any emphasis the Court placed on the critical role counsel played in the fair administration of justice was offered in dicta.[249] It was not until *Padilla* that the Court unequivocally thrust Sixth Amendment protections into the plea negotiation process.

Second, the Court's opinion recognized criminal defendants facing possible deportation as a demographic "least able to represent themselves."[250] By acknowledging this group as such, the Court touched on equality, implicitly injecting the principle into the right to counsel discussion. Never before had the Court intervened in the actual plea bargaining negotiation process. And

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243. *Id.*

244. *Id.* at 364–65.

245. *Id.* at 374.

246. *Id.* at 373. The Court further determined that it is an affirmative duty of defense counsel to advise her client regarding the deportation consequences of a criminal conviction. *Id.* at 381.

247. Walker v. Johnston, 312 U.S. 275, 286 (1941). *See also* Waley v. Johnston, 316 U.S. 101, 104 (1942).

248. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (stating that "[p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered").

249. Herman v. Claudy, 350 U.S. 116, 118–19 (1955) (a case involving a plea of guilty with Court discussing due process violation "where the circumstances show that his rights could not have been fairly protected without counsel"); Moore v. Michigan, 355 U.S. 155, 159 (1957) (in a case involving a guilty plea entered without counsel, the Court held that "petitioner's case falls within that class in which the intervention of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing"); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (holding that when one pleads guilty without counsel to a capital charge, prejudice results and the conviction must be reversed).

250. *Padilla*, 559 U.S. at 370–71.

when the Court did intervene, it did so on behalf of a group "least able to represent themselves."[251]

Missouri v. Frye and *Lafler v. Cooper* were decided in 2012. While *Frye* set the test for ineffective assistance of counsel claims during plea negotiations,[252] *Lafler* discussed remedies.[253] The main issue in *Frye* was "whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both."[254] The Court answered in the affirmative, concluding that when defense counsel failed to communicate an offer to his client, he failed to provide effective assistance of counsel within the meaning of the Sixth Amendment.[255] In doing so, the Court recognized that plea bargains are "central" to the administration of justice.[256] The Court asserted that "defense counsel [has] responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[257] For the Court, the failure to recognize this reality would in effect gut much of the Sixth Amendment's meaning because "ours 'is for the most part a system of pleas, not a system of trials.'"[258] In order to remain loyal to the constitutional imperative of the Sixth Amendment, the Court demonstrated an appreciation of the role plea bargaining plays in the justice system.[259]

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251. *Id.*

252. *See* Missouri v. Frye, 566 U.S. 133 (2012).

253. *See* Lafler v. Cooper, 566 U.S. 156 (2012).

254. *Frye*, 566 U.S. at 145. In *Missouri v. Frye*, respondent Galin Frye was charged with driving with a revoked license in August of 2007. *Id.* at 138. The prosecutor sent Frye's defense counsel a letter in which two offers were made. *Id.* The first offer required Frye to plead guilty to a felony charge in exchange for the State recommending a three-year sentence with Frye serving ten days in jail as "shock time" and no recommendation on probation. *Id.* at 138–39. The second offer would reduce the felony charge to a misdemeanor with the State recommending a ninety-day jail term. *Id.* The letter further stated that both offers would expire on December 28, 2007. *Id.* at 139. Defense counsel failed to advise Frye that the offers were made, and they expired without any discussion between Frye and his lawyer. *Id.* Frye pled guilty to the Class D felony charge with no plea agreement between himself and the State. *Id.* The prosecutor, however, recommended a three-year sentence with ten days served in prison and no recommendation regarding probation. *Id.* The judge sentenced Frye to three years in prison. *Id.* Frye filed for post-conviction relief in state court, contending that his lawyer's failure to inform him of the plea offers denied him effective assistance of counsel. *Id.* Undergoing the *Strickland* analysis, the Missouri Court of Appeals agreed and deemed Frye's plea withdrawn and remanded to the lower court to either require a trial or to allow Frye to plead to any offense the prosecutor charged. *Id.* at 139–40. The U.S. Supreme Court granted certiorari. *Id.* at 140.

255. *Id.* at 143–44.

256. *Id.*

257. *Id.* at 143.

258. *Id.* (quoting *Lafler*, 566 U.S. at 170).

259. *Id.* at 144–45.

In *Lafler*, the Court sought to provide a remedy to defendants prejudiced by an attorney's deficient performance where it results in the rejection of a plea offer and the defendant is convicted at trial.[260] In tackling the remedy, the Court fashioned two alternatives and placed them both within the exclusive discretion of the trial judge.[261] For the Court, the proper remedy required the prosecution to reoffer the plea.[262] Once this occurs, the trial judge may decide, in her discretion, either to vacate the conviction and accept the plea or to allow the conviction to stand.[263]

Justice Scalia, author of the dissents in both *Frye* and *Lafler*, rested his analysis primarily on the notion that the Sixth Amendment assistance of counsel guarantees fair trials *only*.[264] There is no right to a plea bargain, and because of this, defendants are not entitled to constitutional remedies premised upon ineffective assistance of counsel.[265] For the dissenters, the "whole new boutique of constitutional jurisprudence" is without a true remedy.[266] The majority opinion, according to the dissenters, elevated "plea bargaining from a necessary evil to a constitutional entitlement."[267]

The trilogy offered a re-commitment by the Court to honor established constitutional protections recognized in the context of criminal procedure. In these cases, the Court revisited earlier doctrinal interpretations of the right to counsel, providing a glimpse of a resurgence of the egalitarian ideals in *Powell* and *Gideon*. Why the shift? While the Court's composition drastically changed from the mid-1980s to the 2010s, the doctrinal treatment of right to counsel challenges remained constant. I argue that two events, namely mass incarceration and a concern with the criminal justice system, worked to produce a wave of convergence between the dominant group and the subordinate group on the issue of criminal justice administration. While not to the same degree as *Powell* and *Gideon*, this convergence repositioned the interest of working poor whites in line with that of minority communities, offering a

260. *Lafler*, 566 U.S. at 160. In *Lafler v. Cooper*, the respondent was charged with a number of felonies, including assault with intent to murder. *Id.* at 161. Instead of pleading guilty pursuant to an offer made by the State where the respondent would serve fifty-one to eighty-five months, he elected to plead not guilty upon the advice of his attorney. *Id.* More specifically, respondent's attorney allegedly stated that because the victim was shot below the waist, the prosecutor would be unable to prove intent to murder. *Id.* At trial, the respondent was convicted on all counts and was sentenced to the mandatory minimum of 185 to 360 months in prison. *Id.*

261. *Id.* at 170–71.

262. *Id.* at 171.

263. *Id.* The Court reasoned that this permits the injury suffered by the defendant to be reviewed by the trial court and, in turn, allows the trial court to evaluate the case within proper constitutional guidelines. *Id.*

264. *Frye*, 566 U.S. at 155 (Scalia, J., dissenting); *Lafler*, 566 U.S. at 175–76 (Scalia, J., dissenting).

265. *Lafler*, 566 U.S. at 180–81 (Scalia, J., dissenting).

266. *Id.* at 186.

267. *Id.*

stronger and more cohesive interest in remedying defects in the justice system. The plea bargaining trilogy offers a series of contradiction-closing cases that provided an official condemnation of egregious justice system practices.

First, the plea bargaining cases indicated that the Court was still willing to address issues involving fairness and equality within the criminal justice context when necessary. In the aftermath of 9/11 and the War on Terror, America's struggle to maintain an international image of a free and equal society was tarnished by mass incarceration. It is said that the United States has a "51st state" – its jails and prisons, with a "greater combined population than Alaska, North Dakota[,] and South Dakota."[268] The incarceration rate in American has increased by 500% in the last forty years.[269] The non-violent prison population alone is larger than the combined populations of Alaska and Wyoming.[270] Compared to other nations, the United States rate of imprisonment is 750 per 100,000, versus 628 per 100,000 in Russia and 67 per 100,000 in Denmark.[271] In 2009, 1 out of every 136 U.S. residents was incarcerated, either in prison or jail.[272] At last count, the total number of imprisoned persons was 2,297,400, with 1,617,478 in state and federal prisons and 679,992 in local jails.[273] Approximately 80% of those charged with a criminal offense are poor,[274] and over two-thirds are a racial minority.[275] For black defendants, the situation is bleak. In 1960, the incarceration rate for African Americans was 660 per 100,000 people.[276] In 2010, the incarceration rate for black men was 3074 per 100,000 people.[277] In addition, the extra pressures from the Great Recession required the reexamination of government spending, uncovering astronomical criminal

268. Vincent Schiraldi & Jason Ziedenberg, *2 Million Prisoners in the Land of the Free*, SFGATE (Dec. 26, 1999, 4:00 AM), http://www.sfgate.com/bayarea/article/2-million-prisoners-in-the-Land-of-the-Free-3053456.php.

269. *Fact Sheet: Trends in U.S. Corrections*, SENT'G PROJECT 2, http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (last updated Dec. 2015) (measuring incarceration trends from 1985 to 2013).

270. John Irwin et al., *America's One Million Nonviolent Prisoners*, JUST. POL'Y INST. 4 (Mar. 1999), http://www.justicepolicy.org/images/upload/99-03_REP_OneMillionNonviolentPrisoners_AC.pdf.

271. PEW, *One in 100*, *supra* note 235, at 5, 35.

272. PEW, *One in 31*, *supra* note 236.

273. *Prison Inmates at Midyear 2009 – Statistical Tables*, BUREAU JUST. STAT. (June 23, 2010), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2200.

274. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

275. Irwin et al., *supra* note 270.

276. Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RES. CTR. (Sept. 6, 2013), http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/.

277. Paul Guerino et al., *Prisoners in 2010*, BUREAU JUST. STAT. 27 (Feb. 2, 2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

justice expenditures.[278] With the justice system under scrutiny, the plea bargaining cases served as a symbolic check on problems inherent in the system.

Second, the trilogy reflected the political culture's broader concern with the effectiveness of criminal justice administration. In requiring effective assistance of counsel during plea negotiations, the Court signaled a possible return to its position as guardian of the subordinate group in the exercise of its civil rights. While the majority opinions in *Padilla*, *Frye*, and *Lafler* offered a pragmatic justification for the outcomes, the bases of the decisions were strongly criticized by the dissents for the lack of textual backing.[279] By recognizing the significance of plea bargaining, the Court opted to resolve the cases on the basis of "the world as it is." As the Court recognized, guilty plea dispositions comprise at least 98% of federal criminal cases[280] and 94% of state criminal cases.[281] Since 1977, the ratio of federal criminal defendants who exercise their right to a jury trial has decreased from 25% to 3%.[282] Before *Padilla*, scholars and advocates vociferously criticized plea bargaining, noting a number of issues in the negotiation process.[283] Understanding that the lack of transparency in the process insulates it from judicial review, criticisms levied against the process called for regulation and constitutional protections for defendants, many of whom are *the least able to represent themselves* – poor, uneducated, and often times minority.[284] Moreover, thousands of courts across the country serve simply as plea mills, churning out a profit for the locale.[285] From traffic violations, to misdemeanors, to felony charges, judges conduct hearings and take pleas without the defendant ever consulting with or being

278. PEW, *One in 100*, *supra* note 235, at 11. Expenditures on corrections were reported to overtake state budgets for education. *Id.* at 16. Total state spending on corrections, including federal contributions, is estimated at $49 billion annually. *Id.* at 11. Recent figures regarding state spending on individual prisoners is estimated at an annual average cost of $23,876 (2005 figures) and can range from $44,860 per inmate (in Rhode Island) to $13,009 (in Louisiana). *Id.*

279. Missouri v. Frye, 566 U.S. 133, 151–55 (2012) (Scalia, J., dissenting); Lafler v. Cooper, 566 U.S. 156, 177–78, 186–87 (2012) (Scalia, J. dissenting).

280. ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 242–45 (2010), http://www.uscourts.gov/sites/default/files/2010judicialbusiness_0.pdf.

281. *Id.*

282. Matthew Clark, *Dramatic Increase in the Number of Cases Being Plea Bargained*, PRISON LEGAL NEWS (Jan. 15, 2013), https://www.prisonlegalnews.org/news/2013/jan/15/dramatic-increase-in-percentage-of-criminal-cases-being-plea-bargained/.

283. Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2651 (2013); Stephen J. Shulhofer, *Is Plea Bargaining Inevitable*, 97 HARV. L. REV. 1037, 1039–45 (1984); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 658 (1981).

284. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE. L.J. 2176, 2178 (2013).

285. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2152 (2013).

represented by a lawyer.[286] Individuals plead guilty on the advice of a lawyer that they just met minutes before.[287] Without an official declaration regarding constitutional protections afforded defendants during plea bargaining, governments could continue to operate in a shadow adversarial system off the record and outside of public purview. Ignoring the realities of plea bargaining was to silently sanction egregious mistakes and grossly negligent conduct, which no doubt play a role in the unnecessary addition of years to prison terms, in turn, contributing to mass incarceration in a technical sense. It is in this context that the plea bargaining cases were decided.

Applying interest convergence to the trilogy requires a basic understanding that eras of convergence will vary in terms of the breadth and the depth to which the interests converge. While the level of convergence may not appear as strong as that in *Powell* and *Gideon*, a convergence existed nevertheless. The dominant group, concerned with maintaining a reputation of a free and equal America, was interested in proving its commitment to fair treatment, despite being the world's leading jailer. The subordinate group, interested in the wholesale reformation of the criminal justice system, gladly welcomed the Court's intervention in the shadow system of plea bargaining. For this group, some protection was better than none. The trilogy thus offered a series of contradiction-closing cases, implicitly affirming America's commitment to equal justice.

VI. CONCLUSION

Interest convergence as a theoretical paradigm is rational. It not only considers process and outcome variables in its analysis, it allows for the consideration of "the world as it is." While traditional modes of interpretation guide the Court, the Justices lead and operate the institution; they are human beings bringing with them their own sets of values and interests. Interest convergence approves of using external factors in assessing judicial decision-making, thus allowing consideration of important occurrences and events that the Justices themselves experienced at the time of each opinion.

During each era of convergence, the contradiction-closing cases reflected the will of the dominant group, while simultaneously conceding to the subordinate group. While *Powell* and *Gideon* theoretically placed indigent defendants on an equal playing field, the dominant group benefitted with the opinions, adding to the rehabilitation of America's image in both cases domestically and internationally. Similarly, in the plea bargaining trilogy, the subordinate group received a constitutional protection in the guarantee of counsel during plea bargaining, while the dominant group sought to buttress and rehabilitate America's reputation as a prison state, both home and abroad. *Strickland* and *Hill*, decided during a time of divergence, mirrored the conservative retrenchment

286. *Id.*
287. *Id.*

of the dominant group, failing to provide any gains or concessions to the political powerless.

Many scholars perceive the *Gideon* decision as a victory for individual rights in which the power of the justice system would be tempered by the constitutional guarantee of defense counsel. *Frye* and *Lafler* are also celebrated as triumphs and natural extensions of the principles pronounced in *Gideon*. There is, however, a different perception of the *Gideon* legacy. In the recent *Yale Law Journal Symposium*, recognizing the fiftieth anniversary of *Gideon*, Professor Paul Butler claimed that the decision worsened the plight of poor and minority persons generally:[288]

> The reason that prisons are filled with poor people, and that rich people rarely go to prison . . . is because prison is for the poor, and not the rich. In criminal cases poor people lose most of the time, not because indigent defense is inadequately funded, although it is, and not because defense attorneys for poor people are ineffective, although some are. Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice.[289]

Butler argued that *Gideon* makes the lawyer an end instead of a means to an end.[290] It seems the system still will over-punish and disproportionately charge poor people and minorities, whether or not a lawyer is involved.

If we are to fix the problems, we must first see "the world as it is" and affect our strategy accordingly. Applying theoretical frames that consider external considerations in judicial decision-making, such as interest convergence, may allow for a more comprehensive understanding of judicial trends and outcomes. Understanding that political culture may influence judicial decision-making allows the justice system's actors to adjust their strategies more completely. Neglecting to include socio-political factors is to ignore a very basic detail: humans do not live in vacuums, including the Justices on the Court. In the "world as it is," the people ring the bell, the gladiators enter the arena, and the judges decide the winner.

288. *See generally* Butler, *supra* note 284.
289. *Id.* at 2178.
290. *Id.* at 2191.