"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer

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"[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

- The U.S. Supreme Court in *Gideon v. Wainwright*[1]

"Beggars can't be choosers."

- Old adage[2]

Introduction

"I want a Black lawyer to represent me." These are the first words you hear after you introduce yourself to your new client. You have been appointed to represent this man on a criminal charge. You are white. He is Black.[3] You answer that you are an

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1. 372 U.S. 335, 344 (1963).

2. *See* Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 182 (1998) ("[T]he familiar adage that 'beggars can't be choosers' has uniformly been incorporated into Sixth Amendment jurisprudence . . . .").

3. Throughout this Article, "Black" and "African-American" are used interchangeably, as are "white" and "Caucasian." "Black" is also capitalized throughout to acknowledge the status of African Americans as a distinct cultural group. *See* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV.

experienced criminal lawyer and will represent him to the best of your ability, regardless of his or your race. He responds that he too is experienced with the criminal justice system—a system that targets Black men, like himself, for prosecution far more than whites, that sentences Black men to prison more frequently and for a longer duration than whites, and that fails to acknowledge or address the role that race and racism play in the development, enforcement, and execution of the criminal laws established by "the system." You explain that the law does not allow the client, as an indigent, to choose his own lawyer. "You can hire whomever you want to handle your case," you say, "if you have the financial ability to do so. Otherwise, the court chooses your lawyer for you, and there is little you can do about it, other than to decide to represent yourself."

Your client is not satisfied with this response. He explains that an African-American lawyer will be better able to understand and appreciate the circumstances that resulted in the bringing of these charges and that he, the client, can trust a Black lawyer more than a white one. You agree that trust is indispensable to an effective attorney-client relationship, but you disagree that trust is unobtainable merely because you are white, and that you, as a white lawyer, cannot be as effective as a lawyer who is African-American. Sensing that you and your client have reached an impasse, you suggest that both of you give this matter more thought and discuss it further at your next meeting. Your client assents and you leave.

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Under the federal Constitution, an indigent criminal defendant has a right to appointed counsel to represent him in his criminal case.[4] Typically, such a defendant has little or no say in who that lawyer will be. If the appointed lawyer is of a different race than the defendant, the latter may worry that the lawyer will be unable to understand or fully appreciate his circumstances. He may worry that the lawyer's judgment and advice cannot be

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1331, 1332 n.2 (1988) (stating her view that "[w]hen using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun"). Further, the use of masculine pronouns throughout this Article, when feminine pronouns could just as well apply, is merely the stylistic preference of the author.

4. *See* U.S. CONST. amends. VI, XIV, § 1; *see also Gideon*, 372 U.S. at 345 (holding that an indigent criminal defendant in state court is constitutionally entitled to court-appointed counsel at his trial).

trusted. He may worry that his relationship with the lawyer will be less than what it could be. In sum, he may be concerned that the lawyer will not be able to represent him as effectively as a lawyer whose race is the same as his.

These concerns can seriously impede the building of trust between the attorney and client. Trust is essential to establishing rapport[5] and is hard enough to come by in the appointed attorney-indigent client context, even without the issue of race.[6] Trust and rapport, in turn, enhance attorney effectiveness which, correspondingly, promotes justice, both for the individual defendant and the larger criminal justice system. Indeed, as the opening quote from *Gideon v. Wainwright* suggests, establishing a just and fair system is the key reason for requiring appointed counsel in the first place.[7]

Yet despite the importance of trust and rapport in the attorney-client relationship, and their impact on justice, scant attention has been paid to the effect race has on that relationship.[8]

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5. *See* Morris v. Slappy, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., and Marshall, J., concurring in the result) ("'Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence.' . . . 'Basic trust . . . is the cornerstone of the adversary system and effective assistance of counsel.'" (quoting ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.1 cmt. (2d ed. 1980) and Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981))); *see also id.* at 24 (stating that the attorney-client relationship "'involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney'" (citation omitted)); ABA STANDARDS FOR CRIMINAL JUSTICE Defense Function Standard 4-3.1(a) (3d ed. 1993) ("Defense counsel should seek to establish a relationship of trust and confidence with the accused . . . ."); Holly, *supra* note 2, at 187 ("[F]ulfillment of counsel's role as an advocate largely depends upon a basic trust between attorney and client . . . ."); *cf.* Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 40 (2000) ("Communication is probably the most important part of the attorney-client relationship. In order for an attorney to effectively advocate for her client, she must first establish a relationship with that client, and she must obtain the necessary information.").

6. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Defense Function Standard 4-1.2 cmt. (3d ed. 1993). This standard observes that:

> A lawyer who is privately retained generally has the confidence of the client, who after all has made a conscious choice of counsel . . . . By contrast, the lawyer who is appointed or who serves in an organized defender office must win the confidence of the client, who usually has had no say in the choice of an advocate.

Id.

7. *See Gideon*, 372 U.S. at 344 (noting that the Sixth Amendment right to appointment of counsel is a constitutional principle "established to achieve a fair system of justice").

8. *See* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1354-55, 1354 n.154 (1992) (noting the rarity of "empirical studies of how attorneys talk

This is remarkable considering the prevalence of cross-racial representation. Statistics show that most criminal defendants rely on court-appointed counsel.[9] Black defendants are more likely than their white counterparts to need such counsel given that people of color are poor at a higher rate than whites.[10] Conversely, the lawyers representing these Black defendants tend to be white given the relatively small percentage of African Americans in the legal profession.[11] Thus, the concerns of our hypothetical defendant are likely to be widespread given that cross-racial representation is the norm, not the exception. And whether accurate or not, these concerns can produce the very ineffectiveness that our defendant fears and that the system

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with their clients in private" and citing one study that observed that "'[o]ne of the reasons that data about lawyers and dispute transformation are so incomplete and theoretical is the paucity of observational studies of lawyer-client relationships . . . .'" (citation omitted)); *see also* David A. Thomas, *Racial Dynamics in Cross-Race Developmental Relationships*, 38 ADMIN. SCI. Q. 169, 169 (1993) ("[O]rganizational research has rarely focused on the dynamics of interracial work-centered relationships.").

9. *See* Holly, *supra* note 2, at 220 ("[S]tatistics reveal that approximately seventy-five to eighty percent of criminal defendants are indigent."); OFFICE OF THE U.S. COURTS, FEDERAL DEFENDER SERVICES: A STATUS REPORT 1 (1993) ("About 85% of criminal cases prosecuted in the federal courts require the services of court-appointed counsel, either private attorneys or staff of federal defender organizations."); *see also* Fox Butterfield, *Texas Nears Creation of State Public-Defender System*, N.Y. TIMES, Apr. 6, 2001, at A14 (stating that nationwide, "82 percent of defendants in felony cases are now represented by publicly financed lawyers, according to the Bureau of Justice Statistics at the Justice Department").

10. Acevedo et al., *supra* note 5, at 20 ("People of color continue to be poor at a higher rate than whites."); *see also id.* at 29 (noting that ninety percent of the clients in the Civil Division of New York's Legal Aid Society are people of color).

11. *See id.* at 29 n.119 (citing *Affirmative Action on the Edge*, U.S. NEWS & WORLD REPORT, Feb. 13, 1995, at 35, 37 (reporting that "whites account for over 94% of all admitted attorneys")); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1008 n.7 (1997) ("According to the *U.S. Bureau of Labor Statistics*, 123,060,000 members of the civilian noninstitutional population sixteen years old and over were employed in 1994. Of that total, 821,000 were lawyers. Only 3.3% of the lawyers were black." (citation omitted)); *see also* Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 767-68 (1997). Russell observes that:

> [M]inority attorneys still suffer from severe underrepresentation in the legal profession. At the beginning of this decade, Blacks, Asian Americans, Latinos and Latinas, and Native Americans comprised only twelve percent of the nation's law students, less than eight percent of lawyers, eight percent of law professors, and two percent of the partners at the nation's largest law firms. When compared with the overall percentage of people of color in the national population—approximately twenty-five percent—these paltry figures illustrate the extent to which attorneys of color are still very much a token presence in the legal system.

Id. (citations omitted). When her essay appeared, Russell was Associate Professor of Law at Santa Clara University Law School. *Id.* at 766 n.*.

strives to avoid.

This Article looks at this issue in the context of an African-American defendant and a white court-appointed lawyer.[12] More specifically, this Article describes the potential concerns an indigent Black defendant could have when appointed a white lawyer, the lawyer's possible responses to those concerns, and ways those concerns may be addressed by the larger judicial system.

As background, this Article first examines the Sixth Amendment right to appointed counsel in a criminal case with an emphasis on that Amendment's goal of furthering justice, both for the individual defendant and for the entire criminal justice system.[13] The nature and scope of the right to counsel is reviewed, as well as how the U.S. Supreme Court has attempted to make that right effective.[14] This review shows that the Court has achieved mixed results in its Sixth Amendment[15] quest to see that "justice . . . 'be done.'"[16]

Part II relates the potential concerns a Black defendant may have about being appointed a white lawyer. These concerns are encompassed within three arguments that separately address issues of racism, attorney effectiveness, and the practical difficulties in educating the white lawyer on the impact race has on the defendant's case.[17]

The white lawyer's possible responses to the Black

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12. For purposes of this Article, "court-appointed lawyer" means a lawyer appointed by the trial court and paid for by the government, and "indigent" means that the defendant is unable to afford private counsel. For an excellent discussion of the definitions of "indigent" under federal and state law, see Craig P. Gaumer and Paul R. Griffith, *Presumed Indigent: The Effect of Bankruptcy on a Debtor's Sixth Amendment Right to Criminal Defense Counsel*, 62 UMKC L. REV. 277, 286-90, 294-95 (1993).

13. The focus of this Article is on the Sixth Amendment right to counsel given that Amendment's specific applicability to criminal cases. Conversely, the Fourteenth Amendment, which has also been interpreted as mandating a right to appointed counsel, applies to criminal and civil cases alike. *See, e.g., In re* Gault, 387 U.S. 1, 34-41 (1967) (Due Process right to counsel in a civil juvenile delinquency hearing); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981) (Due Process right to counsel may exist in a civil parental status termination hearing); Vitek v. Jones, 445 U.S. 480, 496-98 (1980) (plurality opinion) (Due Process right to counsel for civil hearing regarding an inmate's involuntary transfer from prison to a state mental hospital).

14. *See infra* notes 26-98 and accompanying text.

15. U.S. CONST. amend. VI.

16. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" (citation omitted)).

17. *See infra* notes 99-129 and accompanying text.

defendant's concerns are the subject of Part III. Three broad responses, with some variants, are identified. These responses either deny the existence of racism, refute the relevance of the defendant's race to the attorney-client relationship, or, conversely, acknowledge race and racism's relevance to that relationship.[18] As explained more fully below, this last response incorporates elements of what is called the "Race Consciousness Model of Lawyering," which posits that personal identifying characteristics, such as race and ethnicity, impact attorney effectiveness and the way that a lawyer and client relate to each other.[19]

Finally, Part IV suggests three ways to ameliorate the racial friction (and further justice in the process) that may arise in the white appointed lawyer-Black indigent defendant relationship.[20] First, as the Race Consciousness Model recommends, greater and better communication should be promoted between the accused and his lawyer about the issue of race.[21] Such communication should also take place within law schools and between other actors in the criminal justice system, including prosecutors, judges, and legislators. Second, courts should accord greater weight to the importance of a meaningful attorney-client relationship and be more receptive to appointing substitute counsel when the issue of race impedes the development of such a relationship.[22] Finally, the procedures for initially selecting the appointed lawyer should be revised to give the accused the option to choose his own counsel.[23] Alternatively, the defendant should be assigned two alternate counsel in addition to his appointed lawyer and given the right to substitute in one of these alternates.[24]

This Article concludes with a call for all actors in the criminal justice system to acknowledge the influence of race in the appointed attorney-indigent client relationship and for better education for, and communication between, these parties about this issue. Improved race consciousness may redress our hypothetical defendant's concerns and the powerlessness he feels in being unable to realize *Gideon's* promise of justice for all.[25]

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18. *See infra* 130-184 and accompanying text.
19. *See infra* notes 175-178 and accompanying text.
20. *See infra* notes 185-225 and accompanying text.
21. *See infra* Part IV.A.
22. *See infra* Part IV.B.
23. *See infra* Part IV.C.
24. *See infra* Part IV.C.
25. Gideon v. Wainwright, 372 U.S. 335 (1963).

I. The Federal Constitutional Right to Appointed Counsel in Criminal Cases

It is hard to overstate the importance of the right to court-appointed counsel to the American adversary system of criminal justice. The goal of our system is to see that justice is done. This goal is important for the accused, who is entitled to be treated fairly during the course of his prosecution, and it is important for the larger judicial system, which must ensure reliable results to maintain credibility. For the system to work, justice must exist on both the micro-level (for the defendant) and on the macro-level (for the system). In interpreting the Sixth Amendment right to counsel, the Supreme Court has been mindful of these interests, as the following summary of Sixth Amendment jurisprudence shows.

A. The Nature of the Right

The Sixth Amendment states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence."[26] Initially, it was thought that this requirement applied only to federal courts and, moreover, that it meant merely that a criminal defendant had the right to employ a lawyer to assist in his defense.[27]

It was not until 1932 that this view began to change and "the language of the Sixth Amendment [began expanding] well beyond its obvious meaning."[28] The change started with the Supreme

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26. U.S. CONST. amend. VI.

27. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–1995, at 277 (1996) ("Originally, [the Sixth Amendment right to counsel] was interpreted merely to guarantee that an individual had the right to employ an attorney."); 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW 13-2 (1990 & Supp. 2000) ("Congress enacted two statutory provisions [around the time the Sixth Amendment was adopted] suggesting that this guarantee might be limited to a right to retained counsel."); *see also* Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." (citation omitted)).

28. Nichols v. United States, 511 U.S. 738, 746 (1994) (stating that by 1979, the Court "had already expanded the language of the Sixth Amendment well beyond its obvious meaning"); *see also* CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1430 (Johnny H. Killian & George A. Costello eds., 1996). The Congressional Research Service has explained that:

> Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the [Sixth Amendment guarantee of the assistance of counsel] was limited to assuring that a person wishing and

Court's decision in *Powell v. Alabama*,[29] in which the Court, for the first time, interpreted the U.S. Constitution, and specifically the Sixth and Fourteenth Amendments,[30] to require the appointment of counsel in certain circumstances.[31]

Powell v. Alabama, otherwise known as the "Scottsboro Boys Case," concerned nine Black youths, including Ozie Powell, who were charged with raping two white girls in 1931 on a freight train while traveling near Scottsboro, Alabama.[32] The girls were with a group of white boys who, with one exception, were thrown from the train during an altercation with the Black youths.[33] The suspects were arrested the same day, before the train reached Scottsboro, where a mob had formed.[34] At or before the arraignment six days later, the trial judge appointed "all the members of the [local] bar" to represent the defendants.[35] However, at the trials held on April 6, 1931 (a mere six days after the arraignment), no one definitively stepped forward to take responsibility for the defense of the boys.[36] In four separate one-day trials, eight of the boys were found guilty and sentenced to death.[37] All but one of the convictions were affirmed by the Alabama Supreme Court.[38]

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able to afford counsel would not be denied that right. It was not until the 1930s that the Supreme Court began expanding the Clause to its present scope.

Id.

29. 287 U.S. 45 (1932).

30. U.S. CONST. amend. XIV. The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of "life, liberty, or property, without due process of law." *Id.* at § 1.

31. *Powell*, 287 U.S. at 71-72; *see also* 2 CHESTER J. ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 521 (2d ed. 1997) (noting that prior to *Powell*, "there was no right to an appointed counsel in an indigent case"); RUDSTEIN ET AL., *supra* note 27, at 13-2 (stating that *Powell* was "[t]he first Supreme Court case to address the right of an indigent to appointed counsel"); Brian L. McDermott, *Defending the Defenseless*: Murray v. Giarratano *and the Right to Counsel in Capital Postconviction Proceedings*, 75 IOWA L. REV. 1305, 1309 (1990) ("The Court in *Powell v. Alabama* first established the right to counsel . . . .").

32. *See Powell*, 287 U.S. at 49-51; *see also id.* at 74 (Butler, J., dissenting) (describing the four trials in which the nine youths were tried).

33. *See id.* at 50-51.

34. *See id.* at 51 (noting that the defendants were "met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility").

35. *Id.* at 49, 53.

36. *See id.* at 53, 56; *cf.* Powell v. State, 141 So. 201, 203 (Ala. 1932) (stating that the joint trial of five of the defendants—Ozie Powell, William Roberson, Andy Wright, Olen Montgomery, and Eugene Williams—was held on April 8, rather than April 6, 1931), *rev'd*, 287 U.S. 45 (1932).

37. *See Powell*, 287 U.S. at 50; *id.* at 74 (Butler, J., dissenting).

38. *Id.* at 50; *id.* at 74 (Butler, J., dissenting).

In reversing those convictions, the U.S. Supreme Court held that the Sixth Amendment requires that counsel be appointed at state expense to assist an indigent defendant at trial.[39] The Court based its holding on that Amendment's requirement that the accused "have the Assistance of Counsel for his defence."[40] Finding that "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel," the Court ruled that the trial court erred in failing to appoint specific counsel to assist the defendants.[41]

Although the Sixth Amendment formed a basis for the Court's decision in *Powell*, the principal rationale for that decision rested on the Fourteenth Amendment's Due Process Clause.[42] Moreover, in *Powell*, the Court emphasized the importance of appointed counsel to the goal of justice, calling the necessity of such counsel an "immutable principle[] of justice which inhere[s] in the very idea of free government."[43] The Court reiterated this point a mere six years later in *Johnson v. Zerbst*,[44] when it wrote that the Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[45]

Johnson v. Zerbst is also significant because it more fully explained the Sixth Amendment underpinning of the right to appointed counsel, and it expanded that right to include all felony prosecutions.[46] *Zerbst*, however, only applied to federal courts.[47]

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39. *See id.* at 71-72 (holding that where the defendant is unable to employ counsel in a capital case, due process of law requires that counsel be assigned for him).

40. *Id.* at 66 (citation omitted).

41. *Id.* at 72.

42. *Id.* at 71 ("[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment . . . .").

43. *Id.* at 71 (stating that the failure to appoint counsel under the circumstances of that case "would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard'" (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898))).

44. 304 U.S. 458 (1938).

45. *Id.* at 462 (citation omitted).

46. *See id.* at 467-68. The Court stated:

> Since the Sixth Amendment constitutionally entitles one charged with [a] crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . . If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty.

It was not until twenty-five years later that the Court, in the seminal case of *Gideon v. Wainwright*,[48] extended *Zerbst*'s holding to the states.[49]

In *Gideon*, the Supreme Court ruled that the Sixth Amendment right to court-appointed counsel applied to the states through the Fourteenth Amendment.[50] In reaching that decision, the Court relied not only on *Powell* and *Zerbst*, but also on "reason and reflection [that] require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[51]

Gideon is also notable because it rejected the case-by-case approach for Sixth Amendment court-appointed counsel analysis, in which counsel is appointed only in certain circumstances after balancing the competing interests.[52] For the first time, it adopted a per se approach for deciding whether a criminal defendant is entitled to appointed counsel.[53] Crucial to the Court's decision was the "obvious truth" that a fair trial cannot be assured unless counsel is made available to a poor defendant.[54] Thus, in officially embracing the view that under the Sixth Amendment all indigent criminal defendants at trial are per se entitled to court-appointed counsel, the Court once again paid heed to the overarching goal of "achiev[ing] a fair system of justice."[55]

Id. The *Zerbst* Court was unequivocal in its holding that the Sixth Amendment requires that an indigent federal defendant be offered appointed counsel. *Id.*

47. *Id.*

48. 372 U.S. 335 (1963).

49. *Id.* at 344-45.

50. *Id.*

51. *Id.* at 344.

52. The case-by-case approach, exemplified by the holding in *Betts v. Brady*, 316 U.S. 455 (1942), initially held sway with the Supreme Court. *Betts*, decided a mere four years after *Johnson v. Zerbst*, held that the Sixth Amendment right to the appointment of counsel in state prosecutions should be decided on a case-by-case basis and was necessary only where it "seem[ed] to be required in the interest of fairness." *Id.* at 471-72. In so holding, the Court affirmed Betts' pro se robbery conviction and concluded that the appointment of counsel was "not a fundamental right, essential to a fair trial." *Id.* at 471. *Gideon* overruled *Betts*, calling it "'an anachronism when handed down.'" *Gideon*, 372 U.S. at 345 (quoting amici curiae).

53. *See* ANTIEAU & RICH, *supra* note 31, at 522 (noting that *Gideon* rejected the case-by-case approach for appointing counsel in criminal cases); William L. Dick, Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 627-28 (1989) (stating that *Gideon* adopted the per se approach for criminal cases).

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

55. *Id.* (stating that a constitutional principle behind the Sixth Amendment right to appointed counsel is "to achieve a fair system of justice").

B. The Scope of the Right

The Sixth Amendment right to appointed counsel applies only to "criminal prosecutions."[56] More specifically, it only applies to criminal cases in which actual imprisonment will be imposed.[57] The Supreme Court made this limitation clear in two cases after *Gideon*. First, in *Argersinger v. Hamlin*,[58] the Court clarified that the right to appointed counsel applies to misdemeanor prosecutions.[59] Assuring just outcomes was one of the principal reasons for that decision.[60] In so concluding, however, the Court left open the question of whether the right to appointed counsel applied to cases in which the authorized penalty included incarceration, but where no actual incarceration would be imposed.[61] That question was answered in the negative by the second case, *Scott v. Illinois*, in which the authorized penalty for defendant Aubrey Scott's crime (shoplifting) included up to one year in jail.[62] Given that Scott's actual sentence consisted of a fine rather than jail time, the Court held that he had not been entitled to a court-appointed lawyer.[63] "[A]ctual imprisonment [is] the line defining the [Sixth Amendment] constitutional right to appointment of counsel," the Court stated.[64]

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56. U.S. CONST. amend. VI.

57. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979).

58. 407 U.S. 25 (1972).

59. *Id.* at 36-37.

60. *See id.* at 31 ("The assistance of counsel is often a requisite to the very existence of a fair trial . . . ."); *see also id.* at 34 (observing that even in cases that do not go to trial, counsel is needed "so that [the accused] is treated fairly by the prosecution").

61. *See Scott*, 440 U.S. at 379 (Brennan, J., joined by Marshall, J., and Stevens, J., dissenting) (noting that "[t]he question of the right to counsel in cases in which incarceration was authorized but would not be imposed was expressly reserved [in *Argersinger*]").

62. *Id.* at 368.

63. *See id.* at 373-74.

64. *Id.* at 373; *see also id.* at 374 (finding that the Sixth and Fourteenth Amendments require that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"). The holding in *Scott* was reaffirmed in 1994 in *Nichols v. United States*, 511 U.S. 738 (1994), in which the Court held that a prior uncounseled conviction valid under *Scott* can be used to enhance the sentence in a subsequent conviction.

Recently, the Supreme Court granted certiorari to review an Alabama Supreme Court case that held that the right to appointed counsel is triggered where a suspended term of incarceration is imposed conditioned on probation and other terms. *See Ex parte* Shelton, No. 1990031, 2000 WL 1603806, at *5 (Ala. May 19, 2000) (holding that "a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel"), *cert. granted*, 121 S.Ct. 1955 (May 14, 2001) (No. 00-1214). As of November 19, 2001, oral argument had

The right to appointed counsel, moreover, extends beyond the trial phase of the criminal case.[65] Such non-trial phases covered by the right, known as "critical stages," include preliminary hearings, court proceedings after formal charges have been filed, and certain pre-indictment procedures, such as line-ups.[66] A right to counsel also may exist after the trial.[67]

Extending the right to appointed counsel to non-trial phases furthers the Sixth Amendment's aim of ensuring just procedures and outcomes. Conversely, and as discussed more fully below, this aim has been undermined when it comes to selecting that counsel.[68] More specifically, although the Sixth Amendment has been interpreted to guarantee the right to court-appointed counsel, it has not been construed to guarantee the right to a specific lawyer. When counsel is appointed, "normally the accused will not be heard to object to the attorney assigned."[69] Indeed, "[c]ourts generally hold that the initial selection of counsel to represent an indigent is a matter resting within the almost absolute discretion of the trial court."[70] This means as well that an indigent

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not been scheduled. *See* U.S. SUPREME COURT, ARGUMENT CALENDARS (OCTOBER TERM 2001), http://www.supremecourtus.gov/oral_arguments/argument_calendars.html (last updated Nov. 19, 2001).

65. Under the Sixth Amendment, court-appointed counsel is also required for other non-trial phases of a criminal prosecution. *See* ANTIEAU & RICH, *supra* note 31, at 524-27 (reviewing Supreme Court cases stating that under the Sixth Amendment, court-appointed counsel is required during non-trial phases of a criminal prosecution). *See generally* RUDSTEIN ET AL., *supra* note 27, at 13-38 (listing some of the phases of the criminal case where the right to counsel has been found to be constitutionally required).

66. *See* RUDSTEIN ET AL., *supra* note 27, at 13-46 (stating that the determining factor is whether the phase of the case is a "critical stage" of the proceeding); *see also* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (stating that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [the accused]"); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (at preliminary hearing); United States v. Wade, 388 U.S. 218, 336-37 (1967) (at post-arrest lineup); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (after formal charges have been filed). *But see* 2 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 8-11 (3d ed. 1996) (stating that a right to counsel has generally been found not to exist at the evidence-gathering stage).

67. *See, e.g.*, Mempha v. Rhay, 389 U.S. 128, 137 (1967) (at sentencing); Douglas v. California, 372 U.S. 353 (1963) (at the first appeal as of right). *But see* Ross v. Moffitt, 417 U.S. 600, 617-19 (1974) (finding no constitutional right to appointed counsel to pursue discretionary appeals).

68. *See infra* Part IV.C.

69. COOK, *supra* note 67, at 8-55.

70. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 549-50 (2d ed. 1999); *see also* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 102-03 (1993) ("[V]irtually every American court considering the issue has held that refusal to

defendant does not have the right to replace his appointed lawyer with other appointed counsel of his choice.[71] Conversely, subject to few limitations,[72] a defendant with money can hire whomever he wants as his lawyer.[73]

Despite the absence of input from the defendant regarding the choice of appointed counsel, a defendant does have the constitutional right to waive counsel altogether and represent himself.[74] To do so, the defendant must be competent, fully aware of the right being waived, and informed of the "dangers and disadvantages" of waiver.[75] Thus, the waiver must be knowing and intelligent, a determination the trial court must make based on the particular facts and circumstances of the case.[76]

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accept the indigent's choice of counsel is permissible and constitutional . . . ."). For the reasons for allowing the trial judge to appoint counsel without input from the defendant, see 3 LAFAVE ET AL., *supra*, at 550-51.

71. *See* 3 LAFAVE ET AL., *supra* note 70, at 555 (stating that an accused "has no right to replace one appointed counsel with another even if that can be done without causing any delay in the proceedings").

72. For example, a defendant cannot be represented by a disbarred lawyer, or one who is not licensed to practice in the jurisdiction in which representation is sought, or by one who has a conflict of interest. *See generally* Holly, *supra* note 2, at 190-98 (discussing some of the reasons a court might prohibit a retained lawyer from handling a defendant's case).

73. *See* Powell v. Alabama, 287 U.S. 45, 53 (1932) (noting that a defendant who hires counsel should have "a fair opportunity to secure counsel of his own choice"); *see also* 3 LAFAVE ET AL., *supra* note 70, at 557 ("Where defendant has a Sixth Amendment or due process right to the assistance of counsel, that constitutional guarantee encompasses the 'right to retained counsel of his choosing' as an aspect of his 'right to spend his own money to obtain the advice and assistance . . . of counsel.'"(citation omitted)); COOK, *supra* note 67, at 8-46 ("The right to counsel includes the right of the accused to select counsel subject to certain limitations.").

74. *See* Faretta v. California, 422 U.S. 806, 807 (1975) (holding that an accused has a constitutional right to represent himself at trial). The right to self-representation may also be protected by statute. *See, e.g.*, 28 U.S.C. § 1654 (1994) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."). *But cf.* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 154 (2000) (finding no constitutional right to self-representation on appeal).

75. COOK, *supra* note 67, at 8-37 to 8-38 ("For the waiver to be effective, the prosecution must show that the accused was competent to make a waiver and that the accused was fully aware of the right being waived."); *Faretta*, 422 U.S. at 835 (holding that before waiving counsel, the defendant must be informed of "the dangers and disadvantages of self-representation"); *see also* RUDSTEIN ET AL., *supra* note 27, at 13-53 to 13-72 (describing the general principles that apply to waivers of counsel); 3 LAFAVE ET AL., *supra* note 70, at 574-81 (explaining in detail the requisite warnings and judicial inquiry associated with counsel waivers).

76. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (stating that the waiver of counsel must be intelligent and intentional and that the court should consider the totality of the circumstances in considering a waiver request); *Faretta*, 422 U.S. at 835 (waiver must be knowing and intelligent); *see also* RUDSTEIN ET AL., *supra* note 27, at 13-53, 55 (noting that waiver must be competent and determined on a case-by-case basis); COOK, *supra* note 67, at 8-37 to 8-41 (discussing the requirements of

C. Making the Right Effective

Consistent with the goal of achieving justice, the Sixth Amendment right to counsel has been interpreted to include the right to "effective" assistance of counsel.[77] For many years, courts believed that the constitutional standard for effective assistance differed depending on whether counsel was retained or appointed.[78] The Supreme Court laid that issue to rest in 1980 when it ruled in *Cuyler v. Sullivan*[79] that there is "no basis for drawing a distinction between retained and appointed counsel."[80] Four years later in *Strickland v. Washington*,[81] the Court, for the first time, provided a thorough analysis of what it means to be "ineffective."[82]

According to *Strickland*, establishing ineffectiveness requires proving that counsel's performance was deficient and that the defense was prejudiced as a result.[83] To establish prejudice, the defendant must show that there is a reasonable probability that the result in the case would have been different but for counsel's

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an effective waiver and citing relevant cases); 3 LAFAVE ET AL., *supra* note 70, at 538-39, 574-81 (discussing waiver of the Sixth Amendment right to counsel).

77. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

78. *See* COOK, *supra* note 67, at 8-64 to 8-65 ("For many years, lower courts had disagreed on whether the same constitutional standard for effective assistance of counsel applied when counsel was appointed as when counsel was retained .... [Indeed, some believed that] the burden of proof resting with the accused would be greater in [cases where counsel had been retained].").

79. 446 U.S. 335 (1980).

80. *Id.* at 344-45 ("Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."); *see also* COOK, *supra* note 67, at 8-65 (stating that the controversy regarding whether the effectiveness standard was different for retained versus appointed attorneys was resolved in *Cuyler v. Sullivan*).

81. 466 U.S. 668 (1984).

82. *Id.* at 683 (noting that the case "presents a type of Sixth Amendment claim that this Court has not previously considered in any generality"); *see also* 3 LAFAVE ET AL., *supra* note 70, at 621 (observing that prior to *Strickland*, the Supreme Court "had not sought to articulate a comprehensive conception of ineffective assistance of counsel," and stating that *Strickland* focused on the Sixth Amendment, but that the ineffectiveness standard articulated therein has "apparent applicability as well to those stages of the process in which due process or equal protection establish a constitutional right to counsel").

83. *Strickland*, 466 U.S. at 687 ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components. First, the defendant must show that counsel's performance was deficient .... Second, the defendant must show that the deficient performance prejudiced the defense.").

deficient performance.[84] A reasonable probability "is a probability sufficient to undermine confidence in the outcome."[85]

In delineating a performance standard to which all attorneys must adhere, *Strickland* sought to maintain an adversarial system that was just: one that ensured fairness for the accused and reliable results for society at large. In the Court's own words:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[86]

The standard *Strickland* established, however, is very deferential to counsel's performance.[87] Indeed, as the Court made clear in that case and in another case decided the same day, there is a presumption that counsel's performance is effective.[88] This deference undercuts the pursuit of justice, because it means that, for all intents and purposes, attorney decisions regarding trial strategy and tactics are largely immune from attack from a defendant claiming ineffectiveness.[89] Such deference, in Justice

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84. *See id.* at 694 (stating the test for prejudice as: "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). With regard to the burden of proof, see *United States v. Cronic*, 466 U.S. 648, 658 (1984) (stating that the burden of proving a constitutional violation of the right to effective assistance of counsel rests with the defendant).

85. *Strickland*, 466 U.S. at 694.

86. *Id.* at 685; *see also id.* at 684 ("[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."); *id.* at 686 (stating that producing a "just result" is the purpose of the constitutional requirement of effective assistance of counsel).

87. *Id.* at 689. ("Judicial scrutiny of counsel's performance must be highly deferential.").

88. *See id.* at 689 (noting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"); *Cronic*, 466 U.S. at 658 (stating that "we presume that the lawyer is competent to provide the guiding hand that the defendant needs").

89. *See* COOK, *supra* note 67, at 8-92 ("Tactical and strategic decisions which might have been handled differently by many or even most attorneys will not establish incompetence."); *cf.* 3 LAFAVE ET AL., *supra* note 70, at 717-18. Professor Wayne LaFave observes, however, that:

> [A] decision apparently based on a tactical judgment is not therefore rendered immune from an incompetency challenge . . . . Speaking to the interplay between an attorney's duty to investigate and the making of strategic decisions, the *Strickland* Court did note that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' This [standard] obviously requires great deference for strategic choices, but it comes with the important prerequisite of a 'complete investigation.'

Id.

Marshall's words, "covertly . . . legitim[izes] convictions and sentences obtained on the basis of incompetent conduct by defense counsel."[90]

Also problematic for the pursuit of justice is *Strickland*'s requirement that prejudice be shown before a defendant who is the victim of incompetent counsel can obtain relief.[91] So long as counsel's errors do not have a "reasonable probability" of casting "reasonable doubt" on the defendant's guilt, the Court said, those errors can be ignored.[92] Due process, however, in this instance, should not depend on proving injury. The absence of fair procedures itself should be sufficient to establish a constitutional violation.[93]

Finally, the Supreme Court has also made clear that the right to effective counsel does not mean that a defendant has the right to "meaningful" counsel. In *Morris v. Slappy*,[94] decided one year before *Strickland*, the Court reviewed a ruling by the Ninth Circuit Court of Appeals that the Sixth Amendment right to counsel "include[s] the right to a meaningful attorney-client relationship."[95] The Court summarily rejected any such notion, saying that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel."[96]

As explained below, the language used in *Slappy* conveys the message that the Court does not really care about the nature of the relationship between the appointed lawyer and the poor client.[97] Indigent clients care deeply about that relationship because, most significantly, they have little or no say in who their lawyer will be. In employing uncaring language and by sanctioning procedures that the indigent sees as fundamentally unfair, the Court in *Slappy*, like some aspects of the *Strickland* opinion, undermined the Sixth Amendment's call for justice.[98]

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90. *Strickland*, 466 U.S. at 713 (Marshall, J., dissenting).

91. *See supra* notes 83-85 and accompanying text.

92. *Strickland*, 466 U.S. at 695 (1984) ("[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

93. *See id.* at 710-12 (Marshall, J., dissenting) (arguing that *Strickland*'s prejudice standard is erroneous and that the right to effective counsel guarantees "fundamentally fair procedures" irrespective of the outcome in the case).

94. 461 U.S. 1 (1983).

95. *Id.* at 10-11.

96. *Id.* at 13-14.

97. *See infra* Part IV.B.

98. *See Strickland*, 466 U.S. at 668; *infra* Part IV.B.

II. An Indigent Black Defendant's Concerns About Having a White Court-Appointed Lawyer

As can be seen from the foregoing discussion, while the Supreme Court's right to counsel cases acknowledge the importance of ensuring justice, some of those cases do a better job than others in furthering that goal. With that goal in mind, this Article now turns to the concerns an indigent Black defendant may have in being appointed a white lawyer.[99] For ease of reference, these concerns have been incorporated into three broad arguments: the Racism Argument, the Effectiveness Argument, and the Expediency Argument. A Black defendant may rely on one or a combination of these arguments in justifying his concerns over having a white lawyer.[100] Each of these three arguments will be discussed in turn.

A. The Racism Argument

The Racism Argument is predicated on a profound distrust of the entire criminal justice system. It posits that racism infects most, if not all, of the nation's criminal laws and the actors who create, enforce, and interpret them. A defendant making this argument believes either that his white appointed lawyer is racist or that the criminal justice system, of which the appointed lawyer is a part, is racist. In the defendant's mind, therefore, the lawyer cannot be trusted. The result is that the defendant may refuse to meaningfully communicate with the lawyer or rely on the latter's judgment and advice. "I don't want to participate in this sham representation," the defendant may say, "since this racist system is already rigged against me, and you (the lawyer), whether racist or not, are part of that system."

The concerns expressed in the Racism Argument may constitute a fundamental impediment to establishing an effective attorney-client relationship. These concerns may be based on

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99. The focus here is on race-based concerns. Moreover, the purpose of this section is not to examine whether the defendant's concerns are valid, but merely to elaborate on what some of those concerns may be. This purpose is important to remember, considering that some of the defendant's arguments may be racist or predicated upon inaccurate racial stereotypes. Some of those stereotypes, for example, that a white lawyer cannot be as effective as a Black lawyer, can also work in the converse.

100. There may, of course, be other race-based concerns and arguments that a Black defendant may have. This Article focuses only on those that the author has been able to identify. These arguments also assume that the appointed lawyer is competent to handle the defendant's case according to the standard established in *Strickland*. *See generally Strickland*, 466 U.S. at 668 (1984).

overt acts of racial discrimination, by the police for example, inflicted upon or witnessed by the defendant personally. Or, they may be based on racist acts that have been brought to the accused's attention by family, friends, or the media. Such overt acts, even just one, can produce a profound skepticism in the fairness of "the system." "Justice is for white people," he may believe, "not for a Black defendant like me."[101]

The defendant's concerns also may be based on the existence of a form of racism that is less overt, more subtle, but more prevalent.[102] This racism is a product of what Professor Charles Lawrence terms "unconscious racial motivation."[103] Racism, according to Professor Lawrence, is embedded in our culture and is part of a shared "common historical and cultural heritage."[104] This shared cultural experience undergirds our thoughts and actions, and influences our feelings about race.[105] Many of these feelings cast people of color in a negative light, assume that whites are somehow superior, or attach irrational significance to the color of a person's skin.[106] According to Lawrence, most people are unaware

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101. One USA Today/CNN/Gallup poll conducted in 1995 found that "sixty-six percent of blacks believe that the criminal justice system is racist and only thirty-two percent believe it is not racist." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 699 (1995); *see also id.* at 699 n.115 (stating the results of another poll that showed "that 54% of blacks thought [the] criminal justice system was biased against blacks"); *cf.* Alexandra Walker, *Conversation in Black and White*, WASH. POST, Sept. 2, 2001, at B8 (revealing that "[i]n June [2001], a Gallup Poll reported that 66 percent of black Americans believe race relations always will be a problem in this country," and that a "survey, conducted by Harvard University, the Henry J. Kaiser Family Foundation and The Post, found that eight in 10 blacks say they occasionally experience incidences of racism").

102. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987) ("Increasingly, as our culture has rejected racism as immoral and unproductive . . . hidden [racial] prejudice has become the more prevalent form of racism."). When he wrote that article, Lawrence was Professor of Law at Stanford University. *Id.* at 317 n.*. Currently, he is Professor of Law at the Georgetown University Law Center. *See* GEORGETOWN UNIVERSITY LAW CENTER, http://www.law.georgetown.edu/index.html (last visited Nov. 30, 2001).

103. Lawrence, *supra* note 102, at 322.

104. *Id.*

105. *See id.* at 330 ("[R]acism in America . . . is part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.").

106. *See id.* at 322 ("Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."). Lawrence adds:

> For many whites, the explanation [for Black inequality] lies in the inherent inferiority of blacks. Few will express this belief openly. It is no longer consistent with American ideology to speak in terms of inherent

of the influence these unconscious racist feelings have in their everyday actions with minority groups.[107] "We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions," Lawrence explains, "[because] [w]hen an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness."[108]

Thus, a white lawyer may not be conscious of the racism that hangs like a cloud over the defendant's case. A Black defendant making the Racism Argument, however, will be aware of this racism or at least suspect its existence. Without studies or statistics, and in the face of denials by "the system," this defendant, in the words of Professor Paul Butler, "knows what he knows":[109] that his race has been, and will be, an impediment to retaining his liberty.[110]

In sum, the Racism Argument is rooted in concerns Professor Butler labels the Racial Liberal Critique and the Racial Radical Critique.

> American criminal justice is racist because it is controlled primarily by white people, who are unable to escape the culture's dominant message of white supremacy, and who are therefore inevitably, even if unintentionally, prejudiced. These white actors include legislators, police, prosecutors, judges, and jurors. They exercise their discretion to make and enforce the criminal law in a discriminatory fashion.

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racial traits. But the myth of racial inferiority remains embedded in the fabric of our culture.

Id. at 375.

107. *Id.* at 322 ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role . . . . To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.").

108. *Id.* at 323.

109. In his article, *The Evil of American Criminal Justice: A Reply*, George Washington University Law Professor Paul Butler describes the concept of "knowing what you know" to establish the existence of some fact, like racism, that is not readily provable. *See* Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 143-44 (1996). "Knowing what you know," writes Butler, "refers to those beliefs, often emotional, that are at the core of one's being and that precede or subvert education and other formal ways of knowing." *Id.* at 143.

110. *See id.* at 143-44 ("I think that knowing what you know informs the perspective of many African Americans when they consider the ugly statistic that one out of three young black men [as opposed to one in fourteen white men] are under criminal supervision . . . ."); *id.* at 145 n.8 (noting the statistic that "[i]n the United States, there are more young black men in prison than in college . . . [and] there are more African-American men, in absolute numbers, in prison than whites, even though white men outnumber African-American men more than five to one").

> Sometimes the discrimination is overt . . . and sometimes it is unintentional . . . . [Further, the] criminal law is racist because, like other American law, it is an instrument of white supremacy. Law is made by white elites to protect their interests and, especially, to preserve the economic status quo, which benefits those elites at the expense of blacks, among others. Due to discrimination and segregation, the majority of African Americans receive few meaningful educational and employment opportunities and, accordingly, are unable to succeed, at least in the terms of the capitalist ideal.[111]

Finally, the indigent defendant's poverty may exacerbate his feelings of alienation and powerlessness. Not only does a poor defendant not have any say in who his appointed lawyer will be, but, like the defendant in *Morris v. Slappy*,[112] whose counsel announced that he was ready for trial over his client's objection, he also may be thwarted from controlling the conduct of his own defense.[113] As some commentators have observed:

> Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is "processing" and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court?" "No. I had a public defender."[114]

B. The Effectiveness Argument

This argument is more practical than the Racism Argument. It focuses not on the prevalence of racism, but on the effectiveness of counsel. It asserts that a white court-appointed lawyer cannot be as effective on behalf of a Black defendant as an African-American lawyer.[115]

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111. Butler, *supra* note 101, at 692-93. For commonly cited examples of racism in the criminal justice system, see *id.* at 695-697.

112. 461 U.S. 1 (1983).

113. In contrast, a retained lawyer who disobeys his client's wishes can be summarily fired and replaced. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16 cmts. 4 & 5 (2001) ("A client has a right to discharge a [retained] lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services . . . . Whether a client can discharge appointed counsel may depend on applicable law . . . .").

114. Schulhofer & Friedman, *supra* note 70, at 86.

115. The assumption in this section is that the defendant's objective is to "win" his case, i.e., obtain a dismissal of the charge(s), an acquittal of same, or an acceptable sentence. *See id.* at 77 ("Criminal defendants, we may assume, are ordinarily interested in winning acquittal, or if that fails, the lowest possible sentence."). This Article does not address the concerns of a criminal defendant with a different objective, e.g., a political activist who orchestrates his arrest and

The basis for this argument is not that the appointed lawyer or the system is racist per se, but that the lawyer, being a member of the majority, cannot or will not fully understand or appreciate what it means to be Black in America. Consequently, the lawyer cannot or will not accept or truly understand the prevalence of racism in the criminal justice system; the interplay between race and poverty; and the effects racism plays in the upbringing of African-American youth in this country, including how and why race contributed to the defendant facing these particular criminal charges. Given this lack of acceptance and understanding, the argument goes, a white lawyer may "[fail] to take racial differences into account [and thereby miss] a large part of the client's story and problem."[116]

The reason a defendant of color may have this concern is the unique but shared effect race has on his life. As Professor David Wilkins has written:

> Race exerts a major influence over every significant aspect of the lives of black Americans. It literally colors the way that we are perceived by the world at the same time that it shapes our self-perceptions. As a result, blacks are inextricably bound together, both in the sense that the actions of individual blacks impact the opportunities of other blacks, and in the manner in which the opportunities available to all blacks are tied to the fate of the black community as a whole. Consequently, race is likely to be an important aspect of a black American's identity, if only to the extent that blacks seek to protect black identity from negative attacks by others. The essential point is that in today's America, *race matters* in ways that inevitably structure identity.[117]

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wants a trial to showcase his cause, or a defendant who wants to hire an African-American lawyer to support the advancement of Black lawyers in the legal profession.

116. Acevedo et al., *supra* note 5, at 15 ("[W]hites may be unaware and unfamiliar with the lives of their clients of color to such an extent that failure to take racial differences into account may mean missing a large part of the client's story and problem.").

117. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1532-33 (1998). When his article appeared, Wilkins was Kirkland and Ellis Professor of Law and Director of the Program on the Legal Profession at Harvard Law School. *Id.* at 1502 n.*. One observer has noted that:

> [R]ace 'transcends place, creating a community that has little to do with geography but everything to do with the larger political and cultural community of color.' This larger community, 'generally recognizes the reality of racism, the pleasure of a common culture, and the need to act together to effectuate common interests and to remedy common problems that repeat themselves across geographical divides.'

Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1351 (1998) (quoting Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post*-Shaw

Thus, a Black indigent defendant may feel more comfortable with a lawyer of his own race. He may believe that a Black lawyer will be less critical and more sensitive, accepting, knowledgeable, and empathetic than a white attorney.[118] In sum, he may make assumptions about the lawyer's ability based on the latter's race.

A recent written survey of lawyers in the Civil Division of the New York City Legal Aid Society illustrates this point.[119] When asked, "Do you believe your clients take the race of their attorney into consideration?" a majority of the white female lawyers and lawyers of color (male and female) answered in the affirmative.[120] One Black attorney stated that "clients often make assumptions about the ability of their lawyer to identify with their concerns based on whether or not their attorney is of the same race."[121] A Latino lawyer wrote, "I sense a certain degree of apprehension and confusion when the attorney of record lacks the necessary sensitivity with minority clients."[122] As the authors of this survey concluded:

> Those who share a common identity group factor such as race, should feel better able to communicate their needs and their feelings to others of the same race. Their shared identity would facilitate understanding and allow for more productive counseling. What little scholarship there is in this area seems to support this theory.[123]

Based at least in part on the assumption that race affects ability, an accused of color making the Effectiveness Argument

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Era, 49 VAND. L. REV. 227, 234-35 (1996)).

118. *See* Acevedo et al., *supra* note 5, at 56 ("Clearly, a Black Latina attorney who was raised in poverty and experienced discrimination firsthand will view racism differently than a white male raised in affluent suburbs who has been taught to disregard the 'invisible package of unearned assets.'" (citation omitted)).

119. The survey sent out ninety-seven anonymous questionnaires to staff and managing attorneys in the Civil Division of the Legal Aid Society of the City of New York. *See id.* at 25. "The Civil Division is the largest provider of civil legal services to the poor in New York City." *Id.* at 28. Whereas some ninety percent of the Division's clients are people of color, sixty-three percent of the attorneys on staff are white. *Id.* at 29. The purpose of the survey was to test the Neutrality and Race Consciousness models of lawyering. *Id.* at 3-4.

120. *Id.* at 33-34. Interestingly, a majority of white male attorneys answered "no" to this question, "indicating that they do not believe that their clients take the race of their attorney into account." *Id.* at 33.

121. *Id.* at 34.

122. *Id.*; *see also id.* at 37-38 (noting in the same survey that "the majority (59%) of all people of color believed that their race had a positive effect, indicating that they felt that the race-based commonality they have with their clients facilitates representation of those clients" and that, in contrast, "as a group, [71% of] white attorneys believe that race does not play a part in the attorney-client relationship").

123. *Id.* at 18.

believes that a white lawyer will be less effective than a Black attorney.[124] Four areas in particular may be of concern. First, the accused may be concerned about the lawyer's effectiveness in the courtroom. He may believe that a white lawyer will not relate as well to the judge, jury, or prosecutor, or that they will not relate as well to him. This concern may be general or it may relate to a specific issue in the defendant's case. For instance, the accused may want his race or racism to be a central part of his defense. He may want to "play the race card," and he may feel that it will be done more effectively by a lawyer of color.[125] Examples of such a defense include arguing to the fact-finder that it should disregard some key piece of evidence because it is tainted by racism, that it should return a not guilty verdict because the entire prosecution is racist, or that it should nullify the verdict because of the defendant's race.[126]

Second, the defendant may be concerned with the lawyer's effectiveness in negotiations with the prosecutor. The accused may feel that a white lawyer cannot negotiate for a plea bargain as effectively because, as noted, he does not fully understand a Black defendant's situation, background, or perspective. In this sense, an African-American lawyer may be able to negotiate with more credibility and authority than his white counterpart. This is particularly true, the defendant may believe, in cases where race or racism is an issue in the case, which it frequently is. Indeed, a Black accused may legitimately believe that race is always an issue in the case, most notably in sentencing where sentencing guidelines disparately impact Black offenders. Likewise, arguments to the prosecutor that a particular police officer targeted the defendant because of his race or that some key piece

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124. The *defendant*'s race also may be a factor in the lawyer's effectiveness. Many lawyers, Black and white, believe that people of color are not treated as fairly by the courts as whites. *See, e.g., id.* at 48 (reporting that a majority of the attorneys surveyed (Black and white) in the Civil Division of New York City's Legal Aid Society believe that their clients of color are treated less favorably than their white clients).

125. This argument assumes that there is a legitimate basis for the "race card" defense in the facts of the case.

126. *See, e.g.*, Butler, *supra* note 101, at 677 (arguing that African-American jurors should take race into account in deciding whether to nullify a verdict); *see also id.* at 705 (stating that "[a]ny juror legally may vote for nullification in any case, but, certainly, jurors should not do so without some principled basis"); *cf.* John W. Bissell, *Comments On Jury Nullification*, 7 CORNELL J.L. & PUB. POL'Y 51, 55-56 (1997) (stating that nullification is a violation of the juror's sworn oath to return a verdict consistent with the evidence and the law, and quoting one federal judge as saying, "[jury nullified] verdicts are lawless, a denial of due process and constitut[e] an exercise of erroneously seized power" (citation omitted)).

of evidence should be discredited because of racism may fare better coming from an African American. Finally, the prosecutor himself may be a person of color, and the defendant may believe that having a lawyer of the same race will result in better rapport between the two.

A third area in which effectiveness may be a concern is investigation and trial preparation. A defendant making the Effectiveness Argument could claim that a Black lawyer can get greater and better access to some African-American witnesses or be more likely to succeed in obtaining relevant information from them. He may feel, for instance, that some witnesses will be more likely to cooperate with a Black lawyer than a white one. Access to predominately Black neighborhoods may also be viewed as easier for a Black lawyer, who may be welcomed as a "brother helping a brother."[127]

Finally, our hypothetical defendant could argue that a Black lawyer will be more effective at gaining the trust and confidence of the accused's family and friends. These groups may be more apt to trust such a lawyer, who is "one of them," than a white attorney who could be viewed as being aligned with the very system that is responsible for prosecuting the defendant. The appointed lawyer's effectiveness within this milieu may be of paramount importance to the accused, as the accused may be relying on advice from his family and friends during the progression of the case.

Regardless of whether the defendant is concerned with courtroom effectiveness or his counsel's effectiveness outside the courtroom, a defendant making the Effectiveness Argument believes that race matters in his counsel's performance. Perhaps this is why, as one attorney in the aforementioned Legal Aid survey noted, "there are . . . clients who specifically request a 'black attorney.'"[128]

C. The Expediency Argument

Like the preceding argument, the Expediency Argument focuses on the practical. It starts from the same premise as the Effectiveness Argument: that a white attorney, being an "outsider," does not fully understand or appreciate what it means to be Black in America. Because of this deficiency, both of these arguments would say, the white lawyer is handicapped,

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127. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 284 (1981) (defining "brother," among other definitions, as "a person regarded as sharing a common national or racial origin with the user of the word").

128. Acevedo et al., *supra* note 5, at 35 n.142.

detrimentally affecting his performance on behalf of his client.

But, whereas the Effectiveness Argument claims that the white lawyer cannot be as effective as his Black counterpart, the Expediency Argument says that he can. In other words, the white lawyer's deficiency in knowledge, understanding, and sensitivity can be rectified. He can be re-educated and re-indoctrinated to think as a Black lawyer, at least to the extent that he can be as effective as one. Accomplishing these tasks, however, would require substantial time and effort, commodities that the indigent defendant has in short supply. Thus, the bottom line of the Expediency Argument is the same as the Racism and Effectiveness Arguments: a Black lawyer is preferable to a white one.

The Expediency Argument represents a fallback position of sorts for an African-American client defending his desire for a Black lawyer. "I concede that you, the white lawyer, are not racist, and can be as effective as a Black attorney," the client would say, "but, you must concede that your performance on my behalf may not be as effective as your Black counterpart given the effects race has played and will play on my case (see Effectiveness Argument)." "To rectify this problem," the client continues, "I, at a minimum, will have to spend many hours educating you, and sharing with you my experiences and insights about race. Neither you nor I have the time or willingness to undertake this enormous task, so I tell you again, I want a Black lawyer to represent me."

In the final analysis, the Expediency Argument takes a pessimistic view of the white appointed attorney-Black indigent client relationship. It acknowledges that there is a problem with that relationship, but that the problem is beyond repair given the practicalities of the "real world." Much of this pessimism is well-founded, being based on the "real world" indigent defense phenomena of inadequate defense funding and resources, appalling attorney-to-client ratios, and insensitive judges who are often more interested in moving cases along than doing justice.[129]

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129. One example of this insensitivity can be found in the state and federal criminal courts in Alexandria, Virginia. Both of these courts utilize what is euphemistically called "The Rocket Docket," under which criminal cases, even very serious ones, must go to trial or plead out within a certain accelerated time period, often sixty days, after indictment. For overworked public defenders, this rush to trial puts an enormous strain on the already stressed attorney-client relationship. This kind of scheduling is particularly egregious when the defendant's case enters the system though an indictment rather than an arrest warrant. Such cases generally have already been "worked up" and investigated by the government prior to the indictment so that the prosecutor is, for all practical purposes, ready for trial before the court-appointed lawyer has even received the case. Of course,

Some of this pessimism is also grounded in laziness and inertia. After all, creating a better racial relationship with the lawyer requires hard, sometimes painful work. Overcoming that inertia is difficult, to say the least, especially given the deservedly fatalistic approach to which most Black indigent defendants are inclined. In this sense, then, the Expediency Argument is similar to the Racism Argument, as both see "the system" as the source of the problem.

III. The White Court-Appointed Lawyer's Possible Responses

Like the defendant's arguments, the white lawyer's responses will be dictated by his perspective, a perspective that may view racism differently given his upbringing, education, and enjoyment of the majority's "'invisible package of unearned assets.'"[130] The key is for the lawyer to see all perspectives, to step outside of himself, as it were, so that he can bring to the table a more informed view. Of course, some of the following responses will do that better than others, and some not at all.

Some of the responses also contain elements of what Professor Alan Freeman has described in the context of racial discrimination law as the Perpetrator Perspective and the Victim Perspective.[131] As Professor Freeman sees it, anti-discrimination law can take either of these two perspectives, the latter perspective being the more desirable of the two.[132]

The Perpetrator Perspective views the underlying cause of racial discrimination not as a systemic problem, but as the

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defendants with means are not as prejudiced by such scheduling, as they can hire their retained lawyers well before arrest/indictment.

130. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondence Through Work in Women's Studies*, *in* CRITICAL WHITE STUDIES, LOOKING BEHIND THE MIRROR 291 (Richard Delgado & Jean Stefancic eds., 1997). McIntosh writes:

> I have come to see white privilege as an invisible package of unearned assets which I can count on cashing in each day, but about which I was 'meant' to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.

Id.; *see also id.* at 293-94 (listing forty-six privileges that whites enjoy merely because of their skin color, including Caucasians' assurance "that if [they] need legal or medical help, [their] race will not work against [them]").

131. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049 (1978). When his article appeared, Freeman was Professor of Law at the University of Minnesota Law School. *Id.*

132. *See id.* at 1052-57.

individual action or actions of a perpetrator on a victim.[133] Its focus is to stop the particular perpetrator, not to address the underlying conditions that cause the discrimination.[134] Thus, for instance, the solution under the Perpetrator Perspective for an act of discrimination by a waiter in a restaurant would be to fire the waiter rather than to address the hiring and training practices of the waiters restaurant-wide.

The Victim Perspective, on the other hand, views discrimination as more than just the individual acts of some bigots. This perspective says that the root causes of discrimination lie deeper, in the structure of our laws and in the societal conditions that treat African Americans as "member[s] of the perpetual underclass."[135] Under this perspective, racial discrimination will persist until conditions like unemployment, inferior schools, and inadequate housing are eliminated.[136]

Freeman argues that anti-discrimination law is "hopelessly embedded in the perpetrator perspective."[137] As will be seen, that perspective also permeates some of the responses a white appointed lawyer may have to our hypothetical African-American client. And to the extent that those responses are infused with the Perpetrator Perspective, the cause of justice—a key principle behind the Sixth Amendment—is undermined.

Generally, the lawyer responding to a Black defendant's concerns can take two broad approaches: he can dispute the defendant's concerns, or he can agree with them in whole or part. The responses in these two approaches can be categorized into

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133. *See id.* at 1053.

134. *See id.* Professor Freeman writes:

> The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.

Id.

135. *Id.* at 1052-53. Freeman further states:

> From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.

Id.

136. *See id.* at 1053 ("The victim . . . conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated.").

137. *Id.*

three groups: the Denial or the No Racism Response, the Irrelevance Response, and the Relevance Response. The lawyer may rely on one of these individually or in combination in addressing the defendant's concerns over having a white lawyer.[138] Each of these three responses and their variants will now be discussed in turn.[139]

A. Denial or the No Racism Response

The thrust of this response is to deny that racism exists or is still a problem. It attempts to answer the charge made in the Racism Argument that either the white court-appointed lawyer is racist or the system, of which he is a part, is racist. The Denial or No Racism Response asserts simply that the defendant is wrong; that is, it is inaccurate to say that the white lawyer and/or the system as a whole are racist. "You are mistaken," the lawyer may say to his African-American client, "racism is no longer a problem, and you should therefore trust me/the system."

1. The "not us" variant

One variant of the No Racism Response is to deny the continued existence of racism in both the individual lawyer and the system as a whole. "Racism was at one time a serious problem," the lawyer might say, "but it is now a thing of the past, and neither I nor the police, prosecutors, judges, or jurors are racists."

This variant attempts to address the defendant's charge of racism in one broad and swift stroke by grouping together the individual lawyer and "the system." Its purpose is to get past the charge, to dismiss it, so that the lawyer can move on to other

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138. Like the indigent Black defendant's concerns, the white appointed lawyer's responses may be based on racist beliefs or inaccurate racial stereotypes. Again, this Article does not examine the validity of these responses, but merely elaborates on what some of the responses may be. There may, of course, be other responses that a white lawyer may have. This Article focuses only on those which the author has been able to identify. Moreover, as before, these responses assume that the appointed lawyer is competent to handle the defendant's case according to the standard established in *Strickland*. *See supra* notes 82-85 and accompanying text. These responses also assume that the lawyer shares the same objective as the defendant, i.e., to "win" the case as defined by the defendant.

139. One other approach, not discussed in this Article, is for the lawyer purposely to divert the defendant's attention away from racial concerns by discussing other concerns, for example, the defendant's poverty, that also could have a tremendous impact on the lawyer's effectiveness. Again, the focus of this Article is on race-based concerns and the responses thereto, and not on other concerns.

issues that he feels are more germane to the defendant's case. A lawyer employing this approach refuses to engage substantively the defendant on the issue of race. It is an approach that is condescending, not to say naïve, for in its summary dismissal, it does not respect the defendant's feelings or intellect.

As such, the "not us" variant falls clearly within Freeman's Perpetrator Perspective. As with that perspective, this variant "'declare[s] that the war is over,'" that "the problem of racial discrimination . . . has been solved."[140] "But for an occasional aberrational practice," the lawyer might say parroting Freeman, "future society [in which racial discrimination no longer exists] is already here and functioning."[141] Put another way, the lawyer might simply say, "don't worry, be happy."

2. The "not me" variant

Another variant of the Denial Response is to concede that the system may be racist, but assert that the particular appointed lawyer is not. Like the first variant, this falls within the Perpetrator Perspective because of its "no problem" approach. It attempts to separate the lawyer from the system, hoping that it will allay the defendant's concern that racism is everywhere. In the manner of the Perpetrator Perspective, the lawyer hopes to separate himself from "those blameworthy individuals who are violating the otherwise shared norm."[142] Thus, the white lawyer in this variant, like the Wizard of Oz, asks the accused to ignore what is behind the curtain.[143] "I am a good person," the lawyer would say, "and my intent is good and my motives pure, and that should be good enough for you."

By focusing the dialogue on his own good intentions, the lawyer in this variant echoes the views of what Butler calls, the "law enforcement enthusiasts."[144] Proponents of this view claim that "intent is the most appropriate barometer of . . . racism."[145]

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140. Freeman, *supra* note 131, at 1102 (citation omitted).

141. *Id.* at 1103 (arguing that post-1973 Supreme Court cases construing anti-discrimination laws rationalize "[t]hat but for an occasional aberrational practice, future society is already here and functioning").

142. *Id.* at 1054.

143. THE WIZARD OF OZ (MGM 1939) (In an attempt to discourage Dorothy and her companions from uncovering the illusion of his omnipotence, the Wizard demands in a thunderous voice, "Pay no attention to that man behind the curtain!").

144. Butler, *supra* note 101, at 697.

145. *Id.* at 697-98 ("According to . . . law enforcement enthusiasts, the criminal law may have a disproportionate impact on the black community, but this is not a moral or racial issue because the disproportionate impact is the law's effect, not its

That is, racism requires proof of discriminatory intent, and absent such proof, there is no problem to remedy.[146] This is so even if the effect of doing nothing is to perpetuate more racism.

By casting himself as an innocent person, moreover, the lawyer employs an approach sanctioned by no less than the U.S. Supreme Court. According to Lawrence, the Court in *Washington v. Davis*[147] held, inter alia, that a racially disproportionate impact is not enough to challenge the constitutionality of a facially neutral law.[148] Racially discriminatory purpose or intent is required, because otherwise, "innocent people [will] bear the costs of remedying a harm in which they played no part."[149] Similarly, a lawyer utilizing the "not me" variant of the Denial Response may claim that the Black defendant's rejection of his appointed lawyer is tantamount to punishing an "innocent" person (the lawyer) for the sins of the system.

As such, this variant asks the defendant to ignore the detrimental effects the racism of "the system" will have on his case, assuming that the defendant even believes his lawyer is not a racist per se. The variant also fails to account for Lawrence's "unconscious racism." If the defendant believes, as Lawrence does, that we are all motivated by unconscious racist feelings—that, in effect, "we are all racists"[150]—then it will bring the defendant no solace to hear his lawyer say, "I am not bad even if the system is." Such a response is akin to the Court's approach in *Davis* that, using Freeman's terminology, unless there is a "perpetrator," there is no problem to remedy.[151]

Finally, underlying both variants of the Denial Response is the belief that a defendant who makes the Racism Argument may himself be engaged in racist thinking. That is, that he may be judging the lawyer, without knowing anything about him, based merely on the color of his skin. A lawyer using this response will thus encourage the defendant to assume nothing and not to

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intent. For law enforcement enthusiasts, intent is the most appropriate barometer of governmental racism.").

146. *See* Freeman, *supra* note 131, at 1054 ("Central to the perpetrator perspective are the twin notions of 'fault' and 'causation' . . . .").

147. 426 U.S. 229 (1976).

148. *See* Lawrence, *supra* note 102, at 318 (stating that *Davis* established the doctrine that "plaintiffs challenging the constitutionality of a facially neutral law [must] prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration").

149. *Id.* at 320.

150. *Id.* at 322 ("To the extent that this cultural belief system has influenced all of us, we are all racists . . . .").

151. *See supra* notes 133-134 and accompanying text.

employ what may be inaccurate racial stereotypes. Rather, the lawyer may suggest, the defendant should judge each person on the basis of that person's character alone so as not to impede the development of a positive attorney-client relationship.

B. The Irrelevance Response

The Irrelevance Response focuses on the practical, and parts of it speak to all three of the defendant's arguments (the Racism, Effectiveness, and Expediency Arguments). The essence of the response is that the race of the lawyer does not matter at all, or at least not as much as the defendant believes. The racism vel non of the system (or its actors) is not the focus, as this approach claims that the lawyer should be "color-blind."[152] As such, he should not take the race of any of the system's participants, including his own, into account.[153]

There are two variants of this response. The first addresses the defendant's claim in the Effectiveness Argument that, in the context of the defendant's case, a white lawyer cannot be as effective as a lawyer who is African-American. The second attempts to answer all three of the defendant's arguments by focusing attention on the real-world practicalities of indigent defense.

1. "Ability matters, not race" variant

This variant accepts the truth of the defendant's belief that the white attorney cannot fully understand or appreciate what it means to be Black, but it disagrees that because of this handicap, the white lawyer cannot be as effective as (or more effective than) his Black counterpart. Under this view, effectiveness depends not on race, but on ability. That is, effective advocacy transcends race. Thus, the judge, jury, and prosecutor will be swayed by the facts and arguments, not by the racial identity of the lawyer. Likewise, witnesses and the defendant's confidants, including his family and friends, will respond favorably to a lawyer, regardless of race, who is committed to the defendant and genuinely and diligently working on his behalf.

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152. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . ."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

153. *See* Russell, *supra* note 11, at 785-86 (defining "'colorblind' lawyering" as "advocacy strategies premised upon the position that racism is or should be characterized as irrelevant to a particular context, even if it has been otherwise raised in the proceedings").

This variant further believes that trust is not a matter of race. Rather, trust is earned over time and comes not from the race of the lawyer, but from the hard work and results that the lawyer achieves on his client's behalf. "Judge me by my results," the white lawyer might say, "not by my skin color."

The "ability matters, not race" variant's reliance on color-blindness contains elements of Freeman's Perpetrator Perspective, as it serves to "legitimize the status quo."[154] A different model of lawyering, however, more precisely describes this variant. This model is the Neutrality Model.[155] It posits that, given his commitment to the "rule of law," a lawyer can and should provide his best representation irrespective of his or the client's race. A lawyer's capabilities, in other words, are not affected by his race, but rather are race-neutral.[156] Hence,

> "aspects of the self [s]uch as one's race, gender, religion, or ethnic background [are] irrelevant to defining one's capabilities as a lawyer." . . . Therefore . . . race not only *should not* be a factor in the attorney client relationship, but it absolutely *is not* a factor if law school has done its job.[157]

The reason that race is irrelevant under this model (i.e., that a lawyer should "bleach out"[158] any effects race has on his professionalism) is that otherwise, people would come to believe that justice is not uniform. The principle that justice is blind is premised on the belief that the laws will be applied impartially and that a lawyer's level of advocacy will not vary depending on the client's skin color. If justice did vary, this model says, "there would no longer be any reason to adhere to the law."[159]

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154. Freeman, *supra* note 131, at 1105 (noting that a problem with some of the Supreme Court's antidiscrimination jurisprudence is that it "legitimize[s] the status quo by immunizing the preexisting condition of black underrepresentation from statutory or constitutional scrutiny").

155. *See* Acevedo et al., *supra* note 5, at 3-12 (describing the Neutrality Model).

156. *See id.* at 3 (stating that under the Neutrality Model, "lawyers, because of extensive socialization and training in law school, apply their skills equally to all clients, regardless of the race, ethnicity, gender, or sexual orientation of the attorney or client." (citation omitted)).

157. *Id.* at 11 (quoting Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1579 (1993)).

158. *Id.* at 10 (quoting Professor Levinson as saying that the purpose of law school is to instill a new professional identity in place of the existing one and that in the process, law school "'bleach[es] out' . . . merely contingent aspects of the self").

159. *Id.* at 7.

> Without this commitment to neutrality, law would cease to be legitimate. If people believed that the sort of justice that you were accorded depended on personal identity factors, such as race, rather than the impartial application of neutral laws, there would no longer be any reason to adhere

Clients also need standardization, the Neutrality Model claims. As Professor Wilkins explains:

> From the client's perspective, this understanding of the lawyer's role [that the quality of lawyering does not depend on race] appears to offer vulnerable consumers the benefits of standardization. Clients need not ask whether a given lawyer does or does not subscribe to a particular professional norm. Nor is it important for the client to investigate the lawyer's background or personal beliefs, because these contingent features are, by definition, irrelevant to how the lawyer will perform her professional role. Given that many Americans find racial issues especially difficult and divisive, bleached out professionalism's promise to render racial questions irrelevant is likely to appear particularly welcome to clients who believe that focusing attention on race interferes with the development of supportive and effective professional relationships.[160]

Standardization is not just important for the clients, but also for the legal institution as a whole. Neutrality, or "bleached-out professionalism," ensures that lawyers will adhere to a standard set of professional norms, norms that are essential to holding attorneys accountable to a code of conduct.[161] Neutrality also helps ensure that the legal profession will remain a viable vehicle for societal advancement. Without bleached-out professionalism, the argument goes, minority lawyers might be treated differently, thus depriving them of the social benefits and prestige that ordinarily accompany a law degree.[162]

Thus, under the "ability matters, not race" variant of the Irrelevance Response, the white lawyer's pitch to his Black client is as follows: "I can and will present the best defense regardless of my race, including playing the 'race card' if that is in your best interest. My ability and professionalism will not be affected by my skin color; nor will my effectiveness on your behalf. My race, in other words, is irrelevant."

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to the law.

Id. (citation omitted).

160. Wilkins, *supra* note 117, at 1512.

161. *See id.* at 1513 (stating that removing the promise of uniformity "would arguably make it even more difficult for society to hold lawyers accountable for protecting legal rules and structures, because divergent groups of lawyers might hold quite different understandings of how they should relate to clients and state officials").

162. *See id.* at 1513-14 (discussing the reasons that abandoning the bleached-out professionalism model would "undermine the legal profession's role as an important avenue for social advancement").

2. The "no choice" variant

The second variant of the Irrelevance Response is the more practical of the two, and, in its brutally honest way, attempts to address all three of the defendant's arguments. This variant says that irrespective of the defendant's arguments on racism, effectiveness, and expediency, and even assuming the validity of those arguments, the accused's options are limited. In an ideal world the defendant could hire whomever he wants. However, in this, the real world, an indigent Black defendant who cannot hire an attorney only has three options: (1) keep the white lawyer who has already been appointed; (2) ask the court to appoint a different lawyer who is of the same race as the defendant; or (3) represent himself.

The last option is not a viable choice for most defendants, given the complexity of the criminal law and trial practice.[163] Self-representation is even less attractive for those who are in custody. Moreover, there are legal disincentives. For example, a pro se litigant who is convicted may not thereafter be allowed to complain of ineffective assistance of counsel.[164] Similarly, the second option is not practical, both because the accused does not have the right to choose who his appointed counsel will be,[165] and because it would be improper for a judge to remove the current appointed lawyer merely because the latter happens to be Caucasian. Moreover, even if the judge grants the defendant's request, there is a risk that replacement counsel will be less qualified than the lawyer he is replacing.

The first option, therefore, practically speaking, is the only one left to the defendant. Realistically, according to the "no choice" variant, the defendant should keep the white lawyer, that being the least unattractive option available. "You might not be happy with the situation," the white lawyer may say to his client, "but you are stuck with me, so let's make the best of it." Or, a lawyer with less finesse might simply say, "I'm your lawyer. Take it or

163. *See* Amy Bach, *Justice on the Cheap*, THE NATION, May 21, 2001, at 27 (reporting that "[n]ationally, only 1 percent of felony defendants represented themselves in the nation's seventy-five largest counties in 1992"); *cf.* 3 LAFAVE ET AL., *supra* note 70, at 567 (observing generally that when a trial court denies a defendant's request for substitute appointed counsel or for more time to hire retained counsel, "[v]ery often the defendant will choose [to represent himself], noting that he does so only because it is the lesser of two evils").

164. *See* COOK, *supra* note 67, at 8-114 (stating that courts have found that "[a]n accused who elects to defend pro se may not thereafter complain of ineffective assistance").

165. *See supra* notes 68-73 and accompanying text.

leave it."

As can be seen, both variants of the Irrelevance Response seek to preserve a status quo that the defendant finds unsatisfying, and in that sense they possess shades of Freeman's Perpetrator Perspective.[166] Moreover, as with the Denial or No Racism Response, underlying the Irrelevance Response is the message that the defendant should not impede the development of a positive attorney-client relationship by resorting to racist logic or inaccurate racial stereotypes. "My race is irrelevant to my legal persona," the lawyer may counsel his client. "Work with me and I will prove it."

C. The Relevance Response

The final response our hypothetical lawyer may proffer takes the opposite approach to the Irrelevance Response. The Relevance Response acknowledges both that racism is a serious problem in this country and that irrespective of racism, the race of the lawyer (and the client for that matter) does impact both the attorney-client relationship and the lawyer's effectiveness. This response, therefore, admits the relevance of racism and race. At the same time, however, this response does not concede that the client should jettison his white court-appointed lawyer. Rather, this response says that, for a number of reasons, including the practicalities of the real world, the lawyer and client should stay together.

The Relevance Response has three variants. All of these variants focus on the effectiveness of counsel for the reason that, even for the defendant making the Racism Argument, the lawyer's effectiveness is the single most important issue for a defendant who wants to win his case. The variants differ, however, in this respect: the first two agree with the view that racism infects the criminal justice system (including the lawyer) and/or that because of his white upbringing, a white lawyer cannot fully understand or appreciate what it means to be African-American; the third variant disagrees that a white lawyer, just because he is Caucasian, cannot understand or appreciate what it means to be Black. Each of these variants will be discussed in turn.[167]

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166. *See supra* notes 133-134 and accompanying text.

167. There is another variant of the Relevance Response that, for the following reasons, is not treated in depth in this Article. This variant, which can be called the "I quit" variant, says that all of the defendant's arguments are absolutely true and his request for a Black lawyer should be honored without any discussion of the underlying issues. The lawyer says, in effect, "If you don't want me, I will quit."

1. The "you need a white lawyer" variant

The first variant of the Relevance Response attempts to respond to the defendant's Racism and Effectiveness Arguments. This variant posits that the Black defendant will be better off with a white lawyer precisely because racism infects the criminal justice system. "If you believe the system is racist," the white lawyer might say, "then you need a white lawyer."[168] This is also true if, as the Effectiveness Argument claims, the white lawyer cannot fully understand or appreciate the environment from which the African-American client comes. "I agree that I cannot fully understand your environment," a lawyer making this response might say, "but it is also true that as a lawyer, I do understand the environment of the criminal justice system. And it is within that environment that you are now forced to operate, an environment, by the way, that is primarily run by (not to mention developed and constructed by) whites."

Despite its odiousness,[169] the power of the "you need a white

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This variant constitutes a response that a conscientious lawyer would not make. First, if the lawyer truly believes, as this Article assumes, that it is in the best interests of the defendant for the latter to remain a client of the former, then the lawyer should do everything ethically within his power to persuade the defendant to remain a client. Second, the "I quit" variant is neither realistic nor practical given the real-world options discussed in Part III.B above. Finally, this variant represents a complete abdication of the lawyer's responsibility, both as an officer of the court and as a member of society, to promote justice and better relations between people of different races and ethnicities. At a minimum, a conscientious lawyer should look upon the defendant's race-based concerns as an opportunity to engage in a meaningful dialogue with an eye toward improving understanding between lawyer and client.

168. A survey of attorneys of color in the Civil Division of the New York City Legal Aid Society revealed that "many . . . clients of color actually preferred attorneys who embodied the clients' stereotype of what lawyers should be." Acevedo et al., *supra* note 5, at 35. For instance, in the survey, "[o]ne African-American [female attorney] stated 'clients must take the race of their attorney into consideration since when it comes to lawyers society thinks Jewish is better.'" *Id.* Another African-American attorney in the survey "wrote that 'sometimes clients come to the office openly stating that they want a (white) Jewish attorney.'" *Id.*

169. One reason for this odiousness is that the "you need a white lawyer" variant relies at least in part on racist logic and/or racial stereotypes that may be inaccurate. In this context, a separate question arises regarding whether the lawyer's responses should include ones that rely on such logic or stereotypes. Is it proper or even ethical for a lawyer to meet a racist argument with a racist argument? *See* Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1750-60, 1799-1803 (1993) (discussing the use of racial stereotypes in criminal trials and arguing the use of racial imagery by lawyers should be strictly limited, to wit: "use of racial imagery should be subject to the same strict scrutiny standard as other racial classifications"); *see also* Wilkins *supra* note 117, at 1587 (advocating against lawyers raising arguments "designed solely to appeal to the racial prejudice of jurors, [as such arguments] do nothing to further the defendant's underlying right to put the State to its proof" and stating that "arguments of this

lawyer" variant is hard to deny. The sad fact is that the system itself, and particular actors within it, do treat African Americans differently than whites. For this reason, a white lawyer may be more effective than his Black counterpart. As Wilkins has observed, "Black clients, who bear the brunt of the legal system's racism, may find it more difficult to secure justice if they hire a black lawyer."[170] This inequality of treatment may be particularly pronounced when race or racism is a specific issue in the case. Professor Margaret Russell, for instance, argues that certain race-based defenses may be more effective coming from a white lawyer:

> Black attorneys who raise such [issues of race] in court often face a heavy burden of justifying either that race really exists as an issue at all, or that they are competent to address the topic of race in a fair and reasoned manner. When Black attorneys articulate racism as a primary factor in a particular case, they may encounter fractious demands that they "prove it," or harsh accusations that they are "playing the race card" or otherwise engaging in unprofessional behavior . . . . Unlike white attorneys, who have the relatively luxurious comfort of invisibility and transparency in raising issues of race in the lawyering process, Black attorneys must always brace themselves to have their racial, professional, and personal identities placed in issue as well.[171]

Professor Clark Cunningham has similarly suggested that on racial matters, whites may impose a higher standard of proof on Blacks making a race-based argument; that "[w]hen a white person hears a black person use a word like 'racist,' the response is often a strong defensive reaction that implicitly says to the black person, 'prove it!'"[172] Thus, a race-based argument to a white jury may fare better coming from a lawyer who is Caucasian rather than from one who is African-American.

2. The "we need to talk" variant

The second variant to the Relevance Response is more mellifluous. It is based on what has been called the Race

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kind are fundamentally contrary to the social purposes of lawyering").

170. David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 797 (1997). Wilkins goes on to say that "[w]hite clients may also be less likely to engage the services of a black lawyer if they are concerned that he or she will not be taken seriously by other important actors in the system." *Id.*

171. Russell, *supra* note 11, at 771-72 (1997); *see also* McIntosh, *supra* note 130, at 294 (listing as one of the privileges she enjoys because she is Caucasian, "[i]f I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have").

172. Cunningham, *supra* note 8, at 1378. Cunningham was Associate Professor of Law at Washington University when his article appeared. *Id.* at 1298 n.†.

Consciousness Model of lawyering.[173] This model, in contrast to the Neutrality Model,[174] posits that personal identifying characteristics[175] such as race, gender, and ethnicity, are very relevant to defining an attorney's abilities and effectiveness.[176] Indeed, these characteristics can be the key reason that the lawyer is (or is not) effective. Rather than "bleaching out" these characteristics, the Race Consciousness Model says that the presence and effects of these characteristics need to be openly acknowledged and discussed. Doing so will lead to greater understanding and ultimately a better attorney-client relationship. In sum, this model of lawyering

> is based on the premise that individuals who share common personal identity factors such as race feel an affinity for one another that enhances communication and understanding between them. Since communication and understanding is vital to the attorney-client relationship, the race of both the attorney and the client has an impact on lawyering and is a factor that should be taken into consideration.[177]

Thus, this variant of the Relevance Response says that the white lawyer and the Black defendant should recognize the effects race and racism will have on their relationship and, more broadly, on the defendant's case. This means that both parties should specifically discuss race. That discussion may obviously be difficult and perhaps painful, but the result will be enhanced communication and better understanding between the two. This, in turn, will strengthen the attorney-client relationship and thereby make the lawyer a more effective advocate. "I want to understand and appreciate the differences between us," the lawyer may say, "so that I can see the positive and negative effects of those differences, and more meaningfully explain your story to the judge/jury/prosecutor."[178]

The "we need to talk" variant accordingly attempts not only to acknowledge the concerns underlying the defendant's three

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173. *See* Acevedo et al., *supra* note 5, at 3-4, 12-19.

174. *See supra* notes 155-162 and accompanying text.

175. Bill Hing refers to these kinds of characteristics as "personal identification differences." *See* Bill O. Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1993); *see also* Acevedo et al., *supra* note 5, at 3 n.7 (referring to such characteristics as "personal identity factors").

176. *See* Acevedo et al., *supra* note 5, at 3.

177. *Id.*

178. It is also possible that the end result of the "race discussion" between lawyer and client is that the two agree that the defendant would be better served by an African-American lawyer. While this is not the preferred result, it is one that this variant must acknowledge and accept.

arguments, but also, at least on a micro-level, to address those concerns. In this sense, this variant is akin to Freeman's Victim Perspective, the goal of which is to address the underlying conditions that cause racial discrimination.[179] Like that perspective, the "we need to talk" variant seeks to address the underlying problem of a fractured, racially divisive attorney-client relationship by encouraging greater and better communications between the parties about that problem.

But why should the defendant undertake this task? If, as the Effectiveness and Expediency Arguments claim, a Black lawyer can be more effective without the need for "re-tooling," then why should a Black defendant bother with a white lawyer? There are at least three answers to this question. First, as already noted, the real-world practicalities are such that the appointed lawyer and indigent defendant are stuck with each other, for better or worse. The parties might as well opt for "better," especially given their shared objective to win the defendant's case. Second, any lawyer, Black or white, who successfully goes through the process of meaningfully talking about race with his client will be a more effective advocate on his client's behalf than a lawyer who does not go through this process. This means that a white lawyer who is "race conscious" because of such discussions will likely be more effective than a Black lawyer who has not engaged in such discussions with his client. Finally, race-conscious discussions contemplated by the "we need to talk" variant will improve the knowledge and understanding of white lawyers and Black defendants, which, in turn, may contribute to justice and an improvement in the racial discourse in society as a whole. In other words, there is a social ethic that demands that people of different races and ethnicities learn to get along with each other. Hence, in contrast to the "you need a white lawyer" variant of the Relevance Response, which perpetuates the divisiveness between the races, the "we need to talk" variant attacks the divisiveness problem directly, thereby furthering the Sixth Amendment's efforts at achieving justice.

Moreover, there is empirical support to buttress the "we need to talk" variant's claim that discussing race will benefit the attorney-client relationship. Wilkins recently observed, for example, that "a series of pioneering studies [have] determined that interracial teams that openly discuss issues of race are more likely to form long-term supportive and productive working

179. *See supra* notes 135-136 and accompanying text.

relationships."[180] One of these studies examined twenty-two pairs of cross-racial (Black-white) work relationships and found that the junior people in these relationships who wanted to directly engage the senior people on racial differences were more likely to obtain greater satisfaction and benefits from those relationships when the senior people shared the desire to directly discuss race.[181] This study suggests that our hypothetical Black client-white lawyer relationship will have the greatest chance of being mutually satisfying when both parties actively discuss racial differences. Similarly, Professor Cynthia Estlund has noted that:

> Numerous controlled studies have shown a positive relationship between even short-term cooperative interaction with equal-status partners and feelings of respect and liking for the other-race individual. One recent survey of the research concludes that "there is undoubtedly a positive correlation, generally speaking, between reported interaction of members of an ethnic out-group and positive or friendly attitudes toward that group."[182]

In sum, the "we need to talk" variant recommends that, to further quote Wilkins, "lawyers . . . cast off the bleaching pretensions of mainstream legal discourse and confront directly the extent to which race and racism are thoroughly enmeshed in legal discourse."[183]

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180. Wilkins, *supra* note 117, at 1592.

181. *See* Thomas, *supra* note 8, *passim* (1993). Ironically, junior and senior people who both did not want to directly discuss race were also found to develop more satisfying and beneficial relationships. *See id.* at 177, 190. This finding points out that for the relationship to be most satisfying, both parties to it must agree on whether racial differences will or will not be discussed. *See id.* Thus, given that our hypothetical defendant wants to openly address race and racism, it behooves our hypothetical lawyer to acknowledge the relevance of race in the relationship.

182. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 24 (2000) (citations omitted). Estlund was Professor of Law at Columbia Law School when her article appeared. *Id.* at 1 n.*. She further observes that:

> A leading early theory of prejudice posited that negative stereotypes and hostility toward other racial groups flourished in ignorance and that close contact between members of different races improved racial understanding and racial attitudes. Segregation was thus as much the cause as the result of racial tension and division. Integration, and positive interracial contacts, were the answer . . . . [This theory] has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.

Id. at 22-24.

183. Wilkins, *supra* note 117, at 1520 (summarizing the view of critical race theorists who believe that "the experiences of minority lawyers and litigants can only be understood through the lens of the 'master narrative' of race").

3. The "on my own" variant

The final variant of the Relevance Response is similar to the "we need to talk" variant in that it also acknowledges the value of understanding and appreciating the racial differences between lawyer and client. The "on my own" variant, however, does not recognize the need for race-conscious communications between the two parties. Rather, this variant says that the lawyer can get there on his own. That is, this variant claims that the lawyer is already conscious of the racial differences and fully appreciates the effects of those differences. The lawyer may make this claim based on his own life experiences, including his knowledge of racism and its effects; his experiences with other defendants; or his conversations or other interactions with people of color. "I understand where you are coming from," this attorney might say, "because I have personally experienced/witnessed racism and its effects, and I can use the knowledge acquired from that experience on your behalf."[184]

A theme running through this and the "we need to talk" variants is that the client should refrain from relying on unsubstantiated assumptions that the lawyer cannot be effective merely because he is white. Such assumptions can hinder the development of a positive attorney-client relationship. The defendant can ill afford such a result, the "on my own" variant cautions, given what is at stake: the defendant's life and/or liberty.

IV. Seeking a Resolution

The problem of an attorney-client relationship that is rife with racial tension, as our hypothetical relationship is, cannot be solved solely by resort to one or more of the possible attorney responses outlined above. Below are some suggestions for improving that relationship, including granting the indigent defendant more say in choosing who his appointed lawyer will be. Striving for such improvement should be the goal of every lawyer, appointed or not. That said, some of the suggestions recognize that sometimes the defendant's best option is to terminate the relationship with his white lawyer and seek new appointed counsel.[185]

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184. The "on my own" variant attempts to answer the claim of the Effectiveness Argument that a white lawyer cannot be as effective as a Black one because the former cannot understand or appreciate what it means to be a person of color.

185. In the end, an appointed lawyer must respect his client's desire to

Addressing a Black defendant's concerns with being assigned a white court-appointed lawyer also is important to furthering the Sixth Amendment goal of ensuring that justice be done. As noted previously, the concept of justice is important on both the micro-level (for the defendant) and on the macro-level (for the judicial system). With respect to the former, addressing the defendant's concerns will result in better communication between lawyer and client, which, in turn, may lead to enhanced trust and attorney effectiveness. Improved effectiveness may not only positively affect the outcome of the defendant's case, but it also may contribute to the defendant's perception of fairness. This perception is a prerequisite to the defendant believing that the criminal justice system is legitimate and that its verdicts should be accepted and respected both during the pendency of his case and afterward, when he rejoins society.[186]

The actuality and perception of fairness is also key to achieving justice on the macro-level. Better communication between lawyers and clients, which leads to improved attorney effectiveness, means that more appropriate criminal charges will be filed, fewer innocents will be found (or plead) guilty, and fairer sentences will be imposed. These more just outcomes and the perception of fairness that they engender will bolster the integrity of the criminal justice system and the public's respect for it.

The system's integrity also will be enhanced because poor defendants will obtain the same meaningful and effective attorney-client relationships that defendants of means now take for granted. Some parity will thus be restored to the appointed, versus retained, attorney relationship. Finally, addressing an African-American defendant's concerns with being assigned a white lawyer will further justice beyond the criminal justice system by improving race relations between Caucasians and

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terminate the attorney-client relationship even if the former believes that decision to be in error or not in the best interest of the defendant. *See* 3 LAFAVE ET AL., *supra* note 70, at 595 (stating that the attorney must abide those decisions that are within the power of the client to make). In this context, moreover, the lawyer should not consider what is best for society at large given his duty of fidelity and loyalty to the client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2000) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

186. A defendant who does not respect the criminal justice system may also choose to "opt out" of it by refusing to work with or rejecting the court-appointed attorney. The system's typical response to such a defendant is to require him to work with the lawyer or force the accused to represent himself with the appointed lawyer as an advisor. These responses do not produce judgments, verdicts, or sentences that society can deem reliable or fair. Thus, if enough defendants choose to "opt out," the entire criminal justice system may break down.

people of color. Such justice should be a goal of every person, lawyer or not.

With this preamble, this Article now attempts to further the Sixth Amendment's goal of ensuring justice by offering some suggestions for improving our hypothetical attorney-client relationship.

A. Promote Greater and Better Communication

The cornerstone of trust in a white attorney-Black client relationship cannot be laid without meaningful communications about race and racism. As the Race Consciousness Model recommends, lawyers and clients of different races should talk about race and its effects, if any, on the defendant's case.[187] Ignoring those effects, per the Neutrality Model,[188] does not address the underlying causes of racial tension. Dissipating that tension will only come, as Freeman's Victim Perspective[189] says, by directly attacking the conditions underlying that tension.

At a minimum, greater and better communication will help sensitize the parties to the influence of race in the relationship. As has been observed, "an attorney who is out of touch [about personal identification differences] may be able to get by and even achieve good results for clients. However, learning about identification differences and understanding their potential significance can only enhance the attorney-client relationship and the attorney's effectiveness."[190]

Such communication, however, should not be limited to the attorney and client. The other actors in the criminal justice system, including prosecutors, judges, and legislators, must be sensitized to the racial concerns of indigent Black defendants. Those actors should promote better, more honest communication about race.[191] Indigent defendants too, should be better educated

187. *See supra* Part III.C.2.

188. *See supra* Part III.B.1.

189. *See supra* notes 135-136 and accompanying text.

190. Hing, *supra* note 175, at 1810.

191. *See* Alfieri, *supra* note 117, at 1367 ("Renewed calls for empathy in race-infected contexts are now widely heard, even in contemporary politics . . . ."); Walker, *supra* note 101 (commenting that "[i]n general, whites and blacks are highly conscious of race in their interactions with one another yet are unwilling to discuss openly what this means"). Walker goes on to recommend:

> More than anything, blacks and whites need to know each other as whole, complex individuals. We need to talk about the tensions underlying our interactions. That would be the first step in a long process of reckoning with this nation's racist history, in order to stem its effect on the present.

Id.

about their rights and encouraged to speak up when they have concerns. Too often, racial issues, like the metaphorical elephant, crowd the room without ever being acknowledged.

This deafening silence can be traced in part to the failed Neutrality Model's ethic of bleaching out differences such as race, gender, and ethnicity.[192] Law schools should foster race consciousness so that students learn to be sensitive to the issue of race and not afraid to discuss it. As some have advocated:

> [L]aw schools should focus more on [racial] differences, and more on communication skills . . . . Because law is taught from a neutral perspective, we may be inhibiting white students, who most likely have not been forced to examine racial issues, from developing the sensitivity that may be necessary to effectively advocate for people of color . . . . Perhaps, then, the time has finally arrived for our law schools to acknowledge that the pursuit of colorblindness is an inadequate social policy by which to achieve justice within our legal system.[193]

Despite what the Neutrality Model believes, teaching race consciousness will not undermine our legal system. First, race consciousness will not result in laws being applied with any more bias than they already are. Second, just because race and racism are openly acknowledged and discussed does not mean that lawyers will be any less effective. Indeed, as previously noted, studies and common sense say just the opposite.[194] Third, race conscious lawyering will not change the requirement that all lawyers adhere to a specified code of ethical and professional conduct. Lawyers, Black and white, who run afoul of ethical rules or who are incompetent under the *Strickland* standard, will still be held accountable.[195] Lastly, taking race into account will not

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192. *See supra* Part III.B.1.

193. Acevêdo et al., *supra* note 5, at 66; *see also* Hing, *supra* note 175, at 1830-33 (recommending that law schools teach classes and require more clinical experience in how to be conscious of personal identification differences such as race, ethnicity, and gender); *cf.* Cunningham, *supra* note 8, at 1378 (noting that some have advocated for adopting a less accusatory tone in the racial discourse, and citing as an example that whites often respond with acts of "microaggression" when accused of being discriminatory and that in response, "scholars [have] introduce[d] a new word, 'racialist,' to describe judgments and actions controlled by racial stereotypes without adopting an accusatory tone").

194. *See supra* notes 180-182 and accompanying text.

195. While not addressing the issue of race, the Defense Function Standards of the American Bar Association do address the issue of different model standards for retained versus appointed counsel. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Defense Function Standard 4-1.2 cmt. (3d ed. 1993) (stating that it was not "thought appropriate to set a different standard according to the nature of the employment").

diminish the legal profession's role as an instrument of minority advancement. If anything, that role will be strengthened as race-conscious lawyers see the need for greater diversity within the legal profession.[196]

Finally, in order to promote greater and better communication, standards of professional conduct should be adopted setting forth a commitment to an improved dialogue between attorney and client on the matter of race. Such standards as the American Bar Association's Standards for Criminal Justice (Prosecution Function and Defense Function) and the Model Rules of Professional Conduct are currently silent on this issue.[197]

B. Accord Greater Weight to the Importance of a Meaningful Attorney-Client Relationship

Morris v. Slappy, it will be recalled, unequivocally rejected the view of the Ninth Circuit Court of Appeals that a "meaningful" attorney-client relationship is part of the Sixth Amendment right to counsel.[198] The facts of *Slappy* are illustrative of the lack of control many indigent defendants have over the conduct of their own cases.

Joseph Slappy was charged in San Francisco with the rape and robbery of a woman walking home from the grocery store.[199] Harvey Goldfine from the San Francisco Public Defender's Office was appointed to represent Slappy, but was hospitalized shortly before trial and thus was unable to continue with the case.[200] Six days before the scheduled trial date, another trial attorney from

196. *See* Wilkins, *supra* note 117, at 1592 (stating that "there is substantial evidence that, contrary to the assumptions underlying bleached out professionalism, race consciousness, not colorblindness, is the most effective strategy for negotiating diversity in the workplace").

197. *See* ABA STANDARDS FOR CRIMINAL JUSTICE *passim*, Defense Function Standard 4-3.1 & cmt. (3d ed. 1993) (discussing the necessity and importance of trust and confidence, but never mentioning race or racism as a factor in the attorney-client relationship); *see also* MODEL RULES OF PROF'L CONDUCT *passim*, R. 2.1 (not mentioning race as a factor that a lawyer may consider when rendering professional advice, but instead, stating that in rendering such advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation"); *id.* at R. 8.4 cmt., para. 2 (stating that a lawyer does not engage in misconduct if he engages in "legitimate advocacy" respecting "race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status"); *cf. id.* at Scope, para. 14 (noting that the Model Rules of Professional Conduct "do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules").

198. Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

199. *Id.* at 4-5.

200. *Id.* at 5.

the Public Defender's Office, Bruce Hotchkiss, was assigned to take over.[201]

On the first day of trial, Slappy complained that Hotchkiss had not had enough time to prepare his defense.[202] That complaint was rejected by the trial judge, who in the face of Hotchkiss' representations that he was prepared, refused to postpone the trial.[203] Slappy renewed this complaint on the second and third days of trial, eventually arguing to the trial court that he was unrepresented by counsel given that his initial attorney, Harvey Goldfine, was in the hospital.[204] The trial judge rejected these arguments as well, and ultimately Slappy was convicted of all charges.[205]

After his conviction was affirmed on direct appeal, Slappy brought a habeas corpus action in federal court claiming, inter alia, that the trial court erred in refusing to postpone his trial.[206] The district court rejected Slappy's claims, but the Ninth Circuit Court of Appeals reversed, ruling that the Sixth Amendment right to counsel "include[s] the right to a meaningful attorney-client relationship."[207] Finding that Slappy had established such a relationship with Goldfine, and that the trial court erred in denying the accused's request for a continuance, the Ninth Circuit ordered that Slappy be retried.[208]

The Supreme Court reversed, characterizing the Ninth Circuit's ruling as "novel" and "without basis in the law."[209] In so doing, the Court too cavalierly dismissed the importance of a meaningful attorney-client relationship, especially to indigent defendants who have little or no choice in who their counsel will be. In essence, the *Slappy* Court ignored the Sixth Amendment's goal of achieving justice by sacrificing it on the altar of expediency.

To further that goal, greater weight should be accorded to the importance of a meaningful lawyer-client relationship. This does not mean that a defendant should have a constitutional right to such a relationship or that a judge, to use the words of the

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201. *Id.*
202. *Id.* at 6.
203. *Id.* at 6-7. Among other representations, Hotchkiss said to the trial court, "I feel that I am prepared. My own feeling is that a further continuance would not benefit me in presenting the case." *Id.* at 6.
204. *Id.* at 7-9.
205. *Id.*
206. *Id.* at 9-10.
207. *Id.* at 10-11.
208. *Id.*
209. *Id.* at 13.

Supreme Court, has to "guarantee that a defendant will develop [meaningful] rapport."[210] It means simply that courts should recognize the importance of such a relationship and give greater deference thereto when called upon to assess the relations between lawyer and client.[211] In *Slappy*, the Court was wrong, as Justices Brennan and Marshall in a separate opinion pointed out, to find absolutely no merit in the Ninth Circuit's view.[212]

The consequence of according greater deference to the importance of a meaningful attorney-client relationship is that an indigent will have an easier time arguing to a trial judge that different counsel ought to be appointed to his case. Because a meaningful relationship is not something the Supreme Court thinks is worth protecting, trial judges currently have no disincentive to summarily rejecting an indigent's motion for new appointed counsel.[213] When, however, the issue of race impedes the development of such a relationship, courts should be more willing to appoint substitute counsel.

This means as well that new counsel should be appointed if the defendant can make a credible showing that his appointed lawyer will be ineffective because of the latter's race, or that a lawyer of a different race will be markedly more effective than the current appointed lawyer. This is not to say that a court should relieve an appointed lawyer merely because he is white or Black. That is a result that the legal system and society as a whole

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210. *Id.* at 13-14 (saying that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney . . . that the [Ninth Circuit] Court of Appeals thought part of the Sixth Amendment guarantee of counsel").

211. *See, e.g.*, Slappy v. Morris, 649 F.2d 718, 721 (9th Cir. 1981) (recognizing that the Sixth Amendment right to counsel "encompasses the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance" when the defendant's attorney is temporarily unavailable), *rev'd* 461 U.S. 1 (1983).

212. *See Morris v. Slappy*, 461 U.S. at 19-20, 25 (Brennan, J., joined by Marshall, J., concurring in the result) (stating that an interest in a meaningful attorney-client relationship "does find support in other cases" and that "[i]n light of the importance of a defendant's relationship with his attorney to his Sixth Amendment right to counsel, recognizing a qualified right to continue that relationship is eminently sensible").

213. Currently, obtaining substitute counsel is unreasonably difficult. *See supra* notes 69-76 and accompanying text; *see also* COOK, *supra* note 67, at 8-58 (noting that a motion for new appointed counsel generally will not be successful unless "the accused can point to particular reasons for [the] dissatisfaction"); 3 LAFAVE ET AL., *supra* note 70, at 595 n.6 (citing cases that hold that a defendant is not entitled to substitute appointed counsel "where the disagreement with counsel relates to a matter within the exclusive province of the lawyer"); *cf.* COOK, *supra* note 67, at 76 (Supp. 2000) (noting that "[t]he failure of a trial court to consider an accused's complaints about appointed counsel is error").

cannot countenance.[214] However, courts should be more sensitive to the effects of personal identifying characteristics, such as race, and grant relief to an indigent defendant who can establish a credible link between those characteristics and the effectiveness of his current counsel.

Paying more attention to the meaningfulness of the attorney-client relationship will also, like Freeman's Victim Perspective recommends,[215] address the causes underlying the racial concerns of a Black indigent defendant. Courts would have to listen to those concerns if the quality of the relationship were given greater prominence than it is now. This approach also complements the Race Consciousness Model's call for greater and better communication.[216] Once the actors in the criminal justice system begin talking about race, they will be more receptive to the indigent defendant's call for a more racially meaningful attorney-client relationship. Finally, for an indigent defendant who truly wants to replace his lawyer, the above approach restores some of the defendant's dignity by giving him more control over the kind of relationship he may want to have with his lawyer.

C. Revise Procedures for Appointing Counsel

In addition to giving an indigent defendant more say in replacing his appointed lawyer, an indigent defendant should also be given greater say in the initial selection of his appointed lawyer. The procedures for appointing counsel should be revised to give the accused the option to select his own counsel. Assuming that the chosen lawyer agrees to the appointment, that he is conflict-free and qualified to handle the case, and that he or she is otherwise acceptable to the court, there is no overriding reason not

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214. An interesting question that is beyond the scope of this Article is whether a defendant who rejects his appointed counsel merely because of the latter's race violates some ethical obligation. A lawyer, of course, is prohibited from discriminating on the basis of race. Professor Wilkins, in considering this question in terms of gender, concluded that:

> Although [the] client and every other citizen is morally (and in many cases legally) required not to discriminate on the basis of status in their employment decisions, there is nothing in the nature of the attorney-client relationship that prohibits clients from seeking to obtain the services of those lawyers whom they believe will best serve their cause. Thus, the client's decision to take gender into account when hiring his lawyer stands on different ethical footing than the lawyer's decision to refuse the representation on the basis of the client's gender.

David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 898-99 (1998).

215. *See supra* notes 135-136 and accompanying text.

216. *See supra* Part III.C.2.

to honor the defendant's choice. Granting the accused this privilege will help bring some parity to the retained versus appointed counsel selection process, give the client greater control over the conduct of his defense, and replace some of the defendant's dignity that the current "take it or leave it" regime strips away.

Alternatively, the defendant could be assigned two alternate counsel in addition to his appointed lawyer. The latter would be responsible for meeting with the accused and representing him as usual. However, within some reasonable period of time after the appointment, the defendant could elect to substitute in any one of the alternates. The initially appointed counsel would be obligated to assist the defendant in making that decision, and the alternates would be permitted during that time period to speak with the accused about the case.[217] Once the final section has been made, or the time period had expired, the de-selected lawyers would be relieved of any further responsibility for the case.

Several scholars who have studied indigent appointments have recognized the value in allowing the client more say in the selection process. Professor Peter Tague, for instance, has argued that "an indigent will receive better representation if allowed to choose the attorney who will defend him."[218] In observing that an accused has significant reasons for wanting to choose his appointed counsel, one of which is allowing for "greater participation in structuring his defense,"[219] Professor Tague examined the justifications for the existing practice and found those justifications wanting.[220] He even believes that there is merit in the view that an accused has a constitutional right to

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217. To ensure confidentiality, the attorney-client privilege would have to be extended to cover these communications.

218. Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 85 (1974) [hereinafter Tague, *An Indigent's Right*] ("Despite the evidence that an indigent will receive better representation if allowed to choose the attorney who will defend him, the courts have refused to accede to this request."); *see also* Peter W. Tague, *Ensuring Able Representation For Publicly-Funded Criminal Defendants: Lessons From England*, 69 U. CINN. L. REV. 273 (2000) (suggesting that vouchers could be used to allow an indigent defendant to choose a private lawyer). Tague is currently Professor of Law at the Georgetown University Law Center. *See* GEORGETOWN UNIVERSITY LAW CENTER, http://www.law.georgetown.edu/index.html (last visited Dec. 1, 2001).

219. Tague, *An Indigent's Right*, *supra* note 218, at 99.

220. *See id.* ("[D]enying an indigent the right to choose his counsel fails to further in any substantial way legitimate government interests, interests that can be protected by less intrusive measures. The classification distinguishing indigent from nonindigent should therefore fall and an indigent should have equal opportunity to select his own counsel.").

choose his own attorney.[221]

Professors Stephen Schulhofer and David Friedman have similarly found the current methods of appointing counsel wanting.[222] They argue that indigents should be allowed control over the selection of appointed counsel through "deregulated systems," including vouchers to retain private counsel.[223] "[T]he defendant could be provided several recommendations," they suggest, "or the name of a single attorney likely to accept appointment. An even more cautious model would continue the practice of having the court appoint counsel, but would advise defendants that they can choose a substitute if they prefer."[224] The end result of such systems would be an enhanced attorney-client relationship. In their words, "[t]he mere existence of a right to choose would dissipate some of the distrust that now infects many involuntary attorney-client relationships and would *for the first time* give the appointed attorney a self-interested reason to value the satisfaction of his client as well as that of the court."[225]

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221. *See id.* at 87, 99; *see also* Holly, *supra* note 2, at 201-19 (critiquing the rationales for denying indigents the right to choose their own counsel and suggesting that because indigent defendants are obligated to repay all or a portion of the costs of their legal defense, they have a limited right to select the attorney who is assigned to them).

222. *See* Schulhofer & Friedman, *supra* note 70, at 106 (commenting that "[t]he reasons given for refusing to honor defendants' choices [of appointed counsel] are in our view insufficient"). When their article was published, Schulhofer was Bernice J. Greenberg Professor of Law and Director of the Center for Studies in Criminal Justice at the University of Chicago Law School, and Friedman was a Visiting Professor at Cornell Law School. *Id.* at 73 n.*.

223. *Id.* at 77, 101.

224. *Id.* at 103; *see also* 3 LAFAVE ET AL., *supra* note 70, at 551 (observing that "[a]t least two states [Georgia in capital cases and California] have departed from [the] traditional position that allows a trial court to completely disregard the defendant's preference for appointment of a particular counsel").

225. Schulhofer & Friedman, *supra* note 70, at 104 (emphasis in original). Schulhofer and Friedman also believe that the officials who choose appointed counsel may not have the best interests of the defendant at heart. They observe:

> A public official who chooses for the defendant is likely to have . . . a weaker incentive to make the best choice. Indeed . . . the official . . . has incentives to value cooperativeness, disinclination to work long hours, and other qualities that might not win favor with defendants themselves. Providers may end up being selected according to how well they serve the court, not how well they serve defendants.

Id. at 80. The American Bar Association also encourages the practice of allowing indigent defendants to choose their own appointed counsel. The ABA Standards for Criminal Justice, for instance, contain this recommendation:

> Neither statutes nor court decisions recognize the right of an eligible defendant to select the private lawyer of his or her choice . . . . In contrast, the defendant with sufficient funds can retain the lawyer of his or her choice and discharge an attorney when confidence in the lawyer diminishes. There is much to be said for allowing the eligible defendant, when administratively feasible, the same freedom of action available to the

In sum, fair procedures and reliable results, both components of justice, are more likely to result if the indigent has a real voice in deciding the composition and character of the relationship with his appointed lawyer. The Sixth Amendment decisions and court rules disallowing the indigent defendant any meaningful say in selecting or replacing his appointed counsel undermine that mandate for justice.

Conclusion

This Article has related the potential concerns an indigent Black defendant may have when appointed a white lawyer and some possible responses to those concerns, both by the lawyer and the system of which the lawyer is a part. Three arguments were identified that encapsulate those concerns: the Racism Argument, the Effectiveness Argument, and the Expediency Argument. Three possible responses by the lawyer, with some variants, were also identified: the Denial or No Racism Response, the Irrelevance Response, and the Relevance Response. Finally, strategies were suggested for alleviating the racial friction that may arise in the white lawyer-Black defendant relationship, including adoption of the Race Consciousness Model's goal of discussing racial differences.

The overarching goal of the constitutional right to counsel is to promote the cause of justice, both for the individual defendant, who has the right to a fair trial, and for the system of criminal justice, which needs to produce reliable results. That goal is undermined when a white appointed lawyer refuses to acknowledge or adequately address the effects his and his client's race have on their relationship. Accordingly, the appointed lawyer and the other actors in the criminal justice system should become more race-conscious and not only communicate better about race, but also acknowledge and address the concerns, whether real or perceived, that underlie an African-American defendant's objections to being appointed a lawyer who happens to be Caucasian.

> defendant of means. Where the defendant has personally selected counsel, there is likely to be greater confidence in the attorney and in the justness of the legal system generally. Obviously, if all defendants insisted on the right to choose their own attorneys, the administrative burden would surely undermine the effectiveness of the assigned-counsel system. But where the requests are few and do not pose serious administrative inconvenience, selection of counsel by defendants should be encouraged.

ABA STANDARDS FOR CRIMINAL JUSTICE Standard 5-2.3 cmt. (2d ed. 1980) (citations omitted).

Adherents of the Neutrality Model believe that racial differences do not matter and that they should be "bleached out" of the attorney-client relationship. This view is not only wrong for those defendants who believe that race matters, but it is also dangerous, for it undermines *Gideon*'s call for justice for all. Yet, it is naïve to believe that the viewpoint of those schooled to ignore race and racism can be changed overnight. But, we should begin the process. The Sixth Amendment right to counsel demands no less.