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G Forces: Gideon v. Wainwright and Matthew Adler's Move Beyond Cost-Benefit Analysis

G Forces: *Gideon v. Wainwright* and Matthew Adler's Move Beyond Cost-Benefit Analysis

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I. INTRODUCTION

At crossroads marked by what social scientists call "concentrated disadvantage,"[1] poor people and people of color encounter crime and criminal justice systems disproportionately and in multiple roles.[2] Accusers and victims, defendants and perpetrators, witnesses and bystanders—in high crime areas, a single individual often bears two, three, or more of these identities simultaneously.[3]

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1 Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 378–79 (2005) ("[T]he strongest and most stable macro-level predictors of crime include racial heterogeneity . . . poverty, and family disruption—factors typically treated as indicators of 'concentrated disadvantage.'").

2 *See, e.g.*, ERIKA HARRELL, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: BLACK VICTIMS OF VIOLENT CRIME 1–3 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf. In 2005, nearly half of homicide victims and nearly 40 percent of robbery victims in the United States were black. *Id.* at 1–3, 5. Among crime victims, nearly 80 percent of African Americans and 70 percent of whites are victims of intraracial crime, with blacks more likely than whites to be victims of interracial crime. *Id.* at 5 & tbl. 5.

3 *See id.* at 1–3, 5 & tbl. 5.

This essay highlights the role of the indigent criminal defendant. That role warrants heightened scrutiny given the widely acknowledged crisis in the provision of public defense services[4] fifty years after the landmark right-to-counsel ruling in *Gideon v. Wainwright*.[5] In light of that crisis, this essay explores the implications of Matthew Adler's extraordinary book, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis*,[6] for the struggle to improve the quality of public defense and to address resource disparities that drive (or, at minimum, are closely associated with) disproportionate contact with crime and criminal justice systems by low-income people and people of color.

For several reasons, Professor Adler's book is an important resource for academicians and activists who care about criminal justice issues generally, as well as for those concerned more specifically with the quality of public defense services. First, Adler provides an invaluable explanation and expansion of social welfare economic theory. In his framing, this expressly normative discipline resists the dominant economic paradigm's cabining of well-being to the satisfaction of personal preference. Adler's turn on social welfare economic theory is prioritarian: He focuses on the relative contribution of large-scale policy decisions to enhanced individual well-being, with priority given to improving the lot of the less well-off. Significantly, Adler also acknowledges the need to account for the extent to which individuals shape their own opportunities and life histories. Personal

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[4] *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 93–95 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf; AMY BACH, ORDINARY INJUSTICE 13–28 (2009) (documenting system failures); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178–85 (2003) (same).

[5] 372 U.S. 335, 339 (1963) (establishing Sixth Amendment right to appointed counsel for indigent defendants facing felony charges).

[6] MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS (2012).

responsibility, or free will, must be incorporated as a variable in his economic calculus.

In addition, while the arguments in *Well-Being and Fair Distribution* are intricate, Adler presents them in patient, discursive detail. Therefore the curious reader—even one uninitiated in the mathematical language of economic theory that fills many pages and footnotes of Adler's book—will find him an able guide and translator. Adler's arguments also are interdisciplinary. Yet his command of the subject matter guarantees that a broad spectrum of readers—from the trained economist, moral philosopher, or legal theorist to the intellectually curious observer or social activist—will find much to intrigue and to interrogate. Finally, *Well-Being and Fair Distribution* is the hair of the dog—and should be gratefully received amidst the latest bleary-eyed hangover caused by excessive celebration of *homo economicus* and his relentless self-interest maximization.[7]

Gideon's fiftieth anniversary is a timely occasion to note Adler's remarkable contribution to the scholarly literature, and to begin testing his theoretical arguments in the real-world context of public defense services. *Gideon* famously ensconced the indigent defendant's Sixth Amendment right to appointed counsel in cases involving state-level felony charges.[8] But in considering the implications of Adler's theory for public defense reform, it is important to recognize that *Gideon* shares a birthday with an overshadowed twin, *Douglas v. California*.[9]

Instead of relying on the Sixth Amendment as in *Gideon*, the *Douglas* Court held that the due process and equal protection clauses of the Fourteenth Amendment require appointment of counsel on direct appeal in

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[7] *Cf.* Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice*, 55 LAW & CONTEMP. PROBS. 159, 167–70 (1992) [hereinafter Moore, *Covenant and Subjectivity*] (discussing alternatives to *homo economicus* and individual self-interest maximization as models for human subjectivity).

[8] 372 U.S. at 339.

[9] 372 U.S. 353 (1963).

states that offer direct appeal as of right.[10] Thus, *Gideon* and *Douglas* are twin sons of different mothers. Just as well-being and fairness are tightly intertwined in Adler's theory, substantive and procedural justice are bound up with inequality reduction in the development of right-to-counsel doctrine.

This doctrinal history indicates that public defense can fit nicely within Adler's focus on fair, responsibility-sensitive distribution of well-being. Defender services are idiosyncratic. They are a federal constitutional positive-right mandate. They require redistribution of resources to people who are by definition lower on any relevant scale of well-being.[11] Yet indigent criminal defendants are seldom viewed as ranking among the "deserving poor."[12] To the contrary, with respect to Adler's responsibility-sensitive approach, empirical research indicates that 20 percent of jurors invert the due process presumption of innocence; as representatives of their communities, these jurors presume instead that criminal defendants did something bad to deserve being caught up in the system.[13]

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[10] *Id.* at 355–56.

[11] Qualifying individuals by definition cannot afford to retain counsel. *See, e.g.*, WASH. REV. CODE § 10.101.010 (2012). As Justice Ginsberg has noted, 70 percent of defendants represented by appointed counsel plead guilty, and 70 percent of those plea-convicted defendants serve time in jail or prison. Kowalski v. Tesmer, 543 U.S. 125, 140 (2004) (Ginsberg, J., dissenting). Nearly 70 percent of incarcerated inmates failed to graduate high school, are in the lowest two of five literacy levels, and are therefore unable, for example, to "use a bus schedule." *Id.* Public defense cases also disproportionately involve defendants suffering from mental illness. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 4, at 7.

[12] *See, e.g.*, Karen M. Tami, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L. J. 314, 323–26, n.42 (2012) (discussing the construction of the "deserving poor" trope); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda,* 2010 WIS. L. REV. 239, 240, 248 (2010) (same).

[13] *See* Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 247–49 (2006); *see also* Keith A. Findley & Michael S.

Thus, public defense services satisfy Adler's interest in fair, responsibility-sensitive distribution of well-being. They also fit well within his focus on large-scale policy matters. In 2007, expenditures on indigent defense totaled more than $830 million.[14] Significantly, that sum accounts only for the minority of states (twenty-two) that handle funding on a statewide basis as opposed to on a county or municipal basis.[15]

That magnitude of public expenditure easily meets Adler's criterion for a large-scale policy arena. Moreover, his insights may be especially useful to proponents of public defense reform as a recent spate of cases expands the mandate for appointed counsel. For example, in *Halbert v. Michigan*,[16] the Court invoked the equal protection analysis of *Douglas* to mandate appointed counsel for plea-sentenced defendants seeking first-tier discretionary appellate review. Even more recently, in *Padilla v. Kentucky*,[17] the Court held that the Sixth Amendment right to effective counsel requires attorneys to caution defendants when a plea offer implicates the collateral consequence of deportation. Notably, the Court imposed these expanded duties in the face of apparently intractable disparities in financial and other resources that simultaneously drive demand for and hinder the provision of quality public defense services.[18]

The exacerbating public defense crisis requires reform advocates to mine new resources for improving defender services. Part II contributes to that

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Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 340–41 (discussing prosecutorial presumptions of defendants' guilt).

[14] LYNN LANGTON & DONALD FAROLE, U.S. DEP'T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS 2007 4 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

[15] *Id*.

[16] 545 U.S. 605, 610–11 (2005).

[17] 130 S. Ct. 1473, 1478 (2010).

[18] *See supra* notes 1–4 and accompanying text; *see infra* Part IV.B; *see also* Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. (forthcoming 2014) (discussing solutions for the democracy deficit at the intersection of crime, race, and poverty) [hereinafter Moore, *Democracy Enhancement*].

effort by investigating Adler's innovative work at the intersection of law, moral philosophy, and economic theory. It is impossible to plumb the depths of *Well-Being and Fair Distribution* in these few pages. I seek instead to identify key steps in Adler's analysis and to provoke interest among scholars and practitioners in his formula for moral decision-making in the context of large-scale policy matters.

But Adler acknowledges a number of challenging questions that are set aside for future elaboration. He also sidesteps raging debates over some of the first principles or working assumptions upon which his arguments rest.[19] Part III touches on some of these questions and challenges.

Part IV responds to Adler's more vociferous naysayers by using some of his key concepts to analyze the arrested development of the indigent defendant's right to appointed counsel. This Part queries whether a moral decision-making process akin to Adler's continuous prioritarian social welfare function may have informed the development of right-to-counsel doctrine. The brief discussion here anticipates future elaboration of this analysis and argument. An expanded inquiry should assess, for example, any role that Adler's form of inequality-averse decision-making has played in the genesis of exemplary public defense systems and other attempts to redress the systemic disparities that are linked with the causes and consequences of crime.

This essay concludes by calling for refinement of Adler's methodology to prioritize democracy enhancement at the intersection of crime, race, and poverty. Movement beyond reform efforts driven by elites and toward a regime in which low income people and people of color are empowered to ask their own criminal justice policy questions, to form their own coalitions, and to advocate for their own solutions remains, at this writing, an elusive

[19] *See, e.g.*, ADLER, *supra* note 6, at xiii ("[T]his book works *within* welfarism, rather than engaging ongoing debates between welfarists and non-welfarists.").

hope.[20] It is my own hope that broader awareness of Adler's excellent work will help to transform that possibility into a reality.

II. INEQUALITY AVERSION AND THE MOVE BEYOND COST-BENEFIT ANALYSIS

This Part summarizes Adler's purpose in writing *Well-Being and Fair Distribution* and identifies key concepts in his argument. The prioritarian focus on improving the lot of the less well-off is critical to his theory's relevance in the real-world struggle for public defense reform. Unpacking that connection requires close attention to Adler's integration of moral philosophy and economic analysis. Part II.A discusses Adler's stance on several overarching or "metaethical" controversies that necessarily influence the elucidation of any moral decision-making procedure, including his own. Part II.B tracks Adler's struggle to capture the crucial, yet elusive meaning of "well-being." Part II.C identifies economic principles that are pivotal to Adler's theory, and traces their role in his argument.

A. Practical Purpose and First Premises

Professor Adler's goal in *Well-Being and Fair Distribution* is as precise as his prose. Using rigorous deductive analysis, he designs a procedure for morally evaluating large-scale policy choices. The procedure ranks decision outcomes according to their relative enhancement of individual well-being, with priority given to improving the lot of the less well-off.[21] Adler's intent is practical. He wants policymakers to apply his decision-making procedure

[20] *Cf.* Bach, *supra* note 12, at 266–69 (critiquing "nonexistent" or "ineffective" participation by affected communities in construction and oversight of poverty-reduction programs).

[21] ADLER, *supra* note 6, at 78.

within real-world constraints of limited knowledge, uncertain and changing externalities, and the absence of anything like a free lunch.

Adler begins by laying out four initial premises. Three of these premises are substantive and one is procedural. For many readers, Adler's first premise will be the most controversial. His moral universe is person-centered. Animals and environmental concerns are excluded, except as hypothetically relevant to the pursuit of human well-being.

Adler cites Kant, Rawls, Scanlon, and "[a]ll of welfare economics" to support his anthropocentric starting point.[22] In this view, only humans have the capacity to establish and follow moral norms—those "ought" principles for guiding conduct that apply fairly to all individuals. For Adler, this unique capacity for moral reasoning makes human beings the only entities to whom the concept of fair distribution can properly apply.

Adler claims agnosticism regarding metaethical controversies. But his person-centered starting premises are deeply rooted in the neoKantian tradition. That methodology celebrates the concept of autonomy, or moral self-rule via the individual's rational generation and acceptance of binding normative principles.[23] Additional evidence of a neoKantian influence includes Adler's arguments that the "separateness of persons"[24] and the reification of each individual human being as "a distinct source of moral concerns" justify the goal of distributing well-being fairly.[25] Also salient is

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[22] *Id.* at 5, 8–9 nn.12–16.

[23] *See, e.g.,* ANDREWS REATH, AGENCY AND AUTONOMY IN KANT'S MORAL THEORY: SELECTED ESSAYS 137−38 (2006).

[24] ADLER, *supra* note 6, at 314–17 & n.15 (citing JOHN RAWLS, A THEORY OF JUSTICE 10–15 (1999)); *id*. at 439–42 & n.59 (citing THOMAS NAGEL, EQUALITY AND PARTIALITY 69 (1995)); *see also* Ian Ward, *Another Look at the New Rawls*, 24 ANGLO-AM. L. REV. 104, 120–21 (1995) (discussing Rawls in the context of neoKantianism).

[25] ADLER, *supra* note 6, at 29.

his adoption of the contested proposition that personal identity is continuous throughout an individual's lifetime.[26]

Adler's insistence on the unique, nonfungible moral significance of each individual's personhood fits well with core concerns animating right-to-counsel doctrine, including the "peculiarly sacred" vindication of individual liberty in the face of concentrated government power.[27] There is similar resonance between the constitutional interests in fairness and equal treatment that underpin right-to-counsel doctrine and Adler's second, closely related criterion for moral decision-making: impartiality. This second criterion might be captured more precisely as a demand for the exercise of moral imagination.[28] By definition, moral norms cannot be of wholly idiosyncratic origin or application. More specifically, the ranking of outcomes in Adler's moral decision-making procedure must itself function impartially—that is, equally across persons—as to the interests of the individuals whose well-being the procedure is designed to enhance.

But these initial premises beg a critical question: How precisely are binding moral norms to be generated? Adler answers this procedural question by invoking the concept of reflective equilibrium. He cites the imprimatur of "the vast majority of contemporary moral philosophers" for this methodological choice.[29] Reflective equilibrium is the deliberative

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[26] *Id.* at 406, 409–14; *see also* Moore, *Covenant and Subjectivity*, *supra* note 7, at 159–62, 186–89 (discussing contested meanings of subjectivity). *But see* ADLER, *supra* note 6, at 269–70 n.47 (probing boundaries of essential properties of personhood).

[27] Avery v. Alabama, 308 U.S. 444, 447 (1940) (citing Lewis v. United States, 146 U.S. 370, 374–75 (1892)).

[28] *Compare* Moore, *Covenant and Subjectivity*, *supra* note 7, at 188–89 (arguing for "imaginative participation in another's life-world"), *with* ADLER, *supra* note 6, at 31 ("[A] willingness to consider choice from a broader perspective that encompasses other persons' interests, relationships, projects and attachments, not just the agent's own, is the hallmark of any variant of moral thinking.").

[29] ADLER, *supra* note 6, at 21; *cf.* Ward, *supra* note 24, at 104, 120–21 (discussing Kant's explication of the *sensus communis* and citing IMMANUEL KANT, THE CRITIQUE OF JUDGMENT 150–54 (Oxford Univ. Press 1990)).

process through which participants test their moral intuitions and principles against competing principles and against concrete facts. Participants revise intuitions and principles that are incommensurate either with more attractive competing intuitions and principles or with the obstinacy of real-world facts in particular cases.

Adler readily concedes that reflective equilibrium is methodologically distinct from (if not alien to) the deductive logic and mathematical proofs that form the core of much economic theory. This is so whether or not moral deliberation is undertaken by individuals abstracted from the concrete particulars of existence, like the crowd separated from themselves and each other by the Rawlsian veil.[30] But as Adler demonstrates, formal mathematical proofs yield many logically possible formulae for making large-scale moral decisions to enhance human well-being. He concludes that to evaluate those competing alternative decision structures, "[t]here really is no other game in town" than the "fuzzier and more contestable" process of reflective equilibrium.[31]

Adler's third substantive criterion for a moral decision-making procedure, in addition to person-centeredness and impartiality, is transcendence from social norms or conventions. Moral judgment is necessarily critical. It distinguishes better from worse. Adler concludes from these observations that moral judgment necessarily stands apart from that which is judged and therefore cannot be merely coextensive with existing social practices, including law.

The contestable notion of moral judgment's detachment from social practice is less pivotal to Adler's reasoning than his unobjectionable premise that critical moral judgment can motivate movement from the descriptive *is* to a normative *ought*. As discussed above, Adler's *ought* is

[30] *See* RAWLS, *supra* note 24, at 136–38 (discussing the hypothetical veil of ignorance behind which individuals generate principles of justice).
[31] ADLER, *supra* note 6, at 22.

consequentialist: He focuses on the outcomes of decision-making by large-scale policymakers, and offers a framework for ranking outcomes to favor the enhancement of individual human well-being. As was also previously noted, Adler's *ought* is prioritarian: His methodology gives preference to choices that improve the lot of the less well-off. Each of these emphases resonates with core commitments of public defense reformers.

But Adler's insistence that this type of decision-making is moral—and therefore transcends social norms, including law—problematizes any leap to codify his decision-making process as a procedural mandate. Importantly, he does not draw the inverse conclusion. He does not deny that prioritarian moral decision-making can produce legal mandates. Part IV begins exploring the evidence that the federal constitutional right to appointed counsel emerged through just such a process, that is, a process of reflective equilibrium in a person-centered framework emphasizing impartiality and fairness through inequality reduction and improvement of the lot of the less well-off.

B. Platitudes and the Meaning of "Well-Being"

Simply by establishing the foregoing initial premises for his more detailed arguments, Adler supplies readers previously innocent of economic theory's complex variations with a series of refreshing "Aha!" moments. As he correctly observes, some readers will be surprised to learn that cost-benefit analysis "is a kind of moral decision procedure."[32] But he is too modest here. For some, the existence of social welfare economics as a discipline will be news. Still others will wonder at the confidence of his proclamation, pace Twain, that reports of this discipline's demise have been greatly exaggerated.[33]

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[32] *Id.* at 12.

[33] *Id.* at 89; *cf.* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 562:13 (17th ed., 2002) (quoting a June 1, 1897, note from Mark Twain to a reporter for the N.Y. JOURNAL

Adler's book is important because he makes these discoveries possible (or, at minimum, offers elegant arguments that can inspire critical reflection) for readers whose views of economic theory are shaped primarily by Chicago-school free market and libertarian analyses. *Well-Being and Fair Distribution* offers food for thought to those who, with Alan Greenspan, were "shocked" by the most recent evidence that their "model [for] . . . the critical functioning structure that defines how the world works" contained "a flaw" despite decades of "very considerable evidence" that the model worked "exceptionally well."[34] The model's unanticipated "flaw" was the unreliability of self-interest as the lodestar of a healthy economy. Adler's book also offers much for anyone who was shocked that Greenspan was shocked.[35]

An economic theory that shifts the analysis from gross satisfaction of personal preference to inequality reduction can be a powerful tool for public defense reform advocates. Adler lays out the core components of that new framework as follows. First, he clearly marks the points at which he declines to engage in ongoing and often fierce debates among economists and among moral philosophers. For example, he sidelines the dispute

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stating, "[t]he report of my death was an exaggeration."). *But see, e.g.*, Daniel M. Hausman, Review, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis*, 28 ECON. & PHIL 435, 436 (2012) ("Despite the genius with which the approach is developed, the approach is, I believe, hopeless; and the very genius with which it is developed establishes this conclusion."), *available at* http://journals.cambridge.org/action/displayFulltext?type=1&fid=8764394&jid=EAP&volumeId=28&issueId=03&aid=8764392&newWindow=Y; Mark Sagoff, Review, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis*, NOTRE DAME PHIL. REV., Dec. 4, 2012 (describing Adler's book as "so brilliant it does not just bang another nail in the coffin of welfare economics. It is the coffin itself."), *available at* http://ndpr.nd.edu/news/36051-well-being-and-fair-distribution-beyond-cost-benefit-analysis.

[34] *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight and Governmental Reform*, 110th Cong. 46 (2008) (statement of Dr. Alan Greenspan, Former Chairman, Federal Reserve Bank) (transcript available at http://democrats.oversight.house.gov/images/stories/documents/20081023100438.pdf).

[35] *See, e.g.*, Moore, *Covenant and Subjectivity*, *supra* note 7, at 167–70.

between advocates and opponents of social welfare economics. Instead, he "works *within* welfarism"[36] and strives to make the rigor and comprehensiveness of his argument structure attractive to adherents and skeptics alike. He also situates his arguments within a consequentialist moral philosophical tradition—that is, one focused on production of good outcomes, with "goodness" encompassing considerations of fair distribution—while giving a brief nod to critiques of that tradition.[37]

As noted above, metaethical disputes comprise one topic upon which Adler claims agnosticism. He tries to avoid staking any claims on this "treacherous ground."[38] Take the debate over the ontological status of moral facts or assertions. As Adler explains, some insist that moral assertions, such as "Truth-telling is good," lack any independent, external referent, and simply reveal information about the speaker's preference, plan, or emotion. Others view moral facts as products of a hypothetical setting in which the preferences of fully rational, informed, and impartial participants converge. Still others perceive moral facts as entities existing independent of human intervention. In this view, a moral assertion can be as true or false as the statement, "The Earth revolves around the Sun."

Adler leans toward the intermediate stance (the convergent preference model) in defining "well-being." The meaning of the term "well-being" obviously is critical to his analysis. But he views resolution of the underlying dispute about the true nature of moral facts as unnecessary to acceptance of his arguments by members of opposing philosophical camps. Instead, he invites readers of any persuasion to be persuaded by the elegance of his logic.

Adler also acknowledges diversity of opinion on the precise definition of well-being. Indeed, his systematic engagement with this key contested issue

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[36] ADLER, *supra* note 6, at xviii.
[37] *Id.* at 24–32.
[38] *Id.* at 19.

in moral philosophy is one of the joys of *Well-Being and Fair Distribution.* That engagement includes the poignant observation that "reaching a point of reflective equilibrium with respect to the nature of well-being is *difficult*."[39] In the end, by leaning toward the convergent-preference model for defining well-being, Adler intends to accommodate varying accounts.

As he relates, some philosophers (and many economists) champion a liberal definition of well-being in terms of the satisfaction of individual preferences or desires. Others assess the quality of internal mental states. From the Benthamite-utilitarian perspective, for example, the relevant question is whether a particular choice will increase pleasure or pain.[40] Still others identify objective goods that constitute human well-being. Philosophers' checklists of objective goods range from life and health, through the existence of other species and play, to interpersonal relationships and aesthetic sensibilities.[41]

From this "blooming, buzzing confusion,"[42] Adler teases out three basic principles (or "platitudes")[43] incorporated into any meaningful conception of well-being. First, the concept of well-being "has *critical* force. In other words, an individual can be mistaken about his own well-being."[44] That principle would indeed be a platitude to the parent of any teenager, and Adler views the majority of philosophers as accepting it. He includes philosophers whose definition of well-being lies at the liberal, preference-satisfaction end of the spectrum. But he concedes that many economists would reject the idea out of skepticism toward any normative evaluation of others' goals and preferences.

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[39] *Id.* at 170.
[40] *Id.* at 162–63.
[41] *Id.* at 165–69.
[42] WILLIAM JAMES, 1 THE PRINCIPLES OF PSYCHOLOGY 462 (Frederick H. Burkhardt et al. eds., 1981).
[43] ADLER, *supra* note 6, at 170.
[44] *Id*.

Second, the concept of well-being must have *"motivational* force."[45] Well-being is a good outcome for an individual subject. As between two outcomes, if one is better and one is worse the subject would be motivated to choose the former. But echoing his earlier lament about the difficulty of defining well-being, Adler confesses that "what exactly it means for an outcome to be better for an individual is elusive."[46]

Instead he identifies a third principle or platitude underlying the concept of well-being. The concept must involve more immediate than remote alternative outcomes. An outcome's immediacy and remoteness could relate, for example, to time, geography, or intensity of personal relationship. The connection between an influence, choice, or outcome and an individual's well-being attenuates asymptotically as the consequence becomes less immediate (or more remote).[47]

Ultimately, as noted above, Adler relies on an abstract conceptual methodology to generate a definition of well-being. Well-being, for his purposes, is defined by the convergent preferences of fully rational, informed, and impartial participants striving together toward reflective equilibrium. He modifies that open-ended striving by giving the participants a defined subject for deliberation: the extended life-history.[48] This concept is critical for Adler's move beyond cost-benefit analysis or other economic applications that resist the interpersonal comparisons necessary to assessing fair distribution of well-being and prioritization of the interests of the less well-off.

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[45] *Id.* at 173.
[46] *Id.*
[47] *Id.* at 174–78. Adler admits that the issue of remoteness in the definition of well-being has been of far more concern to philosophers than economists. *Id.* at 178.
[48] *Id.* at 49, 102, 155–56.

C. Pareto and Pigou-Dalton

It is worth reiterating here that Adler focuses on social welfare economics as a source for making moral decisions about large-scale policy choices. Because he works within welfarism, his decision-making model aims at maximizing human well-being. Yet he expressly rejects utilitarianism's definition of the "good" as an aggregation of satisfied preferences. Instead, he wants a decision-making model that is sensitive to fair distribution of well-being. Fairness is in turn a criterion for his model because he views each individual as a separate, unique focus of moral concern. Finally, fairness, in Adler's framework, prioritizes outcomes that improve well-being for the less well-off.

These preliminary commitments require a mechanism for interpersonal, as opposed to merely intrapersonal, comparisons of individual well-being. Adler offers the concept of the life-history as a foundation for making those interpersonal comparisons. He explains the crucial concept of life-history as follows.

For each individual *i* or *j* in the universe of individuals deliberating over the definition and pursuit of well-being, there can be posited a mathematical expression of the relationship between *i* and the outcome of his or her entire life.[49] As noted above, Adler presumes that the individual personal identities of *i* and *j* remain separate, constant and nonfungible throughout the course of *i*'s and *j*'s respective lives.[50] The universe of possible entire outcomes for *i* and *j* can be denoted as containing *x, y,* and *z*, where these outcomes represent descriptions of all possible past, present, and future histories.[51] A life-history is the pairing of one individual from the universe of individuals with one outcome from the universe of possible outcomes. Pairings would

[49] *Id.* at 49–50.
[50] *See supra* notes 26−28 and accompanying text.
[51] ADLER, *supra* note 6, at 49–50.

be expressed, for example, as *i*'s life in *x* outcome (*x*; *i*) and *j*'s life in outcome *y* (*y*; *j*).[52]

It is now possible to begin ranking life-histories. Here Adler introduces readers unacquainted with economic theory to some of the discipline's basic axioms. These include the Pareto and Pigou-Dalton principles. A decision-making system that strives to maximize human well-being can satisfy the Pareto-indifference principle if it is possible to compare two different life-histories—that is, two different entire outcomes for the same person [(*x*; *i*) and (*y*; *i*)] and identify outcomes in which *i* is equally well-off.[53] That decision-making procedure reveals that *x* and *y* have the same moral worth, and ranks those outcomes equally.[54]

But a decision-making system also must be able to evaluate outcomes in terms of the strong and weak Pareto principles.[55] The former tests for outcomes such that at least one individual is better off in outcome *x* than in outcome *y*, *and* for everyone else, *x* and *y* are at least equally good. In that setting, *x* is morally better than *y*.[56] Weak Pareto provides another method for ranking outcomes: If each participant is better off in outcome *x* than in outcome *y*, then *x* beats *y* in terms of moral worth.[57]

A problem arises because some outcomes are Pareto-noncomparable. For example, it may be the case that *i*'s well-being is better in *x* than in *y*, but *j*'s well-being is better in *y* than in *x* [(*x*; *i*) > (*y*; *i*) but (*x*; *j*) < (*y*; *j*)].[58] Or outcome *x* could be better for the well-being of a few people than is outcome *y*, while *x* is worse for the well-being of more people than is

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[52] *Id.*
[53] *Id.* at 52–56.
[54] *Id.* at 52–55.
[55] *Id.* at 53–55.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 55–56.

outcome y [$(x; i, j, k) > (y; i, j, k)$ but $(x; l, m, n \ldots z) < (y; l, m, n \ldots z)$].[59] Adler sets himself the task of providing a mechanism to rank the moral value of these tougher, Pareto-noncomparable outcomes.

Adler voices some skepticism about the ability systematically to compare well-being across different individuals, particularly using the deductive logic of economic theory. He asks,

> [W]hat *is* the most attractive account of well-being? Why believe that it allows for interpersonal comparisons? What would such comparisons consist of? And even if interpersonal comparisons *are* possible, how do we construct numerical utilities that represent the well-being ranking of life-histories or the well-being differences between life-histories?[60]

Adler answers this question in part through the concept of extended preferences. These are constructed as participants seek reflective equilibrium regarding the fair distribution of well-being by ranking the universe of life-histories according to both preference (their own self-interested preference as well as other-interested preferences) and probability (the likelihood that a given life-history will come to fruition).[61] Within the universe of these ranked life-histories, it is then possible to evaluate the differences between various pairs of life-histories and make moral judgments about better and worse outcomes across persons.

Enter the Pigou-Dalton principle. This is a mechanism for prioritizing the reduction of inequality. In other words, a moral decision-making procedure that maximizes individual well-being also satisfies Pigou-Dalton "if it gives greater weight to well-being changes affecting worse-off individuals."[62] In Adler's schematic, the principle has four premises and a conclusion. If (1)

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[59] *Id.*
[60] *Id.* at 155.
[61] *Id.* at 201–02.
[62] *Id.* at 78.

Jamila's well-being is greater than Isaac's in outcome *y* and greater than or equal to Isaac's in outcome *x*; (2) Isaac's well-being is greater in *x* than in *y*, but the reverse holds true for Jamila; (3) the differences between Jamila's well-being in *x* and *y* and Isaac's well-being in *x* and *y* are equal; and (4) no one else is affected by the difference between *x* and *y*, then *x* is morally better than *y.* [63]

In terms of ranked life histories, the premises would look like this:[64]

(1) $(y; j) > (y; i)$ and $(x; j) \geq (x; i)$
(2) $(x; i) > (y; i)$ and $(y; j) > (x; j)$
(3) $[(y; j) - (x; j)] = [(x; i) - (y; i)]$
(4) $(x; k, l, m \ldots z) = (y; k, l, m \ldots z)$

Another way to state premises (1) and (2) is:

$$(y; j) > (x; j) \geq (x; i) > (y; i)$$

Put that way, it is easy to see that Jamila's well-being is greater than Isaac's in *y* and greater than or equal to Isaac's in *x*. Conversely, Isaac is worse off in *y* and at least as well off as Jamila in *x*. Because the Pigou-Dalton principle prioritizes reduction of inequality, as long as the interpersonal well-being differences between Jamila and Isaac are equal as between life-histories in *x* or *y*, it is morally better to improve Isaac's well-being.[65]

Adler captures the moral impetus favoring improvement in the well-being of the less well-off in terms of a graphically illustrated mathematical equation.[66] The equation is sufficiently complicated that it will not be reproduced here. But the *x*:*y*-axis graph is readily imagined. A curved line begins at (0,0) and ascends steadily in an arc that is concave with respect to

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[63] *See id.* at 339.
[64] *See id.* at 340.
[65] *See id.* at 79.
[66] *Id.* at 72, 79, 553.

the *x*-axis. Overall utility increases along the *x*-axis. Thus, an individual with more well-being (Jamila) would be to the right at point *j* from Isaac, who would be at some lesser well-being point *i* closer to (0,0).[67] A "g function" transforms utility along the *y*-axis. Crucially, that transformation decreases inequality, but in such a way that Jamila's loss in well-being would never exceed Isaac's gain.[68]

Thus, Adler's g-function drives change in a particular direction—a continuous prioritarian direction that emphasizes improvement in well-being for the less well-off. He notes that purely utilitarian decision-making processes, like cost-benefit analysis, cannot satisfy Pigou-Dalton's demand for sensitivity to fair distribution of well-being across persons.[69] In Adler's calculus, the inequality-aversion factor (denoted as γ) would prioritize higher levels of improvement for the less well-off as inequality increases. At maximum levels of inequality, γ would asymptotically approach "absolute priority [for] worse-off individuals."[70] Conversely, γ would yield a more utilitarian prioritization of collective well-being as inequality drops.[71]

D. Summing Up

Adler's arguments warrant attention because they offer a new way to promote decision-making in large-scale policy settings aimed at improving the lot of the less well-off. Those settings include the struggle to improve public defense services. Adler's neoKantian insistence on the nonfungible value of each person resonates with constitutional interests in securing

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[67] *See id.* at 79.
[68] *See id.* at 72, 79 (describing this transformed utility function, g(u), as "strictly increasing and strictly concave"); *id.* at 79 (showing that the g function continually decreases inequality with priority of change favoring the less well-off.)
[69] *Id.* at 78.
[70] *Id.* at 383–87, 553.
[71] *Id.* at 387.

liberty and equal, fair treatment, particularly in confrontations between the individual and concentrated government power. Adler's application of economic theory's deductive logic opens the way toward the interpersonal comparisons of well-being that can support an inequality-averse "g function" that is attentive to fair, responsibility-sensitive distribution.

To be clear, this essay's brief introduction to some key concepts and arguments in *Well-Being and Fair Distribution* cannot do justice to Adler's detailed discussion. Nor will this essay present a thoroughgoing critique of the book's complex interdisciplinary arguments. Adler acknowledges a number of challenging questions that are set aside for future elaboration. He also sidesteps fierce debates over some of his first principles and working assumptions. Part III touches on some of those unresolved issues, which will influence the application of Adler's theory in real-world contexts such as public defense reform.

III. PROBLEMS, PUZZLES, AND PROVING GROUNDS

Adler's arguments face heavy fire from scholars who are averse to the possibilities that well-being could be subject to interpersonal comparison or that the well-being of one may be sacrificed to improve the lot of others on any terms properly denominated as "moral."[72] With respect to the first concern, classically liberal angst spikes with any trenching on the autonomous individual's freedom to choose his or her ends.[73] But it takes a radical skeptic to dismiss even the abstract possibility of discovering common ground through deliberative processes. (That's what democracy is supposed to look like.) And at least some readers will find Adler's novel challenge to the hegemony of classical liberalism's autonomous self-

[72] *See, e.g.*, Sagoff, *supra* note 33, ("[w]arn[ing] against the fatal conceit" of "[a]pparatchiks of a Welfarist Party . . . enforc[ing] their own views of what counts as an informed, fully rational, extended preference.").
[73] *See id.*

interest-maximizer[74] to be a chief source of interest in a complex and challenging set of arguments.

The second concern sparks greater interest. Daniel Hausman is a leading scholar in the philosophy of economics who faults Adler for the "startling" claim that "concerns about fairness exhaust morality."[75] Hausman also alleges that Adler "explicitly defends" the premise that "small benefits to enough well-off individuals can compensate for harms to very badly off individuals."[76]

Both criticisms seem overstated. As noted in Part II, Adler strives through his anthropocentric insistence on the primacy and separateness of persons to champion the indissoluble and non-fungible moral worth of each individual human being.[77] It is here that his neoKantian approach diverges quite sharply from utilitarianism's bald willingness to sacrifice the interests of one to the collective good of the many.

Adler does adopt a rebuttable assumption that fairness is a sufficient moral criterion within his own welfarist framework. He cites Rawls as a comrade-in-arms.[78] Yet he also justifies his working assumption by reiterating the expansive definition and role of fairness within his theory. For Adler, fairness

> provides an overarching structure for determining the normative significance of facts about human well-being. All of the various aspects of an individual's welfare determine the valence of her claim between a given pair of outcomes.[79]

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[74] *See supra* notes 32–37 and accompanying text.
[75] Hausman, *supra* note 33, at 438.
[76] *Id.* at 441.
[77] *See supra* notes 23–29 and accompanying text.
[78] *See* ADLER, *supra* note 6, at 338–39 & n.54 (discussing RAWLS, *supra* note 24, at 15, 93–98).
[79] *Id.* at 338.

In other words, the concept of fairness is tightly linked with the "all-things-considered" reflective equilibrium process that generates definitions of well-being, rankings of life-histories, and the corresponding interpersonal moral claims of individuals to increased well-being.[80] This genesis of fairness—a kind of Immaculate Conception—may inspire awe (or incredulity). But given this genesis, Adler's claim for the sufficiency of fairness as a moral criterion within his social welfare framework is, perhaps ironically, considerably more modest than Hausman suggests.

Nor does Adler champion a "Numbers Win" subordination of a worse-off individual's interests to the collective improvement of the better-off. To the contrary, in his calculus the g-function prioritizes increased well-being for the less well-off. Adler argues that *despite* possessing the "Numbers Win" feature, a continuous prioritarian social welfare decision-making structure is optimal for large-scale policy matters.[81]

Adler further notes that many find "Numbers Win" to be an "unattractive" feature of continuous prioritarian social welfare decision-making structures.[82] He describes "Numbers Win" as "very troubling,"[83] "unfortunate,"[84] and a "deficit" for this type of decision-making procedure.[85] He attempts, perhaps unpersuasively, to ameliorate the effects of the "Numbers Win" feature with a modifier. Where decreases in well-being for an individual are "sufficiently small," he proposes that some fraction of that loss—"perhaps a very small fraction"—should be capable of being "trumped by benefits to a sufficiently large number of people."[86]

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[80] *See id.* at 201–02, 337 nn.52–53.
[81] *Id.* at 360.
[82] *Id.* at 358.
[83] *Id.* at 360.
[84] *Id.* & n.87.
[85] *Id.* at 360.
[86] *Id.* at 377–78.

Although future scholarship will doubtless develop more fully the extant and potential critiques of *Well-Being and Fair Distribution,* several noteworthy questions arise in the context of criminal justice policy reform and in the more specific setting of public defense services. One pressing item on Adler's own "to-do" list is a more complete account of the meaning and role of individual responsibility in a continuous prioritarian moral decision-making procedure.[87] How can systems appropriately "distinguish between individuals who are responsible for being badly off and those who are badly off through no fault of their own"?[88]

The closing pages of *Well-Being and Fair Distribution* offer several angles from which to tackle that important task. As Adler notes, determining aspects of a life-history for which individuals can and should be held accountable "implicat[es] one of the deepest philosophical puzzles—free will."[89] Again, the high salience of these issues in the criminal justice setting is indisputable. Criminal law and procedure constitute a proving ground in theoretical and practical struggle over the scope and meaning of personal responsibility. In delineating the appropriate boundaries of regulatory authority between individual, community, and the concentrated power of government, the discipline perpetually teeters over the divide between deontology and teleology, retributivism and deterrence.[90]

Thus, criminal justice issues provide an excellent context within which to test and refine Adler's arguments, particularly in elaborating the role of free will as compared to conditioned choice or luck. On this point, interesting subjects for future analysis include the definition and functionality of

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[87] *Id.* at 37–38.
[88] *Id.* at 579.
[89] *Id.* at 584.
[90] This point is commonly driven home in the opening pages of first-year criminal law casebooks. *See, e.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 1–3, 30–48 (2012).

incentives. Also important are debates over the existence and effect of implicit racial or ethnic bias,[91] and the extent to which structural inequalities have racially invariant consequences.[92]

At a more fundamental level, the architecture of the reflective equilibrium process is subject to challenge. Recall that Adler aims to bridge the gap between theory and practice. He seeks to augment cost-benefit analysis as an applied methodology for governing large-scale policy choices with a continuous prioritarian social welfare process that is sensitive to responsibility—that is, the exercise of individual free will. In the real world, what mechanisms can promote equal participation by the less well-off in constructing consensus over the definition of well-being? Are there any assurances that consensus will reflect more than the extended preferences of elites?

Adler's move from theory to practice requires simplification of possible life-history outcome and utility sets "so that individuals and social planners

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[91] *See, e.g.*, Amy L. Wax, *Supply Side or Discrimination? Assessing the Role of Unconscious Bias*, 83 TEMP. L. REV. 877, 887–902 (2011) (surveying literature and challenging empirical support for unconscious bias as a causal factor capable of objective proof or redress through law). *But see, e.g.*, State v. Golphin, Nos. 97 CRS 47314-15, slip op. at 2–4, 19–28 (Cumberland Cnty., N.C. Super. Ct. Dec. 13, 2012) (vacating three defendants' death sentences based on finding of prosecutors' intentional and implicit racial bias in capital jury selection), *available at* http://www.law.msu.edu/racial-justice/Golphin-et-al-RJA-Order.pdf. The state legislature subsequently repealed the Racial Justice Act that made these findings possible. *See* Moore, *Democracy Enhancement*, *supra* note 18 (discussing Act's history, implementation, and repeal; citing, *inter alia*, Act of June 13, 2013, 2013 N.C. Sess. Laws 154, § 5(a-d), repealing N.C. GEN. STAT. §§ 15A-2010-2012 (2012).

[92] *Compare*, *e.g.*, Robert J. Sampson & Lydia Bean, *Cultural Mechanisms and Killing Fields*, *in* THE MANY COLORS OF CRIME 8, 11 (Ruth D. Peterson et al. eds., 2006) (discussing "resilient" invariance findings related to "factors representing disadvantage, e.g., differing combinations of poverty, income, family disruption, joblessness, and unemployment") *with* Jeffery T. Ulmer et al., *Racial and Ethnic Disparities in Structural Disadvantage and Crime: White, Black, and Hispanic Comparisons*, 93 SOC. SCI. Q. 799, 800 (2012) ("[T]he degree to which differences across groups in structural disadvantage predict racial or ethnic differences in violence is far from settled.").

can actually *think* about them."[93] He sets aside the "thorny, and perhaps insoluble," challenge of justifying what is included or excluded during that process of simplification.[94] He also describes social constructs such as race and gender as "cognitively immutable," that is, as factors that are difficult to set aside for people who "possess the attribute[s]."[95] Adler sees that cognitive immutability problematizes the conditions of full information and rationality necessary for the ranking of life-histories and utility sets.[96] He "very much hope[s]" that the fully informed, rational evaluators would not be influenced by socially-constructed status identifiers in the evaluative process.[97] Realizing this hope may prove elusive.[98]

These and other challenging aspects of Adler's analysis await more comprehensive critical analysis. My goals here are simply to sketch key aspects of his argument for a continuous prioritarian decision-making model, to note some areas for future refinement and development of the argument, and to take some initial steps toward testing the argument's application in the real-world context of the struggle for improved public defense services.

It is to the latter task that this essay now turns. As discussed in Part IV, the indigent criminal defendant's right to appointed counsel is embedded in a complex socioeconomic setting. It is a context in which both well-being and fair distribution are perpetually contested and at risk. Exploring the development of right-to-counsel doctrine as a real-world instantiation of Adler's theory may help to counter arguments that would classify *Well-*

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[93] ADLER, *supra* note 6, at 246.
[94] *Id.* at 246, 258.
[95] *Id.* at 274.
[96] *Id.*
[97] *Id.* at 274–75.
[98] *See* Moore, *Democracy Enhancement*, *supra* note 18.

Being and Fair Distribution with *The Sound and the Fury*—as a "splendid failure."[99]

IV. WELL-BEING, FAIR DISTRIBUTION, AND THE RIGHT TO APPOINTED COUNSEL

Despite the questions and challenges facing Adler's innovative arguments for a continuous prioritarian decision-making procedure, his focus on inequality-averse improvements in well-being for the less well-off warrants further investigation for academicians and activists interested in reforming criminal justice systems generally and public defense systems in particular. This Part begins that investigation. Part IV.A interrogates the seminal cases in the development of right-to-counsel doctrine, and identifies a decision-making process similar to Adler's at work. Part IV.B summarizes the practical failures of right-to-counsel doctrine, and calls for modification of Adler's approach to improve the applicability of the continuous prioritarian social welfare model in the real-world context of justice reform.

A. Powell and Prioritarianism

An exemplar of prioritarian social welfare decision-making may lie in the tangled roots of the indigent criminal defendant's federal constitutional right to appointed counsel. This distinctive constitutional positive right mandates redistribution of resources to those who by definition occupy lower rungs on the ladder of socioeconomic well-being.[100] And the doctrinal history reveals an ongoing struggle toward consensus on the right's justification and scope.

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[99] *Compare* Sagoff, *supra* note 33, *and* Hausman, *supra* note 33, *with* Kathleen Hulley, *The Most Splendid Failure: Faulkner's The Sound and the Fury*, 8 REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES 260 (1979) (book review).

[100] *See supra* note 11 and accompanying text.

The complex and sometimes overlapping sources of the right to appointed counsel include the due process and equal protection clauses of the Fourteenth Amendment,[101] as well as the Sixth Amendment guarantee of "Assistance of Counsel" for federal defendants[102] and the incorporation of that federal right via the Fourteenth Amendment with respect to the states.[103] Albeit in a herky-jerk trajectory, the right to appointed counsel has steadily expanded in scope from its original application as a due process corrective in *Powell v. Alabama*.[104]

As has been discussed in detail elsewhere,[105] the truncated capital proceedings in *Powell* arose squarely at the intersection of crime, race, and poverty. The defendants were young African American men accused of raping two white women.[106] They were tried under circumstances just shy of a courthouse lynching,[107] or, in the words of the *Powell* majority, "judicial murder."[108]

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[101] Douglas v. California, 372 U.S. 353, 356–58 (1963) (establishing due process and equal protection rights to appointed appellate counsel in jurisdictions providing direct appeal as of right); Powell v. Alabama, 287 U.S. 45, 71 (1932) (establishing due process right to timely appointment of counsel for capital trials).
[102] Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).
[103] Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (requiring appointed counsel for indigent defendants facing felony charges); Argersinger v. Hamlin, 407 U.S. 25, 27 (1972) (requiring appointed counsel for indigent defendants facing misdemeanor charges).
[104] *Powell*, 287 U.S. at 64–65.
[105] *See, e.g.*, Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts "Legal Lynchings," in* CRIMINAL PROCEDURE STORIES 1 (Carol B. Steiker ed., 2006).
[106] *Id.*
[107] *Id.* The young men "ranged in age from 13 to 20." *Id.* Their names were Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, Haywood Patterson, Charles Weems, Clarence Norris, Roy Wright, and Eugene Williams. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320, 1334 (2004) (discussing the deeply imbedded myth in American culture that black men are "animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape").
[108] *Powell*, 287 U.S. at 72.

Powell was a watershed case. For the first time the Court held that, even without an express request for counsel, the lack of lawyering in the "critical period" of pretrial client consultation and fact investigation violated due process—at least where the defendants were young, illiterate, far from home, and on trial for their lives.[109] "No attempt was made to investigate. No opportunity to do so was given."[110] The cases went forward "with the haste of the mob."[111] The defendants had no meaningful right to be heard.[112]

In such circumstances, the right to timely appointment of counsel was held to be fundamental—a prerequisite for preserving the "liberty and justice which lie at the base of all our civil and political institutions."[113] The Court justified this newly articulated due process guarantee with what has become a time-tested methodology: listening to the choir. The Court assessed the degree to which consensus had developed on this issue as evidenced in state constitutions, legislative enactments, and case law.[114]

Although the analogy may be problematized—a task not taken up here—the Court's methodology has affinities with the process of reflective equilibrium that is essential to Adler's prioritarian social welfare economic theory. As a reminder, reflective equilibrium is the reasoning process through which premises are confirmed or modified when tested against competing views and real-world facts.[115] The *Powell* Court used a similar approach in assessing the state of convergent, cross-jurisdictional preferences on the question of the right to appointed counsel.

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[109] *Id.* at 57–58, 71.
[110] *Id.* at 58.
[111] *Id. But see id.* at 75–76 (Butler and McReynolds, JJ., dissenting) (discussing pretrial motions and trial tactics undertaken by defense attorneys, including cross-examination of complaining witnesses).
[112] *Id.* at 67 (majority opinion).
[113] *Id.* (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
[114] *Id.* at 72–73.
[115] *See supra* notes 29–31 and accompanying text.

The Court surveyed the jurisdictional landscape over time and space and found that by 1932, when the Court ruled on the due process issue, the federal government and the states uniformly mandated judicial appointment of counsel for indigent capital defendants.[116] The Court also discovered that the majority of states required appointment of counsel for *any* defendant facing *any* criminal charge for which he could not afford to hire a defense attorney.[117] Probing more deeply beneath these converging mandates, the Court also detected an underlying "immutable principle" binding fairness to equality.[118] That principle was rooted in a type of inequality aversion consistent with Adler's version of a social welfare decision-making process. Here, the target was reduction of disparities in knowledge, power, and skill that exist between an individual criminal defendant and a prosecuting authority.[119]

On that point, the Wisconsin Supreme Court had issued a hearty national back-patting as early as 1910. In *Hack v. State*, that Court described a playing field that had been at least leveled for indigent defendants, if not affirmatively tipped in their favor:

> Thanks to the humane policy of the modern criminal law . . . if [a defendant] be poor, he may have counsel furnished him by the state . . . ; not infrequently he is thus furnished counsel more able than the attorney for the state.[120]

The *Powell* majority was less overtly sanguine about the quality of representation provided to indigent criminal defendants. The Court nevertheless read the available empirical data in a similar spirit. Like the court in *Hack*, the majority Justices in *Powell* invoked American colonial

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[116] *Powell*, 287 U.S. at 73.
[117] *Id.*
[118] *Id.* at 72–73.
[119] *See id.*
[120] Hack v. State, 124 N.W. 492, 494 (Wis. 1910).

rebellion against the English common-law notion that defense attorneys were unnecessary in felony cases because trial judges would protect defendants' interests.[121]

Until 1836, English law allowed civil litigants and misdemeanor-level criminal defendants to hire counsel if they could afford to do so. In contrast, defendants facing felony charges—and therefore a possible death sentence—could hire counsel only to address questions of law.[122] This odd arrangement was anathema to many. As one American colonial critic noted, "It is manifest that there is as much necessity for counsel to investigate matters of fact, as points of law, if truth is to be discovered."[123] The *Powell* opinion echoed that refrain. The Court repeatedly emphasized the critical duties of pretrial client consultation and fact investigation as unique to the defense function.[124]

The Court's focus here was not merely on counsel's utility in terms of equality enhancement and procedural fairness. *Powell* also championed the intimate relationship between the individual defendant and the advocate dedicated to advancing his interests. Trial judges, the Court noted,

> cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[125]

The Court struck a similarly elegiac tone in *Avery v. Alabama*. While rejecting the defendant's right-to-counsel claim under *Powell*, the *Avery*

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[121] *Powell*, 287 U.S. at 61 (citing 1 COOLEY'S CONST. LIM. 8th ed., 698, *et seq*., and notes); *cf. Hack*, 124 N.W. at 494.
[122] *Powell*, 287 U.S. at 61.
[123] *Id.* at 63 n.1.
[124] *Id.* at 63.
[125] *Id.* at 61.

Court nevertheless ascribed a "peculiar sacredness"[126] to the constitutional guarantee at issue. Such sonorous language may have derived in part from the *Powell* Court's express reliance upon existing state constitutional, statutory, and judicial mandates for appointing counsel.[127] At a deeper level, the language may derive from a radical commitment, too often honored in the breach, to the same confluence of fairness and equality toward which Adler's theory aims.

The Court's invocation of state consensus on the right to appointed counsel did not end with *Powell* and *Avery*.[128] In *Gideon v. Wainwright*, the Court applied similar reasoning in holding that the Sixth Amendment, as incorporated through the Fourteenth Amendment, mandated appointment of counsel in state felony cases.[129] *Gideon* is viewed with *Powell* as a watershed case and has far overshadowed *Douglas v. California*,[130] decided the same day.

Douglas arose when two codefendants were convicted of thirteen serious felonies. The defendants were tried together after their motions to continue and to obtain separate, conflict-free counsel were denied.[131] Applying a state rule of criminal procedure, the intermediate appellate court rejected the

[126] Avery v. Alabama, 308 U.S. 444, 447 (1940) (citing Lewis v. United States, 146 U.S. 370, 374–75 (1892)).
[127] *See Powell*, 287 U.S. at 72–73.
[128] *See* Johnson v. Zerbst, 304 U.S. 458, 462–63, 467–68 (1938) (quoting *Powell* and *Hack* with approval; holding that, absent a knowing and voluntary waiver, the failure to appoint counsel for indigent federal defendants violates the Sixth Amendment and divests the trial court of jurisdiction). *But see* Betts v. Brady, 316 U.S. 455, 465, 472–73 (1942) (rejecting claim that Fourteenth Amendment due process clause incorporated the Sixth Amendment by guaranteeing a fundamental right to appointment of counsel for indigent defendants facing state felony charges; finding such diverse state approaches that federal constitution should not "straitjacket[]").
[129] Gideon v. Wainwright, 372 U.S. 335, 339 (1963). *See also* David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises, in* CRIMINAL PROCEDURE STORIES 101, 101–02 (Carol B. Steiker ed., 2006) (discussing the history of *Gideon*).
[130] Douglas v. California, 372 U.S. 353 (1963).
[131] *Id.* at 353–54.

defendants' request for appointed counsel to handle their appeals.[132] That court affirmed the convictions, and the state Supreme Court denied petitions for review.[133] The U.S. Supreme Court granted certiorari to determine the constitutionality of the procedural rule allowing appellate courts to deny requests for appointed counsel based on judicial review of the record and a conclusion that appointed counsel would yield no "advantage" to defendants or the courts.[134]

The *Douglas* Court held that the due process and equal protection clauses of the Fourteenth Amendment required appointment of counsel on direct appeal in states that offer direct appeal as of right.[135] Examining the decision in light of Adler's social welfare decision-making procedure reveals that the majority expressly championed the conjunction of inequality-aversion and fairness. The targeted "evil" was "discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"[136] To force indigents through "a gantlet" that the rich could evade "did not comport with fair procedure."[137]

Although the analysis here barely skims the doctrinal surface, it appears that in these early right-to-counsel cases inequality aversion targeted the incommensurate power, position, and resources of an individual vis-à-vis the concentrated legal authority of government to charge, prosecute, convict, and strip away liberty or life. Methodologically, the Court was no diva dominating the stage. Instead, a harmonizing federal top-note joined the states' majoritarian chorus. Further investigation and analysis should continue testing the hypothesis that early right-to-counsel jurisprudence

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[132] *Id.*
[133] *Id.* at 354.
[134] *Id.*
[135] *Id.* at 355–56.
[136] *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).
[137] *Id.* at 357.

may be an object lesson in the identification and vindication of convergent preferences that prioritize the interests of the less well-off.

B. Expansion, Weak Enforceability, and Triage

The foregoing analysis applies Adler's methodology to identify inequality-averse convergent interests at work in the development of constitutional right-to-counsel doctrine. But that doctrinal development has also incited a fair amount of discord. One dissenting Justice in *Douglas* decried the majority's mandate for appointment of appellate counsel as "utter extravagance and a waste of the State's funds . . . an intolerable burden on the State's judicial machinery."[138]

Argersinger v. Hamlin, which extended *Gideon* to misdemeanor cases,[139] contained a more detailed fiscal note.[140] Concurring in the judgment, Justices Powell and Rehnquist advocated a flexible due process approach instead of a bright-line Sixth Amendment mandate for appointment of counsel in misdemeanor cases.[141] They warned that "hundreds of communities in the United States with no or very few lawyers [and] with meager financial resources" would be unable to fulfill their Sixth Amendment duties.[142]

Such worries were well-founded. They have been voiced repeatedly and with increasing urgency as the right to appointed counsel has expanded

[138] *Id.* at 359 (Clark, J., dissenting).
[139] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); *see also* Alabama v. Shelton, 535 U.S. 654, 658, 674 (2002) (extending *Argersinger* to probation cases with potential for incarceration). *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 310–12 (2011) (describing varying levels of compliance with duty to appoint misdemeanor counsel).
[140] *Argersinger*, 407 U.S. at 46–61 (Powell & Rehnquist, JJ., concurring in the judgment).
[141] *Id.* at 60–61.
[142] *Id.*

substantively and across procedural phases of case development.[143] Today, the right comprises juvenile as well as adult representation[144] and includes the critical periods of pretrial investigation and communication, arraignment, trial, and direct appeal. The right also touches upon additional pretrial settings,[145] including plea-bargaining,[146] sentencing,[147] first-tier petitions for discretionary appellate review,[148] state post-conviction proceedings,[149] and advice on the collateral consequence of deportation that attaches to any potential plea agreement.[150]

Yet, in a pattern typical of other constitutional criminal procedure guarantees,[151] a substantively meaningful right to appointed counsel has been only weakly enforceable since *Strickland v. Washington* established an ex post performance-and-prejudice standard for evaluating counsel's constitutional effectiveness.[152] The Antiterrorism and Effective Death

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[143] *See supra* note 4 and accompanying text.
[144] *See In re* Gault, 387 U.S. 1, 41 (1967) (imposing due process duty to appoint counsel for indigent juveniles facing delinquency proceedings that could result in loss of liberty).
[145] *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008).
[146] *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1390–91 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1410–11 (2012).
[147] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 390–99 (2000) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).
[148] *See* Halbert v. Michigan, 545 U.S. 605, 610–11 (2005) (applying Douglas v. California, 372 U.S. 353 (1963), to require appointment of counsel for plea-sentenced defendants seeking first-tier discretionary appellate review).
[149] *See* Martinez v. Ryan, 132 S. Ct. 1309, 1320–21 (2012) (finding ineffective assistance of counsel on first-tier collateral review may establish cause to overcome procedural default defense to federal habeas claim); *see also* Maples v. Thomas, 132 S. Ct. 912, 927 (2012) (applying holding in *Martinez* where post-conviction counsel abandoned client without notice).
[150] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (holding that constitutionally effective assistance requires advising defendants on collateral consequence of deportation related to plea offer).
[151] *See* Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1341–46 (2012) (discussing weak enforceability of prosecutors' due process duty to disclose exculpatory and impeachment evidence under Brady v. Maryland, 373 U.S. 83 (1963)).
[152] *Strickland*, 466 U.S. at 687.

Penalty Act further undercut enforceability by restricting federal habeas access, slamming a crucial procedural door to many ineffective assistance claims.[153]

An abundant literature documents the resulting regulatory shortcomings and their contribution to crises in the underfunding and overloading of indigent defense service systems across the country.[154] That analysis will not be repeated here. It suffices to say that *Strickland*'s bar for constitutionally effective assistance is so low that lawyers have hurdled it while habitually drunk,[155] while sleeping during trial,[156] and (despite being awake and presumably sober) while failing to investigate and present readily available evidence of actual innocence in a capital murder case.[157]

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[153] *See, e.g.*, John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 444–56 (2011) (contesting evidence and argument for eliminating habeas access for most prisoners in Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 818–33 (2009)); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH & LEE L. REV. 85, 133–46 (2012) (same). By requiring appointment of counsel for plea-sentenced defendants seeking discretionary review, and by softening procedural default rules that might otherwise foreclose federal habeas relief due to failures of state post-conviction counsel, the Court is holding states accountable for failing to provide effective counsel to litigate ineffective assistance claims against trial and appellate lawyers. *See Halbert*, 545 U.S. at 610–11; *Martinez,* 132 S. Ct. at 1320–21. The Court appears to be pushing more responsibility onto the states to improve representation, or at least to ensure that ineffective assistance claims can be fully litigated in state court. *Halbert* also hints at some resurgence of the inequality-aversion principle that animated *Douglas v. California*. *See Halbert*, 545 U.S. at 610–11.

[154] For examples, *see supra* note 4.

[155] Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000), *cert. denied*, 533 U.S. 960 (2001) (affirming death sentence despite feeling "troubled" at capital defense attorney's admitted "decades-long habit" of drinking "twelve ounces of rum" each night during trial); *see also* Ronald R. Tabak, *Why An Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1112–13 (2003).

[156] *See* Muniz v. Smith, 647 F.3d 619, 623–25 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1575 (2012) (discussing "sleeping lawyer" jurisprudence).

[157] *See* Scanlon v. Harkleroad, 740 F. Supp. 2d 706, 728–30 (M.D.N.C. 2010), *aff'd per curiam*, 467 Fed. Appx. 164 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 164 (2012) (finding

Such doctrinal and empirical data lead to a depressed and depressing view of indigent defense systems. Without succumbing to the general malaise, leading criminal justice scholar Ronald Wright summarized the grim state of affairs: "Year after year, in study after study, observers find remarkably poor defense lawyering . . . and they point to lack of funding as the major obstacle to quality defense lawyering."[158]

Some commentators, viewing *Gideon*'s promise as broken and without meaningful hope of repair, champion triaged public defense services. They urge investment of resources where, in their view, those investments will yield the biggest bang for the buck: death penalty cases, felonies, and cases involving a viable claim of actual innocence.[159] Former prisoner and longtime justice activist Susan Burton suggests a very different tactic. She proposes that defendants and defenders change the broken system by crashing it.[160] Burton sees no other avenue toward productive change than

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trial counsel ineffective in guilt/innocence phase, but denying defendant new trial due to lack of prejudice). The author represented Petitioner Donald Scanlon in state and federal appellate and post-conviction challenges to his convictions and death sentence. *Id.* at 708.

[158] Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221 (2004). Wright proposes advocacy of parity between prosecutorial and defense functions as an effective strategy for reform. *Id.* at 253–62.

[159] *But see* Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 959–73 (2010) (critiquing proposals for triaging or reassigning defense services proposed in, for example, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1590 (2005) and Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 816–25 (2004)); *see also* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 990–95 (2012) (arguing for triage in counsel appointments).

[160] Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0.

the collective monkeywrenching of the machinery through refusal of plea offers and insistence on taking cases to trial.[161]

Both suggestions are subject to criticism. With respect to the triage approach, it is well settled that a governmental threat to individual liberty through criminal prosecution triggers the leveling counterweight of appointed counsel for indigent defendants.[162] Triage proponents tack too far toward the utilitarian in their willingness to sacrifice the individual to the aggregate good. Susan Burton acknowledges similar objections to her proposal that defendants crash criminal justice systems through collective insistence on the right to trial.[163]

Another avenue—and one perhaps consistent with Professor Adler's continuous prioritarian moral decision-making procedure—is to examine closely those centers of indigent defense that strive for excellence, seeking to understand why they work as well as they do despite many reasons to expect failure.[164] Particular scrutiny is warranted where community defense

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[161] *Id.*

[162] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (requiring appointed counsel for indigent defendants facing felony charges); *In re* Gault, 387 U.S. 1, 41 (1967) (imposing due process duty to appoint counsel for indigent juveniles facing delinquency proceedings that could result in loss of liberty); Argersinger v. Hamlin, 407 U.S. 25, 27 (1972) (extending *Gideon* to misdemeanor cases involving the risk of incarceration).

[163] *See* Alexander, *supra* note 160. A softer approach involves litigation aimed at court-ordered increases in funding or reductions in defender caseloads. *See, e.g.*, State v. Peart, 621 So. 2d 780 (La. 1993). On the limited effect of *Peart*-style actions, see *Note: Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1742–1745 (2005). *But see* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 458–75 (2009) (outlining effective strategies for repairing the right to client counsel).

[164] *See, e.g.*, James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 179, 182–83 (2012) (discussing superior outcomes in Philadelphia murder cases involving public defense attorneys over members of the private bar); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 213–18 (2008) (discussing leadership development as an effective strategy for reform); Kim Taylor-Thompson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 165–66, 165–66 & n.51 (2004)

or similar collaborative efforts address root causes of crime and punishment.[165] Such efforts include the promotion of early intervention programs with pregnant women and young children; increased access to quality education, stable employment, safe housing, and drug and mental health treatment; and the transportation services necessary to access these resources.[166]

Not coincidentally, such systemic reforms can help cure the democracy deficit at the intersection of crime, race, and poverty by strengthening capacities to criticize existing norms and structures, to organize across lines of race and class, and to advocate successfully for meaningful change.[167] In working toward that goal, scholars and activists who seek to identify and promote sustainable conditions for grounding an effective oppositional politics in the context of criminal justice reform and, more specifically, public defense reform may find a helpful resource in Professor Adler's pioneering work. His unique incorporation of inequality aversion and fairness as pivotal analytical tools may prove to be an important contribution to the reframing of theoretical and practical arguments for reform.

V. CONCLUSION

Well-Being and Fair Distribution is a closely-reasoned and provocative contribution to the literature at the highly contested intersection of law, moral philosophy, and economic theory. Professor Adler's rich

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(discussing "stellar" reputations of some defender offices; citing Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 448–54 (2001)).

[165]Taylor-Thompson, *supra* note 164, at 180–94 (describing Seattle Defender Association's Racial Disparity Project).

[166]*See, e.g.*, Moore, *Democracy Enhancement*, *supra* note 18 (discussing effectiveness of early intervention and other prevention strategies).

[167]*See id.*

interdisciplinary discussion is an intriguing new resource for academicians and activists working at another intersection—the distinctively intransigent national intersection of crime, race, and poverty. For fifty years, *Gideon v. Wainwright* has stood as a constitutional marker at that intersection.

But as a banner for change, *Gideon* has wavered more than waved. The arrested development of the right to appointed counsel bespeaks a complicated doctrinal history and an ongoing struggle over fairness and equality—a struggle akin to the reflective equilibrium process that is integral to Adler's continuous prioritarian social welfare function. Further research should more thoroughly probe this connection, including the possibility that recent Supreme Court decisions such as *Halbert v. Michigan*[168] auger a resurgent inequality-averse doctrine grounded in the due process-equal protection line of right-to-counsel cases.[169]

As the struggle for quality public defense services continues, Adler's novel approach to justice issues could become a powerful influence, particularly if his methodology is adapted to prioritize democracy enhancement. Such a focus could help shift grasstop reform—that is, efforts driven by elites on behalf of the less well-off—toward grassroots change that empowers low income people and people of color to participate more directly in the formation, implementation, and oversight of the criminal justice policies in which indigent defense services play such a critical role.

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[168]545 U.S. 605, 610–11 (2005) (requiring appointment of counsel for plea-sentenced defendants seeking first-tier discretionary appellate review).

[169]*Id.*; *see also supra* note 153 (discussing equal protection analysis in *Halbert*); *cf.* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1220-32 (2013) (arguing for equal protection-fundamental rights strategy for public defense reform).