Back to the Future: (Re)Constructing Ineffective Assistance of Counsel

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This Article explores a new way of determining ineffective assistance of counsel. Under existing law, a defendant must show that (1) counsel's performance was deficient, and (2) such deficiency resulted in prejudice. Although the right to counsel is a foundational guarantee in criminal proceedings, the ineffectiveness standard fails to adequately protect defendants against poor representation. Given the pervasive racial disparities throughout the criminal legal system, this failure falls heaviest on Black defendants.

Other criminal law scholars have recognized that the prejudice requirement thwarts defendants' vindication of their right to counsel. But this Article recognizes that a particular harm of the standard's prejudice requirement is that it thwarts Reconstruction's goal of ensuring fair criminal proceedings for Black people.

In constructing a new standard, this Article turns toward Reconstruction. Among broader objectives, the architects of Reconstruction intended to protect the rights of Black people in criminal proceedings. This is evidenced in the history and text of the Reconstruction Amendments, which contain clauses

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specifying the need for "due process," "equal protection of the laws," and limiting punishment to those who have been "duly convicted." Rooted in Reconstruction, the new ineffectiveness standard removes a barrier to relief: the prejudice requirement. Instead, defendants would need only to demonstrate that counsel's conduct was deficient relative to prevailing professional norms and considering the circumstances of the case.

Ineffective assistance of counsel is a racial justice problem, and the current ineffectiveness standard is part of that problem. The current standard directly contravenes the commitments Congress made during Reconstruction. This Article engages the history, text, and spirit of Reconstruction to advance a racial justice solution to a problem that has frustrated the rights of all defendants.

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INTRODUCTION

The Sixth Amendment contains multiple provisions that ensure an accused person a fair criminal trial.[1] Among them is the right to the assistance of counsel.[2] Without the assistance of counsel, a person facing the prosecutorial powers of the state is ill-equipped to safeguard their other constitutional rights.[3] In this way, the assistance of counsel is central to securing defendants' rights when facing criminal prosecution.[4]

The United States Supreme Court did not have much occasion to weigh in on the Sixth Amendment right to counsel until the twentieth century. For nearly 150 years after ratification, the right to counsel was a relatively underdeveloped and undertheorized area of constitutional law. It was not until 1932 that the Court held due process required the Sixth Amendment right to counsel in capital cases.[5] Shortly thereafter,

[1] U.S. CONST. amend. VI (protecting an accused person's right to an impartial jury, confront witnesses, speedy trial, public trial, notice, compulsory process, and assistance of counsel).

[2] *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996) (recognizing that the right to counsel helps ensure a fair trial).

[3] *See* United States v. Cronic, 466 U.S. 648, 653-54 (1984) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956))); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)) (noting that defendant's other procedural rights "would be . . . of little avail if [the defendant] did not comprehend the right to be heard by counsel").

[4] *See* Amar, *supra* note 2, at 705 (referring to the right to counsel "[a]s a big one, ramifying in many directions").

[5] *Powell*, 287 U.S. at 71-73.

the Court held that the Sixth Amendment required the government to fund counsel for indigent defendants facing federal charges[6] and extended that obligation to the states for non-capital cases in 1963.[7] Two decades later in *Strickland v. Washington*, the Court recognized that the presence of "a person who happens to be a lawyer . . . at trial alongside the accused . . . is not enough,"[8] finding that the right to the assistance of counsel must necessarily include the right to *effective* counsel.[9]

With these decisions, the Court acknowledged that the right to counsel was a fundamental right, and that counsel was necessary to ensure that an accused person received a fair trial.[10] Although the Court has described the right to effective counsel as "a bedrock principle in our justice system,"[11] the heightened standard for determining constitutional ineffectiveness is difficult to meet.[12] Proving ineffectiveness requires defendants to demonstrate that defense counsel's conduct was objectively unreasonable and that there was a reasonable likelihood that such conduct prejudiced the outcome of the proceeding.[13] In short: the essential elements are deficient performance and prejudice. This Article focuses on the prejudice prong.

Given the pervasive racial disparities in the criminal legal system, the ineffectiveness standard is particularly difficult for Black defendants to meet.[14] Anti-Black bias stereotypes Black people as dangerous and criminal.[15] Historian Khalil Gibran Muhammad describes it as "racial

[6] *See* Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938).

[7] *See Gideon*, 372 U.S. at 345.

[8] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[9] *Id.* at 686 (citing McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)) ("[T]he right to counsel is the right to the effective assistance of counsel.").

[10] *Id.* at 684-85; *Gideon*, 372 U.S. at 342-43.

[11] Martinez v. Ryan, 566 U.S. 1, 12 (2012).

[12] *See* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1228-30 (2019) [hereinafter *The Sixth Amendment Façade*] (describing the difficult and high burden defendants face in winning ineffective assistance of counsel claims).

[13] *Strickland*, 466 U.S. at 687-88.

[14] *See* Ossei-Owusu, *The Sixth Amendment Façade*, *supra* note 12, at 1228-30.

[15] Buck v. Davis, 580 U.S. 100, 121 (2017) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)) (finding ineffective assistance of counsel were defense

criminalization: the stigmatization of crime as '[B]lack'" while "masking . . . crime among whites as individual failure."[16] Research demonstrates that police stop and question Black people more frequently;[17] prosecutors file more serious charges against Black people;[18] defense counsel are more likely to suggest plea deals that impose longer sentences for Black clients than those they would suggest for white clients facing similar charges;[19] and judges and juries impermissibly rely on race when determining whether to convict Black defendants and what sentence to impose upon them.[20] These racial disparities persist in post-conviction, during which courts review ineffective assistance of counsel claims.[21]

Other criminal law scholars have recognized that the prejudice requirement thwarts defendants' vindication of their right to counsel and enables poor representation.[22] Unlike prior critiques of the prejudice requirement, this Article recognizes that in preventing Black defendants from enjoying the right to counsel, a particular harm of the standard's prejudice requirement is that it hinders Reconstruction's goal of ensuring fair criminal trials for Black people. The architects of

counsel injected a "powerful racial stereotype — that of [B]lack men as 'violence prone'" — into trial for the jury's consideration).

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

[17] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976-77 (2002) (describing why Black men are likely to be stopped by police at higher rates, even in a racially integrated neighborhood).

[18] *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 34-38 (1998).

[19] Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413, 422 (2011).

[20] Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009).

[21] Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L L. REV. 585, 588 (2020).

[22] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1864 (1994) (concluding that the prejudice requirement is "particularly inappropriate" as applied to capital trials in the penalty phase).

Reconstruction intended, among broader objectives, to protect the rights of Black people in criminal proceedings.[23] This objective is reflected in the legislative history, text, and political context of the Reconstruction Amendments.[24]

Collectively, the Thirteenth, Fourteenth, and Fifteenth Amendments eradicated slavery, conferred legal protections, and extended citizenship and voting rights to formerly enslaved people.[25] Both the Fourteenth and Thirteenth Amendments contain language specifying the need for "due process," "equal protection of the laws," and limiting punishment to those who have been "duly convicted."[26] Collectively, this language demonstrates that Congress intended to offer procedural protections to Black people facing criminal charges. Each amendment also contains language empowering Congress to pass additional laws to advance Reconstruction's aims.[27] Thus, Congress did not intend Reconstruction to be static or for the law to be fixed at the time of ratification. Reconstruction was meant to be an ongoing process, continually moving the nation closer toward a democracy where its citizens are free and the State treats them fairly and equally.

The ineffectiveness standard stands in direct contrast. Even if a reviewing court finds that defense counsel's conduct was deficient, the court must deny the ineffectiveness claim if the defendant cannot demonstrate prejudice.[28] In other words, a defendant can experience deficient representation, but the prejudice requirement can prevent the defendant from obtaining redress based on that deficiency. The standard produces results that are at odds with the Sixth Amendment's guarantee of the right to counsel and the Reconstructions Amendments, which extended fairness, equality, and due process to Black defendants in criminal prosecutions. These guarantees are necessary "to protect [a defendant's] fundamental right to a fair trial."[29] Justice Marshall, who dissented from *Strickland*, believed the prejudice requirement would

[23] *See infra* Part II.

[24] *See infra* Part II.

[25] *See* U.S. CONST. amends. XIII, XIV, XV.

[26] *Id.* amends. XIII, XIV.

[27] *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

[28] Sonnier v. Quarterman, 476 F.3d 349, 356, 361 (5th Cir. 2007).

[29] Strickland v. Washington, 466 U.S. 668, 684 (1984).

enable "manifestly ineffective" assistance to persist unvindicated.[30] His prediction proved accurate.[31]

The prejudice requirement has prevented defendants from obtaining relief even when defense counsel slept through portions of the trial,[32] failed to investigate and present mitigating evidence in a death penalty case,[33] and admitted to physical and mental incapacitation during representation.[34] A standard that considers such representation "effective" renders the concept of a fair trial with a reliable result a legal fiction. Even before the Court decided on the two-prong standard in *Strickland*, some lower federal courts imposed a prejudice requirement to determine counsel's effectiveness.[35] One federal jurist described the requirement as "denud[ing] the constitutional right to effective assistance of counsel of a great deal of the value it was intended to have."[36] The prejudice requirement has even failed to protect Black defendants against defense counsel who harbor anti-Black racist views.[37]

This Article recognizes the significant roadblock that the prejudice requirement presents to defendants attempting to assert their right to effective counsel.[38] It proposes a new prejudice-free standard to remove that roadblock. A new standard that focuses instead on the quality of performance could help restore the Sixth Amendment right to counsel to

[30] *Id.* at 711 (Marshall, J., dissenting).

[31] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997) (describing the *Strickland* standard as tolerating "a very low activity level by defense attorneys").

[32] Muniz v. Smith, 647 F.3d 619, 624-25 (6th Cir. 2011) (denying ineffectiveness claim where petitioner "fail[ed] to show . . . a reasonable probability [that] his counsel could have prevented either of these prejudicial events from occurring had he been awake — much less that it would have affected the outcome of the trial").

[33] *Sonnier*, 476 F.3d at 357-63.

[34] Bellamy v. Cogdell, 974 F.2d 302, 303-06 (2d Cir. 1992).

[35] *See* McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974) (indicating that an ineffectiveness claim required a showing of both deficient performance and prejudice).

[36] United States v. Decoster, 624 F.2d 196, 262 (D.C. Cir. 1976) (en banc) (plurality opinion) (Robinson, J., concurring).

[37] Paul Messick, Note, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 CALIF. L. REV. 1231, 1232-67 (2021) (describing difficulty defendants have demonstrating counsel's ineffectiveness under *Strickland* based on defense counsel's racism).

[38] *See infra* Part III.A.

its fundamental purpose of producing fair and reliable results and advance Congress's Reconstructionist aims at ensuring due process for all.

Reconstruction was a transformative period in the nation's history, dramatically changing the legal status of Black people. The Thirteenth Amendment abolished slavery and forbade involuntary servitude except as punishment for a crime, and only if the person had been "duly convicted."[39] Relatedly, the Fourteenth Amendment's Due Process Clause guaranteed procedural protections to Black people before the state could deprive them of certain fundamental rights, such as life or liberty.[40] In subsequent years, the Court extended due process protections to other marginalized groups, including indigent defendants.[41] Marginalized people now comprise most of those who are incarcerated[42] and of those who raise ineffective assistance of counsel claims.[43] In this way, turning toward Reconstruction and the protections it extended to Black people, a distinctly marginalized group, is appropriate.

During Reconstruction, lawmakers extended fundamental rights and protections to formally enslaved people in ways that radically altered constitutional law. Historian Eric Foner encourages broad consideration of the Reconstruction amendments.[44] Referring to this period as the "second founding," Foner argues that beyond altering constitutional text, the amendments "created a fundamentally new document with a new definition of both the status of [B]lack[people] and the rights of all Americans."[45] Although the Reconstruction amendments did not change the Sixth Amendment's text, Congress

[39] U.S. CONST. amend. XIII, § 1.

[40] *Id.* amend. XIV, § 1.

[41] *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (extending Fourteenth Amendment due process and equal protection to same-sex couples obtaining marriage licenses); Griffin v. Illinois, 351 U.S. 12, 17-19 (1956) (extending Fourteenth Amendment Due Process and Equal Protection Clauses to indigent defendants unable to pay for trial transcript necessary to mount appeal).

[42] *See infra* Part I and accompanying text and notes.

[43] *See id.*

[44] *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION xix-xxix (2019).

[45] *Id.* at xx.

intended the legislation to cast new light on the Bill Rights, of which the Sixth Amendment is a part.[46]

This Article turns toward Reconstruction given the harm that the *Strickland* prejudice requirement renders on Black defendants. The approach in this Article is part of a scholarly trend that looks to Reconstruction to illuminate, clarify, and advance contemporary civil rights.[47] In *Abolition Constitutionalism*, Dorothy Roberts encourages scholars and advocates to break free from "the dominant interpretation of the Constitution," much like those who opposed slavery did over 150 years ago, to "advanc[e] the unfinished freedom struggle."[48] When contemplating contemporary civil rights, Thirteenth Amendment scholar William Carter, Jr. recommends interpreting Reconstruction legislation "with regard to both its immediate purposes and its broader intended reach."[49] Using this framework, this Article constructs a new ineffectiveness standard that has the potential to advance some of the broader aims of Reconstruction: legal protections for marginalized people.

The sentiments, aspirations, and principles expressed during the nation's second founding are fertile areas from which to draw guidance when interpreting constitutional meaning in the present. Reconstruction provides a clarifying lens through which to reimagine all aspects of constitutional law, including the Sixth Amendment right to

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[46] *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1234-36 (1992); *see also infra* Part II.A.

[47] *See generally* Susan D. Carle, *Reconstruction's Lessons*, 13 COLUM. J. RACE & L. 734 (2023) (mining Reconstruction's history to inform the contemporary racial justice movement); Eric Foner, *The Supreme Court and the History of Reconstruction — and Vice-Versa*, 112 COLUM. L. REV. 1585 (2012) (examining Reconstruction's history and identifying dissonance between that history and contemporary Supreme Court doctrine); Alexander Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201 (2023) (excavating Reconstruction legislation to show flaws in the current qualified immunity doctrine); Note, *Judicial Immunity at the (Second) Founding: A New Perspective on § 1983*, 136 HARV. L. REV. 1456 (2023) [hereinafter *Judicial Immunity at the (Second) Founding*] (examining Reconstruction legislation to better understand the appropriateness of contemporary judicial immunity).

[48] Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105 (2019).

[49] William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 584 (2014).

counsel. Under the Reconstruction Congress's expansive vision, fundamental rights and protections were not meant to be contingent on restrictive hurdles, such as proving prejudice to demonstrate the denial of a right. Through the lens of Reconstruction, the current ineffectiveness standard — whereby a defendant must demonstrate prejudice in addition to deficient performance — is inconsistent with notions of fundamental fairness, due process, and freedom.

A new ineffectiveness standard, derived from Reconstruction, would not require a showing of prejudice nor deference to trial counsel's conduct. Instead, it would require the defendant to demonstrate that counsel's conduct was objectively unreasonable relative to prevailing professional norms and considering the circumstances of the case. Measuring counsel's conduct against prevailing professional norms appreciates the changing demands and expectations of practice. Incorporating consideration of the case enables a reviewing court to appraise counsel's conduct relative to the unique circumstances that can arise in each case. Such circumstances can include the nature of the charges and characteristics of the defendant.

In envisioning a new ineffectiveness standard, this Article embraces what Robin West calls "impassioned normativity."[50] Normative scholarship aims to explain what the law should be, while impassioned normativity advances ideas about what the law should be based on what "justice requires."[51] Such work can be "utopian, overtly political, aspirational, heartful, and impassioned."[52] Here, justice requires a new standard that could provide relief to defendants who have experienced poor representation. The Sixth Amendment right to counsel and the Fourteenth Amendment Due Process Clause require nothing less.

Relying on Reconstruction, this Article (re)constructs the ineffective assistance of counsel standard. The new standard has the potential to advance the Reconstruction Congress's aims to provide procedural protections to Black people and by extension, to secure greater protections for all defendants. The Article proceeds in three parts. Part I identifies the broader historical context of Reconstruction as a

[50] Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 16 (2016).

[51] *See id.*

[52] *Id.*

framework for reexamining fundamental rights in the present.[53] It excavates the early history of the right to counsel and of effective representation. It also looks critically at the Sixth Amendment's early failure to extend many of the basic procedural protections to enslaved people accused of criminal conduct.[54]

Part II examines the Reconstruction Congress's intent to further actualize the promise of democracy that the Framers conceived of during the nation's initial founding.[55] This Part argues that these efforts allow for a radical reinterpretation of constitutional law, including the right to effective counsel.[56] Part III (re)constructs the ineffectiveness standard. This Part identifies the requirements under the new standard, distinguishes it from the two-prong standard, and explores how the new standard would operate.[57] It also demonstrates the doctrinal viability of the new standard based on early right to counsel jurisprudence.[58] A prejudice-free standard, formulated from Reconstruction, could help actualize the full promise of the Sixth Amendment right to counsel.

I. THE BROAD HISTORICAL APPROACH: A FRAMEWORK FOR REINTERPRETING THE RIGHT TO EFFECTIVE COUNSEL

Surfacing Reconstruction's broader historical context can lead to generative interpretations of constitutional law in the present. Reconstruction expanded the founding Framers' narrow construction of citizenship, fundamental rights, and legal protections to include formerly enslaved people. With this second founding, Congress intended Reconstruction legislation to further actualize the promise of freedom and democracy that the Framers conceived of during the nation's initial founding. In this way, Reconstruction can provide a clarifying lens through which to view all aspects of constitutional law, including text that Congress drafted decades earlier, such as the Sixth Amendment right to counsel.

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[53] *See infra* Part I.

[54] *See infra* Part I.

[55] *See infra* Part II.

[56] *See infra* Part II.

[57] *See infra* Part III.

[58] *See infra* Part III.

Part of the Bill of Rights, the Sixth Amendment sets out the rights afforded to people facing criminal prosecutions. In relevant part, it guarantees that "the accused shall enjoy the right to . . . have the assistance of counsel for his defen[s]e."[59] The right to counsel provision helps advance one of the central aims of the Sixth Amendment: to produce a fair trial.[60] Despite the Sixth Amendment's promise, the founding Framers did not contemplate applying the amendment's guarantees equally. Along with the rest of the Bill of Rights, Congress intended the Sixth Amendment to extend to citizens, which, at the time, would have excluded Black people,[61] indigenous people,[62] and women.[63] If any state actor withheld basic rights from these marginalized groups, there were no enforceable means of redress.

With Reconstruction, Congress intended to end the disparities in the law that existed for Black people. Congress also sought to provide procedural protections before state actors could deny Black people their newly conferred rights. Overtime, the Court later extended these protections to other marginalized groups.[64] Within the criminal legal system, marginalized people — indigent people, people of color, people with disabilities — are disproportionately criminalized, qualify for appointed counsel, and incarcerated.[65] The same populations of people

[59] U.S. CONST. amend. VI.

[60] *See* Amar, *supra* note 2, at 642-43 (identifying three clusters of rights that the Sixth Amendment clauses protect as a speedy trial, a public trial, and a fair trial).

[61] *See* Dred Scott v. Sandford, 60 U.S. 393, 423 (1857) ("[T]hese rights are of a character . . . which make it absolutely certain that the African race were not . . . in the contemplation of the framers of the Constitution . . . .").

[62] *See id.* at 403-04 (describing indigenous people as "governed by their own laws," and regarding the governments of Native Nations "as foreign Governments").

[63] *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 964-65 (2002).

[64] *See* Reed v. Reed, 404 U.S. 71, 76 (1971) (extending Fourteenth Amendment Equal Protection Clause to protect women against sex discrimination); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (extending Fourteenth Amendment due process and equal protection clauses to indigent defendants unable to pay for trial transcript necessary to mount appeal). *See generally* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (extending Fourteenth Amendment Due Process and Equal Protection Clauses to same-sex couples obtaining marriage licenses).

[65] Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169, 169 (2022) (recognizing that disabled people of color are uniquely

raise ineffective assistance of counsel claims and do so with little success.[66] It is for these reasons that this Article looks to Reconstruction to reinterpret the right to effective counsel.

This Part introduces a broad historical approach as a framework for constitutional interpretation in the present. Here, it helps illuminate and clarify the contemporary right to effective counsel. This approach examines the social, political, and legal context that existed prior to Reconstruction. It starts with an examination of the early history of the right to counsel, centering the law's failure to extend the right to counsel to enslaved people facing criminal charges. In focusing on the lack of criminal process for enslaved people, this Part provides the historical backdrop for the radical intervention that Reconstruction provided.

A. Looking Back to Look Forward

Reconstruction, from approximately 1863 to 1877, was a period of transformational change for the nation and to the status of formerly enslaved and newly free Black people.[67] It resulted in sweeping changes

vulnerable to contact with the criminal legal system); Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/S2W2-BMMB] (noting that "[r]oughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers"); Leah Wang, *Updated Data and Charts: Incarceration Stats by Race, Ethnicity, and Gender for All 50 States and D.C.*, PRISON POL'Y INST. (Sept. 27, 2023), https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/ [https://perma.cc/6WGD-GD2A] (noting that the rate of incarceration is higher for Black people relative to white people); *see* LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, U.S. DEP'T OF JUST., DISABILITIES REPORTED BY PRISONERS 2 (2021) (showing that more than half of state and federal prisoners between 55 and 64 years old reported having a disability).

[66] *See* NANCY J. KING, FRED L. CHEESMAN & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 1, 28 (2007) (finding that eighty-one percent of capital petitioners and over fifty percent of non-capital petitioners raised ineffective assistance of counsel claims in federal habeas) [hereinafter HABEAS LITIGATION]; Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2431 (2013) [hereinafter *Enforcing Effective Assistance*] (noting low success rate of ineffectiveness claims).

[67] *See* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 51-52 (6th ed. 2008).

that impacted all of society, the economy, and the nation's political structure. Through legislation, Congress sought to address the barriers preventing Black and enslaved people from enjoying full civic engagement.[68] On one level, this included protecting Black people's access to voting, wage earning, property, and education.[69] On a more fundamental level, this included equal protection of the laws[70] and the right to due process before being deprived of life, liberty, or property.[71] Collectively, the Reconstruction amendments had the potential to ameliorate the denial of rights and the subjugation and discrimination based on race that enslaved people experienced.

This Article embraces an expansive view of Reconstruction's history to advance greater constitutional protections in the present. The approach here continues the work of scholars and jurists who have relied on Reconstruction to better understand and provide support for contemporary civil rights.[72] It also acknowledges the persistent yet undertheorized role that race and ethnicity have played in the development of indigent defense[73] and right to counsel jurisprudence.[74] Reconstruction legislation was about addressing the country's race-

[68] *See* U.S. CONST. amends. XIII, XIV, and XV. These amendments outlawed slavery, guaranteed the right to vote, and provided due process of law to all citizens of the United States.

[69] *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 2764-68 (1866) (statements from Sen. Howard interspersed with questions from other senators).

[70] U.S. CONST. amend. XIV, § 1.

[71] *Id.*

[72] Students for Fair Admissions, Inc., v. President and Fellows of Harv. Coll., 600 U.S. 181, 386-89, 393, 409 (2023) (Jackson, J., dissenting) (relying on the broader social, political, and economic history that produced the Reconstruction amendments and related legislation to defend the constitutionality of affirmative action); *see, e.g.*, *Judicial Immunity at the* (*Second*) *Founding*, *supra* note 47 (examining judicial immunity through reconstruction).

[73] *See* Ossei-Owusu, *The Sixth Amendment Façade*, *supra* note 12, at 1165-66 (noting that race and its relationship to indigent defense have received less scholarly sustained analysis).

[74] *See* Alexis Hoag-Fordjour, *White is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 805-08 (2023) (examining how whiteness colors determinations of trial counsel's conduct when assessing ineffective assistance of counsel claims).

based exclusion of citizenship,[75] the disparate treatment of Black people based on race,[76] and the lack of due process afforded Black people,[77] also based on race. Given the prominence of race and ethnicity in the development of criminal procedure and indigent defense,[78] reimagining the right to counsel standard invites critical engagement with Reconstruction.

Reconstruction expanded rights, citizenship, and protections to formerly enslaved people. With broad sweeping legislation, Congress sought to fundamentally alter the social, political, economic, and legal landscape of the nation. Beyond adding text to the Constitution, the Reconstruction Amendments overhauled the then existing understanding of constitutional law.

Dorothy Roberts relies on the Reconstruction amendments to make the case for contemporary prison abolition. She argues that there is "*utility* in applying the abolitionist history and logic of the Reconstruction Amendments to today's political conditions in the service of prison abolition."[79] Roberts "makes the case for revitalizing" Reconstruction legislation, anti-slavery organizing, and anti-slavery ideas "to help move toward a radical future" without prisons.[80] Similarly, William Carter relies on the broad power of the Thirteenth Amendment to strengthen contemporary anti-retaliation law and offer

[75] *See* CONG. GLOBE, 39th Cong., 1st Sess. 2512 (1866) (recognizing that the object of Reconstruction was to confer citizenship on "the men lately freed from slavery").

[76] *Id.* at 2766 (explaining that the Fourteenth Amendment was intended to end disparate treatment of Black men based on race).

[77] *Id.* (specifying that the Fourteenth Amendment "disable[s] a State from depriving . . . any person, whoever he may be, of life, liberty, or property without due process of law").

[78] Ossei-Owusu, *Sixth Amendment Façade*, *supra* note 12, at 1163 ("[T]he politics of race *fundamentally shaped* indigent defense jurisprudence and policy. Inattention to this fact limits understandings of the right to counsel and ultimately of the criminal justice system itself."). *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49 (2000) (describing how the Court's intervention in Black defendants' cases involving egregious Jim Crow "justice" in the South helped shape criminal procedure in ways that would not have resulted had the cases involved marginal unfairness).

[79] Roberts, *supra* note 48, at 9-10 (emphasis in original).

[80] *Id.* at 122.

better protections to people who engage in pro-equality speech.[81] Carter finds that the Reconstruction Framers understood the perils of unpopular speech, which at the time included pro-equality and abolition.[82] With this understanding, Carter recognizes that Congress intended to eradicate the private retaliation of such speech with the Thirteenth Amendment.[83] Relying on this history, Carter concludes that Congress can continue to enact legislation via the Thirteenth Amendment's enforcement clause to protect contemporary pro-equality and anti-discrimination speech.[84]

Likewise, judges have turned to Reconstruction era history for guidance on interpreting contemporary civil rights issues. During oral arguments in *Merrill v. Milligan*, a case involving the Voting Rights Act ("VRA"), Justice Jackson challenged Alabama's position that the Fourteenth Amendment conflicted with the VRA. The justice explained: "I looked at the report that was submitted by the Joint Committee on Reconstruction which drafted the Fourteenth Amendment, and that report says that the entire point of the amendment was to secure rights of freed former slaves."[85]

In *Baxter v. Bracey*, a case challenging qualified immunity and where the Court denied the petition of certiorari, Justice Thomas issued a dissent, turning to Reconstruction era legislative history for support.[86] He argued that when Congress passed Reconstruction legislation, it never contemplated making defenses available to state actors who deprived Black people of their constitutional rights.[87]

In dissenting from *Students for Fair Admission*, Justice Jackson turned toward Reconstruction to find support for the constitutionality of

[81] *See* William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1856 (2012).

[82] *Id.* at 1858-64.

[83] *Id.* at 1864.

[84] *Id.* at 1874-76.

[85] Jay Kuo, *All Hail Justice Ketanji Brown Jackson, Who Came with the Constitutional Receipts*, STATUS KUO (Oct. 5, 2022), https://statuskuo.substack.com/p/all-hail-justice-ketanji-brown-jackson [https://perma.cc/EQD8-MMLG].

[86] *See* Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting).

[87] *Id.* (citing Briscoe v. LaHue, 460 U.S. 325, 337 (1983)).

affirmative action.[88] Looking beyond the historical intent to protect and advance the rights of formerly enslaved people, the justice found that the Fourteenth Amendment allowed race-conscious admission for the benefit of all underrepresented racial minorities. To hold otherwise, she concluded, would be "ahistorical," and "obstruct our collective progress toward the full realization of . . . [Reconstruction's] promise."[89]

This sustained engagement with Reconstruction — its broader historical context, the legislation, and congressional intent — demonstrates its power to advance civil rights and legal protections in the present. The nation has not yet achieved the full potential of Reconstruction's promise. This underutilization of Reconstruction is especially pronounced within the criminal adjudication system. In 1987, the Court failed to find that the Fourteenth Amendment prohibited the racial disparities that Georgia's death sentencing scheme produced.[90] Nonetheless, in his dissent, Justice Blackmun surfaced Reconstruction's legislative history to find that Congress was "great[ly] concern[ed]" with the discriminatory enforcement of criminal laws throughout the states and thus sought to address it with the passage of the Fourteenth Amendment.[91]

Significantly, the use of history in this Article differs from the Roberts Court's history-and-tradition approach. That method queries whether certain rights existed in the past to determine whether such rights should exist in the present.[92] It reflects a truncated and static interpretation of constitutional history that ignores contemporary reality and centuries of social and political advancement.[93] In 2022, using this truncated approach, the Court struck down a law regulating

[88] Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 386-89 (2023) (Jackson, J., dissenting).

[89] *Id.* at 411.

[90] McCleskey v. Kemp, 481 U.S. 279, 282, 314-19 (1987).

[91] *Id.* at 346-47 (Blackmun, J., dissenting).

[92] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n., Inc. v. Bruen, 597 U.S. 1, 26-29 (2022) (using the history-and-tradition approach to determine "whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding").

[93] *See* Reva B. Siegel, Commentary, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 908-09 (2023).

firearms[94] and overturned a pregnant person's right to an abortion.[95] In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court's reliance on history-and-tradition resulted in striking down a New York gun regulation law.[96] The ruling also produced a test for lower courts to analyze the constitutionality of gun laws under the Second Amendment. To survive the analysis, a state must show that contemporary gun regulations are "consistent with the nation's historical tradition of firearm regulation."[97] Pundits have called the test "destabilizing" and confusing.[98] The Court used a similar approach in *Dobbs v. Jackson Women's Health Organization* to overrule the right to an abortion, explaining that the right was not deeply rooted in the history and traditions of this country.[99]

Critics have pointed to fact that the history-and-tradition method enshrines an era in which the Constitution did not recognize large portions of the population as citizens, such as women, Black people, and other people of color.[100] The approach also reflects a selective use of history that prioritizes a restrictive interpretation of the Constitution and disregards evidence that would support a contradictory interpretation. For example, in *Dobbs*, the holding ignores that Congress ended forced reproductive servitude of enslaved women and girls via the Thirteenth and Fourteenth Amendments.[101] The Court's use of history

[94] *Bruen*, 597 U.S. at 11.

[95] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[96] *Bruen*, 597 U.S. at 22, 26-29.

[97] *Id.* at 24.

[98] Adam Liptak, *Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers*, N.Y. TIMES (Nov. 7, 2023) https://www.nytimes.com/2023/11/07/us/politics/supreme-court-gun-rights-domestic-violence.html; *see* Linda Greenhouse, *Will the Supreme Court Toss Out a Gun Law Meant to Protect Women?*, N.Y. TIMES (Nov. 6, 2023) https://www.nytimes.com/2023/11/06/opinion/guns-domestic-abuse-supreme-court.html ("The United States Court of Appeals for the Fifth Circuit, interpreting the Supreme Court's sweeping and destabilizing 2022 Bruen gun rights decision . . . .").

[99] *Dobbs*, 597 U.S. at 231.

[100] *See* Melissa Murray & Kate Shaw, Opinion, *The Conservative Supreme Court Vision That Means Inequality for Women*, N.Y. TIMES (Nov. 12, 2023), https://www.nytimes.com/2023/11/12/opinion/supreme-court-rahimi-women.html.

[101] Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html.

was also inaccurate.[102] The holding in *Dobbs* relied on the Court's calculation that at the time of the Fourteenth Amendment's ratification, most states had banned abortion, purportedly as many of twenty-eight of thirty-seven states.[103] However, Aaron Tang explains that the historical record reveals that fewer than half of the states had actually banned abortion at that time.[104] Given the Court's reasoning in *Bruen* and *Dobbs*, the history-and-tradition approach appears more outcome driven rather than as a viable model of constitutional interpretation.

In contrast, this Article relies on a broad historical view of Reconstruction. This model examines Reconstruction's social and political context, the legislative text, and congressional intent to interpret the Constitution and constitutional rights in the present. This approach appreciates the evolving nature of society and the flexibility that Congress built into the Constitution. With Reconstruction, Congress intended for the amendments and related legislation to be malleable and evolve with society's changing understanding of its people and laws. This is apparent in the enforcement clause found in each of the three amendments, which empowered Congress "to enforce [each amendment] by appropriate legislation."[105] With this simple phrase, repeated in each amendment, Congress sought to provide a framework that would enable future lawmakers to continually advance and protect the rights of Black and other marginalized people.

The broad historical approach in this Article focuses primarily on the Fourteenth Amendment's Due Process Clause, which guarantees individuals certain procedural rights before the state can deprive them of life or liberty, two factors principally at stake in a criminal prosecution.[106] It recognizes that Congress intended the Fourteenth Amendment to address, in part, the depravation of enslaved people's rights within the criminal adjudication system.[107] The text of the

[102] *See* Aaron Tang, *Lessons from Lawrence: How "History" Gave Us* Dobbs *— And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 77-85 (2023).

[103] *See Dobbs*, 597 U.S. at 271-72.

[104] Tang, *supra* note 102, at 67-68.

[105] U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

[106] U.S. CONST. amend. XIV, § 1.

[107] McCleskey v. Kemp, 481 U.S. 279, 328-33 (1987) (Brennan, J., dissenting) (exposing "Georgia's legacy of a race-conscious criminal justice system" and noting that

Thirteenth Amendment further supports this interpretation of the Fourteenth Amendment. The Thirteenth Amendment explicitly prohibits "involuntary servitude . . . as a punishment for crime" unless the individual was "duly convicted," thus requiring due process during criminal prosecutions.[108] One critical aspect of due process within the criminal context is the right to the assistance of counsel.[109]

B. Early Conceptions of the Right to Counsel and Effective Representation

Understanding how Reconstruction changed the right to counsel invites engagement with how the right to counsel operated prior to and upon ratification of the amendment in 1791. Prior to the Sixth Amendment's ratification, several colonies recognized the crucial importance of defense counsel for the accused.[110] Although English common law influenced early American law, the colonies' establishment of the right to counsel predated the right in England.[111] At the time, the common law in England prohibited defense counsel from representing defendants charged with ordinary felonies.[112] In early eighteenth century England, felony proceedings included a presiding judge, a layperson

Congress intended the Fourteenth Amendment's Equal Protection Clause to address it).

[108] U.S. CONST. amend. XIII.

[109] Powell v. Alabama, 287 U.S. 45, 71 (describing counsel "as a necessary requisite of due process of law").

[110] *See also* MD. CONST., art. 21 ("That in all criminal prosecutions, every man hath a right . . . to be allowed counsel . . . ."); MASS. CONST., part 1, art. 12 (same); N.H. CONST., pt. 1, art. 15 (same); N.Y. CONST., art. 1, §6 (same); PA. CONST., art. I, § 9 (same); *Powell*, 287 U.S. at 64-65 (1932) (noting that twelve of the thirteen colonial constitutions included provisions specifying the right to counsel); *id.* at 61 (noting that several colonies established the right to counsel prior to the Federal Constitution); FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 22-24 (1951) (describing the right to counsel provisions passed in Maryland, North Carolina, New Jersey, Pennsylvania, South Carolina, Georgia, New York, Virginia, Massachusetts, New Hampshire).

[111] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 255 (2003) (noting that Parliament extended the right to counsel for felony prosecutions in 1836, whereas it had previously existed for misdemeanor cases).

[112] *See* Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 324-25 (2009).

accuser, the accused, and the jury.[113] The accuser spoke directly to the accused person, who had an opportunity to respond, and the judge questioned both parties to flesh out the testimony before the jury.[114] Somewhat paradoxically, defense counsel participated in trials involving less serious charges, with the exception of treason, which was a capital offense.[115]

The American colonies rejected England's lawyer-free model, prioritizing the need for defense counsel in criminal prosecutions. The Court later reflected on England's lawyer-free model, musing, "how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused?"[116] It was clear that in the American system, the accused needed meaningful advocacy separate and apart from the presiding judge. Thus, prior to the nation's birth, the founding Framers recognized the importance of defense counsel. More than an advocate before the judge, defense counsel was meant to serve as a counterbalance relative to the prosecuting attorney.[117] The need for defense counsel was defined by the accused's need for "assistance in meeting his adversary."[118]

Yet, the young nation that adopted the Sixth Amendment was a slave society that professed to be a liberal democracy. To maintain this precarious balance, federal law denied citizenship to Black people, and federal courts applied the law unequally based on race.[119] At the state level, lawmakers created parallel tracks of laws based on race and status.[120] One track regulating the lives and conduct of white people, and

[113] *See* LANGBEIN, *supra* note 111, at 253.

[114] *Id.*

[115] *See* Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999, 2002-04 (2014).

[116] Powell v. Alabama, 287 U.S. 45, 61 (1932).

[117] *See* United States v. Ash, 413 U.S. 300, 308-09 (1973) (describing the purpose of defense counsel in relation to the early American adversarial system).

[118] *Id.* at 309-13.

[119] *See* Scott v. Sandford, 60 U.S. 393, 411-12 (1857) (explaining that the constitutional framers did not intend to include Black people as citizens deserving of constitutional privileges and immunities).

[120] *See* Tomlinson v. Darnall, 39 Tenn. (2 Head) 538, 542 (1859) (describing state law empowering white people to police, patrol, and punish enslaved people as "of great

another maintaining the subordinated status of enslaved people.[121] Laws also regulated the lives of free Black people and mixed race Black people, referred to as "mulatto."[122] Depending on the jurisdiction and the legal rights in question, state laws grouped the latter with white people, enslaved people, or in their own category.[123]

Between ratification and Reconstruction, the Court had not yet recognized that the Sixth Amendment required states to *fund* counsel for indigent people regardless of their race or ethnicity.[124] However, during this period, state trial courts routinely appointed counsel to indigent white people accused of committing crimes.[125] The limited criminal procedural protections the law afforded Black people often reflected the legal system's support for the property interests of those who owned the enslaved person rather than a respect for enslaved person's civil rights.[126]

Enslaved people presented a conundrum in the criminal procedure context as it related to the right to counsel. The law did not deem

importance" to maintaining "the institution of slavery" and "the subordination of [enslaved persons]").

[121] *Compare* BLACK CODE, ch. XXXIII, 1806 Territory of Orleans Acts 150, 150-221 (Bradford & Anderson 1807), https://babel.hathitrust.org/cgi/pt?id=mdp.35112203962842 [https://perma.cc/7GBX-8ATV] [hereinafter BLACK CODE] (prescribing laws regulating the conduct of Black people and enslaved people), *with* ACT FOR THE PUNISHMENT OF CRIMES AND MISDEMEANORS, ch. L, 1804 Territory of Orleans Acts 416, 416-53 (Bradford 1805), https://babel.hathitrust.org/cgi/pt?id=mdp.35112204563441&seq=7 [https://perma.cc/RX5R-6UPS] [hereinafter CRIMES AND OFFENCES] (prescribing laws regulating the conduct of white people).

[122] *See* Murray v. State, 9 Fla. 246, 246-47 (1860) (enslaved party) (describing state law criminalizing behavior committed by "slaves, free negroes, and mulattoes" and designating different punishments based on race, whereby "negro or mulatto, bond or free" people were subject to one punishment and "white persons" subject to another).

[123] *See id.* at 246-54 (grouping free Black and mixed-race Black people with enslaved people).

[124] *See* Nabb v. United States, 1 Ct. Cl. 173, 174 (1864) (describing the Sixth Amendment right to counsel as "the declaration of a right in the accused, but not of any liability on the part of the United States").

[125] *See* Rowe v. Yuba County, 17 Cal. 61, 63 (1860) (describing court's constitutional obligation to appoint counsel for indigent persons facing criminal charges, and lawyers' professional obligation to accept such appointments).

[126] *See* A. E. Keir Nash, *A More Equitable Past — Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 213-14 (1970).

enslaved people citizens who were entitled to fundamental rights, including the right to counsel.[127] By virtue of being enslaved, Black people lacked liberty interests and thus incarceration failed to pose the same punitive constraint relative to those not enslaved. Yet, enslaved people were also valuable property whose very status created a third-party interest in the enslaver. James Madison, the primary author of the Bill of Rights, which contained the Sixth Amendment, acknowledged that "[t]he Federal Constitution . . . views [slaves] in the mixt character of persons and of property."[128]

State courts grappled with the dual and conflicting status of enslaved persons.[129] Courts recognized enslaved people's humanity when finding them morally culpable and worthy of punishment for committing harm.[130] However, when determining whether to extend criminal procedural protections to enslaved people, courts did not respond consistently. Some state courts considered enslaved people undeserving of the formalities and protections of the adjudication system. For example, the Florida Supreme Court concluded that the state did not owe an enslaved person facing criminal charges the same procedural protections afforded white men.[131] The court described the formal adjudication process as too "dignified" for enslaved defendants and that "employing counsel" would be a "heavy expense" to the enslaver.[132]

When considered as property, enslaved people held great monetary value, which necessitated protection for the benefit of the enslaver.

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[127] *See* Scott v. Sandford, 60 U.S. 393, 407 (1857) (finding that Black people "had no rights which the white man was bound to respect"); *see also* A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 971 (1992) (describing the dual and conflicting status of enslaved people, "always property, sometimes a person, and never a citizen").

[128] THE FEDERALIST NO. 54, at 368 (J. Cooke ed., 1961) (Alexander Hamilton or James Madison).

[129] *See* Jones v. Allen, 38 Tenn. (1 Head) 626, 636 (1858) (enslaved person at issue) (finding that enslaved persons "are not mere chattels but are regarded in the two-fold character of persons and property").

[130] *See* Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1479-93 (1988) [hereinafter *Limits of Racial Equality*] (explaining the dual status of enslaved people "as both property and persons").

[131] *See* Murray v. State, 9 Fla. 246, 254 (1860) (enslaved party).

[132] *Id.*

Such protection might include access to defense counsel at the enslaver's expense.[133] This was particularly true if the enslaved person faced capital charges, which could result in death, and thus, the loss of property to the enslaver.[134] The prison population during slavery reflected the value of Black people as property. Prior to Emancipation, states imprisoned mostly white people.[135] Incarceration was not the preferred punishment for enslaved people as it would have removed them from the workforce and amounted to a loss of property to the enslaver.[136]

1. Specialized "Slave Courts" with Varying Levels of Process

Prior to Reconstruction, Black people's status and rights were governed largely by state enacted "slave codes" and "black codes" rather than federal constitutional law.[137] These varied from state to state.[138] Even when the slave codes included procedural protections, courts often prioritized protecting the property interests of the enslavers

[133] H. M. Henry, *The Slave Laws of Tennessee*, TENN. HIST. MAG., Sept. 1916, at 175, 184 (describing Tennessee law where counsel appointed to represent a capitally charged enslaved defendant could sue the enslaver for his fees, but also noting that the law was repealed after two years).

[134] *See* Daniel J. Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J.S. HIST. 537, 538 (1974) [hereinafter *Criminal Procedure*] (local jurisdictions tended to extend procedural safeguards to enslaved people facing capital charges).

[135] Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 268 (2008) (noting that the incarcerated population in Alabama, for example, was ninety-eight percent white in 1850, but flipped to seventy-four percent non-white by 1870, after Emancipation).

[136] *See* Act Concerning Servants & Slaves, 23 Acts of the N.C. Gen. Assembly 64, 64 (1715–1716), https://docsouth.unc.edu/csr/index.php/document/csr23-0001 [https://perma.cc/BN7U-DAP6] (setting punishment for enslaved defendants as execution, dismemberment, or corporal).

[137] *See Limits of Racial Equality*, *supra* note 130, at 1481 (noting that "by 1787, the slave codes were an integral part of southern legal structure").

[138] *See* BLACK CODE, *supra* note 121 (noting laws regulating conduct of Black people and enslaved people); Scott v. Sandford, 60 U.S. 393, 411-12 (1857) (specifying that the framers did not intend to include Black people as a protected group under the Constitution).

rather than the individual civil rights of enslaved people.[139] And if it behooved enslavers' property interests for state courts not to enforce "the minimal protections afforded [enslaved people] under the slave codes," than the courts were willing to forgo those protections.[140]

Virginia was one of the first jurisdictions to operate a parallel justice system regulating enslaved people.[141] Historians have described the Commonwealth as "maintain[ing] the most repressive system of criminal law regarding" enslaved people.[142] With a 1692 legislative act, Virginia established a specialized slave court "for the speedy and easy prosecution of slaves, committing capital[] crimes."[143] The Virginia law did not designate the appointment of defense counsel for the enslaved person. Instead, it enabled the enslaver to "appear at the [trial] and make what just defence he can for such slave."[144] However, any defense was limited to "matters of fact, and not to any formality in the indictment or other proceedings of the court."[145] Although this afforded the enslaver to at least be present and represent their economic interests in their human property, it prevented the enslaver from raising any substantive legal concerns about the proceedings.

By the first half of the 1800s, most slaveholding jurisdictions operated specialized "slave courts" to expeditiously adjudicate criminal cases

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[139] DANIEL J. FLANIGAN, THE CRIMINAL LAW OF SLAVERY AND FREEDOM 1800-1868 104 (1987) [hereinafter THE CRIMINAL LAW OF SLAVERY] (describing the Southern legal system as "protecting property rights as well as human life").

[140] *Limits of Racial Equality*, *supra* note 130, at 1479-80; *see also* Murray v. State, 9 Fla. 246, 254 (1860) (enslaved party) (forgoing the formalities of a criminal trial with an enslaved defendant, in part, to spare the enslaver the "heavy expense" of "employing counsel").

[141] *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 32-40 (1978) [hereinafter IN THE MATTER OF COLOR] (noting that Virginia passed the first legislative enactment referring to Black people in 1639 and describing various laws, including criminal, regulating the lives of enslaved people).

[142] Flanigan, *Criminal Procedure, supra* note 134, at 546.

[143] *Act of April 1692*, *in* 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 269-70 (William Waller Hening ed., 2d ed. 1823) https://babel.hathitrust.org/cgi/pt?id=mdp.35112104867827&seq=225 [https://perma.cc/BM89-2PS2].

[144] *Id.* at 270.

[145] *Id.*

involving enslaved defendants.[146] Each was governed by state law and contained a different set of procedures than the adjudication system that processed white defendants.[147] As the Georgia Supreme Court explained, "[i]t is theoretically [true] every where . . . that two races of men living together, one in the character of masters and the other in the character of slaves, cannot be governed by the same laws."[148] The various state laws generally designated white male "freeholders," the term for landowners, who owned enslaved people to preside over cases, often as part of a panel with local justices of the peace.[149] Resultingly, those presiding sometimes lacked substantive knowledge of criminal law.[150]

The Louisiana Supreme Court clarified that "[t]he law . . . does not demand on the trial of slaves . . . an observance of the technical rules which regulate criminal proceedings in the higher courts."[151] This meant trial courts could adjudicate enslaved defendant cases without defense counsel or other formalities that the law afforded white defendants. The same court a few years later expressed a different admissibility standard for confessions from enslaved defendants.[152] The court explained, "too much strictness has been observed on this subject as to free persons . . . . We are not prepared to say the same strictness should be observed, so as to exclude the confessions of slaves as evidence."[153]

When state laws provided certain procedural protections, like the right to counsel, reviewing courts could just as easily fail to enforce or uphold the provisions. The Louisiana Supreme Court refused to

[146] *See* Flanigan, *Criminal Procedure*, *supra* note 134, at 546 (mentioning the various Southern states that operated criminal courts to process enslaved defendants).

[147] *Compare* BLACK CODE, *supra* note 121 (prescribing laws regulating the conduct of Black people and enslaved people), *with* CRIMES AND OFFENCES, *supra* note 121 (prescribing laws regulating the conduct of white people).

[148] *See* Neal v. Farmer, 9 Ga. 555, 579 (1851) (murder of an enslaved person at issue).

[149] *See, e.g.*, Act Concerning Servants & Slaves, 23 Acts of the N.C. Gen. Assembly 64, 64 (1715–1716), https://docsouth.unc.edu/csr/index.php/document/csr23-0001 [https://perma.cc/H6Z7-PFZ9] (designating three justices and three freeholder-enslavers to preside over enslaved defendant cases involving capital crimes).

[150] *See* Flanigan, *Criminal Procedure*, *supra* note 134, at 544.

[151] State v. Kentuck, 8 La. Ann. 308, 309 (La. 1853) (enslaved party).

[152] *See* State v. Jonas, 6 La. Ann. 695, 698-99 (La. 1851) (enslaved parties).

[153] *Id.*

question the record when considering a challenge to an enslaved person's conviction based on the appointment of an unlicensed lawyer.[154] Instead, the court denied the claim, explaining that if "[t]he record states that an attorney was assigned the prisoner . . . we must presume that an attorney of the Court was appointed."[155]

Louisiana was governed by the Black Codes or Code Noir.[156] Adopted in 1806, the law imposed loose procedural rules and afforded maximum discretion to the justices of the peace and freeholders who presided over cases.[157] Those presiding also decided on the "manner" of punishment, which typically involved "corporeal punishment," so long as it did not "extend to the lo[s]s of life or limb."[158] There was no mention of defense counsel nor any other type of advocate.

In contrast, Louisiana's 1804 Crimes Act established another justice system for white and free people.[159] Given that Louisiana had only recently become a United States territory, the Crimes Act adopted some of the English common law procedural protections.[160] These mimicked the protections found within the Sixth Amendment, such as the right to compulsory process, the right to a jury trial, and the right to counsel.[161] Specifically, the law provided that "every person accused and indicted, [s]hall be allowed and admitted to make his full defence by coun[s]el learned in the law."[162]

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[154] *See Kentuck*, 8 La. Ann. at 308.

[155] *Id.* at 309.

[156] *See* BLACK CODE, *supra* note 121.

[157] *See id.* at 158, 160 (noting that enslaved people "shall be indicted and tried without appeal by the judges"); *see also* Judith Kelleher Schafer, *"Under the Present Mode of Trial, Improper Verdicts are Very Often Given": Criminal Procedure in the Trials of Slaves in Antebellum Louisiana*, 18 CARDOZO L. REV. 635, 642 (1996) (explaining that the Black Code gave little guidance about administering justice and afforded those presiding over cases broad discretion).

[158] BLACK CODE, *supra* note 121, at 194.

[159] CRIMES AND OFFENCES, *supra* note 121.

[160] *See id.* at 440-44.

[161] *Id.*

[162] *Id.* at 442.

2. Extending Due Process to the Enslaved, for the Benefit of Enslavers

The lack of due process afforded enslaved people in the criminal adjudication system was not absolute. Some state laws provided enslaved people with defense counsel and other procedural safeguards.[163] States tended to extend procedural protections, such as providing counsel, for death eligible offenses only.[164] Notably, states subjected enslaved people to capital charges at higher rates than white people and for relatively minor infractions.[165]

Extending defense counsel for death eligible offenses benefited the enslaver who had an economic interest in preventing the loss of property due to execution. A single enslaved person could be extremely valuable. Some calculations estimate that in 1850, an enslaved person carried the same approximate monetary value as a home.[166] As one historian observed, "in many [criminal] cases [enslavers] wished to do everything possible to procure an acquittal for their" property, which sometimes meant obtaining skilled defense counsel.[167] Rather than prioritize due process, efforts like this reflected the enslaver's property interests.

Depending on the state, some laws designated that the enslaver was required to fund defense counsel when their enslaved person faced

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[163] *See* Flanigan, *Criminal Procedure*, *supra* note 134, at 554 (mentioning circumstances where enslaved people obtained defense counsel).

[164] *See* State v. Jim, 48 N.C. (3 Jones) 348, 352 (1856) (enslaved party) (explaining that enslaved defendant facing capital charges for attempted rape of a white woman "is put on trial as a *human being*; entitled to have his guilt or innocence passed on by a jury" (emphasis in original)).

[165] *See* FLANIGAN, THE CRIMINAL LAW OF SLAVERY, *supra* note 139, at 18-19 (noting that the Virginia laws contained seventy-three capital offenses that could be committed by enslaved people, whereas only one capital offense that could be committed by white people); *see also* McCleskey v. Kemp, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting) (noting that during slavery, Georgia enforced "an automatic death sentence" when the perpetrator was Black, but enabled a jury to recommend life imprisonment for "anyone else").

[166] Samuel H. Williamson & Louis P. Cain, *Measuring Slavery in 2020 Dollars*, MEASURING WORTH, https://www.measuringworth.com/slavery.php (last visited July 23, 2024) [https://perma.cc/KVL3-7ZDW] (calculating the "relative output of a $400 [enslaved person] in 1850" at about "$3.4 million" in 2020).

[167] Flanigan, *Criminal Procedure*, *supra* note 134, at 554.

capital charges.[168] For at least two years, a Tennessee law enabled defense counsel to sue the enslaver for fees if the owner refused to pay.[169] Although not codified into law, the Georgia Supreme Court expressed the belief that it was the enslaver's duty to "see to it, that his [enslaved person] has the benefit of counsel, and counsel's advice, when he is accused . . . [of a capital] crime."[170] The court likened funding defense counsel to a "return for the profits of the bondman's labor and toil."[171] Enslavers had a clear proprietary interest in funding defense counsel for their human property. Even if the offense did not result in capital punishment, there was still a risk of temporary loss of property or damaged property if the enslaved person was incarcerated or dismembered as a result of corporal punishment.

It is important to recognize the convergence of interests which enabled enslaved persons to receive counsel and other procedural safeguards. In assessing major civil rights victories, critical race theorist Derrick Bell explained that disempowered people obtain social, political, or legal gains only when their interests converge with the interests of people in power. Bell called this "interest convergence."[172] Applied here, interest convergence helps explain why certain states extended procedural protections to enslaved people. In those instances, enslaved people obtained defense counsel and other procedural protections because enslavers had an interest in keeping their human property out of prison, alive, and in working condition.[173]

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[168] *See* Schafer, *supra* note 157, at 658 (noting that enslaver had to fund defense counsel, but that Orleans Parish would if the owner refused).

[169] *See* Henry, *supra* note 133, at 184 (citing Act of 1836, which stated that an enslaved defendant facing capital punishment should have counsel appointed and that if the enslaver refused to pay, the lawyer could sue for their fees, compensated fee structure later repealed with Act of 1838).

[170] Jim v. State, 15 Ga. 535, 540 (1854) (enslaved party) (noting that the enslaved defendant was charged with killing a white overseer).

[171] *Id.*

[172] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522-28 (1980).

[173] *See* Flanigan, *Criminal Procedure*, *supra* note 134, at 547 (noting that Southerners extended procedural protections to enslaved defendants to protect enslavers' "property rights").

In addition to interest convergence, some of the states that extended procedural protections to enslaved defendants did so to help preserve slavery. Some enslavers feared that the absolute deprivation of rights for enslaved people could lead them to revolt against the institution of slavery.[174] That was too big of a risk given that slavery powered the national economy.[175] Further, enslaved peoples' subordinated status provided a socially and politically stabilizing force for white people.[176]

3. The Fugitive Slave Law: Incentivizing the Denial of Due Process

By the mid-1800s, forces arose that impacted the procedural protections of enslaved and free Black people in non-slaveholding jurisdictions.[177] In 1850, Congress passed the Fugitive Slave Act, which required the return of Black people deemed fugitive slaves.[178] The law tapped into the existing federal court system for enforcement to determine if someone was a fugitive, empowering courts to issue arrest warrants, hold proceedings, hear witnesses, and issue decisions.[179] However, it did so without the formalities of a trial.[180] The law denied suspected fugitives the right to speak in their own defense and suspended habeas corpus.[181] Most dramatically, it did not require suspects to be represented by counsel nor to be tried before a jury. One survey estimated that Black people captured in the name of the law

[174] HIGGINBOTHAM, *supra* note 141, at 8-9.

[175] *See* Matthew Desmond, *Capitalism*, *in* THE 1619 PROJECT 174-76 (Nikole Hannah-Jones & Caitlin Roper et al. eds., 2021).

[176] *See* Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79, 86 (1991).

[177] *See* JONATHAN DANIEL WELLS, THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTANCE ON THE EVE OF THE CIVIL WAR 205-13 (2020) [hereinafter THE KIDNAPPING CLUB] (describing the Fugitive Slave Act of 1850's impact on New York).

[178] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (https://www.loc.gov/exhibits/odyssey/archive/03/0305001r.jpg) [https://perma.cc/7ZKV-362C] [hereinafter FSA] (repealed 1864).

[179] *Id.*

[180] *Id.* at 463 (empowering marshals and others to seize an alleged fugitive "without process" to bring that person before a judge, prohibiting alleged fugitive from speaking in their own defense, failing to require counsel to defense alleged fugitives, failing to require a transcript of the adjudication process).

[181] *Id.*

between 1850 and 1860 received counsel "in fewer than three of every five cases."[182]

For the Black people who were able to secure counsel to challenge accusations of being a fugitive slave, representation was not based on enforceable procedural protections. Rather, representation often occurred on account of abolitionist efforts of antislavery activists and other like-minded lawyers, some of whom risked professional and ethical consequences.[183] The incentive for intervention was high. Each fugitive slave prosecution offered abolitionists a platform to spread awareness of the injustices of slavery across the nation.[184]

The Fugitive Slave Act of 1850 was a more aggressive version of the Constitution's Fugitive Slave Clause, ratified in 1793.[185] The earlier Clause required the return of an enslaved person who fled to another state to their enslaver in the state from which they came.[186] However, the Clause was loosely enforced. This all changed in 1850. The Act empowered courts to appoint commissioners to orchestrate the arrest, imprisonment, and return of fugitive slaves.[187] The law also paid commissioners fees according to a judge's ruling — ten dollars if the judge returned the fugitive to their enslaver and five dollars if the judge found insufficient proof that the Black person in question was an enslaved fugitive.[188] Either way, a commissioner received money for

[182] James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHI.-KENT L. REV. 1179, 1190 (1993).

[183] *See* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1895-1932 (2019) (detailing accounts of antislavery lawyers representing Black people accused of being fugitive slaves under 1850 law).

[184] *Id.* at 1898-99.

[185] *Compare* U.S. CONST. art. IV, § 2, cl. 3 (prescribing the process for returning alleged fugitives to the jurisdiction where they were held in bondage), *with* FSA, *supra* note 178 (prescribing the process for adjudicating and returning alleged fugitive enslaved persons to the jurisdiction where they were held in bondage, establishing fines and incarceration as punishment for people preventing the seizure of alleged fugitives, creating financial incentives for seizing and adjudicating alleged fugitives).

[186] *See* U.S. CONST. art. IV, § 2, cl. 3.

[187] FSA, *supra* note 178, § 1 (empowering United States circuit courts in each jurisdiction to appoint commissioners to set bail, collect affidavits, and take depositions for the purpose of returning enslaved fugitives to their enslavers).

[188] *Id.* § 8.

bringing a Black person before the court. The law also fined commissioners and others up to $1,000 for failure to enforce the law.[189]

The Fugitive Slave Law deputized private individuals to hunt and capture people suspected of having run away from slavery.[190] In doing so, it developed a market for people who could orchestrate the sale of a captured Black person back into slavery, regardless of whether they had ever been enslaved.[191] A Black person's status as a free person did not matter. Relying on scant evidence and the absence of defense counsel, officials could quickly process and send an accused Black person to a Southern enslaver.[192] This was the fate of John Thomas, a free Black man working in Manhattan.[193] Without a warrant, officials kidnapped Thomas off the streets of New York, claiming that he belonged to an enslaver in Kentucky.[194] Through a ruse, the officials denied Thomas an opportunity to appear before a judge and denied him counsel.[195] His supporters learned that officials transported Thomas south to Richmond, Virginia presumably intending to return him to Kentucky afterward.[196]

The injustice surrounding enforcement of the Fugitive Slave Act of 1850 served as a catalyst for multiple political efforts. For one, it increased support and urgency for abolition.[197] It also provided momentum for Reconstruction legislation, particularly the Fourteenth

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[189] *Id.* § 7.

[190] *Id.* § 5 ("[A]ll good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required . . . .").

[191] *See* WELLS, THE KIDNAPPING CLUB, *supra* note 177, at 107-11 (detailing false criminal allegations used to arrest Black people in New York City and sell them into slavery).

[192] *Id.* at 215-20 (describing Henry Long's saga under the FSA: Long was accused of being a runaway enslaved person, tried, adjudicated a fugitive, returned to Virginia, and then sold into slavery in Georgia).

[193] *Id.* at 258-59; *see also Slave-Hunting in New York*, ANTI-SLAVERY BUGLE, Mar. 16, 1861, at 3 (mentioning that Marshals transported John Thomas to Virginia without adhering to legal process).

[194] WELLS, THE KIDNAPPING CLUB, *supra* note 177, at 258-59.

[195] *Id.*

[196] *Id.*; *see also Slave-Hunting in New York*, *supra* note 193, at 3 (noting that "John Thomas was taken to Richmond by two Marshal's officers . . . without any warrant or hearing").

[197] Farbman, *Resistance Lawyering*, *supra* note 183, at 1895.

Amendment's Due Process Clause.[198] The lack of due process was especially stark with the Fugitive Slave Law. The law's procedural protections existed for the benefit of enslavers to obtain the return of their property swiftly and efficiently, not for the benefit of the person accused of being a fugitive.[199]

Examining the lack of procedural rights afforded to Black people under the Fugitive Slave Law helps to contextualize the passage of the Fourteenth Amendment as it relates to criminal procedure and the right to counsel. With the Fourteenth Amendment, Congress set out to address the lack of meaningful process afforded enslaved people. The Fugitive Slave Law and the racial disparities within the criminal adjudication system would have been in their frame of reference. Given the prominence of defense counsel in securing other procedural rights, when lawmakers advanced due process, the right to counsel was a necessary component.

II. RECONSTRUCTION: A RADICAL REINTERPRETATION OF CONSTITUTIONAL LAW

During the nation's second founding, lawmakers expanded equal protection, due process, and the privileges and immunities that corresponded with citizenship to formerly enslaved people. Reconstruction was about addressing racially disparate treatment and discrimination that formerly enslaved people encountered in all facets of life, including criminal prosecutions.

Ratified in 1865, the Thirteenth Amendment freed enslaved people and prevented involuntary servitude as punishment for crime unless the person had been "duly convicted."[200] That simple two-word phrase indicated that Congress connected due process to criminal proceedings. When introducing the Fourteenth Amendment to the Senate, Senator Jacob Howard explained, "[i]t protects the [B]lack man in his fundamental rights as a citizen with the same shield which it throws

[198] *See* Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 HOFSTRA L. REV. 1, 1-5 (2022) (exploring the relationship between the FSA and the Fourteenth Amendment as it relates to due process in criminal proceedings).

[199] *See id.* at 37 (describing the FSA as "designed to facilitate kidnapping" and structured "in favor of enslavers").

[200] U.S. CONST. amend. XIII, § 1.

over the white man."[201] In explaining the Fourteenth Amendment's reach, lawmakers recognized that it would "prohibit[] the hanging of a [B]lack man for a crime for which the white man is not to be hanged."[202] At the time, Congress understood that the right to counsel was a fundamental right and a central component of due process.[203]

This Part examines Reconstruction's legislative history to identify the constitutional framework for the new ineffective assistance of counsel standard. In doing so, it mines the Congressional floor debates and the report from the Joint Committee on Reconstruction, which convened to investigate the conditions in the former Confederate states following Emancipation. This Part focuses on the social and political context and statements from lawmakers leading up to the Fourteenth Amendment's ratification to shed light on the Reconstruction and Congress's intent to extend due process, among other rights, to formerly enslaved people. Lastly, this Part helps demonstrate that the plight of enslaved people within the criminal legal system was on lawmakers' minds.

A. Joint Reconstruction Committee

The emancipation of millions of enslaved people shattered the very foundation upon which this country was built.[204] In response, the nation was forced to transform its political, legal, and economic systems. Ending slavery also disrupted the wealth of thousands of white people and threatened the social status of millions more. This transition to a "free" society was not seamless. Beyond the blood shed during the Civil War, violence erupted throughout the former Confederate states in the years following the war. In the immediate aftermath of Emancipation, angry white people slaughtered thousands of Black people attempting to assert their citizenship rights for the first time.[205] It was evident that

[201] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

[202] *Id.* (explaining the Fourteenth Amendment's reach).

[203] *See supra* Part I.B.

[204] *See* FONER, *supra* note 44, at 1-3.

[205] *See generally* EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876 (2020) https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf [https://perma.cc/2WX6-BYN9] [hereinafter RECONSTRUCTION IN AMERICA] (cataloging and describing racial violence directed at Black people during Reconstruction).

Congress needed to establish strong federal legislation to protect and enforce the precarious new status of Black people.[206]

Addressing the disparate and discriminatory ways that state criminal courts treated Black and enslaved people in the criminal adjudication system was not the centerpiece of Reconstruction.[207] However, throughout the legislative drafting and ratification process, lawmakers expressed concern with the roughshod fashion in which state criminal courts and officials treated Black people. While discussing potential legislation, the Thirty-Ninth Congress reviewed Lieutenant General Grant's military order to President Johnson.[208] In it, General Grant expressed the need for the law to "protect[] colored persons from prosecution" for offenses that white people were not "prosecuted or punished [for] in the same matter and degree."[209] Similarly, in framing the need for the Fourteenth Amendment, Senator Howard encouraged his colleagues to end the practice of racial disparities in the criminal legal system: "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste?"[210]

By resolution,[211] Congress instructed a bipartisan committee of United States Senators and Representatives "to inquire into the condition of the States which formed the so-called Confederate States . . . and report" on their findings.[212] On January 12, 1866, this joint committee convened to hear testimony from Union officials, Black people, and others with experience in the former Confederate States.[213] The committee members questioned these witnesses about a variety of matters. Their questions reflected an interest in determining the

[206] *See* FONER, *supra* note 44, at 8-17.

[207] *Id.* at xix-xx (identifying the primary goals as abolishing slavery, extending citizenship to Black men, and securing Black male suffrage; recognizing the "far-reaching" goals as providing "access to the [civil] courts, ballot box, and public accommodations, and to protect [Black people] against violence").

[208] CONG. GLOBE, 39th Cong., 1st Sess. 1834 (1866).

[209] *Id.*

[210] *Id.* at 2766.

[211] CONG. GLOBE, 39th Cong., 1st Sess. 57 (1865).

[212] J. COMM. ON RECONSTRUCTION, H.R. REP. NO. 39-30, at vii (1866) [hereinafter RECONSTRUCTION REPORT].

[213] *See id.* at iii (describing Committee's purpose).

experience of Black people in state courts. In the wake of Emancipation, committee members wanted to know whether Southern officials were treating Black people fairly, whether Black people had access to justice, and whether Black people could rely on state courts, both as victims of crime and as people accused of crime.

The committee asked Colonel Orlando Brown, who was stationed in Virginia, if "the negro st[oo]d any chance of obtaining justice in the courts?"[214] Colonel Brown, having conferred with an experienced local lawyer, responded no.[215] The committee posed a similar question to Bedford Brown, a North Carolina lawmaker, asking whether "a [B]lack man [would] stand an equal chance for justice in a State court [in] . . . North Carolina with a white man . . . before a jury?"[216] When Bedford Brown responded with a qualified: yes, "if he was a man of good character," the committee pressed further, inquiring as to whether state courts permitted Black men to testify.[217] Again, Mr. Brown answered with qualification: "It is limited to some extent."[218] The committee's questions became more targeted. "Is the low white man esteemed as possessing more veracity than the [B]lack man of the same grade and condition, in North Carolina?"[219] To that, Mr. Brown conceded that yes, "poor" whites "would be entitled to a higher grade of character . . . "[220] by virtue of their race.

General Rufus Saxton testified about a similar sentiment in South Carolina.[221] Responding to the committee's inquiry about whether state courts would treat Freedmen's Bureau agents fairly, General Saxton explained:

> [They] would probably fare just as bad in the courts as the freedmen, and it is my belief that there are large numbers in South Carolina who would consider it no greater crime to kill an

[214] RECONSTRUCTION REPORT, *supra* note 212, at pt. 2, at 127 ("[N]egroes could not obtain justice before a Virginia jury[.]").

[215] *Id.* ("[N]egroes could not obtain justice before a Virginia jury[.]").

[216] *Id.* at pt. 2, at 264.

[217] *Id.* at 265.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *See id.* at 218.

> agent of the Freedmen's Bureau, who claims justice for those committed to his charge, than to kill a negro.[222]

Reports from Mississippi presented a similar picture. Captain Mathews, a member of the sub-commission of freedmen, testified that "[t]he condition of the freedmen in [Mississippi] . . . is *most miserable indeed*."[223] He explained that Black people were being treated "absolutely without law," that white people in "Mississippi [were] looking anxiously for the day when the troops . . . withdraw[], and they be left to execute their own laws . . . . "[224] Captain Mathews believed "that slavery, if not in name, in fact exists in its most aggravated form."[225]

John Allen delivered testimony about the general sentiment of white Texans toward the Union and Black people.[226] When asked about the potential for juries to render a fair verdict, Mr. Allen referenced experiences he had while serving as a prosecutor in Louisiana.[227] He conceded that "in a case where a white man and a [B]lack man were concerned," jurors were apt to "utterly disregard the evidence" in favor of the white man.[228]

Another military official testified about a free Black man whom local officials unjustly "tried under the old slave code" in Texas.[229] The defendant had come upon his former enslaver "cruelly whipp[ing]" the defendant's wife; the former enslaver then turned to assault the Black man. When the Black man fled, he raised an axe, warning his former enslaver and other white men not to approach him; in response, they shot him.[230] The Black man survived, but locals wanted to "hang him" for having raised an axe, albeit in self-defense, against white men.[231] The local authorities "put [him] in jail [and] tried" him before a jury, which

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[222] *Id.*

[223] RECONSTRUCTION REPORT, *supra* note 212, at pt. 3, at 184 (emphasis in original).

[224] *Id.*

[225] *Id.*

[226] RECONSTRUCTION REPORT, *supra* note 212, at pt. 4, at 86.

[227] *See id.* at 89.

[228] *Id.*

[229] *Id.* at pt. 4, at 155 (the military official sought to secure the freedman's release).

[230] *Id.* at 155-56.

[231] *Id.* at 156.

quickly returned a guilty verdict.[232] There was no mention of defense counsel, and the military official added that the authorities neglected to arrest the white assailants.[233]

When describing white sentiment toward extending civil rights to Black people, Brevet Major General John W. Tuner testified that "[t]he very question of according civil rights to a negro is . . . very repugnant . . . something at which [white Virginians] revolt from the very bottom of their souls."[234] Minister James W. Hunnicutt testified that white Virginians were likely to feign cooperation to reenter the Union.[235] And after doing so, they would hold legal proceedings in which "the testimony of the negroes will not be worth a snap of your finger . . . . "[236] Minister Hunnicutt predicted that white people in power would continue to "do what they please with [Black people in legal proceedings]; there are the judges, the lawyers, and the jury against the negro, and perhaps every one of them is sniggering and laughing while the negro is giving his testimony."[237]

At the conclusion of the testimony, the Joint Reconstruction Committee produced a report spanning over 800 pages. Much of it described concerted efforts of white people to thwart Emancipation, including widespread violence directed at Black people attempting to make a life in the wake of Emancipation. The Joint Committee concluded that without strong federal legislation, white Southerners in power would continue to resist Black citizenship and equal rights and to deny Black people due process.

Given the strength of the forces opposing rights, legal protections, and citizenship for Black people, Congress recognized that Reconstruction legislation had to be broad sweeping, touching every aspect of economic, social, and political life. The Joint Committee included the Fourteenth Amendment in draft form in the report,

[232] *Id.*

[233] *Id.*

[234] *Id.* at pt. 2, at 5.

[235] *Id.* at 150.

[236] *Id.*

[237] *Id.*

referring to it as "Article 14."[238] Ultimately, Representative John Bingham of Ohio drafted Section I of the Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.[239]

Combined with the other Reconstruction amendments, the Fourteenth Amendment extended the corresponding benefits of citizenship to formerly enslaved people.[240] It also addressed specific post-war issues related to debt, eligibility for holding federal office, and political representation.[241] Most significantly, the Fourteenth Amendment included a brief enforcement clause, which empowered lawmakers to pass necessary and "appropriate legislation" to advance the principles contained in the amendment.[242] The enforcement clause made clear that the drafters intended the force of the amendment to reach beyond what lawmakers ratified. The hope was that the amendment would generate additional legislation to advance citizenship, rights, and legal protections.

B. Expanding Rights and Protections to Formally Enslaved People

With the Fourteenth Amendment, Congress intended "to undo the formalistic reasoning that infected antebellum jurisprudence" based on racial classification and status.[243] The amendment contained five sections, including the Due Process Clause. In relevant part, the clause prohibited states from depriving "any person of life [or] liberty, without

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[238] RECONSTRUCTION REPORT, *supra* note 212, at xxii.

[239] Gerard N. Magliocca, Opinion, *The Father of the 14th Amendment*, N.Y. TIMES (Sept. 17, 2013), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/ (emphasis added) (quoting U.S. CONST. amend. XIV).

[240] *See* U.S. CONST. amends. XIII–XV.

[241] U.S. CONST. amend. XIV, §§ 2–4.

[242] *Id.* § 5.

[243] Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

due process of law . . . . "[244] Congress modeled the Due Process Clause on an identical phrase in the Fifth Amendment.[245] The founding Framers enacted the Fifth Amendment more than seventy years prior as part of the Bill of Rights. There, the Due Process Clause limited the federal government from depriving persons "of life [or] liberty . . . without due process of law."[246] Even though the Due Process Clause is textually identical in both amendments, the congressional intent behind each differs, as does the potential impact.

The political and social context in which Congress ratified the Fourteenth Amendment was markedly different than that of the Fifth Amendment. As detailed above, the Thirty-Ninth Congress ratified the Fourteenth Amendment to further actualize the emancipation of enslaved people through the extension of citizenship rights, legal protections, and legal benefits. These were non-issues when Congress ratified the Fifth Amendment in the previous century.

The two amendments also differed regarding scope. While the Fifth Amendment limited federal conduct, the Fourteenth Amendment's Due Process Clause limited state conduct. The Fifth Amendment's limited applicability to the former Confederate states was top of mind when the Thirty-Ninth Congress conceived the Fourteenth Amendment's Due Process Clause. During Congressional discussions of the Fourteenth Amendment, Representative Bingham critiqued an 1833 opinion from the Court that held that the Bill of Rights did not apply to the states.[247] The lack of federal power over state action was a motivating force behind Reconstruction.[248]

Congress recognized the need for laws with the power to limit state governments and state actors from impeding citizens' fundamental

[244] U.S. CONST. amend. XIV, § 1.

[245] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[246] *Id.*

[247] CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866) (statements of Rep. Bingham critiquing Barron v. Baltimore, 32 U.S. 243 (1833)); *see also Barron*, 32 U.S. at 250 ("These amendments contain no expression indicating an intention to apply them to the state governments.").

[248] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

constitutional rights.[249] The Fourteenth Amendment's Due Process Clause was meant to do just that.[250] Moreover, the Amendment's enforcement clause empowered Congress to pass subsequent legislation that would continue to advance the law's goals.[251] Thus, the Fourteenth Amendment guaranteed broader protections and its Due Process Clause was more powerful than the one in its Fifth Amendment counterpart. Representative Bingham explained as much when speaking in favor of the amendment. Rhetorically, he asked his colleagues, "Is the [B]ill of [R]ights to stand in our Constitution hereafter, as in the past five years within eleven [Confederate] States, a mere dead letter?"[252] Referring to the Fourteenth Amendment, he answered his own question: "It is absolutely essential to the safety of the people that it should be enforced."[253]

Likewise, Senator Howard characterized the Fourteenth Amendment's purpose as more expansive than that of the Fifth Amendment. When introducing the various sections to the Senate, he explained, "[t]he great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[254] The fundamental guarantees to which he was referring were the rights found within the Bill of Rights. This included the Sixth Amendment right to counsel. In contemplating the reach of the Fourteenth Amendment, the drafters sought to include protections to formerly enslaved people within the criminal legal system.

Even though Congress managed to pass several transformative laws that had the potential to empower Black people, Reconstruction lacked support from other vital political entities, including President Andrew

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[249] *See* FONER, *supra* note 44, at 78 (noting that the Due Process Clause of the Fourteenth Amendment was "primarily [about] . . . 'state action' — preventing state governments and officials form denying citizens their basic rights, enacting discriminatory laws, or enforcing laws in a discriminatory manner"); *supra* Part II.A.

[250] FONER, *supra* note 44, at 78.

[251] *See id.* at 85 (explaining that the enforcement clause "ensured that the process of defining Americans' rights would not end with ratification").

[252] CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (statements of Rep. Bingham).

[253] *Id.*

[254] *Id.* at 2766 (statements of Sen. Howard).

Johnson and the United States Supreme Court.[255] The backlash from empowered and hostile white people unwilling to recognize Black citizenship was swift and violent.[256] Rather than bring full equality, procedural protections, and the privileges of citizenship to Black people, Reconstruction was met with decades of legally sanctioned racial segregation.[257] And despite Congress's desire for the Fourteenth Amendment's Due Process Clause to apply the Bill of Rights to the states, it took the Court longer to formally recognize the Amendment's incorporation power.[258] Almost a full century later, the Court recognized that the Sixth Amendment right to counsel applied to the states.[259] In many ways, the nation is still striving for the ideals promulgated during Reconstruction.[260]

C. Reconstruction's Impact on the Right to Counsel

Despite the broad sweeping language of the Reconstruction amendments, it had little impact on formerly enslaved people's rights when facing criminal charges. However, combined with the violent

[255] FONER, *supra* note 44, at 67-68 (describing President Johnson's hostility toward Black citizenship); Roberts, *supra* note 48, at 63 (noting that Congress passed the Civil Rights Act of 1866 over President Johnson's veto); Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 FORDHAM URB. L.J. 721, 730 (2021) (describing "[t]he Court's early evisceration of . . . Reconstruction").

[256] *See* RECONSTRUCTION IN AMERICA, *supra* note 205, at 22-31.

[257] *See id.* at 93-95 (describing the devasting impact that Reconstruction's end had on Black people in America for the next eighty years); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (recognizing that racial segregation in public schools violates the Fourteenth Amendment Equal Protection Clause).

[258] *See* Timbs v. Indiana, 586 U.S. 146, 146 (2019) (finding that the Eighth Amendment's excessive fines clause is incorporated to apply to the states); McDonald v. City of Chicago, 561 U.S. 742, 759-66 (2010) (describing the history of the Court's incorporation doctrine); Roger Fairfax, *Interrogating the Nonincorporation of the Grand Jury Clause*, 43 CARDOZO L. REV. 855, 857-59 (2022) (noting that the Fifth Amendment right to a grand jury indictment has not yet been incorporated).

[259] *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (overturning *Betts v. Brady*, 316 U.S. 455 (1942), where the Court held that the Sixth Amendment right to counsel did not apply to the states).

[260] *See* Roberts, *supra* note 48, at 48-49 (describing the struggle began during Reconstruction to end the racial capitalist order as "unfinished").

backlash following Reconstruction,[261] the need for Black people's procedural protections, including the right to counsel, could not have been more acute. In response to Black people's change in legal status, many former slaveholding states turned to the criminal legal system to facilitate Black people's virtual re-enslavement.[262] Using the states' prosecutorial powers, communities across the country, and especially in the South, incarcerated thousands of newly freed Black people.[263] An Alabama planter reflected, "[w]e have the power to pass stringent police laws to govern the Negroes — this is a blessing — for they must be controlled in some way or white people cannot live among them."[264] This transition to relying on the criminal legal system to control Black people resulted in a dramatic shift in prison population demographics. For example, in 1850, the prison population in Alabama was almost exclusively white.[265] This reflected the high value of Black people as enslaved labor and the privatization of Black punishment at the hands of white enslavers.[266] However, just two decades later, Black people made up over seventy percent of the incarcerated population in Alabama.[267]

Although the Thirty-Ninth Congress explained the purpose and scope of the Fourteenth Amendment's Due Process Clause, the Court took a different approach to interpreting its meaning.[268] In the immediate

[261] *See* RECONSTRUCTION IN AMERICA, *supra* note 205, at 42-55.

[262] *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (detailing the South's use of the criminal legal system and convict leasing to extract forced labor from formerly enslaved people and their decedents following Emancipation).

[263] *Id.* at 63-69; MICHELLE ALEXANDER, THE NEW JIM CROW 20-58 (2010) (describing the transition from slavery to the criminal legal system as a tool for social control of Black people).

[264] ALEXANDER, *supra* note 263, at 28 (citing WILLIA COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 28 (1991)).

[265] Roberts, *supra* note 135, at 268 (noting that the incarcerated population in Alabama, for example, was ninety-eight percent white in 1850).

[266] *See supra* Part I.B.

[267] Roberts, *supra* note 135, at 268.

[268] Notably, the language in Section 1 does not mention race. The consolidated *Slaughter-House Cases* embraced this ambiguity and for the first time the Court engaged with the Fourteenth Amendment's Due Process, Privileges and Immunities, and Equal

aftermath of Reconstruction, few state criminal cases came before the Court to test the boundaries of the clause. The vehicle needed to be a state prosecution with potential violations of federal constitutional law. *Hurtado v. California*, decided in 1884, was the first to fit that profile.[269] At issue before the Court was whether California's law violated Joseph Hurtado's right to due process because it allowed for indictment of a capital crime without convening a grand jury, a right specified by the Fifth Amendment of the federal Constitution.

Had the federal government prosecuted Mr. Hurtado in this way, the process would have violated the Fifth Amendment's indictment by grand jury requirement. But no such requirement existed for state prosecutions within the Fourteenth Amendment even though, as the Court noted, the Due Process Clauses in both amendments were identical.[270] In reviewing the trial proceedings, the Court noted that the magistrate found probable cause based on information, that Mr. Hurtado had "the aid of counsel," and through counsel, he was able to cross-examine the state's witnesses.[271] With these features, the Court could not conclude that California law violated Mr. Hurtado's right to due process. Moreover, if the purpose of the Fourteenth Amendment was to require states to indict suspects via a grand jury, then the amendment "would have embodied . . . express declarations to that effect."[272]

Even though Mr. Hurtado lost, the Court provided some guidance on the meaning of due process in the criminal context. The decision implied that the other procedural safeguards California extended to Mr. Hurtado — the aid of counsel, the right to confront witnesses against him, and an indictment based on information and a finding of probable

Protection Clauses. Slaughter-House Cases, 83 U.S. 36 (1872). Petitioners were butchers challenging a New Orleans law that created a monopoly on the industry. The Court's decision ultimately gutted the Privileges and Immunities Clause.

[269] Hurtado v. California, 110 U.S. 516 (1884). Notably, five years earlier the Court decided *Strauder v. West Virginia*, 100 U.S. 303 (1880), in which it held Black people could not be wholly excluded from jury service based on race. However, the decision engaged the Fourteenth Amendment's Privileges and Immunities and Equal Protection Clauses and not the Due Process Clause.

[270] *Hurtado*, 110 U.S. at 534.

[271] *Id.* at 538.

[272] *Id.* at 535.

cause, collectively — constituted due process. This result suggests that the right to defense counsel might apply to the states even if the right to a grand jury right did not. The Court also explained that due process protected "against arbitrary [state] legislation" that might deprive a person of liberty and justice.[273] And then, somewhat more vaguely, that the clause did not require "particular forms of procedure," instead, it protected "the very substance of individual rights to life, liberty, and property."[274]

The Court continued to take tentative steps towards defining the contours of constitutional criminal due process as it applied to the states. This included identifying the relationship between the Fourteenth Amendment's Due Process Clause and the Sixth Amendment right to counsel.[275] At best, this reflected the Court's mindfulness of federalism and the desire to respect the individual right of each state to determine how to adjudicate criminal laws within their own borders. At worst, it reflected a perception that poor people prosecuted in state criminal courts, many of whom were people of color,[276] were not as deserving of the constitutional protections found within the Bill of Rights.[277]

With *Hurtado*, the Court signaled that due process likely required defense counsel to be involved in criminal proceedings, along with other procedural protections. But it was not yet clear whether due process required the Sixth Amendment right to counsel, standing alone.

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[273] *Id.* at 532.

[274] *Id.*

[275] *See* Palko v. Connecticut, 302 U.S. 319, 324 (1937) (recognizing that the Fourteenth Amendment's Due Process Clause protects "the right of one accused of crime to the benefit of counsel"), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969). *But see* Betts v. Brady, 316 U.S. 455, 471-73 (1942) (rejecting application of the Sixth Amendment's right to counsel provision to the states via the Fourteenth Amendment), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

[276] Here, I'm referring to people society now recognizes as people of the global majority, such as Black people, Latinos, Asians, and indigenous people, as well as subgroups of European immigrants that came to the US in the late 1800s and early 1900s when society had more restrictive views of whiteness based on perceived capacity for self-governance and pathologized behavior. *See* MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 40 (1998).

[277] *See* Alexis Hoag, *The Color of Justice,* 120 MICH. L. REV. 977, 984-87 (2022) (reviewing SARA MAYEUX, FREE JUSTICE (2020)).

D. Due Process Requires Effective Representation

In *Powell v. Alabama*, the Court recognized that having effective assistance of counsel was a fundamental right that the Fourteenth Amendment Due Process Clause and the Sixth Amendment right to counsel guaranteed.[278] At the time, Chief Justice Charles Evans Hughes presided over the Court.[279] He had previously served as the president of the New York City Bar Association and the Legal Aid Society, which provided free legal services for people who could not afford counsel.[280] Hughes believed that "expert legal advice" for the poor was necessary.[281] Otherwise, he explained, "it is idle to talk of equality before the law."[282]

Powell v. Alabama involved two white women who accused nine Black youths of rape.[283] In an appearance of due process, the trial judge initially appointed the entire Alabama bar as defense counsel; the judge then appointed a single lawyer who lacked time to adequately prepare.[284] In reversing the conviction, the Court recognized a constitutional right to counsel for indigent defendants facing state capital charges, a right to counsel of one's choice, and a right to effective counsel.[285] More specifically, the Court held that the trial judge failed to effectively appoint counsel in violation of the defendant's right to due process.[286] Relying on both the Sixth Amendment and the Fourteenth Amendment, the Court concluded that "the right to the aid of counsel is . . . fundamental" and must "necessarily [be] included in due process of law."[287]

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

[279] *See* A. Leon Higgenbotham, Jr. & William C. Smith, *The William B. Lockhart Lecture: The Hughes Court and the Beginning of the End of the "Separate But Equal" Doctrine*, 76 MINN. L. REV. 1099, 1121-22 (1992) (discussing the "Hughes Court's growing sensitivity to the plight of [B]lack[people] in southern courts").

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

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

[282] *Id.*

[283] *See Powell*, 287 U.S. at 49 (1932).

[284] *Id.* at 49, 56-58.

[285] *Id.*

[286] *Id.* at 71.

[287] *Id.* at 68-70.

In recognizing the assistance of counsel as a fundamental right, the Court identified features of the defendants' identities that necessitated assistance.[288] These features included ignorance, illiteracy, youth, and being Black.[289] From the Court's perspective, the defendant's intellectual limitations required the assistance of counsel to help them navigate the complexities of the law.[290] But the fact that the defendants were Black was also a crucial factor. The defendants' race combined with the incendiary allegations — raping white women — generated local hostility towards the defendants.[291] To avoid potential lynchings, the sheriff arranged for the local militia to safeguard the youths in a neighboring jurisdiction, Gadsden, and transport them to and from the courthouse approximately sixty miles away in Scottsboro.[292]

The threat of violence was directly borne out of the interracial nature of the alleged crime.[293] The Court seemed particularly troubled at the potential of a proceeding conducted amidst the hostile passions of a mob. It described such a proceeding without counsel as akin to "judicial murder."[294] Even if the trial resulted in a lengthy or even capital sentence, the Court seemed to prefer a proceeding conducted according to the dispassionate process of the law. That cool process included the effective appointment of counsel in advance of trial to enable adequate preparation.

The anti-Black racism surrounding the trial was a significant detail that the Fourteenth Amendment was well-suited to address. These were the same forces that skewed proceedings against enslaved defendants in "slave courts" and the same powerful forces present in the proceedings reported to the Joint Reconstruction Committee.[295] Proceedings with

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[288] *Id.* at 57-58.

[289] *Id.*

[290] *Id.* at 71-72.

[291] *Id.* at 51 (describing the local atmosphere as "tense, hostile, and excited" due to the race of the defendants and the nature of the charges).

[292] *Id.*

[293] *See* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 48 (1996) (explaining that "white male anxieties about . . . interracial sex," particularly between Black men and white women, contributed to the widespread lynching of Black men).

[294] *Powell*, 287 U.S. at 72.

[295] *See supra* Parts I.B, II.A.

the superficial trappings of the Sixth Amendment right to trial — defense counsel, adverse witness examination, a jury — meant little without the additional protection of due process. Due process was absent in the trials adjudicating Black people accused of crime, and the *Powell* decision attempted to reignite the Fourteenth Amendment and bring due process back in the form of *effective* counsel.

Although the Court held that due process required effective assistance of counsel, the Court's focus was on the trial court's failure to *effectively appoint* counsel.[296] The ruling did not grapple with counsel's conduct per se. Instead, the Court focused on the trial court's responsibility to ensure that indigent defendants received counsel far enough in advance to enable counsel to provide "effective aid."[297] The decision left "effective aid" undefined. What was clear was that due process required more than simply appointing counsel, because the Alabama trial court had complied with that. Due process required states to appoint counsel under conditions that would enable counsel to perform effectively.

Three decades after *Powell*, the Court in *Gideon v. Wainwright* held that due process required states to provide defense counsel to indigent defendants facing non-capital charges.[298] Although the Court did not speak to the quality of defense counsel required, it continued to engage centrally with the Fourteenth Amendment's Due Process Clause in interpreting the right to counsel. What developed was a body of law whereby the Court applied the Fourteenth Amendment's due process protection depending on the nature of the offense and the characteristics of the accused (such as race, intellectual ability, and indigency). These were some of the same considerations that propelled the Thirty-Ninth Congress to recognize the need for a due process protection applicable on the states.

On the surface, this decision was a win for indigent defendants. Relying on both the Sixth and Fourteenth Amendments, the Court held that the assistance of counsel was a necessary and fundamental part of

[296] *Powell*, 287 U.S. at 71 (finding that "the trial court [failed] to make an effective appointment of counsel" in violation of the defendants' rights).

[297] *See id.*

[298] Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963).

a fair trial.[299] But the Court left a lot unsaid, including how states should implement the right. On the positive side, the due process right to counsel was no longer tethered to defendants having to demonstrate dire circumstances, like a death sentence or a lynch mob.

On the other hand, in *Gideon*, the Court's extension of the right to counsel on behalf of Mr. Gideon, a white man,[300] served to reinforce and reproduce racial inequality in the criminal adjudication system. In framing the decision on the rights "implicit in the concept of ordered liberty,"[301] the Court avoided engaging with Reconstruction and failed to address the plight of formerly enslaved people. Instead, the Court highlighted the founding Framers' aspirational promise of equality and fairness; it was a promise that the Framers did not extend to Black people. These observations are even more pronounced when comparing *Gideon* to *Strickland v. Washington*, decided two decades later.[302]

Following *Powell* and *Gideon*, two questions remained for the Court to address: whether due process required effective counsel in run of the mill cases, and how to measure counsel's effectiveness while still fulfilling the due process requirement. The Court answered those questions in *Strickland v. Washington* when it conceived of the two-prong, deficient-performance-and-prejudice standard. However, this Article argues that the *Strickland* standard fails to fulfill the due process requirement.

III. (RE)CONSTRUCTING A NEW STANDARD

There is a need for a new standard for ineffective assistance of counsel. Ineffective assistance of counsel is one of the most raised claims during federal habeas, part of the post-conviction collateral review process.[303] However, under the current standard, reviewing courts rarely find that defense counsel rendered constitutionally

[299] *Id.* at 341-43.

[300] Brief for the Respondent at 18, Gideon v. Cochran, 372 U.S. 335 (1963), No. 155, 1963 WL 66427, at *10.

[301] *Gideon*, 372 U.S. at 342.

[302] *See* Strickland v. Washington, 466 U.S. 668, 697 (1984) (recognizing that counsel's deficient performance does not violate a defendant's Sixth Amendment right to effective counsel where defendant fails to demonstrate prejudice).

[303] KING ET AL., HABEAS LITIGATION, *supra* note 66, at 28.

ineffective assistance.[304] Procedural barriers in post-conviction present a hurdle;[305] the prejudice requirement presents an equally formidable one.[306] Reviewing courts often dispense with "ineffectiveness cases . . . based on lack of prejudice . . . without [even] discussing counsel's deficient performance."[307] The difficulty defendants encounter when seeking redress under the standard means that incarcerated people who experienced poor representation rarely obtain relief.

The current standard is "virtually impossible to meet" because it forces reviewing courts to find "[a]lmost all representation . . . to be within *Strickland*'s 'wide range of professionally competent assistance.'"[308] In his dissent from *Strickland*, Justice Marshall observed that "[a] proceeding in which the defendant does not receive meaningful assistance . . . does not . . . constitute due process."[309] He feared that the prejudice requirement would provide relief only to defendants capable of demonstrating innocence.[310] He explained that "[e]very defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer."[311] He argued that "the constitutional guarantee of effective assistance of counsel" was

[304] *See Enforcing Effective Assistance*, *supra* note 66, at 2431 & n.10 (noting success rate of just over one percent for federal habeas petitioners who raise ineffective assistance of counsel claims in Michigan).

[305] *See* Shinn v. Ramirez, 596 U.S. 366, 392 (2022) (Sotomayor, J., dissenting) ("The Court's decision will leave many people who were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel.").

[306] *See* Whitehead v. Cowan, 263 F.3d 708, 731 (7th Cir. 2001) (finding defendant's failure to prove the standard's prejudice prong "decisive" in his inability to demonstrate ineffective assistance of counsel).

[307] Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 20 (2002).

[308] John H. Blume & Stacy D. Neumann, *"It's Like Déjà Vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard, and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 142 (2007) (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)).

[309] Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting).

[310] *See id.*

[311] *Id.*

intended to "ensure that convictions are obtained only through fundamentally fair procedures."[312]

In crafting the Due Process Clause, the Reconstruction Framers were concerned with fairness and process.[313] Yet, the prejudice requirement imposes a burden on defendants that threatens these principles. This Part (re)constructs a new ineffectiveness standard informed and inspired by Reconstruction. It first examines the problems of the existing two-prong standard which requires defendants to demonstrate both deficient performance and prejudice. It then proposes a prejudice-free standard, defines the contours of the deficient performance requirement, and explores potential limitations. Casting aside the prejudice requirement is not a far-fetched suggestion, but an intervention rooted firmly in the doctrinal history of the right to effective assistance of counsel.[314]

A. Two-Prong Standard: Strickland v. Washington

Under the two-prong standard, even if a reviewing court finds that defense counsel's conduct was deficient, the court must deny the ineffectiveness claim if the defendant cannot demonstrate prejudice.[315] In other words, a defendant can experience deficient representation, but the prejudice requirement can prevent the defendant from obtaining redress for that deficiency. Even after the Court established the two-prong standard, there were vocal critics of the prejudice requirement who argued that it impeded fairness.[316]

Subjecting people to deficiently performing counsel with little opportunity for redress if they cannot demonstrate a likelihood of

[312] *Id.*

[313] *See supra* Parts II.A–B.

[314] *See* Avery v. Alabama, 308 U.S. 444, 445-46 (1940) (finding that "mere formal appointment" of defense counsel does not meet the Fourteenth Amendment's due process requirements); Powell v. Alabama, 287 U.S. 45, 50 (1932) (discussing the right to effective counsel as part of the Fourteenth Amendment Due Process Clause); Blackman v. State, 76 Ga. 288, 289 (1886) (noting that the right to counsel "would amount to nothing if . . . counsel . . . are not allowed sufficient time to prepare [the] defence").

[315] Bright, *supra* note 22, at 1858.

[316] *See, e.g.*, *id.* at 1864-65 (arguing that the prejudice requirement is inappropriate, particularly in capital cases).

innocence or a decreased sentence results in unfairness. Proving counsel's ineffectiveness under *Strickland* has been particularly difficult for defendants of color.[317] Thus, rather than provide meaningful assistance, the Sixth Amendment guarantee enables states to efficiently prosecute and incarcerate millions of marginalized people under the appearance of due process.[318]

The two-prong standard requires defendants to demonstrate that defense counsel's conduct was objectively unreasonable and that there was a reasonable likelihood that such conduct prejudiced the outcome of the proceeding.[319] In other words, the standard requires deficient performance and prejudice. When considering counsel's performance, the reviewing court must start with the premise that defense counsel's conduct was reasonable and that counsel's conduct may have constituted sound trial strategy.[320] While this Article focuses on the problems that the prejudice prong presents, defendants also encounter difficulties overcoming the presumptions found within *Strickland*'s deficient performance prong.[321]

Assuming the defendant can demonstrate deficient performance, the prejudice requirement often impedes relief. In *Muniz v. Smith*, the defendant, Mr. Muniz, argued that his defense lawyer was constitutionally ineffective for falling asleep during critical portions of his trial — including while the prosecution was cross-examining him.[322] In support, Mr. Muniz submitted uncontroverted evidence in the form of an affidavit from a juror who witnessed his counsel's slumber.[323] Although the United States Court of Appeals for the Sixth Circuit found that the defense lawyer's conduct was deficient, the court concluded that even if Mr. Muniz's counsel had been awake, the outcome of Mr.

[317] *See* Ossei-Owusu, *supra* note 12, at 1228-30.

[318] *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2192-93 (2013).

[319] Strickland v. Washington, 466 U.S. 668, 669 (1984).

[320] *Id.* at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

[321] *See* Hoag-Fordjour, *supra* note 74, at 777-79.

[322] Muniz v. Smith, 647 F.3d 619, 623-24 (6th Cir. 2011).

[323] *Id.*

Muniz's trial would have been the same.[324] Thus, the lack of prejudice indicated the absence of the ineffectiveness of counsel.[325]

Likewise, in *Sonnier v. Quarterman*, the reviewing court failed to find ineffective assistance of counsel based on defendant's inability to demonstrate prejudice. The defendant, Mr. Sonnier, was facing the death penalty after a jury convicted him of murdering a woman and her son.[326] At trial, Mr. Sonnier instructed his attorneys to withhold mitigating evidence in his defense. According to his wishes, counsel did not present any mitigating evidence, and the jury sentenced him to death.[327]

However, the reviewing court noted that the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,[328] which were in place at the time of Mr. Sonnier's trial, made clear that regardless of the defendant's request, defense counsel in capital cases must undertake a reasonable investigation.[329] Only after counsel has made a reasonable investigation can they decide that further investigation is unnecessary.[330] The court conclude[d] that the trial attorneys stopped short of making a reasonable investigation" that would have enabled them to "uncover[] relevant mitigating evidence[.]"[331] For these reasons, the reviewing court found that Mr. Sonnier sufficiently demonstrated that his trial counsels' conduct was deficient.[332] However, the court then concluded that even with the available mitigating evidence that Mr. Sonnier uncovered in post-conviction, he failed to demonstrate that it would "have caused the jury to decline to impose the death penalty in [his] case."[333]

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[324] *Id.* at 624.

[325] *Id.* at 624-26.

[326] Sonnier v. Quarterman, 476 F.3d 349, 355 (5th Cir. 2007).

[327] *Id.*

[328] AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989).

[329] *Sonnier*, 476 F.3d at 357-58.

[330] *Id.*

[331] *Id.*

[332] *Id.* at 358.

[333] *Id.* at 359-60.

Cases like these only scratch the surface of the fundamental unfairness that the two-prong standard imposes on defendants. It is particularly frustrating when a reviewing court recognizes that trial counsel performed deficiently but then declines to find prejudice. Such holdings make a mockery of the Sixth Amendment right to counsel.[334] They also call into question the strength of the Due Process Clause and fall short of the aspirational language of the Reconstruction Congress.

B. The New Single-Prong Standard

The two-prong standard requires an overhaul to better reflect the realities of the criminal adjudication system and to help fully actualize the promise of Reconstruction. When the Court decided *Gideon*, the system recognized only forty-three percent of criminal defendants as indigent, and thus in need of appointed counsel.[335] By the 2000s, approximately eighty percent of people charged with crime qualified as indigent.[336] During the same period of time, the number of incarcerated people jumped from about 330,000, to over 2 million.[337] Although nineteenth century lawmakers likely could not predict the growth and scale of the contemporary criminal legal system, the laws they enacted are still capable of providing guaranteed protections.

The weight of the criminal legal system falls heaviest upon those least likely to be able to secure counsel and those most in need of procedural protection from the state. Even though the rate of incarceration has increased for all populations, it is six times higher for Black people relative to white people.[338] Disabled people comprise forty percent of the

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[334] Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 426-28 (1996) (describing examples where defendants were unable to prove ineffective assistance of counsel under *Strickland* even though appointed counsel failed to remain alert or sober during trial).

[335] *See* LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 7-8 (1965).

[336] *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000); Oppel & Patel, *supra* note 65.

[337] JUST. POL'Y INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1 (2000) (showing incarceration rates from 1910 to 2000 and indicating about 330,000 people incarcerated in 1960 and over 2 million in 2000).

[338] *Id.* at 5.

state prison population, but only fifteen percent of the general population.[339] Although people who can afford counsel can also raise ineffective assistance of counsel claims,[340] they make up a smaller percentage of people who are prosecuted and incarcerated, and thus raise ineffectiveness claims in lower numbers. Removing the prejudice requirement from the ineffectiveness standard aligns with Congress's intent to protect the rights of marginalized people facing the deprivation of life and liberty. It would also benefit all defendants raising ineffectiveness claims.

A new single-prong standard would focus on assessing counsel's performance. It would also shift the burden of proof on the state once the petitioner makes the requisite deficient performance showing. Evaluating counsel's performance, without contingency, allows for a streamlined assessment that preserves both the Sixth Amendment right to counsel and the Fourteenth Amendment's Due Process Clause.

The new standard does not rely upon a list of rigid guidelines to identify effective assistance of counsel. Rather, petitioner must assess counsel's performance relative to reasonable conduct as defined by prevailing professional norms and the circumstances of the case. This respects the flexibility with which defense counsel must operate to make strategic decisions based on constantly shifting variables, but it is also mindful of the unique circumstances that can arise in a particular case for a particular defendant. The "circumstances of the case," described in more detail below, includes the nature of the offense and the characteristics of the defendant.

Once the petitioner makes the requisite showing that defense counsel's conduct failed to adhere to reasonable professional conduct considering the circumstances of the case, the burden shifts to the state. The onus would be on the state to demonstrate that trial counsel's action or inaction did not impact "a potentially meritorious defense."[341] This would be a hard standard for the state to meet, and appropriately so. Importantly, it would no longer be incumbent on the petitioner to make the arduous showing of prejudice. Under the new standard, the

[339] MARUSCHAK ET AL., *supra* note 65, at 2.

[340] Cuyler v. Sullivan, 466 U.S. 335, 342-44 (1980).

[341] State v. Aplaca, 837 P.2d 1298, 1301 (Haw. 1992).

state would carry the burden to show that counsel's actions or inactions *did not* impact a potentially meritorious defense.

The burden shifting on the state reflects the fact that after a defendant's conviction, the state has more resources and is in a better position to investigate and present evidence about defense counsel's conduct. Raising a claim of ineffective assistance of counsel is a resource-intensive process that often requires extensive fact-investigation. Proof of ineffective assistance of counsel is rarely present in the trial record. Thus, the investigation often entails going outside the record to obtain documents and interview witnesses that defense counsel may have originally failed to interview or even failed to identify.[342] Most petitioners who raise ineffective assistance of counsel claims are indigent and incarcerated, and few petitioners have access to appointed counsel in post-conviction.[343]

1. Determining Reasonable Conduct

Under *Strickland*, the first part of the deficient performance prong is not as problematic as the prejudice requirement. Thus, measuring counsel's conduct against a similar rubric as *Strickland* — relative to reasonable conduct, as defined by prevailing professional norms — does not necessarily reproduce the obstacles that *Strickland* creates. Beyond the prejudice requirement, part of what makes *Strickland*'s standard problematic is the second half of the performance prong. Part of the deficient performance assessment under *Strickland* are the presumptions that reviewing courts are required to adopt when assessing counsel's conduct.[344] *Strickland* requires reviewing courts to presume that trial counsel's conduct was reasonable, that trial counsel performed competently, and that counsel's conduct may have

[342] *See* Martinez v. Ryan, 566 U.S. 1, 12 (2012) (describing the difficulties petitioners encounter when litigating ineffective assistance of counsel, "the prisoner is in no position to develop the evidentiary basis for a claim of infective assistance, which often turns on evidence outside the trial record").

[343] *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) (noting that "[t]here is no constitutional right to an attorney in state post-conviction proceedings").

[344] Hoag-Fordjour, *supra* note 74, at 830-38 (interrogating the racialized norms embedded in *Strickland*'s presumption of reasonableness and competency).

constituted sound trial strategy.[345] This set of presumptions and deference to trial counsel's conduct weighs heavily in favor of trial counsel and saddles the petitioner with an additional burden. The new standard would not reproduce these presumptions.

Since *Strickland*, practice standards have improved. They specify a greater level of detail in identifying counsel's duties owed to an accused person, and the diversity of contributing authors now includes women, people of color, and people who regularly represent indigent defendants. In turn, courts have increased their reliance on these more robust practice guidelines.[346]

These improvements cannot be understated. At the time the Court issued its opinion in the *Strickland* case, it pointed to the 1980 ABA Standards for Criminal Justice for guidance.[347] However, those involved in drafting the standards were mostly privileged white men, none of whom had experience representing indigent clients. Four members of the Court, Justices Blackmun, Fortas, Powell, and Burger helped draft the standards prior to joining the bench.[348] Their participation in the drafting may have given the standards outsized importance when the Court selected them as guideposts to determining counsel's performance.

The latest edition of the ABA Criminal Justice Standards for the Defense Function was published in 2017.[349] These new standards prohibit defense counsel from engaging in improper "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status."[350] They also encourage defense counsel to "detect, investigate, and eliminate" such bias or prejudice "with particular attention to historically persistent

[345] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[346] *See* Blume & Neumann, *supra* note 308, at 158-59 (observing that federal courts are relying more on the ABA Guidelines, including the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases).

[347] *Strickland*, 466 U.S. at 688-89.

[348] *See* Hoag-Fordjour, *supra* note 74, at 832-34.

[349] AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed. 2017).

[350] *Id.* § 4-1.6.

biases like race in all of counsel's work."[351] These provisions reflect the potential for counsel's own bias against some aspect of the defendant's identity to corrosively impact representation.[352]

In 1989 and again in 2003, the ABA developed a separate set of guidelines for death penalty defense to reflect the unique circumstances and demands on counsel in death penalty cases.[353] Such demands included increased experience, the necessity to work with experts, and increased legal knowledge of capital procedure. In 2008, the ABA issued supplemental guidelines for capital defense representation that focused on the specialized duties having to do with investigating and developing mitigating evidence.[354]

In 2000, the Court reversed a death sentence on behalf of a petitioner due to ineffective assistance of counsel.[355] In doing so, it measured counsel's assistance according to the ABA Standards for Criminal Justice, 1980 edition.[356] The Court reversed the death sentences in two other cases for similar reasons, again relying on the ABA Standards for Criminal Justice.[357] The Court's reliance on these standards indicated its willingness to point to specific guidelines to measure counsel's performance. It also signaled to advocates to rely on those same guidelines when framing the deficient performance prong in ineffective assistance of counsel claims.[358]

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[351] *Id.*

[352] *See* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1497-98 (2021).

[353] *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 916 (2003) [hereinafter Am. Bar Ass'n, *Guidelines*] (noting the earlier edition from 1989).

[354] *See generally* Am. Bar Ass'n, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) [hereinafter Am. Bar Ass'n, *Supplementary Guidelines*] (delineating guidelines for investigating and developing mitigating evidence in death penalty cases).

[355] *See* Williams v. Taylor, 529 U.S. 362, 399 (2000).

[356] *Id.* at 396.

[357] *See* Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003).

[358] *See* Blume & Neumann, *supra* note 308, at 145.

2. Circumstances of the Case

Embedding the standard with a consideration for the unique circumstances of the case — the nature of the offense and characteristics of the defendant — accounts for the vastly different case and client specific duties that can arise for defense counsel. It also reflects the Court's considerations in cases it decided between *Powell* and *Gideon* in which it recognized the Fourteenth Amendment right to effective assistance of counsel.[359] Even when denying a petitioner's claim, the Court reiterated that certain circumstances, such as capital charges, the accused's lack of knowledge of the law, and racist forces, could require effective assistance of counsel. Without explicitly evoking the Reconstruction Congress's sentiments, the Court's decisions during this period were an extension of what Congress intended with the Fourteenth Amendment's Due Process Clause.

A consideration for the circumstances of the case also resurfaces Justice Marshall's concern in *Strickland*. He cautioned against assessing counsels' responsibilities similarly across different types of cases. Justice Marshall noted as much in his dissent, cautioning the majority against assigning the same duties to defense counsel representing a capitally charged defendant as counsel representing a defendant in "an ordinary," non-capital trial.[360] Given Justice Marshall's experience representing capitally charged clients, he knew intimately the different skill level required relative to a more run-of-the-mill, non-capital case. As exemplified by the ABA's later-adopted death penalty-specific standards, death penalty cases required a different skill level and expertise from defense counsel, and likewise, counsel owed increased duties to capitally charged defendants.[361]

The consideration for "circumstances of the case" also reflects the Thirty-Ninth Congress's intention when drafting the Due Process Clause.[362] Without the due process protection applicable on the state,

[359] *See* McMann v. Richardson, 397 U.S. 759, 771 (1970); *see also* United States v. DeCoster, 624 F.2d 196, 259-60 (D.C. Cir. 1976) (Robinson, J., concurring).

[360] Strickland v. Washington, 466 U.S. 668, 715 (1984) (Marshall, J., dissenting).

[361] *See* Am. Bar Ass'n, *Guidelines*, *supra* note 353; Am. Bar Ass'n, *Supplementary Guidelines*, *supra* note 354.

[362] *See supra* Part A.

there was no legally enforceable mechanism to prevent states from denying enslaved people (and other disfavored groups) the Sixth Amendment right to counsel.[363] The Due Process Clause required states to provide meaningful and effective representation to all citizens, including formerly enslaved people and other marginalized groups.[364] Prior to Emancipation, some states provided counsel to enslaved people, yet counsel's representation did not have to be meaningful nor effective.[365] Even after Emancipation, well into the twentieth century, some state courts provided indigent Black defendants with counsel but did so in ways to prevent meaningful and effective representation.[366] When the Court intervened in such cases to extend the due process right to effective counsel, it was because the Court considered the circumstances of the case, including the nature of the offense and the characteristics of the accused.

3. Potential Limitations and Impact

The new, single-pronged ineffectiveness standard anchored in the Fourteenth Amendment's Due Process Clause risks reinforcing the white supremacy embedded within the deficient performance prong. Under *Strickland*, to demonstrate deficient performance, the defendant must show that counsel's conduct was objectively unreasonable relative to prevailing professional norms. The defendant must also overcome the reviewing court's presumption that trial counsel's conduct may have been reasonable and competent. What is potentially problematic about the original deficient performance prong is that notions of competency, professionalism, and reasonableness are situated in whiteness. The *Strickland* standard sets these racialized norms at odds against the Black racialization of criminal conduct and criminal defendants.[367] Relying on

[363] *See supra* Part I.B.

[364] The United States Supreme Court later recognized as much on behalf of indigent defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[365] *See supra* Part I.B.

[366] Although the trial court in *Powell v. Alabama* technically appointed defense counsel, he did so without providing counsel sufficient time to adequately prepare for the case in violation of the defendants' due process rights and right to counsel. 287 U.S. 45, 75-77 (1932).

[367] *See* Hoag-Fordjour, *supra* note 74, at 846.

a single prong that measures counsel's performance against professional norms has the potential to perpetuate some of the very issues that the Reconstruction Congress sought to address.

The legal profession was founded and shaped by white people.[368] In an effort to maintain homogeneity, the first bar associations sought to purify the profession and actively excluded people of color.[369] In turn, white norms and values shaped the legal profession's culture, norms, and values.[370] These norms later helped shape the profession's definition of reasonable conduct and professional competency.[371] The *Strickland* standard pits these racialized notions of professional competence and presumptions of reasonableness against a convicted defendant's allegations of attorney incompetence. For many defendants, regardless of their race, the *Strickland* standard presents a formidable obstacle.

Strickland's deficient performance prong can thwart those efforts. Anchored in the sentiments Congress expressed in the Fourteenth Amendment's Due Process Clause, the new standard relies on a single-prong showing. At first glance, this appears to reify the old standard's deficient performance prong. However, the proposed single-prong standard differs from *Strickland*'s deficient performance prong in significant ways. The proposed standard does not impose a presumption that defense counsel's conduct was reasonable, nor that counsel acted competently. *Strickland*'s presumption of reasonableness and competency is where white supremacy is most apparent. Without those presumptions, the defendant need not overcome them when demonstrating counsel's deficient performance.

Under the proposed standard, the defendant must point to counsel's actual conduct or misconduct, actions or inactions and compare them to what a reasonably competent defense counsel should have done. Here too, there is opportunity for white supremacy to skew the reviewing court's view of what is considered "reasonable." However, as explained above, it is critical that the defendant, and ultimately the reviewing

[368] *See id.* at 795-96.

[369] *See id.* (describing the American Bar Association's efforts to exclude non-white people from law schools and from the profession).

[370] *See id.* at 830-38 (demonstrating that the legal profession was founded upon and maintains white racialized norms of practice).

[371] *See id.* at 834.

court, look to the relevant standards of practice.[372] Although the first criminal defense practice standards lacked the input from indigent defenders, people of color, women, and other marginalized populations,[373] newer standards are beginning to incorporate these voices.[374]

A single-prong approach has the potential to impact both the viability of incarcerated people's ineffectiveness claims and the quality of defense services on the front end. First, it could increase the number of defendants who are able to successfully demonstrate ineffective assistance of counsel. The remedy for an ineffectiveness claim is a reversed sentence or conviction. Without a prejudice prong, defendants like Mr. Muniz and Mr. Sonnier would have been able to obtain relief in light of their trial counsel's deficient performance. Secondly, another outcome may be improvement in the delivery of indigent defense services, such as increased funding and lower caseloads,[375] to avoid overturned convictions and sentences. The criminal legal system is concerned with cost, efficiency, and finality. If the new standard results in overturning convictions and sentences, to reduce the cost and inefficiency of retrials and resentencing proceedings, jurisdictions may begin to allocate more funding to improving the quality of defense services on the front end.

C. Doctrinal Viability

Rather than a single-prong, prejudice-free standard seeming fantastical or remote, the doctrinal history of the right to effective counsel supports it. A federal jurist and former civil rights attorney explained that when the right to effective counsel is grounded in both the Sixth Amendment and "the generality of the due process concept,"

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[372] *See supra* Part III.B.1.

[373] *See* Hoag-Fordjour, *supra* note 74, at 833-34 (revealing that the authors of the AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE (1971) were authored by a majority of privileged, white males).

[374] *See, e.g.*, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUB. DEF. DELIVERY SYS. (2023).

[375] *See* Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391-93 (2016) (describing how the lack of funding and resources negatively impacts the quality of public defense).

there is "no justification for requiring the defendant to prove prejudice . . . ."[376] Decades before *Strickland*, the Court recognized that the Fourteenth Amendment Due Process Clause protected a defendant's right to the meaningful assistance of counsel and that the right was "unqualified."[377] In a narrow set of circumstances — actual conflict of interest between the client and lawyer and the complete lack of defense — the Court does not require the defendant to make a prejudice showing, but it has yet to expand those circumstances.[378]

1. Pre-*Strickland* Focus on Deficient Performance

Before deciding on the arduous two-prong standard in *Strickland*, the Court recognized that the Fourteenth Amendment's Due Process Clause protected the right to counsel.[379] Prior to *Strickland*, some courts determined counsel's effectiveness using a similar prejudice-free approach.[380] While not consistently referring to "effective" counsel, these early cases recognized a defendant's right to meaningfully confer with counsel, to receive the benefit of counsel's expert assistance, or to have sufficient time with counsel to prepare for trial.[381]

Prior to *Strickland*, a few reviewing courts used a standard that focused on the performance prong, whereby they assessed counsel's conduct relative to minimal practice guidelines or the general duty defense counsel owed the accused. In doing so, the reviewing court

[376] United States v. DeCoster, 624 F.2d 196, 259-60 (D.C. Cir. 1976) (Robinson, J., concurring); Louise Seals, *Spottswood W. Robinson III*, RICHMOND TIMES-DISPATCH, Feb. 2, 1999, at D1 (describing Judge Robinson's storied civil rights career prior to his appointment to the federal bench).

[377] *See* Chandler v. Fretag, 348 U.S. 3, 9 (1954).

[378] *See* United States v. Cronic, 466 U.S. 648, 659 (1984) (holding that no prejudice is required when defense "counsel entirely fails to subject the prosecution's case to meaningful adversarial" testing); Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (describing how a defense counsel's actual conflict of interest does not require a showing of prejudice to the outcome of the case).

[379] *See supra* Part II.D.

[380] *See DeCoster*, 624 F.2d at 215 (rejecting the requirement that the defendant prove prejudice; instead "defendant must demonstrate . . . a likelihood of effect on the outcome"); Pinnell v. Cauthron, 540 F.2d 938, 939 (8th Cir. 1976) (measuring counsel's effectiveness relative to reasonably competent conduct under similar circumstances).

[381] *Id.*

identified a set of practice standards, often the ABA Standards for Criminal Justice Relating to the Defense Function, and measured counsel's conduct based upon those standards.[382] In *Coles v. Peyton*, the Fourth Circuit assessed counsel's performance relative to a set of standards identified by the court.[383] The court explained that "[a]n omission or failure to abide by these requirements constitutes a denial of effective representation unless the state . . . can establish lack of prejudice thereby."[384] Unlike *Strickland*'s standard, which placed the onus on the defendant to prove both deficient performance and prejudice, the Fourth Circuit placed the onus on the state to show lack of prejudice.[385] Absent that showing, the court assumed that the conduct impacted the outcome.

The California Supreme Court is another example. In a 1979 decision, *People v. Pope*, the court assessed various standards for determining ineffective assistance of counsel before settling on a flexible, objective standard that focused solely on counsel's conduct relative to objective practice guidelines.[386] It rejected the "farce and mockery" standard, calling it "vague and subjective."[387] A less rigid standard was necessary because "[t]he constitutional right to the adequate assistance of counsel suggests a focus on the quality of the representation provided the accused, while due process concerns itself with the fairness of the trial as a whole."[388] Further, the court recognized that an accused person can "receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery."[389] This discrepancy indicated that the

[382] *See generally* United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) (citing the AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, RELATING TO THE PROSECUTION FUNCTION & THE DEFENSE FUNCTION (3d ed. 1992)).

[383] *See Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968) (discussing conferring with the accused, advising the accused of their rights, and assessing potential defenses).

[384] *Id.*

[385] *Id.* (explaining that the state carries "the burden of proof" of demonstrating "lack of prejudice" after the defendant demonstrates "a denial of effective representation").

[386] *People v. Pope*, 23 Cal. 3d 412, 422-24 (1979), *overruled by* People v. Berryman, 6 Cal. 4th 1048, 1081 n.10 (1993).

[387] *Id.* at 421-22.

[388] *Id.* at 423.

[389] *Id.*

"farce and mockery" standard failed to adequately protect defendants' constitutional right to effective counsel.

After reviewing the right to counsel under both state and federal law,[390] the California court landed on a standard whereby it assessed counsel's conduct relative to "a reasonably competent attorney acting as a conscientious, diligent advocate."[391] The first step was for the defendant to point to "certain basic duties," which all attorneys must perform. The court identified the ABA Standard for Criminal Justice Relating to the Defense Function as a guidepost.[392] Although not quite a prejudice requirement, the defendant must also "establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense."[393] From there, the court assessed whether counsel's conduct matched that of "a reasonably competent attorney acting as a conscientious, diligent advocate." Unfortunately, subsequent California case law has since overruled the court's reasoning.[394]

2. A More Protective Ineffectiveness Standard Under State Law

Even after *Strickland*, some state courts established ineffectiveness standards that are more protective of defendants. Relying on their own state constitutions, a handful of state standards depart from *Strickland*'s

[390] *Id.* at 422.

[391] *Id.* at 427.

[392] *Id.* at 424.

[393] *Id.* at 425.

[394] *See* People v. Berryman, 6 Cal. 4th 1048, 1081 n.10 (1993) (explaining that the language in *Pope* indicating that state and federal right to counsel laws are different is "no longer vital").

prejudice requirement. These states include Hawaii,[395] New York,[396] Alaska,[397] and Oregon.[398]

For example, under Hawaii's standard, a petitioner must show "(1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and (2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."[399] Hawaii's pared down standard strips away the presumption of reasonableness and removes some of the ambiguity embedded in the performance prong. Most significantly, it releases the defendant from having to show a reasonable likelihood of a different outcome. It replaces *Strickland*'s outcome determinative prejudice prong with a requirement to show that an avenue of defense was impacted. Hawaii's standard reflects the fact that under its constitution, "defendants are clearly afforded greater protections of their right to effective assistance of counsel."[400]

These state court standards depart from *Strickland*'s demanding two-prong test and demonstrate that a more defendant friendly standard is possible.

CONCLUSION

With Reconstruction, Congress sought to extend citizenship, equality, and legal protections to Black people. This included extending procedural protections to Black people in criminal proceedings. The

[395] *See* State v. Aplaca, 837 P.2d 1298, 1305 n.2 (Haw. 1992) (recognizing that the *Strickland* standard is difficult to meet and adopting a different one).

[396] *See* People v. Vilardi, 555 N.E.2d 915, 918 n.3 (N.Y. 1990) ("[The New York Court of Appeals] has not adopted the *Strickland* test for determining ineffective assistance of counsel claims."); People v. Bodden, 82 A.D.3d 781, 783 (N.Y. App. Div. 2d 2011) ("The state standard focuses on 'the fairness of the process as a whole rather than its particular impact on the outcome of the case.'").

[397] *See* State v. Jones, 759 P.2d 558, 572 (Alaska Ct. App. 1988) (describing Alaska's prejudice requirement as "significantly less demanding" than the requirement from *Strickland*).

[398] *See* Lichau v. Baldwin, 39 P.3d 851, 857 (Or. 2002) (finding that a defendant can demonstrate prejudice with a showing that "counsel's failure had a tendency to affect the result of his trial").

[399] *Aplaca*, 837 P.2d at 1305.

[400] *Id.* at 1305 n.2.

prejudice requirement from *Strickland*'s ineffective assistance of counsel standard is but one obstacle preventing the full actualization of the Reconstruction Congress's intent in the criminal context. This obstacle stands in the way of all defendants seeking vindication for their right to effective counsel.

Given the harm that the prejudice prong exacts on defendants, particularly Black defendants, it is only fitting to turn toward Reconstruction for a solution. In harnessing the underutilized potential of Reconstruction, a prejudice free ineffectiveness standard provides a racial justice solution to a problem that impacts all defendants. Failing to recognize Black people's full rights and legal protections within the criminal adjudication system impacts how the system operates for everyone. A new ineffectiveness standard that enables a greater opportunity for redress has the potential to benefit all marginalized defendants and help move us closer to actualizing the Reconstruction Congress's intent.