WHITE IS RIGHT: THE RACIAL CONSTRUCTION OF EFFECTIVE ASSISTANCE OF COUNSEL

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The legal profession is and has always been white. Whiteness shaped the profession's values, culture, and practice norms. These norms helped define the profession's understanding of reasonable conduct and competency. In turn, they made their way into constitutional jurisprudence. This Article interrogates the role whiteness plays in determining whether a defendant received effective representation and provides a clarifying structural framework for understanding ineffective assistance of counsel jurisprudence.

The Sixth Amendment ineffective assistance of counsel standard relies on presumptions of reasonableness and competency to determine whether defense counsel's conduct met constitutional requirements. To prove ineffective assistance of counsel, defendants must show counsel's conduct fell below an objective standard of reasonableness and that—but for counsel's unprofessional errors—there is a reasonable probability that the proceeding's outcome would have been different. This Article focuses on the racialized presumption of reasonableness and competency that the law applies to defense counsel when determining ineffective assistance of counsel claims.

The law enables courts to rely on a default white normative perspective to shield criminal adjudications from critical analysis. This Article applies a critical lens to examine the historical and racialized construction of the criminal legal system and the legal profession. It excavates a Jim Crow-era case, Michel v. Louisiana*, which laid the foundation for the presumption of counsel's reasonableness and competency. It reveals how the Court relied on* Michel *to solidify these racialized presumptions in* Strickland v. Washington*'s ineffective assistance of counsel standard. This historical context helps explain why all defendants encounter difficulty when seeking relief from defense counsel's poor performance.*

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PROLOGUE

Reginald Williams,[1] a Black teenager, was facing the federal death penalty for the aggravated murder of a white man. The murder occurred in a predominately white, rural area, whereas Reginald was from a Black community in a neighboring state's sprawling metropolis. The trial court appointed Reginald two white lawyers from the community where the murder occurred. They recruited two younger, inexperienced lawyers to assist them—both white—and a white retired police officer to investigate.

The defense team immediately had trouble connecting with Reginald. Counsel's singular focus was to convince Reginald to accept a plea offer of life without parole. Meanwhile, they neglected to investigate and develop evidence to mitigate the capital charges. Terrified, overwhelmed, and lacking agency, Reginald refused the plea, which only frustrated counsel. Lead counsel eventually stopped meeting with Reginald in pretrial detention. The investigator resorted to intimidation and badgering to persuade Reginald to accept the plea. Counsel tried to recruit Black people, strangers to Reginald, to "level with" him.

Counsel continued to hire and fire various experts but failed to turn to the people with the greatest expertise about building a case for Reginald's life: Reginald, his family, and his community. Counsel failed to investigate the family's intergenerational trauma, mental health conditions, and the structural racism the family encountered after enslavement. The team wrote Reginald's father off as a criminal and neglected to speak with a single member of his family. During voir dire, counsel failed to inquire about racial bias or prejudice—asking instead if anyone had Black friends or co-workers without additional inquiry—and impaneled an indifferent, nearly all-white jury. Counsel failed to object to the government's use of racially coded, dehumanizing language to refer to Reginald. The least experienced attorney questioned the witnesses during sentencing; it was counsel's first time observing a capital sentencing hearing, let alone conducting one. The jury returned a death sentence. Reginald's cousin later reflected that Reginald had a story to tell, but it was not the one the jury heard.[2]

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[1] Not his real name.

[2] Based on the author's firsthand knowledge.

I am part of the appellate team challenging Reginald's conviction and death sentence. Although we raised ineffective assistance of counsel, there is little chance for relief despite counsel's substantive failures in representing Reginald—their poorly conducted voir dire, their failure to tell an accurate version of Reginald's story, their failure to connect with Reginald's family, and their lack of racial awareness. In determining the effectiveness of defense counsel's conduct, the reviewing court must presume counsel's conduct was reasonable, that counsel was competent, and measure counsel's conduct against prevailing professional norms—norms which are based on white-dominated culture, values, and conduct and are rooted in racial subordination and privilege. Although the ineffective assistance of counsel standard does not mention race, law and society have enduring racialized conceptions of lawyers, professionalism, and people accused of crime. This Article argues that these racialized conceptions helped shape the development of the Sixth Amendment right to effective counsel and continue to impact ineffective assistance of counsel jurisprudence.

Introduction

Decided in 1984, *Strickland v. Washington*, established the two-prong test for determining whether defense counsel rendered constitutionally ineffective assistance.[3] According to the standard, Reginald must show (1) that his trial lawyers' conduct fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel's unprofessional errors, the result of his proceeding would have been different.[4] In short: deficient performance and prejudice. In addition, the standard requires Reginald to overcome the presumption that counsel's conduct was reasonable and that it may have constituted sound trial strategy.[5]

Defendants have experienced great difficulty convincing reviewing courts that their trial lawyer rendered constitutionally ineffective assistance.[6] The legal system's interest in finality plays a role.[7]

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

[4] *Id.*

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

[6] *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) (describing the difficult and high burden defendants face in winning IAC claims, which "ha[s] been and continue[s] to be particularly acute for [racial] minorities").

[7] *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1739 (2022) (arguing that finality is "essential" to criminal law); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1157, 1211 (2015) (describing the "fetish of finality" that prevents courts and lawmakers from addressing "gross injustices in the criminal process").

Structural issues with the delivery of indigent defense services are another obstacle. These include excessive caseloads, staffing shortages, and attorney inexperience, all of which are related to chronic underfunding.[8] But this is only part of the story.

That *Strickland* presents a formidable hurdle for defendants seeking post-conviction relief is well-established.[9] Scholars have recommended a variety of interventions to increase a defendant's opportunity to obtain relief under the standard.[10] Many focus their attention on the prejudice prong, which requires the defendant to show that counsel's deficient performance impacted the outcome of their case, either their conviction and/or sentence.[11] One of the standard's earliest critics, Justice Thurgood Marshall, argued against a prejudice requirement.[12] Fewer have focused their criticism on the deficient performance prong.[13] But even less interrogated is the Court's reliance on the racialized criminal legal system and legal profession in measuring deficient performance.[14] This Article seeks to address that gap.

This Article pivots away from prior critiques of *Strickland* and examines the ineffective assistance of counsel standard through a critical race lens to excavate the white supremacy and privilege undergirding the Court's deficient performance determinations. In *The Pathological Whiteness of Prosecution*, India Thusi encourages criminal scholars to turn the critical gaze "on [w]hiteness and the experiences of privilege that it enables."[15] This Article brings that critical gaze to the Sixth Amendment's ineffective assistance of counsel stan-

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[8] *See, e.g.*, Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312–15 (2013) (describing this phenomenon).

[9] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997) ("To put it another way, ineffective assistance doctrine tolerates a very low activity level by defense attorneys."); Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2431 n.10 (2013) (noting a success rate of just over one percent of IAC claims raised by federal habeas petitioners in Michigan).

[10] *See, e.g.*, Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581 (2020) (describing how litigants can use *Strickland* properly to make other, more complex ineffectiveness arguments).

[11] *See, e.g.*, 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, 1864–65 (1994) (arguing that the prejudice requirement is inappropriate, particularly in capital cases).

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

[13] *See, e.g.*, Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 2–3 (2009) (noting that scholarly attention has mostly focused on other aspects of ineffective assistance, rather than deficient performance).

[14] *See infra* Part I.

[15] I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 819 (2022).

dard. It explores what a historical interrogation of the racialized construction of effective representation can reveal. Such an interrogation is largely absent from Sixth Amendment jurisprudence and scholarship.[16] This historical excavation helps explain how the standard continues to reproduce white supremacy and privilege instead of providing relief to indigent defendants who received inadequate representation.

Prior ineffective assistance of counsel critiques are largely silent as to the racialized and hierarchical dynamic that exists between defense counsel and the defendant and how it impacts ineffective assistance of counsel determinations. This dynamic is what contributes, in part, to court findings that counsel is effective by virtue of their racialized status as lawyers vis-à-vis the racialized status of defendants.[17] A notable exception is Shaun Ossei-Owusu's work, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, which explores the racialized history of the Sixth Amendment right to counsel.[18] Ossei-Owusu focuses on the development of legal aid institutions prior to the Court's decision in *Gideon v. Wainwright*, which extended the right to counsel to indigent defendants.[19] He argues that race impacted the delivery and development of the right to counsel and that such an acknowledgement can help inform contemporary reforms to indigent defense services.[20] This provided the groundwork for analyzing the Sixth Amendment through a critical race lens at large, while this Article hones in on the ineffective assistance of counsel component.

Expanding on my prior racialized examination of the Sixth Amendment right to counsel of choice,[21] this Article brings race to the forefront in analyzing the way courts determine defense counsel's effectiveness. In *Black on Black Representation*, I explored the impact that extending the right to counsel of choice to indigent defendants could have on indigent Black clients who prioritized racial congruency in representation and/or cultural competency.[22] Race is a salient, yet undertheorized aspect of the right to counsel. My intent is to advance previous race excavation work in other aspects of criminal procedure

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[16] *See, e.g.*, Ossei-Owusu, *supra* note 6, at 1165–66 (explaining that "indigent defense and its relationship to race have received less sustained analysis" relative to other aspects of the criminal legal system).

[17] *See infra* Section I.C.

[18] *Id.*

[19] *Id.* at 1168–1202 (revealing the racialized pre-*Gideon* landscape of the right to counsel).

[20] *Id.* at 1238.

[21] *See* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. Rev. 1493 (2021).

[22] *Id.*

and apply it to the various aspects of the Sixth Amendment right to counsel. Devon Carbado produced a body of work interrogating "the race constructing role the Court performs in the Fourth Amendment context."[23] In it, Carbado turns a critical lens on the Court's "racial allocation of the burdens and benefits of the Fourth Amendment," revealing that the Court's reification of race controverts the law's purported colorblindness.[24] Also within the Fourth Amendment context, Bennett Capers turned a critical eye on white privilege in his essay *The Under-Policed*, asking what the under-criminalization of white people can reveal about mass incarceration.[25] This Article extends such critiques—with a focus on the whiteness, power, and privilege of the legal profession—and applies them to the Sixth Amendment's ineffective assistance of counsel standard.

This excavation reveals that the ineffective assistance of counsel standard was built upon a Jim Crow-era case, *Michel v. Louisiana*, involving an interracial rape conviction, an indigent Black client, and a white lawyer who the Court assumed was competent by virtue of his whiteness and professional status.[26] Given the inflammatory nature of the conviction, which threatened racial and social norms, the Court's denial of the defendant's basic right to counsel was unsurprising. In denying the defendant's legal claim, the Court reinforced existing racial and social ordering under the guise of race neutrality.[27]

Three decades later, the Court relied on dicta from *Michel* when it established the presumption of counsel's reasonableness and competency in *Strickland*.[28] Accordingly, when determining deficient performance, reviewing courts must start with the premise that defense counsel was competent, acted reasonably, and their conduct may have been sound trial strategy. Courts measure all of this against prevailing professional norms.[29] This Article reveals that white supremacy, racialized notions of professionalism, and the racially subordinated status of defendants (regardless of the defendant's actual race) undergird each step of the determination.

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[23] Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 965–66 (2002).

[24] *Id.* at 969.

[25] I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589 (2016) (describing the underenforcement of criminal law in nonminority communities as granting a "racial pass").

[26] *See infra* Section II.A.

[27] Michel v. Louisiana, 350 U.S. 91, 101 (1955) (musing that counsel's failure to challenge the exclusion of Black people from the grand jury, an otherwise meritorious claim, "might be considered sound trial strategy," and declining to "infer lack of effective counsel from this circumstance alone").

[28] Strickland v. Washington, 466 U.S. 668, 689 (1984) (citing *Michel*, 350 U.S. at 101).

[29] *Strickland*, 466 U.S. at 688.

Strickland's first prong, deficient performance, requires defendants to measure trial counsel's conduct against prevailing professional norms.[30] For these norms, the Court referenced the American Bar Association (ABA) Standards for Criminal Justice.[31] The law operates as though these norms are neutral, objective, and unbiased.[32] But they are situated amidst white-dominated culture, values, and conduct and rooted in racial subordination and privilege.[33] When the ABA first promulgated guidelines in 1908,[34] the legal profession was almost exclusively white.[35] With the rise in professionalism across industries in the late 1800s and early 1900s, the legal profession sought to maintain its exclusivity and white supremacy by erecting barriers to entry.[36] These efforts proved successful. Between 1900 and 1940, Black lawyers made up less than one percent of licensed attorneys.[37] Exclusionary barriers based on race extended into practice, for example, New York City's criminal defense bar excluded eastern European and Jewish lawyers, considered "not fully white" at the time, from membership.[38]

Meanwhile, criminal behavior was, and continues to be, racialized as Black. The stereotype of Black people as criminal and dangerous was born out of slavery and the racial hierarchy that resulted. Bryan Stevenson explains that "[t]he presumptive identity of [B]lack men as 'slaves' evolved into the presumptive identity of 'criminal,'" and that

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[30] *Id*.

[31] *Id.* (citing 1 STANDARDS FOR CRIM. JUST. 4-1.1 to -8.6 (AM. BAR ASS'N, 2d ed. 1980)).

[32] *See, e.g.*, Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and the Rule of Law*, 73 FORDHAM L. REV. 2081, 2089–91 (2005) (describing the dominant view that the law and society are colorblind, which is based on the premise that "whites tend to see themselves as the neutral norm").

[33] Thusi, *supra* note 15, at 818–19 (explaining that critical white studies "considers the role of [w]hiteness in facilitating racial subordination and setting the standards for normality" and that it "acknowledges that the conduct and experiences of [w]hite people set the standards").

[34] *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003).

[35] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 19 (1976) (noting that "[e]thnic homogeneity" was a defining feature of the legal profession in the nineteenth century).

[36] *See* SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 47 (2020) (describing expensive and lengthy training requirements that reinforced the legal profession's white racial exclusivity).

[37] Kenneth S. Tollett, *Black Lawyers, Their Education, and the Black Community*, 17 HOW. L.J. 326, 346 (1972).

[38] *See* Ossei-Owusu, *supra* note 6, at 1173–76 (describing law reformers' desire to racially "purify" the criminal defense bar).

"we have yet to fully recover from this historical frame."[39] In an 1861 opinion, the Alabama Supreme Court reasoned that Black people were "human beings" only in the context of "committing crime," but because they are "slaves, they are necessarily . . . incurably, incapable of performing civil acts" and are therefore, "things, not persons" in every other context.[40] Historian Khalil Muhammad calls it "racial criminalization: the stigmatization of crime as '[B]lack'" while simultaneously "masking . . . crime among whites as individual failure."[41]

Recognizing the Black-white racial polarization of the legal profession and people accused of crime provides a clarifying structural framework for understanding the ineffective assistance of counsel doctrine. The legal standard pits criminal defendants' allegations of incompetence against lawyers ensconced in the protective layer of professionalism. With the additional weight of white supremacy, the ineffective assistance of counsel standard became a virtually insurmountable obstacle for defendants to overcome. Although the Court decided *Strickland* in 1984, the ineffective assistance of counsel standard's roots extend a full century prior to Reconstruction.[42] To better understand the ineffective assistance of counsel standard's contemporary operation, this Article's excavation starts there. Professor Dorothy Roberts explains that "[B]lack people are actively being harmed by structures and ideologies rooted in slavery and reproduced in new forms under current political conditions."[43] To better understand the standard's contemporary operation, this Article looks at the standard's origins. Professor Daniel Harawa encourages criminal scholars to excavate the racist origins of laws to help "advance racial justice."[44]

In interrogating whiteness, this Article helps us understand why all defendants, regardless of race, encounter difficulty when seeking relief from trial counsel's poor performance. Faced with a defendant's allegations of professional incompetence, counsel's status as a lawyer renders the ineffective assistance of counsel standard toothless.

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[39] Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 12 (Angela J. Davis ed., 2017).

[40] Creswell's Executor v. Walker, 37 Ala. 229, 236 (1861). I normally use people-first language—for example, "enslaved person"—to highlight the individual humanity of those who were enslaved. However, I preserved the original use of "slave" to underscore the Alabama Supreme Court's dehumanization of those subjected to chattel slavery.

[41] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS 3 (2010).

[42] *See infra* Section I.B.

[43] Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. F. 37, 51 (2022).

[44] Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 721 (2022).

Rather than provide a pathway for aggrieved defendants, the ineffective assistance of counsel standard acts as an empty vessel designed to protect the profession. The Article proceeds in four Parts: Part I identifies critical race theory as a tool to examine the historical and racialized construction of the criminal legal system and the legal profession. It tethers this analysis to early ideas about representation and effectiveness. Part II excavates *Michel v. Louisiana*,[45] the Jim Crow-era case that laid the foundation for the presumption of counsel's reasonableness and competency and the assumption that trial counsel's conduct was sound trial strategy. This Part details how *Michel* exemplified the racialized notions of crime, perpetrators of crime, and defense counsel.

Part III reveals how the racialized construction of criminal legal system actors helped shape the Court's decision to use *Strickland v. Washington* as the vehicle for the ineffective assistance of counsel standard. It also reveals how the Court elevated dicta from *Michel* and placed it firmly within the ineffective assistance of counsel standard, mandating that reviewing courts presume counsel acted reasonably. Part IV details how racialized professional norms and the presumption of reasonableness and competency reinforce the hierarchy between defense counsel and the defendant. This Part then applies the framework to two recent cases, *Florida v. Nixon*[46] and *McCoy v. Louisiana*.[47] Each case involved a Black defendant facing capital murder charges and overwhelming evidence of guilt and defense counsel who made the strategic decision to concede the defendant's guilt. The Court's decision in each case illustrates how the racial construction of the ineffective assistance of counsel doctrine perpetuates white supremacy.

This Article concludes with a call for scholars to acknowledge the role that white supremacy plays in the development of criminal procedure. Such acknowledgment enables us to realize more dynamic strategies to release the subjugating hold the criminal legal system exacts on marginalized people. Here, that includes a proposal to abolish the presumption that counsel's conduct was competent and that it may have been sound strategy.

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[45] 350 U.S. 91 (1955).

[46] 543 U.S. 175 (2004).

[47] 138 S. Ct. 1500 (2018).

I
The Racial Construction of the Criminal Legal System and Legal Profession

Following chattel slavery, the criminal legal system funneled Black people into prisons, forced labor, and the execution chamber.[48] Despite the Constitution's explicit protections, the State often denied Black people basic due process rights, including effective defense counsel.[49] Instead of determining guilt or innocence, criminal trials, if they occurred, provided the appearance of process prior to excessive, and sometimes lethal, punishment.[50] White supremacy, which included maintaining white economic and political control, was a central feature of this social reorganization.[51] Although the Court intervened in some of the more egregious criminal cases,[52] it failed to address what often motivated the initial prosecution of a Black defendant and the resulting sentence: white supremacy. It is little wonder, then, that the Sixth Amendment right to *effective* counsel failed to account for the racialized hierarchy embedded in the criminal adjudication system.

This Part provides the theoretical and historical foundation for this Article. It begins with an introduction to critical race theory as a framework to analyze the early criminal adjudication system. The primacy that critical race theory places on race is a vital tool through which to examine the development of criminal law enforcement in this country. It starts with slavery and continues to Reconstruction, an early and failed attempt to provide Black people equal access to, and equal protection of, the law. Central to this examination is the crime of rape, where the disparate application of the law is most pronounced depending on the race of the accused and accuser. As detailed more

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[48] *See, e.g.*, Bharat Malkani, Slavery and the Death Penalty: A Study in Abolition 32–78 (2018) (describing the rise in the racialized use of the death penalty after slavery and slavery's legacy on capital punishment).

[49] *See* Michael J. Klarman, From Jim Crow to Civil Rights 117 (2004) (describing Black defendants being subjected to "egregiously unfair trials" during the first half of the twentieth century); Alexis Hoag, *The Color of Justice*, 120 Mich. L. Rev. 977, 986 (2022) (explaining that early indigent defense providers' benevolence often stopped short of providing representation to Black people charged with crimes).

[50] *See, e.g.*, Glenda Elizabeth Gilmore, Defying Dixie: The Radical Roots of Civil Rights, 1919–1950, at 126 (2008) (describing "[a] trial" as "a lynching in disguise").

[51] *See* Stevenson, *supra* note 39, at 3, 11 (explaining that after slavery, "states looked to the criminal justice system to construct policies and strategies to maintain white supremacy and racial subordination").

[52] *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48 (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).

fully below, the criminal legal system treated Black men accused of raping white women with the greatest seriousness, while denying that white men raped Black women.[53] The petitioners in *Michel v. Louisiana*, Edgar Labat, Clifton Poret, and John Michel, all of whom were Black, were convicted of raping white women and sentenced to death as a result.[54]

This Part examines the legal system's failure to fully enforce laws to protect Black people subjected to criminal conduct and to protect Black people accused of engaging in criminal conduct. The emerging legal profession was at the center of the criminal adjudication system, making threshold determinations about culpability and supplying counsel to the deserving poor.[55] This Part introduces the racialized development of the legal profession and the racialized construction of professionalism. This foundational interrogation of the criminal legal system and the legal profession enables a richer understanding of the ineffective assistance of counsel standard. The law's racialization of aspects of the criminal legal system persists in ways that continue to impact ineffective assistance of counsel adjudications.

A. Critical Approaches to the Law

Critical race theory grew out of critical legal studies, a scholarly movement that argued that the law served the interests of those who created it: largely, wealthy people, property owners, and those with political power and control.[56] Critical legal studies challenged traditional approaches to understanding the law's operation, including questioning the inherent neutrality of the law. Critical legal theorists maintained that the law did not operate objectively or apolitically, but rather that it was embedded with social bias. They acknowledged that the law was implicated in establishing and perpetuating an unjust social order.[57] However, these theorists were slow to embrace the primacy of race in their critiques, finding that wealth disparities either coexisted with, or trumped the impact of, race.[58]

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[53] *See infra* Section I.B.

[54] The United States Supreme Court consolidated two separate cases: *Poret v. Louisiana* and *Michel v. Louisiana*. Michel v. Louisiana, 350 U.S. 91, 93, 95–96 (1955); Brief for Petitioner at 1, Michel v. Louisiana, 350 U.S. 91 (1955) (No. 32) (describing the victim as a "white female"); Brief for Petitioner at 4, Michel v. Louisiana, 350 U.S. 91 (1955) (No. 36) (same).

[55] Hoag, *supra* note 49, at 984–87 (describing the history of a "racially checkered system" of indigent defense).

[56] *See, e.g.*, KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 24–30 (2018).

[57] *See, e.g.*, *id.* at 24–26.

[58] *See, e.g.*, *id.* at 28–29 (noting that while scholars of critical legal studies were willing to hear racial critiques to a certain extent, they were skeptical of any attempt to

A number of legal scholars, many of whom were people of color, grew dissatisfied with critical theorists' failure to examine racism's impact on the law.[59] They also grew critical of the movement's failure to address racism within its own community.[60] These scholars—Richard Delgado, Mari Matsuda, Kimberlé Williams Crenshaw, and others—formed a new scholarly community to interrogate race, racism, and power through their scholarship, at conferences, and in the classroom.

1. Critical Race Theory

Critical race theory was a theoretical framework and movement that law students and legal scholars formed in the late 1970s and the 1980s.[61] Derrick Bell, recognized as the intellectual architect of critical race theory, developed and promulgated many of its founding ideas.[62] The burgeoning scholarly movement sought to understand the relationship of race, racism, and power to society, the development of the law, and civil rights. A central tenet of critical race theory was that race was socially constructed rather than rooted in biological differences.[63] It recognized that the social construct of race was a malleable idea that developed to justify racial inequality and to protect white supremacy. Critical race theory also recognized that racism was an ordinary, common occurrence.[64] This reality was born out of the fact that race was central to this nation's social organizing, and that white supremacy helped shape this nation's economy, political system, and society.[65] Beyond understanding race and racism's impact on society,

incorporate those critiques into their overarching theories, spurring critical race theorists to form their own separate scholarly movement).

[59] Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1354–59 (2002) (describing the intellectual and organizational beginnings of critical race theory, born out of the critical legal studies community).

[60] *Id.* (highlighting the silence of critical legal studies scholarship on race, the resistance of white members of the critical legal studies community to any focus on issues of race, and the wider silencing of legal scholars of color, including by critical legal studies members).

[61] *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4 (3d ed. 2017).

[62] Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory [https://perma.cc/28XU-644A].

[63] *See, e.g.*, BRIDGES, *supra* note 56, at 7, 10–11 (noting critical race theory's assumption that law "is actively constituting race and the relations between the various races").

[64] *See* DELGADO & STEFANCIC, *supra* note 61, at 8–9.

[65] *See, e.g.*, Dorothy Roberts, *Race*, *in* THE 1619 PROJECT 49–52 (Nikole Hannah-Jones et al. eds., 2021) (describing the development and explicit legal codification in colonial America of strict racial hierarchy, which was reinforced at the founding of the nation and persisted thereafter).

institutions, and the law, these new theorists sought to transform the relationship among race, racism, and power to create a more equitable society for everyone.[66]

Critical race theory questions the law's purported objectivity and neutrality. For example, the ineffective assistance of counsel standard presumes trial counsel's conduct was reasonable and requires reviewing courts to measure counsel's conduct against prevailing professional norms. Critical race theory questions the social context of what the law considers "reasonable conduct" and "professional norms." The framework reveals that these concepts are neither objective nor neutral. When the legal profession first promulgated practice guidelines in the early 1900s,[67] the legal profession was predominately white, male, and privileged.[68] Currently, white people comprise eighty-one percent of the profession,[69] while they only comprise fifty-nine percent of the overall population of this country.[70] White culture is the dominant culture of the legal profession.[71] What is thought to be objective and neutral is in fact based on white values, norms, and conduct. The harm is not in this fact—that the legal profession is based on white-dominant culture—but in the failure to recognize and account for this fact. This failure can result in silencing, discounting, and further subordinating nonwhite people and their lived experiences.

2. *Interrogating Whiteness*

As critical race theorists interrogated the role of race and racism in the law, they began to look more critically at whiteness to better understand and address the subordinated status of nonwhite people. That approach examines the power and privilege afforded to the social construction of whiteness. Doing so helps contextualize the subordination of people of color or others with marginalized identities. As applied to interrogating whiteness, critical race theorists challenge the assumption that whiteness is the norm or neutral starting point.

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[66] BRIDGES, *supra* note 56, at 28 (explaining that critical race theorists wanted to dismantle "existing racial hierarchies" rather than simply critique them).

[67] *See* Altman, *supra* note 34 (describing the ABA's adoption of the 1908 Canons of Ethics).

[68] *See, e.g.*, AUERBACH, *supra* note 35, at 19 (noting that "[e]thnic homogeneity" was a defining feature of the legal profession in the late nineteenth century); *id.* at 29 (noting that a law school's admissions policy in the early 1900s excluded women).

[69] *ABA National Lawyer Population Survey*, AM. BAR ASS'N (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf [https://perma.cc/3PBL-3MPM].

[70] *See Quick Facts*, U.S. CENSUS BUREAU (July 1, 2022), https://www.census.gov/quickfacts/fact/dashboard/US/RHI825221#RHI825221 [https://perma.cc/4ZQJ-8HFM] (noting the non-Hispanic white population).

[71] *See infra* Section IV.A.

This is a shift from traditional legal scholarship on race, which often places the critical eye on nonwhite people. For example, scholarship that focuses on the overrepresentation of Black defendants throughout the criminal legal system can lead to the belief that racial inequality is born out of racial inferiority instead of anti-Black racism and white supremacy.[72] Focusing on Black people in criminal law and procedure risks ignoring the role that white supremacy plays in creating a racial hierarchy that places whites on top and that serves as a justification for racial inequality. It can also limit interventions to "fixing" Black people rather than addressing white supremacy.

Interrogating whiteness is ripe for further scholarly development given the common perception that whiteness is invisible or that white people are raceless.[73] Jasmine Gonzales Rose argues that the idea of white people as raceless "is so entrenched in our society and legal systems that . . . white norms, customs, or experiences are often . . . considered universal, [and] not racially or culturally distinct."[74] As a result, it is easy to believe that the law's norms and starting points are neutral and not racialized. Yet, our social and legal reality reveals otherwise. This extends to the ineffective assistance of counsel standard's presumption of reasonableness and competency, and to its reliance on prevailing professional norms.

Focusing on whiteness helps identify the racialized dynamic between the legal profession on the one hand and indigent criminal defendants on the other hand. It is critical to understand this relationship, given that the ineffective assistance of counsel standard places the onus on defendants to prove their lawyer acted incompetently and in violation of their Sixth Amendment right to effective counsel. Kimberlé Crenshaw theorizes that the law and customs created an oppositional dynamic whereby "[w]hites became associated with normatively positive characteristics" and "Blacks became associated with the subordinate, even aberrational characteristics."[75] Under this theory, by virtue of lawyers' whiteness and elevated professional

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[72] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1380 (1988) (highlighting that some scholarship attributed Black subordination to a lack of certain characteristics associated with white stereotypes, which were treated as neutral social norms, and which replaced white supremacy as an explicit justification for Black subordination).

[73] *See* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (describing white transparency, where white people fail to recognize that they have a racial identity and that facially neutral norms are, in reality, white-specific).

[74] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2252–53 (2017).

[75] Crenshaw, *supra* note 72, at 1373–74.

status, they were viewed as capable, competent, and virtuous.[76] Conversely, as Black people become associated with dangerousness and criminality,[77] the resulting presumption was that Black people were inferior, incompetent, and culpable.[78] Acknowledging this racialized dichotomy helps explain the Court's adjudication of ineffective assistance of counsel claims largely in favor of defense counsel.

B. The American Criminal Legal System: Black Criminality and Inequality

The current operation of the American criminal legal system is rooted in chattel slavery. It is part of what literary scholar Saidiya Hartman refers to as "the afterlife of slavery."[79] Her work explores the "long duration of unfreedom," calling Emancipation a "nonevent."[80] In recognizing that "[t]he liberal conception of freedom had been built on the bedrock of slavery,"[81] Hartman acknowledges that the current devaluation and fungibility of Black life is rooted in racial slavery. She writes, "[B]lack lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago."[82] This framing helps contextualize the criminalized and punitive treatment of Black people. Notions of white supremacy and Black inferiority helped justify the enslavement of Black people. Although Emancipation freed Black people from slavery, it failed to deliver racial equality.[83] To advance equality,

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[76] *See* Michel v. Louisiana, 350 U.S. 91, 101 (1955) (noting that trial counsel, who was white, was a "well-known criminal lawyer with nearly fifty years' experience," and finding counsel competent based largely on that professional reputation).

[77] *See* MUHAMMAD, *supra* note 41, at 271 (describing how crime statistics reinforced the notion of Black criminality while allowing previous subcategories of criminalized "nonwhite" European immigrants to fall away and become "white"); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 508–17 (1994) (describing the social construction of crime, and particularly violent crime, as Black).

[78] *See* Stevenson, *supra* note 39, at 9–10 (explaining that white identity formation following slavery was premised on the belief that Black people were inferior).

[79] SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007) (explaining that the issue of slavery persists through the continued imposition of systemic poverty, incarceration, and disparities in health and education on Black Americans).

[80] Saidiya Hartman, *The Hold of Slavery*, N.Y. REV. BOOKS (Oct. 24, 2022), https://www.nybooks.com/online/2022/10/24/the-hold-of-slavery-hartman [https://perma.cc/5C77-P7SJ] (describing the lasting effects of slavery as a dehumanizing institution, which was succeeded by continued racial violence and subjugation).

[81] *Id.*

[82] HARTMAN, *supra* note 79, at 6.

[83] *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 3–16 (Free Press 1998) (1935).

Emancipation needed to address the widely held belief that Black people were inherently inferior based on race. It did not.[84] This failure enabled the criminal legal system to replace chattel slavery as a social organizing tool.[85]

The belief in Black inferiority and culpability made the arrest, prosecution, and punishment of Black people more palatable.[86] This starting premise provides the foundation for interrogating the racialized construction of effective counsel. With a focus on interracial rape—the crime at the center of *Michel v. Louisiana*—this Section unpacks Black criminality and inequality.

Interracial rape is a powerful vehicle through which to examine the racialized construction of criminality and defendants' access to basic rights, like effective counsel.[87] Although rape can involve people of different race and gender combinations, the focus here is on Black men accused of raping white women. History and the criminal legal system have treated this combination the most punitively and with the greatest seriousness.[88] More than a criminal charge, the mere accusation of a Black man raping, or attempting to rape, a white woman had the power to enrage white communities and strike terror in Black communities.[89] During slavery, white mobs responded to allegations of Black men raping white women swiftly and with lethal violence.[90] Even after slavery ended, white mobs meted out similarly lethal vit-

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[84] *Id.* at 635–50 (describing the widespread perpetuation of the view that Black people were inferior to white people through written histories of Reconstruction that either denigrate or completely ignore Black people of that era).

[85] *See* Stevenson, *supra* note 39, at 8–11 (describing states' use of the criminal punishment exception to the Thirteenth Amendment's prohibition on slavery as a way to reinforce "the economic exploitation and political disempowerment of [B]lack people").

[86] *See id.* at 7–8, 12–13 (highlighting the lasting "mythology of [B]lack criminality" and devaluation of Black lives, and the resulting abuse of Black people through the criminal justice system and mob violence).

[87] *See, e.g.*, ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 89–103 (2013) (arguing that the racialization of rape—casting Black men as rapists and white women as victims—began to solidify in the 1880s, becoming a powerful tool to deny Black people civil rights, reinforce white supremacy, and justify the brutal execution of Black men for decades).

[88] *See* Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117–23 (1983) (describing the legal system's relative erasure of Black women as victims of rape due to racism and sexism, beginning in slavery and continuing through the twentieth century).

[89] *See, e.g.*, EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA—CONFRONTING THE LEGACY OF RACIAL TERROR 29–30 (3d ed. 2017) [hereinafter LYNCHING IN AMERICA], https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf [https://perma.cc/7ECM-42GE] (highlighting that nearly twenty-five percent of Black lynching victims documented by the Equal Justice Initiative were lynched based on sexual assault charges).

[90] *See infra* Section I.B.3.

riol.[91] It was only after the First World War that the state adjudication system began to indict suspects and hold trials with greater regularity.[92] However, these hastily run proceedings often resulted in swift executions.[93] By then, the death penalty had largely replaced extrajudicial lynchings of Black men.[94]

Given the inflammatory nature of interracial rape accusations, social mores easily trumped the basic civil rights of the accused. A Black man's alleged rape of a white woman could jeopardize his right to due process, including the right to effective counsel. This was true in the Court's earliest right to counsel case, *Powell v. Alabama*, where two white women accused a group of Black youths of rape.[95] To give the appearance of due process, the trial court appointed "all the members of the [Alabama] bar" to represent the defendants.[96] In overturning the conviction, the Court explained that the trial court's appointment "preclude[d] . . . effective aid."[97]

The Court neglected to specify how to measure counsel's effectiveness in *Powell*. It was not until *Michel v. Louisiana*, also involving interracial rape, that the Court indicated a method for determining effectiveness.[98] In *Michel*, the Court refused to overturn the conviction even though trial counsel failed to provide meaningful represen-

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[91] *See, e.g.*, LYNCHING IN AMERICA, *supra* note 89, at 15, 30 (describing the rise of the Ku Klux Klan and other white terror groups that carried out extreme violence against Black men in response to alleged rapes of white women); *see also* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 216–18 (2002) (describing the 1916 trial of Jesse Washington, a Black teenager accused of sexually assaulting a white woman in Texas, and the murderous white lynch mob that interrupted the trial to brutally lynch Mr. Washington).

[92] *See* Hoag, *supra* note 21, at 1506–09 (describing the transition from extrajudicial lynchings of Black people to state adjudications, which were carried out with little federal oversight and thus minimal regard for Black defendants' constitutional rights).

[93] *See id.* (highlighting the swiftness with which state criminal legal systems tried Black defendants for capital and non-capital offenses); GILMORE, *supra* note 50, at 126 (noting that the Scottsboro trials demonstrated how criminal legal proceedings of Black defendants in the South were often "lynching[s] in disguise," disillusioning some white Southerners who had advocated for bringing accused Black people to court as a method of preventing lynching).

[94] *See* James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 284 (1998) ("[P]erhaps the most important reason that lynching declined is that it was replaced by a more palatable form of violence[: capital punishment].").

[95] 287 U.S. 45, 49–50 (1932) (noting that each of the three separate trials set for defendants was completed in a single day and resulted in guilty verdicts and death penalty sentences for all defendants).

[96] *Id.* at 49 (explaining that the trial judge had claimed to believe that the members of the Alabama bar would continue to help the defendants throughout the trial process if no counsel appeared).

[97] *Id.* at 71.

[98] 350 U.S. 91, 93 (1955).

tation to the defendant. Instead, the Court pointed to trial counsel's positive reputation in the legal community to demonstrate counsel's effectiveness.[99] The interracial nature of the offense colored the Court's view of trial counsel's conduct.[100]

1. Rape, Racism, and White Supremacy

Prior to Reconstruction, laws specified the race of the alleged perpetrator and victim to determine whether a crime existed and the appropriate punishment.[101] The crime of rape was used as a tool to advance white supremacy: White men had the legal freedom to sexually assault Black women, whereas the law severely punished Black men for even attempting similar conduct against white women. In Missouri, the attempted rape of a white woman by an enslaved Black man or "mulatto" could result in castration.[102] In Alabama, a Black man, whether free or enslaved, was subjected to the death penalty for raping a white woman.[103] These racially disparate laws were not exclusive to the South.[104]

Meanwhile, laws dictated less severe punishment for white men who raped white women.[105] In many jurisdictions, the law did not recognize rape committed against Black women as criminal.[106] Instead, laws regulated the treatment of enslaved Black people based on their subjugated status as property.[107] Colonial lawmakers explicitly with-

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[99] *Id.* at 100–01.

[100] *See infra* Part II.

[101] *See* Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 998 (citing examples of criminal code provisions that made certain acts felonies only when committed by Black people); Brief for Petitioner at 54 n.62, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444) (giving an example of these pre-Reconstruction laws in Georgia).

[102] *See* State v. Anderson, 19 Mo. 241, 244 (1853) (denying a convicted enslaved Black person's claim that sentence of castration for attempted rape of a white woman was "cruel and unusual" in violation of the Constitution) (citing MO. REV. STAT. § 2.31(2) (1845)).

[103] *See* ALA. CODE § 3307 (1852).

[104] *See, e.g.*, An Act for the Trial of Negroes, ch. LXI, § IV, 1700 Pa. Laws 79 (establishing castration as punishment for Black men convicted of rape or attempted rape of a white woman in Pennsylvania).

[105] *See, e.g.*, 1819 Va. Acts 585–86 (setting the death penalty as punishment for the rape of a white woman by a free or enslaved Black man or mulatto and ten to twenty-one years of incarceration if by a white man); 1833 Ga. Laws 625, 791 (capital punishment for rape or attempted rape of a white woman by an enslaved or free Black man and not more than twenty years of incarceration if by a white man).

[106] *See, e.g.*, BELL HOOKS, AIN'T I A WOMAN 24–27, 33–36 (1981) (describing how Black women were dehumanized).

[107] *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1716–21 (1993) (describing the legal and societal fusion of the slavery system with Black racial identity).

held the equal protection of "the common law of crimes" from enslaved Black people when whites "violently abused" them.[108]

2. *Reconstruction: An Attempt at Racial Equality*

Reconstruction was meant to end these kinds of racial disparities. It had the potential to deracialize the law, including the criminal legal system. In the wake of the Civil War, the Thirty-Ninth Congress passed transformative legislation that extended citizenship rights and the equal protection of the laws to Black people. Such an extension was intended to shift power, autonomy, and agency into the hands of Black people, regardless of their former enslavement. The Fourteenth Amendment guaranteed citizenship rights to all persons born or naturalized in the United States.[109] Significantly, it extended the "equal protection of the laws" to these newly recognized citizens.[110] The Fourteenth Amendment was supposed to end the legal discrepancies that existed between Black and white people in all facets of life, including criminal adjudications. It had two purposes in the context of the criminal legal system: to extend the laws' protections to Black people (those harmed) and to end the unequal application of criminal laws to Black people (those accused of harming others).

In early 1866, a Joint Committee of the Thirty-Ninth Congress convened to develop legislation to reunify the splintered nation.[111] They heard testimony from those who bore witness to the violent atrocities facing newly freed Black people.[112] One witness from Virginia testified:

> I have had more than a hundred complaints made to me with reference to the abuse of freedmen . . . . They have been beaten, wounded, and in some instances killed; and I have not yet known one white man to have been brought to justice for an outrage upon a colored man.[113]

Statements like these revealed the need for criminal laws to provide equal protection to Black people who experienced harm. When introducing the Fourteenth Amendment to the Senate, Senator Jacob Howard of Michigan explained: "It prohibits the hanging of a [B]lack

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[108] *See* Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 95 (1985).

[109] U.S. CONST. amend. XIV, § 1.

[110] *Id*.

[111] JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (1866).

[112] *Id.* pt. III.

[113] *Id.* pt. II, at 50.

man for a crime for which the white man is not to be hanged."[114] This exemplified the Amendment's power to end the unequal application of criminal laws to those who allegedly harmed others.

Despite the aspirational power of the Fourteenth Amendment and other Reconstruction-era legislation, federal courts failed to uphold Congress's intent.[115] Two test cases, *Blyew v. United States*[116] and *United States v. Cruikshank*,[117] presented the Court with early opportunities to enforce the newly enacted laws. The specific laws at issue, the Civil Rights Act of 1866[118] in *Blyew* and the Enforcement Act of 1870[119] in *Cruikshank*, offered powerful protections to Black people's right to personhood, property, and voting.[120] Congress passed these laws in tandem with the Reconstruction Amendments with a similar purpose in mind—increasing the federal government's power to enforce laws protecting Black people's basic citizenship rights.

Yet the Court's decision in each case signaled its unwillingness to recognize Black people as full citizens warranting protection under the law. In *Blyew*, the Court truncated the reach of the Civil Rights Act of 1866, finding that the federal trial court lacked jurisdiction to adjudicate a brutal murder involving white perpetrators and Black victims because the victims were not "persons affected by" the law.[121] Similarly, in *Cruikshank*, the Court found the federal laws in question only applied to state government actions, but not to individual actors, thus failing to address a white mob that slaughtered 150 Black people protesting fraudulent elections.[122]

Blyew and *Cruikshank* laid the foundation for a legal infrastructure where lower courts were unwilling and unable to protect Black people's basic rights, whether as victims of crime or as those accused of criminal conduct. The Court's early resistance to Black equality allowed the criminal legal system to become an effective tool for extending the oppressive and subjugating reach of slavery.[123] The

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114 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

115 *See* 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").

116 80 U.S. 581 (1871).

117 92 U.S. 542 (1876).

118 14 STAT. 27–30 (1866).

119 16 STAT. 140 (1870).

120 *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 118 (2019).

121 80 U.S. at 593.

122 92 U.S. at 551–58.

123 *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II,

ramifications of the Court's resistance to recognizing the law's full protections of racially marginalized people within the criminal legal system endure to this day.[124] This recognition is helpful when considering the gap between the ideals of the Sixth Amendment right to effective counsel and the reality.[125]

According to scholar Dorothy Roberts, "[A] campaign of white supremacist terror, laws, and policies . . . effectively nullified the [Reconstruction] Amendments and replaced abolition with Jim Crow as the constitutional regime."[126] That the Court was resistant to protecting Black victims of crime in *Blyew* and *Cruikshank* signaled the legal system's greater antagonism toward Black people accused and convicted of criminal conduct. With the stroke of a pen, the Thirty-Ninth Congress seemingly extended personhood, citizenship, and humanity to Black people, but the federal courts were slower to accept Black people's shift in status.

3. Enforcing Racial Inequality

After the Court gutted Reconstruction, states were able to rely on the criminal legal system to maintain Black people's subjugated status.[127] Despite federal laws in place to protect against such tactics, the federal courts dropped the ball on enforcement and played a powerful role in cementing racial inequality.[128] Without enforcement from federal courts, Reconstruction legislation did little to prevent the racially discriminatory application of criminal laws. Black people attempting to assert their basic citizenship rights through compen-

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at 7–9 (2008) (describing how the Southern judicial system was used to provide Black people accused of crimes as labor for industry).

[124] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 282–83, 291–92 (1987) (finding that petitioner's statistical proof that Georgia's death penalty had a racially disproportionate impact on Black people was insufficient to prove that the state's administration of capital punishment violated the Fourteenth Amendment's Equal Protection Clause).

[125] *See, e.g.*, 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).

[126] Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 8–9 (2019).

[127] *See, e.g.*, SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY (2016) (revealing Georgia's gendered racial terror directed at Black women through criminal prosecution, incarceration, and forced labor during the late nineteenth and early twentieth centuries).

[128] *See, e.g.*, Plessy v. Ferguson, 13 U.S. 537, 543–44 (1896) (holding that racial segregation did not violate the Fourteenth Amendment).

sated labor, land ownership, and self-governance were met with unchecked white resistance and physical brutality.[129]

The white power structure's unwillingness to cede governance and control to Black people manifested in disparate application of state criminal prosecutions.[130] Vaguely worded criminal laws enabled law enforcement to selectively target Black people for relatively minor conduct.[131] False allegations of Black men raping white women served as pretext for lynchings in which mobs exacted punishment amid far more innocuous circumstances, such as an economic dispute,[132] a consensual interracial relationship,[133] or merely a perceived social transgression.[134] Reconstruction's failure resulted in a lethal legal landscape for Black people. The weight of the law came down harshest on Black people suspected of crime and softly—if at all—on white perpetrators of violence against Black people. This helped to solidify the racialized status of criminal conduct as Black.

The 1889 lynching of Keith Bowen, a Black man, in Aberdeen, Mississippi, is one example of thousands following Reconstruction.[135] Three white women accused Mr. Bowen of entering a room where they sat, alleging that he attempted to assault one of them.[136] Contemporaneous newspaper accounts do not elaborate on what allegedly occurred, but the implication was that Mr. Bowen attempted to rape one of the white women.[137] That was enough for local law

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129 *See, e.g.*, EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876, at 42–55 (2020), https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf [https://perma.cc/LK9M-S9D4] (cataloging more than 2,000 Black people killed during Reconstruction).

130 *See, e.g.*, BLACKMON, *supra* note 123.

131 *Id.* at 6–9.

132 GILMORE, *supra* note 50, at 98–99 (describing that "the first step in a lynching was an African American's argument with a landlord or boss over earnings," that "established members of the [B]lack community" were also lynched for "run[ning] afoul of white elites over some commercial transaction," and that "poor [B]lack transients looking for work often found themselves accused of crimes by people they had never met").

133 *See, e.g.*, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 56–59 (2d ed. 2020) (1970) (describing consensual relationships between Black men and white women that resulted in rape accusations and lynching).

134 Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 37 (1996) (identifying "innocuous breaches of the social code" as one of many reasons white Southerners lynched Black people).

135 *See, e.g.*, LYNCHING IN AMERICA, *supra* note 89, at 3–5, 30.

136 ROBERT W. THURSTON, LYNCHING: AMERICAN MOB MURDER IN GLOBAL PERSPECTIVE 108 (2011) ("What might have been an attempted robbery or even a simple mistake became construed as an assault, meaning attempted rape.").

137 One heading made reference to the victim—"An Assailant of a Woman Lynched"—enabling the reader to infer what may have occurred. PHILA. INQUIRER, Aug. 14, 1889, at 2.

enforcement officials to arrest Mr. Bowen later that day.[138] Despite federal laws guaranteeing Mr. Bowen due process and equal protection of the law, an angry white mob "took Bowen from the custody of the officers and strung him up by the neck on the public road."[139] In the course of a single day, the white neighborhood congregation served as jury, judge, counsel, and executor.[140] Even though the white mob acted unlawfully in lynching Mr. Bowen, the law rarely punished that kind of conduct when the victim was Black.[141]

By the turn of the twentieth century, the rate of lynching decreased as the state began to rely on state-sanctioned capital punishment to address Black "criminality."[142] Local lawmakers in some jurisdictions promised swift trials and executions under the guise of "due process" to assuage the murderous desires of lynch mobs.[143] Southern prosecutors and juries frequently sought and imposed the death penalty against Black men convicted of raping white women.[144] Between 1930 and 1972, Black men comprised almost ninety percent of those executed for rape.[145] And of the executions for rape convictions, over ninety-seven percent occurred in the South.[146] During a similar time frame, no white men were ever executed for the rape of a

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138 *Id.* Another subheading read, "Near the scene of an attempted outrage—swift punishment of a brutal action." *Hanged by the Road*, CINCINNATI ENQUIRER, Aug. 14, 1889, at 1.

139 *A Lynching in Mississippi*, ATLANTA CONST., Aug. 14, 1889, at 1.

140 *Id.*

141 LYNCHING IN AMERICA, *supra* note 89, at 48 (describing failed efforts at federal anti-lynching legislation, noting that few white people were convicted of murder for lynching Black people and that only one percent of lynchings after 1900 resulted in a criminal conviction).

142 *See* NGOZI NDULUE, DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 12–16 (2020) [hereinafter DPIC, ENDURING INJUSTICE] (explaining the nation's reliance on capital punishment as an acceptable alternative to lynching, particularly of Black men accused of raping white women).

143 Michael J. Klarman, Powell v. Alabama*: The Supreme Court Confronts "Legal Lynchings," in* CRIMINAL PROCEDURE STORIES 2 (Carol Steiker ed., 2006).

144 Brief Amicus Curiae of the Am. C.Ls. Union, the Am. C.Ls. Union of La. & the NAACP Legal Def. and Educ. Fund, Inc. at 7, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343).

145 DPIC, ENDURING INJUSTICE, *supra* note 142, at 16 (citing U.S. DEP'T OF JUST., BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, BULLETIN NO. 45, CAPITAL PUNISHMENT 1930–1968 (1969)) (reporting that, between 1930 and 1968, Black men accounted for 405 of a total of 455—or eighty-nine percent—of executions for rape).

146 *Id.* (reporting that, of 455 executions, 443 occurred in former Confederate states). Notably, the Court has held that the death penalty for the rape of an adult woman violated the Eighth Amendment's prohibition against excessive punishment. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977).

Black woman or child who was not also killed.[147] This was despite the prevalence of the act.[148]

Not only was the law more prone to viewing Black people as "criminal," but it was also less prone to viewing Black people as "victims."[149] In these ways, the crime of rape was racialized as Black and the system racialized rape victims as white. This racialized lens informed whom the system recognized as deserving of fundamental rights, such as equal protection of the laws, due process, and the right to counsel. Allegations of interracial rape involving Black men and white women were unpopular crimes to defend, to say the least. Total exclusion of Black people from juries and other decisionmaking roles—including as defense counsel—virtually guaranteed convictions and death sentences for Black defendants facing death-eligible charges.[150] In fact, between 1870 and 1950, the vast majority of people whom states executed for rape, robbery, and burglary—crimes which are no longer death-eligible—were Black.[151] This is the historical context from which Louisiana indicted Edgar Labat, Clifton Poret, and John Michel for the rape of white women in the early 1950s.

C. (Almost) All the Lawyers Are White

When the Court attributed a presumption of reasonableness and competence to defense counsel in *Michel*, the legal profession was

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147 *See* DPIC, ENDURING INJUSTICE, *supra* note 142, at 16; *see also* Maxwell v. Bishop, 398 F.2d 138, 141–45 (8th Cir. 1968) (noting a statistical study showing that no white man had ever even been convicted for raping a Black woman in Arkansas between 1945–65).

148 *See, e.g.*, DANIELLE L. MCGUIRE, AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER, at xvii–xviii (2010) (describing how "[t]he sexual exploitation of [B]lack women by white men had its root in slavery[,] continued throughout the . . . twentieth century," and was used "to uphold white patriarchal power" and "as a tool of coercion, control, and harassment").

149 *See* Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 444 (1988) ("A [B]lack defendant whose victim is white is *twenty-two times* more likely to receive the death penalty than is a [B]lack defendant whose victim happens to share his race.").

150 *See* EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION, 13–17 (2021) [hereinafter RACE AND THE JURY], https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [https://perma.cc/F69Y-QPWV] (finding that, for example, in 1898 Louisiana amended its constitution to allow felony convictions as long as nine of twelve jurors voted to convict, enabling a jury to convict a Black defendant even if three jurors voted to acquit).

151 *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 230 (2002) (reporting that of the 771 people of identifiable race executed for rape in the South, 701 were Black, and that thirty-one of thirty-five people executed for robbery and eighteen of twenty-one executed for burglary were also Black).

synonymous with whiteness.[152] This was born out of enduring structural racism, lack of access to education, and barriers the profession erected to exclude racially marginalized groups who sought entry.[153] That the legal profession was, and continues to be, largely white is vital to understanding the difficulty indigent defendants face when courts adjudicate ineffective assistance of counsel claims.[154] The racial and cultural identity of the profession shaped early ideas about reasonable conduct, competency, and professionalism. The legal profession then codified these ideas into practice norms, guidelines, and standards.[155]

The Court continues to rely on practice norms to determine whether defense counsel's conduct was reasonable and, ultimately, whether counsel's inaction or misconduct resulted in a violation of a defendant's constitutional right to effective counsel.[156] In *Strickland*, the Court identified practice norms as a source for determining whether defense counsel's conduct was reasonable.[157] Whiteness—with all its power and privilege—is baked into the ineffective assistance of counsel standard. Existing critiques have largely overlooked this history as it relates to *Strickland*'s deficient performance prong.

In 1878, a small group of lawyers established the American Bar Association (ABA) to bring cohesion, uniformity, and credibility to

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[152] *See* GERALDINE R. SEGAL, BLACKS IN THE LAW, PHILADELPHIA AND THE NATION 19 (1983) (noting that in the 1930s, less than one percent of lawyers were Black, comprising 1,230 out of 160,000 lawyers).

[153] *See, e.g.*, George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 106 (2003) ("During the 1920s and 1930s, the bar, the courts, and state governments imposed the accreditation system in part as an intentional means to exclude [B]lacks and other minorities from the profession . . . .").

[154] *See, e.g.*, *id.* at 103 (reporting that, at the time of writing, only four percent of lawyers were Black, and that Black people were more underrepresented in the legal profession than in any other industry, including physicians). As of 2020, over eighty-six percent of lawyers were non-Hispanic whites. AM. BAR ASS'N, PROFILE OF THE LEGAL PROFESSION 2020, at 33 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [https://perma.cc/4Y57-S25V].

[155] For demonstration of how the ABA has codified the profession's longstanding norms into formal rules and guidelines, see, for example, *Transactions of the Thirty-First Annual Meeting of the American Bar Association Held at Seattle, Washington*, 33 ANN. REP. AM. BAR ASS'N 3, 55–86 (1908) [hereinafter *Transactions of the ABA*]; MODEL CODE OF PRO. RESP. (AM. BAR ASS'N 1969); STANDARDS RELATING TO THE PROSECUTION FUNCTION & THE DEF. FUNCTION (AM. BAR ASS'N, Approved Draft 1971).

[156] *See* Wiggins v. Smith, 539 U.S. 510, 522, 524 (2003) (identifying 1 STANDARDS FOR CRIM. JUST. 4-4.1 (AM. BAR ASS'N, 2d ed. 1980) and GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNS. IN DEATH PENALTY CASES 11.4.1(c) (AM. BAR ASS'N 1989) as sources to rely upon in determining the reasonableness of counsel's conduct).

[157] Strickland v. Washington, 466 U.S. 668, 688 (1984) (citing 1 STANDARDS FOR CRIM. JUST. 4-1.1 to -8.6 (AM. BAR ASS'N, 2d ed. 1980).

the legal profession.[158] These founding members reflected an elite subset of the profession: native-born, Protestant, and male.[159] The formation of the ABA was part of a larger trend in professionalization across industries. These efforts reflected the ruling class's desire to maintain white supremacy and control as an influx of nonwhite people infiltrated Northern cities, threatening white, Anglo-Saxon Protestant dominance at the turn of the nineteenth century.[160] This influx of "outsiders" included Black people migrating from the South[161] and immigrants from Europe.[162] At the time, the United States allocated whiteness more restrictively than at present, based on groups' perceived capacity for self-governance and pathologized behavior.[163] Accordingly, foreign-born Italian, Irish, and Jewish people from across Europe were considered nonwhite.[164]

The law was an attractive entry into the professional classes for the influx of "outsiders." A new crop of more attainable and affordable night schools and YMCA law schools opened to meet the demand.[165] In response, the ABA attempted to shut down these "lesser" schools and eventually promulgated stringent accreditation standards to slow the tide of newcomers and maintain so-called professional purity.[166] This was an effective tool against aspiring new immigrants and Jews, and, in conjunction with Jim Crow, it helped shut out most aspiring Black people.[167] The ABA and the Association

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158 *See, e.g.*, EDSON R. SUNDERLAND, THE HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 17 (1953) (identifying the ABA's founding objectives).

159 *See* AUERBACH, *supra* note 35, at 4–6 (arguing that "[a] paramount objective of this elite was to structure the legal profession . . . to serve certain political preferences at a time when social change threatened the status and values of the groups to which elite lawyers belonged").

160 *See, e.g.*, *id.* at 106–08 (describing elite lawyers' complaints about the influx of immigrants and Jewish people into the profession and efforts to limit entry).

161 ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 8–15 (2010) (discussing the Great Migration, the massive movement of millions of Black people from the South to North between the First World War through the 1960s).

162 *See, e.g.*, MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 40 (1998).

163 Thus, exemplifying race as a social construct. *See* BRIDGES, *supra* note 56, at 7, 10–11 (overviewing the critical race theorists' conception of race as a social construct).

164 *See* JACOBSON, *supra* note 162, at 41.

165 George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637, 641 (2003).

166 *See id.* at 641–42 (describing how the ABA targeted schools that served minority law students by prohibiting for-profit schools, requiring law students to have obtained an undergraduate degree, and eventually mandating that law schools build libraries and employ full-time faculty, all at great financial cost).

167 *See id.* at 640–43 (finding that the ABA's more stringent accreditation standards led the percentage of Black lawyers to decline from 1.1% of the profession to .08% between 1940 and 1960).

of American Law Schools also raised law school entry standards, leading to a reduction in the number of law students who had attended Black public and private high schools.[168] The ABA also lobbied for onerous and expensive licensing requirements.[169] In Louisiana, where the *Michel* trials occurred, few, if any, Black lawyers were admitted to the bar between 1927 and 1941.[170] In the early 1960s, there were only forty documented Black lawyers in the state.[171]

The same legal barriers that prevented Black people from accessing legal education and entry into the profession left Black people vulnerable to disparate treatment at the hands of the criminal legal system.[172] The dearth of racial representation among lawyers left indigent Black people accused of crime vulnerable to injustice at the hands of both the criminal legal system and defense counsel.[173] In the 1960s, the U.S. Commission on Civil Rights studied the lack of criminal defense lawyers willing to represent indigent Black people facing criminal charges.[174] The ensuing report noted that Southern lawyers and judges refused "to fulfill their plain responsibilities" to protect and uphold Black people's constitutional rights.[175] This problem was not exclusive to the South.[176]

II
Michel v. Louisiana: An Astute and Honorable Lawyer

Decided in 1955, *Michel v. Louisiana* is a helpful vehicle through which to examine the racialization of professional competency, crim-

168 *See* J. Clay Smith, Jr., Emancipation: The Making of the Black Lawyer, 1844–1944, at 6–7 (1993).

169 *See, e.g.*, Mayeux, *supra* note 36, at 47 (stating that elite lawyers, who often worked for corporate law firms, insisted on maintaining a unitary bar with identical licensing requirements for all lawyers, regardless of their area of practice).

170 Smith, *supra* note 168, at 287.

171 *See id.* at 146.

172 Not until 1950 did the Court recognize that public professional schools did not conform to the Fourteenth Amendment's separate but equal principle. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (finding that Texas's separate law school for Black students, opened in 1947, was constitutionally unequal to the state's law school for white students).

173 *See* David S. Mann, *Not for Lucre or Malice: The Southern Negro's Rights to Out-of-State Counsel*, 64 Nw. U. L. Rev. 143, 144 (1969) (describing the difficulty Black people had in "obtain[ing] competent and vigorous" legal representation due to "the abdication by the southern bar of its obligation to serve a disfavored minority").

174 U.S. Comm'n on C.R., Law Enforcement: A Report on Equal Protection in the South 184–88 (1965) (describing the dearth of Black lawyers in the South to represent Black people in criminal and civil proceedings).

175 *Id.* at 184.

176 *See id.* at 187–88 (noting that Black people's insufficient access to the legal system was "by no means exclusively a southern problem").

inal conduct, and the criminal adjudication system. The decision reflected the Court's consolidation of two sets of interracial rape cases in New Orleans: Edgar Labat and Clifton Poret in 1950 and John Michel in 1953. They were Black men convicted of raping white women—the ultimate affront to white supremacy. At the time, rape was a capital offense, meaning the Constitution required the state to provide defense counsel to indigent defendants.[177] The state excluded Black people from the grand juries that voted to indict each defendant. In each case, trial counsel failed to adhere to the deadline for challenging the grand jury.[178] Notably, only Mr. Labat had a court-appointed lawyer during the time when anyone could have complied with the deadline.[179]

After receiving a conviction, Mr. Labat had the audacity to accuse his court-appointed white lawyer of professional incompetence.[180] Despite counsel's obvious failures, the Court denied defendant's claim.[181] Given the nature of the offense, the Court seemed to communicate that the defendant was fortunate to have the assistance of a lawyer, any lawyer, even one who failed to provide meaningful assistance. Three decades later, the Court relied on portions of the decision when formulating the ineffective assistance of counsel standard in *Strickland*.[182] The resulting standard created formidable obstacles for all defendants challenging defense counsel's effectiveness. Scholars have paid little, if any, attention to *Michel*.[183] This Section examines the facts of the underlying cases, the legal issues, and the Court's subsequent reliance on *Michel* when it created the ineffective assistance of counsel standard.

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177 *See* Powell v. Alabama, 287 U.S. 45, 73 (1932) (reversing the convictions of nine Black defendants who had been accused of raping two white women).

178 Michel v. Louisiana, 350 U.S. 91, 97 (1955).

179 *See* Brief for Petitioner at 1–2, Michel v. Louisiana, 350 U.S. 91 (1955) (No. 32) [hereinafter Brief for Petitioner Michel] (stating that John Michel was not represented by counsel within the window for objection); Brief on Behalf of Petitioner, Edgar Labat at 4, Michel v. Louisiana, 350 U.S. 91 (1955) (No. 36) [hereinafter Brief for Petitioner Labat] (stating that Labat's co-defendant, Clifton Alton Poret, was not arrested or before the court until nearly two years after the commission of the crime).

180 *Michel*, 350 U.S. at 100 ("Petitioner now contends that he was denied effective representation of counsel.").

181 *Id.* at 100–01 (noting that after defense counsel's appointment, the status of Mr. Labat's case "remained unchanged" until counsel requested leave to withdraw).

182 Strickland v. Washington, 466 U.S. 668, 689 (1984) (citing *Michel*, 350 U.S. at 101).

183 Most legal scholarship mentions *Michel* as cited by *Strickland*, but does not reveal the underlying facts or legal issues. One exception is Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 653–55 (2013), which notes Justice O'Connor's reliance on *Michel* in *Strickland* and describes the factual background of *Michel*. Another is Chhablani, *supra* note 13, at 18 & n.79, which briefly mentions the case and includes a footnote describing the facts.

A. Michel v. Louisiana*: The Cases*

Michel v. Louisiana represented two consolidated cases, *Poret and Labat v. Louisiana* and *Michel v. Louisiana*. Each case involved an accusation of interracial rape in New Orleans. On November 12, 1950, a twenty-four-year-old white woman, Helen Rajek, alleged that two Black men "dragged [her] into an alley and . . . raped her" in the early morning hours.[184] Building on a neighbor's description, Ms. Rajek later identified Clifton Poret, a carpenter's apprentice, as the rapist, and Edgar Labat, a hospital orderly, as Poret's accomplice.[185] An all-white grand jury indicted the two men for aggravated rape.[186] Officials arrested Mr. Labat shortly after the alleged offense. Almost two years passed before officials arrested Mr. Poret.[187] At trial, an all-white petit jury convicted Messrs. Labat and Poret of aggravated rape; the convictions carried "mandatory death sentence[s] . . . unless the jury recommend[ed] mercy," which it did not.[188]

In a separate incident three years later, two white teenaged girls alleged that John Michel, age nineteen, robbed them at knifepoint and then raped one of them multiple times.[189] Shortly after law enforcement arrested Mr. Michel, they procured a written confession from him.[190] An all-white grand jury indicted Mr. Michel.[191] At trial, the prosecutor asked one of the victims if Mr. Michel "said he 'liked white skin'" when he raped her.[192] She responded in the affirmative.[193] An all-white jury convicted him of rape and sentenced him to death.[194]

1. Challenging the Grand Jury: A Matter of Timing

In each case, the defendants argued they had a right to challenge Orleans Parish's exclusion of Black people from the grand jury that indicted them.[195] According to the state, petitioners had failed to properly raise an outright challenge to the grand jury's racial composi-

184 Dave Zinman, *12 Years on Death Row*, NEWSDAY, Oct. 13, 1965, at 1c.

185 *Id.*

186 *See* State v. Labat, 226 La. 201, 211 (1954).

187 Brief for Petitioner at 4, Poret v. Louisiana, 350 U.S. 91 (1955) (No. 36) 1955 WL 72402 [hereinafter Brief for Petitioner Poret].

188 Zinman, *supra* note 184, at 1c.

189 State v. Michel, 74 So. 2d 207, 209 (La. 1954).

190 *Id.* at 217.

191 *See id*. at 210; Brief for Petitioner Michel, *supra* note 179.

192 *Michel*, 74 So. 2d. at 214.

193 *Id.*

194 *Id.* at 210; *see also Supreme Court Dooms Former Local Resident*, CAL. EAGLE, Dec. 8, 1955, 1 (noting that the defendants in both prosecutions complained that their juries excluded Black people).

195 *See* Brief for Petitioner Michel, *supra* note 179; Brief for Petitioner Poret, *supra* note 187; Brief for Petitioner Labat, *supra* note 179.

tion.[196] The state claimed that the only issue available for appeal was whether the state applied a procedural rule—one setting a time limit on filing a motion to quash the grand jury—in a racially discriminatory manner.[197]

At the time, Black people comprised over thirty percent of the population in Orleans Parish.[198] All-white grand juries would have been virtually impossible to achieve unless the state intentionally excluded people based on race. Beginning in 1880, the Supreme Court repeatedly held that racial discrimination in the selection of the grand jury violated a defendant's rights, requiring reversal of the conviction.[199] The grand jury was supposed to operate as an independent body, providing a crucial check on the state's prosecutorial power.[200] The grand jury was to decide whether probable cause existed "to believe that a defendant committed a crime."[201] If so, the grand jury voted to indict, if not, it would return a no true bill, meaning the grand jury failed to find sufficient evidence to charge the accused person with a crime.[202]

The grand jury was one of the few ways community members could participate in the criminal adjudication process and impact the outcome of a case. By excluding Black people from the grand jury, the state denied the defendants in *Michel* full participation of their community. Given the highly inflammatory nature of the charges and white attitudes towards Black defendants, full participation was crucial. Writing in the late nineteenth century, one Louisiana paper wrote that "hostility to[ward] the negro" motivated juries "to render a verdict of 'guilty as charged,' because the accused has a [B]lack skin."[203] When Reconstruction extended jury service to Black people, the

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196 Brief for Respondent at 2–3, Poret v. Louisiana, 350 U.S. 91 (1955) (No. 36), 1955 WL 72404 [hereinafter Brief for Respondent State of Louisiana].

197 *Id.* at 4.

198 Brief for Petitioner Michel, *supra* note 179, at 4.

199 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (concluding that racial discrimination in jury selection violates the Equal Protection Clause of the Fourteenth Amendment); Rogers v. Alabama, 192 U.S. 226, 231 (1904) (restating that the exclusion of Black people from grand jury service on the basis of their race violates the Fourteenth Amendment); Pierre v. Louisiana, 306 U.S. 354, 362 (1939) (holding that systemic exclusion of Black grand jurors by state officials violates the Fourteenth Amendment).

200 *See* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 727–28 (2008) (arguing that the grand jury functions as an independent check on the power of the executive, legislative, and judicial branches).

201 Vasquez v. Hillery, 474 U.S 254, 263 (1986) (finding that discrimination in grand jury selection is not harmless error curable by a fair trial and, therefore, requires reversal of the conviction).

202 *See, e.g.*, Fairfax, *supra* note 200, at 705 (noting grand jury's primary function to determine whether probable cause to indict exists).

203 *Prejudiced Verdicts*, OPELOUSAS COURIER (St. Landry), Oct. 26, 1895, at 1.

white power structure resisted through violence and/or state legislation limiting Black participation on juries.[204]

These and other efforts to circumvent Reconstruction and the Supreme Court's rulings continued because excluding Black people from juries was a necessary component of preserving white supremacy in the criminal legal system. Orleans Parish's complete exclusion of Black people from grand juries indicated that the legal system did not want to recognize Black people as full members of the community. If Black people had the ability to participate as decisionmakers in the adjudication process, they might disrupt the existing racial order. In a criminal legal system racialized as white, Black voices and views were unwelcome. Maintaining white supremacy required protecting white victims and punishing Black people, not the other way around.[205]

Relying on the Fourteenth Amendment and Supreme Court precedent prohibiting racial discrimination in jury selection, the appellants in *Michel* argued that Louisiana "denied [them] due process of law and the equal protection of the laws" when it "systematically exclud[ed] negroes . . . from . . . the Grand Jury which indicted" them.[206] The defendants appealed to the U.S. Supreme Court,[207] which granted certiorari on a single issue: whether Louisiana's application of a procedural rule governing grand jury challenges violated the Fourteenth Amendment.[208] The Court ultimately found that the defendants in each case had missed the deadline under Louisiana's procedural rule to challenge the composition of the grand jury.[209]

The procedural rule required defendants to object "to a grand jury . . . before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier."[210] At oral argument, petitioners argued that Louisiana applied the rule only to Black defendants who missed the deadline, but not to white defendants.[211] The Court found that petitioners failed to properly raise the issue before oral argument and denied the challenge, musing that if petitioners had properly raised it and if the record supported it,

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204 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (discussing an 1898 constitutional convention where Louisiana lawmakers intentionally sought to maintain "supremacy of the white race" by allowing felony convictions based on nonunanimous verdicts, thus diluting Black participation on juries); RACE AND THE JURY, *supra* note 150, at 14–15.

205 *See supra* Section I.B.

206 Brief for Petitioner Poret, *supra* note 187, at 17.

207 Michel v. Louisiana, 350 U.S. 91, 101 (1955).

208 *See id.* at 92–93 (citing LA. CODE CRIM. PROC. ANN. art. 202 (1929)).

209 *See id.* at 96, 99–101.

210 *Id.* at 92.

211 *See id.* at 101.

"we might have a very different case here."[212] With little substantive engagement on the equal protection issue, the Court's brief opinion might have been lost to history. But in dicta, the Court planted the seed for what grew into a barrier to justice for future defendants challenging their lawyers' conduct.

2. *Determining Counsel's Competence*

At first blush, the decision in *Michel* implies the case was primarily about the required procedure to challenge the grand jury's racial composition. However, petitioner Edgar Labat raised another issue in his brief, that he was denied the right to effective assistance of counsel.[213] Although the decision devotes only a few lines to this claim, *Strickland*'s reliance on those lines elevated *Michel*'s significance and impact.

In his brief, Edgar Labat alleged that he "was denied his constitutional right to be represented by effective counsel."[214] Relying on the Fourteenth Amendment and state law, Mr. Labat argued that, although he received court-appointed counsel, his lawyer "did absolutely nothing . . . the entire time that counsel's name was of record."[215] It was during this time that defense counsel missed the deadline to challenge the grand jury.[216] Relying on *Powell v. Alabama*, Mr. Labat asserted that the trial court knowingly appointed an elderly lawyer in poor health "solely to satisfy the record" and that the conditions of this appointment "preclude[d] the giving of effective aid in the preparation and trial of the case."[217]

In considering the issue, the Court recognized that Mr. Labat's court-appointed counsel had been bedridden for several months pretrial and that he was advanced in age.[218] It also acknowledged that after more than a year of inaction on Mr. Labat's case, counsel asked for leave to withdraw, having missed the filing deadline to quash the grand jury.[219] Yet, the Court mused that defense counsel's failure to timely challenge the grand jury "might be considered sound trial strategy."[220]

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212 *Id.* at 101–02.

213 Brief for Petitioner Labat, *supra* note 179, at 3.

214 *Id.*

215 *Id.* at 7.

216 *Id.*

217 *Id.* at 9, 10 (quoting Powell v. Alabama, 287 U.S. 45, 71 (1932)).

218 Michel v. Louisiana, 350 U.S. 91, 100 (1955).

219 *Id.* at 100–01.

220 *Id.* at 101.

At the time, an ineffective assistance of counsel claim was a loosely defined area of federal law, lacking a uniform standard.[221] The Court first recognized the right to "effective aid" in 1932 in *Powell v. Alabama*, situating it in the Fourteenth Amendment's Due Process Clause.[222] However, the Court neglected to specify how to measure the constitutionality of counsel's conduct. The plain facts of *Powell* indicated a gross miscarriage of justice—angry white mobs threatening lynching, brief proceedings days after the alleged rapes, and all-white juries that sentenced nine Black teenagers to death.[223] The plight of the nine youths also became a national embarrassment necessitating some kind of intervention.[224] Therefore, the extreme nature of the facts and circumstances surrounding the state prosecutions at issue in *Powell* obscured the potential applicability of the decision to future cases.

In overturning Mr. Powell's conviction, the Court held that the trial court failed to *effectively* appoint counsel in violation of the defendant's right to due process.[225] The ruling did not grapple with counsel's conduct per se. The focus was on the trial court's responsibility to ensure that indigent defendants received *effective* counsel for the adversarial process to function properly.[226] The Court was more concerned with whether the defendant had an *opportunity* to be effectively represented, not so much with whether counsel's conduct was effective.[227]

Without a rubric to measure counsel's effectiveness during Mr. Labat's trial, the Court in *Michel* offered a description of Mr. Mahoney outside the context of Mr. Labat's representation. It referred to Mr. Mahoney, since deceased, as "astute and honored."[228] The Court pointed out that Mr. Mahoney had been a member of the bar for about fifty years and "the legal profession in New Orleans [had] honored him with a plaque."[229] Considering these facts, the

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[221] *See infra* Part III; *see also* Sara Mayeux, *Ineffective Assistance of Counsel Before* Powell v. Alabama*: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014) (detailing the history of state court ineffective assistance of counsel adjudications from the 1880s to 1932 where judges determined whether counsel's ineptitude necessitated reversing defendants' convictions).

[222] *Powell*, 287 U.S. at 71.

[223] *See* Mayeux, *supra* note 221, at 2180–81; MAYEUX, *supra* note 36, at 72–73.

[224] *See* MAYEUX, *supra* note 36, at 72–73.

[225] *Powell*, 287 U.S. at 71.

[226] *See id.*

[227] *See id.*

[228] Michel v. Louisiana, 350 U.S. 91, 101 n.7 (1955).

[229] *Id.*

Court concluded Mr. Mahoney was "exceptionally qualified"[230] and "[t]here [was] no evidence of incompetence."[231]

The Court declined to place weight on defense counsel's performance while representing Mr. Labat. Instead, it speculated about why counsel failed to advocate on Mr. Labat's behalf. Extending the benefit of the doubt to counsel, the Court suggested that Mr. Mahoney's failure to timely challenge the grand jury might have been "sound trial strategy."[232] In support, the Court pointed out that Mr. Labat's co-defendant was still on the run.[233] This logic makes little sense when a timely filed motion to quash an unlawfully selected grand jury could have resulted in a dismissal of the indictment against Mr. Labat, regardless of his co-defendant's whereabouts.[234] Nevertheless, the Court refused to "infer lack of effective counsel" from this glaring error.[235]

Instead, the Court placed great weight on Mr. Mahoney's professional reputation in the legal community. It assumed Mr. Mahoney was competent because he was a member of the legal profession. If it sounds like a circular argument, it is. The Court explained that "[w]hen the court . . . appoints . . . a member of the bar in good standing . . . the presumption is that such counsel is competent."[236] Because "[o]therwise, he would not be in good standing at the bar and accepted by the court."[237]

Notably, this circular argument did not pass muster in *Powell*. There, the trial judge appointed every member of the Alabama bar to represent the defendants.[238] All members of the bar were presumably in good standing. So, what was the difference? In *Powell*, the trial court's appointment failed to hold any single attorney responsible for representing the defendant. In *Michel*, however, the trial court's appointment of one willing and available defense lawyer at least offered the appearance of due process.

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230 *Id.*

231 *Id.* at 101.

232 *Id.*

233 *Id.*

234 *See* Pierre v. Louisiana, 306 U.S. 354, 362 (1939) (holding that the state's exclusion of Black people from the grand jury required reversal of the conviction and of the decision to deny the motion to quash the indictment).

235 *Michel*, 350 U.S. at 101.

236 *Id.*

237 *Id.*

238 Powell v. Alabama, 287 U.S. 45, 49 (1932).

3. Michel v. Louisiana *Through a Critical Lens*

Defense counsel's whiteness, with all the power and privilege that afforded him, enabled the Court to find his representation competent. This was despite clear indications that counsel did nothing on Mr. Labat's case.[239] Mr. Mahoney's status as a white lawyer rendered his incompetence invisible to the Court. In its cursory review of Mr. Mahoney, the Court looked to his bar membership and standing in the Louisiana legal community, two institutions imbued with white supremacy, and did not delve further.[240] In the wake of *Powell*, the Court was principally concerned with whether the trial court made a sufficient appointment to meet threshold due process requirements.[241] The *Michel* majority held that it did.[242] The decision suggested that despite counsel's abject failure to provide representation, this was a circumstance—interracial rape—where the Court would not find a white lawyer ineffective when representing a Black man.[243] In finding defense counsel's conduct to be beyond review, the Court declined to disrupt white supremacy and Louisiana's racial order.

In denying Mr. Labat's claim, the Court maintained the racialized hierarchy between defense counsel and indigent defendants. Beneath the surface of the Court's reasoning was the incredulity that a Black man convicted of rape accused a white man of violating his constitutional rights.[244] Mr. Labat's Black race and the racialized nature of his criminal conviction prevented the Court from seeing him as a person entitled to and deserving of basic rights, including due process and effective counsel. Defense counsel's white race and the nexus between whiteness and standards of professional conduct prevented the Court from assessing the actual circumstances of representation.[245] Counsel's privileged identity as a white man and lawyer enabled the Court to ignore the obvious shortcomings in his representation.[246] The Court looked primarily to counsel's professional reputation—he was an experienced, award-winning lawyer.[247]

When considering counsel's failure to act, the Court did so in the light most favorable to counsel. It assumed counsel's inaction might have been "sound trial strategy."[248] This was an argument the state

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239 *See supra* Section II.A.2.
240 *See supra* notes 30–38 and accompanying text.
241 *See supra* Section II.A.2.
242 *Michel*, 350 U.S. at 101.
243 *See supra* notes 87–97 and accompanying text.
244 *See id.*
245 *See supra* notes 30–38 and accompanying text.
246 *See id.*
247 *Michel*, 350 U.S. at 101 & n.7.
248 *Id.* at 101.

advanced in its brief.[249] There, it posited that the decision "whether or not to make an immediate attack on the grand jury was entirely within . . . [counsel's] discretion."[250] According to the state, "Mahoney may have determined that such an attack would be in vain, since he may have known . . . that there had been no systematic exclusion."[251] Given that a third of the population in Orleans Parish was Black,[252] this reasoning was a stretch. It would have been evident to anyone who observed the grand jury that a substantial portion of the population was wholly unrepresented. Regardless, the Court supplied a different reason in its decision—Mr. Labat's co-defendant "could not be found."[253] According to the Court's rationale, defense counsel may have been trying to delay the proceedings until the co-defendant reappeared. However, successfully quashing the grand jury would have delayed the proceedings even further, requiring the Parish to convene an entirely new grand jury to reindict both defendants.[254] Neither rationale made sense in light of the record and the meritorious nature of Mr. Labat's grand jury claim. However, granting Mr. Labat's claim would have disrupted the state's tightly enforced racial order.[255]

In *Michel*, the Court showed its willingness to uphold white supremacy at the expense of the defendant's constitutional right to effective counsel. Although the decision did not refer to "prevailing professional norms,"[256] it measured counsel's effectiveness relative to Mr. Mahoney's professional reputation. In the Court's view, the fact that the local bar gave Mr. Mahoney an award meant he was competent. Because the profession approved of Mr. Mahoney, the Court did too. Ultimately, the Court extended the benefit of the doubt to a poorly performing (white) lawyer, but refused to grant similar leeway to an aggrieved (Black) defendant. This is the historical context from which the Court continues to measure counsel's performance.

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249 *See* Brief for Respondent State of Louisiana, *supra* note 196, at 25.

250 *Michel*, 350 U.S. at 101 n.7.

251 Brief for Respondent State of Louisiana, *supra* note 196, at 25–26.

252 Brief for Petitioner Michel, *supra* note 179, at 4.

253 *Michel*, 350 U.S. at 101.

254 *See* Strauder v. West Virginia, 100 U.S. 303, 310, 312 (1880) (holding that the state law's racial discrimination in jury selection violated the Fourteenth Amendment and that the state court erred in proceeding to trial and overruling defendant's challenge of the jury's composition).

255 *See, e.g.*, Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES 261 (Carol Steiker ed., 2006) (detailing local and state officials' staunch, and at times violent, resistance to recognizing basic civil rights of Black people in Louisiana).

256 This is a phrase the Court uses in *Strickland v. Washington*. 466 U.S. 668, 688, 690 (1984).

B. Michel*'s Legacy*

In 1955, when the Court decided *Michel*, it had been nearly a century since Congress enacted robust federal legislation to recognize Black people's rights and created the powerful tools to protect those rights.[257] However, the decision demonstrated the Court's ongoing failure to fully enforce them.[258] With *Michel*, the Court indicated its hesitancy to prescribe remedies that would actualize an indigent defendant's right to counsel, which included the effective assistance of counsel. Doing so would disrupt the existing racial hierarchy and interfere with the criminal legal system as an effective social organizing tool. This case might have been forgotten but for the Court's reliance on it when developing the ineffective assistance of counsel standard in *Strickland*. Dicta from *Michel* provided the foundation on which all reviewing courts determine whether defense counsel's conduct met constitutional requirements.

In *Strickland*, the Court relied on *Michel* to determine whether defense counsel's conduct constituted deficient performance. Justice O'Connor, who authored *Strickland*, mentioned *Michel* twice.[259] First, she referred to *Michel* for the premise that reviewing courts should look to the "legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role" that the Sixth Amendment envisioned.[260] Second, she cited *Michel* for the proposition that the reviewing "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[261] As further clarification, the Court explained that it is the defendant's burden to "overcome the presumption that" defense counsel's conduct "might be considered sound trial strategy."[262] The Court's pared down words in *Strickland*, invoking *Michel*, gave no indication of the underlying facts.

Strickland's resulting ineffective assistance of counsel standard solidified the racialized power imbalance between the legal profession and indigent people charged with crime. Race played a subtler role in *Strickland* relative to *Michel*. However, *Strickland*'s elevation of *Michel* requires us to interrogate white supremacy in the development of the ineffective assistance of counsel standard. We cannot ignore white supremacy's impact on the Court's assignment of the burden to

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257 *See supra* Section I.B.

258 *See, e.g.*, Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. Rev. 87, 110–13 (discussing the Court's early anti-Black decisions following Reconstruction).

259 *Strickland*, 466 U.S. at 688–89.

260 *Id.* at 688 (citing Michel v. Louisiana, 350 U.S. 96, 100–01 (1955)).

261 *Id.* at 689 (citing *Michel*, 350 U.S. at 101).

262 *Id.* (quoting *Michel*, 350 U.S. at 101).

the defendant. Nor can we ignore the role white supremacy played in the Court's presumption of reasonableness and competency in counsel's conduct. Given the racialized circumstances of *Michel*, the Court viewed a lawyer's acceptance of appointment, without more, as sufficient representation for an indigent defendant. The determination of whether a defendant received constitutionally effective representation was built on white supremacy and a desire to maintain a fixed racial hierarchy with Black people on the bottom.

After years of appeals funded by civil rights groups, Edgar Labat and Clifton Poret's convictions were overturned by the Fifth Circuit.[263] The state arranged for the two men to plead guilty to lesser charges, and then released them.[264] They each spent over sixteen years incarcerated, including fourteen years on death row.[265] John Michel, executed in 1957, was the first person executed in Louisiana's new electric chair at Angola and the last person the state executed for a rape conviction absent murder.[266]

III
A Diminished Right to Effective Counsel

The legal ambiguity that Edgar Labat faced when raising a claim of ineffective assistance of counsel persisted for three decades. Although Mr. Labat raised his claim under the Fourteenth Amendment's Due Process Clause, the Court slowly shifted focus to the Sixth Amendment's defense counsel guarantee. In 1963, the Court extended the right to defense counsel for indigent defendants facing non-capital charges.[267] There, it held that the Sixth Amendment right to counsel was a fundamental right, and that the Fourteenth Amendment's Due Process Clause safeguarded the right against state action.[268] But it took another two decades for the Court to recognize that the Sixth Amendment right to counsel must also include the right to *effective* counsel.[269]

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263 Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) (reversing the conviction based on the systemic exclusion of Black people and wage earners from the jury system in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses), *cert. denied*, 386 U.S. 991 (1967); *see also* Zinman, *supra* note 184, at 1c.

264 *2 Convicts Freed After 14 Years on Death Row*, N.Y. Times, Dec. 30, 1969, at 14.

265 *Death Row Ordeal of 14 Years Ends*, Miami Herald, Jan. 1, 1970, at 12-A.

266 *See* Brief for Petitioner at 8, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343) (noting that capital punishment for a non-homicidal offense violated the Eighth Amendment's cruel and unusual punishments clause).

267 Gideon v. Wainwright, 372 U.S. 335 (1963) (extending the right to counsel initially found in *Powell v. Alabama*).

268 *Id.* at 343.

269 *See* Strickland v. Washington, 466 U.S. 668 (1984).

In 1984, the Court established a uniform standard for determining counsel's effectiveness in *Strickland v. Washington*, creating the two-prong test—deficient performance and prejudice—to determine whether counsel's conduct violated the defendant's right to counsel.[270] Prior to *Strickland*, the lower federal courts used a variety of methods to measure counsel's effectiveness, each with varying degrees of difficulty for defendants. Some methods were more favorable to defendants, other skewed heavily toward the state. Applying a critical lens to the Court's development of the ineffective assistance of counsel standard helps explain why the Court chose *Strickland v. Washington* as the vehicle and why it landed on the arduous two-prong test.

This Part reveals how the racialized construction of criminal behavior, criminal defendants, and the legal profession helped shape the Court's decision to rely on *Strickland v. Washington* as a vehicle for the ineffective assistance of counsel standard.

A. Measuring Counsel's Effectiveness Prior to Strickland

The Sixth Amendment is silent as to the constitutional requirements for defense counsel's conduct.[271] In *Powell v. Alabama*, where the Court first recognized the right to effective counsel, it did not identify how to measure effectiveness.[272] There, the way the trial judge appointed counsel, prevented meaningful representation. Thus, the Court concluded that the defendant's right to effective counsel was violated.[273] Following *Powell* and prior to *Strickland*, federal courts used a variety of methods to measure defense counsel's effectiveness. This Article discusses three of the most common standards: "farce and mockery," two-prong, and guidelines.

The "farce and mockery" standard was the most stringent, least defendant-friendly test.[274] Only if counsel's conduct resulted in a proceeding that amounted to a "farce and mockery of justice," offending the conscience of the court, would it violate a defendant's constitutional right to effective counsel.[275] This method allowed for poor per-

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[270] *Id.*

[271] *Id.* at 688.

[272] *See* Powell v. Alabama, 287 U.S. 45 (1932).

[273] *Id.* at 53 ("[H]ere, . . . such designation of counsel . . . amount[ed] to a denial of effective and substantial aid . . . .").

[274] *See, e.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (defining ineffectiveness as "when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense"); Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965) (noting that "only . . . extreme instances" of counsel's inadequacy constitute "a farce of the trial").

[275] *See* Scott v. United States, 334 F.2d 72, 73 (6th Cir. 1964).

formance that existed somewhere under the threshold of offending the reviewing court's conscience.

Other courts used a two-prong approach, assessing counsel's conduct and then determining whether counsel's conduct had an impact on the outcome of the case.[276] In some ways, this was akin to the two-prong test that the Court later codified in *Strickland*. However, the federal circuit courts varied as to which party—either the state or the petitioner—carried the burden of showing impact on the case. In *Strickland*, the burden of showing that counsel's performance impacted the outcome of the case is placed firmly on the defendant. This was not the case in the Fourth Circuit. In *Coles v. Peyton*, the appellate court found that defense counsel failed to properly investigate the case, including failing to follow certain leads, failing to pursue a viable defense theory, and failing to interview critical witnesses.[277] The court was satisfied that counsel's performance was sufficiently wanting.[278] Then, "in the absence of affirmative proof of lack of prejudice," it concluded "that petitioner was denied effective assistance of counsel."[279] This subtle phrase demonstrated a shift in framing, placing the onus on the state to prove that counsel's poor performance did not impact the outcome of the case. Unlike in *Strickland*, it was not the responsibility of the defendant to show that counsel's poor performance impacted the case's outcome. The defendant needed only to show that counsel performed poorly.

Lastly, the guidelines approach. According to this method, courts assessed trial counsel's conduct relative to minimum professional guidelines, usually the American Bar Association guidelines, without requiring consideration of the conduct's impact on the case. At one point, the appellate court for the D.C. Circuit rejected the "farce and mockery" standard in lieu of the guidelines approach.[280] Accordingly, the court held that counsel owed certain duties to the client derived largely from the most recent publication of the ABA Standards Relating to the Defense Function.[281] It also explicitly rejected the requirement that it was the defendant's burden to prove prejudice.[282] If counsel's conduct failed to adhere to the minimal practice stan-

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276 *See, e.g.*, United States v. Holtzen, 718 F.2d 876, 878 (8th Cir. 1983) (per curiam) (using and applying this two-prong test).

277 Coles v. Peyton, 389 F.2d 224, 227 (4th Cir. 1968).

278 *Id.*

279 *Id.*

280 United States v. DeCoster, 624 F.2d 196, 200 (D.C. Cir. 1976) (plurality opinion) (en banc).

281 *Id.* (citing STANDARDS RELATING TO THE PROSECUTION FUNCTION & THE DEF. FUNCTION (AM. BAR ASS'N, Approved Draft 1971)).

282 *Id.* at 215.

dards, then the reviewing court found that such conduct violated the defendant's right to effective counsel.[283] The Eighth Circuit adopted a test similar to the guidelines approach. In determining counsel's effectiveness, it looked to whether counsel "exercise[d] the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances."[284]

Relative to "farce and mockery" and the two-prong test, the guidelines approach was the least arduous standard for a defendant to meet. Under the guidelines approach, defendants did not need to show that counsel's conduct was so extreme it amounted to a farce and mockery of justice, shocking the court's conscience, nor did they need to show counsel's incompetence impacted the outcome of the case.

However, the lack of a uniform standard was untenable. Reviewing courts adjudicating identical ineffective assistance of counsel claims in different jurisdictions could issue opposite results depending on which test they applied. Without guidance from the United States Supreme Court, district courts were left to pick and choose from the various standards. These issues came to a head in a criminal case prosecuted in Maryland, *State v. Marzullo*, in which Victor Marzullo was convicted of "assault with intent to rape and perverted practice."[285]

B. Maryland v. Marzullo *as a Potential Vehicle*

On July 22, 1974, Baltimore City indicted Mr. Marzullo for two separate counts of rape involving two different women.[286] The public defender's office provided him defense counsel.[287] Mr. Marzullo immediately complained about his appointed counsel, but the trial court refused to provide a substitute.[288] When the state brought the first case to trial, the complaining witness admitted, in the presence of the jury, that she could not identify Mr. Marzullo as her attacker.[289] In

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[283] *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970) (defining effective assistance of counsel as conduct "within the range of competence demanded of attorneys in criminal cases").

[284] Pinnell v. Cauthron, 540 F.2d 938, 939 (8th Cir. 1976).

[285] Brief for the Petitioner at 3, Maryland v. Marzullo, 435 U.S. 1011 (1978) (No. 77-784) [hereinafter Brief for Petitioner State of Maryland].

[286] *See* Marzullo v. Maryland, 561 F.2d 540, 545 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); Brief for Petitioner State of Maryland, *supra* note 285, app. B, at 12a.

[287] *Marzullo*, 561 F.2d at 545.

[288] *Id.*

[289] *Id.*; *Ruling on Arnick Incompetence Let Stand*, BALT. SUN, May 2, 1978, at D1.

vain, the prosecutor reminded her that she positively identified him before trial before ultimately agreeing to dismiss the charge.[290]

The state announced it was ready to proceed on the second indictment, which included charges for "rape, assault with intent to rape, common law assault, statutory mayhem, and perverted sexual practice."[291] The trial judge kept some of the same jurors from the first case, inquiring whether they could remain fair and impartial for the second case.[292] The jurors did not respond, but the trial court swore them in.[293] The second complaining witness, an eighteen-year-old married woman, testified in detail about the alleged attack and positively identified Mr. Marzullo as the person responsible.[294] Mr. Marzullo testified about some of the same details, but explained that the sexual act was consensual.[295] After the act, he testified that they argued and that "he slapped her."[296] The case ended in convictions for "assault with intent to rape" and "perverted practices."[297] The trial court sentenced Mr. Marzullo to ten years on the first charge and a concurrent five-year sentence on the second.[298]

1. Seeking Federal Habeas on Ineffective Assistance of Counsel

After exhausting his state court appeals, Victor Marzullo filed a petition for habeas relief in federal district court.[299] He alleged a number of claims, including "incompetency of counsel."[300] Although Mr. Marzullo alleged a number of deficiencies with counsel's conduct, the court spent most of its attention on one: counsel's failure with regard to jury selection.[301] According to Mr. Marzullo, defense counsel failed to select a new jury after jurors presided over Mr. Marzullo's first rape trial that ended in dismissal.[302] These same jurors then presided over the charges that ended in Mr. Marzullo's convic-

290 *Marzullo*, 561 F.2d at 545.

291 *Id.*

292 *Id.*

293 *Id.* (indicating "(No response)" from the jury to questions the judge posed).

294 *Id.* at 545–46.

295 *Id.* at 546.

296 *Id.*

297 *Id.* at 546; *see also Defendant Has Right to 'Competent' Lawyer*, TIMES ARGUS, May 1, 1978, at 1.

298 *Marzullo*, 561 F.2d at 546.

299 Brief for Petitioner State of Maryland, *supra* note 285, at 3–4.

300 *Id.* app. B, at 13a–14a; *see also Marzullo*, 561 F.2d at 546 (holding that Marzullo's counsel failed "to protect [him] from the prejudicial effects of the jury's exposure to the first rape charge").

301 *See* Brief for Petitioner State of Maryland, *supra* note 285, app. B, at 19a–22a.

302 *Marzullo*, 561 F.2d at 545.

tion.[303] In denying petitioner's claim, the district court "noted that there is a presumption that counsel properly performed his duties."[304] It then cited the "farce and mockery" standard, explaining that "one is deprived of effective assistance . . . only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial."[305] The district court then methodically dispensed of Mr. Marzullo's complaints regarding counsel's conduct, calling them "frivolous"[306] and "harmless."[307] Regardless, the court stated that when a client admits his inability to handle his own case, he "places himself in counsel's hands [and] is bound by counsel's decisions."[308] By this measure, practically no defendant who relied on defense counsel for assistance could ever allege ineffectiveness. The district court also refused to question counsel's conduct that may have been "trial tactics."[309] It then denied relief.[310] Mr. Marzullo appealed to the circuit court.

The Fourth Circuit rejected the "farce and mockery" standard, and applied the guidelines approach.[311] It also rejected the state's argument that counsel's conduct was a "trial tactic," akin to the defense of "sound strategy," as unsupported by the record.[312] The appellate court compared counsel's conduct to the ABA Standards Relating to the Defense Function,[313] and concluded that counsel's conduct "was outside the range of competence expected of attorneys in criminal cases."[314] As such, the appellate court granted Mr. Marzullo's habeas petition, reversing the convictions. It ordered the state to either release or retry Mr. Marzullo.[315] Maryland appealed, filing a petition for certiorari to the United States Supreme Court.

Four years prior to *Strickland*, Maryland's petition asked the Court to identify the minimum standard of competence necessary for an attorney to fulfill a defendant's Sixth Amendment right to effective

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303 *Id.* at 546.

304 Brief for Petitioner State of Maryland, *supra* note 285, app. B, at 19a (citing Brown v. Smyth, 271 F.2d 227 (4th Cir. 1959)).

305 *Id.* (quoting Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965)).

306 *Id.* app. B, at 20a, 21a.

307 *Id.* app. B, at 20a.

308 *Id.* app. B, at 21a (citing Williams v. Beto, 354 F.2d 698, 705–06 (5th Cir. 1965)).

309 *Id.*

310 *Id.* app. B, at 26a.

311 The Fourth Circuit referred to it as the "normal competency standard." Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977).

312 *Id.* at 546–47.

313 STANDARDS RELATING TO THE PROSECUTION FUNCTION & THE DEF. FUNCTION §§ 5.2(b), 7.2(a) (AM. BAR ASS'N, Approved Draft 1971).

314 *Marzullo*, 561 F.2d at 547.

315 *Id.*

counsel.[316] *Marzullo* was an attractive vehicle for the Court to deliver a uniform standard: There was a robust state court record, the issue was well preserved, and applying different standards, the lower federal courts reached different decisions on the same issue.[317] But the Court balked and denied certiorari. The denial of certiorari meant that the Fourth Circuit's decision granting Mr. Marzullo habeas relief stood.

In a forceful dissent, Justice White complained that "the federal courts of appeals are in disarray" due to the lack of a uniform standard.[318] He implored the Court to identify a standard "to eliminate disparities in the minimum quality of representation" owed "to indigent defendants."[319] Justice White chastised the majority for failing to review the case, accusing the Court of "shirk[ing] its central responsibility."[320] Without signaling a preference for any particular standard, Justice White noted that the majority of circuits required defense counsel to "render 'reasonably competent' assistance," or as the Fourth Circuit described it, "representation within range of competence demanded of attorneys in criminal cases."[321]

What if the Court granted certiorari in Mr. Marzullo's case? What if the Court affirmed the Fourth Circuit's decision and adopted the guidelines approach? Defendants would not be saddled with overcoming the presumption of reasonableness, the assumption that counsel's conduct was sound strategy, or the assumption that counsel was competent. Would more defendants be able to successfully assert that they had received ineffective assistance of counsel? Yes. But in denying certiorari, the Court seemed to "fear . . . too much justice."[322]

2. White Defendant Privilege

There was a reason the Court did not select Victor Marzullo's case as the vehicle for establishing a uniform standard for determining ineffective assistance of counsel. The most likely reason was race. It was acceptable for a white defendant to slip through the cracks and obtain relief due to his poorly performing lawyer. However, the Court was not going to broaden the pathway for other indigent defendants,

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316 *Id.*

317 *See* Brief for Petitioner State of Maryland, *supra* note 285, at 3–5.

318 Maryland v. Marzullo, 435 U.S. 1011 (1978) (White, J., dissenting from denial of certiorari).

319 *Id.* at 1012–13.

320 *Id.* at 1013.

321 *Id.* at 1011–12. Notably, Justice White joined the majority in *Strickland*.

322 *See* McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

especially if it meant increasing opportunities for indigent Black defendants to overturn their convictions and sentences.

Victor Marzullo was, in all likelihood, white. Given his surname, he was likely Italian-American with origins in Southern Italy.[323] Although, at one point in our nation's history, society viewed Italians as nonwhite and inherently criminal, by the time Mr. Marzullo sought habeas relief in federal court, Italians had long since become white.[324] Over time, Italians and other "ethnic" whites were able to align themselves with whiteness and shed the stereotype of criminality.[325] With whiteness came privilege and power. Accordingly, Mr. Marzullo received the benefit of white privilege at each step of the adjudication process. The court decisions do not mention the victim's race, but statistics tell us it was unlikely that she was Black.[326] Regardless, as a white man, Mr. Marzullo's crime was not an affront to white supremacy, his post-trial accusation that his lawyer acted incompetently did not threaten the racial hierarchy, and the appellate court's reversal of his conviction did not disrupt the social order.

Had the court used Mr. Marzullo's case as the vehicle for establishing a uniform ineffective assistance of counsel standard, it would have had the opportunity to create defendant-friendly law by affirming the lower court's adjudication of the claim. In *Marzullo*, the Fourth Circuit rejected the arduous "farce and mockery" standard, it rejected the assumption that counsel's conduct was a "trial tactic," and it rejected the district court's presumption that counsel was competent.[327] Had the Court granted certiorari and affirmed the Fourth Circuit's order, the uniform ineffective assistance of counsel standard may have been the guidelines approach. An ineffective assistance of counsel standard whereby the defendant need only point to practice standards and show how trial counsel's conduct did not meet them—

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323 *See* DICTIONARY OF AMERICAN FAMILY NAMES loc. 505 (Patrick Hanks ed., 2006) (ebook).

324 *See, e.g.*, Brent Staples, Opinion, *How Italians Became 'White'*, N.Y. TIMES (Oct. 12, 2019), https://www.nytimes.com/interactive/2019/10/12/opinion/columbus-day-italian-american-racism.html [https://perma.cc/J48Q-ED2N]. A century prior, Southern Italian immigrants faced stereotypes similar to Black people: inferior, savage, and inherently corrupt. *See, e.g.*, JACOBSON, *supra* note 162, at 56–58. They were seen as having darker-skin and commonly referred to as "dago," an epithet understood to mean a white n-word. *Id.* at 57. In 1891, a group of Italian-Americans stood trial for allegedly murdering a police officer in New Orleans. *See* Staples, *supra*. After some of them were acquitted, an angry mob broke into the prison and lynched eleven of them. *Id.*

325 Staples, *supra* note 324.

326 *See, e.g.*, Wriggins, *supra* note 88, at 121–23 (describing chronic under-acknowledgment and under-prosecution of rape involving Black female victims from the late 1960s through the early 1980s).

327 Marzullo v. Maryland, 561 F.2d 540, 543, 546 (4th Cir. 1977).

without needing to overcome the racialized presumption of counsel's reasonableness, sound strategy, or competence—would have enabled more defendants to obtain relief. But such a standard would have challenged the effectiveness of the criminal legal system as a racialized social organizing tool.

As a white man criminally charged and convicted in Baltimore, Maryland, Mr. Marzullo was somewhat of an anomaly. In 1970, Baltimore was over 45% Black, well on its way to becoming a majority Black city.[328] As opportunities for economic advancement fell in the city, along with the white population, law enforcement disproportionately targeted Black people for arrest, prosecution, and incarceration.[329] By 1990, Black people comprised almost 60% of the population.[330] Local reporting in 1990 pointed to the early 1970s as having the highest murder rate in the city's history.[331] The 1990 murder rate matched the 1970 rate, with Black people making up more than 90% of murder suspects.

When Baltimore City indicted Mr. Marzullo, the racialized view of Italians was a thing of the past. But, had Mr. Marzullo been Black and accused of raping two white women a decade prior, he might have received the death penalty.[332] The Court did not prohibit the use of the death penalty for rape of an adult woman until 1977, when it decided *Coker v. Georgia*, the same year the Fourth Circuit granted Mr. Marzullo's habeas petition.[333] Given the racialized history of rape, Black men were punished far more severely for rape, particularly involving white women, relative to white men.[334] When capital pun-

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328 James Bock, *Census Data Show Segregation Goes On*, BALT. SUN, Jul. 7, 1991, at 1A.

329 *See, e.g.*, NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 115–30, 157–93 (1967) [hereinafter KERNER COMMISSION REPORT] (commonly referred to as the "Kerner Commission Report" for commission chair Governor Otto Kerner of Illinois).

330 Bock, *supra* note 328.

331 David Simon, *2 Slayings Push Toll in 1990 to 296, Most Since Early 1970s*, BALT. SUN, Dec. 24, 1990, at 1B.

332 Rape was a death-eligible offense in Maryland until 1972. *See* MD. ANN. CODE art. 27, §§ 461–462 (1957) (repealed 1972). Capital punishment was on hiatus in Maryland from 1972 to 1978. *See* MD. CODE ANN. art. 27, §§ 413–414 (1978) (demonstrating that rape was no longer a death-eligible offense); *see also* Furman v. Georgia, 408 U.S. 238 (1972) (plurality opinion) (finding the death penalty, as administered, unconstitutional); Gregg v. Georgia, 428 U.S. 153, 153 (1976) (finding the death penalty constitutional with guided discretion and other safeguards). Maryland maintained a death penalty until 2013. *See Maryland: Governor Signs Repeal of the Death Penalty*, N.Y. TIMES (May 2, 2013), https://www.nytimes.com/2013/05/03/us/maryland-governor-signs-repeal-of-the-death-penalty.html [https://perma.cc/D7HF-5KMJ].

333 Coker v. Georgia, 433 U.S. 584, 594 (1977) (noting that, at the time, rape was a capital offense in only three states: Georgia, North Carolina, and Louisiana).

334 Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 585–86, 594–97 (1997) (describing historical and present-day

ishment for rape was still lawful, Black men made up the vast majority of those executed.[335] Even without the potential for the death penalty, the chances that the state would agree to dismiss a rape charge against a Black defendant were small.[336] It was also unlikely that a jury would convict a Black defendant on lesser charges—"assault with intent to rape" and "perverted practices."[337]

Moreover, when the Court granted certiorari in *Coker*, it did so in one of the very few white defendant cases, thus "ignoring the bleak history of race, rape and capital punishment[.]"[338] Thus, in *Coker*, the Court was able to avoid addressing the glaring racial discrimination issue in violation of the Fourteenth Amendment. Instead, it held that the death penalty was a disproportionately severe punishment for the crime of rape in violation of the Eighth Amendment. Considering the Court's sidestepping in *Coker*, it is easier to recognize the role that race played in *Marzullo*. These realities help explain why the Court denied certiorari in *Marzullo* and why it granted certiorari in a very different case four years later. That case, *Strickland v. Washington*, involved a Black defendant and three highly aggravated murders.[339]

C. Strickland v. Washington *as the Vehicle*

The Court could have relied on other cases to establish the ineffective assistance of counsel standard. It chose *Strickland v. Washington*, a Dade County, Florida, case involving an indigent Black defendant, David Leroy Washington, who pleaded guilty to "a ten-day crime spree,"[340] and his white court-appointed lawyer, William (Bill) Tunkey.[341] By the late 1970s, the perception that Black men were

over-criminalization of interracial rape involving Black men and white women); *id.* at 594 (noting relative over-penalization of Black men relative to white men). A 1962 study found that between 1923 and 1962, Maryland executed more than three times as many Black defendants for rape as it did white defendants. COMM. ON CAP. PUNISHMENT, REP. OF THE COMM. ON CAP. PUNISHMENT TO THE LEGIS. COUNCIL OF MD. 8 (1962).

335 DPIC, ENDURING INJUSTICE, *supra* note 142.

336 Conversely, Black defendants are disproportionately wrongfully convicted of rape. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 66–67 (2008) (finding that "73% of innocent rape convicts were Black or Hispanic, while one study indicates that only approximately 37% of all rape convicts are minorities") (footnotes omitted).

337 Marzullo v. Maryland, 561 F.2d 540, 546 (4th Cir. 1977); *see* Baker, *supra* note 334, at 594–97; *id.* at 594 (observing that "Black men who rape white women receive much greater penalties than do other men who rape white women").

338 Sheri Lynn Johnson, Coker v. Georgia*: Of Rape, Race and Burying the Past*, in DEATH PENALTY STORIES 171, 190 (John H. Blume & Jordan M. Steiker eds., 2009).

339 466 U.S. 668, 671 (1984).

340 Washington v. Strickland, 673 F.2d 879, 883 (5th Cir. Unit B 1982).

341 *See* WRT TUNKEYLAW, https://www.tunkeylaw.com [https://perma.cc/63FN-E6XN] (containing a picture of Bill Tunkey and referencing his representation of David Washington).

inherently criminal and dangerous was firmly entrenched in the American imagination.[342] This Section looks beyond the racial significance of Mr. Washington as a Black man convicted of multiple murders: It also interrogates how Mr. Tunkey's whiteness and racialized professional status as a lawyer contributed to the Court's development of the ineffective assistance of counsel standard.

1. The Case

In September 1976, David Washington engaged in a series of crimes that left three people dead.[343] Within weeks, he surrendered to Dade County authorities. On October 7, 1976, the state indicted Mr. Washington for multiple offenses, including one count of first-degree murder, a death-eligible offense.[344] The same day, the court appointed Bill Tunkey, a public defender, to represent him.[345] Counsel began preparing for trial.[346] Against counsel's advice, Mr. Washington confessed to two other murders, which resulted in additional first-degree murder charges, also death-eligible offenses.[347] On December 1, 1976, again against Mr. Tunkey's advice, Mr. Washington confessed to all of the charges he faced and waived his right to a jury at the sentencing hearing.[348]

Under Florida's new post-*Furman* death penalty statute, the trial judge was tasked with weighing aggravating factors against mitigating factors to determine whether to sentence the defendant to death.[349] The nature of the state's case in aggravation was clear: It would involve details of the "crime spree." At this point, the focus of Mr. Tunkey's representation should have shifted gears from defending against the charges to developing life-saving mitigating evidence to present at sentencing.[350]

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342 *See, e.g.*, N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1342–46 (2004) (describing the modern myth of Black men as dangerous and criminal).

343 *Washington*, 673 F.2d at 883.

344 *Id.*

345 *Id.*

346 *Id.*

347 *Id.*

348 *Id.*

349 *See* Proffitt v. Florida, 428 U.S. 242, 251 (1976) (finding that Florida's new death penalty statute met "the constitutional deficiencies identified in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)]"), *overruled by* Hurst v. Florida, 577 U.S. 92, 94 (2016) (holding Florida's death penalty scheme, whereby the jury gave a sentencing recommendation to the judge, who then made findings to determine the sentence, unconstitutional).

350 *See* Gregg v. Georgia, 428 U.S. 153, 191 (1976) ("The obvious solution . . . is to bifurcate the proceeding . . . [and] once guilt has been determined opening the record to the further information that is relevant to sentence.").

Defense counsel acknowledged that "he was immobilized by a 'hopeless feeling'" after Mr. Washington confessed to the murders, and that "he did not feel that 'there was anything . . . [he] could do . . . to save David Washington from his fate.'"[351] Initially, Mr. Tunkey spoke with Mr. Washington in jail and called Mr. Washington's wife and mother, neglecting to meet with them in person.[352] But after Mr. Washington admitted to the murders, Mr. Tunkey abandoned further mitigation efforts. He essentially gave up.[353] Defense counsel failed to interview any other witnesses who could have provided information about Mr. Washington's background or character, and he failed to investigate Mr. Washington's mental health to help explain Mr. Washington's mental and emotional state at the time of the crime.[354] At the sentencing hearing, Mr. Tunkey stated the obvious: Mr. Washington accepted responsibility for the crimes and was remorseful.[355]

Rather than engender sympathy in the eyes of the decisionmaker, Mr. Washington's admission of guilt reinforced notions of Black criminality and dangerousness.[356] As aggravation, the state offered evidence detailing the offenses.[357] Mr. Washington "planned and committed . . . three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft."[358] The victims were "[B]lack and white, young and old, male and female, all . . . murdered in torturous ways."[359] No one was spared. The judge found several aggravating circumstances and no mitigating circumstances.[360] He sentenced Mr. Washington to three death sentences for the murders and consecutive prison terms on the other charges.[361]

2. The Appeal

When Mr. Washington appealed his sentences due to ineffective assistance of counsel, there was still no uniform ineffective assistance

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[351] Brief for Respondent at 2, Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554).

[352] *See Strickland*, 466 U.S. at 672–73.

[353] *See id.* at 672; Brief for Respondent at 2, *Strickland*, 466 U.S. 668 (No. 82-1554).

[354] *Strickland*, 466 U.S. at 673.

[355] *Id.* at 673–74.

[356] *See* Ossei-Owusu, *supra* note 6, at 1224 (referring to David Leroy Washington's case as "epitomiz[ing] the uncomfortable fact of [B]lack criminality").

[357] *Strickland*, 466 U.S. at 674.

[358] *Id.* at 671–72.

[359] Washington v. Strickland, 673 F.2d 879, 908 (5th Cir. Unit B 1982).

[360] *Strickland*, 466 U.S. at 675 (noting that the trial judge found "no (or a single comparatively insignificant) mitigating circumstance").

[361] *Washington*, 673 F.2d at 883.

of counsel standard. The Florida Supreme Court relied on the standard identified in *Knight v. State*.[362] There, the Florida Supreme Court drew heavily from Judge Leventhal's plurality opinion from the District of Columbia Circuit Court.[363] That standard closely resembled a two-prong test where the defendant carried the burden. Like the "farce and mockery" standard, the two-prong test favored the state. The two-prong test buoyed poorly performing lawyers by requiring defendants to show that defense counsel's performance impacted the outcome of their case. In the racialized hierarchy between counsel and client, this was one of the least disruptive tests.

First, the Florida Supreme Court required the defendant to show counsel's deficiency, which had to be substantial and measure "below that of competent counsel."[364] Secondly, the defendant was required to prove prejudice, meaning counsel's deficiency affected the outcome of the proceeding.[365] Lastly, the state could rebut defendant's proof by showing that there was no prejudice beyond a reasonable doubt.[366] Applying this standard, the Florida Supreme Court denied Mr. Washington's claim, explaining that Mr. Washington failed to show that Mr. Tunkey's deficiencies resulted in prejudice.[367] Essentially, Mr. Tunkey's poor performance did not matter because Mr. Washington's guilt was overwhelming.

Mr. Washington then filed a petition in federal district court, seeking habeas relief for ineffective assistance of counsel. Through counsel, he filed several affidavits from family members, friends, employers, and teachers, all of whom indicated that they would have been willing to testify at trial, but that no one from Mr. Washington's trial defense reached out to them.[368] These affidavits revealed that Mr. Washington was a "responsible, non-violent, young man who did not use drugs or alcohol, [and] was active in his church and devoted to his family."[369] Mr. Washington also furnished affidavits from medical experts explaining that during childhood, he had experienced "physical abuse and [an] unstable family situation," which contributed to his "severe frustration, anxiety and depression" about his family's current financial problems.[370]

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362 *Id.* at 884 (citing Knight v. State, 394 So. 2d 997 (Fla. 1981)).

363 United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976) (en banc) (plurality opinion).

364 *Washington*, 673 F.2d at 884 n.1.

365 *Id.*

366 *Id.*

367 *Id.* at 884 (citing Washington v. State, 397 So. 2d 285, 286 (Fla. 1981)).

368 *Id.* at 886–88.

369 *Id.* at 887–88.

370 *Id.* at 888.

The state called Mr. Tunkey and the original sentencing judge, Judge Richard Fuller, as witnesses. Mr. Tunkey admitted to making "minimal" efforts at reaching out to other witnesses.[371] He failed to investigate or present any of the mitigating evidence Mr. Washington presented during post-conviction. When the state asked Judge Fuller if the evidence contained in Mr. Washington's affidavits would have altered the judge's decision to sentence Mr. Washington to death, he said no.[372]

The federal district court relied on a similar two-prong test, requiring the defendant to show both deficient performance and prejudice as a result. After considering the evidence and arguments, the court concluded that Mr. Tunkey's performance was lacking and that he "fail[ed] to conduct an adequate investigation in preparation for [Mr.] Washington's sentencing hearing."[373] But then, it held Mr. Tunkey up as "a competent, experienced criminal attorney, who . . . was faced with a unique and potentially overwhelming situation."[374] It explained that Mr. Washington's desire to take responsibility for the crimes "impaired" Mr. Tunkey's "professional judgment."[375]

Although the district court acknowledged Mr. Tunkey's errors in representation, it denied Mr. Washington's ineffective assistance of counsel claim because it found that Mr. Washington failed to meet his burden of proving prejudice.[376] Research shows that decisionmakers give more weight to mitigating evidence when the defendant is white and are significantly more likely to discount mitigating evidence in favor of a death sentence when the defendant is Black.[377] Again, Mr. Tunkey's incompetent representation did not matter in light of Mr. Washington's guilt. In the district court's view, Mr. Washington was less deserving of constitutionally sound representation because he had engaged in criminal conduct. The racialized understanding of defense counsel and defendant enabled the court to place the consequences of defense counsel's inadequacy on Mr. Washington instead of on Mr. Tunkey.

The federal district court's decision denying Mr. Washington's ineffective assistance of counsel claim echoed the Court's reasoning in *Michel*. Just as in *Michel*, the district court pointed to defense

371 *Id.* at 886.

372 *Id.* at 889.

373 *Id.* at 890.

374 *Id.*

375 *Id.*

376 *Id.*

377 Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 583–84 (2011).

counsel's experience, professional status, and competency in denying the defendant's claim. The difference here was that the district court considered Mr. Washington's claim using a standard that required a prejudice showing, something the Court did not consider in *Michel*. However, the outcome was the same.

The factors the court considered—Mr. Tunkey's experience, professional status, and competency—were all racialized as white, meaning evoking them evoked power and privilege. The court deployed this power and privilege over Mr. Washington and his claim that defense counsel violated his constitutional rights. From the district court's perspective, it was as though Mr. Tunkey's acceptance of appointment was enough. Mr. Washington, indigent, Black, and guilty, should have been grateful to receive a lawyer. Defense counsel merely needed to show up.

As the district court acknowledged, Mr. Washington's crimes overwhelmed defense counsel. Mr. Washington's crimes also overwhelmed his constitutional right to effective counsel. The racialized construction of crime—here, three murders and related crimes—prevented defense counsel from recognizing that Mr. Washington had a life story worth investigating and presenting to the decisionmaker.

David Washington then appealed to the United States Court of Appeals for the Fifth Circuit.[378] Reviewing the district court's analysis, the appellate court was concerned that the lower court failed to properly review whether Mr. Tunkey was ineffective without considering prejudice.[379] It also found that Judge Fuller's testimony from the district court hearing, assessing whether Mr. Washington's new evidence would have made a difference, was inadmissible.[380] For these reasons, the appellate court reversed and remanded the case back to the district court for reconsideration. It was a partial, short-lived victory for Mr. Washington. In response, Warden Strickland requested and received an en banc hearing before the full circuit.[381]

The en banc circuit court weighed in to clarify the circuit's two-pronged ineffective assistance of counsel standard.[382] It declared that the prejudice prong required the petitioner to show that counsel's deficient performance "resulted in actual and substantial disadvantage

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[378] During the appeal process, Congress split the United States Court of Appeals for the Fifth Circuit, moving Alabama, Georgia, and Florida to the newly-created Eleventh Circuit, effective October 1, 1981. Mr. Washington's case remained in the Fifth Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

[379] *Washington*, 673 F.2d at 906.

[380] *Id.* at 903.

[381] Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc).

[382] *Id.* at 1258.

to . . . his defense."[383] With regard to counsel's performance, it announced that the reviewing court's assessment of the reasonableness of counsel's conduct was intertwined with case-specific strategy.[384] Accordingly, it found that the district court had not given enough weight to Mr. Tunkey's strategic choices in light of the overwhelming evidence of guilt facing Mr. Washington.[385] As such, the en banc court found that the district court failed to appropriately consider the reasonableness of Mr. Tunkey's decision to not investigate and present more robust mitigating evidence.[386]

In its review, the en banc court embraced one of the takeaways from *Michel*.[387] It reasoned that a reviewing court would not necessarily need to find a lawyer incompetent, despite the lawyer's decision not to investigate potentially life-saving mitigating evidence, if the failure to investigate was the result of a "strategic choice."[388] In essence, the appellate court placed great weight on defense counsel's decisionmaking, to the detriment of the defendant. It remanded the case back to the federal district court with instructions to follow this clarified standard.[389] Before the district court could apply the standard, Warden Strickland filed a petition for certiorari before the United States Supreme Court.[390]

3. Formulating the Ineffective Assistance of Counsel Standard

The Court granted Warden Strickland's petition for certiorari, accepting the invitation to identify a uniform ineffective assistance of counsel standard.[391] Writing for the majority, Justice O'Connor turned to the facts of the crime.[392] When a person's guilt is not in question, it is easier to excuse the system's denial of that person's basic rights. Given the perception that Black people are less deserving of empathy and more deserving of punishment, this is an even easier exercise when the defendant is Black.[393] This is why Justice Clarence Thomas

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383 *Id.* at 1262.
384 *Id.* at 1251.
385 *See id*.
386 *See id.*
387 Michel v. Louisiana, 350 U.S. 91, 101 (1955) ("The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness.").
388 *Washington*, 693 F.2d at 1251.
389 *Id.* at 1263–64.
390 Strickland v. Washington, 466 U.S. 668, 683 (1984).
391 *Id.* at 684.
392 *Id.* at 671.
393 *See, e.g.*, Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019) (finding that Americans have less empathy for Black people and harbor racialized views of retribution as Black and mercy and leniency as white).

often recites the gruesome details of a crime when authoring an opinion denying relief to a criminal defendant or dissenting from the majority's grant of relief.[394] Justice Sonia Sotomayor has criticized this tactic, reminding her colleagues that the "Constitution insists . . . that no matter how heinous the crime, any conviction must be secured respecting all constitutional protections."[395]

The racialized construction of the legal profession was also relevant.[396] Mr. Tunkey's status as a lawyer shielded him from the Court's harshest criticism and afforded him a presumption of competency and reasonableness. Unlike the lower federal court opinions, the Court never mentioned defense counsel by name. Although a finding of ineffective assistance of counsel would not impact a lawyer's eligibility to practice law, Bill Tunkey's professional reputation was at stake. The Court's oblique reference to Mr. Tunkey as "defense counsel" or "appointed counsel" allowed his professional status as a lawyer to obscure and soften his poor performance. Bill Tunkey's reputation as an "experienced" and "competent" defense counsel remained untainted.[397]

Though the decision was devoted to determining whether Bill Tunkey's actions adhered to the constitutional requirements for the right to effective counsel, it was David Washington's name all over the opinion. Mr. Washington's conduct was not in question; that was a settled issue. Mr. Washington's culpability should not have been part of the Court's consideration of whether trial counsel's conduct constituted a denial of his constitutional rights.

When identifying the proper ineffective assistance of counsel standard, the Court turned to *Michel v. Louisiana*, a case saddled with the legacy of slavery and white supremacy, where Black people were

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394 *See* Yvette Borja, *Clarence Thomas Remains Very Upset that "Criminals" Have "Civil Rights*," BALLS & STRIKES (Nov. 15, 2022), https://ballsandstrikes.org/scotus/clarence-thomas-civil-rights-very-upset [https://perma.cc/G96X-3RX9]; *see also, e.g.*, Shinn v. Ramirez, 142 S. Ct. 1718, 1728–29 (2022) (recounting vivid details about the crimes for which Mr. Ramirez and Mr. Jones were convicted, despite lower federal court holdings that Mr. Ramirez lacked the requisite mental culpability and Mr. Jones was likely innocent); Buck v. Davis, 580 U.S. 100, 131–33 (2017) (Thomas, J., dissenting) (describing the defendant's crimes in graphic detail as a "killing spree" and his "startling" lack of remorse).

395 *Shinn*, 142 S. Ct. at 1740–41 (Sotomayor, J., dissenting).

396 *See supra* Section I.C.

397 At publication, Bill Tunkey was still a practicing criminal defense attorney in Florida who advertised his services on a professional website. *See* WRT TUNKEYLAW, *supra* note 341. Under a section labeled "U.S. Supreme Court," the website noted Mr. Tunkey's defense of David Washington at trial. *Id.* It included the synopsis: "[T]he Court formulated the still valid [ineffective assistance of counsel] standard . . . and ruled that Bill Tunkey, the lead counsel for Mr. Washington, satisfied the test and provided effective assistance of counsel to his client." *Id.*

excluded from critical decisionmaking roles and counsel's status as a white lawyer afforded him the presumption of competency and reasonableness. This racist history is absent from *Strickland*, but the Court's reliance on *Michel* props up and perpetuates this legacy for all future ineffective assistance of counsel determinations.

In *Strickland*, the Court recognized that the lower federal courts agreed that "the proper standard for attorney performance is that of reasonably effective assistance."[398] Questions remained about whether the Court should adopt that standard, what conduct is considered reasonable, how to measure effective assistance, and what level of effectiveness met the Constitution's requirement. The Court also noted ambiguity among the lower courts about prejudice.[399] For answers, it turned to *Michel v. Louisiana*.

Citing *Michel*, the Court explained that the Constitution "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."[400] Thus, the starting premise was that defense counsel would meet the demands that the Sixth Amendment envisioned. The law presumed that defense counsel, by virtue of being a lawyer, would provide effective representation. Then, to justify that presumption, the Court expected the legal profession to develop its own defense standards, which reviewing courts would rely upon to determine whether counsel performed effectively.

This circular and confusing justification placed the measure of effectiveness firmly in the hands of a racialized and privileged profession. Disempowered and marginalized defendants would have little hope for relief. Under this rubric, a defense lawyer who merely showed up to accept appointment could be deemed effective. The Constitution envisioned more than a warm-bodied defense. Perhaps a more workable standard is something closer to the guidelines approach, whereby reviewing courts assess defense counsel's conduct relative to minimum professional guidelines, without a presumption of competency and without requiring the defendant to prove prejudice, although even that standard relies on racialized professional norms under the guise of "guidelines." But enforcement of the Constitution's full requirements—something this nation has yet to do for Black people—would disrupt the stabilizing force Black people provide at

398 Strickland v. Washington, 466 U.S. 668, 687 (1984).

399 *Id.* at 684.

400 *Id.* at 688 (citing Michel v. Louisiana, 350 U.S. 91, 100–01 (1955)).

the bottom of the racial hierarchy.[401] Adhering to the Constitution's full guarantee of due process and equal protection would also destabilize the criminal legal system as a tool for social control.

The Court's presumption that defense counsel would meet the Constitution's demands was not the only presumption. *Strickland* went further, again relying on *Michel*. It mandated that reviewing courts presume that trial "counsel's conduct [fell] within the wide range of reasonable professional assistance."[402] As a guide for reasonableness, the Court referred to "prevailing professional norms," such as those found in the ABA Standards for Criminal Justice.[403] It then placed the burden of overcoming this presumption on the defendant. The Court explained that in certain circumstances, counsel's challenged conduct might constitute "sound trial strategy."[404] The Court's presumption of reasonableness, its placement of the burden on the defendant, and the assumption that trial counsel acted competently cemented the racialized hierarchy between defense counsel and the defendant.

The Court applied its newly articulated ineffective assistance of counsel standard to Mr. Tunkey's conduct in preparation for and during trial.[405] The analysis comprised only a page and a half of the majority's thirty-page decision.[406] Like in *Michel*, the inquiry did not start with defense counsel's conduct as it related to the underlying trial. It started with the presumption that Mr. Tunkey's representation met the Sixth Amendment's requirements. The Court extended a presumption of competence to Mr. Tunkey by virtue of him being a lawyer, without consideration of his actual conduct on behalf of Mr. Washington. The racialized construction of the legal profession meant that Mr. Tunkey's conduct as defense counsel was reasonable merely because he was a lawyer. It was as if Mr. Washington, an indigent Black man guilty of murder, should have been grateful that a white lawyer accepted appointment. Mr. Washington's claim was dead in the water.[407] The Sixth Amendment right to counsel must require more. And if the state cannot meet the demand of supplying effective counsel to indigent defendants, then the solution is not to enable inad-

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401 *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 8 (1992).

402 *Id.* at 689 (citing *Michel*, 350 U.S. at 101).

403 *Id.* at 688 (citing 1 STANDARDS FOR CRIM. JUST. 4-1.1 to -8.6 (AM. BAR ASS'N, 2d ed. 1980)).

404 *Id.* at 689 (quoting *Michel*, 350 U.S. at 101).

405 *Id.* at 698.

406 *Id.* at 698–700.

407 *See id.* at 698 (concluding that the facts of Mr. Washington's case "make clear that the conduct of respondent's counsel . . . cannot be found unreasonable").

equate representation; the solution would be to bring fewer criminal prosecutions.

The ineffective assistance of counsel standard prioritized and preserved defense counsel's professional reputation at the expense of the defendant's constitutional right to effective representation. It also enabled the criminal adjudication system to continue operating as a social organizing tool. Borrowing directly from *Michel*, the Court in *Strickland* extended the benefit of the doubt in defense counsel's favor, relying on "strategy" to explain away counsel's inaction on the case. In *Michel*, the Court excused Mr. Mahoney's failure to challenge the exclusion of Black people from the grand jury as "sound trial strategy."[408] The Court classified Mr. Tunkey's failure to investigate and present Mr. Washington's character and background as reasonable because it was based on sound trial "strategy."[409]

Under the ineffective assistance of counsel standard, courts have broad latitude to categorize counsel's conduct as strategy and are cautioned not to second-guess counsel's decisions to take a particular course of action or to not take one.[410] Labeling inaction, or misconduct, as strategy also forestalls a finding of deficient performance.[411] Without a finding of deficient performance, the ineffective assistance of counsel standard does not require a reviewing court to engage with whether counsel's conduct prejudiced the defendant. Nevertheless, in *Strickland*, the Court still provided a prejudice analysis.[412] In the Court's view, information that Mr. Washington "was generally a good person" and that he was "under considerable emotional stress" at the time of the crime would have "barely . . . altered" the information the judge considered.[413]

Baked into the Court's conclusion that mitigating evidence would not have made a difference was a racialized understanding of defense counsel and indigent defendants. As a lawyer—with all the racialized power and privilege of the profession—Mr. Tunkey's judgment not to

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408 *Michel*, 350 U.S. at 101.

409 *Strickland*, 466 U.S. at 699.

410 *Id.* at 689 (requiring reviewing courts to be "highly deferential" to trial counsel and to "eliminate the distorting effects of hindsight").

411 Proving ineffective assistance of counsel requires the defendant to show both deficient performance and prejudice. There is a narrow set of circumstances where counsel's conduct amounts to an effective denial of the right to counsel or wholly fails to meet the basic constitutional requirements; in these instances, prejudice is presumed. *See* Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980) (presuming prejudice where defense counsel represented conflicting interests); United States v. Cronic, 466 U.S. 648, 659 (1984) (presuming prejudice where defense counsel failed to subject defendant's case to the adversarial process).

412 *Strickland*, 466 U.S. at 699–700.

413 *Id.* at 700.

investigate or present such evidence was above reproach. The Court extended a presumption of competence and reasonableness to Mr. Tunkey by virtue of his profession. Conversely, the Court was incapable of extending empathy or mercy to Mr. Washington, a Black man convicted of three murders, nor could it conceive of the trial judge extending Mr. Washington mercy.[414] Thus, the Court could not fathom that evidence about Mr. Washington's background and character, evidence that would have revealed his human frailties,[415] would make a difference.

Justice Marshall, the first Black member of the Court, was troubled by the majority's prejudice requirement. In his dissent, Justice Marshall cautioned that the prejudice requirement could result in a "manifestly guilty defendant" being denied constitutionally effective representation.[416] He believed the Constitution entitled all defendants to receive effective representation, not just those wrongfully convicted. At the time, Justice Marshall was the only member of the Court with experience defending indigent people charged with a crime.[417] He had intimate knowledge of the racialized criminal adjudication system, especially as it related to Black defendants charged with interracial rape and facing capital punishment.[418] As a litigator, Justice Marshall's very existence challenged the racialized norms of practice.[419] Whereas defense counsel's mere acceptance of appointment was enough in *Michel v. Louisiana*,[420] anything more on behalf

414 *See* Levinson, Smith & Hioki, *supra* note 393.

415 *See, e.g.*, Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 321–25 (1983) (describing the need to present the defendant to the decisionmaker as a human being in death penalty cases).

416 *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting).

417 *See, e.g.*, Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369 (1994) (discussing Justice Marshall's experience defending people charged and convicted of crimes and how it shaped his decisionmaking on the Court).

418 *See, e.g.*, GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (Harper Perennial 2013) (2012) (detailing the capital prosecution of four Black youths charged with raping a white woman in Lake County, Florida, and Thurgood Marshall's involvement as defense counsel); Jacey Fortin, *Florida Pardons the Groveland Four, 70 Years After Jim Crow-Era Rape Case*, N.Y. TIMES (Jan. 11, 2019), https://www.nytimes.com/2019/01/11/us/groveland-four-pardon-desantis.html [https://perma.cc/LEQ2-255K] (reporting on Governor DeSantis' pardon of the four Black men who were defended by Thurgood Marshall, seventy years later).

419 *See, e.g.*, KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 85–86 (2012) (describing Marshall's mentor, Charles Houston, appearing in a Southern courtroom in the 1930s and "challeng[ing] social etiquette" with his mere presence).

420 *See supra* Section II.A.

of Black men charged with interracial rape threatened to go outside social and professional norms.[421]

The decision denying Mr. Washington habeas relief meant that the state could carry out his sentence. David Washington met the same fate as John Michel. Two months after the Court issued its order, Florida executed Mr. Washington by electrocution.[422]

D. Strickland*'s Legacy*

As *Michel* and *Strickland* demonstrate, white supremacy and anti-Black racism shaped the Court's development of the right to effective counsel. But this history starts even earlier.

In *Powell v. Alabama*, the Court first required states to provide counsel to poor, illiterate, Black defendants charged with capital crimes.[423] The Court's racial framing and paternalism cemented the hierarchy whereby Black people required the "guiding hand of counsel" to protect them from obvious injustice.[424] The decision gave the appearance of due process without addressing the racially discriminatory application of criminal prosecutions.

In *Gideon v. Wainwright*, the Court sought to extend this right to indigent defendants charged with lesser crimes.[425] There, the only explicit mention of race was in the state's brief in opposition. Florida noted that the trial proceedings neglected to discuss Mr. Gideon's "age, education, [and] work experience," but that it was important to "point[] out that Petitioner is a white male."[426] According to Florida, Mr. Gideon's whiteness—with all its power and privilege—indicated that he did not need appointed counsel. Defense lawyers were only intended for Black defendants to give the appearance of due process in the face of a racially discriminatory adjudication system.

Nearly forty years later, *Strickland*'s ineffective assistance of counsel standard is more effective at protecting poorly performing lawyers than at providing relief to aggrieved defendants. Despite the

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421 *See* KING, *supra* note 418, at 278–79 (describing threats on Thurgood Marshall's life while representing the three surviving men convicted of interracial rape); Mann, *supra* note 173, at 145 (noting that lawyers willing to represent Black defendants in the South were vulnerable to "a wide range of adverse responses including social ostracism, loss of clients, loss of employment, trumped-up criminal charges, the threat of disbarment, and physical violence") (citation omitted).

422 Jesus Rangel, *Confessed Murderer of 3 Executed in Florida*, N.Y. TIMES, July 14, 1984, at 24.

423 287 U.S. 45, 51–52 (1932).

424 *Id.* at 69.

425 372 U.S. 335 (1963).

426 Brief for Respondent at 18, Gideon v. Cochran, 372 U.S. 335 (1963) (No. 155), 1963 WL 66427.

prevalence of ineffective assistance of counsel claims in state and federal courts,[427] very few defendants prevail.[428] A study found that courts denied about eighty percent of ineffective assistance of counsel claims raised by defendants who later proved their innocence through DNA evidence.[429] This Article posits that one barrier to relief is the Court's racialized presumption of counsel's competency and reasonableness when adjudicating ineffective assistance of counsel claims. The Court's presumptions, based on norms of practice, are racialized as white. Ignoring this reality curtails an understanding of the ineffective assistance of counsel standard and its operation, and limits the scope of proposed solutions.

IV
The Presumption of Reasonableness and Competency

This Part interrogates the racialized norms of practice, both official practice standards and the profession's unofficial culture. Both inform how courts view the reasonableness of counsel's conduct and counsel's competency. It then examines how these racialized norms can impact the Court's determination of defense counsel's conduct. To do so, this Part compares *Florida v. Nixon*[430] and *McCoy v. Louisiana*,[431] two cases involving Black defendants facing capital charges and overwhelming evidence of guilt. In each case, defense counsel made the strategic decision to concede his client's guilt to garner sympathy from the jury. However, one critical difference was that defense counsel in *Nixon* was white, and defense counsel in *McCoy* was Black.[432] The Court's analysis of the Sixth Amendment right to counsel in each case exemplifies the racial construct of the legal profession and notions of effectiveness.

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427 *See, e.g.*, Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Executive Summary: Habeas Litigation in U.S. District Courts 5 (2007) (examining federal habeas petitions in state capital and non-capital cases and finding ineffective assistance of counsel claims in over eighty percent of capital cases and over fifty percent of non-capital cases).

428 *See, e.g.*, Ossei-Owusu, *supra* note 6, at 1228–30.

429 Emily M. West, Innocence Project, Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases 3 (2010).

430 543 U.S. 175 (2004).

431 138 S. Ct. 1500 (2018).

432 *See Nixon*, 543 U.S. at 182 (describing Mr. Nixon's dissatisfaction with his lawyer and demand for a Black lawyer instead); Jeffery C. Mays, *To Try to Save Client's Life, a Lawyer Ignored His Wishes. Can He Do That?*, N.Y. Times (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/nyregion/mccoy-louisiana-lawyer-larry-english.html [https://perma.cc/T8GX-NNVZ] (showing a picture of Mr. McCoy's attorney, a Black man).

A. Interrogating Racialized Norms of Practice

The legal profession is, and has always been, a white profession.[433] The profession was shaped by white people, white culture, and white values.[434] The profession's efforts to exclude people of color and others who did not conform to notions of "whiteness" helped cement its racialized status. In the early 1900s, a motivating factor for the profession's promulgation of standards and norms was "class and ethnic hostility" directed at "outsiders" attempting to enter the profession.[435] Decades later, these standards and norms of practice are what guide courts' determinations of defense counsel's effectiveness. So entrenched are these racialized practice norms that one historian, Jerold Auerbach, wondered whether the legal profession's "legacy of prejudice" could *ever* allow it to be a vehicle for "equal justice when the legal profession . . . structured [itself] to reflect and reinforce social inequality . . . ."[436]

The prominent role the ineffective assistance of counsel standard places on practice norms invites us to interrogate their development. This interrogation looks at both official and unofficial practice norms because both contributed to the Court's understanding of reasonable conduct. In *Michel*, the Court looked to defense counsel's reputation in the local legal community to determine whether his conduct was reasonable.[437] In *Strickland*, the Court explicitly pointed to the ABA Standards for Criminal Justice to guide its determination of whether defense counsel's conduct was reasonable.[438]

1. Historical Background of the ABA Standards for Criminal Justice

The ABA Standards for Criminal Justice reflected the legal profession's ongoing efforts, beginning in the 1960s, to apply order and regulation to a sharp increase in the demands on the criminal legal

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433 *See, e.g.*, Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015, 8:25 AM), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that [https://perma.cc/J6RQ-3VXD].

434 *See, e.g.*, Pearce, *supra* note 32, at 2091 (describing the profession's "'bleaching out' approach" that "discourage[s] white lawyers from acknowledging that their race is an influence" on practice).

435 AUERBACH, *supra* note 35, at 50, 52.

436 *Id.* at 10.

437 *See* Michel v. Louisiana, 350 U.S. 91, 101 n.7 (1955) (concluding that defense counsel was "exceptionally qualified" because the local bar honored him with a plaque for his fifty-plus-year career as a criminal lawyer).

438 Strickland v. Washington, 466 U.S. 668, 688 (1984) (citing 1 STANDARDS FOR CRIM. JUST. 4-6 to -117 (AM. BAR ASS'N, 2d ed. 1980)).

system.[439] The legal profession's burgeoning focus on creating clearer professional standards for criminal lawyers also occurred in the immediate wake of *Gideon v. Wainwright*, which recognized that the Constitution required states to provide attorneys to indigent defendants.[440] Without guidance from the Court on how states were supposed to fund or otherwise logistically implement such an enterprise, local jurisdictions were left scrambling to comply.[441]

Throughout the decade and across the country, Black people mounted widespread demonstrations against structural racism, abusive police practices, and inadequate social services.[442] Law enforcement responded to the civil disobedience with mass arrests and prosecutions.[443] In its examination of the uprisings, the Kerner Commission observed that the criminal legal system was ill equipped to provide due process to the accused, many of whom were Black. The "[m]ost prominent" issue "was the shortage of experienced defense lawyers to handle the influx of cases in any fashion approximating individual representation."[444] The Report noted that the "riot situations" made the need for "prompt, individual" legal counsel "particularly acute."[445] Black people in urban communities did not hide their criticism of the "'assembly-line' justice" they received at the hands of the legal profession.[446]

These forces helped motivate the ABA to create detailed standards of practice for lawyers engaged in criminal defense work. Perhaps this was also the legal profession's preemptive effort to pro-

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439 *See* Kenneth J. Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution and Future*, 59 DENV. L.J. 3, 4 (1981) (noting the profession's "deep concern over the burgeoning problems of crime" in the 1960s (quoting Tom C. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOTRE DAME L. REV. 429, 429 (1972))).

440 372 U.S. 335, 344 (1963) ("[O]ur state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials . . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

441 *See* Hoag, *supra* note 49, at 989–90, 992–93 (discussing how funding shortfalls, widely varying delivery models, and the War on Crime led to dramatic differences in the quality of representation that indigent defendants received in the immediate aftermath of *Gideon*).

442 *See* ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S (2021) (documenting the history of demonstrations against systemic anti-Black racism during the civil rights movement and in the decades afterward).

443 *See* KERNER COMMISSION REPORT, *supra* note 329, at 184 (describing how mass arrests of protestors "overwhelmed processing and pretrial procedures").

444 *Id.* at 186.

445 *Id.*

446 *Id.* at 183.

tect itself against complaints of malpractice from individual clients.[447] The organization began conceiving of uniform standards during Lewis Powell, Jr.'s tenure as ABA president from 1963 to 1965.[448] At the time, Powell was a practicing attorney. In 1972, Powell ascended to the United States Supreme Court and joined the majority opinion in *Strickland* that adopted the standards as reference guides for defense counsel's conduct.[449] In fact, Powell was one of four future members of the Court who participated in the project that became the ABA Standards for Criminal Justice.[450] Harry Blackmun also served on the project's advisory committee.[451] After joining the Court in 1970, Justice Blackmun was also in the majority that identified the standards as appropriate guides to measure counsel's effectiveness in *Strickland*.[452]

The drafters of the ABA Standards for Criminal Justice were leaders of the profession: academics, prosecutors, defense lawyers (both private and public), and judges. The majority were white and male, including Louis B. Nichols, the former chairman of the ABA Criminal Law Section who spearheaded the effort to implement the ABA standards.[453] Nichols had previously served as a top aide to FBI Director J. Edgar Hoover during the agency's problematic era of

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447 The formalization of legal ethics rules in the 1960s reflected an increase in the frequency of legal malpractice litigation. Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N. UNIV. L. REV. 1, 1–2 (1982). As tort liability for legal malpractice expanded, commentators believed that the standardization of ethics rules would benefit the profession, either by setting a consistent standard of care for legal malpractice, or by foreclosing expanded tort liability by reinforcing the profession's self-governing nature. *Compare* Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 286–95 (1979) (arguing for the use of ethics rules as a basis for malpractice liability), *with* Jean E. Faure & R. Keith Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 374–75 (1986) (arguing that ethics rules were intended to "ensure the integrity of the legal system as a whole" rather than provide a basis for private recovery).

448 *See* Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1112 (2011) (discussing how Justice Powell "oversaw the concept of issuing" uniform standards "to guide criminal litigators" as ABA president-elect and then president).

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

450 *See* Hodson, *supra* note 439, at 8 n.14 (noting the participation of Chief Justice Burger, Justice Abe Fortas, and Justice Harry A. Blackmun in the development of the ABA Standards for Criminal Justice).

451 *Id.*

452 *Strickland*, 466 U.S. 668.

453 *See* Hodson, *supra* note 439, at 9 (describing Nichols's 1968 proposal for the Criminal Law Section to "make a long-range commitment for a nationwide implementation" of the standards).

targeting political dissidents, including Black civil rights leaders.[454] Certain critical perspectives were missing from the standard's drafters, including Black people and indigent people who had been represented by appointed counsel. As a result, the ABA Standards for Criminal Justice reflected the norms, practices, and priorities of the legal profession's most privileged, and powerful, white people.

The ABA Standards for Criminal Justice were not the organization's first foray into formulating and adopting practice guides. It also produced ethical guides, the earliest of which was the 1908 ABA Canons of Professional Ethics.[455] The 1908 Canons reflected the shared values and culture of a small "homogeneous upper-class metropolitan" group of lawyers and contained "class and ethnic biases."[456] The 1908 Canons provided guidance on a range of professional issues, including the defense of indigent people accused of crimes.[457] These Canons borrowed heavily from the 1887 Canons of the Alabama State Bar, written by Thomas Goode Jones, a veteran of the Confederate army, two-time Alabama governor, and president of the Alabama State Bar Association.[458] Jones advocated white supremacy and assisted in drafting the 1901 Alabama Constitution, which established racial segregation as the state's organizing principle.[459] With surprisingly few modifications, the 1908 Canons carried through the twentieth century as the authoritative norms of lawyer conduct.[460] When the ABA promulgated the Model Code of Professional Responsibility in 1969, the Code borrowed heavily from the 1908 ABA Canons of Professional Responsibility.[461]

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454 *See* Joe Ritchie, *Louis Nichols Dies, Was No. 3 at FBI*, WASH. POST, June 10, 1977, at C8 (detailing Nichols's involvement in the FBI); GILMORE, *supra* note 50, at 354–55 (describing the FBI's "national network of agents" that surveilled Black people who advocated for civil rights).

455 *See Transactions of the ABA*, *supra* note 155, at 55–86 (adopting the Canons of Professional Ethics and discussing the work of the Committee on Code of Professional Ethics in forming them).

456 AUERBACH, *supra* note 35, at 42, 44.

457 *See* Comm. on Code of Pro. Ethics, *Final Report of the Committee on Code of Professional Ethics*, 33 ANN. REP. AM. BAR ASS'N 567, 576 (1908) (enumerating ethical principles governing the responsibilities of appointed counsel for indigent criminal defendants).

458 *See* Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471 n.2, 472, 478–79 (1998) (describing the 1908 ABA Canons' origin in the 1887 Alabama Canons, Jones's authorship, and his political and military record as a Confederate veteran and segregationist governor).

459 *Id.* at 479.

460 *See* Altman, *supra* note 34, at 2395–96 (noting that, though there were a few additions to the Canons, they were not changed substantially until the 1969 adoption of the ABA's Model Code of Professional Responsibility).

461 The commentary of Professor Geoffrey Hazard, Jr., who served as Reporter to the 1981 ABA Commission on the Evaluation of Professional Standards, illuminates the close

2. *Unofficial Professional Norms and Culture*

Beyond the official promulgation of standards and practice guides, the legal profession developed a distinct unofficial culture. The profession's culture mirrored the culture of those who had always been in charge: privileged, white males.[462] People with these identities were readily welcomed into the profession and had an easier time advancing within it. Through membership and advancement, the profession unofficially enforced and perpetuated a shared white supremacist identity and cultural values. These forces occurred with little introspection or awareness.[463] The legal profession's white supremacist culture privileged whiteness and discriminated against behavior and appearance that did not conform to whiteness. In these ways, the profession's unofficial norms were equally effective at shaping what conduct was considered reasonable and competent. Although the *Strickland* standard does not reference unofficial professional norms, these norms are firmly entrenched in the law's presumption of reasonableness and competency.

The racialization of the legal profession begins in law school, an environment that Bennett Capers has described as white.[464] Law school is a physical space where "white students predominate, and [Black students] are 'typically absent, not expected, or marginalized when present.'"[465] The black-letter law curriculum introduces students to norms, legal standards, and doctrines that are purported to be neutral, unbiased, and objective. Yet, these norms, standards, and doctrines are based on a dominant white perspective. This extends to classes covering the criminal legal system: Criminal Law, Criminal Procedure, and Evidence.[466] Many law students are introduced to

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relationship between the 1908 Canons and the ABA's modern ethics rules. Professor Hazard explicitly described the 1969 Code as "intended . . . [to] retain the ethical aspirational character of the old Canons of Professional Ethics of 1908 . . . ." Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 572 (1982).

462 *See* AUERBACH, *supra* note 35, at 19–21 (describing white, Anglo-Saxon Protestant "homogeneity" as "one of the salient characteristics of the legal profession" in the nineteenth century and noting how the profession's elite adapted to immigration and urbanization by "hitch[ing] professional values, which they were advantageously located to define, to the service of social stratification").

463 *See supra* note 434 and accompanying text.

464 *See* Bennett Capers, *Law School as a White Space*, 106 MINN. L. REV. 7, 21–25 (2021) (describing law schools, since their emergence in the 1850s, as "white spaces").

465 *Id.* at 21 (quoting Elijah Anderson, *"The White Space*," 1 SOCIO. RACE & ETHNICITY 10, 10 (2015)).

466 *See, e.g.*, Gonzales Rose, *supra* note 74, at 2300, 2302–03 (contending that legal professionals assume "that the white experience is the norm," that the "narratives and perspectives [of people of color] are kept out of legal history," and that academic and continuing legal education should incorporate a critical race analysis of evidence law).

Strickland v. Washington in Criminal Procedure Adjudication, an advanced course mixing constitutional and criminal law.[467] Students learn about the doctrine's two-prong test, but are unlikely to receive instruction about how the presumption of counsel's reasonableness and competency is rooted in white professional norms.

The racialization of the legal profession extends into practice. Literature reveals that white male professional norms can limit gender and racial diversity within private law firms, particularly in positions of leadership.[468] These norms shape who is viewed as appropriate, successful, and effective in terms of conduct, appearance, and performance.[469] In addition to limiting diversity within certain segments of the profession, there is evidence that white professional norms can impact who is subjected to professional discipline. A recent study found that the California Bar placed Black male attorneys on probation at a rate three times higher than their white male counterparts, and that the state bar was four times as likely to disbar Black male attorneys relative to white male attorneys.[470] Although the study found that there were many contributing factors, it concluded that race likely impacted the disparities.[471]

Here, the focus is on criminal defense lawyers. The profession's white supremacy shapes and polices who is seen as a lawyer, who is treated like a lawyer, and who can exist in spaces reserved for lawyers. Kenneth Mack described the conundrum Black lawyers in Southern courtrooms faced in the early 1930s. Mack observed that, "[t]heoretically," Black lawyers should have been able to "claim a common professional identity" enabling "them to do anything in court that whites did, even if the same kinds of things were forbidden just

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467 *See, e.g.*, CYNTHIA LEE, L. SONG RICHARDSON & TAMARA LAWSON, CRIMINAL PROCEDURE: CASES AND MATERIALS 823–30 (2d ed. 2018) (reproducing *Strickland* without critical commentary).

468 *See, e.g.*, DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 60–86 (2015) (describing the lack of gender and racial diversity within the profession, particularly in leadership roles, and the profession's values and conditions that limit diversity); TSEDALE M. MELAKU, YOU DON'T LOOK LIKE A LAWYER: BLACK WOMEN AND SYSTEMIC GENDERED RACISM (2019) (same).

469 *See* RHODE, *supra* note 468, at 66 (noting that the performances of women and people of color in legal jobs "fail to receive the presumption of competence enjoyed by white men"); MELAKU, *supra* note 468, at 26–27 (discussing how white, male norms of personal appearance and "ability to assimilate into existing firm culture" hamper law firms' efforts to diversify their workplaces).

470 Memorandum from Dag MacLeod, Chief of Mission Advancement & Accountability Div., to Members, Bd. of Trs., State Bar of Cal. 1 (July 16, 2020), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000026245.pdf [https://perma.cc/LCR8-7MGT].

471 *See id.* at 2 (explaining that many of the variables that contributed to the disparity were themselves probably affected by race).

outside the courthouse."[472] Such things would have included examining white witnesses, interacting with opposing counsel, and posing arguments to decisionmakers.[473] But racialized social norms prevented that. Mack noted that "[i]n some parts of the South, particularly white rural counties, locals . . . simply . . . forb[a]d[e] [B]lack lawyers from practicing in the courts."[474]

A century later, the profession's white supremacy still impacts Black defense attorneys simply attempting to serve their clients. Black defense counsel routinely experience court officials mistaking them for defendants when they appear in criminal court.[475] A recent study of state courts in New York found that nearly every attorney of color had been mistaken for someone other than an attorney, such as the defendant or an interpreter, and that many were asked to show identification or to move from the front row reserved for attorneys.[476] Bryan Stevenson, a Black lawyer, recalled self-consciously dressing "as conservatively as possible for court" so as to "meet the court's expectation of what a lawyer looked like."[477] At the time, he wore a beard and was concerned about what his appearance as a bearded Black man in the South would communicate to criminal court judges and how his appearance might negatively affect his clients.[478]

The alienating experiences of Black criminal defense lawyers illustrate the legal profession's white supremacist cultural identity. The law is accustomed to assigning value, privilege, and credibility to lawyers by virtue of their whiteness, but the racial identity of a Black person who is a lawyer challenges the basis of those assumptions. The law is accustomed to assigning dangerousness and culpability to Black people, but the professional identity of a Black person who is a lawyer challenges those assumptions too. In turn, these racialized norms contribute to courts' determinations of defense counsel's conduct. An examination of *Florida v. Nixon* and *McCoy v. Louisiana*, two capital cases involving lawyers who made factually identical strategic deci-

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472 MACK, *supra* note 419, at 85.

473 *Id.*

474 *Id.*

475 *See, e.g.*, Meagan Flynn, *'Lawyering While Black': Maryland Deputy Accused Attorney of Being a Suspect, Complaint Says*, WASH. POST (Mar. 28, 2019), https://www.washingtonpost.com/nation/2019/03/28/lawyering-while-black-maryland-deputy-accused-attorney-being-suspect-complaint-says [https://perma.cc/688A-YBD5] (reporting that a deputy sheriff detained a Black lawyer and required him to show proof that he was an attorney, after the lawyer appeared in court on behalf of his client who had failed to appear).

476 JEH CHARLES JOHNSON, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS 66 (2020).

477 BRYAN STEVENSON, JUST MERCY 165–66 (2014).

478 *Id.*

sions against their clients' wishes, illustrates the power of these racialized norms.[479]

B. Applying the Framework to Defense Counsel's Strategic Decisions: Florida v. Nixon *and* McCoy v. Louisiana

Since the Court identified a uniform ineffective assistance of counsel standard in *Strickland*, reviewing courts routinely deny defendants' claims. The racialized presumption of counsel's reasonableness and competency contributes to defendants' difficulty in meeting their burden of proving ineffectiveness. This Section compares two cases, *Florida v. Nixon* and *McCoy v. Louisiana*, to help illustrate the power of this racialized presumption in determining the success of defendants' claims. In each case, defense counsel faced overwhelming evidence of their client's guilt. As a strategic decision, counsel in *Nixon* and *McCoy* decided to concede guilt to garner sympathy from the jury. The tactic proved unsuccessful. After receiving death sentences, both defendants challenged their lawyers' conduct. Mr. McCoy prevailed; the Court reversed his conviction and sentence.[480] But Mr. Nixon did not. He is awaiting execution in Florida.[481] A critical difference is that Mr. McCoy's lawyer, Larry English, was Black,[482] whereas Mr. Nixon's lawyer, Michael Corin, was white.[483] The Court assigned a presumption of reasonableness and competency to Mr. Corin's conduct, yet refused to extend the same to Mr. English's, reinforcing the legal profession's racialized practice norms and notions of competency.

1. Florida v. Nixon

In August 1984, Jeanne Bickner's burned remains were discovered in Tallahassee, Florida.[484] Ms. Bickner was white.[485] The next day, police arrested Joe Nixon, a Black man; he immediately confessed. Law enforcement quickly began to collect "overwhelming evidence establishing that [he] had committed the murder in the manner he described."[486] The state indicted Mr. Nixon for first-degree capital

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479 543 U.S. 175 (2004); 138 S. Ct. 1500 (2018).

480 *McCoy*, 138 S. Ct. at 1512.

481 *See* Nixon v. Florida, 327 So. 3d 780, 781 (Fla. 2021) (per curiam) (denying Mr. Nixon's most recent appeal of his death sentence), *cert. denied*, 142 S. Ct. 2836 (2022).

482 *See* Mays, *supra* note 432 (showing a picture of Larry English, a Black man).

483 *See Nixon*, 543 U.S. at 182 (describing Mr. Nixon's disruptive behavior in court, where he was represented by Mr. Corin and demanded a Black lawyer instead).

484 *Id.* at 179.

485 *See* Mike Cassidy, *'The Pain Never Really Goes Away*,' TALLAHASSEE DEMOCRAT, Aug. 16, 1984, at B1 (showing a photo of Ms. Bickner, a white woman).

486 *Nixon*, 543 U.S. at 179–80.

murder, kidnapping, robbery, and arson.[487] The court appointed a local public defender, Michael Corin, to represent Mr. Nixon. The state refused to negotiate a plea offer for a sentence less than death, so Mr. "Corin concluded that the best strategy would be to concede guilt, thereby preserving his credibility [as a lawyer] in urging leniency during the [sentencing proceeding]."[488] Mr. Corin repeatedly explained his strategy to Mr. Nixon, who "was generally unresponsive."[489] At no point did Mr. Nixon approve the strategy.

Relying on his "professional judgment," Mr. Corin decided to concede Mr. Nixon's guilt despite failing to secure Mr. Nixon's consent.[490] Once trial proceedings began, Mr. Nixon became "disruptive and violent."[491] In response to Mr. Nixon's repeated outbursts and his threat "to misbehave if forced to attend trial," the judge found that Mr. Nixon waived his right to be present.[492] Thus, the trial began in Mr. Nixon's absence. According to Mr. Corin's plan, he conceded guilt during opening statements, he did not present a defense, and he again conceded guilt during closing argument.[493] The jury convicted Mr. Nixon on all charges.[494] During the sentencing proceeding, the state presented evidence detailing the aggravated nature of the crime.[495] Mr. Corin offered mitigating evidence from Mr. Nixon's family members and mental health experts to support the argument that Mr. Nixon was not an "intact human being" and thus did not deserve the death penalty.[496] The jury sentenced Mr. Nixon to death.[497] At the trial's conclusion, the judge commended Mr. Corin's representation, referring to the tactic of conceding guilt as "an excellent analysis of . . . [the] case."[498]

Mr. Nixon acquired new defense counsel for the direct appeal in state court, arguing that trial counsel rendered constitutionally ineffective assistance.[499] The argument focused on the fact that Mr. Corin failed to obtain Mr. Nixon's express consent before conceding guilt on Mr. Nixon's behalf. Relying on the ineffective assistance of counsel standard from *Cronic*, appellate counsel argued that the reviewing

487 *See id.* at 180.
488 *Id.* at 180–81.
489 *Id.* at 181.
490 *Id.* at 181–82.
491 *Id.* at 182.
492 *Id.*
493 *Id.* at 182–83.
494 *Id.* at 183.
495 *Id.* at 184.
496 *Id.*
497 *Id.*
498 *Id.*
499 *Id.* at 185.

court could presume prejudice because Mr. Corin failed to subject Mr. Nixon's case to the adversarial process.[500] The direct appeal was unsuccessful.

Mr. Nixon again relied on *Cronic* in his motion for post-conviction relief.[501] Initially, the Florida Supreme Court remanded the case for more factual development on whether Mr. Nixon consented to counsel's strategy. Finding that Mr. Nixon never consented, the Florida Supreme Court ultimately agreed that *Cronic* was the correct standard and granted relief.[502] It reasoned that counsel's duty was to hold the state to its burden, which defense counsel failed to do, and moreover, that Mr. Nixon's "silent acquiescence to counsel's strategy" was insufficient.[503] The victory was short-lived. The state of Florida filed a writ of certiorari before the United States Supreme Court.

The Court granted review to resolve whether Mr. Corin's failure to obtain Mr. Nixon's express consent to counsel's strategy violated Mr. Nixon's Sixth Amendment right to effective counsel.[504] Further, the Court sought to determine whether it should apply the *Cronic* standard, where prejudice is assumed, or the two-pronged *Strickland* standard, which would require Mr. Nixon to prove prejudice.[505] On the one hand, the Court acknowledged that counsel lacked the authority to enter a guilty plea on behalf of a client without the client's consent and that the client's "tacit acquiescence . . . is insufficient."[506] However, it also reasoned that because Mr. Corin explained his proposed strategy to Mr. Nixon several times and met resistance in response, counsel was not required to obtain Mr. Nixon's express consent.[507] Given the unique nature of a capital trial, the Court chose to analyze the case under *Strickland*. It explained that in a capital trial, defense counsel must consider both phases of trial (guilt and sentencing) when determining how best to proceed. Based on the overwhelming evidence of Mr. Nixon's guilt and trial counsel's desire to preserve his credibility in the sentencing phase of the proceeding, the Court concluded that counsel's strategy was reasonable and did not amount to deficient performance.[508]

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[500] Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1990).

[501] Nixon v. Singletary, 758 So. 2d 618, 621 (Fla. 2000) (remanding the case for an evidentiary hearing to determine whether Mr. Nixon affirmatively consented to counsel's strategy).

[502] Nixon v. State, 857 So. 2d 172, 174 (Fla. 2003).

[503] *Id.* at 176.

[504] Florida v. Nixon, 543 U.S. at 186.

[505] *Id.* at 186–87.

[506] *Id.* at 187–88.

[507] *Id.* at 189.

[508] *Id.* at 192.

Although the Court did not mention race in the decision, race was relevant throughout. It played a role in the state's decision to seek the death penalty,[509] the structural forces that resulted in Mr. Nixon requiring appointed counsel,[510] the jury's decision to sentence Mr. Nixon to death,[511] and, most importantly for this Article, in the Court's adjudication of Mr. Nixon's claim of ineffective assistance of counsel. For Mr. Nixon, the racial construction of effective counsel overshadowed his fundamental right to autonomy. Here, the Court decided that counsel—a white professional—knew best. It presumed Mr. Corin's conduct was competent and reasonable even though that conduct deprived Mr. Nixon—an indigent Black man—of his fundamental right to decide whether to plead guilty. The right to plead guilty is entrusted to the defendant alone; the usurpation of that right amounts to the denial of a defendant's fundamental right to autonomy.[512] The Court has long recognized that the decision to plead guilty requires "an affirmative showing that [the decision] was intelligent and voluntary."[513] That did not happen here. In the Court's view, Mr. Corin's professional competency trumped Mr. Nixon's autonomy.

In ruling against Mr. Nixon, the Court's underlying rationale for counsel's effectiveness echoed the rationale from *Michel* and *Strickland*.[514] Given Mr. Nixon's apparent guilt, the Court seemed to communicate that the defendant, an indigent Black man, was fortunate to have the assistance of a lawyer, any lawyer, even one who failed to provide meaningful assistance. It was as though Mr. Nixon had no business accusing a white man of professional incompetency. Then, in terms of the Court's view of Mr. Corin's performance, his whiteness provided a cloak of competency. With that cloak, Mr.

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509 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 353 (1987) (Blackmun, J., dissenting) (reviewing a study showing that defendants charged with killing white victims received the death penalty at a rate nearly eleven times higher than defendants charged with killing a Black victim).

510 *See* Hoag, *supra* note 21, at 1496–97 n.19 (reviewing studies showing overrepresentation of Black people in the criminal legal system, the majority of whom are indigent and require appointed counsel).

511 *See* Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006) (finding that the more phenotypically Black the defendant looked in white victim cases, the more likely jurors would vote for death).

512 *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) (recognizing that defendants have the "ultimate authority" to make certain fundamental decisions, such as the right "to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

513 Boykin v. Alabama, 395 U.S. 238, 242 (1969) (reversing a conviction and capital sentence because the record lacked evidence of a voluntary guilty plea).

514 *See* Strickland v. Washington, 466 U.S. 668 (1984); Michel v. Louisiana, 350 U.S. 91, 101 (1955).

Corin's conduct was beyond reproach. This was particularly striking in light of what Mr. Corin's strategy involved: Failing to secure express consent from his client before entering a guilty plea on his client's behalf.

A decade and a half later, in *McCoy*, the Court was confronted with a similar issue: A Black defendant, facing capital murder charges and strong evidence of guilt, and a lawyer who made the strategic decision to concede guilt. The Court's decision was the opposite. It held that the client's autonomy trumped defense counsel's strategy. The difference this time was that defense counsel lacked the cloak of competency. Counsel was Black.

2. McCoy v. Louisiana

In May 2008, three members of a family were shot and killed in Bossier City, Louisiana.[515] They were the mother, stepfather, and son of Robert McCoy's estranged wife.[516] After law enforcement apprehended Mr. McCoy, a Black man, he was appointed a public defender.[517] Soon after, a Bossier Parish grand jury indicted Mr. McCoy for three counts of first-degree murder; the state sought the death penalty.[518] Mr. McCoy entered a plea of not guilty and maintained that he was innocent.[519] His theory was that corrupt law enforcement killed the victims.[520] Counsel requested a competency determination and Mr. McCoy was found competent to stand trial.[521]

By the end of 2009, Mr. McCoy informed the court that his relationship with appointed counsel had become broken beyond repair.[522] The court removed the public defender and allowed Mr. McCoy to temporarily represent himself until his family retained counsel.[523] In March 2010, Mr. McCoy's parents hired Larry English, a Black defense lawyer.[524] Mr. English "knew Robert [McCoy] and . . . knew his family," and he knew that Mr. McCoy "needed . . . help."[525] Mr. English "concluded that the evidence against McCoy was overwhelming" and that in order to avoid the death penalty, Mr. McCoy

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515 McCoy v. Louisiana, 138 S. Ct. 1500, 1505 (2018).
516 *Id.* at 1505–06.
517 *Id.* at 1506.
518 *Id.*
519 *Id.*
520 *Id.*
521 *Id.*
522 *Id.*
523 *Id.*
524 *Id.*; *see also* Mays, *supra* note 432.
525 Mays, *supra* note 432.

should concede guilt.[526] Mr. McCoy was "furious" at the recommendation, and insisted that Mr. English pursue an acquittal.[527]

During his opening statement, over Mr. McCoy's steadfast and vocal objections, Mr. English conceded that his client had engaged in the murders.[528] Mr. McCoy testified in his own defense, professing "his innocence and pressing an alibi difficult to fathom."[529] At closing, Mr. English again conceded Mr. McCoy's guilt.[530] The jury voted to convict.[531] During the penalty phase of trial, Mr. English urged the jury to exercise mercy in light "of McCoy's 'serious mental and emotional issues.'"[532] The jury voted for three death sentences.[533]

Mr. McCoy appealed his sentence and conviction, alleging that defense counsel violated his Sixth Amendment rights when counsel conceded Mr. McCoy's guilt over the defendant's objections.[534] The state court applied *Strickland*'s ineffective assistance of counsel standard, finding that counsel's conduct did not violate the defendant's Sixth Amendment right to effective counsel.[535] Mr. McCoy then sought review from the United States Supreme Court.

The United States Supreme Court analyzed the issue under a different aspect of the Sixth Amendment, the defendant's right to autonomy.[536] In doing so, the Court prioritized the client's wishes over the reasonableness of counsel's conduct. It reasoned that while "[t]rial management is the lawyer's province," decisions about "whether to plead guilty," among others, "are reserved for the client."[537] The Court chose not to apply *Strickland*'s ineffective assistance of counsel framework.[538] Instead, it held that defense counsel's usurpation of Mr. McCoy's decision to contest guilt violated the defendant's right to autonomy.[539] The violation amounted to structural error, warranting automatic reversal absent a showing of prejudice.[540]

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526 *McCoy*, 138 S. Ct. at 1506.
527 *Id.*
528 *Id.* at 1507.
529 *Id.*
530 *Id.*
531 *Id.*
532 *Id.* (citation omitted).
533 *Id.*
534 State v. McCoy, 218 So. 3d 535, 568 (La. 2016).
535 *See id.* at 568–72 (finding counsel's decision to concede defendant's guilt sound strategy under *Strickland*).
536 *McCoy*, 138 S. Ct. at 1510–11; *see also* Faretta v. California, 422 U.S. 806, 819 (1975) (explaining that the Sixth Amendment "grants to the accused *personally* the right to make his defense" (emphasis added)).
537 *McCoy*, 138 S. Ct. at 1508.
538 *Id.* at 1510–11.
539 *Id.* at 1511.
540 *Id.*

The Court's refusal to afford Mr. English the presumption of professional reasonableness and competency illustrates the forcefulness of the legal profession's racialized identity. In *Strickland*, the Court deferred to counsel's decision to forego an investigation into his client's background and character and to lean into the client's acceptance of guilt as a strategy to save his life. Similarly, in *Nixon*, the Court deferred to counsel's decision to plead guilty on behalf of his client as a strategy to save his life. Though both tactics proved unsuccessful, the Court deemed counsel's decisions reasonable and competent. Conversely, in *McCoy*, the Court found counsel's decision to lean into his client's guilt, as a strategy to save his life, unreasonable.

On the surface, *McCoy* and *Nixon* share some basic facts. Both defendants faced highly aggravated murder charges; evidence of guilt was overwhelming; defense counsel and the defendant disagreed about trial strategy; defense counsel made a strategic decision to concede the defendant's guilt as a strategy to garner sympathy; and the defendant did not agree with counsel's strategy. But there were two critical differences: First, although the court initially appointed Mr. McCoy a public defender, he retained defense counsel, whereas Mr. Nixon received a public defender. Secondly, defense counsel for Mr. McCoy was Black, whereas Mr. Nixon's lawyer was white.

The fact that Mr. McCoy retained counsel's services contributed to the Court's holding in his favor. Despite the law's principled desire for equity between defendants who can afford counsel and those who are indigent, Sixth Amendment jurisprudence places a premium on defendant's ability to pay when it comes to exercising choice. The Court has held that due process and fundamental fairness require the state to provide indigent defendants with the same access to criminal defense services as defendants who can afford counsel.[541] This is true in all contexts except one: the right to counsel of choice.[542] There, the Court has held that only defendants who can hire their own lawyer

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[541] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (extending right to counsel to indigent defendants facing non-capital charges); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (entitling petitioners to a trial transcript); Burns v. Ohio, 360 U.S. 252, 258 (1959) (stating that financial barriers restricting appellate review had "no place in our heritage of [e]qual [j]ustice"); Ake v. Oklahoma, 470 U.S. 68, 76–81 (1985) (requiring that the state provide a competent psychiatrist where the defendant's psychiatric state is a significant factor at trial).

[542] Wheat v. United States, 486 U.S. 153, 159 (1988) ("The Sixth Amendment right to choose one's own counsel is circumscribed in . . . [that] a defendant may not insist on representation by an attorney he cannot afford . . . .").

can exercise the right.[543] Thus, Mr. McCoy was operating from a place of relative privilege.

In *McCoy*, counsel's Blackness prevented the Court from extending the presumption of competency and reasonableness to counsel's strategic decision. The Court's unwillingness to extend the presumption of competency and reasonableness to Black defense counsel was particularly striking relative to *Nixon*, where defense counsel engaged in identical conduct but was white. Rather than defer to Black defense counsel's strategic decisionmaking, in *McCoy*, the Court elevated the defendant's competency. Ultimately, the Court afforded greater agency, power, and control to Mr. McCoy vis-à-vis defense counsel. The Court also evaluated Mr. McCoy's claim through an underdeveloped aspect of the Sixth Amendment, the defendant's right to autonomy.[544] The Court's evaluation of Mr. McCoy's claim reveals the power of the racial construction of effective assistance of counsel.

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White supremacy and anti-Black racism permeated every aspect of Reginald's case: the government's decision to seek federal capital charges,[545] the government's use of dehumanizing, racially coded language,[546] and the jury's anti-Black bias.[547] Reginald needed a lawyer who understood these issues and who could defend against them. Reginald needed defense counsel who could lodge objections and portray him as a young person deserving of empathy and mercy.[548] His

543 *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989) (finding that indigent defendants "have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts").

544 *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting) (identifying autonomy and dignity as central to a criminal defendant's Sixth Amendment rights).

545 The federal jurisdiction where the government filed the case had a smaller Black and less ethnically diverse population than the state jurisdiction where the crime occurred. The jury pool was drawn from the federal jurisdiction. To protect the defendant's confidentiality, we have omitted the specific demographic figures that would identify the district, but these figures are on file with the *New York University Law Review*.

546 *See, e.g.*, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1751–53 (1993) (describing how prosecutors evoke the common stereotype of Black people "as more violent and more criminal than whites" to encourage jurors to convict Black defendants).

547 *See, e.g.*, Lynch & Haney, *supra* note 377, at 583 (describing a study where participants were significantly more likely to sentence Black defendants to death than similarly situated white defendants, and where that likelihood was greater for simulations involving a Black defendant and a white victim).

548 *See, e.g.*, Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide*, 53 DEPAUL L. REV. 1557, 1558

trial lawyers were ill equipped to offer such a defense and failed to do so.

The question of whether counsel's inaction and misconduct violated Reginald's constitutional right to effective counsel is still an open one. When the court addresses the claim, it will first presume counsel's conduct was reasonable. However, recognizing the racial construction of effective counsel casts doubt on the court's presumption of competency. Currently, the *Strickland* standard enables courts to rely most heavily on the legitimacy that comes with counsel's racialized professional status, often obscuring any deficiencies in their performance. In navigating Reginald's appeal, the post-conviction team must identify more creative strategies. We are leaning into the executive's disapproval of capital punishment[549] and are formulating a dynamic strategy outside the confines of post-conviction litigation. Those are short-term solutions, specific to Reginald's case. A more radical, broad-sweeping intervention would be to abolish the presumption of competency.

An ineffective assistance of counsel standard that no longer relies on a presumption of competency would look more like the pre-*Strickland* guidelines approach. Thus, when a reviewing court is tasked with determining whether trial counsel's conduct was deficient, instead of presuming counsel's conduct was reasonable and assuming that counsel's conduct may have been strategic, the court would look directly at whether counsel's conduct was deficient. Under this rubric, the defendant would no longer be saddled with the burden of overcoming the presumption that counsel acted competently. Nor would the defendant have to overcome the assumption that counsel's conduct was a strategic decision. Instead, the defendant could point to whether counsel's conduct was reasonable relative to prevailing guidelines. Admittedly, a guidelines approach still relies on racialized norms of practice. However, recognizing these racialized forces embedded in the standard is the first step toward imagining a solution that could advance racial equity and justice.

(2004) (describing predominately white jurors' "inability to perceive [Black] capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors' own" as the "empathetic divide").

549 As a candidate for president, Joe Biden cited "racial and income-based disparities in our justice system" and pledged to "eliminate the death penalty at the federal level." *See The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/justice [https://perma.cc/CX7U-SP47].

Conclusion

We live in a nation founded upon and reliant on the subordination of people of color. Our laws are based on white legal traditions and designed to maintain the existing power structure. The law's notions of who is reasonable, who is competent, and who bears the burden of proof are all based upon white cultural norms and are intended to perpetuate the racial hierarchy. Nowhere is this clearer than in the criminal adjudication system. Interrogating the role of whiteness in the Court's criminal procedure jurisprudence can inspire interventions better suited to address its deep-seated problems. Daniel Harawa encourages scholars to identify and examine the racist origins of laws. He cautions that failing to do so "allows [racism] to persist unexamined and unabated."[550] Recognizing that white supremacy is embedded in the ineffective assistance of counsel standard is only the beginning. As Derrick Bell theorized, racism is permanent.[551] Acknowledging this reality frees us "to imagine and implement racial strategies that can bring fulfillment and even triumph."[552]

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[550] Harawa, *supra* note 44, at 721, 721–35 (exploring scholarship on the racist origins of four areas of criminal law and advocating for Court intervention).

[551] *See* Bell, *supra* note 401, at 12.

[552] Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 How. L.J. 79, 79 (1991).