

Meeting Materials Part 1 Table of Contents

- Agenda Item 17: Review and Discussion Regarding Draft of Report 1 (pg.2)

AGENDA ITEM 16

REVIEW AND DISCUSSION REGARDING DRAFT
OF REPORT 1

TABLE OF CONTENTS

Foreword by Chair Kamilah Moore [to come]

Executive Summary [to come]

Chapter 1 Introduction

Chapter 2 Enslavement

Chapter 3 Racial Terror

Chapter 4 Political Disenfranchisement

Chapter 5 The Root of Many Evils: Housing Segregation

Chapter 6 Separate and Unequal Education

Chapter 7 Racism in Environment and Infrastructure

Chapter 8 Pathologizing the Black Family

Chapter 9 Control over Spiritual, Creative and Cultural Life

Chapter 10 Stolen Labor and Hindered Opportunity

Chapter 11 An Unjust Legal System

Chapter 12 Harm and Neglect: Mental, Physical and Public Health

Chapter 13 The Wealth Gap

Chapter 1. Introduction

I. Introduction

Why Reparations in California?

After all, California promised to be a free territory not once, but twice. First, in 1829 as a part of Mexico.¹ Then again in 1850 when California entered the Union and declared in its Constitution that “neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”²

So why is California considering reparations for Black Americans and descendants of enslaved people?

Consider Basil Campbell. Campbell was born enslaved in Missouri, where he married a woman named Mary Stephens and had two sons.³ In 1854, four years after California joined the Union as a free state, a man named J.D. Stephens bought Campbell for \$1,200 and forcibly moved him 1,500 miles away to a farm in Yolo County, California.⁴ Campbell never saw his wife or two sons again. J.D. Stephens enslaved Basil Campbell in California, ignoring California’s status as a free state, for another seven years, until Stephens decided that Campbell had sufficiently paid off his purchase price.⁵ Over the rest of his life, Campbell married again, adopted his wife’s children, and amassed a small fortune in land and livestock.⁶ After his death in 1906, his two sons from his first marriage in Missouri filed a petition for a portion of Campbell’s estate.⁷ A California appellate judge concluded that a marriage between enslaved people “is not a marriage relation, and it is mockery to speak of it as such.”⁸ The California Supreme Court later upheld this decision and agreed that the family that Campbell created while enslaved had no legal standing.⁹ The land once owned by Campbell is now a nature preserve.¹⁰

Consider the Burgess family. According to testimony given before the Task Force to Study and Develop Reparation Proposals for African Americans (Task Force), Rufus Burgess’s enslaver trafficked him to Coloma, California in the late 1840s.¹¹ After his enslavement, like Basil Campbell, Rufus Burgess was able to build a family, a home, and a small fortune in Coloma, including farmland and orchards.¹² Before his death in 1869, Burgess handwrote in his autobiography that “man has deeply wronged me, but the glory of God lives forever.”¹³ According to testimony by his descendant Jonathan Burgess, the California government ignored the Burgess family’s land deeds in the 1950s and razed the family home to establish the Marshall Gold Discovery

¹ Lapp, *Blacks in Gold Rush California* (1977) pp. 4-9, 130-139.

² Cal. Const. of 1849, art. I, § 18.

³ Smith, *Freedom’s Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (2013), p. 231.

⁴ L.H., *The Roots of Slavery in Woodland*, *The Davis Vanguard* (Mar. 20, 2016) <<https://tinyurl.com/3b3r2k75>> (as of Jan. 21, 2022).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *In re Campbell’s Estate* (1910) 12 Cal.App. 707.

⁹ *In re Campbell’s Estate* (1910), 108 P. 676, 676.

¹⁰ Restore/Restory: A People’s History of the Cache creek Nature Preserve, *History: Basil Campbell* <<https://tinyurl.com/2s3a5e4r>> (as of Jan. 21, 2022).

¹¹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jonathan Burgess <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

¹² *Ibid.*

¹³ *Ibid.*

State Historic Park.¹⁴ The Burgess family has never been compensated.¹⁵ “My uncle cried every time we drove past the park,” Burgess told the Task Force, because the land had been theirs.¹⁶

Consider the Short family. In December 1945, O’Day Short, his wife Helen, their seven-year-old daughter Carol Ann, and their nine-year-old son Barry moved into the house that they had built in Fontana, California.¹⁷ In 1945, Fontana was a white neighborhood.¹⁸ Deputy sheriffs warned Short that he was “out of bounds,” and that to avoid “disagreeableness,” Short should move his family back to the segregated Black neighborhood on “the other side of the Baseline.”¹⁹ The real estate agent who sold the property to the Shorts warned them on December 3, 1945 that a “vigilante committee had a meeting on your case last night. They are a tough bunch to deal with. If I were you, I’d get my family off this property at once.”²⁰ On December 6, two weeks after they moved in, an explosion and a fire engulfed the house.²¹ Neighbors reported seeing Helen try to beat down the flames consuming her children.²² Helen, Carol Ann, and Barry died in the hospital.²³ The San Bernardino County Coroner and District Attorney concluded that the explosion was an accident.²⁴ The District Attorney based this conclusion partly on a statement given by O’Day while he was in the hospital. During the same conversation, O’Day also said, “I am here on my sick bed, my hair burned off my head, my legs twisted under me. You have no respect for my position. All you want to do is get the information you are looking for.”²⁵ The District Attorney told O’Day that his wife and two young children had died when doctors had been keeping the information from him for fear that his condition would worsen.²⁶ O’Day Short died a few days later.²⁷ A subsequent California Attorney General report investigating the murders concluded that no evidence of vigilante activity in Fontana could be found.²⁸

Consider Alfred Simmons, a Black school teacher who rented a house from his white colleague in the Elmwood district of Berkeley in 1958.²⁹ The Berkeley chief of police asked the Federal Bureau of Investigation (FBI) to investigate how Simmons managed to live in the all-white community.³⁰ The FBI referred the case to the U.S. Attorney, who did not prosecute because no laws had been broken.³¹ The Federal Housing Administration, the agency created by the federal government to help Americans buy homes, then wrote to Simmons’s white

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020). p. 190.

¹⁸ *Id.* at p. 192.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Id.* at p. 193

²² *Ibid.*

²³ *Ibid.*

²⁴ *Id.* at p. 194.

²⁵ *Ibid.*

²⁶ *Id.* at p. 204.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Rothstein, *The Color of Law* (2017), pp. 66-67.

³⁰ *Ibid.*

³¹ *Ibid.*

landlord to tell him that his future mortgage insurance applications would be rejected because renting to a Black American was an “Unsatisfactory Risk Determination.”³²

Consider Paul Austin and Tenisha Tate-Austin, who bought a home in Marin City in 2016. Three years later, a white appraiser valued their home for \$500,000 less than it was worth, calling it a “distinct, marketable area.”³³ “I took that as code word as: it’s a Black area,” said Paul Austin, who testified before the Task Force that he felt physically sick when he read the appraisal report.³⁴ Paul Austin testified that his grandparents had moved to California in the 1940s to work in the shipyards in Sausalito.³⁵ When they had saved up enough money to buy a house, his grandparents realized that they could not buy homes outside of Marin City due to redlining.³⁶ Redlining is a set of government policies that helped white families buy homes in the suburbs while forcing Black families to remain in urban centers.³⁷ These policies have devalued Black neighborhoods³⁸ and led to continued education segregation.³⁹ In 2019, a California Attorney General investigation found that the Sausalito-Marin City School District intentionally established a racially and ethnically segregated elementary and middle school, by offering inferior education programming and directly harming a mostly Black and Latino student body.⁴⁰ In the 1950s, Paul Austin’s paternal grandfather was one of the first Black families to move to Mill Valley, a white neighborhood.⁴¹ Paul’s grandfather built a home where the driveway dropped 90 degrees so that the house could not be seen from the road. “Grandson,” Paul’s grandfather told him, “I had to build this house at nights and on the weekends, so we wouldn’t be detected, because they didn’t want any Black families living in their city.”⁴² A white man picked up the lumber for them.⁴³ Like Alfred Simmons’s white landlord, the white woman who sold her land to Paul’s grandfather was, in Paul’s words, “blackballed,” because the neighbors found out that she had sold her property to a Black family.⁴⁴ In 2021, Paul testified that the smaller

³² Ibid.

³³ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³⁴ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³⁸ Perry, et al., *The Devaluation of Assets in Black Neighborhoods*, Brookings Institute (Nov. 2018), pp. 10-19 <<https://tinyurl.com/3uj9bdn5>> (as of Jan. 20, 2022).

³⁹ Ibid.; Oliver & Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995) pp. 8-9, 20; Guastafarro, *Why Racial Inequities in America's Schools are Rooted in Housing Policies of the Past*, USA Today (Nov. 2, 2020) <<https://tinyurl.com/yfm53e6e>> (as of June 23, 2021).

⁴⁰ <https://oag.ca.gov/news/press-releases/attorney-general-becerra-sausalito-marin-city-school-district-agrees-end>

⁴¹ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

⁴² California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

⁴³ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

⁴⁴ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

houses in a white neighborhood that are a mile away from Paul and Tenisha’s house are valued at \$200,000 to \$300,000 more.⁴⁵

What does California owe the Campbells, the Burgesses, the Shorts, the Simmonses, the Austins, and the 2.28 million Black Californians who have experienced different versions of these stories throughout their lives, their parents’ lives, their grandparents’ lives, and their great-grandparents’ lives, some of whom were enslaved?

Similar stories are repeated throughout the history of California and the nation.

As W.E.B. Du Bois asked in 1935: “Nations reel and stagger on their way; they make hideous mistakes; they commit frightful wrongs; they do great and beautiful things. And shall we not best guide humanity by telling the truth about all this, so far as the truth is ascertainable?”⁴⁶

To that end, the following twelve chapters will recount the horrors and harms perpetrated against Black Americans in California and the nation in a number of different areas:

In order to maintain a system of enslavement and subjugation in the United States, white government leaders used the belief system of white supremacy to restrict the freedom of Black Americans and the flourishing of Black culture and prosperity.⁴⁷ These belief systems have served to normalize and perpetuate crimes against humanity and systemic racism in our governmental institutions. These beliefs created dehumanizing stereotypes of Black Americans, which mainstream arts and culture disseminated and amplified, fueling racial terror and violence long after enslavement ended. These beliefs were enshrined into the United States’ laws, court decisions, and government policies and practices, and into California’s laws, court decisions, and government policies and practices.⁴⁸ Government actors used these laws and practices to suppress and criminalize Black political participation and rip apart Black families. Federal, California, and local government, acting in tandem and in parallel with private actors, created and intensified housing segregation. Government actions intertwined with private action and segregated America, leading to environmental harms, unequal educational and health outcomes, and over-policing of Black neighborhoods in California and across the nation. Government actions and failures over 400 years have created a wealth gap that persists between Black and white Americans at all levels of income, regardless of education or family status. In fact, the wealth gap today is the same size it was two years before the passage of the Civil Rights Act of 1964.

II. Preliminary Recommendations

[Task Force member will generate preliminary recommendations for inclusion in this section.]

III. The Task Force’s Charge

What does California owe its Black residents?

⁴⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

⁴⁶ Du Bois, *Black Reconstruction in America, 1860–1880* (Free Press 1999), p. 714.

⁴⁷ See generally Kendi, *Stamped from the Beginning* (2016).

⁴⁸ See, e.g., U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3; Cal. Const. of 1849, art. II, § 1; An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, California Statutes, at 67–69; *Dred Scott v. Sandford* (1857) 60 U.S. 393; *People v. Hall* (1854) 4 Cal. 399, 403.

Assembly Bill 3121 (AB 3121) established this Task Force to Study and Develop Reparation Proposals for African Americans.⁴⁹ The Task Force consists of nine members.⁵⁰ AB 3121 charges the Task Force with studying the institution of slavery and its lingering negative effects on society and on living Black Americans, including descendants of persons enslaved in the United States.⁵¹ The Task Force must synthesize documentary evidence of the capture, procurement, and transportation of Africans for the purpose of enslavement; the domestic trade of trafficked Black Americans; the treatment of enslaved people; the denial of humanity and the abuse of Black Americans; and the discrimination and lingering negative effects that followed in the colonies that eventually became the United States, and the United States of today.⁵²

The Task Force must recommend appropriate remedies of compensation, rehabilitation, and restitution for Black Americans, with a special consideration for descendants of persons enslaved in the United States.⁵³ The Task Force recommendations must address how they comport with international standards and how the State of California will apologize for its role in perpetuating gross human rights violations and crimes against humanity on enslaved Africans and their descendants.⁵⁴ The Task Force must address the role of California laws and policies in continuing the negative lingering effects on Black Americans as a group and how these injuries can be reversed.⁵⁵ The recommendations must include how to calculate compensation, what form it will take, and who should be eligible.⁵⁶

The Task Force must issue a public report to the Legislature by June 1, 2022.⁵⁷ On June 1, 2021, the Task Force voted to issue a report in two parts.⁵⁸ Part one, to be published by June 1, 2022, will describe the institution of slavery, the ensuing discriminatory systems created by slavery, and its reverberations throughout American history and into the present.⁵⁹ It will make preliminary recommendations. Part two, to be published before the law sunsets on July 1, 2023, will include the Task Force's final recommendations, following further hearings, community engagement, and consultations with experts, regarding potential forms that an apology and reparations should take.⁶⁰

IV. Overview of Activities

AB 3121 authorizes the Task Force to hold public hearings to pursue its mission.⁶¹ In order to inform the contents of part one of its report, the Task Force held [XX] public meetings, during which it considered public

⁴⁹ California Assembly Bill No. 3121 (2019-2020 Reg. Sess.)

⁵⁰ Cal. Gov. Code, § 8301.2, subd. (a).

⁵¹ Cal. Gov. Code, § 8301.1, subd. (b)(1).

⁵² *Ibid.*

⁵³ *Id.*, subd. (b)(3).

⁵⁴ *Id.*, subd. (b)(3)(A)-(B).

⁵⁵ *Id.*, subd. (b)(3)(C)-(D).

⁵⁶ *Id.*, subd. (b)(3)(E)-(G).

⁵⁷ Cal. Gov. Code § 8301(a), (b).

⁵⁸ California Task Force to Study and Develop Reparation Proposals for African Americans, June Meeting Minutes (Jun. 1, 2021), <<https://tinyurl.com/2p8k8x6f>> (as of Jan. 21, 2022).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Cal. Gov. Code, § 8301.3, subd. (a)(1). The meetings are conducted pursuant to the Bagley Keene Act. Gov. Code § 11120. Due to the COVID-19 pandemic, from June 2021 to [March] 2022, according to California Governor Executive Orders N-29-20, N-08-21, and N-1-22, all meetings were conducted virtually.

comments, expert, and personal witness testimony, in addition to considering the voluminous materials submitted to the Task Force via email from those unable to attend the meetings.

In total, the Task Force has heard [XX] hours of testimony from [XX] witnesses and [XX] hours of public comment, and received [NUMBER] emails and [NUMBER] phone calls. In addition, on September 23, 2021, the Task Force contracted with the Ralph J. Bunche Center at UCLA to implement a community engagement plan. [Description of UCLA work thus far.]

V. Structure of the Report

Part one of the report focuses on anti-Black, racist federal, state, and local government actions and negligence throughout American history and into the modern day.

Under international law, a government is responsible where its wrongful actions or negligence caused injury to a specific group of people.⁶² Once proven, governments have a duty to remedy wrongful actions.⁶³ Reparations offer such a remedy, and the United Nations recognizes five formal categories of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁶⁴ American courts of law have long recognized a similar concept—that parties must redress the harms caused by their actions or omissions where there was a duty to act.⁶⁵ Advocates frame reparations as a program that seeks acknowledgment, redress, and closure for injustice.⁶⁶

This report is created by the Task Force to support the Legislature in its future effort to acknowledge the wrongful actions and negligence of California as well as the wrongful actions and negligence of the local governments within its jurisdiction that have harmed Black Americans.

In addition to California's potential legal obligations, repairing a wrong is a political and moral obligation. America and California's democratic forms of government exist to embody the will of the people.⁶⁷ In accepting this system, we, as Americans and as Californians, are more than a random group of people who live in the same geographic area; we bind ourselves into a community that lives beyond the lifespans of its individual members.⁶⁸ Through government, a community channels its visions for the society it wants to create through the laws that govern it.⁶⁹

Following the charge of AB 3121 to describe the trade of trafficked African people across the oceans and within the lands of the United States, in this Report, the Task Force will recount the moral and legal wrongs the American and Californian governments have inflicted upon their own Black citizens and residents. The first chapter describes the institution of slavery as it existed in the geographic territory of the United States, and the

⁶² Intl. Law Com., Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/83, at Art. 34 (2001).

⁶³ Ibid.

⁶⁴ UN General Assembly Resolution 60/147, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

⁶⁵ *Merrill v. Los Angeles Gas & Elec. Co.* (1910) 158 Cal. 499, 503–04; Rest.2d, Torts §§ 430, 431.

⁶⁶ Darity and Mullen, *supra*, p. 2.

⁶⁷ *Reynolds v. Sims* (1964) 377 U.S. 533, 562; *see also* U.S. Const., preamble; California Const., preamble.

⁶⁸ See Hamilton, *Federalist No. 1* <<https://tinyurl.com/y2tdk6xe>> (as of Oct. 27, 2021); U.S. Const., preamble; California Const., preamble; Hamilton, *Federalist No. 1* <<https://tinyurl.com/y2tdk6xe>> (as of Oct. 27, 2021); Hearings before House Com. on Jud., Subcom. on the Constitution, Civil Rights & Civil Liberties, on H.R. 40, 116th Cong., 1st Sess., testimony of Ta-Nahesi Coates.

⁶⁹ Ibid.

legal, political, economic, and cultural systems maintaining and enriched by enslavement. The subsequent eleven chapters describe how these racist systems metastasized throughout America and California, reaching into all corners of American life. Each chapter traces an issue from its historic foundations in slavery, through successive discriminatory government actions, and government failures to correct and remedy the harms of anti-Black racism. Each chapter describes the uncorrected, compounding, and continuous harms all levels of the American government inflicted upon Black Americans, as well as the modern-day effects of those harms.

By focusing on the role of government actors at all levels of local, State and national authority in enslavement and racial discrimination, this report does not and cannot ignore the countless racist actions of private citizens throughout American history. The government's role does not absolve private actors of their own responsibility or prevent private individuals and entities who benefited from this state of affairs for generations from offering their own apologies and engaging in their own acts of reparations.⁷⁰ As the report makes clear in the following pages, federal, state, and local governments often worked in tandem with private individuals⁷¹ to build and maintain a system placing Black Americans in the lowest social strata of this country.⁷²

The report's focus on Black Americans also does not and cannot ignore the countless ways in which the Californian government and its private citizens enslaved, dehumanized, or discriminated against other marginalized communities.

Often, government discrimination or racist mob violence targeted many communities at once. During the Zoot Suit Riots of 1943, white mobs of U.S. servicemen, off-duty police officers, and civilians indiscriminately attacked Latino, Black, and Filipino men in Los Angeles.⁷³ Sometimes, one racial group enacted violence against another. As AB 3121 charges this Task Force solely with investigating the history of systemic racism as it relates to Black Californians, it does not focus on the innumerable acts of racist violence and discrimination by government officials and private citizens against other people of color.

VI. American Descendants of Slavery

[To come: summary describing internal United States residential and migration patterns of American Descendants of Slavery. Immigration patterns throughout the United States and California regarding immigration into the United States from the African diaspora.]

VII. State of Black California

California is home to the fifth largest Black population in the United States, after Texas, Florida, Georgia, and New York.⁷⁴ As of 2020, about 39.5 million people live in California, of whom about 2.8 million self-identify

⁷⁰ See, e.g., Desai, *The First Reparations Attempt at an American College Comes from its Students*, *The Atlantic* (Apr. 2019) <<https://tinyurl.com/45yde8y9>> (as of Oct. 27, 2021); Lockhart, *A Virginia Seminary Is the First School to Create a Reparations Fund*, *Vox* (Sept. 10, 2019) <<https://tinyurl.com/6sspaw5j>> (as of Oct. 28, 2021).

⁷¹ See, e.g., *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n* (2001) 531 U.S. 288, 295-303; *Shelley v. Kraemer* (1948) 334 U.S. 1, 13-23; *Burton v. Wilmington Parking Auth.* (1961) 365 U.S. 715, 716-26.

⁷² See generally, Wilkerson, *Caste* (2020).

⁷³ Gerber, *Zoot Suit Riots: After 75 Years, L.A. Looks Back on a Violent Summer* (June 4, 2018) <<https://tinyurl.com/e45vbt4h>> (as of Nov. 5, 2021).

⁷⁴ The Campaign for College Opportunity, *The State of Higher Education for Black Californians* (Feb. 2021), p. 10, <<https://tinyurl.com/c7rf7uwk>> (as of Nov. 2, 2021).

as Black.⁷⁵ While the number of Black Californians has increased in the last thirty years, the overall percentage of Black Californians has fallen over the same period.⁷⁶ Black Californians make up about six percent of the state's population today, a decrease from 8.1 percent of the state's population in 1990.⁷⁷

Black Californians live in all 58 Californian counties, but most Black Californians live in Los Angeles County (943,145), San Bernardino County (223,116), San Diego County (211,354), Alameda County (198,250), and Riverside County (197,329).⁷⁸ The counties with the highest number of Black Californians, as a percentage of the total population, are Solano County (16.87 percent), Sacramento County (12.43 percent), Alameda County (11.78 percent), Contra Costa County (10.69 percent), and San Bernardino County (10.23 percent).⁷⁹ In the past three decades, about 275,000 Black Californians have left expensive coastal cities to move inland or to other states.⁸⁰ During the same timeframe, the Black populations of some of California's historically Black neighborhoods in cities across California have plunged: Compton by 45 percent, San Francisco by 43 percent, and Oakland by 40 percent.⁸¹

Despite the history of Black voter suppression throughout the United States and California, California has steadily improved voting access since the late twentieth century.⁸² Surveys from 2019 show that six percent of likely voters are Black, equal to their share of the population in California.⁸³

Nevertheless, the effects of 400 years of compounding governmental and private acts of racial violence and discrimination described in this report have resulted in disparities between Black and white Californians in almost every corner of life. Compared to white Californians, Black Californians earn less and are more likely to be impoverished. In 2018, on average, Black Californians earned \$53,565, compared to \$87,078 for white Californians.⁸⁴ Around 19.4 percent of Black Californians live below the poverty line, compared to nine percent of white Californians.⁸⁵ Black Californians are also far less likely to own a home than white Californians; in 2019, 59 percent of white households owned their homes, compared with 35 percent of Black Californians.⁸⁶ And in contrast to the advances in voting rights in California, the rates of Black homeownership in California

⁷⁵ U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021). This number includes all Californians who identify solely as Black or as Black and at least one other race.

⁷⁶ Compare U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021) with Raphael and Stoll, *The State of Black California* (Feb. 1, 2008), UCLA: School of Public Affairs, p. 78.

⁷⁷ Ibid.

⁷⁸ U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021).

⁷⁹ U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021).

⁸⁰ Hepler, *The Hidden Toll of California's Black Exodus*, Cal Matters (Jul. 15, 2020) <<https://tinyurl.com/36y2783a>> (as of Dec. 30, 2021).

⁸¹ Ibid.

⁸² See Katz, et al., *Reckoning with our Rights: The Evolution of Voter Access in California*, UCLA Luskin Center for History and Policy (Sept. 2020) pp. 20-27 <<https://tinyurl.com/5xzhj32p>> (as of Nov. 17, 2021).

⁸³ Baldassare et al., *California's Likely Voters*, Public Policy Institute of California (Sept. 2021), <<https://tinyurl.com/shnhwacm>> (as of Nov. 2, 2021).

⁸⁴ Sen. J. Economic Com., Rep. on The Economic State of Black America in 2020 (Feb. 14, 2020), p. 28 <<https://tinyurl.com/4ukt2w4u>> (as of Nov. 2, 2021).

⁸⁵ Ibid.

⁸⁶ California Forward, Building Racial and Economic Equity Through Home Ownership (Apr. 2021) <<https://tinyurl.com/3wmsac7s>> (as of Nov. 3, 2021).

has declined by over 11 percent since 2010.⁸⁷ In fact, Black homeownership in California in the 2010s has been lower than in the 1960s, when sellers could still legally discriminate against Black home buyers.⁸⁸

Homelessness is a more acute problem in California than in the rest of the country, and the burden falls heaviest on Black Californians. Almost 50 percent—or nearly one in every two Black Californians—lives in a household where rent or mortgage payments eat up more than 30 percent of the residents' income, compared to about 30 percent of white Californians who suffer similar housing cost burdens.⁸⁹ Nearly 40 percent of California's unhoused people are Black, even though Black Californians represent only six percent of the state's total population.⁹⁰

The pervasive effects of racial discrimination have seriously harmed the health of Black Californians. In 2021, the life expectancy of an average Black Californian was 75.1 years, six years shorter than the state average.⁹¹ Black babies are more likely to die in infancy⁹² and Black mothers giving birth die at a rate of almost four times higher than the average Californian mother.⁹³ Compared with white Californians, Black Californians are more likely to have diabetes,⁹⁴ to die from cancer cancer,⁹⁵ or be hospitalized for heart disease.⁹⁶

Racial discrimination in housing, education, and the legal system, along with institutionally racist approaches and militarized culture, have collectively resulted in the over-policing of Black communities and the mass incarceration of Black citizens.⁹⁷ According to data from 2020, the police are more than two times more likely to stop and search Black Americans in California than white Americans, even though officers reported no criminal activity for the Black individuals stopped more than twice as often as they did for the white individuals stopped.⁹⁸ In 2020, law enforcement officers used force against Black Americans in California 2.6 times more often than they did against white Americans,⁹⁹ and data from 2016 to 2019 indicates that law enforcement officers in California are three times more likely to seriously injure, shoot, or kill a Black American in

⁸⁷ [Citation to US census].

⁸⁸ *Black Homeownership Initiative: Building Black Wealth*, California Housing Finance Agency <<https://tinyurl.com/43h8sm9d>> (as of Jul. 12, 2020); See also *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020); Reid, *Crisis, Response, and Recovery: The Federal Government and the Black/White Homeownership Gap*, UC Berkeley Turner Center for Housing Innovation (Mar. 2021) <<https://tinyurl.com/2p9x8cz6>> (as of Jan. 24, 2022).

⁸⁹ Levin, *Black Californians' Housing Crisis, by the Numbers*, Cal Matters (June 19, 2020) <<https://tinyurl.com/4hf7b2es>> (as of Nov. 3, 2021).

⁹⁰ Cimini, *Black People Disproportionately Homeless in California*, Cal Matters (Oct. 5, 2019) <<https://tinyurl.com/z6xhxj5v>> (as of Nov. 3, 2021).

⁹¹ Aurrera Health Group, *Health Disparities by Race and Ethnicity in California: Pattern of Inequity* (Oct. 22, 2021), p. 7 <<https://tinyurl.com/2kser7js>> (as of Nov. 3, 2021)

⁹² *Id.* at p. 42.

⁹³ Cal. Maternal Quality Care Collaborative, *The California Pregnancy-Associated Mortality Review* (2018), p. 21 <<https://tinyurl.com/yc5uc8dx>> (as of Jan. 21, 2022).

⁹⁴ Cal. Health Care Foundation, *Health Disparities by Race and Ethnicity in California: Pattern of Inequity* (Oct. 22, 2021), p. 25 <<https://tinyurl.com/2kser7js>> (as of Nov. 3, 2021).

⁹⁵ *Id.* at p. 28.

⁹⁶ *Id.* at p. 19.

⁹⁷ Reskin. *The Race Discrimination System* (2012) 38 Annual Rev. of Soc. 17, 17–35.

⁹⁸ Racial and Identity Profiling Advisory Board, 2022 Report Quick Facts (2022), <<https://tinyurl.com/5n8ybsdb>> (as of Feb. 9, 2022); see also Premkumar et al., *Police Use of Force and Misconduct in California*, Public Policy Institute of California (Oct. 2021), <<https://tinyurl.com/366k6kew>> (as of Nov. 2, 2021).

⁹⁹ Racial and Identity Profiling Advisory Board, *supra*.

California, even when other factors are taken into account.¹⁰⁰ About 28.3 percent of people imprisoned in California are Black—even though they make up about six percent of the population in the state.¹⁰¹

Black youth in the state also face heightened risk of punishment. Black students in California are suspended at three times the rate of white students,¹⁰² and lose nearly four times the number of days of instruction to suspensions and expulsions as white students.¹⁰³ Recently, the California Attorney General’s Office identified racial disparities in discipline for Black students across four different school districts.¹⁰⁴

Further, school discipline is often the first step toward law enforcement involvement. Black students in California are disproportionately referred by schools to law enforcement.¹⁰⁵ A California Attorney General’s Office investigation found that, since 1991, school resource officers in the Stockton Unified School District had arrested 34,000 students, including 1,600 under 10 years old, with many minor misbehaviors turned into criminal offenses, disproportionality impacting Black and Latino students, and students with disabilities.¹⁰⁶

As a result, compared to white youth in California, Black youth are over 30 times more likely to be held in a juvenile justice facility in the State.¹⁰⁷ In June 2020, Black American youth comprised 36 percent of those ordered to be placed in state juvenile detention facilities, even though they make up only 14 percent of the youth population in California.¹⁰⁸

VIII. Terms Used Throughout the Report

When discussing issues as complex as race and reparations, precision is paramount. Precision helps ensure that we — the writers and the reader, as American and Californian citizens and residents — begin in the same place, to arrive at the same understanding. As described later in this report, words have been weaponized throughout

¹⁰⁰ Premkumar et al., *supra*.

¹⁰¹ U.S. Census Bureau, Quick Facts: California <<https://www.census.gov/quickfacts/fact/table/CA/RHI225219>> (as of July 22, 2021).

¹⁰² California Department of Education, *State Superintendent Torlakson Announces 2018 Rates for High School Graduation, Suspension and Chronic Absenteeism* (Nov. 19, 2018) <<https://www.cde.ca.gov/nr/ne/yr18/yr18rel76.asp>> (as of June 22, 2021).

¹⁰³ Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California*, The Civil Rights Project (Sept. 18, 2018) p. 5 <<http://www.civilrightsproject.ucla.edu/research/k-12education/school-discipline/the-unequal-impact-of-suspension-on-the-opportunity-to-learn-in-ca/>> (as of June 22, 2021); see also Office for Civil Rights, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, U.S. Dept. of Ed. (June 2021)

<<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>> (as of June 24, 2021) (finding that “Black pre-school students were expelled at rates that were more than twice their share (38.2% of total pre-school enrollment (18.2%))”).

¹⁰⁴ *People of the State of California v. Barstow Unified School District*, No. 20STCV3228, Complaint filed Aug. 25, 2020, p. 6-7.

¹⁰⁵ U.S. Commission on Civil Rights, *Beyond Suspension: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, Briefing Report (2019) pp. 10–11, 49, 66; Whitaker, et al., *Cops and No Counselors*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 5, 35 (analyzing 2015-16 academic year data collected by U.S. Department of Education and finding that California had a 44 percent increase in referral to law enforcement from 2013-14 to 2015-16); Black Organizing Project et al., *From Report Card to Criminal Record: The Impact of Policing Oakland Youth* (Aug. 2013) p. 17 (“While Blacks make up only 30.5 percent of the student population, they make up more than 70 percent of all Oakland School Police arrests.”);

¹⁰⁶ California Department of Justice, *Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities*, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 24, 2021).

¹⁰⁷ Ridolfi, et al., *California Youth Face Heightened Racial and Ethnic Disparities in Division of Juvenile Justice*, Center on Juvenile and Criminal Justice (Aug. 2020) <<https://tinyurl.com/fx292mre>> (as of Jan. 24, 2022).

¹⁰⁸ *Ibid.*

American history to dehumanize Black Americans. Words can also be used to mend—to acknowledge, to respect, and to uplift. To that end, this report defines and adopts the following terms throughout its pages.

The N-words – The word “nigger” has been used for centuries to dehumanize Black Americans.¹⁰⁹ The terms “Negro” and “Colored person” (as opposed to “person of color”), although adopted by Black communities for periods of time, have since been recognized as derogatory terms.¹¹⁰ When quoting historical documents, this report will quote these words—not to condone the words or their vicious meanings—but to present them in the context in which these slurs were used. The California Legislature enacted AB 3121, recognizing that the lasting wounds of slavery and discrimination cannot begin to mend until those wounds are first addressed. In that same spirit, we quote these terms recognizing that reparations or any other answer to racism cannot be complete until we squarely face slavery and the systemic discrimination that followed and persists today.

White supremacy – white supremacy is a system of belief and power that white people are superior to other races.¹¹¹ This report confronts the idea of white supremacy and the various forms that it takes. When discussing the concept of white supremacy, the report uses the term to refer to one of two concepts.

First, this report uses the terms “white supremacy” or “white supremacists” to identify groups or individuals who believe that white people are superior to people of other races. When used this way, “white supremacy” describes individual prejudice. Examples of white supremacist groups—including groups that exist to this day—include, for example, the Ku Klux Klan.¹¹²

Second, this report uses the term “white supremacy” to describe the racist premise upon which social and legal rules and practices are formed with the intention of discriminating or enacting violence against people of color, including Black people.¹¹³ This report also uses it to describe cultural images and stereotypes that reinforce prejudices against people of color, including Black people.¹¹⁴ When used this way, white supremacy describes forms of racism that extend beyond individuals or organizations, a form of racism often described as structural or systemic racism.¹¹⁵ As this report demonstrates, the fundamental political, social, and economic system of our country negatively impacts people of color regardless of the intent of any one person to be racist.

This report does not use the term “white supremacy” to describe white people as a group, white Americans, or white Californians. Not all white people are white supremacists. Anyone, regardless of race, with or without

¹⁰⁹ Kennedy, Nigger: The Strange Career of a Troublesome Word, Washington Post (Jan. 11, 2001) <<https://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/nigger.htm>> (as of Nov. 4, 2021).

¹¹⁰ Malesky, *The Journey from ‘Colored’ to ‘Minorities’ to ‘People of Color’*, NPR (Mar. 30, 2014) <<https://tinyurl.com/2ha7s27m>> (as of Nov. 3, 2021); Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American”* (1992) 56 Public Opinion Quarterly 496, 497-501.

¹¹¹ See, e.g., Newkirk II, *The Language of White Supremacy* (Oct. 6, 2017) <<https://www.theatlantic.com/politics/archive/2017/10/the-language-of-white-supremacy/542148/>> (as of Jan. 21, 2022).

¹¹² Solomon, *FBI Categorizes Proud Boys as Extremist Group with Ties to White Nationalism*, NPR (Nov. 20, 2018) <<https://tinyurl.com/6dmwexcc>> (as of Nov. 4, 2021); Southern Poverty Law Center, *Extremist Groups* <<https://tinyurl.com/4duwkua7>> (as of Nov. 4, 2021).

¹¹³ See Bailey et al., *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequities* (2021) 384 New England J. of Medicine 768, 768-69; Gates, Jr., *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow* (2019), p. xxii.

¹¹⁴ See Bailey et al., *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequities* (2021) 384 New England J. of Medicine 768, 768-69; Gates, Jr., *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow* (2019), p. xxii.

¹¹⁵ Wiecek, *Structural Racism and the Law in America Today: An Introduction* (2011) 100 Ky. L. J. 1, 5-19.

intent, consciously or unconsciously, can engage in acts of white supremacy, or be a part of a racist system. A racist system harms all who live in it, even those who may have historically reaped the benefits of the system.¹¹⁶

Throughout the report, we also use words that center the people discussed. We avoid words that describe solely their conditions, especially when enslavement and other racist laws and policies have imposed these conditions.

Rather than refer to “slaves,” we refer to “enslaved persons.” As the White House Historical Association notes, most historians now refer to “enslaved persons” instead of “slaves” because the term “slave” reduces the enslaved person to an object.¹¹⁷ Instead, historians use “enslaved person” to grant agency and recognition to the enslaved individual and to remind us about the violence and inhumanity of slavery.¹¹⁸ For similar reasons, this report refers to “enslavers,” rather than “owners” or “masters.”¹¹⁹

Instead of “fugitive,” this report refers to “freedom-seekers” when describing enslaved persons or other people seeking to escape slavery and other forms of captivity. The term “fugitive” was commonly used with laws such as the Fugitive Slave Laws of 1793 and 1850 passed by Congress, which used the term to reinforce the system of enslavement and criminalize those who sought freedom.¹²⁰

Rather than refer to “felon” or “ex-offender,” this report uses terms such as “formerly incarcerated” and “returning citizen.” Similarly, this report uses terms such as “person in prison” or “incarcerated person,” rather than “inmates.” Like the term “fugitive,” the terms “felon,” “ex-offender,” and “inmate” have stigmatized people who are or have once been in jail or prison. By labeling people as nothing more than their criminal justice status, these words deny people their full personhood and reinforce a stigma that prevents people from fully participating in society.¹²¹

Instead of referring to people without homes as “the homeless,” this report uses terms such as “unhoused people” or “people experiencing homelessness.” This follows the practice of the Associated Press Style Guide, which recognized that the phrase “the homeless” dehumanizes people by collectively reducing them to a label based on housing status, rather than their status as people.¹²²

Though the report uses person-centered terms, the report may sometimes quote historical documents or statements that do not. This report presents these quotations unaltered to present them unfiltered.

In using person-centered words, this report recognizes that words alone may not cure the wounds that people have suffered.¹²³ While words may not fix the systems they describe, this report uses these words, recognizing that they are the beginning—not the end—of what we must do to redress racism, past and present.

¹¹⁶ Metz, *Dying of Whiteness: How the Politics of Racial Resentment Is Killing America's Heartland* (2019)

¹¹⁷ White House Historical Association, *Slavery in the President's Neighborhood FAQ* <<https://tinyurl.com/6auw6eup>> (as of Oct. 27, 2021).

¹¹⁸ *Ibid.*

¹¹⁹ National Park Service, *Language of Slavery* <<https://tinyurl.com/cuma563v>> (as of Nov. 4, 2021)

¹²⁰ *Ibid.*

¹²¹ Cox, *The Language of Incarceration* (2020) 1 *Incarceration* 1, 5-9; see also Bedell et al., *Corrections for Academic Medicine: The Importance of Using Person-First Language for Individuals who have Experienced Incarceration* (2019) 94 *Academic Medicine* 172, 173-74.

¹²² Perlman, *2020 AP Stylebook Changes: Person-First Language, and the Great 'Pled' Debate*, *Columbia Journalism Review* (May 6, 2020) <<https://tinyurl.com/9t25jscy>> (as of Nov. 4, 2021).

¹²³ See Betts, *Incarcerated Language*, *Yale Review* (2018) <<https://tinyurl.com/de8wysde>> (as of Nov. 4, 2021).

Chapter 2. Enslavement

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

On July 5th, 1852, Frederick Douglass gave a speech to a crowd of 600 mostly white anti-enslavement activists in Rochester, New York, the day after Independence Day.¹ Douglass was considered the most famous Black anti-enslavement and civil rights activist at the time.² He began by praising the courage of the nation’s founders in winning their freedom from the British Empire.³ But Douglass did not come to celebrate American independence and liberty.⁴ The United States was founded on the idea that “all men are created equal[,]” but white Americans enslaved their fellow Black Americans and “notoriously hate[d] [...] all men whose skins are not colored like your own.”⁵ For Douglass, the Fourth of July only highlighted the “immeasurable distance” between free white Americans and enslaved Black Americans.⁶ “The blessings in which you, this day, rejoice, are not enjoyed in common.—The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not me,” he explained; “*You* may rejoice. *I* must mourn.”⁷

Frederick Douglass’s speech about the Fourth of July shows the conflict at the heart of American history. The United States prides itself on liberty, equality, and justice for all, but, for over 400 years, white people of European ancestry built and continued a brutal racial order: white at the top, all other races below. From the beginning, America’s wealth was built by the forced labor of people kidnapped from Africa and their descendants. The U.S. government at all levels allowed and participated in the exploitation, abuse, terror, and murder of people of African descent so that white people could profit as much as possible from their enslavement. To justify stealing the intellect, skill, and labor of Black Americans, enslavers created and spread false, racist ideas that Black Americans were less intelligent than whites, that they loved their children less than white parents, and that they felt less pain than white people.

Insisting that Black Americans were less than human made it easier for enslavers and the American government at all levels to deny them the legal rights that many white Americans believed were a basic part of being American. After enslavement officially ended in 1865, white Americans terrorized Black Americans with violence and racist ideas. Black Americans lived under violent threats to themselves and their families and did not have the economic opportunities or political rights of their white peers. Through laws allowing, promoting, and protecting enslavement, federal, state, and local governments were complicit in stealing centuries of unpaid

¹ Balkansky, *What, to the American Slave, is Your Fourth of July?* (July 15, 2020) Library of Congress <<https://blogs.loc.gov/headlinesandheroes/2020/07/what-to-the-american-slave-is-your-4th-of-july/>> (as of Jan. 16, 2022) (Balansky).

² Balkansky, *supra*.

³ Douglass, *What to the Slave is the Fourth of July?* (July 5, 1852) Teaching American History, <<https://teachingamericanhistory.org/document/what-to-the-slave-is-the-fourth-of-july/>> (as of Nov. 3, 2021) (*What to the Slave*).

⁴ What to the Slave, *supra*.

⁵ What to the Slave, *supra*.

⁶ What to the Slave, *supra*.

⁷ What to the Slave, *supra*.

wages from Black Americans. The racist ideas invented to control enslaved people have echoed through centuries of American laws and policies and inflicted physical, mental, and emotional trauma on approximately 20 generations of Black Americans. The state and federal governments of this country have never atoned for these harms.

This chapter traces the long arc of enslavement in early North America and the United States. Sections III and IV examines the origins of race-based enslavement targeting people of African descent, the ways enslavement generated wealth for white colonists in English North America, and the emergence of transatlantic trafficking in enslaved African people. Sections V traces the importance of enslavement to the founding of the United States from the American Revolution to the creation of the U.S. Constitution. Sections VI, VII, and VIII describes the lives of enslaved people during the height of the domestic slave trade, the complicity of northerners in the perpetuation of enslavement, and enslavement's importance to American educational, religious, and governmental institutions. Section IX discusses the expansion of enslavement into western U.S. territories, the establishment of enslavement in California, and the complicity of the California state government in enslavement and anti-Black oppression. Finally, sections X and XI ends with the U.S. Civil War, the formal abolition of enslavement, policies toward formerly enslaved people during Reconstruction, and the lingering, harmful effects of efforts to recast the defeat of the Confederate States of America into a "Lost Cause" myth that endures to the present day.

III. The Origins of American Enslavement

A. Pre-Modern Enslavement

Enslavement has existed for thousands of years in many different cultures across the world.⁸ It is only in the past 400 to 500 years that white Europeans developed a type of enslavement based heavily on the color of someone's skin and which mainly targeted people of African ancestry.⁹ This type of enslavement developed gradually between the 1400s and the 1700s.¹⁰ It was based on the ideas that African ancestry could be the basis for life-long enslavement, that the children of enslaved African-descent women could be enslaved from birth,¹¹ and that people of African descent were naturally destined to be enslaved.¹²

Before the 1400s, a time period known as the "pre-modern era," enslavement and enslaved people differed widely.¹³ In the ancient Roman Empire, for instance, those who were enslaved were mostly conquered people who came from multiple racial, ethnic, religious, and class backgrounds across Europe, the Middle East, and North Africa.¹⁴ In the Middle Ages (600s to 1400s), Celtic peoples, North Africans, Scandinavians, and especially Slavic people from Eastern Europe (from whom the word "slave" comes) were the most commonly

⁸ Patterson, *Slavery and Social Death: A Comparative Study* (1982), pp. vii – viii (Patterson).

⁹ Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (2006), pp. 53 – 54 (Davis); Peter Kolchin, *American Slavery: 1619 – 1877* (1993), pp. 5 – 6 (Kolchin).

¹⁰ Davis, *supra*, at pp. 53 – 54.

¹¹ Kolchin, *supra*, at p. 17.

¹² Kolchin, *supra*, at p. 18.

¹³ Kolchin, *supra*, at pp. 4 – 5.

¹⁴ *Slavery in Ancient Rome*, British Museum <<https://www.britishmuseum.org/exhibitions/nero-man-behind-myth/slavery-ancient-rome>> (as of Jan. 23, 2022).

enslaved groups in Europe.¹⁵ In the Muslim kingdoms of North Africa and the Middle East, both Slavic people and sub-Saharan African people (Africans who lived south of the Sahara Desert) made up a large number of those who were enslaved.¹⁶

Enslaved people in these diverse societies became enslaved in different ways: they could be prisoners of war, victims of kidnapping, targets of religious crusades, people sentenced to enslavement as a punishment for crimes, or poor people sold to pay off debts.¹⁷ Depending on the culture or time period, children born to one or more enslaved parent were not always automatically enslaved, and it was fairly common for enslavers to free the children, grandchildren, or great-grandchildren of enslaved people.¹⁸

Finally, early enslaved people fulfilled a variety of roles in their societies beyond being agricultural workers or house servants.¹⁹ Enslaved people could be status symbols who represented the wealth and power of their enslavers, trusted advisors, poorly treated members of their enslavers' extended families, coerced sexual and marriage partners, or slave-soldiers forced into military service.²⁰

B. Beginnings of Modern Enslavement

Enslavement changed with European world exploration and global colonization between the 1400s and the 1600s.²¹ In North America and South America, English, Spanish, French, Portuguese, and Dutch colonizers took Indigenous peoples' land to grow crops such as sugarcane, tobacco, and coffee; to mine for gold and silver; cut timber; and trap for animal skins.²² In most of these new colonies, natural resources and land to grow crops were common, but workers were scarce.²³

In order to efficiently exploit these resources, Europeans first captured, enslaved, and exploited the Indigenous peoples of North and South America.²⁴ Because the enslavement of Indigenous people could not keep up with the demand for labor, European colonizers began to traffic enslaved workers from the continent of Africa.²⁵

Portuguese and Spanish colonizers brought the first enslaved Africans to North and South America to boost their Indigenous workforce.²⁶ Portuguese merchants had been trafficking West Africans and selling them in

¹⁵ Patterson, *supra*, at pp. 152 – 157.

¹⁶ Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (2016), pp. 19 – 21 (Kendi).

¹⁷ Patterson, *supra*, at pp. 105 – 130.

¹⁸ Patterson, *supra*, at pp. 134 – 147, 262 – 263.

¹⁹ Kolchin, *supra*, at p. 4.

²⁰ Kolchin, *supra*, at p. 4; Patterson, *supra*, at pp. 62 – 64, 92 – 93, 173 – 175.

²¹ Kolchin, *supra*, at p. 5.

²² Guasco, *The Fallacy of 1619: Rethinking the History of Africans in Early America* (Sept. 4, 2017) Black Perspectives, African American Intellectual History Society < <https://www.aaihs.org/the-fallacy-of-1619-rethinking-the-history-of-africans-in-early-america/> > (as of Jan. 17, 2022) (Guasco); Kolchin, *supra*, at pp. 5 – 6.

²³ Kolchin, *supra*, at p. 6.

²⁴ Kolchin, *supra*, at pp. 7 – 8.

²⁵ Kolchin, *supra*, at pp. 7 – 8; Eltis, *A Brief Overview of the Trans-Atlantic Slave Trade: Introduction* (2007) Slave Voyages < <https://www.slavevoyages.org/voyage/essays#interpretation/a-brief-overview-of-the-trans-atlantic-slave-trade/introduction/0/en/> > (as of Jan. 17, 2022).

²⁶ David Eltis, *A Brief Overview of the Trans-Atlantic Slave Trade: Early Slaving Voyages* (2007) Slave Voyages < <https://www.slavevoyages.org/voyage/essays#interpretation/a-brief-overview-of-the-trans-atlantic-slave-trade/early-slaving-voyages/3/en/> > (as of Jan. 17, 2022) (*Early Slaving Voyages*).

Portugal for many years before the colonization of North and South America.²⁷ It was these captives who were first forcibly moved in small groups to European colonies across the Atlantic Ocean.²⁸ Portuguese and Spanish colonizers eventually started buying thousands of enslaved Africans along the West African Coast and bringing them directly to colonies in the Caribbean and Brazil.²⁹ Around 350,000 enslaved people of African descent had already arrived in North and South America³⁰—including Spanish settlements in present-day South Carolina (by 1526)³¹ and Florida (by 1539)³²—by the time Dutch pirates sold around 20 African captives to English colonists in Jamestown, Virginia, in 1619.³³

When these first Africans were brought by force to the English colonies that became the United States, enslavement was based only on skin color, and racist ideas about Africans being specially destined for enslavement, did not yet fully exist.³⁴ European colonists who wanted to exploit enslaved Africans and profit from their work built these racist beliefs over time.³⁵

C. Creating the Racial Hierarchy

In the very earliest years of English colonization in Virginia, European indentured servants were the most common workers.³⁶ Indentured servants were usually either poor people who agreed to work for wealthy people for several years in exchange for transportation to the colonies, or they were people found guilty of crimes who had to work for several years in the colonies before getting their freedom.³⁷

At first, there was not much difference between the treatment of enslaved Africans and European indentured servants.³⁸ The major divisions in Virginia were between wealthy people and poor people who were forced to labor, not between Black and white people.³⁹ When white indentured servants (or former indentured servants) and enslaved Africans began to rebel against wealthy whites who controlled the colony and profited from their labor, wealthy white people used race as a way to divide these two groups and stay in power.⁴⁰

Rich white Virginians began to grant more rights and privileges to poorer white people.⁴¹ This move created a false sense of greater equality among rich and poor white English colonists, who began to come together around a shared idea that they were “white” people who were naturally superior to “Black” people of African descent.⁴²

²⁷ Early Slaving Voyages, *supra*.

²⁸ Early Slaving Voyages, *supra*.

²⁹ Early Slaving Voyages, *supra*.

³⁰ *Trans-Atlantic Slave Trade—Estimates Slave Voyages* <<http://www.slavevoyages.org/estimates/9jrgpwSU>> (as of Jan. 17, 2022).

³¹ Guasco, *supra*.

³² Torres-Spelliscy, *Everyone is talking about 1619. But that’s not actually when slavery in America started* (Aug. 23, 2019) Washington Post <<https://www.washingtonpost.com/outlook/2019/08/23/everyone-is-talking-about-thats-not-actually-when-slavery-america-started/>> (as off Jan. 17, 2022).

³³ Kendi, *supra*, at p. 37; Sluiter, *New Light on the ‘20. and Odd Negroes’ Arriving in Virginia, August 1619* (April 1997) 54 *William and Mary Q.* 395 – 398.

³⁴ Kolchin, *supra*, at pp. 14 – 16.

³⁵ Kolchin, *supra*, at pp. 14 – 17.

³⁶ Kolchin, *supra*, at pp. 8 – 9.

³⁷ Kolchin, *supra*, at pp. 8 – 9.

³⁸ Kolchin, *supra*, at pp. 15 - 16.

³⁹ Kolchin, *supra*, pp. 14 - 16.

⁴⁰ Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (1975), pp. 256 – 269 (Morgan).

⁴¹ Morgan, *supra*, at p. 276.

⁴² Morgan, *supra*, at [p.]

The new unity between rich and poor white people in Virginia encouraged poor whites to keep Africans enslaved and to help their wealthy neighbors squash rebellions of enslaved people.⁴³

Only after rich and poor white colonists in Virginia united against enslaved Africans, and enslavement became widespread and profitable, did whites come up with racist ideas to explain why Black enslavement was natural and good, and why white people deserved more freedom and rights.⁴⁴ European enslavers argued either that enslavement “civilized” Africans by introducing them to European climates and lifeways, or that the Christian Bible had automatically cursed them to suffer enslavement.⁴⁵ The overall goal of these racist ideas was to defend enslavement and white supremacy by claiming that people of African descent were, and always had been, inferior to white people from Europe.⁴⁶

White colonial lawmakers in Virginia then passed new laws that created a racial caste system, which ranked racial groups based on skin color, with white people at the top and nonwhites below.⁴⁷ This became a permanent part of American culture and society.⁴⁸ These laws aimed to control people of African descent, keep them in life-long enslavement, and keep poor whites and enslaved Black people divided.⁴⁹ In the late 1600s and early 1700s, these racist colonial laws gradually built up a legal system that treated people of African descent as permanent outsiders whose skin color made them naturally different from and unequal to all white people.⁵⁰ These Virginia laws:

- Made enslavement permanent and automatic for most people of African descent by saying that children born to enslaved mothers would be enslaved for life⁵¹; that becoming a Christian would not end enslavement⁵²; and that enslavers could not set enslaved people free unless they paid to take them out of the Virginia colony;⁵³
- Made it easier for whites to control free people of African descent (those born into freedom or who did manage to escape enslavement) by denying them legal, political, and social rights.⁵⁴ These included the right to vote, serve in colonial military organizations, have political office, or carry firearms;⁵⁵ and
- Divided all white people from all Black people by making interracial sex or marriage a crime, punishing white women who gave birth to mixed-race children, and forcing these mixed-race children into indentured servitude until they were 31 years old.⁵⁶

⁴³ Kendi, *supra*, at pp. 53 – 54.

⁴⁴ Kendi, *supra*, at pp. 8 – 10.

⁴⁵ Kendi, *supra*, at p. 17.

⁴⁶ Kendi, *supra*, at p. 17.

⁴⁷ Kolchin, *supra*, at pp. 17 - 18

⁴⁸ Kolchin, *supra*, at pp. 17 - 18

⁴⁹ Kendi, *supra*, p. 39.

⁵⁰ Kendi, *supra*, p. 39

⁵¹ Kendi, *supra*, at p. 40.

⁵² Kendi, *supra*, at p. 48.

⁵³ Morgan, *supra*, at p. 337.

⁵⁴ Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (1998), pp. 123 – 124 (Berlin).

⁵⁵ Berlin, *supra*, at pp. 123 – 124.

⁵⁶ Berlin, *supra*, at p. 124.

Other southern colonies that depended on enslavement passed similar laws across the 1700s. In this way, a racial caste system became widespread across much of the area that would later become the United States.⁵⁷

IV. The Transatlantic Trafficking of Enslaved People and Great Britain's North American Colonies

A. The Growth of Enslavement and the Transatlantic Trafficking in English North America

The search for profits, the unity of rich and poor white colonists, and the development of racist ideas about Africans paved the way for the massive increase of slaving voyages to Africa and the enslavement of people of African descent in the lands that would later become the United States.⁵⁸

The enslavement of people of African descent played a major role in the population and economic boom of English colonies in North America during the 1700s.⁵⁹ Enslaved Africans made up 47.5 percent of all people who arrived in the English colonies between 1700 and 1775 (around 278,400 of the 585,000 new arrivals documented during this period).⁶⁰ This meant that the transatlantic slave trade was nearly as important to the growth of English North America as free (or indentured) immigration from Europe.⁶¹

The populations of the English colonies showed this change: Between 1680 and 1750, people of African descent increased from 7 percent to 44 percent of the total population of Virginia, and from 17 percent to 61 percent of the total population of South Carolina.⁶² This trend was even more important in the nearby British colonies of the Caribbean where around one million enslaved Africans were forcibly brought during the same period of time,⁶³ and where the enslaved population made up 80 to 90 percent of the total population.⁶⁴

To keep the profits of enslavement growing, English merchants, the British monarchy, and the British government worked together to become the leaders of the transatlantic slave trade.⁶⁵ Just one English company, the Royal African Company, forcibly brought nearly 150,000 enslaved people from Africa across the Atlantic Ocean between the early 1670s and the early 1720s.⁶⁶ This total was more than any single person or company in the entire history of the transatlantic slave trade.⁶⁷

The English transatlantic slave trade of the 1600 to 1700s differed from the slave trades which existed in West Africa before or during the same period. Enslavement was common within sub-Saharan African societies,

⁵⁷ [citation]

⁵⁸ Kolchin, *supra*, at pp.18 – 19.

⁵⁹ Fogelman, *Migrations to the Thirteen British North American Colonies, 1700 – 1775: New Estimates* (Spring 1992) 22 J. of Interdisciplinary Hist. 700 (Fogelman).

⁶⁰ Fogelman, *supra*, at pp. 697 – 698.

⁶¹ Fogelman, *supra*, at pp. 697 – 698.

⁶² Kolchin, *supra*, at pp. 11 – 12.

⁶³ *Trans-Atlantic Slave Trade—Estimates Slave Voyages* <new query> (as of Jan. 17, 2022).

⁶⁴ Mintz, *Historical Context: American Slavery in Comparative Perspective* Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-american-slavery-comparative-perspective>> (as of Jan. 17, 2022).

⁶⁵ Pettigrew, *Freedom's Debt: The Royal African Company and the Politics of the Atlantic Slave Trade, 1672 – 1752* (2013), pp. 5 – 7 (Pettigrew).

⁶⁶ Pettigrew, *supra*, at p. 11.

⁶⁷ Pettigrew, *supra*, at p. 11.

including those of West Africa, one of the main areas of the transatlantic slave trade.⁶⁸ In West African cultures, enslaved people were usually people captured in wars or attacks on other ethnic or lineage (family ancestry) groups, people who owed debts, or people found guilty of crimes.⁶⁹

Enslaved people in West African societies also had a wide variety of social and economic roles. Most lived in the same home as their enslavers and were treated as low-status members of the family group. Some worked in agriculture or as house servants, while some became wives or concubines (involuntary sexual partners or secondary wives). This enslavement was not usually permanent or passed on to the next generation. Most enslaved people and their children in West Africa gradually lost their enslaved status and became part of the families and communities of their enslavers.⁷⁰

The arrival of Europeans made enslavement along the western coast of Africa more widespread and violent. European enslavers depended on African slave-trading networks for captives to send across the Atlantic Ocean.⁷¹ But the massive demand for African captives, which kept growing as Europeans colonized more areas of the world, changed African enslavement greatly.

African societies increased kidnapping raids on other ethnic or lineage groups to capture more people to sell to Europeans. The focus of the West African slave trade also shifted to the coasts and port cities where Europeans set up trading forts to buy people who had been captured.⁷² The transatlantic slave trade eventually involved capturing Africans from an enormous geographic area that stretched 3,500 miles along the western African coast from present-day Senegal in the north to present-day Angola in the south, and as many as 500 to 1,000 miles into the interior of the continent.⁷³ Captive African people changed hands many times and traveled long distances before they arrived at coastal ports where Europeans bought them.⁷⁴

B. The Middle Passage

African captives suffered horrific physical, emotional, and mental trauma before and during the voyage across the Atlantic Ocean. This journey was called the “Middle Passage” and it was so dangerous, unhealthy, and violent that around 1.8 million people died before they ever reached the Americas.⁷⁵

Enslaved Africans’ suffering began even before the slave ships set sail. Once European enslavers purchased people who had been captured from African enslavers, they locked them up for days, weeks, or even months until they were ready to sail.⁷⁶ In the earlier centuries of the slave trade, Portuguese, Dutch, and English trading companies crowded people who had been captured into large, heavily guarded forts called slave “castles” or

⁶⁸ Walvin, *Crossings: Africa, the Americas and the Atlantic Slave Trade* (2013), pp. 31 – 32 (Walvin); Davis, *supra*, at p. 89.

⁶⁹ Davis, *supra*, at pp. 12 – 13; Walvin, *supra*, at p. 31; Kolchin, *supra*, at p. 20.

⁷⁰ Kolchin, *supra*, at p. 20.

⁷¹ Walvin, *supra*, at pp. 40 – 41.

⁷² Davis, *supra*, at pp. 12 – 13.

⁷³ Davis, *supra*, at p. 100.

⁷⁴ Walvin, *supra*, at p. 49.

⁷⁵ *Trans-Atlantic Slave Trade—Estimates Slave Voyages* <<http://www.slavevoyages.org/estimates/9jrgpwSU>> (as of Jan. 17, 2022).

⁷⁶ Walvin, *supra*, at p. 84.

“factories.”⁷⁷ Later, most slave traders switched to using large corrals called “barracoons” or to just locking up people on board the slave ships until it was time to sail for the Americas.⁷⁸

During the journey across the Atlantic Ocean, enslaved Africans went through months of torture trapped inside slave ships. The voyage, which was called the “Middle Passage” because it was the second leg of a triangular trade between Europe, Africa, and the Americas, took almost 100 days (over 3.5 months) in the early years of the trade (although new sailing technologies cut the length of the trip to 60 to 80 days in later years).⁷⁹ Slaving ships came in many different sizes, but the average Royal African Company boat held around 330 enslaved people.⁸⁰

African men, who made up around two-thirds of all those captured,⁸¹ spent almost all of the journey—sixteen hours or more every day—laying down in specially constructed rooms inside the ships.⁸² Crews stripped them naked, chained them up in pairs, and forced them to lay down on their sides, or to lay head to feet, so that they could fit in as many people as possible.⁸³ On English slave ships, each man had a space smaller than the size of a coffin.⁸⁴ On ships with “tight-packing,” captains added an extra platform so that men laid in two rows stacked on top of each other with only 2.5 feet of vertical space to lay down.⁸⁵ Enslaved women and children, who were usually smaller in number, lived together in groups in small rooms inside the ship.⁸⁶

Conditions inside slave ships were horrific and caused massive amounts of sickness and death. Hundreds of people were crowded together in the blazing heat and tossed back and forth with the ship’s movement, especially during bad weather.⁸⁷ Enslaved captive Olaudah Equiano, who survived the Middle Passage, wrote that “the closeness of the place, and the heat of the climate, added to the number in the ship, which was so crowded that each had scarcely room to turn himself, almost suffocated us.”⁸⁸

Captives did not have much fresh air and their rooms were covered with human waste.⁸⁹ Rats and insects swarmed around them.⁹⁰ Low-quality food, as well as scarce water, led to widespread lack of nutrition and dehydration.⁹¹ Filthy conditions and poor nutrition caused waves of sickness, including scurvy (a lack of vitamins B and C) and “bloody flux” (amoebic diarrhea or dysentery).⁹² Highly contagious diseases—such as

⁷⁷ Walvin, *supra*, at pp. 48, 83.

⁷⁸ Walvin, *supra*, at p. 83.

⁷⁹ Haines, McDonald, and Shlomowitz, *Mortality and Voyage Length in the Middle Passage Revisited* (Oct. 2001) 38 *Explorations in Econ. Hist.* 506.

⁸⁰ Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora* (2007), p. 71.

⁸¹ Davis, *supra*, at p. 100.

⁸² Rediker, *The Slave Ship: A Human History* (2007), p. 68 (Rediker).

⁸³ Mustakeem, *Slavery at Sea: Terror, Sex, and Sickness in the Middle Passage* (2016), p. 59 (Mustakeem).

⁸⁴ Mustakeem, *supra*, at p. 59.

⁸⁵ Kolchin, *supra*, at p. 21.

⁸⁶ Rediker, *supra*, at pp. 68 – 69.

⁸⁷ Walvin, *supra*, at p. 91.

⁸⁸ Olaudah Equiano quoted in California Task Force to Study and Develop Reparation Proposals for African Americans (September 23, 2021), Testimony of Dr. Daina Ramey Berry, <<https://oag.ca.gov/ab3121/meetings/092021>> (as of Jan. 26, 2022).

⁸⁹ Mustakeem, *supra*, at pp. 59 – 62.

⁹⁰ Walvin, *supra*, at pp. 95 – 96.

⁹¹ Mustakeem, *supra*, at pp. 64 – 69.

⁹² Mustakeem, *supra*, at pp. 132 – 136.

smallpox and measles—spread fast in the overcrowded spaces.⁹³ Slave ships were filled with people who were very sick, dying, or dead.

Enslaved Africans also suffered physical and sexual violence at the hands of ships' crews. Crew members moved people who had been captured to the top deck of the ship on a regular basis to force them to bathe and dance for exercise.⁹⁴ They often raped and impregnated women and girls.⁹⁵ Heavily armed crew members watched enslaved people carefully, and they threatened, beat, tortured, and sometimes killed them, especially if they resisted or rebelled.⁹⁶

There is also evidence that ship crews threw sick enslaved people overboard to prevent them from spreading disease to others and to claim insurance money for "lost" human cargo.⁹⁷ In one especially brutal case in 1781, an English slave ship captain ordered his crew to throw 132 Africans overboard because he had run out of supplies and his insurance company would only pay him if enslaved people drowned, not if they starved to death.⁹⁸ During the worst storms, crews also tried to keep from sinking by throwing enslaved people overboard to decrease the weight of the ship.⁹⁹ British insurance companies allowed this and paid ship captains for any human beings who their crews threw overboard to drown.¹⁰⁰

The transatlantic slave trade and the Middle Passage had a sickening cost in human lives. European enslavers forced around 12.5 million enslaved Africans to cross the Atlantic Ocean between 1525 and 1875. More than 14 percent of these people, around 1.8 million in total, died of sickness, neglect, abuse, murder, or suicide.¹⁰¹ The men, women, and children who survived the Middle Passage were then sold to local slave traders, merchants, or plantation owners.¹⁰²

When their voyage across the Atlantic Ocean finally ended in North America, South America, or the Caribbean, enslaved Africans suffered "social death," which meant they were now permanently separated from their home communities, cultures, and families.¹⁰³ They were outsiders in an unfamiliar place, surrounded by strangers with completely different cultures, religions, and languages. Enslaved Africans had to build new families, languages, cultures, and religious practices rooted both in the older traditions of their homelands and the new cultures that they found in the Americas.

⁹³ Walvin, *supra*, at pp. 86, 91 – 92.

⁹⁴ Mustakeem, *supra*, at pp. 62 – 64, 71 - 72.

⁹⁵ Mustakeem, *supra*, at pp. 82 – 90.

⁹⁶ Mustakeem, *supra*, at pp. 76 – 82, 94 – 101.

⁹⁷ Mustakeem, *supra*, at pp. 188 – 189.

⁹⁸ Kolchin, *supra*, at p. 19.

⁹⁹ Walvin, *supra*, at pp. 90 - 91.

¹⁰⁰ Walvin, *supra*, at pp. 90 - 91.

¹⁰¹ Trans-Atlantic Slave Trade—Estimates, SlaveVoyages <<https://www.slavevoyages.org/assessment/estimates>> (as of Jan. 24, 2022).

¹⁰² Mustakeem, *supra*, at pp. 160 – 165.

¹⁰³ Patterson, *supra*, at p. 5.

V. Enslavement and the Founding of the United States

Enslaved people and the institution of enslavement became increasingly important to the colonial societies of North America that would later become the United States.¹⁰⁴ The southern tobacco or rice-growing colonies, including Maryland, Delaware, Virginia, the Carolinas, and Georgia, trafficked more and more enslaved people in the late 1600s and 1700s. These states gradually built economies and societies that depended heavily on enslavement.¹⁰⁵

The human trafficking was not limited to the southern colonies. Whites in northern colonies also trafficked enslaved people, and enslavement became a feature of life in every northern colony. In most New England colonies, enslavement was not a major institution, but in colonies farther south, such as New York and Pennsylvania, enslavement was often a part of daily life. For example, one-fifth of New York City's population was enslaved in 1764, making it the second largest slaveholding city in the 13 original English colonies behind only Charleston, South Carolina.¹⁰⁶

By the time white English colonists began to complain about their mistreatment by the British government and began comparing their lack of rights in the British Empire to enslavement, the real enslavement of people of African descent was already well established in all 13 original British colonies. Five hundred thousand enslaved Black people, who made up 20 percent of the entire colonial population, knew the real horrors and trauma of enslavement.¹⁰⁷

A. The American Revolution

When white colonists declared their independence from Great Britain, they explained their actions by saying that the King of England and the British government had taken away their freedom and their rights as “freeborn Englishmen.”¹⁰⁸ In the Declaration of Independence, Americans famously announced that “all men are created equal” and “that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.”¹⁰⁹ At the same time, these same colonists bought and sold people of African descent who had no freedom and very few rights.

People who opposed the American Revolution were quick to point out the hypocrisy of these words. Thomas Day, a British man who opposed enslavement, said that “[i]f there be an object truly ridiculous in nature, it is an American patriot, signing resolutions of independence with the one hand and with the other brandishing a whip over his affrighted slaves.”¹¹⁰ Even white American colonists understood the hypocrisy of the Declaration of Independence. Abigail Adams, an opponent of enslavement from New England, the wife of John Adams, and a

¹⁰⁴ Mintz, *Historical Context: American Slavery in Comparative Perspective*, Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-american-slavery-comparative-perspective>> (as of Jan. 24, 2022).

¹⁰⁵ Kolchin, *supra*, at pp. 28 – 32.

¹⁰⁶ Foner, *Forever Free: The Story of Emancipation and Reconstruction* (2005), p. 8 (Forever Free).

¹⁰⁷ *American Revolution*, Slavery and Remembrance: A Guide to Sites, Museums, and Memory, Colonial Williamsburg Foundation <<https://slaveryandremembrance.org/articles/article/?id=A0064>> (as of Dec. 10, 2021).

¹⁰⁸ Forever Free, *supra*, at pp. 8 – 9.

¹⁰⁹ Declaration of Independence (July 4, 1776) <<https://www.archives.gov/founding-docs/declaration-transcript>> (as of Jan. 24, 2022) (Declaration).

¹¹⁰ Thomas Day, quoted in Chernow, Alexander Hamilton (2004), p. 307.

future first lady of the United States, wondered just how strongly white colonists felt about human liberty when they were “accustomed to deprive their fellow citizens of theirs.”¹¹¹

The founders of the United States, especially those who owned enslaved people and profited from enslavement, were well aware of their hypocrisy and they tried to downplay it. They knew that enslavement made them, and their independence movement, look bad, but they also wanted to continue to profit from the stolen labor of enslaved people.

Thomas Jefferson, the author of the first draft of the Declaration of Independence, spoke out against enslavement and in favor of human rights. At the same time, Jefferson owned around 600 enslaved people over the course of his lifetime.¹¹² His original draft of the Declaration of Independence openly criticized the transatlantic slave trade, which he called “a cruel war against human nature itself, violating its most sacred rights of life and liberty,” but he blamed it almost all on King George III of England. The king not only failed to stop the slave trade, Jefferson claimed, he also said that the king encouraged enslaved people to rise up and kill white colonists.¹¹³ Embarrassment over enslavement, and the hope to keep making money from it, was clear when the Continental Congress rejected this part of the Declaration and voted to remove it.

Jefferson explained the rejection in his notes. Representatives from South Carolina and Georgia depended on enslavement and wanted to continue in the trafficking of humans. Men from the northern colonies were embarrassed by the criticism of the slave trade because they were highly involved in shipping enslaved Africans across the Atlantic.¹¹⁴ The final version of the Declaration of Independence only mentioned enslavement indirectly by claiming that King George III was trying to cause “domestic insurrections” (code words for rebellions by enslaved people) in the colonies.¹¹⁵

The founders of the United States tried to dodge the issue of enslavement, but enslaved and free people of African descent would not let them. They tested the new nation’s ideas of freedom during the American Revolutionary War (1775 to 1783). Virginia’s colonial governor, a man named Lord Dunmore, quickly took advantage of enslavement in the colonies by promising freedom to any enslaved man who ran away and fought for the British Army against the Americans.¹¹⁶ Around 30,000 to 40,000 people (and maybe as many as 100,000 people) ran away from their enslavement during the American Revolution.¹¹⁷

Some of these male freedom seekers joined the British Army but, large numbers died from smallpox during their service. Others, including many women and children, took advantage of wartime chaos to escape to areas where the British Army was strong.¹¹⁸ The massive number of freedom seekers greatly damaged enslavement in

¹¹¹ Abigail Adams, quoted in *Forever Free*, *supra*, at p. 9.

¹¹² *Jefferson’s Attitudes Toward Slavery*, Jefferson and Slavery, Monticello <<https://www.monticello.org/thomas-jefferson/jefferson-slavery/jefferson-s-attitudes-toward-slavery/>> (as of Nov. 2, 2021).

¹¹³ Jefferson, *Jefferson’s “original Rough draught” of the Declaration of Independence*, *Declaring Independence: Drafting the Documents*, Library of Congress <<https://www.loc.gov/exhibits/declara/ruffdrft.html>> (as of Jan. 24, 2022).

¹¹⁴ Jefferson, *Notes of the Proceedings in the Continental Congress, 7 June – 1 August, 1776*, Library of Congress, Founders Online <<https://founders.archives.gov/documents/Jefferson/01-01-02-0160>> (as of Jan. 24, 2022).

¹¹⁵ Declaration, *supra*.

¹¹⁶ Kolchin, *supra*, at pp. 70 – 71.

¹¹⁷ Nash, *The African Americans’ Revolution*, in the *Oxford Handbook of the American Revolution*, edited by Jane Kamensky and Edward G. Gray (2012), p. 261 (Nash).

¹¹⁸ Kolchin, *supra*, at pp. 72 – 73.

the lower southern states. For instance, around 30 percent of South Carolina’s enslaved population left or died during the Revolution.¹¹⁹

Some states tried to solve this problem by promising freedom to enslaved men who fought on the side of the Americans.¹²⁰ Other states recruited free Black men to boost the size of the small American army. Even though they were smaller in number than whites, free Black men were more likely to volunteer for military service and to serve longer than whites because they wanted both independence for the United States and greater rights for themselves.¹²¹ Overall, around 9,000 free or enslaved African American men served alongside whites in racially mixed military units to fight for American independence.¹²²

Black Americans’ struggles for freedom during the American Revolution led to the end of the enslavement in most of the northern states where the enslaved population was small and local enslavement was not as important to the economy. Enslaved people used the revolutionary ideals of freedom to convince northern judges, and the general public, to end enslavement.¹²³

When enslaved people in Massachusetts sued for their freedom, the state courts decided that enslavement went against the state’s new constitution, which said that “all men are born free and equal.”¹²⁴ Enslavement ended there in 1783.¹²⁵ Nearby, the state of Vermont approved a new constitution that outlawed enslavement completely in 1777.¹²⁶ States farther south, such as New York and Pennsylvania, which depended much more on enslavement, passed gradual emancipation laws to pay enslavers for loss of profits. These laws required children born to enslaved mothers to go through a long indenture (up to 28 years) and then be set free.¹²⁷

Southern states that profited the most from enslavement fought to keep it and rebuild it. States in the upper South—Virginia, Maryland, and Delaware—temporarily began to relax their laws against freeing the enslaved. “Manumission,” the legal process by which enslavers freed enslaved people or allowed them to save money and purchase their freedom, became more common.¹²⁸ This was partly because the Revolutionary War had hurt the market for tobacco and made enslavement less profitable in the upper South.¹²⁹

Revolutionary ideas about human freedom motivated some of this manumission, although with limits. For instance, Virginian George Washington, leader of the revolutionary army and the first president of the United States, freed all of the people he enslaved, but only upon his death.¹³⁰ Washington, however, was not the norm.

Thomas Jefferson, the next slaveholder from Virginia to win the presidency, willingly freed only 10 of the 600 people who he had enslaved over the course of his life.¹³¹ Four of those 10 people were his own children with

¹¹⁹ Kolchin, *supra*, at pp. 72 – 73.

¹²⁰ Nash, *supra*, at pp. 255 – 257.

¹²¹ Nash, *supra*, at p. 254.

¹²² Nash, *supra*, at pp. 254 – 255.

¹²³ Kolchin, *supra*, at p. 78.

¹²⁴ Massachusetts Constitution of 1780, Part 1, Article 1 <<https://malegislature.gov/laws/constitution>> (as of Jan. 24, 2022).

¹²⁵ Nash, *supra*, at p. 258.

¹²⁶ Kolchin, *supra*, at p. 78.

¹²⁷ Kolchin, *supra*, at pp. 78 - 79.

¹²⁸ Kolchin, *supra*, at pp. 77 – 78.

¹²⁹ Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (2014), p. 4 (Baptist).

¹³⁰ *Forever Free*, *supra*, at pp. 9 – 10.

¹³¹ *Slaves who Gained Freedom*, Thomas Jefferson Encyclopedia, Monticello, <<https://www.monticello.org/site/research-and-collections/slaves-who-gained-freedom>> (as of Jan. 24, 2022).

Sally Hemings, an enslaved woman who he owned as his property and who he never freed.¹³² Jefferson's fellow white southerners in the upper south increasingly stopped manumission when they found that selling "surplus" enslaved people to cotton growers in South Carolina and Georgia could be a profitable replacement for tobacco. Meanwhile, the Deep South states rebuilt their plantation economies by buying enslaved people from the Upper South and trafficking in large numbers of enslaved Africans from the transatlantic slave trade.¹³³

Overall, the American Revolution created a new nation that was increasingly divided into three regions: The North, where enslavement was immediately or gradually ended; the upper South, where older patterns of enslavement were changing; and the lower South, where enslavement remained an important and growing part of the economy.

B. The New Cotton Economy, and the Expansion of Enslavement

Instead of dying out after the American Revolution, enslavement became the economic lifeblood of the United States, North and South. After winning independence, the United States built the largest and most profitable enslaved labor economy in the world.¹³⁴ Between the end of the American Revolution in 1783 and the start of the Civil War in 1861, roughly the length of one human lifetime, the enslaved population of the United States increased almost five times from just under 650,000 enslaved individuals to almost four million enslaved people.¹³⁵

Two major processes made this possible. First, new technologies for producing cotton increased the value of enslaved people's labor, which encouraged white southerners to push west into Native Americans' land and to buy more enslaved people. Second, white Americans adopted a national constitution that protected enslavement and gave pro-enslavement whites outsized political power in the federal government. This power allowed enslavers to increase the profits of enslavement and to enjoy those profits with little regulation by the federal government.

Starting in the 1790s new technologies made enslavement more profitable than ever in North America. A new machine, the cotton gin, made it much easier and faster to remove the seeds from short-staple cotton, a sturdy breed of cotton that could be grown in many different climates and soils in the South.¹³⁶ Cotton growing breathed new life into the institution of enslavement. Enslavers looked for new lands to the west to expand cotton plantations.

To help these land-hungry cotton planters, the United States government increasingly pressured Native Americans in the Deep South to give up their homelands.¹³⁷ Native Americans in the southeastern United States, some of whom had adopted the practices of white colonizers such as growing cotton and owning enslaved Black Americans, resisted this pressure. The U.S. government eventually used a brutal policy of removal in which soldiers rounded up Native Americans, removed them from their land, and force marched them hundreds of miles to new lands west of the Mississippi River. Thousands of Native Americans died from

¹³² *The Life of Sally Hemings*, Monticello < <https://www.monticello.org/sallyhemings/> > (as of Jan. 24, 2022).

¹³³ Kolchin, *supra*, at pp. 72 – 73.

¹³⁴ Baptist, *supra*, at p. xxiii.

¹³⁵ Baptist, *supra*, at p. xxiii.

¹³⁶ Baptist, *supra*, at pp. 18, 82.

¹³⁷ [Adam] Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (2005), pp. 54 – 62,

disease and neglect along the way and the removal process came to be known as the “Trail of Tears,” or the “Trail on which We Cried.” As white southern cotton planters moved into these areas, the removal, death, and land theft suffered by Native Americans went hand-in-hand with the widespread enslavement of Black Americans.¹³⁸

C. Enslavement in the New Constitution

Around the same time that the cotton gin took off, southern enslaving states left a permanent mark on the American legal system by shaping the U.S. Constitution to meet their needs in upholding enslavement. During the Constitutional Convention in 1787, southern pro-enslavement representatives pushed for protections for enslavement, partly by threatening not to sign onto the new Constitution.¹³⁹ Their protests made sure that the Constitution included a fugitive slave law, which required the return of enslaved people who sought freedom across state lines.¹⁴⁰

Another part of the new Constitution prevented Congress from outlawing U.S. participation in the transatlantic slave trade for another 20 years.¹⁴¹ During those important 20 years, slave ships legally brought around 86,000 enslaved Africans to the United States.¹⁴² Congress was also required, and given the power, to use military force to stop “insurrections” and “domestic violence,”¹⁴³ which would have included rebellions by enslaved people.¹⁴⁴

The most important pro-enslavement constitutional policy was the 3/5 Clause. The Constitution was built on the idea of representative government and that Americans should elect people to represent their needs and interests in the federal government. In the U.S. House of Representatives, the number of representatives each state got was based on population with the idea that more populous states should get more representation than less populous states. This part of the Constitution raised controversial questions: Was it reasonable or fair for southern states with large numbers of enslaved people to count those people toward their Congressional representation when they allowed enslaved people no vote, no political rights, and very few legal rights? If enslavers usually treated enslaved people as property, why should they suddenly be counted as people for purposes of representation?¹⁴⁵ People who opposed counting enslaved people for purposes of representative came mostly from the North and they argued that the enslaved population should give little or no boost to southern states’ Congressional power.¹⁴⁶ At the same time, enslavers demanded to count the enslaved as whole people, not because they believed enslaved people were equal to white Americans, but because they wanted to use the rapidly growing enslaved population as an excuse for more voice in Congress and to counterbalance the power of the more populous northern states. The authors of the Constitution reached a compromise. States

¹³⁸ Baptist, *supra*, at pp. 228 – 229.

¹³⁹ Baptist, *supra*, at pp. 9 – 11.

¹⁴⁰ US Constitution, Article IV, Section 2, Clause 3.

¹⁴¹ US Constitution, Article I, Section 9, Clause 1.

¹⁴² *Trans-Atlantic Slave Trade—Estimates*, Slave Voyages <<http://www.slavevoyages.org/estimates/Z6QJ1jiU>> (as of Jan. 24, 2022).

¹⁴³ US Constitution, Article I, Section 8, Clause 15; and US Constitution, Article IV, Section 4.

¹⁴⁴ Waldstreicher, *How the Constitution was Indeed Pro-Slavery* (Sept. 19, 2015) The Atlantic <<https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/>> (as of Jan. 24, 2022) (Waldstreicher).

¹⁴⁵ Rael, *A Compact for the Good of America?: Slavery and the Three-Fifths Compromise* (Dec. 19, 2016) Black Perspectives, African American Intellectual History Society <<https://www.aaihs.org/a-compact-for-the-good-of-america-slavery-and-the-three-fifths-compromise/>> (as of Feb. 9, 2022) (Rael).

¹⁴⁶ Rael, *supra*.

would get to count each enslaved person toward their representation in Congress, but each enslaved individual would only count as 3/5 (or 60 percent) of a free white person when it came time to determine how many representatives each state received in the House.¹⁴⁷ This was an enormous benefit for enslavers. They could continue to treat enslaved people as property but still get to count 60% of the enslaved population toward getting more power in Congress.¹⁴⁸

Representation in Congress also had a major influence on presidential elections. The Constitution set up an electoral college in which a group of representatives (called “electors”) voted to choose the next president. Each state got a number of electors equal to the number of senators and representatives that it had in Congress.¹⁴⁹ In this way, enslaving states, which gained more representatives in Congress from the 3/5 Clause, automatically gained more presidential electors, and more power to influence presidential elections, too.¹⁵⁰

At the same time, some historians argue that white southerners would have gone even further to make the U.S. Constitution a pro-enslavement document if they did not have to compromise with representatives from the northern states. The words “slave” and “slavery” could not be found anywhere in the new Constitution. Instead, it used code words for enslaved people such as “Person held to Service of Labour”¹⁵¹ or just “other Persons.”¹⁵² Some historians see this as a sign that white northerners who helped write the Constitution were growing less comfortable with enslavement and did not want the nation’s founding document to say openly that owning human beings as property was legal.¹⁵³

The Constitution also gave Congress the power to end U.S. participation in the transatlantic slave trade in 1808, rather than leaving it completely open, and the fugitive slave law was vague and not well enforced.¹⁵⁴ Finally, the 3/5 Clause probably disappointed pro-enslavement southerners who pushed hard for enslaved people to be counted as whole people, rather than as 60 percent of a person, for purposes of representation in Congress.¹⁵⁵

No matter what the Constitutional Convention intended to do, the new Constitution ended up giving pro-enslavement southerners outsized power in the federal government, strengthening the institution of enslavement. Northerners complained that the enslaving states’ 60 percent boost in Congressional representation and in the electoral college, both due to the 3/5 Clause, gave enslavers too much power over national politics.

Some northerners tried to get rid of the 3/5 Clause.¹⁵⁶ The linking of Congressional representation to presidential electors also helped pro-enslavement southerners control the White House. Enslavers Thomas

¹⁴⁷ US Constitution, Article I, Section 2, Clause 3.

¹⁴⁸ Rael, *supra*.

¹⁴⁹ US Constitution, Article II, Section 1, Clause 2.

¹⁵⁰ Baptist, *supra*, at p. 9.

¹⁵¹ US Constitution, Article IV, Section 2, Clause 3.

¹⁵² US Constitution, Article I, Section 2, Clause 3.

¹⁵³ Wilentz, *No Property in Man: Slavery and Antislavery at the Nation’s Founding* (2018), pp. 10 – 11.

¹⁵⁴ Wilentz, *Constitutionally, Slavery is no National Institution* (Sept. 16, 2015) *New York Times*

<<https://www.nytimes.com/2015/09/16/opinion/constitutionally-slavery-is-no-national-institution.html>> (as of Jan. 24, 2022) (*Constitutionally*).

¹⁵⁵ *Constitutionally*, *supra*.

¹⁵⁶ Richards, *The Slave Power: The Free North and Southern Domination, 1780 – 1860* (2000), pp. 41 – 45 (Richards).

Jefferson, in 1800, and James K. Polk, in 1846, would not have won election to presidency without the South's extra electoral votes based on counting enslaved people.¹⁵⁷

Fifty percent of the nation's pre-Civil War presidents were enslavers.¹⁵⁸ In the 62 years between George Washington's election and 1850, enslavers held the presidency for 50 years, the position of Speaker of the House for 41 years, and the chair of the House of Representatives Ways and Means Committee for 42 years.¹⁵⁹ Control of the presidency also meant control of the U.S. Supreme Court, where presidents chose justices to serve for life. Enslavers made up 18 of the 31 justices (or 58 percent) who sat on the U.S. Supreme Court before 1850.¹⁶⁰ Ultimately, throughout American history, more than 1,700 Congressmen, representing 37 states, once enslaved Black people.¹⁶¹ They did not only represent the South, but also every state in New England, much of the Midwest, and many Western states.¹⁶²

Pro-enslavement southerners' control of Congress, the presidency, and the U.S. Supreme Court increased the lifespan of enslavement and the geographic area where it was legal. Together, pro-enslavement officials in the federal government paved the way for enslavement's expansion into new states and territories in the West by letting enslavers move without regulation into the large geographic area south of the Ohio River.¹⁶³

Between the ratification of the Constitution in 1788 and the start of the Civil War in 1861, Congress approved the creation of nine new enslaving states (roughly 43 percent of all 21 new states).¹⁶⁴ This expansion of enslavement included parts of the new territory of Louisiana, which the United States purchased from France in 1803. In addition to Louisiana joining the Union as an enslaving state in 1812, enslavers won another big victory in 1820 when Congress voted, after protests from anti-enslavement politicians, to let Missouri become a state with a constitution that both allowed enslavement and banned free Black Americans from settling there. The major tradeoff that opponents of enslavement got from the Missouri Compromise was the policy that enslavement would be illegal in all parts of the Louisiana Territory located north of Missouri's southern border.¹⁶⁵ For the time being, white Americans reached an unsteady political peace over enslavement's westward expansion.

¹⁵⁷ Waldstreicher, *supra*.

¹⁵⁸ Presidents who owned enslaved people while in office included George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, John Tyler, James K. Polk, and Zachary Taylor. See Rosenwald, *Slave-owning presidents become targets of protestors* (June 3, 2020) Washington Post <<https://www.washingtonpost.com/history/2020/06/23/slave-owning-presidents-become-targets-protesters/>> (as of Jan. 24, 2022).

¹⁵⁹ Richards, *supra*, at p. 9.

¹⁶⁰ Richards, *supra*, at p. 9.

¹⁶¹ Weil and Adrian Blanco, *More than 1,700 Congressmen Once Enslaved Black People. This Is Who They Were, and How They Shaped the Nation* (Jan. 20, 2022) Washington Post <https://www.washingtonpost.com/history/interactive/2022/congress-slaveowners-names-list/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-In-tr%2F35b8b59%2F61dc6b2f9d2fda14d7e8b144%2F596c43ceade4e24119c923f2%2F8%2F72%2F61dc6b2f9d2fda14d7e8b144> (As of January 24, 2022) (Weil and Blanco).

¹⁶² Weil and Blanco, *supra*.

¹⁶³ Baptist, *supra*, at p. 12.

¹⁶⁴ Richards, *supra*, at pp. 48 – 49.

¹⁶⁵ Baptist, *supra*, at pp. 154 – 158.

VI. The Lives of Enslaved People During the Height of the Domestic Slave Trade

A. Domestic Trafficking of Enslaved People

Cotton solidified enslavement's importance to the United States, especially in the Deep South where the crop grew the best. The demand for enslaved people in the Deep South allowed enslavers in the Upper South to profit from enslavement in a new way: the interstate trafficking of enslaved people. Enslavers on worn-out tobacco farms in Maryland, Delaware, and Virginia could not grow cotton themselves, but they could sell enslaved people to the growing cotton plantations farther south.

Between 1790 and 1859, slave traders sold approximately 845,720 people within the U.S.¹⁶⁶ They made enormous fortunes in this trafficking of human beings, amounting to more than \$159 million between 1820 and 1860.¹⁶⁷ Slave traders force marched, or sailed, hundreds of thousands of enslaved people to new territories along the Mississippi River or the Gulf of Mexico. Today's states of Alabama, Mississippi, Louisiana, and (later) Texas were built on the brutal forced migration of the enslaved.¹⁶⁸

The trafficking of enslaved people destroyed enslaved people's families, communities, and their bodies. Enslavers and slave traders often ambushed enslaved people with a surprise sale so that they could not attempt to run away or plead to stay with their families. A person "sold south" was almost always separated from their family members and home communities forever. Parents and children, husbands and wives, brothers and sisters, and extended family members and friends never saw each other again.¹⁶⁹

On top of the grief and mental and emotional trauma of family separation came physical violence. Slave traffickers usually chained the hands and feet of enslaved people and then chained several individuals together in a line (called a "coffle"). Then, traffickers force marched their captives by gunpoint to the next place of sale.

Newly purchased people might be added to the coffle along the way, or enslaved people might be sold to a string of different traders as they moved South.¹⁷⁰ Some enslaved people might make part of their forced journey via ship or riverboat.¹⁷¹ But it was common practice to march enslaved people hundreds of miles over land to their destinations.¹⁷² Handcuffs and chains rubbed their skin raw, their feet ached and bled, and they suffered from a lack of food, clothing, shelter, and sleep.¹⁷³

Charles Ball, an enslaved man who slave traffickers bought in Maryland and forced marched south, later remembered that once he reached South Carolina, he "had no hope of ever again seeing my wife and children, or of revisiting the scenes of my youth. I apprehended that I should, if I lived, suffer the most excruciating pangs that extreme and long continued hunger could inflict."¹⁷⁴

¹⁶⁶ Baptist, *supra*, at pp. 2 – 3.

¹⁶⁷ Pritchett, Quantitative Estimates of the United States Interregional Slave Trade, 1820 – 1860 (June 2001) 61 J. of Econ. Hist. 474.

¹⁶⁸ Baptist, *supra*, at pp. 2 – 3.

¹⁶⁹ Baptist, *supra*, at pp. 17 – 19, 23.

¹⁷⁰ Baptist, *supra*, at pp. 18 – 32.

¹⁷¹ [Joshua] Rothman, *The Ledger and the Chain: How Domestic Slave Traders Shaped America* (2021), pp. 91 – 92.

¹⁷² Baptist, *supra*, at pp. 1 – 2.

¹⁷³ Baptist, *supra*, at pp. 25 – 26.

¹⁷⁴ Ball, *Slavery in the United States: A Narrative of the Life and Adventures of Charles Ball, a Black Man* (1837), p. 69.

At the end of their forced march south, enslaved people faced the terrifying process of being sold to their new enslavers. Many of the enslaved ended up in the city of New Orleans, the human trafficking center of the Deep South. Upon arrival, traffickers allowed enslaved people food, rest, baths, and new clothing to make them look more appealing to future buyers and bring a higher price upon sale.¹⁷⁵

Enslaved people waited until their day of sale in a high-walled outdoor yard, called a “slave pen,” where they were crowded together with 50 to 100 people. Later, slave traders sold them in a showroom next to the pen.¹⁷⁶ As historian Walter Johnson has written, one of the great obscenities of enslavement was that enslavers forced enslaved people “to perform their own commodification.”¹⁷⁷

Slave traders coached enslaved people on how to act and what to say to potential buyers, to hide any injuries or disabilities, and to highlight their valuable skills.¹⁷⁸ When sales began, enslaved people were required to line up by gender and height, separate from any family members.¹⁷⁹ Buyers questioned and examined them, forcing them to open their mouths to show their teeth and to undress to reveal any signs of illness, disability, disease, or scars from previous whippings (which whites saw as signs of disobedience).¹⁸⁰

Enslaved people with special skills, such as the ability to play a musical instrument, might perform for buyers, while slave traders forced everyone to parade around and dance to show their physical well-being.¹⁸¹ Women and girls often suffered the most violent inspections of their bodies. Buyers took them behind closed doors, stripped them naked, and forcibly examined their breasts and genitals to see if they would be good “breeders” and were free of sexually transmitted infections.¹⁸²

The moment of sale was extremely painful and traumatic. Buyers purchased enslaved people based on racist stereotypes about Black Americans’ capabilities and skills, which were often connected to skin color, gender, and physical size.¹⁸³ Younger enslaved Black men and women and teenagers often sold at high prices as “prime” field hands to pick cotton and do other hard labor.¹⁸⁴ Enslaved men with specialized knowledge and skills such as carpentry, barrel making, or driving carts also sold for higher prices.¹⁸⁵ Enslavers often bought younger enslaved women to work in the cotton fields, but also valued their knowledge and skills in home-based work such as cooking, washing clothes, sewing, cleaning, and childcare.¹⁸⁶

Some buyers specifically bought Black women and girls so that they could subject them to sexual and reproductive violence. The “fancy trade” was the term for selling young women and girls to white men for the purpose of constant rape and/or forced sex work in brothels.¹⁸⁷ Other enslavers bought young mothers (with or

¹⁷⁵ [Walter] Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (1999), pp. 119 – 121 (*Soul by Soul*).

¹⁷⁶ *Soul by Soul, supra*, at pp. 2 – 3.

¹⁷⁷ *Soul by Soul, supra*, at p. 164.

¹⁷⁸ *Soul by Soul, supra*, at pp. 129 – 130.

¹⁷⁹ *Soul by Soul, supra*, at pp. 121 – 123.

¹⁸⁰ *Soul by Soul, supra*, at pp. 141 – 142, 145.

¹⁸¹ *Soul by Soul, supra*, at pp. 130.

¹⁸² *Soul by Soul, supra*, at pp. 143 – 144, 147 – 149.

¹⁸³ *Soul by Soul, supra*, at p. 58.

¹⁸⁴ Berry, *The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (2017), pp. 68 – 70 (Berry).

¹⁸⁵ Baptist, *supra*, at pp. 102 – 103.

¹⁸⁶ *Soul by Soul, supra*, at pp. 153 – 154; Baptist, *supra*, at p. 18.

¹⁸⁷ Baptist, *supra*, at pp. 240 – 243.

without their children) because a woman who had recently given birth to children showed that she was able to have more children in the future to enrich her buyer. Pregnant and breastfeeding women could be forced to nurse all the children, Black and white, on a plantation to free up other enslaved mothers for field work.¹⁸⁸ Finally, elderly people and very young children usually sold for a lot less money because white buyers viewed their labor and skills as less valuable.¹⁸⁹

All of these factors often meant that even if an enslaved family had managed to stay together up to this point, they would now face permanent separation. Solomon Northup, a free Black man from New York who was kidnapped and sold into enslavement, remembered the case of an enslaved woman named Eliza. Eliza begged to be sold with her two children, Emily, who was seven or eight years old and Randall, who was four to five years old. Slave traders sold off Randall to another buyer and refused to sell Emily to Eliza's buyer because they hoped to sell the tiny girl as a "fancy" to a wealthy enslaver when she was a little older. Northup wrote that the sale of her children was absolutely soul-crushing for Eliza. She died young from the grief of losing them.¹⁹⁰

B. Cotton and Capitalism

Enslavers were capitalists, and like all capitalists, they strived for profit maximization. They wanted to get the most work out of enslaved people by pushing them up to, but not beyond, their physical breaking point. To do this, enslavers used violence, or the threat of violence, to make the enslaved work harder and faster and to maintain a constant, carefully calculated rate of production. The result for enslaved people was a nearly endless daily round of work under the constant threat of violence.

Once enslaved people were sold to the Deep South, their new enslavers subjected them to a lifetime of brutal, backbreaking work growing cotton. In the early 1800s, enslaved people who were sold South endured the exhausting work of clearing land for cotton planting. They cut down trees, pulled out stumps, and broke up the top layer of the soil, all while facing deadly diseases such as malaria and yellow fever.

Enslaved people who survived this began the never-ending, year-round process of growing the cotton crop. Enslaved people began every spring by plowing the land and planting cotton seeds. For the next several months they hoed the fields to kill grass and weeds that might damage the fragile young cotton plants.¹⁹¹ Starting in August, enslaved people worked from sunup to sundown to pick cotton, sometimes working by the light of the moon to finish. They only stopped for a 10- to 15-minute meal break per day. This exhausting workday did not end when the cotton picking was done.

Everyone still had to cut wood, feed farm animals, and do all of the other daily tasks that kept the plantation running. Then, enslaved people went back to their cabins, made their evening meals, and cooked food to eat in the cotton fields the next day.¹⁹² The cotton-picking season went on for months into the winter.¹⁹³ After the cotton season ended, enslaved people harvested the corn crop, which, according to Solomon Northup, was used

¹⁸⁸ Soul by Soul, *supra*, at pp. 143 – 144.

¹⁸⁹ Berry, *supra*, at pp. 46 – 47, 136 – 137.

¹⁹⁰ Northup, *Twelve Years a Slave* (1853), pp. 80 – 82, 84 – 88 (Northup).

¹⁹¹ Northup, *supra*, at pp. 163 – 165.

¹⁹² Northup, *supra*, at p. 168.

¹⁹³ Northup, *supra*, at pp. 163 – 168.

for “fattening hogs and feeding slaves.”¹⁹⁴ After the corn harvest was complete, enslaved people burned all the dead corn and cotton plants and began the process of planting the next year’s crops all over again.¹⁹⁵

To make sure that enslaved people worked as hard and as quickly as possible, enslavers came up with the “pushing system.” The main idea behind the pushing system was that every enslaved person should farm a certain number of acres of cotton per year. This number kept increasing, from five acres per enslaved person in 1805 to double that number (10 acres) by the 1850s.¹⁹⁶ In fact, many of today’s financial accounting and scientific management practices to increase profits had their early beginnings among enslavers in the U.S. South and the Caribbean who wanted to perfect the pushing system.¹⁹⁷

To make sure that the production of cotton and profits kept increasing, enslavers intensified the physical violence.¹⁹⁸ Sleep-deprived enslaved people who accidentally slept past sunrise were whipped for lateness.¹⁹⁹ Solomon Northup, the free Black man kidnapped and sold into enslavement in Louisiana, remembered that enslavers followed enslaved people into the fields on horseback and whipped them if they stopped work or fell behind.²⁰⁰ He also remembered that each adult was responsible for picking 200 pounds of cotton per day and that those who did not pick enough got whipped. Even picking less than one’s own personal best daily weight record, or accidentally breaking a branch on a cotton plant, resulted in whipping.²⁰¹ Northup himself was whipped for failing to pick cotton fast enough when he was sick and exhausted.²⁰²

C. Neglect and Violence

Living conditions for enslaved people showed enslavers’ inhumane, brutal emphasis on profit maximization. Most of the enslaved lived in small, poorly built cabins. Gaps between the log walls were so big that the wind and rain constantly blew in. Furniture was either rare or non-existent. Solomon Northup’s bed “was a plank [of wood] twelve inches wide and ten feet long.”²⁰³

Frederick Douglass reported that enslaved people on the Maryland tobacco plantation where he was born had no beds at all; they slept on the hard dirt floor with only a rough blanket.²⁰⁴ On the coldest nights, the young Douglass would steal a sack used for carrying corn and sleep inside it with his head inside and his feet hanging out. Years later, when he wrote about his life, he remembered that “[m]y feet have been so cracked with the frost, that the pen with which I am writing might be laid in the gashes.”²⁰⁵

Besides cold, one of the greatest things Douglass suffered was hunger. Douglass’s enslaver fed enslaved children mashed-up boiled corn in a trough on the ground. The children were then forced to eat “like so many

¹⁹⁴ Northup, *supra*, at p. 171.

¹⁹⁵ Northup, *supra*, at p. 172.

¹⁹⁶ Baptist, *supra*, at pp. 116 – 117.

¹⁹⁷ Rosenthal, *Reckoning with Slavery: How Revisiting Management’s Uncomfortable Past Can Help Us Confront Challenges Today* (2021) 20 Academy of Management Learning & Ed. 467-472.

¹⁹⁸ Baptist, *supra*, at p. 121.

¹⁹⁹ Douglass, *Narrative of the Life of Frederick Douglass, An American Slave. Written by Himself* (1845), p. 11 (Douglass).

²⁰⁰ Northup, *supra*, at p. 165.

²⁰¹ Northup, *supra*, at pp. 165, 167 – 168.

²⁰² Northup, *supra*, at p. 177.

²⁰³ Northup, *supra*, at p. 170.

²⁰⁴ Douglass, *supra*, at pp. 10 - 11.

²⁰⁵ Douglass, *supra*, at pp. 26 – 27.

pigs” and “he that ate fastest got most.”²⁰⁶ Solomon Northup remembered a similar lack of food on the Louisiana plantation where he lived for 10 years. Each person received only three and a half pounds of bacon and a peck of corn (about eight dry ounces) per week.²⁰⁷

Enslaved people, particularly women and girls, also suffered sexual and reproductive violence. Enslavers frequently raped and impregnated enslaved women and girls and increased their profits by doing so.²⁰⁸ Since children born to enslaved women were automatically enslaved at birth, enslavers often owned and sold their own children as property.²⁰⁹ White women often harassed enslaved victims of rape and their mixed-race children by insisting on their sale or punishing them even more cruelly than other enslaved people.²¹⁰

Enslavers also forced sexual intercourse between enslaved people so that they could “breed” more children to make more money.²¹¹ Frederick Douglass remembered that a poor white farmer named Edward Covey owned only one enslaved woman named Caroline and had to rent additional enslaved people from others (a practice called hiring out). To increase his own wealth, Covey forced Caroline and one of the rented enslaved men, who was already married, to have sex. Not long after, Caroline gave birth to twins. Douglass remembered that “[t]he children were regarded as being quite an addition to his wealth.” Sexual violence tripled Covey’s wealth—from one to three enslaved people—within just one year.²¹²

Enslavers also used the bodies of enslaved people for medical and scientific experimentation. For an in-depth discussion of medical experimentation on enslaved people and Black Americans throughout U.S. history, please see Chapter [XX].

VII. Northern Complicity in Enslavement

A. White New Englanders, the Slave Trade, and the Textile Industry

Although enslavement itself was disappearing in the North, white northerners’ participation in enslavement grew along with the southern cotton economy. White northerners had been involved in the transatlantic trafficking of enslaved people for a long time as shipping company owners, slave ship captains, and slave traders.

For example, businessmen from the northern state of Rhode Island controlled most of the trade in captive human beings. Slaving ships from Rhode Island brought rum to the coast of West Africa and traded barrels of the liquor for enslaved people, who they trafficked to North America.²¹³ Around 24 rum distilleries in the town of Newport, Rhode Island, fed this profitable trade.²¹⁴ By the time of the American Revolution, these Rhode Island merchants controlled two-thirds of the entire transatlantic slave trade in the Thirteen Colonies and they

²⁰⁶ Douglass, *supra*, at p. 27.

²⁰⁷ Northup, *supra*, at 168.

²⁰⁸ Berry, *supra*, at pp. 78 – 83.

²⁰⁹ Douglass, *supra*, at pp. 3 – 4.

²¹⁰ Douglass, *supra*, at pp. 3 – 4.

²¹¹ Berry, *supra*, at pp. 78 – 83.

²¹² Douglass, *supra*, at pp. 62 – 63.

²¹³ Farrow, Joel Lang, and Jennifer Frank, *Complicity: How the North Promoted, Prolonged, and Profited from Slavery* (2005), pp. 98 – 99 (Complicity).

²¹⁴ *Complicity, supra*, at pp. 98 – 99.

held onto this control after U.S. independence.²¹⁵ When added together, white Rhode Islanders were responsible for bringing 100,000 enslaved Africans to North America.²¹⁶ Fifty thousand of these enslaved people were captives whom Rhode Island enslavers rushed to bring into the United States before Congress outlawed participation in the transatlantic trafficking of enslaved people in 1808.²¹⁷

At the same time, textile mills, the factories which processed southern cotton into cloth, were the basis of early northern industrial growth.²¹⁸ Cotton grown by enslaved people in the U.S. South fed these mills and the mills employed thousands of people across New England.²¹⁹ By the time of the Civil War in 1861, Americans had invested more than \$98.5 million in cotton fabric production and operated 1,091 separate mills, mostly in New England.²²⁰ Over 122,000 Americans worked in the New England textile mills and the total profits amounted to over \$115 million dollars per year.²²¹

B. Enslavement and the Economic Power of New York City

New York City is a strong example of how northerners participated in and profited from enslavement. Wall Street, which later became the economic center of the United States, was directly linked to enslavement. Captive Africans enslaved by the Dutch West Indian Company were part of the labor force that constructed the early walled street that eventually became Wall Street.²²² Later, the street became the city's first slave market. City leaders decided in 1711 that whites who wanted to rent out enslaved Black or Native American people could only do so at the end of Wall Street next to the East River.²²³

Enslaved people became less and less common in the city after the state of New York passed a law in 1799 that gradually freed children born to enslaved mothers, and then outlawed enslavement completely in 1817.²²⁴ But as enslavement itself was dying out, white New Yorkers were building strong economic ties to southern enslavement that brought millions of dollars in profit every year. New York City was the main destination of southern cotton and the center of the transatlantic cotton trade. New York-based shipping companies gathered the cotton in southern cities and took it north to New York City where merchants packed it and shipped it to Europe.²²⁵

²¹⁵ Complicity, *supra*, at p. 95.

²¹⁶ Complicity, *supra*, at p. 95.

²¹⁷ Complicity, *supra*, at p. 95.

²¹⁸ Mintz, *Historical Context: Was Slavery the Engine of American Economic Growth?*, Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-was-slavery-engine-american-economic-growth>> (as of Jan. 24, 2022).

²¹⁹ Complicity, *supra*, at pp. 6, 25 – 26.

²²⁰ US Bureau of the Census, *Manufactures of the United States in 1860*; compiled from the original returns of the Eighth Census under the direction of the Secretary of the Interior (1865), p. x (1860 Census). <<https://www2.census.gov/library/publications/decennial/1860/manufactures/1860c-02.pdf>> (as of Jan. 24, 2022) (1860 US Census).

²²¹ 1860 US Census, *supra*, at p. x.

²²² *White New Yorkers in Slave Times*, Slavery in New York virtual exhibit <http://www.slaveryinnewyork.org/PDFs/White_New_Yorkers.pdf> (as of Jan. 24, 2022).

²²³ *Slave Market*, Mapping the African American Past, Columbia University Center for Teaching and Learning <<https://maap.columbia.edu/place/22.html>> (as of Jan. 24, 2022).

²²⁴ Foner, *Gateway to Freedom: The Hidden History of the Underground Railroad* (2015), pp. 43 – 44 (Gateway).

²²⁵ Gateway, *supra*, at pp. 44 – 45.

New York City was also the banking and insurance center of the United States, and these businesses provided the money necessary for the fast growth of enslavement in the South. Banks loaned money to enslavers to buy more land and more enslaved people.²²⁶ Banks also accepted enslaved people as security for these loans, which meant that they could take and sell enslaved people if their enslavers failed to pay back these loans. For example, in 2005, JP Morgan Chase, the banking giant, wrote a formal apology because two banks that it now owned had taken 13,000 enslaved people as security for loans in the state of Louisiana. When enslavers could not pay back the loans, the banks ended up taking ownership of 1,250 of these people, and then probably sold them.²²⁷

C. Corporate Profits from Enslavement

Many insurance companies also insured southern cotton crops, which meant paying enslavers if they had a bad year growing cotton.²²⁸ They insured the lives of enslaved people themselves, and paid enslavers if an enslaved person died.²²⁹ Insurance companies also insured shipments of enslaved people sold in the domestic trafficking of enslaved people.²³⁰ Some of these companies were the early ancestors of today's most important insurance companies, including New York Life, AIG, and Aetna.²³¹ American insurance companies' investment and complicity in enslavement was so widespread that the California government required all insurers who did business in the state to make all their records of participation in enslavement open to the public.²³²

New York businesses also profited from processing and manufacturing agricultural products grown by enslaved people into goods for consumers to buy. Brooks Brothers, still a well-known New York City clothing company, made money from enslavement in multiple ways. The company made fashionable, expensive clothing woven from southern cotton grown by enslaved people. It also profited from making cheap clothing that enslavers bought to dress enslaved people.²³³

At the same time, sugar refineries, factories which processed raw sugar into a usable form, became a major New York industry, especially in the borough of Brooklyn. These factories processed thousands of pounds of raw

²²⁶ Gateway, *supra*, at p. 45.

²²⁷ Sidel, A Historian's Quest Links J.P. Morgan To Slave Ownership; Bank's Distant Predecessor Took Human Collateral For Rich Client's Debt (May 10, 2005) Wall Street Journal <<https://www.wsj.com/articles/SB111568595843228824>> (as of Jan. 24, 2022).

²²⁸ Ralph, *Value of Life: Insurance, Slavery, and Expertise* in American Capitalism: New Histories (Beckert & Desan eds., 2018), pp. 267 – 269.

²²⁹ Ralph, *Value of Life: Insurance, Slavery, and Expertise* in American Capitalism: New Histories (Beckert & Desan eds., 2018), pp. 267 – 269.

²³⁰ *Supporting the Trade, Purchased Lives*, The Historic New Orleans Collection, <<https://www.hnoc.org/virtual/purchased-lives/supporting-trade>> (as of Jan. 24, 2022).

²³¹ Thomas, *The hidden links between slavery and Wall Street* (Aug. 29, 2019) BBC News <<https://www.bbc.com/news/business-49476247>> (as of Jan. 24, 2022); Swarns, *Insurance Policies on Slaves: New York Life's Complicated Past* (Dec. 18, 2016) New York Times <<https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html>> (as of Jan. 24, 2022).

²³² State of California, *Slavery Era Insurance Policies*, SB 2199, Chapter 934 (2000), <<http://www.insurance.ca.gov/01-consumers/150-other-prog/10-seir/sb2199.cfm>> (as of Jan. 24, 2022).

²³³ Gateway, *supra*, at p. 45.

sugar grown by enslaved people in Louisiana and Cuba. By 1855, fifteen New York City refineries were producing over \$12 million of sugar per year.²³⁴

The profits of sugar refining can still be seen in New York City today. Columbia University's Havemeyer Hall was funded by and named after one of the city's most important sugar refining families from the 1800s whose business relied on sugar grown by enslaved people.²³⁵ The Havemeyer family built what was once the largest sugar refining factory in the world, the Domino Sugar Refinery, which still stands beside East River in Brooklyn.²³⁶ Although the Brooklyn location is no longer running, the Domino Sugar brand, now owned by the ASR Group, continues to be processed in factories in New York, Maryland, and Louisiana.²³⁷

The legacies of enslavement in the sugar industry continue in the present-day. After the Civil War and the end of enslavement, southern states such as Texas and Louisiana rented out imprisoned Black Americans to white sugar farmers, where many died in the brutal sugar production process.²³⁸ The Louisiana State Penitentiary at Angola and the Texas State Penitentiary at Sugar Land also supported themselves, and profited these state governments, by growing and processing sugar cane on prison grounds.²³⁹ Inmates at Angola continued to process sugar to sell in the prison gift shop as recently as 2014.²⁴⁰

VIII. Enslavement and American Institutions

A. Wealth from Enslavement Built Historically White Universities and Funded Religious Organizations

A wide range of colleges and universities, both private and public, profited from enslavement or ties to enslavers, while at the same time denying admission to Black Americans for most of the nation's history. Almost all Ivy League universities and colleges can be included in this category.

Harvard University Law School was created in 1817 and funded largely by donations from a wealthy merchant named Isaac Royall, Jr. Royall, who was the son of a slave trafficker, owned multiple sugar plantations in the Caribbean and Latin America that were worked by enslaved people.²⁴¹ Other early Harvard donors made their money by trading enslaved people or goods produced by enslaved people in the Caribbean; smuggling enslaved

²³⁴ White, *Building Havemeyer Hall: Charles Frederick Chandler and the Sugar Refining Industry*, Columbia University and Slavery, Columbia University <<https://columbiaandslavery.columbia.edu/content/building-havemeyer-hall-charles-frederick-chandler-and-sugar-refining-industry/#/ftnref10>> (as of Jan. 24, 2022) (White).

²³⁵ White, *supra*.

²³⁶ *Domino Sugar Factory*, NYC-Arts: The Complete Guide <<https://www.nyc-arts.org/organizations/100656/domino-sugar-factory>> (as of Jan. 24, 2022).

²³⁷ *Domino Sugar*, ASR Group <<https://www.asr-group.com/our-companies/domino-sugar>> (as of Jan. 24, 2022).

²³⁸ Staples, *A Fate Worse Than Slavery, Unearthed in Sugar Land* (Oct. 27, 2018) New York Times <<https://www.nytimes.com/2018/10/27/opinion/sugar-land-texas-graves-slavery.html>> (as of Jan. 24, 2022) (Staples).

²³⁹ Hardy, *Angola Inmates Make Sugar Cane Syrup the Old-Fashioned Way* (Dec. 23, 2014) The Advocate <https://www.theadvocate.com/baton_rouge/news/communities/west_feliciana/article_dbc913cb-9fc8-52ad-9de8-8ac99fc9def5.html> (as of Jan. 24, 2022) (Hardy); Staples, *supra*.

²⁴⁰ https://www.theadvocate.com/baton_rouge/news/communities/west_feliciana/article_dbc913cb-9fc8-52ad-9de8-8ac99fc9def5.html

²⁴¹ Wilder, *Ebony and Ivy: Race, Slavery, and the Troubled History of America's Universities* (2013), p. 160 (Wilder); Beckert, Katherine Stevens, et al., *Harvard and Slavery: Seeking a Forgotten History* (2011), p. 11 <<http://www.harvardandslavery.com/wp-content/uploads/2011/11/Harvard-Slavery-Book-111110.pdf>> (as of Jan. 24, 2022) (*Harvard and Slavery*).

Africans into the United States after Congress banned American participation in the transatlantic slave trade in 1808; or running textile mills fed by southern cotton.²⁴²

The wealth of Brown University (formerly known as the College of Rhode Island) was greatly tied to the slave-trading activities of its home state, Rhode Island. Members of the Brown family, early donors after whom the university is named, owned enslaved people and participated in the transatlantic slave trade, including the smuggling of captives into the country after Congress made the transatlantic slave trade illegal.²⁴³ University Hall, the oldest building on the Brown University campus, was partially built by enslaved people and made of wood donated by one of the state's largest slave trading companies.²⁴⁴ South Carolina slave traffickers and enslavers also gave money to help fund the college.²⁴⁵ Other Ivy League schools have similar connections to enslavement. The University of Pennsylvania,²⁴⁶ Princeton University,²⁴⁷ Columbia University,²⁴⁸ Yale University,²⁴⁹ and Dartmouth College²⁵⁰ count enslavers, slave traffickers, and/or pro-enslavement defenders among their early donors, founders, trustees, administrators, building namesakes, faculty, students, and alumni.

Enslavement was also strongly linked to religious life and religious organizations in the United States. Some churches and religious colleges owned, bought, and sold enslaved people. In the southern enslaving states, some churches raised money to buy enslaved people. Anglican and Episcopalian churches in Virginia during the 1600s and 1700s attracted new ministers by allowing them use of church-owned enslaved people.²⁵¹ Some wealthy church members donated enslaved people to churches so that the profits of their labor could be used to fund free schools for poor white children.²⁵²

In the 1700s and 1800s, many Virginia Presbyterian churches hired out enslaved people so that they could use the profits to pay ministers and fund church upkeep.²⁵³ Colleges with religious missions also owned and profited from enslaved people. Virginia's College of William and Mary, which was originally an Anglican college to train new ministers, started owning enslaved people by around 1704.²⁵⁴ Enslaved people worked in

²⁴² *Harvard and Slavery*, *supra*, at pp. 12, 15 – 17.

²⁴³ Wilder, *supra*, at p. 55; *Slavery and Justice: Report of the Brown University Steering Committee on Slavery and Justice* (2006), pp. 14 – 17 <<https://slaveryandjustice.brown.edu/sites/g/files/dprerj1501/files/reports/SlaveryAndJustice2006.pdf>> (as of Jan. 24, 2022) (*Slavery and Justice*). One of the Brown brothers, Moses, converted to Quakerism, emancipated the enslaved people he owned, and became an antislavery activist.

²⁴⁴ *Slavery and Justice*, *supra*, at pp. 12 – 13.

²⁴⁵ *Slavery and Justice*, *supra*, at pp. 13 – 14.

²⁴⁶ Gutmann, *Statement on Penn's Connections to Slavery* (June 28, 2018) Penn Today <<https://penntoday.upenn.edu/announcements/statement-penns-connections-slavery>> (as of Jan. 24, 2022).

²⁴⁷ Sandweiss and Craig Hollander, *Princeton and Slavery: Holding the Center*, Princeton University <<https://slavery.princeton.edu/stories/princeton-and-slavery-holding-the-center>> (as of Jan. 24, 2022).

²⁴⁸ Foner, *Columbia and Slavery: A Preliminary Report*, Columbia University <<https://columbiaandslavery.columbia.edu/content/eric-foners-report>> (as of Jan. 24, 2022).

²⁴⁹ Remnick, *Yale Grapples With Ties to Slavery in Debate Over a College's Name* (Sept. 11, 2015) *New York Times* <<https://www.nytimes.com/2015/09/12/nyregion/yale-in-debate-over-calhoun-college-grapples-with-ties-to-slavery.html>> (as of Jan. 24, 2022).

²⁵⁰ Cano, *A Complicated History: Slavery at Dartmouth* (Feb. 19, 2020) *The Dartmouth* <<https://www.thedartmouth.com/article/2020/02/slavery-at-dartmouth>> (as of Jan. 24, 2022).

²⁵¹ Oast, *Institutional Slavery: Slaveholding Churches, Schools, Colleges, and Businesses in Virginia, 1680 – 1860* (2015), p. 10 (*Institutional Slavery*).

²⁵² *Institutional Slavery*, *supra*, at p. 10.

²⁵³ Oast, *The Worst Kind of Slavery: Slave-owning Presbyterian Churches in Prince Edward County, Virginia* (November 2010) 76 *J. of Southern Hist.* 867 – 868.

²⁵⁴ *Institutional Slavery*, *supra*, at p. 131.

the college's kitchens, dormitories, laundries, stables, and gardens, or on the college-owned tobacco plantation to raise money for student scholarships.²⁵⁵ Although the college sold off many enslaved people during the American Revolution to pay off its debts, tearing them away from their families and communities,²⁵⁶ enslavement continued on the William and Mary campus until the Civil War.²⁵⁷

Some colleges run by the Society of Jesus, a Catholic religious group better-known as the Jesuits, also depended on the lives and labor of the enslaved. The Jesuits who operated Georgetown College (now Georgetown University) owned plantations and hundreds of enslaved people. The profits of these plantations funded the school.²⁵⁸ In 1838, when the college was struggling due to a lack of funding, Jesuits sold 272 enslaved Black people to Deep South plantations so that they could pay off the school's debts.²⁵⁹ Even though Jesuit leaders in Rome required that the enslaved people be kept together as families and given Catholic religious education in their new homes,²⁶⁰ buyers in Louisiana failed to keep these promises.²⁶¹ Altogether, the mass sale of elders, men, women, children, and infants raised \$115,000 (equal to around \$3.3 million in 2016) to fund Georgetown College/University.²⁶²

B. Direct Federal Government Investment in Enslavement

Finally, the federal government directly invested in, protected, and profited from the enslavement of Black Americans. The early U.S. national banking system played an important role in funding the expansion of cotton growing and the interstate slave trade. For example, in the years 1831 to 1832, the Second Bank of the United States, the private bank that the United States used to handle all of the federal government's banking needs, gave five percent of its all its loans to just one slave trading company in New Orleans.²⁶³ By 1861, just under two percent of the entire budget of the United States went to pay for expenses related to enslavement.²⁶⁴ These expenses included dealing with the illegal transatlantic slave trade,²⁶⁵ projects to remove formerly enslaved people from the United States and settle them in other parts of the world,²⁶⁶ enforcing fugitive slave laws,²⁶⁷ and renting enslaved people to build federal military sites in the South.²⁶⁸

²⁵⁵ Institutional Slavery, *supra*, at pp. 131, 133 – 136.

²⁵⁶ Institutional Slavery, *supra*, at p.147.

²⁵⁷ Institutional Slavery, *supra*, at p. 156.

²⁵⁸ Swarns, *272 Slaves were Sold to Save Georgetown. What Does it Owe their Descendants?* (April 16,2016) New York Times <<https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html>> (as of Jan. 24, 2022). Other slaveowning Jesuit universities included Saint Louis University. See Dorn, *Confronting SLU's History With Slavery* (Oct. 4, 2019) The University News <<https://unewsonline.com/2019/10/confronting-slus-history-with-slavery/>> (as of Jan. 24, 2022).

²⁵⁹ *Report of the Working Group on Slavery, Memory, and Reconciliation to the President of Georgetown University* (2016), p. 15 <<https://georgetown.app.box.com/s/nzo1tx4elaerg13akjwxuve3pv9sb03a>> (as of Jan. 24, 2022) (*Working Group*).

²⁶⁰ Working Group, *supra*, at p. 14.

²⁶¹ Working Group, *supra*, at p. 16.

²⁶² Working Group, *supra*, at p. 15.

²⁶³ Supporting the Trade, Purchased Lives, The Historic New Orleans Collection, <https://www.hnoc.org/virtual/purchased-lives/supporting-trade>

²⁶⁴ Ericson, *The Federal Government and Slavery: Following the Money Trail* (Spring 2005) 19 Stud. in Amer. Pol. Dev. 107 (Ericson).

²⁶⁵ Ericson, *supra*, at pp. 108 – 110.

²⁶⁶ Ericson, *supra*, at pp. 110 – 112.

²⁶⁷ Ericson, *supra*, at pp. 112 – 115.

²⁶⁸ Ericson, *supra*, at p. 115.

The U.S. federal government also actively participated in upholding enslavement because it directly controlled the nation’s capital at Washington, D.C. The District of Columbia was formed from lands that once belonged to the two enslaving states of Maryland and Virginia. As a result of this, Washington, D.C. had to carry over the laws of those two states, including laws supporting enslavement.²⁶⁹ U.S. courts in Washington, D.C., took direct responsibility for punishing enslaved people and deciding cases involving the buying, selling, and inheritance of enslaved people.²⁷⁰ Since there were no laws against moving enslaved people through D.C., and because D.C. was centrally located in the Upper South, the area also became an important location in the interstate slave trade.²⁷¹ Slave traffickers gathered and jailed enslaved people in D.C. “slave pens” where they waited to be moved to the Deep South and sold. Solomon Northup, a free Black man who was kidnapped and sold into enslavement in 1841, remembered that he waited to be sold south in a “slave pen within the very shadow of the Capitol!”²⁷² That U.S. capitol building,²⁷³ along with another major national landmark and symbol of democracy, the White House, was partially built by the labor of enslaved people.²⁷⁴

IX. Enslavement in California

A. The Compromise of 1850

As the country grew by taking the land of Native Americans, keeping enslavement out of the West became a major goal for many northerners and it put them into conflict with pro-enslavement southerners who wanted enslavement to keep growing westward and to create new enslaving states. This conflict caused political battles and violence in the years leading up to the Civil War. In the 1840s, some northerners opposed allowing Texas, an independent slaveholding country that had broken off from Mexico, to join the United States because it would an enormous amount of new territory for enslavement to grow.

When the United States declared war on Mexico in 1846 over conflicts related to Texas, many northerners supported the idea of outlawing enslavement from any new lands that the United States might take away from Mexico.²⁷⁵ In 1848, the U.S. did force Mexico to give up a massive territory that included today’s states of California, New Mexico, Nevada, and Utah, as well as parts of present-day Arizona, Wyoming, and Colorado.²⁷⁶ A political crisis grew over whether enslavement should be allowed into these new territories or closed out forever. This crisis intensified when thousands of people rushed to California after the discovery of gold in the state and to set up a new state government with a constitution that outlawed enslavement.

Northern and southern politicians in Congress tried to hold the country together by passing a set of laws called the Compromise of 1850. Together, these laws said that California could join the U.S. as a free state and that the

²⁶⁹ Fehrenbacher and McAfee, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery* (2002), pp. 61 – 62 (The Slaveholding Republic).

²⁷⁰ The Slaveholding Republic, *supra*, at p. 63.

²⁷¹ The Slaveholding Republic, *supra*, at p. 67.

²⁷² Northup, *supra*, at p. 43.

²⁷³ Bell, *Commentary: Enslaved Labor and the Capitol* (2003) United States Capitol Historical Society <<https://uschs.org/explore/historical-articles/enslaved-labor-united-states-capitol/>> (as of Jan. 24, 2022).

²⁷⁴ Mann, *Building the White House*, The White House Historical Association, <<https://www.whitehousehistory.org/building-the-white-house>> (as of Jan. 24, 2022).

²⁷⁵ Kendi, *supra*, p. 186.

²⁷⁶ Smith, *Freedom’s Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (2013), p. 7 (Freedom’s Frontier).

residents of New Mexico and Utah territories could decide for themselves whether they wanted to allow enslavement.

The Compromise of 1850 also gave both sides important laws regarding enslavement that they each wanted. It ended the slave trade in Washington, D.C., which opponents of enslavement had wanted for a long time. It also included a harsher fugitive slave law that gave enslavers greater federal help in chasing down enslaved people who ran away to the free states, limited freedom seekers' ability to defend themselves in court, and harshly punished people who helped freedom seekers or people who refused to participate in enforcing the law.²⁷⁷

This fugitive slave law divided white northerners and white southerners. Northerners hated the new law for forcing them to participate in enslavement. Southerners viewed northern opposition to the law as a refusal to support the U.S. Constitution. This conflict spread all the way to California where pro-enslavement southerners and anti-enslavement northerners fought over what should happen to enslaved people who escaped their enslavement once they got to the free state.

B. Enslavers and the Enslaved in the California Gold Rush

While people in northern and southern states fought over whether enslavement should be allowed to expand west, enslavement already had moved to California. Even though California was supposed to be a free state with an anti-enslavement constitution,²⁷⁸ enslavement existed in the state. More importantly, California's early state government protected the institution of enslavement and greatly limited Black Americans' civil rights.²⁷⁹

The enslavement of Black Americans had already started in California before the state adopted an anti-enslavement constitution in 1849. California had been part of Mexico before the United States took it in the U.S.-Mexico War of 1846 to 1848. Mexico had already outlawed enslavement in 1829,²⁸⁰ but American enslavers began trafficking enslaved Black Americans into California before, during, and after the U.S.-Mexico War, especially once the gold rush began in 1848.²⁸¹

The exact number of enslaved Black people in California is difficult to estimate. Federal and state census records, which counted the number of people in California, show around 203 enslaved Black people living in the state in 1850 and around 178 in 1852.²⁸² These are probably undercounts because early census records are very incomplete.²⁸³ These incomplete records, though, do show support for the findings of historian Rudolph Lapp who estimated that at least 500 to 600 enslaved Black Americans lived and worked in California during

²⁷⁷ Gateway, *supra*, at pp. 124 – 125.

²⁷⁸ Forever Free, *supra*, at pp. 29 – 30.

²⁷⁹ Smith, Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California (Feb. 2011) 80 Pacific Hist. Rev. 33 (Remaking Slavery).

²⁸⁰ Freedom's Frontier, *supra*, at p. 7.

²⁸¹ Lapp, Blacks in Gold Rush California (1977), pp. 4 – 9, 130 – 139 (Lapp).

²⁸² Freedom's Frontier, *supra*, at pp. 240 – 245.

²⁸³ Poor census taking in isolated mining camps, the constant population flux, the loss or destruction of census returns, and the possible desire of enslavers to hide enslavement from census takers, make it impossible to construct a complete picture of enslavement in 1850s California. On these difficulties, see Freedom's Frontier, *supra*, at pp. 237 – 238; and Lapp, *supra*, at pp. 64 - 65.

the gold rush.²⁸⁴ But these numbers may be even higher because another gold rush source estimated that 1,500 enslaved African Americans lived in California in 1852.²⁸⁵

Each of these enslaved people suffered traumatic uprooting from their homes and families. Going to California meant a forced separation from family, friends, and community by a distance of thousands of miles.²⁸⁶ Even though enslavers thought of the move to California as only temporary, most gold seekers spent at least two years in California—and usually many more—due to the distance and difficulty of traveling between the East and West Coast.²⁸⁷ For example, an enslaved North Carolina man, known only as John, arrived in California with slaveholder Robert M. Dickson in 1852 and stayed at least three years, until Dickson suddenly died in 1855.²⁸⁸ We do not know how long John remained in California or whether he ever returned to North Carolina. His journey to California may have resulted in permanent separation from his family.

Like John, more than 75 percent of the enslaved people trafficked to California were younger men or teenaged boys who ended up working as gold miners.²⁸⁹ These enslaved miners faced backbreaking and often dangerous working conditions. Placer mining, the most common type of mining in the earliest days of the California gold rush, involved digging up soil from the beds and banks of rivers and creeks. Sometimes, miners dammed up these bodies of water to get at soil deep in the beds. These practices often required standing knee- or waist-deep in cold water for several hours each day in the broiling summer heat.²⁹⁰

Overwork, exposure to bad weather, unclean working and living environments, a lack of nutritious food, and the absence of medical care often resulted in long-term illnesses or death by disease.²⁹¹ For instance, several enslaved men from western North Carolina died from cholera, a disease caused by contaminated food or water, along with their enslaver, in Tuolumne County in 1852.²⁹² Accidents and injury were also common, as seen in the life of an enslaved man from Kentucky, known only as Rheubin. He drowned in the American River while working in a mining area in 1851.²⁹³

Not all enslaved people worked directly in mining. Women and girls, who made up less than one quarter of all recorded enslaved people in California,²⁹⁴ often worked as servants, cooks, or laundry workers in private homes, hotels, restaurants, or boarding houses.²⁹⁵ People with these skills were so scarce, and their work was so valuable, that enslavers often hired out both enslaved women and men as servants. Enslavers then pocketed all or most of the enslaved people's wages from their rented labor.²⁹⁶

²⁸⁴ Lapp, *supra*, at p. 65.

²⁸⁵ Freedom's Frontier, *supra*, at pp. 40, 257.

²⁸⁶ Freedom's Frontier, *supra*, at p. 44.

²⁸⁷ Rohrbough, *Days of Gold: The California Gold Rush and the American Nation* (1997), pp. 256 – 261 (Rohrbough).

²⁸⁸ Rohrbough, *supra*, at pp. 211 – 214.

²⁸⁹ Freedom's Frontier, *supra*, at pp. 239 – 245.

²⁹⁰ Rohrbough, *supra*, at pp. 136 – 138.

²⁹¹ Baur, *The Health Factor in the Gold Rush Era* (Feb. 1949) 18 *Pacific Hist. Rev.* 97 – 105.

²⁹² Inscoc, *Mountain Masters: Slavery and the Sectional Crisis in Western North Carolina* (1996), p. 73.

²⁹³ Freedom's Frontier, *supra*, at p. 259.

²⁹⁴ Freedom's Frontier, *supra*, at pp. 239 – 245.

²⁹⁵ For some examples, see Beasley, *The Negro Trail Blazers of California* (1919), pp. 70 – 71.

²⁹⁶ *Remaking Slavery, supra*, at pp. 38 - 39; Lapp, *supra*, at pp. 132 – 133.

C. Violence Against the Enslaved and Resistance to Enslavement in California

Much like enslaved people in the South, those in California also faced brutal violence. In 1850, one slaveholder beat an enslaved man in the town square of San Jose for disobeying him. The police arrested both men, but ultimately determined that the slaveholder was not guilty of assault because his victim was legally his property.²⁹⁷

In another case from 1850, an elderly enslaved couple ran away near the town of Sonora. When the slaveholder caught them, he whipped the elderly man until his blood flowed so heavily that it filled his shoes. The couple later escaped with the help of a free Black neighbor.²⁹⁸ One of the worst violent events also happened in 1850, this time in Los Angeles. A group of white southerners chased, shot at, and captured a handful of escaped enslaved people and then beat them until one almost died.²⁹⁹

The forced journey to California had different outcomes for the enslaved people who survived it. Many people probably worked in California for a few years before returning to enslavement in the South. Others, especially those who were allowed to keep a small portion of their wages from hiring out or digging gold, saved enough money to buy their freedom.³⁰⁰ Finally, some enslaved people worked under formal or informal “indenture” agreements by which they promised to work for a certain number of years in California, or to earn a certain amount of money, in exchange for their freedom.³⁰¹ Enslaved people who bought their own freedom might then also earn enough money to free their family members.³⁰²

Large numbers of enslaved people also saw California as a place where they could take their own freedom or challenge their enslavement. The California gold mining country was large, rural, and full of diverse people, including anti-enslavement Black and white northerners. It was much easier to run away, hide, and find allies in California than in the southern enslaving states.³⁰³ But it is important to remember that all enslaved people who went west were forced to leave their family members and communities behind in the South. For this reason, escape was not a good option for many enslaved people because staying with enslavers was their only way to keep in touch with their families.

In this way, enslavers used their control over enslaved people’s family members to force them to cooperate. For this reason, enslaved people may have been more likely to resist in other ways besides running away. For example, some refused to work or escaped temporarily until they were allowed to keep more of their earnings.³⁰⁴ This might have been a safer path to freedom than running away if they could earn enough money to buy themselves and their family members out of enslavement.

²⁹⁷ *A Slave Flogged in San Jose* (Feb. 16, 1850) Daily Alta California, p. 2, col. 3.

²⁹⁸ *Slaveholding in California* (Aug. 30, 1850), *Liberator*, p. 140, col. 5.

²⁹⁹ *An Illustrated History of Los Angeles County, California* (1889), pp. 358 – 359; *Letter from California* (Oct. 11, 1850) *Liberator*, p. 161 col. 3.

³⁰⁰ *Freedom’s Frontier*, *supra*, at pp. 52 - 54.

³⁰¹ *Freedom’s Frontier*, *supra*, at pp. 57 – 63.

³⁰² *Freedom’s Frontier*, *supra*, at pp. 54.

³⁰³ *Freedom’s Frontier*, *supra*, at pp. 50 – 52.

³⁰⁴ *Freedom’s Frontier*, *supra*, at pp. 52 – 54.

D. The California Legislature’s Complicity in Enslavement

California’s 1849 anti-enslavement state constitution did little to stop the violence and exploitation that enslaved people suffered. The new constitution said that “neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”³⁰⁵

The problem was that enslavement already existed in the state and was already being tolerated there. The constitution also said nothing about what should happen to those enslaved people who already lived in California or those who came after statehood. The California constitution could say that the state would not tolerate enslavement, but this statement did not mean much without laws making it a crime to keep someone enslaved, laws to free enslaved people, laws to punish enslavers, or laws to protect Black Americans’ freedom.³⁰⁶

Pro-enslavement white southerners took advantage of this lack of specific laws against enslavement to keep enslavement going in California. During California’s 1849 Constitutional Convention, a meeting to write the state’s first constitution, pro-enslavement politicians from the South quietly accepted the law banning enslavement.³⁰⁷ But after statehood, a large number of southern pro-enslavement men ran for political office in California so that they were overrepresented in the state government compared to their overall population in California. White southerners with pro-enslavement views had a great deal of power in the state legislature, the state court system, and among California’s representatives in the U.S. Congress.³⁰⁸ During the 1850s, these men used their political power to make sure that California protected enslavers. They passed and upheld laws that skirted around the anti-enslavement constitution.

The California government’s most pro-enslavement action was passing and enforcing a state fugitive slave law in 1852.³⁰⁹ Pro-enslavement southerners were angry when they discovered that the federal fugitive slave law of 1850, a harsh new law to help slavecatchers chase down and re-enslave freedom seekers who escaped enslavement, did not apply to most cases in California. Enslavers could only use the federal law to chase down and re-enslave people who escaped across state lines, not those who ran away inside one state’s borders.³¹⁰

In 1852, the California state legislature dealt with this issue by changing the definition of who counted as a “fugitive slave.” Instead of just covering people who escaped across state lines, California’s new state law said that a fugitive slave was any enslaved person who arrived before California officially became a U.S. state in September 1850 but who refused to return to the enslaving states with their enslavers. These people could be arrested, placed under the control of their enslavers, and forced to return to the South.³¹¹

The legal reasoning behind this law was that California’s anti-enslavement constitution did not become official until the moment of statehood. Before then, California was a federal territory controlled by the U.S.

³⁰⁵ Cal. Const. of 1849, art. I, § 18.

³⁰⁶ Freedom’s Frontier, *supra*, at p. 65.

³⁰⁷ Freedom’s Frontier, *supra*, at p. 7.

³⁰⁸ Freedom’s Frontier, *supra*, at p. 8.

³⁰⁹ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, California Statutes, at 67–69.

³¹⁰ Freedom’s Frontier, *supra*, at pp. 66 – 67.

³¹¹ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, Cal. Stat., at 67–69; Freedom’s Frontier, *supra*, at pp. 67 – 70.

government. Pro-enslavement southerners believed that the U.S. Constitution gave every white citizen the right to move into the federal territories and to take their property with them, including human beings who were considered property. For this reason, the law's supporters argued that the state of California had no choice except to help enslavers capture any enslaved person who they had brought in before official statehood in late 1850.³¹²

The California legislature's decision to pass this fugitive slave law made California a much more pro-enslavement state than most other free states. In the northeastern U.S., many free states protested the federal fugitive slave law of 1850 and tried to give Black Americans more legal rights to defend their freedom against slavecatchers. California did the opposite.³¹³

The California fugitive slave law of 1852 allowed enslavers to use violence to capture enslaved people. The law also required state officials to help enslavers capture and arrest enslaved people. Those who refused to help could lose their jobs and/or have to pay expensive fines. Finally, the California fugitive slave law, much like the federal fugitive slave law, said that people accused of being fugitive slaves could not testify in court to defend their rights.³¹⁴ Since California had already outlawed non-white people from testifying in any court case involving whites, free Black Californians, who were usually involved in helping people escape from enslavement, could not be witnesses in any of these cases either.³¹⁵

California's fugitive slave law was supposed to be a temporary one-year policy, but it ended up lasting much longer. In 1853, California legislators extended the fugitive slave law for another year.³¹⁶ They did the same thing again in 1854.³¹⁷ This meant that for three years, from 1852 to 1855, anyone accused of being a runaway from enslavement could be chased down, dragged before a court, and sent back to lifelong enslavement in the South, even if they had been living in the free state of California for five years or more.³¹⁸

E. The California Court System's Complicity in Enslavement

California's courts, including the California Supreme Court, also participated in the enslavement of Black Americans. Free Black activists, with the help of white lawyers, challenged the legality of the fugitive slave law because it went against the anti-enslavement state constitution. They took a test case called *In re Perkins* all the way to the California Supreme Court in 1852.³¹⁹ The state's supreme court justices finally decided that three

³¹² Freedom's Frontier, *supra*, at pp. 67 – 70.

³¹³ Freedom's Frontier, *supra*, at pp. 67 – 68.

³¹⁴ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, Cal. Stat., at 67–69; Freedom's Frontier, *supra*, at pp. 67 – 69.

³¹⁵ Freedom's Frontier, *supra*, at pp. 71 – 72.

³¹⁶ An Act to Amend an Act respecting Fugitives from Labor and Slaves Brought to this State prior to her Admission into the Union, Act of April 15, 1853, ch. 67, Cal. Stat., at 94.

³¹⁷ An Act Amendatory to an Act to Amend an Act respecting Fugitives from Labor and Slaves Brought to this State prior to her Admission into the Union, Act of April 13, 1854, ch. 22, Cal. Stat., at 30.

³¹⁸ Freedom's Frontier, *supra*, at pp. 71 – 72.

³¹⁹ *In re Perkins*, 2 Cal. 424 (1852); Freedom's Frontier, *supra*, at pp. 70 – 71.

Black men—Carter Perkins, Robert Perkins, and Sandy Jones³²⁰—should be forced to go back into enslavement in Mississippi because they had arrived with their enslaver before official statehood.³²¹

The court said that the anti-enslavement law in the California constitution was only a “declaration of a principle.” The constitution said the state would not tolerate enslavement, but California had no laws in place to enforce it by actually setting people free.³²² The justices also agreed with the state legislature that California could not give freedom to enslaved people who arrived before official statehood. The court accepted the extreme pro-enslavement legal view that the U.S. Constitution gave enslavers the right to bring enslaved people into the federal territories without any limits.³²³ This decision came before the similar one in the much more famous case of *Dred Scott v. Sandford* five years later in 1857. In that historic decision, the U.S. Supreme Court ruled that the federal government could not outlaw enslavement in any of the federal territories.³²⁴

Altogether, California courts were involved in at least 10 cases, connected to the freedom of 13 people, under the state fugitive slave law between 1852 and 1855. In five of those 10 cases, the courts returned seven freedom seekers to enslavement. These numbers may seem small, but this list only includes cases that were well-known enough to make it into the newspapers, or for which court records happen to survive.³²⁵

The small numbers also do not accurately show the terror that all Black Americans, free or enslaved, would have suffered under this law. When combined with the outlawing of Black court testimony against whites, the California fugitive slave law put every Black person at risk of being accused of running away, arrested, and enslaved without being able to defend themselves.³²⁶

Finally, the California fugitive slave law was important for symbolic and political reasons. In supporting the law, California’s legislature and courts sent an important message: they were friendly to the southern enslaving states, they believed enslaved people should have no legal rights, and they thought that the U.S. Constitution should protect enslavers and enslavement.³²⁷

³²⁰ The three men had arrived in California in 1849 with Charles Perkins, the son of their enslaver. When Charles Perkins went back to Mississippi in 1851, he informally emancipated the men. Once he heard about the new California fugitive slave law, Perkins decided to use it to reclaim the men and force them to return to Mississippi as slaves.

³²¹ *In re Perkins*, 2 Cal. 424 (1852).

³²² *In re Perkins*, 2 Cal. 424 (1852), 455 – 457.

³²³ *In re Perkins*, 2 Cal. 424 (1852), 452 – 455.

³²⁴ *Dred Scott v. Sandford*, 60 U.S. 393; In fact, one California antislavery attorney asserted that the lawyers for *Dred Scott*’s enslavers cited the California case of *In re Perkins* as a precedent to support Scott’s continued enslavement. For this evidence, see Cornelius Cole, “Judicial Influence--Politics upon the Bench, no. 3,” scrapbook no. 1, box 38, Cole Family Papers, Charles E. Young Research Library, Department of Special Collections, University of California-Los Angeles.

³²⁵ These include: 1) the Lathrop case, described in Lapp, *supra*, at pp. 141 – 142; 2) the Perkins case, described in *In re Perkins*, 2 Cal. 424 (1852); 3) the case of Harriet Jordan, described in *Another Fugitive Slave Case* (Sept. 22, 1852) *Daily Alta California* p. 2, col. 2 and *A Fugitive Slave Case* (Sept. 22, 1852) *Placer Times and Transcript* p. 3, col. 1; 4) an anonymous enslaved woman in El Dorado County, described in *Fugitive Slave Case* (Oct. 2, 1852), *Sacramento Daily Union* p. 2, col. 3; 5) the case of Lucy Brown, described in *Fugitive Slave* (April 20, 1853) *Daily Alta California*, p. 2, col. 2; 6) the O’Neil case, described in *Habeas Corpus* (Jan. 19, 1854) *Sacramento Daily Union* p. 3, col. 2; 7) the case of an anonymous enslaved boy in Marysville, described in *Kidnapping* (March 31, 1854), *Daily Alta California* p.2, col. 2 and *The Kidnapping Case* (April 1, 1854) *Placer Times and Transcript* p. 2, col. 4; 8) the case of Stephen Spencer Hill, described in Johnson, *Roaring Camp: The Social World of the California Gold Rush* (2000), pp. 67 – 68, 191 (Roaring Camp); 9) the Kibbe case, described in untitled article (April 7, 1855) *Daily Alta California*, p. 2, col. 4; and 10) the case of George Mitchell, described in Lapp, *supra*, at p. 147.

³²⁶ *Freedom’s Frontier*, *supra*, at pp. 71 – 73.

³²⁷ *Remaking Slavery*, *supra*, at pp. 49 – 50.

The California legislature finally let the state fugitive slave law expire in 1855.³²⁸ Still, cases involving freedom seekers from enslavement continued. At least six additional cases, involving the freedom of 19 people, came before the California courts between 1855 and the official end of enslavement in 1865.³²⁹ All of these cases—including the famous 1856 freedom case of Bridget “Biddy” Mason in Los Angeles County—eventually led to enslaved people’s freedom.³³⁰

But in one example, the case of Archy Lee from 1857 to 1858, the pro-enslavement California Supreme Court made every effort to return him to enslavement. Lee’s enslaver, Charles Stovall, forced him to go with him to California years after the state fugitive slave law had expired. But California’s supreme court justices decided that since Stovall was a young man who suffered from constant illness, and he did not know about California’s laws, he should not be punished by losing his right to own Archy Lee. It took several more lawsuits by free Black Californians, and a new decision from a federal legal official, before Lee finally won permanent freedom.³³¹

F. California’s Political Leadership and Anti-Black Oppression

During the 1850s, California’s political leaders, including governors, state assemblymen, and state senators, supported other anti-Black laws. California’s 1849 Constitutional Convention restricted the right to vote to white male citizens³³² and also debated (but did not pass) a Black exclusion law to outlaw all future African American migration to the state.³³³

Peter Burnett, California’s first governor, opposed both enslavement and the presence of Black Americans, so he was angry that the new state constitution did not have a Black exclusion law.³³⁴ Before coming to California, Burnett had served in Oregon’s provisional government and had personally helped pass a Black exclusion law, the “Lash Law,” which said that Black Americans who arrived in Oregon would be whipped every six months until they left.³³⁵

Burnett encouraged the California legislature to pass a Black exclusion law immediately.³³⁶ He said that failing to exclude Black residents would lead to enslavers bringing more enslaved people into the state.³³⁷ When the California legislature failed to pass a Black exclusion law in 1850, Burnett gave another speech in 1851

³²⁸ Freedom’s Frontier, *supra*, at pp. 75 – 76.

³²⁹ These include: 1) The case of Bridget “Biddy” Mason, Hannah, and their enslaved children and grandchildren, described in Taylor, *In Search of the Racial Frontier: African Americans in the American West, 1528 – 1990* (1998), pp. 79 – 80 (Taylor); 2) the case of Archy Lee, described in Freedom’s Frontier, *supra*, at pp. 76 – 78; 3) the Mathews case, described in *Alleged Abduction Case* (Jan. 21, 1859) *San Francisco Bulletin*, p. 3, col. 2; 4) the case of Nathaniel Rice, described in *Almost an ‘Archy Case’* (Aug. 20, 1860) *San Francisco Bulletin*, p. 3, col. 5; 5) the case of John Turner, described in *Attempt to Kidnap* (Jan. 25, 1861) *Sacramento Daily Union* p. 3, col. 2; and 6) the case of Ada (Edith) Blue, described in Smith, *California’s Last Slave Case* (March 5, 2014) *New York Times* <<https://opinionator.blogs.nytimes.com/2014/03/05/californias-last-slave-case/>> (as of Jan. 26, 2022).

³³⁰ Taylor, *supra*, at pp. 79 – 80.

³³¹ Freedom’s Frontier, *supra*, at pp. 76 - 78.

³³² Cal. Const. of 1849, art. II, § 1.

³³³ Richards, *The California Gold Rush and the Coming of the Civil War* (2007), pp. 73 – 77.

³³⁴ Freedom’s Frontier, *supra*, at p. 61.

³³⁵ Greg Nokes, *Black Exclusion Laws in Oregon*, Oregon Encyclopedia

<https://www.oregonencyclopedia.org/articles/exclusion_laws/#.YbVXvVmIaUk> (as of December 7, 2021).

³³⁶ Freedom’s Frontier, *supra*, at p. 61.

³³⁷ Freedom’s Frontier, *supra*, at 61.

demanding a law to ban Black residents.³³⁸ This time he claimed that any free Black residents would be so poor, and so upset about not having any civil rights under California law, that they would start a race war against whites.³³⁹ Overall, California tried to pass a Black exclusion law at least four times during the 1850s, but the state legislature was either too politically divided to agree on a law or ran out of time before the legislative session ended.³⁴⁰

California legislators focused instead on limiting the rights of Black Americans who were already in the state. In addition to outlawing Black court testimony in cases involving whites, the California legislature also made interracial marriage between Black and white people illegal,³⁴¹ excluded Black people from getting homesteads (free or cheap farms) on state lands,³⁴² refused to offer state funding for Black children to attend public schools,³⁴³ and would not accept petitions from Black activists who wanted to change these unjust laws.³⁴⁴

After free Black activists successfully rescued Archy Lee from enslavement in 1858, angry pro-enslavement legislators tried to make these anti-Black laws even worse. They tried to pass another state fugitive slave law and to pass yet another Black exclusion law. Although both of these laws failed to pass before the end of the legislative session, the vicious anti-Black tone of state politics prompted many Black Californians to leave the state in search of greater freedom and equality.³⁴⁵ Starting in 1858, up to 800 Black men, women, and children migrated north to the British colonies of Vancouver Island and British Columbia, in what is now Canada, where many became British subjects.³⁴⁶

X. The U.S. Civil War and the End of Enslavement

A. Race, Enslavement, and Political Struggles Leading up to the U.S. Civil War

Between 1850 and the start of the Civil War in 1861, the political fight over enslavement's westward expansion and Black Americans' legal rights became more intense and more violent. Pro-enslavement politicians in Congress pushed through the Kansas-Nebraska Act of 1854, a law that overturned the 1820 Missouri Compromise that had outlawed enslavement in most of the Louisiana Purchase lands. This meant that white settlers in the new western territories of Kansas and Nebraska territories could allow enslavement if they wanted to do so. A bloody civil war broke out in Kansas between pro-enslavement and anti-enslavement settlers who had rushed there to claim the new territory for their side. The Kansas-Nebraska Act and "Bleeding Kansas," as this violence came to be called, shocked many northerners who opposed enslavement moving into the West. They formed a new political party, the Republican Party, which was based mostly in the North and whose main goal was stopping the westward expansion of enslavement.

³³⁸ State of California, Journal of the Senate, 2nd sess. (1851) 19 – 21.

³³⁹ State of California, Journal of the Senate, 2nd sess. (1851) 19 – 21.

³⁴⁰ Freedom's Frontier, *supra*, at pp. 61 – 63.

³⁴¹ An Act Regulating Marriages, April 22, 1850, ch. 140, § 3, Cal. Stat., at 424.

³⁴² "An Act extending the Privileges of the Homestead Law to certain Persons, and to Regulate the Creation of the Same," March 18, 1860, ch. 120, § 2, Cal. Stats., at 87 - 88.

³⁴³ Smith, Dred Scott on the Pacific: African Americans, Citizenship, and Subjecthood in the North American West (Spring 2018) 100 S. California Hist. Q. 50 (Dred Scott on the Pacific).

³⁴⁴ Lapp, *supra*, at pp. 196 – 197.

³⁴⁵ Lapp, *supra*, at pp. 239 – 245.

³⁴⁶ Dred Scott on the Pacific, *supra*, at p. 46.

As northerners became more anti-enslavement, pro-enslavement southerners became even louder in their defense of enslavement. They falsely claimed that enslavement was a gentle institution, and that enslavers treated enslaved people like members of their own families. This racist pro-enslavement idea, known as paternalism, also claimed that enslaved people got just as many benefits from enslavement as white people because they got food, clothing, and shelter in exchange for their work. Pro-enslavement people also used scientific racism, the false theory that all white people were naturally smarter and more “civilized” than Black people, to argue that enslavement was good for people of African descent because it “uplifted” them.

In the late 1850s, the U.S. Supreme Court supported these false theories that Black Americans were inferior to white Americans and helped open the western U.S. to enslavement. In the 1857 case of *Dred Scott v. Sandford*, the court decided that Black Americans were not citizens of the United States and did not have any of the legal rights that white Americans had. Chief Justice Roger Taney, from the enslaving state of Maryland, explained that white people had always treated Black people as slaves and that Black Americans were “so far inferior, that they had no rights which the white man was bound to respect.”³⁴⁷ After denying Black Americans’ claims to legal rights, the court also said that the federal government had no power to close enslavement out of the western territories. The U.S. Constitution allowed slaveholding southerners to take their property, including property in human beings, into the western territories.

The conflict over enslavement’s westward expansion and Black Americans’ rights broke out into a full civil war in 1861. Abraham Lincoln, a Republican, won the presidential election of 1860 by promising to keep enslavement from moving West into any new territories. Pro-enslavement southerners claimed Lincoln’s election was proof that all northerners wanted to end enslavement, give citizenship rights to African Americans, and cause a race war in the South.³⁴⁸

Less than two months after Lincoln’s election, South Carolina, an enslaving state, voted to leave the United States.³⁴⁹ Over the next two months, an additional six enslaving states—Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas—also left the United States. They formed the Confederate States of America, also known as the Confederacy. Once war broke out in 1861, another four enslaving states—Virginia, Arkansas, North Carolina, and Tennessee—joined the Confederacy.³⁵⁰ The deadliest war in U.S. history had begun.

B. Enslavement, the Civil War, and the Emancipation Proclamation

The Confederate States of America, also known as the Confederacy, fought to create a new nation built on enslavement. The Confederate Constitution was based on the U.S. Constitution, except that it outlawed the national government from ever ending enslavement³⁵¹ and it said that white people living in any new Confederate territories had the right to own enslaved people.³⁵²

³⁴⁷ Kendi, *supra*, at pp. 203 – 204.

³⁴⁸ Kendi, *supra*, at p. 214.

³⁴⁹ Baptist, *supra*, at pp. 389 – 390.

³⁵⁰ Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* (2010), pp. 161 – 162 (The Fiery Trial).

³⁵¹ Constitution of the Confederate States, March 11, 1861, Article IV, section 2, clause 1.

https://avalon.law.yale.edu/19th_century/csa_csa.asp

³⁵² Constitution of the Confederate States, March 11, 1861, Article IV, section 3, clause 3.

https://avalon.law.yale.edu/19th_century/csa_csa.asp

Alexander Stephens, the new Vice-President of the Confederacy, declared that, unlike the United States, the Confederacy was not based on the notion that all men were created equal. Instead, the “cornerstone” of the Confederacy, the foundation on which it was built, was “the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition.”³⁵³

For many white southerners in the Confederacy, keeping enslavement was even more important than winning independence from the United States. When the Confederacy lacked soldiers to fight in the later years of the Civil War, Confederate military leaders, including General Robert E. Lee, supported recruiting enslaved men as soldiers. The idea was that enslaved men would fight for the Confederacy in exchange for their freedom.³⁵⁴

In the end, recruiting enslaved men as soldiers and giving freedom to those who fought for the Confederacy was very unpopular because pro-enslavement whites feared that it would weaken enslavement and go against the enslaving states’ reason for seceding.³⁵⁵ For example, Howell Cobb, a Confederate general from Georgia, said that giving guns to the enslaved was a “suicidal policy” and “the day you make soldiers of them is the beginning of the end of the revolution.”³⁵⁶

Since many white southerners agreed with Cobb, the Confederacy did not accept the idea of freeing and arming enslaved men as soldiers until March 1865, the last month of the Civil War. The Confederacy organized a handful of enslaved men as soldiers in these very last days of the war, but none of them fought in battle.³⁵⁷

Unlike the Confederacy, the Union made freeing the enslaved and recruiting enslaved men into the military a major part of its war strategy. Even though Abraham Lincoln and many Republican politicians were not interested in freeing the enslaved at first, the actions of enslaved people pushed the United States toward ending enslavement.³⁵⁸

Enslaved people began escaping to U.S. military sites even before Lincoln became president.³⁵⁹ When the United States Army began moving into the Confederacy, large numbers of refugees from enslavement—as many as 500,000 people or 12.5 percent of the entire enslaved population—sought freedom in U.S. Army camps.³⁶⁰ These freedom seekers worked as wagon drivers, laundry workers, cooks, manual laborers, and nurses for the U.S. army.³⁶¹ However, not all Black Americans served in the Army voluntarily, as a small number were kidnapped and re-enslaved by the Union Army.³⁶²

Congress understood that these freedom seekers would play a key role in winning the war against the Confederacy. Every formerly enslaved person working for the U.S. took away resources from the South and

³⁵³ Alexander H. Stephens, ‘Cornerstone’ Speech, March 21, 1861, <https://teachingamericanhistory.org/document/cornerstone-speech/>

³⁵⁴ Levine, *Confederate Emancipation: Southern Plans to Free and Arm Slaves During the Civil War* (2006), pp. 26 – 36 (Levine)..

³⁵⁵ Levine, *supra*, at pp. 40 – 49.

³⁵⁶ Letter from Howell Cobb to James A. Seddon, January 1, 1865, Encyclopedia Virginia, <https://encyclopediavirginia.org/entries/letter-from-howell-cobb-to-james-a-seddon-january-8-1865/>

³⁵⁷ Jaime Martinez, Black Confederates, Encyclopedia Virginia, April 23, 2021, <https://encyclopediavirginia.org/entries/black-confederates/#heading3>

³⁵⁸ *Forever Free*, *supra*, at pp. 42 – 44.

³⁵⁹ *The Fiery Trial*, *supra*, at p. 166.

³⁶⁰ Woodward, *Marching Masters: Slavery, Race, and the Confederate Army During the Civil War* (2014), p. 107.

³⁶¹ Berlin, *Who Freed the Slaves?: Emancipation and its Meaning*, in *Union and Emancipation: Essays on Politics and Race in the Civil War Era*, edited by David W. Blight and Brooks D. Simpson (1997), p. 111 (*Who Freed the Slaves?*).

³⁶² *Army Engineer to the Headquarters of the Department of the South* (Apr. 3, 1863), cited in Berlin, Reidy & Rowlands, eds., *Freedom: A documentary History of Emancipation, 1861-1867, Series II: The Black Military Experience* (1982) p. 56.

helped the Union. In 1861 and 1862, Congress passed laws called “confiscation acts,” which allowed the U.S. military to give shelter and work to enslaved people who were being forced to work for the Confederacy, and, later to any enslaved person whose enslaver supported the Confederacy.³⁶³

Even as the United States fought a war to end enslavement, the Union could not immediately or completely reject enslavement. With the secession of these 11 Southern states, the number of slaveholding congressmen decreased accordingly.³⁶⁴ However, more than 20 percent of the members of Congress during the Civil War remained either current or former slaveholders.³⁶⁵

Abraham Lincoln was also slow to use his presidential power to free enslaved people. In September 1862, Lincoln wrote a preliminary version of the Emancipation Proclamation, which freed all the enslaved people in any area still in rebellion against the United States on the first day of the new year.³⁶⁶ Lincoln’s preliminary proclamation also recommended transporting newly-freed Black Americans out of the United States and resettling them elsewhere (a scheme that Lincoln considered seriously for years until it was clear that most Black Americans refused to leave the land of their birth).³⁶⁷ Then, on January 1, 1863, Lincoln gave his final Emancipation Proclamation, setting enslaved people free everywhere in the Confederacy, except the parts already controlled by the U.S. Army, and making no referencing to removing Black Americans overseas.³⁶⁸ The Emancipation Proclamation also left out the enslaving states that had not joined the Confederacy—Maryland, Kentucky, Delaware, and Missouri—so that they would not rebel.³⁶⁹

C. Enslaved People Tear Down Enslavement and Fight for their Freedom

Enslaved people set the Emancipation Proclamation in motion by seeking freedom by the thousands, and they also fought for their freedom on the battlefield. Congress stopped excluding Black men from the U.S. Army in 1862 and the Emancipation Proclamation opened the way for Black men to join the army and navy.³⁷⁰ Free Black Americans in Union states organized and fought in military units, including the 54th Massachusetts Volunteer Infantry.³⁷¹ But most Black Civil War soldiers were formerly enslaved men recruited in the South as part of United States Colored Troops (USCT).

Altogether, 178,000 Black men served in 175 USCT regiments.³⁷² Another 19,000 Black men served in the U.S. Navy.³⁷³ By the end of the Civil War, Black servicemen made up roughly 10 percent of the entire Union

³⁶³ Who Freed the Slaves?, *supra*, at pp. 114 – 117.

³⁶⁴ Weil and Blanco, *supra*.

³⁶⁵ Weil and Blanco, *supra*.

³⁶⁶ Who Freed the Slaves?, *supra*, at p. 117.

³⁶⁷ Forever Free, *supra*, at pp. 48 – 51.

³⁶⁸ Forever Free, *supra*, at pp. 50 – 51.

³⁶⁹ Emancipation Proclamation, Jan 1. 1863, <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation>

³⁷⁰ Who Freed the Slaves?, *supra*, at pp. 118 – 119.

³⁷¹ Forever Free, *supra*, at p. 52.

³⁷² Mouser, *The United States Colored Troops (1863-1865)* (July 22, 2017) BlackPast.org. <<https://www.blackpast.org/african-american-history/united-states-colored-troops-1863-1865/>> (as of Jan. 26, 2022) (Mouser).

³⁷³ Mintz, Historical Context: *Black Soldiers in the Civil War*, Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-black-soldiers-civil-war>> (as of Jan. 26, 2022) (*Black Soldiers in the Civil War*).

military.³⁷⁴ They fought in every major Union military campaign between 1864 and 1865,³⁷⁵ and participated in 39 major battles and 410 smaller armed conflicts.³⁷⁶ Around 40,000 of these men (around 20 percent) died during the Civil War.³⁷⁷

The federal government and the U.S. military did not treat Black soldiers equally. Black soldiers faced doing hard labor, being fed less nutritious food than white soldiers, and having less access to medical care.³⁷⁸ The federal government also paid Black soldiers less than white soldiers, and Black soldiers were closed out of opportunities to lead their units as high-ranking officers because these positions were given to white men only. Black soldiers' protests against poor treatment helped fix some of these inequalities.³⁷⁹ After Black soldiers protested strongly against lower pay, Congress finally began paying Black and white soldiers equally in 1864. By the end of the war, 80 Black men also won their promotion to high-ranking officer positions.³⁸⁰ For a further discussion the U.S. military's discriminatory treatment of Black Americans, see Chapter [XX]

These Black servicemen fought bravely to win their freedom and to claim equal rights with white Americans. The 54th Massachusetts Volunteer Infantry, the most famous northern Black unit, and the one in which Frederick Douglass's two sons served, led a heroic attack on Fort Wagner, South Carolina in July 1863. More than 40 percent of the men died or were wounded in the attack.³⁸¹

One of the survivors, Sergeant William Harvey Carney, eventually was awarded the Medal of Honor, the highest military honor in the United States, for saving the 54th Massachusetts flag from the enemy. Carney was among 26 Black Civil War soldiers who earned this prestigious medal for bravery above and beyond the call of duty.³⁸² Sattira A. Douglas, a Black woman whose husband, H. Ford Douglas, fought in the war, explained that Black soldiers wanted "to strike the blow that will at once relieve them of northern prejudice and southern slavery."³⁸³ They fought bravely because they had "everything to gain in this conflict: liberty, honor, social and political position," and losing the war would result in "slavery, [and] prejudice of caste."³⁸⁴

Black soldiers also faced more violence on the battlefield than white soldiers. The Confederacy announced that it would kill or enslave Black soldiers who Confederates captured as prisoners of war.³⁸⁵ Abraham Lincoln tried to protect Black soldiers by warning the Confederacy that the Union would kill or force into hard labor one Confederate prisoner of war for every Black soldier that Confederates killed or enslaved.³⁸⁶ But some

³⁷⁴ *Black Soldiers in the Civil War, supra.*

³⁷⁵ Mouser, *supra.*

³⁷⁶ Hanna, African American Recipients of the Medal of Honor: A Biographical Dictionary, Civil War through Vietnam War (2002), p. 10 (Hanna).

³⁷⁷ *Black Soldiers in the US Military During the Civil War* (Sept. 1, 2017) National Archives <<https://www.archives.gov/education/lessons/blacks-civil-war>> (as of Jan. 26, 2022).

³⁷⁸ *Black Soldiers in the Civil War, supra.*

³⁷⁹ *Black Soldiers in the Civil War, supra.*

³⁸⁰ *Black Soldiers in the US Military During the Civil War* (Sept. 1, 2017) National Archives <<https://www.archives.gov/education/lessons/blacks-civil-war>> (as of Jan. 26, 2022).

³⁸¹ *Black Soldiers in the Civil War, supra.*

³⁸² Hanna, *supra*, at p. vii.

³⁸³ Douglas to Robert Hamilton (June 9, 1863) quoted in *The Black Abolitionist Papers, Volume V, The United States, 1859 – 1865*, edited by C. Peter Ripley (1992), p. 212.

³⁸⁴ Douglas to Robert Hamilton, June 9, 1863, quoted in *The Black Abolitionist Papers, Volume V, The United States, 1859 – 1865*, edited by C. Peter Ripley (1992), p. 213.

³⁸⁵ *Forever Free, supra*, at p. 53.

³⁸⁶ Lincoln, Order by the President, July 30, 1863, Freedmen and Southern Society Project, <http://www.freedmen.umd.edu/retal.htm>

Confederates still targeted Black servicemen with violence. In 1864, Confederates attacked a much smaller Union force of mostly Black soldiers at Fort Pillow in Tennessee. The Confederates entered the fort and killed 300 men, 200 of whom were Black.

Witnesses said that Confederates killed these Black soldiers instead of capturing them as prisoners of war.³⁸⁷ After this massacre, it became popular for Black soldiers to shout “Remember Fort Pillow!” as they went into battle to fight for their lives and their freedom.³⁸⁸

D. The End of the Civil War and the Thirteenth Amendment

In 1864, Congress approved the Thirteenth Amendment to the U.S. Constitution, which said that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”³⁸⁹ Although enslavement was already falling apart before and after Lincoln’s Emancipation Proclamation, the Thirteenth Amendment ensured that the end of enslavement became permanent in the country.³⁹⁰

The United States won the Civil War against the Confederacy in 1865, ending enslavement across the South. Enslaved people in Texas, one of the very last places reached by the United States Army, did not hear that they had been legally freed until June 19, 1865. This was two and a half years after the Emancipation Proclamation. Formerly enslaved Black Texans began celebrating June 19th as “Juneteenth,” a day to remember their hard-fought battle for freedom.³⁹¹ Six months later, on December 6, 1865, the required number of states finally approved the Thirteenth Amendment to the U.S. Constitution outlawing enslavement.³⁹²

XI. Reconstruction and the Lost Cause

A. The Start and Goals of Reconstruction: Civil Rights Legislation

After the end of the Civil War and the outlawing of enslavement, the United States went through a process known as Reconstruction aimed at rebuilding and reuniting the country.³⁹³ Abraham Lincoln had begun this process during the Civil War.³⁹⁴ Lincoln’s assassination in April 1865 left his vice-president, Andrew Johnson, and Lincoln’s fellow Republican Party member in Congress as president.³⁹⁵

³⁸⁷ *The Fort Pillow Massacre, 1864: A Spotlight on a Primary Source*, Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/spotlight-primary-source/fort-pillow-massacre-1864>> (as of Jan. 26, 2022) (*Fort Pillow*).

³⁸⁸ Fort Pillow, *supra*.

³⁸⁹ US Constitution, Amdt. 13, section 1, clause 1.

³⁹⁰ Forever Free, *supra*, at pp. 62 – 63.

³⁹¹ *The Historical Legacy of Juneteenth* (June 19, 2019) National Museum of African American History and Culture, Smithsonian Institution <<https://nmaahc.si.edu/blog-post/historical-legacy-juneteenth>> (as of Jan. 26, 2022).

³⁹² Kolchin, *supra*, at p. 207.

³⁹³ Forever Free, *supra*, at pp. xix – xx.

³⁹⁴ Forever Free, *supra*, at pp. 58 – 67, 79 – 80.

³⁹⁵ Forever Free, *supra*, at pp. 58 – 67, 79 – 80.

President Johnson, who was a former Democrat from the enslaving state of Tennessee, always disapproved of the Confederacy and wanted to punish wealthy enslavers who participated in it.³⁹⁶ But he also wanted to keep white people in charge of the South and opposed giving equal political rights to Black Americans.³⁹⁷

As President Andrew Johnson wrote in a letter in 1866 to the Governor of Missouri: “This is a country for white men, and by God, as long as I am President, it shall be a government for white men.”

Johnson fought with Republicans in Congress over the direction of Reconstruction and Black Americans’ civil rights, which eventually led to Johnson’s impeachment.³⁹⁸ Congressional Republicans took over the process of Reconstruction and passed new laws aimed at giving formerly enslaved people basic legal rights.³⁹⁹

Congressional Republicans had several overlapping goals: re-growing the southern cotton economy, rebuilding the ex-Confederate states’ governments before allowing them to come back fully into the United States, and making sure that formerly enslaved people could no longer be held in enslavement.⁴⁰⁰ Some of the most progressive Republicans wanted to completely change social, economic, and political life in the South to support Black equality. But moderate and conservative Republicans mostly focused on laws that would give Black Americans basic legal and economic rights such as making contracts to work (usually for their former enslavers), getting paid for their work, and keeping their families together.⁴⁰¹

The formerly enslaved and former enslavers in the South had their own goals. Formerly enslaved people wanted more than just basic legal rights. They wanted to be independent and out of the control of their former enslavers and to own small farms where they could work for themselves. They wanted to educate themselves and their children. They wanted the ability to move around in search of family members sold away during enslavement.⁴⁰² Finally, they wanted political rights such as the right to vote and hold office.

Former enslavers refused to acknowledge Black Americans’ new freedom. In every ex-Confederate state, enslavers passed laws called “Black Codes.” Black Codes included vagrancy laws that allowed police to arrest any Black person without an employer and force them to work.⁴⁰³ Black codes in some states also forced Black parents to give control over their children to their former enslavers. Some also required judges to punish Black Americans more harshly than white Americans when found guilty of the same crimes.⁴⁰⁴

Republicans in Congress would have to force former enslavers in the South to treat the formerly enslaved fairly, equally, and with basic human dignity. Republicans briefly considered passing laws that would take away land from wealthy Confederates and give it to formerly enslaved people so that they could support themselves as independent farmers.⁴⁰⁵

³⁹⁶ Forever Free, *supra*, at pp. 78 – 79.

³⁹⁷ Forever Free, *supra*, at pp. 79 – 80, 109 – 110.

³⁹⁸ Forever Free, *supra*, at pp. 107 – 113, 116 – 117, 145 - 146.

³⁹⁹ Forever Free, *supra*, at pp. 113 – 122.

⁴⁰⁰ Forever Free, *supra*, at pp. 111 – 115.

⁴⁰¹ Forever Free, *supra*, at pp. 111 – 113, 142.

⁴⁰² Forever Free, *supra*, at pp. 82 – 92.

⁴⁰³ Forever Free, *supra*, at pp. 95 – 96.

⁴⁰⁴ Forever Free, *supra*, at pp. 95 – 96.

⁴⁰⁵ Forever Free, *supra*, at pp. 141 – 142.

Most white Americans thought these policies were too “radical” because they challenged ideas that the federal government should always protect individual property rights.⁴⁰⁶ Instead, Republicans’ Reconstruction policies focused on making sure that formerly enslaved Black southerners had access to basic civil rights, such as rights to make contracts, own property, keep their families together, have physical safety, and be treated fairly by the courts and the criminal justice system.⁴⁰⁷

In 1866, Congress passed a civil rights act that made anyone born in the United States a citizen, without regard to their race, color, or previous enslavement.⁴⁰⁸ Newly freed Black citizens were supposed to enjoy equal rights under the law “as is enjoyed by white citizens.”⁴⁰⁹ Republicans feared that a federal law like the Civil Rights Act of 1866 could be overturned easily if another political party came into power. They pushed for a constitutional amendment, the Fourteenth Amendment, that would make Black citizenship and civil rights permanent.⁴¹⁰

The Fourteenth Amendment, approved by Congress in 1866 and ratified by the required number of states in 1868, said that any person born in the United States was a citizen (birthright citizenship); that state governments could not take away the life, liberty, or property of any person (citizen or non-citizen) without due process, such as the right to a speedy trial, and protection from illegal search and seizure; and that the states had to treat every person equally under the law.⁴¹¹

Congress soon decided that formerly enslaved people’s civil and economic rights could not be protected unless Black Americans had political rights, specifically rights to vote and hold office.⁴¹² The Fifteenth Amendment, approved by Congress in 1869 and ratified by the required number of states in 1870, made it illegal for states to discriminate against voters based on “race, color, or previous condition of servitude.”⁴¹³

B. California Rejects Reconstruction Civil Rights Legislation

The legislature and governor of California strongly opposed Congress’s Reconstruction civil rights laws and tried to stop them.⁴¹⁴ During the Civil War, Black Californians fought for and won new rights, such as the right to testify in court cases involving whites.⁴¹⁵ This was because white Republicans controlled the legislature and governorship during the early 1860s and took power away from the pro-enslavement Democrats who used to control the state.⁴¹⁶ But many white Californians opposed Congressional civil rights laws to protect formerly enslaved people and worried that these laws would apply to other non-white people in the state.⁴¹⁷

⁴⁰⁶ Foner, *Reconstruction: America’s Unfinished Revolution, 1863 – 1877* (1988), pp. 153 – 161, 235 – 237 (Reconstruction).

⁴⁰⁷ *Forever Free, supra*, at pp. 113 – 123.

⁴⁰⁸ *Forever Free, supra*, at pp. 113 – 115.

⁴⁰⁹ An Act to Protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication (the Civil Rights Act of 1866), US Statutes, Chapter 31, sec. 1

⁴¹⁰ *Forever Free, supra*, at pp. 117 – 118.

⁴¹¹ US Constitution, Amdt. 14, section 1.

⁴¹² *Reconstruction, supra*, at pp. 444 – 449.

⁴¹³ US Constitution, Amdt. 15, section 1.

⁴¹⁴ *Freedom’s Frontier, supra*, at pp. 209 – 214.

⁴¹⁵ *Lapp, supra*, at pp. 206 – 209.

⁴¹⁶ *Freedom’s Frontier, supra*, at pp. 177 – 178.

⁴¹⁷ *Freedom’s Frontier, supra*, at pp. 207 – 208.

Democrats came back into power in California in 1867 by promising white voters that they would fight against Reconstruction and any new law that would make African Americans, Native Americans, or Chinese Americans equal to whites or give them voting rights.⁴¹⁸

California Democrats who controlled the state legislature kept this promise when it came time to ratify the Fourteenth and Fifteenth Amendments.⁴¹⁹ California's legislature ignored the Fourteenth Amendment and never considered it.⁴²⁰ The legislature voted to reject ratifying the Fifteenth Amendment in 1870.⁴²¹ Enough other states had ratified the amendments that they became part of the U.S. Constitution without California's approval.⁴²² Still, California would continue its resistance to Reconstruction civil rights legislation by refusing to ratify the Fourteenth Amendment until 1959 and the Fifteenth Amendment until 1962.⁴²³

California also led the way in legalizing segregation after the Civil War. During this time, California's Supreme Court also made a destructive decision that the rest of the United States eventually followed. In the 1874 case of *Ward v. Flood*, California's Supreme Court justices decided that segregation in the state's public schools was legal as long as Black children and white children had equal access to similar schools and educational opportunities.⁴²⁴ Twenty-two years later, the U.S. Supreme Court made a similar "separate but equal" decision in the case of *Plessy v. Ferguson*. This decision supported the segregation of public facilities in the United States for almost 60 years.⁴²⁵

C. The Destruction of Reconstruction

Black Americans fought for and took advantage of many new legal rights during Reconstruction, but this time period of growing legal equality was short. White supremacist terrorist groups, first the Ku Klux Klan and then later militias such as the White League of Louisiana and the Red Shirts of South Carolina, eventually overthrew the Reconstruction governments that Black and white Republicans had established together in the South.⁴²⁶

White southern Democrats, who wanted to keep Black Americans working on plantations and out of politics, retook control of the southern states.⁴²⁷ The long and expensive process of Reconstruction lost popularity with white northerners, and many of them wanted to give up on the project of trying to change the racial, legal, and economic relationships of the South.⁴²⁸

During the U.S. presidential election of 1876, white northern Republicans abandoned Reconstruction in the South in return for the presidency of the United States.⁴²⁹ During the election of 1876, Ohio Republican

⁴¹⁸ Freedom's Frontier, *supra*, at pp. 207 – 213.

⁴¹⁹ Freedom's Frontier, *supra*, at pp. 210 – 213.

⁴²⁰ Freedom's Frontier, *supra*, at p. 210.

⁴²¹ Freedom's Frontier, *supra*, at pp. 210 – 213.

⁴²² Freedom's Frontier, *supra*, at pp. 210 – 213.

⁴²³ Waite, *Early California lawmakers also preached #resistance—but against immigration* (Aug. 3, 2018) Los Angeles Times <<https://www.latimes.com/opinion/op-ed/la-oe-waite-california-14-amendment-20180803-story.html>> (as of Jan. 26, 2022).

⁴²⁴ *Ward v. Flood*, 48 Cal. 36 (1874).

⁴²⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴²⁶ Forever Free, *supra*, at pp. 171 – 177, 195 – 197.

⁴²⁷ Forever Free, *supra*, at pp.

⁴²⁸ An Act to protect all Citizens in their Civil and Legal Rights. 18 Stat. 335-337

⁴²⁹ Forever Free, *supra*, at p. 198.

Rutherford B. Hayes and New York Democrat Samuel Tilden both claimed to be the winner.⁴³⁰ It was well-known that white southerners had used violence, threats, and fraud to keep Black Americans from voting for the Republican Hayes.⁴³¹ In a secret deal, Hayes and other Republicans agreed to pull away federal troops from key places in the South in exchange for white southerners agreeing that Hayes (not Tilden) had won the presidency.⁴³² The troops were essential in protecting Black Americans' political rights in the South, so when Hayes pulled them in 1877, he ended much of the federal protection for Black Americans, 90 percent of whom lived in the South at the time.⁴³³

The U.S. Supreme Court played its own important role in defeating Reconstruction.⁴³⁴ In the 1870s, the court made several decisions that greatly reduced the power of the Fourteenth Amendment and federal laws to protect Black equality.⁴³⁵

The last of these decisions happened in the 1883 *Civil Rights Cases*, a group of several cases that African Americans had brought under the federal Civil Rights Act of 1875.⁴³⁶ That act had made it illegal for theaters, hotels, and public transportation companies such as railroads to exclude Black Americans.⁴³⁷

The Supreme Court decided in 1883 that the Civil Rights Act of 1875 was unconstitutional because the Fourteenth Amendment, on which it was based, only gave Congress the power to stop state governments from discriminating against Black Americans. Congress could not outlaw individual people and private business owners from discriminating against Black Americans; only the state governments themselves could do that.⁴³⁸ The Supreme Court decision in the *Civil Rights Cases* legalized racial discrimination and segregation in most public places. It set the stage for the "separate but equal" decision in *Plessy v. Ferguson* (1896) and practices such as housing discrimination and education segregation.⁴³⁹

D. The Rise of the Lost Cause Myth

After Reconstruction ended, white southerners created the myth of the Confederate "Lost Cause," in order to downplay the horrors of enslavement and terrorize Black Americans.⁴⁴⁰ Southerners who opposed Black civil rights falsely claimed that the Civil War had little to do with enslavement. The Lost Cause myth claims that Confederacy had fought a heroic war to save the southern way of life from being destroyed by the North. This untruthful history also claims the Confederacy lost the Civil War only because the more populated, industrialized North overpowered white southerners, rather than the fact that enslavement is wrong.⁴⁴¹ This set

⁴³⁰ Forever Free, *supra*, at pp. 197 – 198.

⁴³¹ Forever Free, *supra*, at pp. 197 – 198.

⁴³² Forever Free, *supra*, at p. 198.

⁴³³ Forever Free, *supra*, at p. 198.

⁴³⁴ Forever Free, *supra*, at p. 194.

⁴³⁵ Forever Free, *supra*, at p. 194. The key cases in the 1870s were the *Slaughter-House Cases*, 83 U.S. 36 (1873) and *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁴³⁶ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁴³⁷ An Act to protect all Citizens in their Civil and Legal Rights, 18 US Stat. 335-337.

⁴³⁸ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁴³⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴⁴⁰ Forever Free, *supra*, at p. 216.

⁴⁴¹ Forever Free, *supra*, at pp. 216 – 217.

of ideas became the myth of the “Lost Cause,” which white southerners used to celebrate the defeated Confederacy.

The Lost Cause is not just a story that white southerners tell. It is a weapon of terror against Black Americans and a rejection of the southern defeat in the Civil War and Black civil rights. At the end of the 1800s and the start of the 1900s, white southerners began building thousands of monuments and statues all over the South to celebrate famous Confederates, and to name important buildings after Confederate figures.⁴⁴²

In the 1910s, the Ku Klux Klan, which the federal government had broken up during Reconstruction, re-emerged and began terrorizing and murdering African Americans. The combination of violence against Black Americans and the constant sight of monuments celebrating the enslaving Confederacy were terrorist tactics meant to silence Black Americans and keep them from challenging white supremacy.⁴⁴³

Lost Cause symbols became especially important to white southerners who tried to stop the Civil Rights Movement in the 1950s and 1960s. White southerners who opposed Black rights beat and murdered Black (and some white) civil rights activists. They also began regularly flying versions of the battle flag of the Army of Northern Virginia (the Confederate “Stars and Bars,” popularly known as the “Confederate Flag”) to threaten civil rights activists and to show that they were determined not to give equality to Black Americans.⁴⁴⁴

Even though defenders of the Lost Cause have argued that Confederate monuments and flags stand for “heritage, not hate,” and they claim that removing them erases history, this argument ignores the true history of these objects. White southerners have used them strategically as symbols of terror to try and keep Black people from fighting for full equality.⁴⁴⁵

E. California and the Lost Cause

In California, white Americans popularized the Lost Cause mythology with national audiences. The Hollywood film industry was responsible for bringing the Lost Cause to movie screens and making it popular with many white Americans, North and South, during the first half of the 1900s.

D.W. Griffith’s blockbuster film, *Birth of a Nation* (1915), falsely showed members of the Ku Klux Klan as heroes who were protecting white women and southern honor against violent Black people (mostly played by white actors who painted their faces black). This film was the main factor behind the revival of the Ku Klux Klan in the early 1900s.

Gone with Wind (1939) celebrated pre-Civil War southern plantation life by showing a world of kindly enslavers, loyal and happy enslaved people, and heroic Confederates fighting for the southern way of life.⁴⁴⁶

White Californians built Confederate monuments across the state. For example, a plaque honoring Confederate President Jefferson Davis, set up by the United Daughters of the Confederacy, stood along a Bakersfield,

⁴⁴² *Whose Heritage? Public Symbols of the Confederacy* (February 1, 2019) Southern Poverty Law Center <<https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy#findings>> (as of Jan. 26, 2022) (*Whose Heritage?*).

⁴⁴³ *Whose Heritage?*, *supra*.

⁴⁴⁴ *Whose Heritage?*, *supra*.

⁴⁴⁵ *Whose Heritage?*, *supra*.

⁴⁴⁶ *Forever Free, supra*, at pp. xxii – xxiii, 217 – 218.

California, highway for almost 80 years.⁴⁴⁷ A monument in the Hollywood Forever Cemetery in Los Angeles, California, built in 1925, celebrated all Confederates who died on the Pacific Coast.⁴⁴⁸ Although both of these monuments have now been removed, their existence reminds us of California's complicity in the United States' long history of enslavement, anti-Black terrorism, and systemic racism.

XII. Conclusion

The end of Reconstruction and the rise of the Lost Cause myth marked the beginning of a period of legal apartheid for African Americans at the hand of mostly white Americans through terrorism, violence, and direct legal support from federal, state, and local governments. This period is popularly known as "Jim Crow," after a racist stereotyped character popular with white people in the United States, and it lasted roughly from the 1890s to the Civil Rights Movement of the 1950s to 1970s.

[Paragraph summary of contributions enslavement made to creating and maintaining white supremacy, and how it is woven into the country's governance. Summary preview of the next 11 chapters and their connections to enslavement.]

⁴⁴⁷ Knight, *Commentary: A Fitting End to the Last Confederate Monument in Southern California* (July 8, 2020) Los Angeles Times <<https://www.latimes.com/entertainment-arts/story/2020-07-08/last-confederate-monument-southern-california>> (as of Jan. 26, 2022).

⁴⁴⁸ Waite, *The Struggle over Slavery Was Not Confined to the South, LA Has a Confederate Memorial Problem Too*, (August 4, 2017) Los Angeles Times <<https://www.latimes.com/opinion/op-ed/la-oe-waite-socal-confederates-20170804-story.html>> (as of Jan. 26, 2022).

Chapter 3. Racial Terror

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

Enslavement was followed by decades of violence and intimidation intended to subordinate Black Americans across the United States.¹ Racial terror, and lynchings in particular, pervaded every aspect of post-enslavement Black life.² Black Americans faced threats of violence when they tried to vote, when they tried to buy homes in white neighborhoods, when they tried to swim in public pools, and when they made progress through the courts or in legislation.³ Led by prominent members of society and enabled by government officials, ordinary citizens terrorized Black Americans to preserve a caste system that kept Black Americans from building the same wealth and political influence as white Americans.⁴ Racial terror also continued the generational trauma that began during enslavement.⁵

While lynching, mob violence, and other forms of racial terror are no longer socially acceptable, the legacy of terror continues to haunt Black communities.⁶ Such violence has found a modern form in extrajudicial killings of Black Americans by police and vigilantes.⁷ Racial terror targeted at successful Black Americans has contributed to the present wealth gap between Black and white Americans.⁸ The monitoring of polling places by white supremacist groups evokes a history of violent suppression of Black voters.⁹

¹ Equal Justice Institute (EJI), *Lynching in America: Confronting the Legacy of Racial Terror* (2015), p. 3 <https://time.com/wp-content/uploads/2015/02/eji_lynching_in_america_summary.pdf> (as of Oct. 20, 2021) (EJI 2015).

² EJI 2015, *supra*, at p. 3.

³ Coates, *The Case for Reparations* (June 2014) *The Atlantic* <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>> (as of Oct. 20, 2021) (*Case for Reparations*); Byman, *The Failure of Counterterrorism After the Civil War* (Aug. 22, 2021) *Lawfare* <<https://www.lawfareblog.com/failure-counterterrorism-after-civil-war>> (as of Oct. 20, 2021) (*Lawfare*); Niraj Chokshi, *Racism at American Pools Isn't New: A Look at a Long History* (August 1, 2018) *New York Times* <<https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html>> (as of Dec. 11, 2021).

⁴ EJI 2015, *supra*, at pp. 3, 7; EJI, *Lynching in America: Confronting the Legacy of Racial Terror*: Third Edition (2017), pp. 48-50, 65, 73 <<https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-052421.pdf>> (as of Oct. 20, 2021) (EJI 3d ed.); Wilkerson, *Caste: The Origins of Our Discontents* (2020), p. 151 (*Caste*); Lee, *How America's Vast Racial Wealth Gap Grew: By Plunder* (Aug. 18, 2019), *New York Times*, <<https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>> (as of Oct. 22, 2021) (Lee); *Case for Reparations, supra*; *Lawfare, supra*.

⁵ EJI 3d ed., *supra*, at pp. 65, 68-69.

⁶ EJI 2015, *supra*, at pp. 19-20, 22-23; EJI 3d ed., *supra*, at p. 65.

⁷ Niedermeier, *The Color of the Third Degree* (2019), pp. 17-19 (*Third Degree*); United Nations General Assembly, Report of the Working Group of Experts on People of African Descent on its mission to the United States of America (Aug. 18, 2016), p. 16 (U.N. Working Group Report); Love, *The Trayvon Martin case reveals a vigilante spirit in the US justice system* (Apr. 7, 2012) *Guardian*, King, <<https://www.theguardian.com/commentisfree/cifamerica/2012/apr/07/trayvon-martin-vigilante-spirit-us-justice>> (as of Sept. 8, 2021).

⁸ Lee, *supra*.

⁹ Bump, *The long history of black voter suppression in American politics* (Nov. 2, 2016) *Washington Post*, <<https://www.washingtonpost.com/news/the-fix/wp/2016/11/02/the-long-history-of-black-voter-suppression-in-american-politics/>> (Bump); Buhl, *Donald Trump's Call to Militia to 'Watch' Polling Places Raises Fears of Voter Intimidation* (Oct. 17, 2020)

This chapter chronicles the racial terror inflicted on Black Americans, including in California, and the lasting impact of racial terror. First, this chapter addresses the overarching purpose of racial terror as a method of social control. Second, this chapter will identify the perpetrators of racial terror, most notably the Ku Klux Klan (KKK), and their objective of preserving their dominance in society. This chapter pays special attention to the KKK's history and spread in California. Third, this chapter will discuss the various forms of racial terror, such as lynching, mob violence, and sexual violence. The chapter also identifies numerous instances of racial terror that occurred in California. This chapter shows how racial terror allowed white Americans to politically, economically, and socially subordinate Black Americans. Finally, this chapter will discuss the consequences of racial terror, such as intergenerational trauma and the racial wealth gap, which continue to this day.

III. Objectives of Racial Terror: Social, Political, and Economic Oppression

The practice of racial terror began during enslavement and has continued ever since, developing through Reconstruction, Jim Crow, the 20th century, and into the present day. A critical key to understanding the widespread use of racial terror is recognizing how its perpetrators sought to oppress Black Americans socially, politically, and economically.

As the journalist Isabel Wilkerson argues, a caste system is a social hierarchy created by people in a community that separates groups of human beings based on ancestry, skin color, or other characteristics that cannot be changed.¹⁰ In a caste system, one group of human beings is believed to be superior, while other groups are believed to be inferior and treated as less than human.¹¹ In the racially ordered caste system of the United States, white people occupy this higher social position.¹² One pillar holding up the American racial caste system is the use of physical and psychological terror, which serves to control Black Americans and prevent resistance.¹³ For this caste system to continue functioning, the rest of society, including government officials, only need to look the other way.¹⁴ For government officials, this is a neglect of their duty to protect.¹⁵ In America, for centuries, the perpetrators of racial terror have rarely been held accountable for their violence, and so they have continued to enforce their dominant caste position.¹⁶

The system of racial terror in America started during enslavement, when whipping was a tool to control enslaved people and break their spirit.¹⁷ Enslavers openly publicized their use of violence.¹⁸ And when an enslaved person sought freedom by escaping, enslavers turned to torture, or even invited others to kill the freedom seeker.¹⁹ White enslavers used this public display of violence to demonstrate their power over Black enslaved persons, scare enslaved persons into submission, and uphold the institution of enslavement.²⁰

Newsweek, <<https://www.newsweek.com/donald-trumps-call-militia-watch-polling-places-raises-fears-voter-intimidation-1539900>> (as of Sept. 8, 2021).

¹⁰ Wilkerson, *Caste: The Origins of Our Discontents* (2020), p. 17 (Caste).

¹¹ Caste, *supra*, at p. 17.

¹² Caste, *supra*, at pp. 19, 52.

¹³ Wilkerson, *Caste: The Origins of Our Discontents* (2020), p. 151 (Caste).

¹⁴ Caste, *supra*, at p. 151.

¹⁵ [citation]

¹⁶ Caste, *supra*, at pp. 151, 153; EJI 2015, *supra*, at p. 18.

¹⁷ Caste, *supra*, at pp. 152, 154.

¹⁸ Caste, *supra*, at pp. 153-55.

¹⁹ Caste, *supra*, at pp. 153-55.

²⁰ Caste, *supra*, at pp. 151-154.

Rebellions of the enslaved were also violently suppressed.²¹ For example, white officials purportedly discovered an extensive conspiracy of insurrection in Charleston, South Carolina in 1822.²² The enslaved, led by the free Black carpenter Denmark Vesey, allegedly plotted to take over the city and kill all of its white residents, including women and children.²³ After the discovery of the alleged conspiracy, Vesey was arrested, along with dozens of enslaved persons.²⁴ Confessions and testimony against the alleged conspirators was procured in at least some instances by coercion and torture.²⁵ The prosecution had no physical evidence to support its case.²⁶ In the end, Vesey and thirty-four others were executed, although no insurrection ever occurred and no white person was actually killed.²⁷ Indeed, there is significant doubt as to whether any such insurrection plot ever existed.²⁸ Then-governor of South Carolina Thomas Bennet condemned the trial as hasty and unreliable; his brother-in-law, Supreme Court Justice William Johnson, described the proceedings as perjury and “legal murder.”²⁹

After the formal end of enslavement, Black southerners began to gain political and economic influence. As discussed in Chapter 2 on Enslavement, the Reconstruction Acts of 1867 gave voting rights to Black Americans, and following the laws’ enactment, Black voter turnout reached nearly 90 percent in many jurisdictions.³⁰ During Reconstruction, approximately 2,000 Black men held a public office, including 600 Black state legislators, 18 Black state executive officials, 16 Black representatives elected to Congress, and two of the nation’s first Black senators.³¹ Fifteen percent of all public officials in the South were Black by 1870.³² In spite of violence and other obstacles, Black southerners began owning land, particularly in the Upper South (Delaware, Kentucky, Maryland, Missouri, North Carolina, Tennessee, Virginia, and Washington, D.C.).³³ Black land ownership grew to such an extent that by 1910, nearly half of the Black farmers in the Upper South owned land.³⁴ In addition, Black literacy rates surged from approximately 20 percent in 1870 to approximately 70 percent in 1910.³⁵

In 1876, partially as a result of a disputed presidential election, Reconstruction came to an end. In exchange for Democrats not blocking the certification of Republican Rutherford B. Hayes as President, Hayes and other

²¹ See, e.g., Thomas Wentworth Higginson, *The Story of Denmark Vesey* (June 1861) *The Atlantic* <<https://www.theatlantic.com/magazine/archive/1861/06/denmark-vesey/396239/>> (as of Feb. 9, 2022) (Higginson).

²² Higginson, *supra*.

²³ Higginson, *supra*.

²⁴ Higginson, *supra*.

²⁵ Higginson, *supra*; see also Michael P. Johnson, *Denmark Vesey and His Co-Conspirators* (Oct. 2001) 58(4) *William and Mary Quarterly* 915, 919, 945-48 (Johnson).

²⁶ Johnson, *supra*, at p. 949.

²⁷ Higginson, *supra*.

²⁸ See generally Johnson, *supra*.

²⁹ Philip D. Morgan, *Conspiracy Scares* (Jan. 2002) 59(1) *William and Mary Quarterly* 159, 163.

³⁰ EJI 3d ed., *supra*, at p. 10.

³¹ Foner, *South Carolina’s Forgotten Black Political Revolution* (Jan. 31, 2018) *Slate* <<https://slate.com/human-interest/2018/01/the-many-black-americans-who-held-public-office-during-reconstruction-in-southern-states-like-south-carolina.html>> (as of Oct. 20, 2021); EJI 3d ed., *supra*, pp. 10-12.

³² Byman, *The Failure of Counterterrorism After the Civil War* (Aug. 22, 2021) *Lawfare* <<https://www.lawfareblog.com/failure-counterterrorism-after-civil-war>> (as of Oct. 20, 2021) (Lawfare); Ifill, *Creating a Truth and Reconciliation Commission for Lynching* (Summer 2003) 21 *Law & Ineq.* 263, 273 (Ifill).

³³ Hinson, *Land Gains, Land Losses: They Odyssey of African Americans Since Reconstruction* (May-Sept. 2018) 77(3-4) *Am. J. of Economics and Sociology* 893, 909-10.

³⁴ Hinson, *supra*, at p. 911, citing Schweninger, *Black Property Owners in the South, 1790-1915* (1990), p. 176.

³⁵ National Center for Education Statistics, *120 Years of American Education: A Statistical Portrait* (Jan. 1993), p. 21, tbl. 6 <<https://nces.ed.gov/pubs93/93442.pdf>> (as of Oct. 20, 2021).

Republicans agreed to remove federal troops from key locations of political conflict in the South.³⁶ With the end of Reconstruction, supporters of white supremacy returned to power.³⁷ They regained political, social, and economic control, and prevented Black Americans from voting.³⁸ After federal troops no longer had a strong presence in the South, white southerners intensified the violent oppression of Black Americans.³⁹ As shown in detail below, racial terror took on many forms throughout American history: lynchings, massacres, intimidation, murders, beatings, and police killings. Today, extrajudicial killings of Black Americans by police and vigilantes represent a modern form of racial terror.⁴⁰

White Americans feared that newly empowered Black Americans would destroy the racial hierarchy.⁴¹ The Ku Klux Klan and other white supremacists beat, burned, and killed Black Americans.⁴² Terror pervaded every aspect of Southern life and had a devastating effect on the psyche of Black Americans.⁴³ The perpetrators' principal goal was to use violence and intimidation to prevent Black people from voting, achieving equality,⁴⁴ and amassing political and economic power.⁴⁵ For example, white supremacists murdered Black political activists in the 1873 Colfax massacre and Black military members in the 1876 Hamburg massacre.⁴⁶ The Supreme Court's 1876 decision in *United States v. Cruikshank* enabled such violence to continue by making it more difficult to prosecute.⁴⁷ According to the then-governor of Louisiana, *Cruikshank* "establish[ed] the principle that hereafter no white man could be punished for killing a Negro."⁴⁸

White supremacists often targeted the greatest perceived threats to the caste system: Black political, economic, and social activities, and those perceived to be accomplished members of the Black community. After the end of Reconstruction, government actors in the South did little to correct the view that Black people did not deserve human dignity or basic legal and political rights.⁴⁹ Across the country, white people often rejected the idea that Black Americans were equal to white Americans,⁵⁰ and used violence to preserve America's racial caste system.⁵¹

³⁶ Lawfare, *supra*.

³⁷ Niedermeier, *The Color of the Third Degree* (2019), p. 16 (Third Degree).

³⁸ Niedermeier, *The Color of the Third Degree* (2019), p. 16 (Third Degree).

³⁹ Coates, *The Case for Reparations* (June 2014) *The Atlantic* <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>> (as of Oct. 20, 2021) (*Case for Reparations*); Caste, *supra*, at p. 155; Third Degree, *supra*, at p. 17.

⁴⁰ See, e.g., United Nations General Assembly, Report of the Working Group of Experts on People of African Descent on Its Mission to the United States of America (Aug. 18, 2016), p. 16 (U.N. Working Group Report); Love, *The Trayvon Martin case reveals a vigilante spirit in the US justice system* (Apr. 7, 2012) *Guardian*,

<<https://www.theguardian.com/commentisfree/cifamerica/2012/apr/07/trayvon-martin-vigilante-spirit-us-justice>> (as of Sept. 8, 2021).

⁴¹ Caste, *supra*, at p. 228.

⁴² Ifill, *supra*, at p. 274.

⁴³ Lawfare, *supra*.

⁴⁴ Ifill, *supra*, at pp. 273-74; Lawfare, *supra*.

⁴⁵ Ifill, *supra*, at pp. 273-74; Lawfare, *supra*.

⁴⁶ Martha T. McCluskey, *Facing the Ghost of Cruikshank in Constitutional Law* (Nov. 2015) 65(2) *Journal of Legal Education* 278, 280-81 (McCluskey); see generally Michael S. Smith, *The Lost Freedmen's Town of Hamburg, South Carolina* (2021); see also Renetta DuBose, *The Untold Story of Hamburg, SC* (Feb. 22, 2021) *WJBF* <<https://www.wjbf.com/top-stories/the-untold-story-of-hamburg-sc/>> (as of Feb. 9, 2022).

⁴⁷ McCluskey, *supra*, at pp. 280-81.

⁴⁸ McCluskey, *supra*, at p. 281.

⁴⁹ EJI 2015, *supra*, at p. 7.

⁵⁰ EJI 2015, *supra*, at p. 7; EJI 3d ed., *supra*, at p. 27.

⁵¹ Caste, *supra*, at pp. 90-91, 151, 155; Third Degree, *supra*, at p. 20; Jordan, *A History Lesson: Reparations for What?* (2003) 58 *N.Y.U. Ann. Surv. Am. L.* 557, 593 (Jordan); Ward, *Critical Race Theory and Empirical Methods: Microclimates of Racial Meaning*:

As explained below, racial terror advanced three main goals: maintaining the superior social position of white people; destroying Black economic competition and stealing Black wealth; and limiting the political influence of Black people while advancing white supremacy through government offices.

IV. White Supremacy and Government Support: The Perpetrators of Racial Terror

Throughout American history, from enslavement to the present day, private citizens and government actors have perpetrated and enabled racial terror. Ordinary people committed heinous acts of violence, while others did nothing, watched, or obstructed investigations.⁵² Meanwhile, government officials often did nothing to prevent or prosecute racial terror—and sometimes encouraged or assisted the perpetrators.⁵³ Indeed, white supremacists and Ku Klux Klan members have held positions in all levels of American government.⁵⁴

Among the numerous perpetrators of racial terror, the Ku Klux Klan was especially prominent. The KKK is not the only hate group in American history, and oftentimes racial violence was and is committed by individuals unassociated with an organized group.⁵⁵ But because the KKK has been active and influential for several intervals during its long history, it is centrally important to the history of racial terror in the United States.⁵⁶ Throughout its history, the Klan has targeted members of all racial groups, as well as Jews, Catholics, and others, but its origins were anti-Black.⁵⁷

The KKK was especially powerful during three periods. The first iteration of the KKK lasted from 1866 until 1869. After several decades of dormancy, the second iteration of the KKK lasted from 1915 until about 1944. The third version of the KKK arose in the 1950s and 1960s and went into decline in the 1980s. Each of these iterations will be discussed in greater detail below.

A. Origins of the Ku Klux Klan

The first iteration of the Ku Klux Klan took shape in early 1866, during Reconstruction, and formally disbanded in 1869.⁵⁸ After the Civil War ended, many white southerners resented Reconstruction and its policies, which

Historical Racial Violence and Environmental Impacts (2016) 2016 Wis. L. Rev. 575, 607-08 (Ward); Ifill, *supra*, at pp. 267, 279-80, 284.

⁵² EJI 2015, *supra*, at p. 7; EJI 3d ed., *supra*, at p. 73; *Case for Reparations*, *supra*; Klanwatch Project of the Southern Poverty Law Center, *Ku Klux Klan: A History of Racism and Violence* (2011), pp. 14, 18 <<https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf>> (as of Jan. 7, 2022) (SPLC History); Eckstrand, *The Ugliness of Trolls: Comparing the Strategies/Methods of the Alt-Right and the Ku Klux Klan* (2018) 10(3) *Cosmopolitan Civil Societies: an Interdisciplinary J.* 41, 46, <<https://www.readcube.com/articles/10.5130%2Fccs.v10.i3.6026>> (as of Sept. 8, 2021) (Eckstrand).

⁵³ EJI 2015, *supra*, at pp. 3, 7; EJI 3d ed., *supra*, at pp. 48-50, 73; *Case for Reparations*, *supra*; SPLC History, *supra*, at pp. 14-15, 18; Eckstrand, *supra*, at pp. 46-47; Lawfare, *supra*; Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*, at p. 6 (May 2020), <[tulsa-reparations0520_reportcover_8.5x11](https://www.hrw.org/report/2020/05/05/tulsa-reparations0520-reportcover-8.5x11) (hrw.org)> (as of Oct. 22, 2021) (Human Rights Watch).

⁵⁴ See, e.g., Tara McAndrew, *The History of the KKK in American Politics* (Jan. 25, 2017) JSTOR Daily <<https://daily.jstor.org/history-kkk-american-politics/>> (as of Feb. 9, 2022).

⁵⁵ SPLC History, *supra*, at p. 4.

⁵⁶ See SPLC History, *supra*, at pp. 4-5, 7, 25-26, 51.

⁵⁷ See generally SPLC History.

⁵⁸ SPLC History, *supra*, at pp. 9, 15.

threatened their superiority.⁵⁹ Reconstruction policies led to social, political, and economic gains by formerly enslaved people.⁶⁰

Around this time, the KKK emerged to oppose Reconstruction, led by former Confederate General Nathan Bedford Forrest and a group of Confederate veterans in Pulaski, Tennessee.⁶¹ This first version of the KKK consisted of ex-Confederates and other white southerners, and it was tacitly supported by most white southerners.⁶² Their hooded costumes were intended to represent the ghosts of Confederate soldiers and evoke the history of slave patrols.⁶³ Their hoods also allowed KKK members to remain anonymous as they spread fear and violence.⁶⁴ In order to re-exert control over the Black labor force and maintain white supremacy, the KKK used fear tactics and violence, such as robbery, rape, arson, and murder.⁶⁵ The KKK was effective at targeting its violence and intimidation tactics at Black voters, including hanging and beating Black officeholders.⁶⁶ It is unknown how many Black people were killed by white supremacists during Reconstruction, though it is estimated to be in the high thousands, if not tens of thousands.⁶⁷

In the late 1860s, the KKK began to decline as it succumbed to infighting and increased federal scrutiny.⁶⁸ The federal Enforcement Acts of 1870 and 1871, in conjunction with federal policing, helped weaken the KKK.⁶⁹ When the KKK formally disbanded by the end of Reconstruction, the KKK had achieved its objectives, as white southerners were able to openly revive many aspects of life during enslavement.⁷⁰ Having effectively intimidated and suppressed Black voters, and without the presence of federal troops to protect Black voters, white southerners were successful in retaking control of state governments.⁷¹ Once in control, white supremacists passed laws to take away the rights that Black southerners had gained during Reconstruction.⁷² It also became less necessary to wear a mask to commit violent crimes against Black Americans, as public lynching became an openly accepted part of Southern culture and was tolerated by law enforcement.⁷³

State and local governments often looked the other way or supported the KKK. Although state governments passed laws in response to the KKK's violence, these laws were seldom locally enforced.⁷⁴ Sheriffs, prosecutors, local witnesses, and jurors were sympathetic to white supremacy or afraid of retaliation.⁷⁵ Some

⁵⁹ SPLC History, *supra*, at pp. 8, 10.

⁶⁰ Ifill, *supra*, at pp. 272-274; Hate Groups, *supra*, at pp. 179-80; Lawfare, *supra*.

⁶¹ Balleck, Hate Groups and Extremist Organizations in America: An Encyclopedia (2019), p. 179 (Hate Groups).

⁶² SPLC History, *supra*, at pp. 8, 10, 12, 14.

⁶³ SPLC History, *supra*, at pp. 10-11.

⁶⁴ See Clarke, *supra*, at p. 277.

⁶⁵ Hate Groups, *supra*, at pp. 179-80; SPLC History, *supra*, at p. 12.

⁶⁶ SPLC History, *supra*, at p. 15; Egerton, *Terrorized African-Americans Found Their Champion in Civil War Hero Robert Smalls* (Sept. 2018) Smithsonian Magazine, <[Terrorized African-Americans Found Their Champion in Civil War Hero Robert Smalls | History | Smithsonian Magazine](#)> (as of Sept. 8, 2021).

⁶⁷ Lawfare, *supra*.

⁶⁸ SPLC History, *supra*, at pp. 14-15.

⁶⁹ SPLC History, *supra*, at p. 15; *The Enforcement Acts of 1870 and 1871*, United States Senate <<https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm>> (as of Feb. 9, 2022).

⁷⁰ SPLC History, *supra*, at p. 15; Hate Groups, *supra*, at pp. 179-180.

⁷¹ Clarke, *supra*, at p. 277; SPLC History, *supra*, at p. 15; Lawfare, *supra*.

⁷² SPLC History, *supra*, at p. 15.

⁷³ Clarke, *supra*, at p. 277.

⁷⁴ Lawfare, *supra*.

⁷⁵ Lawfare, *supra*.

attacks were even led by local police.⁷⁶ Thus, few KKK members ever went to prison for their crimes.⁷⁷ And while the federal Enforcement Acts of the early 1870s helped lead to the dissolution of the KKK, the Supreme Court largely nullified the Enforcement Acts with its 1876 decision in *United States v. Cruikshank*, which hindered federal prosecutions and enabled white supremacist violence.⁷⁸

B. Second Iteration of the Ku Klux Klan

The second iteration of the Ku Klux Klan began in 1915, continued through the late 1920s and 1930s, and disbanded by 1944.⁷⁹ After the end of Reconstruction, the KKK remained dormant until 1915, when the California film industry played a unique role in reviving the KKK. That year, celebrated filmmaker D.W. Griffith released *The Birth of a Nation*, which was based on Thomas Dixon's novel *The Clansman*.⁸⁰ Made in and around Los Angeles, *The Birth of a Nation* is acknowledged both as one of the most pioneering and most racist films in cinematic history.⁸¹ President Woodrow Wilson praised *The Birth of a Nation* and showed the film at the White House—a federal government endorsement of white supremacy and anti-Blackness.⁸²

In writing *The Clansman*, Dixon openly wished to depict the “suffering” of white Southerners during Reconstruction and to advocate white supremacy.⁸³ *The Birth of a Nation*, recognized as historically inaccurate racist propaganda, adhered closely to the source material's racism.⁸⁴ For instance, the film portrayed lynching as rightful retribution against a Black man accused of sexually assaulting a white woman.⁸⁵ Griffith would later say that the heroic depiction of the KKK coming to rescue the South from Black advancement during Reconstruction “was needed to serve the purpose.”⁸⁶

The Birth of a Nation was a nationwide blockbuster, and its popularity led directly to the KKK's revival just months after its release.⁸⁷ During a five-year national roadshow of the film from 1915 to 1919, a scholar found that the film incited significant increases in racial violence.⁸⁸ The counties where the film was shown were five times more likely to have a lynching or race riot, and three times more likely to have a KKK chapter after the

⁷⁶ SPLC History, *supra*, at p. 13.

⁷⁷ SPLC History, *supra*, at p. 15.

⁷⁸ McCluskey, *supra*, at pp. 280-81.

⁷⁹ SPLC History, *supra*, at pp. 17, 22-23; Hate Groups, *supra*, at p. 180.

⁸⁰ Corliss, *D.W. Griffith's The Birth of a Nation 100 years Later: Still Great, Still Shameful* (Mar. 3, 2015) Time, <<https://time.com/3729807/d-w-griffiths-the-birth-of-a-nation-10/>> (as of Sept. 8, 2021) (Corliss).

⁸¹ Corliss, *supra*; SPLC History, *supra*, at p. 21.

⁸² Roy Rosenzweig Center for History and New Media, *The Birth of a Nation and Black Protest*, <<https://rrchnm.org/episodes/the-birth-of-a-nation-and-black-protest/>> (as of Feb. 9, 2021) (Rosenzweig); SPLC History, *supra*, at p. 21.

⁸³ Rosenzweig, *supra*.

⁸⁴ Brody, *The Worst Thing About 'Birth of a Nation' is How Good It Is* (Feb. 1, 2013) The New Yorker, <[The Worst Thing About 'Birth of a Nation' Is How Good It Is | The New Yorker](#)> (as of Sept. 8, 2021); NPR, *100 Years Later, What's The Legacy of 'Birth of a Nation'* (Feb. 8, 2015), <[100 Years Later, What's The Legacy Of 'Birth Of A Nation'? : Code Switch : NPR](#)> (as of Sept. 8, 2021) (NPR *Birth of a Nation*); SPLC History, *supra*, at p. 21; Corliss, *supra*.

⁸⁵ Ifill, *supra*, at p. 277.

⁸⁶ Corliss, *supra*.

⁸⁷ Corliss, *supra*; Rosenzweig, *supra*; Hate Groups, *supra*, at p. 180; SPLC History, *supra*, at p. 21.

⁸⁸ James F. Smith, *Lessons on Dangers of Using Media to Spread Racial Hatred and Violence* (Feb. 9, 2021) <<https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/lessons-dangers-using-media-spread-racial-hatred>> (as of Feb. 10, 2022) (*Using Media*).

movie's arrival.⁸⁹ As a result of this surge in recruitment, there were four to five million KKK members by the mid-1920s.⁹⁰ The film remained a KKK recruiting tool for decades.⁹¹

Unlike the first iteration of the KKK, this version had a broader geographic base of support beyond the South, including in California.⁹² This second version of the KKK was generally considered to be less violent, as it focused on gaining influence through the political process.⁹³ In this regard, it succeeded: during the 1920s, the KKK's membership included state government officials in Alabama, Colorado, Georgia, Indiana, Louisiana, Oklahoma, Oregon, and Texas.⁹⁴ Neither major political party was willing to formally repudiate the KKK out of fear of political repercussions.⁹⁵

Regardless of its political turn, the second iteration of the KKK remained violent. In the summer of 1921, the KKK engaged in whippings and tar-and-feather raids.⁹⁶ They also used acid to brand the letters "KKK" on the foreheads of Black Americans, Jews, and others whom the KKK considered to be anti-American.⁹⁷ In the mid-1920s, the KKK launched a terror campaign including lynchings, shootings, and whippings against Black Americans, Jews, Catholics, Mexicans, and other immigrant groups.⁹⁸

Eventually, after a series of scandals, in-fighting, and a change in public perception of its image, the second iteration of the KKK lost credibility, and its membership declined in the late 1920s and 1930s.⁹⁹

C. Third Iteration of the Ku Klux Klan and Hate Groups Today

A third version of the Ku Klux Klan arose in the 1950s and 1960s.¹⁰⁰ While the KKK still exists today, it has been in decline since the late 1980s.¹⁰¹ This time, the KKK returned to its anti-Black roots to counter the social and political gains sought by the Civil Rights Movement.¹⁰² This version of the KKK was particularly violent against Black Americans and civil rights workers in the South.¹⁰³ For example, in 1963, the KKK detonated a bomb at a Birmingham Baptist church that killed four Black girls and injured several more.¹⁰⁴ KKK members also murdered three civil rights workers in Mississippi in 1964.¹⁰⁵ As recently as 1981, Klansmen in Mobile, Alabama lynched Black 19-year-old Michael Donald.¹⁰⁶ His mother brought a civil suit against the KKK and

⁸⁹ Using Media, *supra*.

⁹⁰ Hate Groups, *supra*, at p. 180.

⁹¹ NPR Birth of a Nation, *supra*; Hudson, *supra*, at p. 171.

⁹² Bringhurst, *supra*, at p. 368.

⁹³ Bringhurst, *supra*, at p. 368.

⁹⁴ Hate Groups, *supra*, at p. 180.

⁹⁵ Hate Groups, *supra*, at p. 180.

⁹⁶ SPLC History, *supra*, at p. 18.

⁹⁷ SPLC History, *supra*, at p. 18.

⁹⁸ SPLC History, *supra*, at p. 20.

⁹⁹ Gillett, A Woman's Work (July 2019) History Today, p. 46 (Gillett); Hate Groups, *supra*, at p. 180.

¹⁰⁰ SPLC History, *supra*, at pp. 25, 45; Hate Groups, *supra*, at pp. 181, 183.

¹⁰¹ SPLC History, *supra*, at pp. 25, 45; Hate Groups, *supra*, at pp. 181, 183.

¹⁰² Hate Groups, *supra*, at p. 180; Gillett, *supra*, at p. 46.

¹⁰³ Hate Groups, *supra*, at p. 180.

¹⁰⁴ Hate Groups, *supra*, at pp. 180-81.

¹⁰⁵ Hate Groups, *supra*, at p. 181.

¹⁰⁶ SPLC History, *supra*, at pp. 41-43.

won a \$7 million award after one of the perpetrators admitted he was carrying out an organization-wide directive to harass, intimidate, and murder Black people.¹⁰⁷

An essential part of the success of the KKK is that their actions and ethos were sanctioned by white society—a recurring theme in the history of racial terror.¹⁰⁸ Rarely did the perpetrators face punishment, as ministers, editors, sheriffs, police officers, judges, and elected officials ignored or participated in the violence.¹⁰⁹ Having supporters and members in prominent positions of power allowed the KKK to act with impunity.¹¹⁰ For example, the KKK was able to commit lynchings in front of a public audience and leave bodies on display—all without intervention by law enforcement.¹¹¹ Witnesses often obstructed any investigation or prosecution for these acts by refusing to give information.¹¹² Police not only refused to intervene, but also gave the KKK information about potential targets.¹¹³ Thus, where the KKK led, white society followed, participated, and looked on.

While the KKK no longer enjoys the degree of sociopolitical power it once held,¹¹⁴ contemporary white supremacist groups have taken up the KKK's mantle to threaten the dignified existence of Black Americans and others. [Brief discussion of the methods adopted by modern hate groups to avoid the social stigma of white supremacy.] The 2017 white nationalist rally in Charlottesville,¹¹⁵ the Proud Boys,¹¹⁶ and a 2021 “White Lives Matter” rally in Orange County¹¹⁷ have variously invoked the symbols, propaganda, and ideology of the KKK.

D. California

Neither racial terror nor the Ku Klux Klan were confined to the South.¹¹⁸ During Reconstruction, the federal government did not send troops to California, as a non-slave state.¹¹⁹ This allowed white supremacy groups to flourish in the West.¹²⁰ The western KKK complemented their southern counterparts by violently asserting

¹⁰⁷ SPLC History, *supra*, at pp. 41-43.

¹⁰⁸ SPLC History, *supra*, at pp. 14, 18.

¹⁰⁹ SPLC History, *supra*, at pp. 14, 18.

¹¹⁰ SPLC History, *supra*, at pp. 14, 18.

¹¹¹ SPLC History, *supra*, at pp. 14, 18; Eckstrand, *The Ugliness of Trolls: Comparing the Strategies/Methods of the Alt-Right and the Ku Klux Klan* (2018) 10(3) *Cosmopolitan Civil Societies: an Interdisciplinary J.* 41, 46,

<https://www.readcube.com/articles/10.5130%2Fccs.v10.i3.6026> (as of Sept. 8, 2021) (Eckstrand).

¹¹² Eckstrand, *supra*, at p. 46.

¹¹³ Eckstrand, *supra*, at p. 47.

¹¹⁴ Hate Groups, *supra*, at pp. 181-183.

¹¹⁵ Lois Beckett, *The year in Nazi propaganda: images of white supremacy in Trump's America* (Dec. 27, 2017) *Guardian*,

<https://www.theguardian.com/media/2017/dec/27/the-year-in-nazi-propaganda-images-of-white-supremacy-in-trumps-america> (as of Nov. 12, 2021).

¹¹⁶ Southern Poverty Law Center, *Proud Boys*, <https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys> (as of Nov. 12, 2021).

¹¹⁷ Cardine, Turner, Szabo, *A KKK propaganda drop and a planned White Lives Matter rally rattle 2 O.C. communities* (Mar. 31, 2021) *Los Angeles Times*, <https://www.latimes.com/california/story/2021-03-31/kkk-propaganda-drop-white-lives-matter-rally-inflames-newport-beach-huntington-beach> (as of Sept. 8, 2021).

¹¹⁸ Waite, *The Forgotten History of the Western Klan* (Apr. 6, 2021) *The Atlantic*, <https://www.theatlantic.com/ideas/archive/2021/04/california-klans-anti-asian-crusade/618513/> (as of Nov. 12, 2021) (Waite);

Bringhurst, *supra*, at p. 368.

¹¹⁹ Waite, *supra*.

¹²⁰ Waite, *supra*.

white superiority against the perceived threat of racial outsiders.¹²¹ As the Black population in California was relatively at the time, the KKK and other hate groups mainly terrorized Chinese communities.¹²²

During the second iteration of the KKK, California became a “strong Klan state” with a sizable and violent Klan resurgence in the 1920s.¹²³ Shortly after the release of *The Birth of a Nation*, the KKK emerged in San Francisco, establishing a KKK presence in California for the first time.¹²⁴ KKK chapters in Los Angeles, Oakland, Fresno, Riverside, Sacramento, Anaheim, and San Jose soon followed.¹²⁵

The KKK’s national magazine, *Imperial Night-Hawk*, shows that California ranked 11th out of all 48 states in terms of the number of KKK events held between March 1923 and November 1924.¹²⁶ By hosting 89 events in that 20-month period, California even outranked the old enslavement states of Mississippi, Louisiana, West Virginia, North Carolina, and Tennessee.¹²⁷

California’s KKK consisted of prominent individuals who held positions in civil leadership and police departments.¹²⁸ Its members were largely middle-class, educated Protestants who, in socioeconomic terms, were not much different from their neighbors.¹²⁹ These KKK members registered to vote (in higher percentages than non-members), joined civic organizations like the Chamber of Commerce and rotary club, and sought political power by running for elected office or supporting candidates who sympathized with the KKK.¹³⁰

The California KKK exerted significant political influence in the 1920s, winning seats on city councils, gaining control of the press and airwaves in some towns, and pressuring public officials.¹³¹ In 1922, for example, Democrat Thomas Lee Woolwine lost his bid for governor, suggesting that his fight against the KKK was a political liability.¹³² The KKK backed winning candidate Republican Friend Richardson—who was believed to have been a KKK member, and which he never denied.¹³³

While the KKK declined on a national scale in the 1930s with the Great Depression and a trial of the KKK’s then-leader, California’s KKK remained active through the 1940s and into the 1950s.¹³⁴ As detailed below, the KKK had branches—and spread terror—throughout the state, and exercised significant power in local governments.

1. The Ku Klux Klan in Southern California.

¹²¹ Waite, *supra*.

¹²² Waite, *supra*.

¹²³ Kent, *The Hidden History of Culver City Racism* (Apr. 5, 2019) Streets Blog LA, <https://la.streetsblog.org/2019/04/05/the-hidden-history-of-culver-city-racism/#_ednref29> (as of Sept. 8, 2021).

¹²⁴ Bringhurst, *The Ku Klux Klan in a Central California Community: Tulare County During the 1920s and 1930s* (Winter 2000) 82(4), *Southern California Quarterly* 365, 370 (Bringhurst).

¹²⁵ Hudson, *supra*, at pp. 171-72.

¹²⁶ Hudson, *supra*, at p. 172.

¹²⁷ Hudson, *supra*, at p. 172.

¹²⁸ Hudson, *supra*, at p. 172.

¹²⁹ Hudson, *supra*, at p. 172.

¹³⁰ Hudson, *supra*, at p. 173.

¹³¹ Hudson, *supra*, at p. 173.

¹³² Hudson, *supra*, at p. 182.

¹³³ Hudson, *supra*, at p. 182.

¹³⁴ Hudson, *supra*, at p. 188.

DRAFT FOR TASK FORCE MEMBER REVIEW

FOOTNOTES AND REFERENCES WILL BE COMPLETED AT A LATER DATE

Los Angeles was the epicenter of Ku Klux Klan activity in California.¹³⁵ Prominent and numerous city government officials were KKK members or had KKK ties, including the mayor, district attorneys, and police officers.¹³⁶ Due to aggressive recruitment efforts beginning in 1921, several KKK branches formed in Los Angeles.¹³⁷ KKK chapters also formed in the nearby communities of Santa Monica, Huntington Park, Redondo, Hermosa Beach, Long Beach, Glendale, San Pedro, and Anaheim.¹³⁸

By the 1920s, the Los Angeles Police Department (LAPD) was “a den of corruption” that was infiltrated with KKK members who practiced retaliatory policing in the city’s Black neighborhoods.¹³⁹ “In speaking to the police, you are frequently talking to the Klan,” warned the *Eagle*, a Black Los Angeles newspaper.¹⁴⁰ Los Angeles Deputy Sheriff Nathan Baker regularly recruited KKK members to the Los Angeles Police Department (LAPD) and was thought to be a member of the KKK himself.¹⁴¹

On April 22, 1922, more than 100 armed and hooded Klansmen broke into the Inglewood home of Spanish immigrants.¹⁴² The Klansmen forced the couple’s two teenage daughters to disrobe and ransacked the house.¹⁴³ The Klansmen then brutally beat, bound, and gagged the father and his brother, dragged them to a car, and dumped them six miles away.¹⁴⁴ Thirty-seven Klansmen were indicted for the Inglewood raid, but in a trial that the National Association for the Advancement of Colored People (NAACP) called a “farce,” all were acquitted.¹⁴⁵

The raid prompted an investigation by the District Attorney, who obtained membership lists revealing that the KKK had infiltrated all levels of state and local government.¹⁴⁶ There were 3,000 KKK members in Los Angeles County, over 1,000 in the city limits, and three KKK members on the District Attorney’s own staff.¹⁴⁷ LAPD Chief Louis D. Oaks and County Sheriff William I. Traeger were also identified as members.¹⁴⁸ Law enforcement from nearly every city in California appeared on the list, including 25 San Francisco police officers.¹⁴⁹

Even after the Inglewood raid exposed the breadth of KKK membership, and after the Legislature passed an anti-KKK bill, the KKK still proceeded to hold nine events in Los Angeles between March 1923 and April 1924.¹⁵⁰ The raid and its aftermath inspired KKK members and caused the KKK to redouble its efforts.¹⁵¹ In

¹³⁵ Bringhurst, *supra*, at pp. 369-70.

¹³⁶ Brenda Elaine Stevenson, *The Contested Murder of Latasha Harlins: Justice, Gender, and the Origins of the LA Riots* (2013), p. 186; Hudson, *supra*, at p. 179.

¹³⁷ Bringhurst, *supra*, at pp. 369-70.

¹³⁸ Bringhurst, *supra*, at pp. 370.

¹³⁹ Hudson, *supra*, at p. 180.

¹⁴⁰ Hudson, *supra*, at p. 180.

¹⁴¹ Hudson, *supra*, at p. 178.

¹⁴² Hudson, *supra*, at pp. 177-78.

¹⁴³ Harrison, *From the Archives: Ku Klux Klan images from 1920s Southern California* (Oct. 4, 2017) Los Angeles Times, <<https://www.latimes.com/visuals/framework/la-me-fw-archives-ku-klux-klan-images-from-the-1920s-20170825-story.html>> (as of Nov. 12, 2021) (Harrison).

¹⁴⁴ Harrison, *supra*.

¹⁴⁵ Hudson, *supra*, at pp. 181-82.

¹⁴⁶ Hudson, *supra*, at pp. 169, 179.

¹⁴⁷ Hudson, *supra*, at p. 179.

¹⁴⁸ Hudson, *supra*, at p. 179.

¹⁴⁹ Hudson, *supra*, at p. 180.

¹⁵⁰ Hudson, *supra*, at p. 183.

¹⁵¹ Hudson, *supra*, at p. 183.

DRAFT FOR TASK FORCE MEMBER REVIEW

FOOTNOTES AND REFERENCES WILL BE COMPLETED AT A LATER DATE

1929, KKK supporters helped elect John C. Porter, who had a past with the KKK, as mayor of Los Angeles.¹⁵² And in the 1930s, even after enthusiasm for the KKK began to subside, the KKK still remained active in Los Angeles and the surrounding community, with rallies attended by thousands of people and cross-burnings.¹⁵³ In December 1939, the KKK ceremoniously marched through downtown Los Angeles burning crosses in full view of thousands of people.¹⁵⁴

Beyond Los Angeles, the KKK was active throughout Southern California, including in Orange County, Riverside, and San Diego.¹⁵⁵

In Anaheim, by 1923, the KKK had almost 900 members, and by 1924 dominated the Anaheim city council.¹⁵⁶ Its members generally held more prestigious jobs than the rest of the white population and were politically and civically active.¹⁵⁷ The Anaheim KKK burned crosses and held rallies drawing thousands of people.¹⁵⁸ One such event, an initiation in July 1924, attracted 20,000 people and included a parade of Klansmen with a marching band, airplanes, and fireworks.¹⁵⁹ By spring 1924, the KKK dominated the Anaheim city council, which had initiated a program to replace non-KKK city employees with its own members. Their plan succeeded: ten new policemen, out of 15, were members of the KKK.¹⁶⁰

In Brea, five of the town's first eight mayors were Klansmen, as were six of the 10 councilmen who sat on the board of trustees, half of the city's treasurers, half of the city's engineers, half of its city clerks, half of its city marshals, and two-thirds of its fire chiefs between 1924 and 1936.¹⁶¹ And in Fullerton, from 1918 to 1930, seven of 18 city councilmen were Klansmen.¹⁶²

The Riverside KKK were successful recruiters, claiming over 2,000 members in the 1920s.¹⁶³ In Riverside, the KKK held mass events that attracted thousands of people and included parades with marching bands, floats, and KKK members in full regalia.¹⁶⁴ The Riverside KKK prioritized policing interracial contact, which meant monitoring Black residents' activities.¹⁶⁵ For example, the KKK was preoccupied with the City's 1922 settlement with the NAACP to desegregate a white-only pool.¹⁶⁶ In response, they targeted Black swimmers with humiliation and violence.¹⁶⁷ The Riverside KKK gained political influence, and in 1927, helped elect a

¹⁵² Hudson, *supra*, at p. 183; *The Los Angeles Mayor Who Was Also a KKK Leader*, L.A. TACO (July 8, 2020), <<https://www.lataco.com/la-mayor-kkk/>> (as of Sept. 8, 2021) (*Los Angeles Mayor*).

¹⁵³ *Ku Klux Klan Makes Its Reappearance in Full Regalia in Los Angeles*, Jewish Daily Bulletin (July 28, 1932), p. 2, <http://pdfs.jta.org/1932/1932-07-28_2314.pdf?_ga=2.234420507.427081945.1628279636-1034140869.1627406492> (as of Sept. 8, 2021); *Los Angeles Mayor, supra*.

¹⁵⁴ Hudson, *supra*, at p. 189.

¹⁵⁵ Bringhurst, *supra*, at p. 370.

¹⁵⁶ Hudson, *supra*, at p. 173.

¹⁵⁷ Hudson, *supra*, at p. 173.

¹⁵⁸ La Tour, *A Brief History of the Ku Klux Klan in Orange County: Note on the Banality of Evil* (Jan. 7, 2019) Fullerton Observer, <<https://fullertonobserver.com/2019/01/07/a-brief-history-of-the-ku-klux-klan-in-orange-county-notes-on-the-banality-of-evil/>> (as of Sept. 8, 2021) (Orange County KKK History).

¹⁵⁹ Orange County KKK History, *supra*.

¹⁶⁰ Hudson, *supra*, at p. 173.

¹⁶¹ Orange County KKK History, *supra*.

¹⁶² Orange County KKK History, *supra*.

¹⁶³ Hudson, *supra*, at p. 187.

¹⁶⁴ Hudson, *supra*, at p. 183.

¹⁶⁵ Hudson, *supra*, at p. 186-187.

¹⁶⁶ Hudson, *supra*, at p. 186.

¹⁶⁷ Hudson, *supra*, at p. 186.

mayor, Edward M. Deighton, who openly boasted about his support from the KKK.¹⁶⁸ In the 1930s, Riverside Sheriff Carl Rayburn openly sympathized with the KKK, and “KIGY,” meaning “Klan I Greet You,” was painted on streets and sidewalks throughout the county.¹⁶⁹ The KKK’s membership in Riverside decreased in the 1930s, but they still made appearances and burned crosses.¹⁷⁰

The San Diego KKK, in the 1920s and 1930s, focused on using violence and other intimidating tactics to “chas[e] the wetbacks across the border.”¹⁷¹ The KKK in the 1930s also merged with other racist and fascist groups, such as the Silver Shirts League, that were focused on attacking Black Americans, Latino Americans, and Jews.¹⁷²

2. The Ku Klux Klan in the Central Valley.

The Ku Klux Klan had an active presence in Fresno and Kern County.¹⁷³ As of 1922, a local Fresno newspaper reported over 240 alleged Klansmen in Fresno County, and the KKK held public events and parades with as many as 600 attendees during the early to mid-1920s.¹⁷⁴ The investigation in the aftermath of the Inglewood raid also revealed that a number of Fresno officials were KKK members.¹⁷⁵

In the early 1920s, the KKK actively recruited in Kern County and developed what was considered the most violent KKK chapter in California.¹⁷⁶ In Kern County, in 1922 alone, there were over 100 cases of KKK violence, which included extrajudicial beatings, kidnappings, and tar-and-feathering.¹⁷⁷ In 1922, a local newspaper reported that several high-ranking officials in Kern County were associated with the KKK, including the deputy sheriff, the police chief, the Board of Supervisors chair, and a former assistant district attorney.¹⁷⁸ Although the KKK’s influence started to decline in the 1930s,¹⁷⁹ white supremacist culture persisted in Kern County in the decades that followed.¹⁸⁰ As recently as the 1960s, a sign across the Kern River between Oildale and Bakersfield read “Nigger, Don’t Let the Sun Set on You in Oildale.”¹⁸¹ There were also unconfirmed reports that a similar sign was spray painted on the same bridge as recently as the late 1990s.¹⁸² In 1981, three KKK members were arrested for burning a cross on the front lawn of a Black family in the Kern County town

¹⁶⁸ Hudson, *supra*, at p. 187.

¹⁶⁹ Hudson, *supra*, at p. 186.

¹⁷⁰ Hudson, *supra*, at p. 187.

¹⁷¹ Larralde and Castillo, *San Diego’s Ku Klux Klan* (Spring/Summer 2000) 46(2-3) San Diego Historical Society Quarter, available at <<https://sandiegohistory.org/journal/2000/april/klan/>> (as of Sept. 8, 2021) (San Diego KKK).

¹⁷² San Diego KKK, *supra*.

¹⁷³ Bringhurst, *supra*, at p. 370.

¹⁷⁴ Ramirez, “Violators of Almost Every Right”: Analyzing the Ku Klux Klan of 1920’s (2017) 26 *Ex Post Facto: J. of the History Students at San Francisco State Univ.* 145, 147, <<https://history.sfsu.edu/sites/default/files/EPF/ExPostFacto2017.pdf>> (as of Nov. 12, 2021) (Ramirez), citing *District Attorney Announces Names On Kleagle’s Lists*, *Fresno Morning Republican* (May 5, 1922).

¹⁷⁵ Bringhurst, *supra*, at p. 370.

¹⁷⁶ Bringhurst, *supra*, at p. 393.

¹⁷⁷ Bringhurst, *supra*, at p. 393; Eissinger, *Kern County: California’s Deep South* (March 2011),

<http://meissinger.com/uploads/3/4/9/1/34919185/kern_county_californias_deep_south.pdf> (as of Nov. 12, 2021) at pp. 7-8 (Eissinger); Ramirez, *supra*, at p. 155, citing *Night Riders Halt Raids But Marked Victims Still Flee*, *Fresno Morning Republican* (Mar. 6, 1922); Hudson, *supra*, at p. 180.

¹⁷⁸ Ramirez, *supra*, at p. 155, citing *Chief of Police, Supervisor Head, Among Members*, *Fresno Morning Republican* (May 7, 1922).

¹⁷⁹ *Hate Groups*, *supra*, at p. 180; SPLC History, *supra*, at pp. 22-23.

¹⁸⁰ Eissinger, *supra*, at pp. 10-19.

¹⁸¹ Eissinger, *supra*, at p. 19.

¹⁸² Eissinger, *supra*, at p. 19.

of Boron, and KKK rallies were reported as recently as 1987.¹⁸³ In the early 1990s, Black motorists were attacked on the streets of Oildale by whites hurling racial slurs and epithets.¹⁸⁴ In the 2000s, members of the white supremacist group the Peckerwoods were involved in multiple violent attacks against Black, Hispanic, and Asian American residents that involved the use of racial slurs.¹⁸⁵

3. The Ku Klux Klan in Northern California and the Bay Area.

The Ku Klux Klan established a presence in the Bay Area during the 1920s.¹⁸⁶ By 1922, there were KKK chapters in San Francisco, Oakland, and San Jose.¹⁸⁷ In addition to burning crosses, KKK chapters in the Bay Area held rallies, initiation events, and public parades, which were attended by thousands.¹⁸⁸ In Oakland, the politically active KKK took control of the city government to create policy that would limit Black home ownership, including by embracing restrictive covenants.¹⁸⁹ Between 1921 and 1924, the Oakland KKK grew to at least 2,000, and the chapter enjoyed political success well into the 1920s, winning an election for county sheriff in 1926 and city commissioner in 1927.¹⁹⁰ The Oakland KKK also operated as a vigilante group, accompanying federal agents on prohibition raids.¹⁹¹

V. Forms of Racial Terror

Racial terror has taken many forms throughout its long history. Although the primary component of racial terror is physical violence, perpetrators of racial terror have also destroyed and repossessed Black property. Black families have been separated and harmed through mass incarceration and other government policies. And given the public nature of racial terror, overt action has often times been unnecessary. Threats and intimidation have often successfully kept Black Americans from voting, living in certain neighborhoods, and exercising other civil rights.

Racial terror undermined Black Americans' legal rights, with lasting social repercussions. By attacking Black Americans who were never found guilty in a court of law, racial terror popularized the idea that Black people bear a presumption of guilt—contrary to the presumption of innocence, which the Supreme Court has described as “foundation[al]” to “our criminal law.”¹⁹² Many white lynch mobs killed Black criminal suspects who were later found to be innocent.¹⁹³ Some Black men were even lynched after a jury found them innocent of their alleged offense.¹⁹⁴ White people justified racial terror as a mode of self-defense against Black Americans, as a tactic to deter future perpetrators, regardless of whether a crime had actually been committed.¹⁹⁵ This history of

¹⁸³ Eissinger, *supra*, at p. 19.

¹⁸⁴ Eissinger, *supra*, at p. 20.

¹⁸⁵ Eissinger, *supra*, at p. 20-21.

¹⁸⁶ Eli Moore et al., *Roots, Race & Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area* (Oct. 2019), Haas Institute, p. 26, <<https://escholarship.org/uc/item/2j08r197>> (as of Nov. 12, 2021) (Haas).

¹⁸⁷ Hudson, *supra*, at p. 172.

¹⁸⁸ Hass, *supra*, at p. 26; Rhomberg, *White Nativism and Urban Politics: The 1920s Ku Klux Klan in Oakland, California* (Winter 1998) 17(2) *J. of Am. Ethnic History* 39, 44-46 (Rhomberg).

¹⁸⁹ Hudson, *supra*, at p. 174.

¹⁹⁰ Rhomberg, *supra*, at pp. 39, 44.

¹⁹¹ Rhomberg, *supra*, at pp. 44-46.

¹⁹² *Coffin v. United States*, 156 U.S. 432, 453 (1895); see also EJI 2015, *supra*, at p. 20.

¹⁹³ Jordan, *supra*, at p. 588-589.

¹⁹⁴ Jordan, *supra*, at p. 588.

¹⁹⁵ EJI 3d ed., *supra*, at p. 61.

racial terror reinforced a view that Black Americans were dangerous criminals who posed a threat to white society.¹⁹⁶

A. Lynching

1. Key Features of Lynching Set It Apart from Other Forms of Racial Terror.

The most gruesomely iconic form of racial terror was lynchings: violent and public acts of torture, which were largely tolerated by officials at all levels of government.¹⁹⁷ Such violence traumatized Black people throughout the country, although it most frequently occurred in the South.¹⁹⁸ Although lynchings were carried out against individual victims, the practice of lynching was ultimately aimed at the entire Black community.¹⁹⁹ Much like Jim Crow laws and racial segregation, lynching was primarily a method of enforcing the political, economic, and cultural exploitation of Black Americans.²⁰⁰ For instance, after Booker T. Washington visited the White House to meet with President Theodore Roosevelt, South Carolina Senator Benjamin Tillman remarked, “now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places.”²⁰¹

A core feature of lynching was its role as a public spectacle. Lynchings did not simply involve hanging; rather, they often featured the prolonged torture, mutilation, dismemberment, and/or burning of the victim.²⁰² These events attracted large crowds of white people, often numbering in the thousands, which included elected officials, prominent citizens, and entire families, including children.²⁰³ Children were given front-row views of the victim, imprinting upon their minds for the rest of their life the concept that Black people do not deserve human dignity.²⁰⁴ The white press justified and promoted these carnival-like events, while vendors sold food, and printers produced postcards featuring photographs of the lynching and corpse.²⁰⁵ Spectators would fight over fingers, ears, toes, sexual organs, and other body parts as souvenirs.²⁰⁶ The physical objects associated with a lynching were prized mementos for the crowd.²⁰⁷

The publicity of lynchings not only terrorized Black Americans, but also allowed white communities to economically and politically benefit. The terror of being lynched prevented Black Americans from achieving

¹⁹⁶ EJI 2015, *supra*, at p. 21.

¹⁹⁷ EJI 2015, *supra*, at pp. 3, 7. The Task Force recognizes that “lynching” has been defined differently at various points in history by the entities who recorded incidents of lynching. This has presented challenges in terms of tracking lynching data and assessing the complete impact of racial terror. See Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020), p. 135 (Hudson). For the purposes of this section, the Task Force uses “lynching” to refer to acts of terrorism, specifically the murder of one or more individuals by hanging, where the public or community supported the action. Hudson, *supra*, at p. 135. Lynchings are distinct from other forms of racial violence and hate crimes that were prosecuted as criminal acts.

¹⁹⁸ EJI 2015, *supra*, at pp. 3, 7; EJI 3d ed., *supra*, at 65.

¹⁹⁹ EJI 2015, *supra*, at p. 5.

²⁰⁰ EJI 3d ed., *supra*, at p. 27.

²⁰¹ Ifill, *supra*, at p. 280.

²⁰² Markovitz, *Legacies of Lynching: Racial Violence and Memory* (2004) (Markovitz); Caste, *supra*, at pp. 93-94; EJI 2015, *supra*, at p. 12.

²⁰³ EJI 2015, *supra*, at p. 12; Ifill, *supra*, at p. 285. Children were involved and given front row position of the victim, psychologically tainting their view of Black people from a young age.

²⁰⁴ Jordan, *supra*, at pp. 565-66; Ifill, *supra*, at pp. 285, 297-99.

²⁰⁵ EJI 2015, *supra*, at pp. 12, 14; Caste, *supra*, at pp. 93-94.

²⁰⁶ EJI 2015, *supra*, at pp. 12, 14; Jordan, *supra*, at p. 592; Ifill, *supra*, at pp. 285-86.

²⁰⁷ Jordan, *supra*, at p. 592; Ifill, *supra*, at pp. 285-86.

political power, and preserved them as a compliant, intimidated workforce.²⁰⁸ This, in turn, largely maintained the Southern economy as it was during enslavement.²⁰⁹ And while lynching was overwhelmingly (though not exclusively) a Southern phenomenon,²¹⁰ its effects were felt throughout the United States—just as white supremacists intended to victimize and oppress all Black Americans.²¹¹

2. Lynchings Were Carried Out for a Variety of Reasons, All Intended to Maintain White Supremacy.

Lynchings were based on a broad range of perceived violations of the racial caste system. Hundreds of Black people were lynched after begin accused of murder or rape, though almost none were legally convicted of their alleged crimes.²¹² Regardless, lynching is never an acceptable form of punishment. Many lynchings were based on weak or contrived evidence.²¹³ For example, white men perpetuated the myth of the “unbridled, brutish, black rapist” to justify lynching Black men for allegedly sexually assaulting white women.²¹⁴ The lynchings of Black men accused of rape or sexual assault often involved castration, which underscored how white men felt threatened by Black men and used lynching to attack Black manhood.²¹⁵

Many lynchings were based on much more minor accusations. According to the Tuskegee Institute, approximately 30 percent of lynching victims were accused of nonviolent “offenses.”²¹⁶ Some victims were lynched only for minor social transgressions, or for demanding basic rights and fair treatment. Black victims were lynched for referring to a white police officer by name, associating with white women, accidentally bumping into a white woman, “passing” as white, speaking out about racial equality, testifying on behalf of a Black defendant, and refusing to take off an Army uniform after returning from World War I.²¹⁷

Black Americans were also lynched for asserting their labor rights and economic rights. For example, in 1918, a Black man in Earle, Arkansas refused to work on a white-owned farm without pay.²¹⁸ In response, the white citizens of the city cut him into pieces with butcher knives and hung his remains from a tree.²¹⁹ In numerous instances, Black Americans were also lynched after disputes over wages or debts: in such disputes, if a white person became violent and a Black person reacted in self-defense, the Black person was often lynched for murder or assault.²²⁰

Apart from responding to specific accusations, lynchings were used to drive Black residents from a community. For example, after a 1912 lynching in Forsyth County, Georgia, white vigilantes distributed leaflets demanding that all Black people leave the county or suffer deadly consequences.²²¹ As a result, the Black population

²⁰⁸ Ifill, *supra*, at p. 294.

²⁰⁹ Ifill, *supra*, at p. 294.

²¹⁰ EJI 2015, *supra*, at p. 21.

²¹¹ EJI 2015, *supra*, at p. 5; EJI 3d ed., *supra*, at pp. 27, 38; see also Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020), pp. 131-133.

²¹² EJI 2015, *supra*, at p. 11.

²¹³ EJI 2015, *supra*, at p. 11; Clarke, *supra*, at p. 280.

²¹⁴ Third Degree, *supra*, at p. 20; EJI 2015, *supra*, at p. 10; Clarke, *supra*, at p. 280.

²¹⁵ Ifill, *supra*, at p. 278.

²¹⁶ Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture Violence in the American South* (Apr. 1998) 28(2) *British J. or Political Sci.* 269, 269, 280 & fn. 34, <<https://www.jstor.org/stable/194307>> (as of Oct. 20, 2021) (Clarke).

²¹⁷ EJI 2015, *supra*, at p. 11; Jordan, *supra*, at p. 588; Ifill, *supra*, at p. 276-77.

²¹⁸ EJI 2015, *supra*, at p. 11.

²¹⁹ EJI 2015, *supra*, at p. 11.

²²⁰ Clarke, *supra*, at pp. 270, 280; Ifill, *supra*, at pp. 278-79.

²²¹ EJI 2015, *supra*, at p. 14.

dropped from 1,100 to 30 in eight years.²²² And in 1918, in Unicoi County, Tennessee, after lynching a Black man, a group of white men rounded up 60 Black residents—including children—and forced them to watch the corpse burn.²²³ The white people told the Black people in the town to leave the county within 24 hours.²²⁴

Lynchings also united white Americans of all socioeconomic levels. The public violence of lynchings portrayed the white population as strongly allied against the perceived threat of Black Americans.²²⁵ White mobs asserted their racial superiority by publicly torturing and killing Black victims.²²⁶ Through the Jim Crow period, white Americans experienced divisions along political, economic, and social lines.²²⁷ Although poor whites Americans may have lived in conditions more similar to those of poor Black Americans, lynching helped prevent interracial class-based alliances by unifying white Americans around a core purpose and identity.²²⁸ [2-3 sentences of additional detail re: similar exploitation of Black and white poor, i.e., how lynching undermined interracial class solidarity]

3. Government Officials, and White Society in General, Were Complicit in the Practice of Lynching.

Government actors, including police officers, prosecutors, judges, and elected officials, tacitly approved of or assisted in lynchings.²²⁹ Law enforcement officers released Black people who had been incarcerated to mobs, placed Black prisoners in areas where lynch mobs were known to gather, joined mobs to find Black Americans, and assisted with lynchings.²³⁰ Prosecutors and law enforcement regularly failed to identify and try lynchings for their crimes.²³¹ Only one percent of all lynchings after 1900 resulted in a conviction.²³² Judges contributed to these outcomes by presiding over a process that systematically excluded Black Americans from juries, mistreated Black witnesses, and held trials in jurisdictions with a racist bias.²³³ Local coroners and coroners' juries refused to indict lynchings and made impossible conclusions—such as ruling a death was a suicide after a Black farmer was found riddled with bullets.²³⁴

Throughout the South, state and local politicians protected the perpetrators of violent acts instead of protecting Black southerners from extrajudicial violence.²³⁵ Some governors, rather than condemn lynchings, made statements that focused on the accused crime of the lynched Black person—suggesting that the lynching was justified—and in other cases, affirmatively supported the lynching.²³⁶ And government officials outside the South did little to stop the campaign of widespread lynching.²³⁷ National leaders, for their part, failed to pass even one of more than 100 anti-lynching bills that were proposed in Congress between 1852 and 1951.²³⁸

²²² EJI 2015, *supra*, at p. 14.

²²³ EJI 2015, *supra*, at p. 14.

²²⁴ EJI 2015, *supra*, at p. 14.

²²⁵ Third Degree, *supra*, at p. 20.

²²⁶ Third Degree, *supra*, at p. 20.

²²⁷ Fox, *supra*, at p. 158.

²²⁸ See Fox, *supra*, at p. 158.

²²⁹ Ifill, *supra*, at p. 267.

²³⁰ Jordan, *supra*, at pp. 585-87; Ifill, *supra*, at p. 300.

²³¹ Ifill, *supra*, at pp. 300-301.

²³² EJI 2015, *supra*, at p. 18.

²³³ Ifill, *supra*, at p. 301.

²³⁴ Ifill, *supra*, at pp. 300-01.

²³⁵ Ifill, *supra*, at pp. 301-02.

²³⁶ Ifill, *supra*, at pp. 301-02.

²³⁷ EJI 2015, *supra*, at p. 18.

²³⁸ Ifill, *supra*, at pp. 294, 302-03.

The public was also complicit. Studies show that thousands of white people, at all levels of class and educational status, participated directly in lynch mobs. Many more participated as spectators, and millions did nothing.²³⁹ Participants, meanwhile, were protected by a code of silence.²⁴⁰ Because witnesses refused to cooperate with law enforcement, criminal investigations were thwarted, and the perpetrators of lynchings were able to avoid accountability.²⁴¹

4. The Prevalence of Lynching Has Changed over Time.

Despite numerous efforts, it is impossible to know how many Black people were killed by lynching. In the late 19th century, Ida B. Wells started the Red Record Efforts to identify incidents of extreme racial violence for research, advocacy, and public policy purposes.²⁴² Other researchers and activists have followed Wells' lead, but there is disagreement on figures among those who study racial terror. Researchers use different criteria of what counts as a lynching, and perpetrators hide their crimes—to list just two reasons that there is no definitive number of Black lynching victims.²⁴³ By any measure, however, lynching occurred in every region of the United States, with victims of all races and genders.²⁴⁴ And despite disagreement over exact numbers, there is a consensus that between the Civil War and World War II, thousands of Black Americans were lynched in the United States and were the primary targets of lynch mobs.²⁴⁵

In the 1890s, when the frequency of lynchings peaked, an average of 104 Black people were estimated to have been killed each year by lynch mobs.²⁴⁶ Then, as Black southerners moved north and west, lynching rates steadily declined during the 1930s, 1940s, and 1950s, and lynchings eventually became extraordinary events.²⁴⁷ Thus, when 15-year-old Emmett Till was lynched in 1954 for allegedly whistling at a white woman,²⁴⁸ and when a white mob abducted Mack Charles Parker from his jail cell and lynched him in 1959,²⁴⁹ the killings provoked national public outrage.²⁵⁰ However, the decline in lynchings did not correspond with an end to the racial caste system that led to lynchings in the first place.²⁵¹ Rather, the decline can be attributed to strict segregation laws, tactics of disenfranchisement, and the surge of the death penalty.²⁵²

Beginning in the early 1900s, white Southerners began to fear that the barbaric imagery of lynching would harm the Southern economy.²⁵³ The death penalty offered a more respectable form of violence and the appearance of the rule of law.²⁵⁴ As early as the 1930s, lynchings were often avoided when government actors

²³⁹ Clarke, *supra*, at p. 281; Ifill, *supra*, at p. 296.

²⁴⁰ Jordan, *supra*, at pp. 579-80.

²⁴¹ Jordan, *supra*, at pp. 579-80.

²⁴² Ward, *supra*, at pp. 582-83.

²⁴³ Ward, *supra*, at pp. 585, 596-97.

²⁴⁴ Hudson, *supra*, at p. 133. But these statistics often left out lynching of non-Black people Native Americans, Mexicans, and Chinese. Hudson, *supra*, at p. 136.

²⁴⁵ EJI 2015, *supra*, at p. 3.

²⁴⁶ Third Degree, *supra*, at p. 19.

²⁴⁷ Markovitz, *supra*, at pp. xxviii-xxix.

²⁴⁸ Ifill, *supra*, at p. 302.

²⁴⁹ See generally Smead, *Blood Justice: The Lynching of Mack Charles Parker* (1988).

²⁵⁰ Markovitz, *supra*, at pp. xxviii-xxix.

²⁵¹ Clarke, *supra*, at p. 282.

²⁵² Clarke, *supra*, at pp. 282-285.

²⁵³ Clarke, *supra*, at pp. 282-83.

²⁵⁴ Clarke, *supra*, at pp. 284-85; Third Degree, *supra*, at p. 24.

made clear that the accused would receive a swift judicial conviction and execution.²⁵⁵ While there is no conclusive evidence proving that the death penalty replaced lynching in the South, data shows that executions increased as lynchings declined.²⁵⁶ Indeed, Southerners themselves referred to these executions as “legal lynchings,” and Southern leaders argued that Black Americans could be intimidated and controlled just as effectively with the death penalty.²⁵⁷ And “legal lynchings,” like actual lynchings, disproportionately victimized Black Americans.²⁵⁸ From the 1890s to the 1950s, between 53 and 81 percent of lynchings and executions were of Black Americans, although Black Americans represented approximately only 10 percent of the entire U.S. population.²⁵⁹

By 1915, court-ordered executions outpaced lynchings in the former slave states for the first time, and by the 1930s, two-thirds of those executed were Black—a trend that would continue.²⁶⁰ While Black people were executed for allegedly killing white people, the reverse was not true. As lynchings declined from 1930 to 1970, there was a sharp increase in the number of Black Americans who were executed for rape, but there is no evidence that a white person was executed for raping a Black woman.²⁶¹ According to one study, out of more than 11,000 executions in the United States, only two white men were executed for killing a Black person.²⁶² Another study of approximately 15,000 executions, from colonial times to the 1990s, found that white people were executed for killing Black people in only 29 cases—and in most of those cases, the defendants had also killed white people.²⁶³ These trends in executions reinforce a central theme of lynching: that the lives of Black people were supposedly worth less than those of white people.²⁶⁴

B. Mob Violence

Whereas lynching involves group action against a person as a response to that person’s alleged wrongdoing, mob violence involves assaults by civilians of one ethnic group on members of another ethnic group on the basis of their ethnicity.²⁶⁵ These tactics were often used together against the Black community.²⁶⁶ Lynchings were sometimes followed by mob violence, with white mobs burning Black homes, devastating Black neighborhoods, and forcing Black residents to relocate.²⁶⁷ Mob violence was motivated by the same objectives as lynchings, including to extinguish Black Americans’ political influence and economic gains, and to maintain social control over Black Americans.²⁶⁸

²⁵⁵ Third Degree, *supra*, at p. 24; Proposed Brief of *Amicus Curiae* The Honorable Gavin Newsom in Supp. of Def. and Appellant McDaniel, *People of the State of California v. McDaniel*, No. S171393, at pp. 36-37 (Oct. 26, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/10/10.26.20-Governor-Newsom-McDaniel-Amicus-Brief.pdf> (Newsom Amicus Brief); Frampton, *The Jim Crow Jury* (2018) 71 Vand. L. Rev. 1593, 1612-14.

²⁵⁶ Clarke, *supra*, at p. 285.

²⁵⁷ Clarke, *supra*, at pp. 284-85.

²⁵⁸ Third Degree, *supra*, at pp. 24-25.

²⁵⁹ Clarke, *supra*, at p. 286.

²⁶⁰ EJI 3d ed., *supra*, at p. 63.

²⁶¹ Third Degree, *supra*, at pp. 23-24; Clarke, *supra*, at p. 286.

²⁶² Clarke, *supra*, at p. 288.

²⁶³ Clarke, *supra*, at p. 288.

²⁶⁴ Clarke, *supra*, at p. 288.

²⁶⁵ Jordan, *supra*, at pp. 607-08.

²⁶⁶ Ifill, *supra*, at p. 267.

²⁶⁷ Ifill, *supra*, at pp. 291-92.

²⁶⁸ Fox, *Intimations of Citizenship: Repression and Expressions of Equal Citizenship in the Era of Jim Crow* (Fall 2006) 50 How. L.J. 113, 184-185 (Fox).

The racial hierarchy benefited from mob violence. Mob violence was a ritual that built a sense of community among white people and helped the South to sustain a cohesive culture of white supremacy and enforce legal segregation.²⁶⁹ (As discussed above, mass participation was a typical element of lynchings, which drew upwards of thousands of spectators.²⁷⁰) But mass violence was not strictly a Southern phenomenon. White mob violence occurred in several Northern states prior to 1865, including New York, Pennsylvania, and Ohio.²⁷¹ These Northern white mobs, which numbered in the hundreds or thousands, attacked and killed Black people and set fire to Black properties.²⁷² The violence was often accompanied by inaction or inadequate response by law enforcement.²⁷³ Virtually none of the perpetrators were prosecuted or convicted; those that were received extremely lenient punishments.²⁷⁴

When white Americans felt Black Americans threaten their superiority, mob violence sometimes escalated into massacres, destroying cohesive Black communities and the prosperity that they built.²⁷⁵ Historically, these attacks have often been called “riots” or “race riots,” but these terms obscure the nature of this violence. Throughout Reconstruction, segregation, and the civil rights era, so-called riots were actually massacres. In these attacks, white mobs proactively killed Black Americans and destroyed Black property, though the Black victims were often blamed for inciting the violence in the immediate aftermath.²⁷⁶ This pattern of violence has evolved and continued through the 20th and 21st centuries, as is discussed in greater detail in Chapter [XX] on the legal system.

Massacres inflicted tremendous damage upon Black lives and property.²⁷⁷ It is estimated that over 100 such massacres occurred between the end of the Civil War and the 1940s.²⁷⁸ The 1921 Tulsa Race Massacre is one prominent example. In Tulsa, Oklahoma, in 1921, a Black man was arrested for allegedly assaulting a white woman.²⁷⁹ In response, a white mob looted, burned homes and businesses, and murdered at least 300 Black people in Greenwood, a prosperous Black neighborhood known as “Black Wall Street.”²⁸⁰ The city and county

²⁶⁹ Fox, *supra*, at pp. 158-59.

²⁷⁰ Jordan, *supra*, at p. 573.

²⁷¹ Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges (Nov. 1990), 76 Cornell L. Rev. 1, 30 & n. 137 (Colbert).

²⁷² Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges (Nov. 1990), 76 Cornell L. Rev. 1, 30 & n. 137 (Colbert).

²⁷³ Colbert, *supra*, at pp. 30-31.

²⁷⁴ Colbert, *supra*, at pp. 30-31.

²⁷⁵ Fox, *supra*, at p. 185.

²⁷⁶ FOOTNOTE HERE CONSOLIDATING THE FOOTNOTES FOR MEMPHIS, WILMINGTON, AND EAST ST. LOUIS

²⁷⁷ EJI 2015, *supra*, at p. 7; EJI, *Political Violence and Racial Inequity in America* (Jan. 19, 2021), <<https://eji.org/news/political-violence-and-racial-inequality-in-america/>> (as of Oct. 22, 2021) (EJI 2021); Mack, *Over a century later, facts of 1898 race riots released* (Dec. 16, 2015) Star News Online, <<https://web.archive.org/web/20210827072550/https://www.starnewsonline.com/news/20051216/over-a-century-later-facts-of-1898-race-riots-released>> (archived Aug. 27, 2021) (1898 Race Riot Facts); Lee, *How America’s Vast Racial Wealth Gap Grew: By Plunder* (Aug. 18, 2019), New York Times, <<https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>> (as of Oct. 22, 2021) (Lee); Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence* (Winter 2004) 79 Ind. L. J. 177, 226.

²⁷⁸ Channon Hodge et al., *Burned from the Land: How 60 Years of Racial Violence Shaped America* (May 30, 2021) CNN <<https://www.cnn.com/interactive/2021/05/us/whitewashing-of-america-racism/>> (as of Feb. 10, 2022).

²⁷⁹ Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*, at p. 5 (May 2020), <[tulsa-reparations0520_reportcover_8.5x11 \(hrw.org\)](https://www.hrw.org/report/2020/05/20/tulsa-reparations0520-reportcover-8.5x11)> (as of Oct. 22, 2021) (Human Rights Watch)

²⁸⁰ Fain, *The Devastation of Black Wall Street* (July 5, 2017) JSTOR Daily, <[The Devastation of Black Wall Street | JSTOR Daily](https://www.jstor.org/stable/47411111)> (as of Oct. 22, 2021) (Fain); Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*, at p. 6 (May 2020), <[tulsa-reparations0520_reportcover_8.5x11 \(hrw.org\)](https://www.hrw.org/report/2020/05/20/tulsa-reparations0520-reportcover-8.5x11)> (as of Oct. 22, 2021) (Human Rights Watch).

police deputized hundreds of white people to participate in Over the course of 24 hours on May 31 and June 1, the mob destroyed 35 square blocks, more than 1,200 Black-owned homes, over 60 businesses, a hospital, a public library, and a dozen Black churches.²⁸¹ Thousands of Black Tulsans were left homeless and placed in internment camps.²⁸² In addition to death and destruction, the massacre inflicted catastrophic mental and emotional trauma upon the Black survivors and their descendants.²⁸³ The destruction remained over generations as the city, state, and chamber of commerce worked to prevent rebuilding and turned away funding that could have benefited Greenwood.²⁸⁴

The Tulsa Race Massacre Commission confirmed that Tulsa officials not only did nothing to prevent the massacre, but also participated in the violence and provided firearms and ammunition to the mob.²⁸⁵ Indeed, the city and county police deputized hundreds of white people to participate in the massacre, and the Oklahoma National Guard joined the massacre as well.²⁸⁶ The Commission's report confirmed that no one prosecuted or punished any of the perpetrators for the violent acts that occurred, despite overwhelming evidence of their guilt.²⁸⁷ Instead, the all-white grand jury falsely blamed Black people for the massacre.²⁸⁸ As stated in the grand jury report: "There was no mob spirit among the whites, no talk of lynching and no arms. The assembly was quiet until the arrival of the armed Negroes, which precipitated and was the direct cause of the entire affair."²⁸⁹

This example also highlights the role of the government, at all levels, in mob violence. By looking the other way, declining to prosecute mob members, or by actively fomenting and assisting mob violence, government officials enabled violent white mobs to devastate Black communities.

C. Torture

Southern lynchings often included torture of the victim before death, in addition to burning, mutilation, and decapitation after death.²⁹⁰ The torture preceding public killings usually lasted hours, and could involve shoving a hot poker iron down the victim's throat and pressing it against their body; gouging out eyes; castration; cutting off hands and feet; tearing into the flesh with a large corkscrew; and burning the victim alive.²⁹¹ As historian Leon F. Litwack explains: "The story of a lynching . . . is the story of slow, methodical, sadistic, often highly inventive forms of torture and mutilation."²⁹²

²⁸¹ Human Rights Watch, *supra*, at pp. 1, 6.

²⁸² Human Rights Watch, *supra*, at p. 7.

²⁸³ Reparations Task Force, Witness Testimony of Dr. Eric J. Miller (Dec. 7, 2021), <<https://www.youtube.com/watch?v=nstqrEFYcz0>> (as of Feb. 9, 2022), 7:35-7:46.

²⁸⁴ Reparations Task Force, Witness Testimony of Dr. Eric J. Miller (Dec. 7, 2021), <<https://www.youtube.com/watch?v=nstqrEFYcz0>> (as of Feb. 9, 2022), 7:46-7:57.

²⁸⁵ Human Rights Watch, *supra*, at p. 7.

²⁸⁶ Reparations Task Force, Witness Testimony of Dr. Eric J. Miller (Dec. 7, 2021), <<https://www.youtube.com/watch?v=nstqrEFYcz0>> (as of Feb. 9, 2022), 7:20-7:35.

²⁸⁷ Human Rights Watch, *supra*, at p. 8.

²⁸⁸ Human Rights Watch, *supra*, at p. 9.

²⁸⁹ Human Rights Watch, *supra*, at p. 9.

²⁹⁰ EJI 3d ed., *supra*, at p. 17; Ifill, *supra*, at pp. 281-82.

²⁹¹ EJI 3d ed., *supra*, at p. 35; Jordan, *supra*, at pp. 589-90.

²⁹² EJI 3d ed., *supra*, at p. 17.

Torture was thus another method with which white people sought to punish Black people for stepping beyond their relegated social roles.²⁹³ Victims were often tortured even if they were not convicted of any crime, such as when two brothers in Paris, Texas were tortured for trying to escape abusive work conditions.²⁹⁴

As lynching became less common, so too did the accompanying torture. But just as lynching was replaced with the “legal lynching” of state executions, the police used torture to extract confessions from Black suspects.²⁹⁵ The police objective was to quickly convict the suspects.²⁹⁶ Thus, even facing the death penalty, Black suspects were frequently denied a fair and impartial trial.²⁹⁷

For example, in 1938, Dave Canty, a Black man, was arrested for killing a white woman and wounding another in the course of a robbery in Montgomery, Alabama.²⁹⁸ After hours of police questioning, Canty signed a written confession, admitting responsibility for the attack.²⁹⁹ At trial, however, Canty testified from the witness stand that the police had forced him to confess by torturing him.³⁰⁰ He gave detailed information about the torture and his torturers, and he showed his wounds and scars to the jury.³⁰¹ Police officers and prison staff, however, denied Canty’s account of his torture, and at the conclusion of his three-day trial, Canty was sentenced to death.³⁰² After a new trial reduced his sentence to life in prison, Canty died in the same prison in which he claimed to have been tortured.³⁰³

Unlike lynching, this form of torture was not public.³⁰⁴ In fact, hiding it was critical to supporting a racist system.³⁰⁵ It was difficult for victims and advocates to realize the prevalence of torture, and denials and secrecy made it more difficult to fight the practice.³⁰⁶ When torture was reported and individuals tried to bring charges, allegations and evidence were ignored and invalidated by white judges, prosecutors, and other officials.³⁰⁷ While this practice occurred throughout the country, it was especially prevalent in large cities like Chicago and New York City, as well as the American South.³⁰⁸ There were very rarely any consequences for violence used by police in coercing confessions.³⁰⁹ Police officers often denied the use of such violence, while claiming that regulating police work would lead to an increase in crime.³¹⁰ Thus, the decline of lynching and public torture

²⁹³ EJI 3d ed., *supra*, at p. 68.

²⁹⁴ EJI 3d ed., *supra*, at p. 37.

²⁹⁵ Third Degree, *supra*, at p. 24.

²⁹⁶ Third Degree, *supra*, at p. 24.

²⁹⁷ Third Degree, *supra*, at p. 24.

²⁹⁸ Third Degree, *supra*, at pp. 41-42.

²⁹⁹ Third Degree, *supra*, at p. 42.

³⁰⁰ Third Degree, *supra*, at p. 43.

³⁰¹ Third Degree, *supra*, at pp. 44-45.

³⁰² Third Degree, *supra*, at pp. 46-47.

³⁰³ Silvan Niedermeier, “*All These Scars, There and There.*” *Fighting Forced Confessions in the Pre-1954 South* (Nov. 25, 2019) University of North Carolina Press Blog <<https://uncpressblog.com/2019/11/25/silvan-niedermeier-all-these-scars-there-and-there-fighting-forced-confessions-in-the-pre-1954-south/>> (as of Feb. 9, 2022).

³⁰⁴ Third Degree, *supra*, at pp. 9-12.

³⁰⁵ Third Degree, *supra*, at pp. 9-12.

³⁰⁶ Third Degree, *supra*, at p. 9.

³⁰⁷ Third Degree, *supra*, at p. 11.

³⁰⁸ Third Degree, *supra*, at p. 7.

³⁰⁹ Third Degree, *supra*, at p. 7.

³¹⁰ Third Degree, *supra*, at p. 7.

was not a sign of enlightenment.³¹¹ Rather, lynching and torture developed into more modern forms of racial violence—namely, swift executions and coerced confessions.³¹²

D. Police Killings and Vigilantism

State-sanctioned violence against Black Americans continues today in the form of extrajudicial violence by police officers and vigilantes.

1. Current Police Violence Against Black Americans Has Similarities with the Actions of Slave Patrols and Has Been Considered a Modern Form of Lynching.

Throughout American history, including the present day, the police have held the power to strip Black people of their rights and lives for any reason—or for no reason at all. Police violence is a leading cause of death for Black people in America.³¹³ Today’s extrajudicial killings have historical roots in the social control of slave patrols,³¹⁴ the lynchings of the late 1800s and early 1900s, and police violence against Black southerners during Jim Crow.³¹⁵ Slave patrols, which began in the early 1700s, were made up of white volunteers.³¹⁶ Patrollers were empowered to forcibly discipline enslaved persons, crush potential uprisings, and return enslaved persons who had escaped to their enslavers.³¹⁷ Like slave patrols, police violence in Jim Crow was intended to intimidate Black communities and subordinate Black Americans within the segregated social order.³¹⁸

From the end of the Civil War through the early 20th century, racialized policing was often tailored to local concerns.³¹⁹ In urban areas, in response to growing economic competition between white workers and Black workers moving to cities, the police targeted Black residents with curfews, high incarceration rates, and violence—often deadly violence.³²⁰ In rural areas, sheriffs and deputy sheriffs enjoyed essentially unchecked power from their white constituents.³²¹ As a result, the police violently enforced the racist social order against Black citizens, even for seemingly minor transgressions.³²²

As recognized by the United Nations Working Group of Experts on People of African Descent, “contemporary police killings and the trauma that they create are reminiscent of the past racial terror of lynching.”³²³ Recent incidents of police violence demonstrate this connection. The British Broadcasting Company has collected a list

³¹¹ Third Degree, *supra*, at pp. 24-25.

³¹² Third Degree, *supra*, at p. 25.

³¹³ Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment* (2020) 67 UCLA L. Rev. 1108, 1110, <[Abolishing Racist Policing With the Thirteenth Amendment \(wlu.edu\)](#)> (as of Sept. 8, 2021).

³¹⁴ United Nations Human Rights Office of the High Commissioner, *UN experts condemn modern-day racial terror lynchings in US and call for systemic reform and justice* (June 5, 2020), <<https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933&LangID=E>> (as of Sept. 8, 2021).

³¹⁵ Third Degree, *supra*, at pp. 17-19.

³¹⁶ Hassett-Walker, *The racist roots of American policing: From slave patrols to traffic stops* (updated June 2, 2020), The Conversation <<https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816>> (as of Dec. 13, 2021) (Slave Patrols).

³¹⁷ Slave Patrols, *supra*.

³¹⁸ Third Degree, *supra*, at p. 18.

³¹⁹ Third Degree, *supra*, at pp. 18-19.

³²⁰ Third Degree, *supra*, at pp. 18-19.

³²¹ Third Degree, *supra*, at p. 19.

³²² Third Degree, *supra*, at p. 19.

³²³ United Nations General Assembly, Report of the Working Group of Experts on People of African Descent on its mission to the United States of America (Aug. 18, 2016), p. 16 (U.N. Working Group Report).

of recent high-profile killings of Black Americans by police,³²⁴ highlighting just a fraction of the more than 1,500 Black Americans killed by police since 2015.³²⁵ In 2016, after a Minneapolis police officer killed Philando Castile during a traffic stop,³²⁶ Castile’s sister said, “It’s just like we’re animals. It’s basically modern-day lynching that we’re seeing going on, except we’re not getting hung by a tree anymore—we’re getting killed on camera.”³²⁷ Similarly, in 2020, George Floyd was stopped for allegedly using a counterfeit \$20 bill, which could have been handled with a ticket.³²⁸ Instead, Floyd was killed by an officer kneeling on his neck for nine minutes and 29 seconds.³²⁹ Historian Arica Coleman described Floyd’s death as “a modern-day lynching.”³³⁰

2. Vigilantism, like police killings, carries the history of violence against Black people into the present day.

In addition to extrajudicial police violence, our country’s history of lynching is reflected in the vigilantism taken against Black people, even when they have not committed any offense.³³¹ The Southern Poverty Law Center has compiled a list of Black Americans (and white activists) killed during the Civil Rights Movement.³³² More recent examples of this violence are the killings of Trayvon Martin and Ahmaud Arbery. In 2012, George Zimmerman shot and killed the unarmed, 17-year-old Trayvon Martin, who Zimmerman described as a “suspicious person” in his neighborhood.³³³ After Zimmerman was acquitted for the shooting, in the tradition of lynching, he auctioned his gun as a souvenir.³³⁴

In 2020, while Ahmaud Arbery was out for a jog, he was chased, attacked, and killed by three white men who claimed he resembled a suspect in local break-ins (although no police reports were filed about the alleged break-ins). Arbery was unarmed, and as he lay dying on the ground, one of the white men called him a “fucking

³²⁴ BBC, *George Floyd: Timeline of black deaths and protests* (Apr. 22, 2021) <<https://www.bbc.com/news/world-us-canada-52905408>> (as of Nov. 12, 2021).

³²⁵ Washington Post, *Fatal Force: Police shootings database 2015-2021* (updated Nov. 11, 2021) <<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>> (as of Nov. 12, 2021).

³²⁶ Lopez, *Philando Castile Minnesota police shooting: officer cleared of manslaughter* (June 16, 2017) Vox, <<https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video>> (as of Sept. 8, 2020) (Castile Vox Article).

³²⁷ CBS News, *Victim’s sister: Minnesota police shooting “modern day lynching”* (July 8, 2016), <<https://www.cbsnews.com/news/philando-castile-minnesota-black-man-killed-by-police-family-speaks-out/>> (as of Sept. 8, 2021).

³²⁸ Groves, *Explainer: Use-of-force experts evaluate Floyd arrest* (Mar. 31, 2021) AP News, <[EXPLAINER: Use-of-force experts evaluate Floyd arrest \(apnews.com\)](https://www.apnews.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html)> (as of Sept. 8, 2021) (AP Floyd Article).

³²⁹ AP Floyd Article, *supra*; Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Kneled on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported* (March 30, 2021) New York Times, <<https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html>> (as of Feb. 10, 2022).

³³⁰ Brown, *‘It was a modern-day lynching’: Violent deaths reflect a brutal American legacy* (June 3, 2020) National Geographic, <<https://www.nationalgeographic.com/history/article/history-of-lynching-violent-deaths-reflect-brutal-american-legacy>> (as of Sept. 8, 2020) (National Geographic Floyd Article).

³³¹ Love, *The Trayvon Martin case reveals a vigilante spirit in the US justice system* (Apr. 7, 2012) Guardian, <<https://www.theguardian.com/commentisfree/cifamerica/2012/apr/07/trayvon-martin-vigilante-spirit-us-justice>> (as of Sept. 8, 2021).

³³² Southern Poverty Law Center, *Civil Rights Martyrs* <<https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs>> (as of Nov. 12, 2021).

³³³ Pearson and Botelho, *5 things to know about the George Zimmerman-Trayvon Martin saga* (Feb. 26, 2013) CNN, <[5 things to know about the George Zimmerman-Trayvon Martin saga | CNN](https://www.cnn.com/2013/02/26/us/5-things-to-know-about-the-george-zimmerman-trayvon-martin-saga/)> (as of Sept. 8, 2021) (CNN Martin Article).

³³⁴ DeBerry, *Lynching and the ghastly precedent to George Zimmerman auctioning gun that killed Trayvon Martin* (May 13, 2016) NOLA.com, <[Lynching and the ghastly precedent to George Zimmerman auctioning gun that killed Trayvon Martin | Crime/Police | nola.com](https://www.nola.com/crime-police/lynching-and-the-ghastly-precedent-to-george-zimmerman-auctioning-gun-that-killed-trayvon-martin)> (as of Sept. 8, 2021).

nigger.”³³⁵ Arbery’s family called the killing a lynching.³³⁶ The three men attempted to use a citizen’s arrest provision added into the Georgia Code of 1863.³³⁷ The men argued that the 1863 provision allowed them to arrest another person if a crime was committed “within his immediate knowledge.”³³⁸ The Georgia Code was drafted in part by Thomas R.R. Cobb, a legal scholar who claimed that a Black mother “suffers little” when her children are stolen from her, since she lacked maternal feelings.³³⁹ Cobb helped write principles of white supremacy into Georgia law, including a provision that presumed Black Americans were slaves unless proven otherwise.³⁴⁰ The citizen’s arrest provision was repealed in 2021 in the wake of Arbery’s murder.³⁴¹

As with lynchings, a lack of accountability appears to exist for police violence and vigilantism. The Guardian reports that out of 1,136 killings registered in 2015, only 18 law enforcement officers were charged with crimes.³⁴² Moreover, the United Nations found that federal, state, and county regulations on use of force and firearms do not comport with international standards, which makes it more likely that extrajudicial violence against Black individuals will continue.³⁴³

E. Sexual Violence and Eugenics

As further discussed in Chapter 12 on health, the Black female body has been brutally and routinely compromised in the absence of legal protection. Black women faced forced procreation during enslavement, while after enslavement, Black women were forcibly sterilized.³⁴⁴ As with other forms of racial terror, sexual violence served the social, economic, and political goals of white supremacy.

As discussed in Chapter 2 on enslavement, enslavers used sexual violence and the threat of sexual violence as a way to control enslaved Black people. Enslavers also used sexual violence and forced procreation to grow their fortunes.

While the end of enslavement as an institution may have removed the economic incentive for sexual violence, Black women have continued to suffer from the violence that arises from stereotypes projected upon them. During the Jim Crow era, white men used rape and threats of rape to oppress Black Americans, and particularly Black women.³⁴⁵ Throughout their daily routines, Black women and girls faced the threat of sexual violence by white men.³⁴⁶ Rapes during Jim Crow were intended to maintain white domination and for white men’s sexual

³³⁵ Nathan Layne, *White defendant used racial slur after shooting Ahmaud Arbery, investigator testifies* (June 4, 2020) Reuters, <<https://www.reuters.com/article/us-usa-shooting-georgia-slur/white-defendant-used-racial-slur-after-shooting-ahmaud-arbery-investigator-testifies-idUSKBN23B2H4>> (as of Nov. 12, 2021).

³³⁶ BBC News, *Ahmaud Arbery: What do we know about the case?* (June 5, 2020), <[Ahmaud Arbery: What do we know about the case? - BBC News](https://www.bbc.com/news/health-56444444)> (as of Sept. 8, 2021).

³³⁷ <https://www.npr.org/2021/05/11/995835333/in-ahmaud-arberys-name-georgia-repeals-citizens-arrest-law>

³³⁸ *Ibid.*

³³⁹ Briggs, *supra*, at 25-26.

³⁴⁰ Andrew P. Morriss, "Georgia Code (1861)," in *Slavery in the United States: A Social, Political, And Historical Encyclopedia*, vol. 2, ed. Junius P. Rodriguez (Santa Barbara: ABC-CLIO, 2007), 314-315.

³⁴¹ *Ibid.*

³⁴² U.N. Working Group Report, *supra*, at p. 17.

³⁴³ U.N. Working Group Report, *supra*, at p. 17.

³⁴⁴ Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present* (2007), p. 648 (Medical Apartheid); see also Health Section, *infra*.

³⁴⁵ Sexual Assaults, *supra*, at p. 935.

³⁴⁶ Sexual Assaults, *supra*, at p. 936.

gratification.³⁴⁷ Some rapes also took place during other instances of racial violence, such as attacks to steal Black land and destroy Black property.³⁴⁸ White men were rarely punished for committing sexual violence against Black women and girls, while Black Americans frequently faced retaliation for reporting such attacks.³⁴⁹

As discussed in Chapter [XX] on the legal system, Black women continue to be depicted through tropes of hypersexuality, creating a myth that Black women cannot credibly claim to be victims of sexual violence.³⁵⁰

Black women also suffered a different kind of sexual violence as a result of the eugenics movement. During the early 20th century, the eugenics movement, which claimed to be acting according to “scientific” principles and for the good of human society, scrutinized Black sexual behavior and reproduction. The result was that Black people, and especially Black women, were disproportionately forced into sterility.³⁵¹ This is discussed in detail in Chapter [XX].

F. Violence Against Children and Family Separation

The threat of selling non-compliant enslaved people away from their families was one of the most terrifying tools of coercion that enslavers wielded to control enslaved persons and suppress rebellions.³⁵² As discussed above, under the laws of slave states, the status of a newborn followed the status of their mother.³⁵³ Separation was horrifying and traumatic to the parents and their children.³⁵⁴ Children and their parents were treated not as people, who loved and cared for each other, one generation after another, but as bodies used exclusively for labor.³⁵⁵ Frederick Douglass said that he began to understand himself as a slave following the separation from his mother, as in the absence of nurturing kin, he was completely subjected to the will of others.³⁵⁶ The practice of selling away infants was so common that it was a focus of the northern abolitionist movement, and in the 1850s, many Southern states outlawed taking infants from their mothers in an effort to prove that slavery was not as bad as antislavery northerners claimed.³⁵⁷

After enslavement, southern states re-enslaved Black children, removing them from their parents, and forcing them into so-called apprenticeships to white former enslavers.³⁵⁸ The children, sometimes as young as six, worked for white families as if they were enslaved.³⁵⁹ Throughout the 20th century, government officials disproportionately separated Black children from their families to threaten and coerce mothers into withdrawing from welfare programs.³⁶⁰ A detailed discussion of family separation is in Chapter [XX].

³⁴⁷ Sexual Assaults, *supra*, at p. 936.

³⁴⁸ Sexual Assaults, *supra*, at p. 936.

³⁴⁹ Sexual Assaults, *supra*, at p. 936.

³⁵⁰ Norwood, Mapping the Intersections of Violence on Black Women’s Sexual Health within the Jim Crow Geographies of Cincinnati Neighborhoods (2018) 39(2) *Frontiers* (Boulder) 97, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6179350/pdf/nihms-987283.pdf>, pp. 1-2 (as of Sept. 8, 2021) (Norwood).

³⁵¹ See Health Section, *infra*.

³⁵² Taking Children, *supra*, at pp. 18-19.

³⁵³ Briggs, Taking Children: A History of American Terror (2020) pp. 19-20 (Taking Children); Sexual Economy, *supra*, p. 20.

³⁵⁴ Taking Children, *supra*, at pp. 24-25.

³⁵⁵ Taking Children, *supra*, at p. 22.

³⁵⁶ Taking Children, *supra*, at p. 21.

³⁵⁷ Taking Children, *supra*, at p. 27.

³⁵⁸ Taking Children, *supra*, at p. 28.

³⁵⁹ Taking Children, *supra*, at p. 28.

³⁶⁰ Taking Children, *supra*, at pp. 30, 33-35.

Mass incarceration, another tool of racist social control, has also had the consequence of breaking up Black families. The war on drugs, beginning with Richard Nixon’s 1968 presidential campaign, was explicitly designed to target the antiwar left and Black Americans.³⁶¹ Due to these policies, by 2015, one in nine Black children had at least one parent in prison.³⁶² At the same time, Black families were targeted by racist policing of parenting.³⁶³ Black children were increasingly placed in the child welfare system due to parental neglect—but in reality, this “neglect” was often only poverty.³⁶⁴ These two forms of racist policing combined to double and then triple the rate of incarceration of Black women during the 1980s.³⁶⁵ Eighty percent of these women had children living with them at the time of the arrest, many of whom were then placed in foster care.³⁶⁶ As a result, between 1985 and 1988, the number of children in out-of-home placement—foster care, psychiatric institutions, and the juvenile justice system—increased by 25 percent.³⁶⁷

Finally, Black children have faced disproportionate police violence. As discussed above, law enforcement continues to treat Black people as a dangerous criminal group; Black children are no exception. A 2020 study led by Children’s National Hospital researchers found that Black youth are six times likelier than white youth to be shot and killed by police.³⁶⁸ A detailed discussion of the criminalization of Black children is in Chapter [XX].

G. Economic Terror

White people have used various types of racial violence in order to erase Black economic gains. In the 1890s, the prominent journalist and anti-lynching advocate Ida B. Wells conducted a detailed study of lynchings and found that the vast majority were not in response to sexual crimes, but were rather motivated by economic or political concerns.³⁶⁹ For example, perpetrators initiated attacks as a form of economic intimidation against Black Americans who disputed labor contracts.³⁷⁰ Employers also whipped and lynched Black freedmen who argued with them or left the plantations where they were contracted to work.³⁷¹

Once Black Americans became successful, ran businesses, and owned homes, they were even more targeted. In the South, even before the Civil War, the Associated Press reports that 24,000 acres of land were stolen from 406 Black landowners, including by means of racial terror.³⁷² The success of Black neighborhoods and Black individuals triggered white mobs to initiate violence,³⁷³ as white Americans felt threatened by the growing economic power and independence of Black communities.³⁷⁴

³⁶¹ Taking Children, *supra*, at pp. 107-108.

³⁶² Taking Children, *supra*, at p. 103.

³⁶³ Taking Children, *supra*, at pp. 108-109.

³⁶⁴ Taking Children, *supra*, at p. 108.

³⁶⁵ Taking Children, *supra*, at pp. 108-109.

³⁶⁶ Taking Children, *supra*, at pp. 108-09.

³⁶⁷ Taking Children, *supra*, at pp. 114-15.

³⁶⁸ Heyward and Costa, *Black children are 6 times more likely to be shot to death by police, study finds* (Dec. 17, 2020) CNN, <<https://www.cnn.com/2020/12/17/us/black-children-police-brutality-trnd/index.html>> (as Nov. 12, 2021).

³⁶⁹ Ward, *supra*, at p. 588.

³⁷⁰ Case for Reparations, *supra*.

³⁷¹ EJI 3d ed., *supra*, at p. 15.

³⁷² Case for Reparations, *supra*.

³⁷³ Ifill, *supra*, at p. 188.

³⁷⁴ Fox, *supra*, at pp. 146-147.

There are numerous historical examples of economically motivated violence against prosperous Black communities.³⁷⁵ Perhaps the most significant example is the 1921 Tulsa massacre, discussed above in relation to mob violence, in which a white mob devastated the prosperous Black neighborhood of Greenwood.³⁷⁶ In 1997, the Oklahoma legislature formed the 1921 Tulsa Race Riot Commission (recently renamed the Tulsa Race Massacre Commission³⁷⁷), which was tasked with investigating the Tulsa massacre and recommending methods for reparations.³⁷⁸ The Commission confirmed that hundreds of white people were responsible for looting, killing, and destroying property, enabled and assisted by Tulsa government officials.³⁷⁹ The Commission found that the massacre caused \$1.8 million in property damage—\$25 million in today’s dollars, though others estimate that the damage totaled \$50 to \$100 million in today’s dollars.³⁸⁰ However, the Commission found that no one, except one white pawnshop, was given any compensation for the damage to their property, and there was no other benefit or restitution for victims.³⁸¹

Economically motivated violence was also directed at prosperous Black individuals, not just communities and neighborhoods. An illustrative case is that of Elmore Bolling, a successful Black man in Lowenesboro, Alabama.³⁸² He owned a small fleet of trucks that ran livestock and made deliveries, and he also leased a plantation where he had a general store with a gas station and a catering business.³⁸³ At the peak of his business, Bolling employed 40 other Black people.³⁸⁴ In December 1947, a group of white men showed up at Bolling’s home where he lived with his wife and seven children, shot him seven times, and left him in a ditch to die.³⁸⁵ At the time of Bolling’s death, the family had \$40,000 in the bank and more than \$5,000 in assets (approximately \$500,000 in today’s dollars), but creditors (or those who purported to be creditors) took the money, leaving the family with nothing.³⁸⁶ As someone told the local newspaper at the time, “He was too successful to be a Negro.”³⁸⁷

In addition to attacks on successful Black business owners, white people also committed racial violence against Black individuals who moved into white neighborhoods.³⁸⁸ Their goal was to pressure the new Black residents to move away and maintain housing segregation, as discussed in Chapter [XX].³⁸⁹ Such violence consisted of

³⁷⁵ Fox, *supra*, at p. 147-148; North Carolina Department of Cultural Resources Office of Archives and History, 1898 Wilmington Race Riot Report (May 31, 2006), p. 445-458 <[ROSTER \(ncdcr.gov\)](#)> (as of Sept. 8, 2021) (Wilmington Race Riot Report); EJI 3d ed., *supra*, at p. 45; Brown, *Red Summer: When Racist Mobs Ruled* (Feb. 4, 2021) PBS, <<https://www.pbs.org/wgbh/americanexperience/features/t-town-red-summer-racist-mobs/>> (as of Sept. 8, 2021) (*Red Summer*); *Case for Reparations*, *supra*; Lee, *supra*; Ellis, *J. Edgar Hoover and the “Red Summer” of 1919* (Apr. 1994) 28 J. of Am. Studies 39, 52-54, <<https://history.msu.edu/files/2010/04/Mark-Ellis.pdf>> (as of Sept. 8, 2021).

³⁷⁶ Fain, *supra*.

³⁷⁷ Human Rights Watch, *supra*, at p. 2.

³⁷⁸ Oklahoma H.J.Res. No. 1035 (1997), § 1; Human Rights Watch, *supra*, at p. 38.

³⁷⁹ Human Rights Watch, *supra*, at p. 8.

³⁸⁰ Human Rights Watch, *supra*, at p. 11.

³⁸¹ Human Rights Watch, *supra*, at p. 11.

³⁸² Lee, *supra*.

³⁸³ Lee, *supra*.

³⁸⁴ Lee, *supra*.

³⁸⁵ Lee, *supra*.

³⁸⁶ Lee, *supra*.

³⁸⁷ Lee, *supra*.

³⁸⁸ *Case for Reparations*, *supra*.

³⁸⁹ *Case for Reparations*, *supra*.

pelting homes with rocks, throwing bricks and firebombs at homes, setting garages on fire, and beating Black neighbors in the streets.³⁹⁰

H. Political Terror

Just as groups of white people responded violently to Black economic gains, they also resorted to violence to set back Black political gains. Black voters, and political candidates favored by Black voters, were intimidated and sometimes murdered.³⁹¹ By using violence, white Americans kept their grip on political power. They used this power to oppress Black Americans and prevent Black Americans from achieving equal levels of wealth and political influence.

Reconstruction—and the resulting political gains made by Black Americans—provoked violent backlash from white southerners.³⁹² Violence typically soared right before elections, as the Ku Klux Klan and other white supremacist groups strategically targeted their violence to deny Black voters access to the polls, or to sway election results by forcing Black voters to vote for Democrats.³⁹³ As white supremacists killed thousands of Black Americans over numerous attacks during Reconstruction,³⁹⁴ the balance of power began to shift against Reconstruction and Republicans.³⁹⁵

For example, in 1868, in response to growing Black support for white Republican candidates in St. Landry Parish, Louisiana, white people terrorized the Black community.³⁹⁶ Over the course of two weeks, the attacks left more than 100 Black people dead—and by some estimates, over 200.³⁹⁷ The white attackers achieved their intended effect: although the parish gave 5,000 votes to the Republican governor in the spring 1868 election, there was not a single Republican vote counted in the fall 1868 election in the parish.³⁹⁸ The Republican Party was unable to recover in the parish for the remainder of Reconstruction.³⁹⁹

White supremacists also assassinated political figures. On the eve of the 1868 election, KKK members murdered James Hinds, a white Republican member of the U.S. House of Representatives who advocated for Black civil rights.⁴⁰⁰ This was the first-ever assassination of a U.S. congressman.⁴⁰¹ Benjamin Franklin Randolph, a Black state senator from South Carolina, was assassinated in 1868; the Ku Klux Klan was suspected of his murder, though no one was convicted of the crime.⁴⁰² Similarly, in 1875, election results split

³⁹⁰ Case for Reparations, *supra*.

³⁹¹ Case for Reparations, *supra*.

³⁹² Lawfare, *supra*.

³⁹³ Lawfare, *supra*.

³⁹⁴ Lawfare, *supra*; EJI 3d ed., *supra*, at pp. 9, 12; Boissoneault, *The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 years Ago*, Smithsonian Magazine (Sept. 28, 2018), <[The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 Years Ago | History | Smithsonian Magazine](#)> (as of Sept. 8, 2021) (Boissoneault); Rhodes, *America Is No Stranger to Election Violence* (Nov. 7, 2016) The New Republic, <<https://newrepublic.com/article/138479/america-no-stranger-election-violence>> (as of Sept 8, 2021); Ifill, *supra*, at p. 274.

³⁹⁵ Lawfare, *supra*.

³⁹⁶ EJI 3d ed., *supra*, at p. 12.

³⁹⁷ EJI 3d ed., *supra*, at p. 12; Boissoneault, *supra*.

³⁹⁸ Boissoneault, *supra*; Lawfare, *supra*.

³⁹⁹ Boissoneault, *supra*; Lawfare, *supra*.

⁴⁰⁰ Lawfare, *supra*.

⁴⁰¹ Lawfare, *supra*.

⁴⁰² William C. Hine, *Randolph, Benjamin Franklin* (Nov. 28, 2016) South Carolina Encyclopedia <<https://www.scencyclopedia.org/sce/entries/randolph-benjamin-franklin/>> (as of Feb. 9, 2022).

the Florida legislature evenly between Republicans and Democrats.⁴⁰³ White supremacist assassins broke the tie by killing E.G. Johnson, a Black state senator, to give the Democrats a majority.⁴⁰⁴

After Reconstruction, Southern white politicians sought to advance white supremacy in state governments and to push back against federal laws protecting Black voting rights.⁴⁰⁵ They relied on lynching and vigilante violence to achieve these political goals.⁴⁰⁶ As the national lynching rate soared, in 1892, the Southern-dominated Democratic Party was able to win the White House and a majority of Congress.⁴⁰⁷ In response, the Republican Party abandoned racial equality as part of its platform.⁴⁰⁸ White supremacists were thus able to take control of state governments and pass laws that, in combination with racial terror, suppressed Black voters.⁴⁰⁹ For instance, while more than 90,000 Black citizens voted in South Carolina in 1876, by the end of the 19th century, less than 3,000 Black citizens voted.⁴¹⁰ While Black people represented a majority of registered voters in Mississippi in 1868, only six percent of eligible Black people were registered to vote in Mississippi in 1890.⁴¹¹ And in Louisiana, the number of Black registered voters dropped from 130,344 to 5,320 between 1896 and 1900.⁴¹²

Voter suppression was not always enough for white supremacists. In one instance, they also directly overthrew the local government. After the 1898 election in Wilmington, North Carolina, armed white men overtook the Republican-led city government.⁴¹³ A months-long voter suppression agenda culminated on Election Day, when armed white men patrolled Wilmington to intimidate Black voters and their allies, and white supremacists threatened poll workers as they counted ballots.⁴¹⁴ In one precinct, a group of 150 to 200 white men caused a scuffle, and in the process, stuffed ballot boxes to secure their party's victory.⁴¹⁵ After the election, Black people were massacred in the street.⁴¹⁶ A mob of nearly 2,000 white people indiscriminately murdered between 30 and 100 Black men, women, and children, and forced 2,000 other Black residents off their property.⁴¹⁷

Meanwhile, a mob of over 100 white men occupied the Wilmington city hall and forced city officials to resign under threat of violence.⁴¹⁸ All of those elected officials resigned and were replaced by men selected by an all-white committee.⁴¹⁹ The new city leadership fired all Black municipal employees, and banned prominent Black

⁴⁰³ Lawfare, *supra*.

⁴⁰⁴ Lawfare, *supra*.

⁴⁰⁵ EJI 3d ed., *supra*, at p. 50.

⁴⁰⁶ EJI 3d ed., *supra*, at p. 50; Ifill, *supra*, at p. 276.

⁴⁰⁷ EJI 3d ed., *supra*, at p. 50.

⁴⁰⁸ EJI 3d ed., *supra*, at p. 50.

⁴⁰⁹ Lawfare, *supra*.

⁴¹⁰ Lawfare, *supra*.

⁴¹¹ Ifill, *supra*, at p. 275.

⁴¹² Ifill, *supra*, at p. 275.

⁴¹³ 1898 Race Riot Facts, *supra*.

⁴¹⁴ EJI 2021, *supra*.

⁴¹⁵ EJI 2021, *supra*; 1898 Race Riot Facts, *supra*.

⁴¹⁶ EJI, *Political Violence and Racial Inequity in America* (Jan. 19, 2021), <<https://eji.org/news/political-violence-and-racial-inequality-in-america/>> (as of Oct. 22, 2021) (EJI 2021); Mack, *Over a century later, facts of 1898 race riots released* (Dec. 16, 2015) Star News Online, <<https://web.archive.org/web/20210827072550/https://www.starnews.com/news/20051216/over-a-century-later-facts-of-1898-race-riots-released>> (archived Aug. 27, 2021) (1898 Race Riot Facts); Lee, *How America's Vast Racial Wealth Gap Grew: By Plunder* (Aug. 18, 2019), New York Times, <<https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>> (as of Oct. 22, 2021) (Lee).

⁴¹⁷ EJI 2021, *supra*; 1898 Race Riot Facts, *supra*; Lee, *supra*.

⁴¹⁸ EJI 2021, *supra*.

⁴¹⁹ 1898 Race Riot Facts, *supra*.

leaders, Black businessmen, and white Republicans from the city.⁴²⁰ There was no state investigation of the violence in Wilmington, and the federal investigation produced no indictments.⁴²¹ To date, this has been the only successful coup d'état of a U.S. American government.⁴²²

Similar political violence continued into the 20th century. In Ocoee, Florida, on Election Day 1920, a mob of 250 white people, including KKK members, killed dozens of Black Americans, set fire to their homes, and drove them out of the city to prevent them from voting.⁴²³ This massacre has been called the “single bloodiest election day in modern American history.”⁴²⁴

Due to this extensive history of violence and political repression, it was not always necessary for the KKK or other white supremacists to take direct violent action to intimidate Black voters from the polls. Threats were often just as effective. For example, in August 1922, just a year after the Tulsa massacre, the KKK reportedly flew over Oklahoma City in airplanes, dropping cards into Black neighborhoods, warning people to be cautious before heading to the polls.⁴²⁵ That same year, the Topeka State Journal reported that the KKK committed to staking out polling places in Texas to “take careful note of the voting procedure.”⁴²⁶

Racist voter intimidation continues in contemporary times. During the 2016 election, neo-Nazi and white supremacist groups, including the KKK and the Oath Keepers, organized poll watchers in all 50 states, focusing on urban areas.⁴²⁷ In the 2020 presidential debate, President Trump told his supporters to “go into the polls and watch very closely,” and told a white supremacist organization, the Proud Boys, to “stand by.”⁴²⁸

The racist overtones that surrounded the 2020 election culminated in the January 6, 2021 Capitol Riot, where armed white people violently stormed the U.S. Capitol while Congress was counting the electoral vote.⁴²⁹ The rioters shouted racist epithets at Black Capitol Police officers, paraded around the Capitol waving a Confederate

⁴²⁰ 1898 Race Riot Facts, *supra*.

⁴²¹ 1898 Race Riot Facts, *supra*.

⁴²² EJI 2021, *supra*.

⁴²³ Kaur, *On this day 100 years ago, a White mob unleashed the deadliest Election Day violence in US history* (Nov. 2, 2020) CNN, <<https://www.cnn.com/2020/11/02/us/ocoe-massacre-100th-anniversary-trnd/index.html>> (as of Nov. 12, 2021) (Kaur).

⁴²⁴ Caste, *supra*, pp. 228-29; Kaur, *supra*.

⁴²⁵ Bump, *The long history of black voter suppression in American politics* (Nov. 2, 2016) Washington Post, <<https://www.washingtonpost.com/news/the-fix/wp/2016/11/02/the-long-history-of-black-voter-suppression-in-american-politics/>> (Bump).

⁴²⁶ Bump, *supra*.

⁴²⁷ Schreckinger, *White nationalists plot Election day show of force* (Nov. 2, 2016) Politico, <<https://www.politico.com/story/2016/11/suppress-black-vote-trump-campaign-230616>> (as of Sept. 8, 2021).

⁴²⁸ Buhl, *Donald Trump's Call to Militia to 'Watch' Polling Places Raises Fears of Voter Intimidation* (Oct. 17, 2020) Newsweek, <<https://www.newsweek.com/donald-trumps-call-militia-watch-polling-places-raises-fears-voter-intimidation-1539900>> (as of Sept. 8, 2021).

⁴²⁹ Lisa Mascaro et al., *Pro-Trump mob storms US Capitol in bid to overturn election* (Jan. 5, 2021—though n.b. the listed date of publication is obviously an error) Associated Press, <<https://apnews.com/article/congress-confirm-joe-biden-78104aea082995bbd7412a6e6cd13818>> (as of Nov. 12, 2021).

flag,⁴³⁰ and built a gallows to hang a noose in front of the Capitol building.⁴³¹ This was the first time the Confederate flag was brought into the Capitol as an act of insurrection, something that was not even done during the Civil War.⁴³²

Further discussion of the use of violence and terror to suppress the development and rise of Black political power is in Chapter [XX].

I. Intimidation Tactics and Cross-Burning

Even when not physical in nature, the perpetrators of racial terror used the threat of violence to intimidate Black Americans and preserve the American racial hierarchy. The Ku Klux Klan, for example, often conducted masked rides through towns at night to frighten Black residents, an intimidation technique that mirrored antebellum slave patrols.⁴³³ As discussed above, slave patrols used violence to discipline enslaved persons, prevent uprisings, and capture enslaved persons who managed to escape.⁴³⁴ Furthermore, the KKK's disguises were designed to capitalize on the superstitions of formerly enslaved people and resembled plantation scare tactics.⁴³⁵

The KKK also frequently burned crosses.⁴³⁶ While the cross-burning itself may not have physically harmed anyone, it undoubtedly became a well-known symbol of racial terror to intimidate minorities.⁴³⁷ During oral argument in *Virginia v. Black*, a 2002 case contemplating whether a state could criminalize burning a cross, Justice Thomas made a point of connecting the “symbol” of cross-burning to its terrorizing effect: the burning cross is “unlike any symbol in our society There’s no other purpose to the cross, no communication, no particular message.”⁴³⁸ As he explained, the burning cross “was intended to cause fear and to terrorize a population.”⁴³⁹ In his opinion in the case, Justice Thomas observed that a cross-burning could serve only to

⁴³⁰ Montanaro, *Capitol Police Officer Testifies To The Racism He Faced During The Jan. 6 Riot* (July 27, 2021) NPR, <<https://www.npr.org/2021/07/27/1021197474/capitol-police-officer-testifies-to-the-racism-he-faced-during-the-jan-6-riot>> (as of Sept. 8, 2021); Morrison, *Racism of rioters takes center stage in Jan. 6 hearing* (July 28, 2021) AP News, <<https://apnews.com/article/joe-biden-government-and-politics-riots-race-and-ethnicity-capitol-siege-b3eb4a7f1a0d183c9db89a08c84a70cb>> (as of Sept. 8, 2021).

⁴³¹ MacFarlane, *Noose Displaced at Capitol Insurrection in FBI's Custody* (Nov. 1, 2021) NBC Washington, <<https://www.nbcwashington.com/news/local/noose-displayed-at-capitol-insurrection-in-fbis-custody/2863204/>> (as of Dec. 13, 2021).

⁴³² Cramer, *Confederate Flag an Unnerving Sight in Capitol* (Jan. 14, 2021) New York Times, <<https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html>> (as of Sept. 8, 2021).

⁴³³ Klanwatch Project of the Southern Poverty Law Center, *Ku Klux Klan: A History of Racism and Violence* (2011), pp. 10-11 <<https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf>> (as of Oct. 20, 2021) (SPLC History).

⁴³⁴ Slave Patrols, *supra*.

⁴³⁵ Robb, *Two Men in KKK Disguises: A Photograph from Reconstruction Alabama* (July 2017) 70(3) Ala. Review 222, 238-39 (Robb).

⁴³⁶ Anti-Defamation League, *Burning Cross*, <<https://www.adl.org/education/references/hate-symbols/burning-cross>> (as of Nov. 12, 2021).

⁴³⁷ Koerner, *Why Does the Ku Klux Klan Burn Crosses?* (Dec. 17, 2002) Slate, <<https://slate.com/news-and-politics/2002/12/why-does-the-ku-klux-klan-burn-crosses.html>> (as of Oct. 20, 2021).

⁴³⁸ Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning* (Dec. 12, 2002) New York Times, <<https://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on-cross-burning.html>> (as of Oct. 20, 2021) (Greenhouse).

⁴³⁹ Greenhouse, *supra*.

“terrorize and intimidate”: “In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”⁴⁴⁰

Government entities have also used tactics of racial intimidation to subjugate Black citizens and enforce white supremacy. The State of Mississippi, for example, created the Mississippi State Sovereignty Commission, which formally existed from 1956 to 1977, and was funded from the state budget.⁴⁴¹ The Sovereignty Commission was an intelligence organization targeting civil rights activists and engaged in spying, intimidation, false imprisonment, and jury tampering.⁴⁴² The Sovereignty Commission served as a model for similar agencies fighting to oppose racial justice in other states.⁴⁴³ The Sovereignty Commission’s activity was involved in the false imprisonment of Clyde Kennard.⁴⁴⁴ Kennard, a Black man, attempted to integrate a segregated local college in Hattiesburg, Mississippi.⁴⁴⁵ Files of the Sovereignty Commission reveal that state officials openly discussed that they would prefer to kill or frame Kennard rather than allow him to enroll.⁴⁴⁶

J. California

1. “Good” Western Vigilantism vs. “Bad” Southern Terror

In its first decades of statehood, California had a reputation for vigilantism, including extralegal executions by hanging.⁴⁴⁷ For example, the lynching of people who committed crimes was a common method of “justice” in gold mines,⁴⁴⁸ and Placerville was originally known as “Hangtown.”⁴⁴⁹ As in the South, California lynchings involved active participation by law enforcement.⁴⁵⁰

Ken Gonzales-Day, an expert in California lynchings, found evidence of 352 lynchings that occurred between 1850 and 1935, including of eight Black Americans, but mostly of Native, Chinese, and Latino Americans.⁴⁵¹ As was the case elsewhere in the United States, Black Californians were often lynched in response to labor disputes or alleged crimes.⁴⁵² In the 1871 Chinese massacre, 10 percent of Los Angeles (500 people) formed a

⁴⁴⁰ *Virginia v. Black* (2003) 538 U.S. 343, 391, 394 (dis. opn. of Thomas, J.).

⁴⁴¹ Kevin Sack, *Mississippi Reveals Dark Secrets of a Racist Time* (March 18, 1998) *New York Times*, <<https://www.nytimes.com/1998/03/18/us/mississippi-reveals-dark-secrets-of-a-racist-time.html>> (as of Jan. 24, 2022) (Sack).

⁴⁴² Sack, *supra*.

⁴⁴³ Sack, *supra*.

⁴⁴⁴ Adam Liptak, *Pardon Unlikely for Civil Rights Advocate* (May 4, 2006) *New York Times*, <<https://www.nytimes.com/2006/05/04/us/04pardon.html>> (as of Jan. 24, 2022) (Liptak).

⁴⁴⁵ Liptak, *supra*.

⁴⁴⁶ Liptak, *supra*.

⁴⁴⁷ Hudson, *supra*, at p. 134

⁴⁴⁸ Hudson, *supra*, at p. 134.

⁴⁴⁹ Hudson, *supra*, at p. 134.

⁴⁵⁰ Newsom Amicus Brief, *supra*, at p. 36, citing Caarrigan & Webb, at pp. 414-17.

⁴⁵¹ Hudson, *supra*, at p. 136.

⁴⁵² Rudolph M. Lapp, *Blacks in Gold Rush California* (1977), p. 261; *Lynching Case at Newtown* (Mar. 14, 1852) *Daily Alta California*, Vol. 3, No. 72, p. 2 <<https://cdnc.ucr.edu/?a=d&d=DAC18520314.2.8&e=-----en--20--1--txt-txIN-----1>> (as of Feb. 9, 2022); Louise Amelia Knapp Smith Clappe, *The Shirley Letters from California Mines in 1851-52* (1922), pp. 272-73; *Hanging at Nicolaus* (June 15, 1852) *Daily Alta California*, Vol. 3, No. 166, p. 2 <<https://cdnc.ucr.edu/?a=d&d=DAC18520615.2.9&e=-----en--20--1--txt-txIN-----1>> (as of Feb. 9, 2022); *Great Excitement at Mormon Island* (Jan. 29, 1853) *Sacramento Daily Union*, Vol. 4, No. 578, p. 2 <<https://cdnc.ucr.edu/?a=d&d=SDU18530129.2.9&e=-----en--20--1--txt-txIN-----1>> (as of Feb. 9, 2022).

mob and lynched 17 Chinese men and boys because they believed that Chinese people had killed a white saloon owner.⁴⁵³ Barely anyone was held accountable for these and the other many murders of people of color.⁴⁵⁴

A 1933 lynching of two white kidnapers in San Jose put a stamp of approval on lynching nationwide.⁴⁵⁵ The lynching received more attention than any other lynching in U.S. history, partly because the victims were white—an anomaly for lynchings.⁴⁵⁶ Then-California Governor James Rolph praised the lynchers and vowed to pardon them if they were charged.⁴⁵⁷ Although the victims in the San Jose lynching were white, anti-lynching activists understood at the time that Black Americans, who were the typical target of lynchings, would face the repercussions for the glorification of the San Jose lynching.⁴⁵⁸ As such, they swiftly and widely condemned the lynching and the Governor’s response.⁴⁵⁹

The anti-lynching activists were correct: mobs in other parts of the country followed the Governor’s enthusiastic endorsement to perpetrate their own lynchings, mostly of Black Americans.⁴⁶⁰ The fact that the San Jose lynching occurred in the West underscored that lynching was a national, not solely Southern, problem.⁴⁶¹ But the lynching and the subsequent praise of the mob by the Governor also lent credibility to the practice of lynching and decoupled its exclusive association with Jim Crow.⁴⁶² The *New York Times* reported that southerners widely reacted to the San Jose lynching by remarking, “California’s my address from now on,” or “those Westerners are learning how the South handles ‘em.”⁴⁶³ In fact, by endorsing the practice of lynching, the Governor of California went *further* than some Southern governors who had sought to prevent lynchings.⁴⁶⁴

2. Racial Terror as a Response to Black Prosperity in California

As was the case elsewhere in the country, the Ku Klux Klan and other perpetrators of racial violence in California focused their attacks against those who threatened the system of racial and socioeconomic subjugation of Black Americans—those Black people who found well-paying jobs, amassed wealth, bought homes, used public pools and parks, and otherwise engaged in civil society.

The surge of KKK activity, and its accompanying violence, was connected to the migration of over a quarter million Black Americans to California during World War II—the state with the largest increase in its Black population during that time.⁴⁶⁵ The “Great Migration” was inspired, at least in part, by the recurring incidents of racial terror throughout the South, as well as the poor economic, political, and social conditions that Black

⁴⁵³ Wallace, *Forgotten Los Angeles History: The Chinese Massacre of 1871* (May 19, 2017) Los Angeles Public Library, <<https://www.lapl.org/collections-resources/blogs/lapl/chinese-massacre-1871>> (as of Sept. 8, 2021) (Chinese Massacre of 1871) see also Dorland, *Chinese Massacre at Los Angeles in 1871* (1894) 3(2) Annual Publication of the Historical Society of Southern California, Los Angeles, 22-26, <<https://www.jstor.org/stable/pdf/41167579.pdf>> (as of Sept. 8, 2021).

⁴⁵⁴ Chinese Massacre of 1871, *supra* (charges on eight rioters were overturned on a legal technicality); Newsom Amicus Brief, *supra*, at p. 35, citing Carrigan & Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928* (2003) 37 J. Soc. Hist. 411, 417 (noting “almost no white man was ever made to stand trial for a lynching of a Mexican”) (Carrigan & Webb).

⁴⁵⁵ Hudson, *supra*, at p. 145.

⁴⁵⁶ Hudson, *supra*, at p. 11.

⁴⁵⁷ Hudson, *supra*, at p. 144.

⁴⁵⁸ Hudson, *supra*, at pp. 144-45.

⁴⁵⁹ Hudson, *supra*, at pp. 144-45, 148.

⁴⁶⁰ Hudson, *supra*, at p. 145.

⁴⁶¹ Hudson, *supra*, at p. 147.

⁴⁶² Hudson, *supra*, at p. 165.

⁴⁶³ Hudson, *supra*, at p. 146.

⁴⁶⁴ Hudson, *supra*, at p. 146.

⁴⁶⁵ Hudson, *supra*, at p. 189.

southerners experienced.⁴⁶⁶ California, which was experiencing a dramatic increase in manufacturing jobs during World War II, was an appealing destination.⁴⁶⁷ California's Black wartime workers, as the Black press noted, had a higher standard of living compared to Black workers in the South.⁴⁶⁸ Simultaneously, new KKK members moved to California during World War II just as Black homeowners renewed their offensive against restricted housing.⁴⁶⁹

The comparative freedoms that Black Californians enjoyed motivated white supremacists to organize against Black workers and homeowners (as well as other non-white veterans, such as Mexican and Japanese veterans, returning from the war).⁴⁷⁰ White people were threatened by Black Americans with good jobs who purchased property, voted, and inhabited public spaces and institutions.⁴⁷¹ Fearful of a growing Black population, and emboldened by the silence and cooperation of police and government officials, the KKK initiated a new wave of violent activity in the late 1930s and 1940s to stem the influx of Black populations—or to keep Black people entirely out of white communities.⁴⁷² For instance, the KKK's resurgence in the Inland Empire and Southern California in the 1940s was linked to the gains made by Black workers, homeowners, and civil rights activists.⁴⁷³

Throughout California, the revived KKK had one primary goal: to enforce racial segregation and maintain the social inferiority of Black Americans.⁴⁷⁴ They aimed to keep neighborhoods, schools, pools, parks, and beaches all-white and monitor people of color who transgressed racial boundaries.⁴⁷⁵ For further discussion of residential segregation, see Chapter [XX] on housing.

3. Violence Against Black Homeowners in California

Violence to stifle and reverse Black advancement was perhaps most evident in the attacks on Black homeowners during the 1940s. As new Black migrants were able to afford homeownership, white supremacist backlash grew.⁴⁷⁶ The Ku Klux Klan sought to promote segregation and prevent the integration of Black residents into white neighborhoods.⁴⁷⁷ Violence against Black homeowners in California peaked in the 1940s.⁴⁷⁸ The KKK mainly relied on arson and physical attacks on homeowners to intimidate people of color from buying in majority-white neighborhoods.⁴⁷⁹ This practice dates back to 1909, when white Pasadena residents set fire to the homes of Black arrivals in the neighborhood.⁴⁸⁰

This violence was thoroughly racist. The violence against Black homeowners was not caused by concern over a “lower social class of neighbors,” as the Black homeowners were often of a higher occupational and social

⁴⁶⁶ Ifill, *supra*, at p. 293; Hudson, *supra*, at p. 188.

⁴⁶⁷ Hudson, *supra*, at p. 188.

⁴⁶⁸ Hudson, *supra*, at p. 190.

⁴⁶⁹ Hudson, *supra*, at p. 169.

⁴⁷⁰ Hudson, *supra*, at pp. 169, 190.

⁴⁷¹ Hudson, *supra*, at p. 207.

⁴⁷² Hudson, *supra*, at pp. 174-75, 188.

⁴⁷³ Hudson, *supra*, at p. 201.

⁴⁷⁴ See, e.g., Hudson, *supra*, at p. 190.

⁴⁷⁵ Hudson, *supra*, at pp. 168-69, 190.

⁴⁷⁶ Hudson, *supra*, at pp. 189-90.

⁴⁷⁷ Hudson, *supra*, at pp. 189-90.

⁴⁷⁸ Hudson, *supra*, at p. 168.

⁴⁷⁹ Hudson, *supra*, at p. 190.

⁴⁸⁰ Hudson, *supra*, at p. 13.

status than the white attackers.⁴⁸¹ When Black homeowners moved into a neighborhood, they were “on their best behavior,” giving no cause for complaint, and taking care of their homes and lawns more than their white neighbors.⁴⁸²

The murder of O’Day Short, a refrigeration engineer, is emblematic of the racial terror perpetrated against Black communities during the 1940s in California. After he and his family moved into the white neighborhood of Fontana in 1945, Short was threatened by police, and a local vigilante group said it wanted the Shorts out of the neighborhood.⁴⁸³ On December 6, 1945, two weeks after they moved in, the Shorts died in a house fire that killed the family of four.⁴⁸⁴ As with much of the violence against Black Americans, state officials failed to hold anyone accountable for the murder, and inexplicably blamed the fire on the Shorts.⁴⁸⁵ Then-California Attorney General Robert W. Kenny investigated the murder, but the report failed to confirm that vigilantes caused the fire or that there was any vigilante activity in the community.⁴⁸⁶ The NAACP called the report a “white wash.”⁴⁸⁷

The murder of the Shorts, and the subsequent failure to hold the perpetrators accountable, confirmed that the tentacles of Jim Crow had extended to California. A Los Angeles Sentinel editorial said: “Jim Crow had kept Short from finding a home in Los Angeles; Jim Crow had cast him in the role of a violator of Community traditions if he built a house on the lot he purchased; Jim Crow had warped the sense of duty of deputy sheriffs to the extent that they themselves had joined in a plan to deprive an American citizen of his constitutional rights...All the Shorts are dead. Only Jim Crow is alive.”⁴⁸⁸

Within months following the explosion at the Shorts’ home, Black homeowners were increasingly under attack by the KKK in Southern California.⁴⁸⁹ For example, the KKK staged a comeback in Big Bear Valley focused on restrictive covenants, violence, and cross burnings.⁴⁹⁰ The KKK’s stated goal was to achieve a “One Hundred Per Cent Gentile Community.”⁴⁹¹

4. California’s Coercive Sterilization of Black Men and Women

As discussed in Chapter [XX], California was one of the first states to begin forcibly sterilizing people in the early 1900s, and conducted by far the most sterilizations in the United States (one third of the nationwide total).⁴⁹² From 1909 to 1979, under the state eugenics law, California state institutions forcibly sterilized approximately 20,000 people deemed “unfit to produce.”⁴⁹³ While men made up the majority of sterilizations at first, by the 1930s, women were more frequently the subject of sterilizations, and in the middle of the century,

⁴⁸¹ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017), p. 251 (Color of Law).

⁴⁸² Color of Law, *supra*, at p. 251.

⁴⁸³ Hudson, *supra*, at p. 193.

⁴⁸⁴ Hudson, *supra*, at p. 193.

⁴⁸⁵ Hudson, *supra*, at p. 193.

⁴⁸⁶ Hudson, *supra*, at p. 197, 205.

⁴⁸⁷ Hudson, *supra*, at p. 205.

⁴⁸⁸ Hudson, *supra*, at p. 199.

⁴⁸⁹ Hudson, *supra*, at p. 199.

⁴⁹⁰ Hudson, *supra*, at p. 202.

⁴⁹¹ Hudson, *supra*, at p. 202.

⁴⁹² Hawkins, *California once forcibly sterilized people by the thousands. Now the victims may get reparations.* (July 9, 2021)

Washington Post, <<https://www.washingtonpost.com/nation/2021/07/09/california-once-forcibly-sterilized-people-by-thousands-now-victims-may-get-reparations/>> (as of Sept. 8, 2021) (Hawkins).

⁴⁹³ Jindia, *Belly of the Beast: California’s dark history of forced sterilizations* (June 30, 2020) The Guardian,

<<https://www.theguardian.com/us-news/2020/jun/30/california-prisons-forced-sterilizations-belly-beast>> (as of Sept. 8, 2021).

nearly all of the operations were performed on women.⁴⁹⁴ Black people were also disproportionately sterilized in California.⁴⁹⁵ They constituted just over one percent of California's population in the 1920s, yet they accounted for four percent of total sterilizations by the State of California.⁴⁹⁶

5. Extrajudicial Police Violence in California

Scholars have argued that extrajudicial violence by police officers represents a modern form of lynching. In California, since 2015, 158 Black people were shot and killed by police, at least 16 of whom were known to be unarmed.⁴⁹⁷ Among those whose race and ethnicity were known, Black people represent 18.9 percent of those killed by the police, despite representing only six percent of the population.⁴⁹⁸ Those responsible for these killings have largely never been found to be criminally liable.⁴⁹⁹ The Los Angeles Times reports, for example, that since 2001, Los Angeles County law enforcement has killed over 900 people—nearly 80 percent of whom were Black or Latino.⁵⁰⁰ On average, one police shooting occurred every five days.⁵⁰¹ Out of all of those cases, only two officers were charged as a result of a civilian shot on duty, and in virtually all of the cases, the Los Angeles District Attorney deemed the use of force legally justified.⁵⁰² Similarly, officers with the Vallejo Police Department killed 19 people from 2010 to 2020, but no Vallejo police officer has been found to be criminally liable for killing a civilian while on duty.⁵⁰³

Below are only a few examples of the hundreds of incidents where police have used extrajudicial violence in California to inflict pain or cause death, a topic that is discussed in greater detail in Chapter 11 on the legal system. IN general, these acts of violence were often the result of officers enflaming or failing to de-escalate the situation, and sometimes occurred in a manner that appeared to show little regard for the Black lives harmed or killed. Taken together, these incidents can be understood to perpetuate the myth of Black criminality and function as a threat to the overall well-being of Black people, whom law enforcement may often consciously or unconsciously view as dangerous criminals.

⁴⁹⁴ Hawkins, *supra*.

⁴⁹⁵ Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California* (July 2005) 95(7) Am. J. of Pub. Health. 1128, 1131, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449330/pdf/0951128.pdf>> (as of Nov. 12, 2021) (Stern); see also Health Section, *infra*.

⁴⁹⁶ Stern, *supra*, at p. 1131.

⁴⁹⁷ *Fatal Force*, Washington Post, <<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>> (as of Sept. 8, 2021) (*Fatal Force*).

⁴⁹⁸ *Fatal Force*, *supra*; U.S. Census, *Quick Facts: California*, <<https://www.census.gov/quickfacts/CA>> (as of Sept. 8, 2021).

⁴⁹⁹ Levin, *Los Angeles officers shot at Ryan Twyman 34 times. He was one of four they killed that day* (Aug. 15, 2019) Guardian, <<https://www.theguardian.com/us-news/2019/aug/15/police-shootings-los-angeles-sheriffs-department-ryan-twyman>> (as of Nov. 12, 2021) (Levin).

⁵⁰⁰ Los Angeles Times, *Los Angeles Police Killings Database* (last updated Nov. 4, 2021), <<https://www.latimes.com/projects/los-angeles-police-killings-database/>> (as of Nov. 12, 2021).

⁵⁰¹ Levin, *supra*; Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1506 (1999-2000 Reg. Sess.) Aug. 11, 2020, p. 7, <https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1506> (as of Sept. 8, 2021) (AB 1506 Analysis).

⁵⁰² AB 1506 Analysis, *supra*, at p. 7.

⁵⁰³ AB 1506 Analysis, *supra*, at p. 7.

- In 1991, four LAPD officers repeatedly beat Rodney King on the ground with batons for 15 minutes while a dozen officers stood by and watched.⁵⁰⁴ He was unarmed.⁵⁰⁵ The officers had used racial slurs to refer to King over the LAPD communications systems.⁵⁰⁶ The officers who committed the beating—three of whom were white—were acquitted, which sparked local unrest.⁵⁰⁷
- In 1998, four officers were called to help Tyisha Miller, who had locked herself in the car and fallen asleep.⁵⁰⁸ When the officers failed to wake her from outside, they broke her window to grab the firearm that was sitting in her lap.⁵⁰⁹ That caused Miller to bolt upright, and the officers shot her out of fear—firing 24 bullets and shooting her 12 times in the chest.⁵¹⁰ While the officers were fired, the U.S. Justice Department’s civil rights division—as well as the California Department of Justice, which was conducting a civil investigation into the police department as a whole—declined to bring charges against the individual officers.⁵¹¹
- On New Years’ Day 2009, Bay Area Rapid Transit police officers responded to a report of fighting on a train.⁵¹² One officer pinned down Oscar Grant down with a knee on his neck.⁵¹³ While Grant was lying face-down, the other officer purportedly mistook his gun for a Taser and shot Grant.⁵¹⁴ The officer who shot Grant was convicted of involuntary manslaughter.⁵¹⁵
- In November 2013, Tyler Damon Woods was shot by police while on his knees after fleeing a traffic stop by foot.⁵¹⁶ The officers believed he was armed, which was inaccurate, and shot at Woods approximately 39 times.⁵¹⁷ Nineteen bullets hit him, six of which were each individually enough to kill Woods.⁵¹⁸ The police continued to shoot him, claiming he exhibited superhuman resilience.⁵¹⁹

⁵⁰⁴ Sastry and Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots* (Apr. 26, 2017) NPR, <<https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>> (as of Nov. 12, 2021) (Rodney King Riots).

⁵⁰⁵ Rodney King Riots, *supra*.

⁵⁰⁶ Orlov, *Police messages unearthed – Comments by officers called racist* (Mar. 19, 1991) Los Angeles Daily News, <<https://www.dailybreeze.com/2012/04/19/police-messages-unearthed-comments-by-officers-called-racist/>> (as of Sept. 8, 2021).

⁵⁰⁷ Rodney King Riots, *supra*.

⁵⁰⁸ Rosenzweig, *No Charges in Killing of Tyisha Miller* (Dec. 13, 2002) Los Angeles Times, <<https://www.latimes.com/archives/la-xpm-2002-dec-13-me-tyisha13-story.html>> (as of Nov. 12, 2021) (Killing of Tyisha Miller).

⁵⁰⁹ Killing of Tyisha Miller, *supra*.

⁵¹⁰ Killing of Tyisha Miller, *supra*.

⁵¹¹ Killing of Tyisha Miller, *supra*.

⁵¹² Leonard, *Former BART officer convicted of involuntary manslaughter* (July 8, 2010) Los Angeles Times, <<https://www.latimes.com/archives/la-xpm-2010-jul-08-la-me-bart-verdict-20100709-story.html>> (as of Sept. 8, 2021).

⁵¹³ *Investigation reopens into death of Oscar Grant, a Black man killed by a BART transit officer in 2009* (Oct. 6, 2020) Los Angeles Times, <<https://www.latimes.com/california/story/2020-10-06/killing-of-oscar-grant-by-bart-transit-officer-being-reinvestigated>> (as of Nov. 12, 2021) (Killing of Oscar Grant); Leonard, *Former BART officer convicted of involuntary manslaughter* (July 8, 2010) Los Angeles Times, <<https://www.latimes.com/archives/la-xpm-2010-jul-08-la-me-bart-verdict-20100709-story.html>> (as of Sept. 8, 2021).

⁵¹⁴ Killing of Oscar Grant, *supra*.

⁵¹⁵ Malaika Fraley, *Oscar Grant Case: Civil Jury Rules in Favor of Johannes Mehserle, Denies Award to Slain Man’s Father* (updated Aug. 12, 2016) <<https://www.mercurynews.com/2014/07/01/oscar-grant-case-civil-jury-rules-in-favor-of-johannes-mehserle-denies-award-to-slain-mans-father/>> (as of Feb. 10, 2022).

⁵¹⁶ Moxley, *SoCal Cops Are Still Defending 39-Bullet Barrage on Unarmed Man* (Mar. 14, 2018) OC Weekly, <[SoCal Cops Are Still Defending 39-Bullet Barrage on Unarmed Man – OC Weekly](#)> (as of Sept. 8, 2021) (Moxley).

⁵¹⁷ Moxley, *supra*.

⁵¹⁸ Moxley, *supra*.

⁵¹⁹ Moxley, *supra*.

DRAFT FOR TASK FORCE MEMBER REVIEW

FOOTNOTES AND REFERENCES WILL BE COMPLETED AT A LATER DATE

- In 2019, Vallejo police responded to a wellness request for Willie McCoy, a 20-year-old Black man who was asleep in his car in a Taco Bell parking lot.⁵²⁰ Six officers surrounded the cars when McCoy started to wake up.⁵²¹ The police claimed that McCoy was reaching for a firearm—which did not appear to be supported by the police video—and six police officers fired 55 shots at McCoy, killing him.⁵²² All of the officers involved in the shooting returned to their regular duties. McCoy’s family said McCoy was “executed by a firing squad.”⁵²³
- In August 2020, the Los Angeles County Sheriff’s Department stopped Dijon Kizzee for “riding a bicycle on the wrong side of the road” and “splitting traffic.”⁵²⁴ Kizzee refused to stop, abandoned his bicycle, and fled on foot.⁵²⁵ The Sheriff’s office claims that deputies fired when Kizzee reached back to pick up a gun he dropped, but video evidence appears to contradict this claim.⁵²⁶ An independent autopsy concluded that Kizzee was struck 15 times by two deputies’ 19 rounds.⁵²⁷ After they fired, the deputies called for backup, and Kizzee bled to death on the street.⁵²⁸

There have also been incidents where law enforcement officers in California have participated in racist, nativist, and sexist social media activity online; showed white supremacist sympathies; or worse, systematically carried out attacks against minority members of the community.⁵²⁹ In the 1990s, a federal district court found that a group of deputies in the Los Angeles County Sheriff’s Department, known as the Lynwood Vikings, was “a neo-Nazi, white supremacist gang” that engaged in “terrorist-type tactics” with the knowledge and acquiescence of their superiors.⁵³⁰ The court found that these gangs committed “systemic acts of shooting, killing, brutality, terrorism, house-trashing, and other acts of lawlessness and wanton abuse of power,” particularly against Latinos and Black people.⁵³¹ In 1996, the Sheriff’s Department paid \$9 million in fines and training costs to settle the matter.⁵³² Despite that settlement, according to independent reports, law enforcement gangs still allegedly thrive in low-income, high-minority areas of Los Angeles, where they have allegedly committed

⁵²⁰ Guevarra, *The Life and Death of Willie McCoy* (Aug. 19, 2019) KQED, <<https://www.kqed.org/news/11768008/the-life-and-death-of-willie-mccoy/>> (as of Nov. 12, 2021) (Death of Willie McCoy).

⁵²¹ Death of Willie McCoy, *supra*.

⁵²² Death of Willie McCoy, *supra*.

⁵²³ Levin, ‘Executed by firing squad’: video shows police firing a dozen shots at man (Feb. 14, 2019) Guardian, <[Executed by firing squad: video shows police firing a dozen shots at man | US policing | The Guardian](#)> (as of Sept. 8, 2021).

⁵²⁴ Moon, *Independent autopsy shows Dijon Kizzee was struck 15 times by LA Sheriff’s deputies, according to family attorneys* (Sept. 23, 2020) CNN, <<https://www.cnn.com/2020/09/22/us/private-autopsy-report-police-shooting-dijon-kizzee/index.html>> (as of Sept. 8, 2021) (Killing of Dijon Kizzee).

⁵²⁵ Killing of Dijon Kizzee, *supra*.

⁵²⁶ Killing of Dijon Kizzee, *supra*.

⁵²⁷ Killing of Dijon Kizzee, *supra*.

⁵²⁸ Killing of Dijon Kizzee, *supra*.

⁵²⁹ German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement* (Aug. 27, 2020) Brennan Center for Justice, <<https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>> (as of Sept. 8, 2021) (Brennan Center).

⁵³⁰ Tobar, *Deputies in ‘Neo-Nazi’ Gang, Judge Found: Sheriff’s Department: Many at Lynwood office have engaged in racially motivated violence against blacks and Latinos, jurist wrote* (Oct. 12, 1991) Los Angeles Times, <<https://www.latimes.com/archives/la-xpm-1991-10-12-me-107-story.html>> (as of Nov. 12, 2021) (Deputies in Neo-Nazi Gang).

⁵³¹ Deputies in Neo-Nazi Gang, *supra*.

⁵³² O’Connor and Daunt, *The Secret Society Among Lawmen* (Mar. 24, 1999) Los Angeles Times, <<https://www.latimes.com/archives/la-xpm-1999-mar-24-mn-20461-story.html>> (as of Sept. 8, 2021).

excessive force against minority members of the communities, sometimes using racial epithets while doing so.⁵³³

VI. Legacy and Effects of Racial Terror

As discussed above, racial terror played a critical role in white efforts to subjugate Black people to an inferior economic, political, and social stature and maintain the caste structure that was established during enslavement. As such, racial terror has contributed to many racial inequities in America today.⁵³⁴ While Black communities have remained resilient in the face of numerous structural, social, economic, and political barriers, the threat of racial violence continues to harm Black Americans.⁵³⁵

A. Criminal Justice

The legacy of the Ku Klux Klan's infiltration of law enforcement continues today. Law enforcement officers in at least 14 states, including California, have been tied to white supremacist groups and far-right militant activities.⁵³⁶ Advocates and scholars have argued that police killings of unarmed Black people should be understood as the modern-day equivalent of lynching. Just as the threat of lynching controlled Black Americans, the threat of murder by police controls the lives of Black Americans. Today, Black parents have to educate their children early on about how to interact with the inevitability of racialized targeting by the police.⁵³⁷ As was the case with lynchings, those involved in these extrajudicial killings are only rarely held accountable for their actions.⁵³⁸

Created during enslavement in order for white enslavers to control Black enslaved people, and perpetuated through lynchings, the racist myth that Black people are criminals continues today. As discussed in the Chapter 11 on the legal system, this myth of Black criminality still contributes to racial disparities between Black and white Americans in arrests, convictions, and imprisonment.⁵³⁹ The death penalty, which scholars argue is a vestige of racialized violence against Black Americans, also discussed in Chapter 11 on the legal system, disproportionately kills Black Americans.⁵⁴⁰ Death penalty lawyer Stephen B. Bright argues that capital punishment in the United States is so thoroughly compromised by bias and racial disparities that it must be understood as “a direct descendent of lynching.”⁵⁴¹

⁵³³ See, e.g., Loyola Law School Loyola Marymount University Center for Juvenile Law & Policy, 50 Years of Deputy Gangs in the Los Angeles County Sheriff's Department (Jan. 2021), <<https://lmu.app.box.com/s/uci2ir4mkpudtvvfp7z8iu4kv1gre1dj>> (as of Sept. 8, 2021); Lockhart, *A new lawsuit describes a violent gang in LA County. Its members are deputy sheriffs.* (Oct. 11, 2019) Vox, <<https://www.vox.com/identities/2019/10/11/20910315/banditos-los-angeles-sheriff-department-lawsuit-gangs>> (as of Sept. 8, 2021); Joseph, Rakia, and Corey, *Claims of Racism and Brutality Dog Los Angeles County Sheriff 'Deputy Gangs'* (Sept. 28, 2018) The Appeal, <<https://theappeal.org/claims-of-racism-brutality-dog-los-angeles-county-sheriff-deputy-gangs/>> (as of Sept. 8, 2021).

⁵³⁴ Ward, *supra*, at p. 611

⁵³⁵ Ward, *supra*, at p. 609; Ifill, *supra*, at p. 287-88.

⁵³⁶ Brennan Center, *supra* (citing numerous news articles).

⁵³⁷ *Utah v. Strieff*, (2016) 136 S. Ct. 2056, 2070 (Sotomayor, J., dissenting) (discussing how Black and Brown parents have given children “the talk” for generations, citing Du Bois, Baldwin, and Coates).

⁵³⁸ AB 1506 Analysis, *supra*, at p. 7.

⁵³⁹ EJI 3d ed., *supra*, at p. 61.

⁵⁴⁰ Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty* (1995) 35 Santa Clara L.Rev. 433, 433-435 (Bright).

⁵⁴¹ Bright, *supra*, at pp. 439, 442-466.

B. Economic Effects

Violence and terror targeting Black Americans has directly destroyed Black wealth—which has a compounding effect over time to prevent Black Americans from amassing more wealth and thus contributing greatly to the wealth gap.⁵⁴² The disparities are stark: white Americans have seven times the wealth of Black Americans.⁵⁴³ Although Black people make up nearly 13 percent of the U.S. population, they hold less than three percent of the nation’s wealth.⁵⁴⁴ The median family wealth for white people is \$171,000, compared to \$17,600 for Black people.⁵⁴⁵ And 19 percent of Black households have zero or negative net worth, compared to nine percent of white families.⁵⁴⁶

Lynchings, police brutality, and other forms of violence and intimidation were used to seize land from Black farmers, rendering Black Americans landless and unable to accumulate generational wealth.⁵⁴⁷ Although Black farmers collectively increased their land holdings at a greater rate than whites between 1900 and 1920, Black farm owners lost 57 percent of their land, whereas white farm owners lost 22 percent of their land, from 1900 to 1978.⁵⁴⁸

Similarly, rates of Black homeownership have stagnated and declined. In 1909, 36 percent of Black residents of Los Angeles were homeowners before the implementation of policies and carrying out of violent acts designed to prevent Black home ownership.⁵⁴⁹ By 2021, the rate of Black homeownership had declined to 34 percent.⁵⁵⁰

The effect of violence by the Ku Klux Klan, buttressed by the support of law enforcement, real estate brokers, and federal loan programs, paved the way for segregated neighborhoods with unequal city services for Black neighborhoods.⁵⁵¹ In Los Angeles, for example, Black residents were pushed to neighborhoods like Watts, while the city stopped running street cars that would have transported Black workers to shipyard and aircraft jobs in other parts of the city, limiting Black employment opportunities.⁵⁵² Even though KKK activities declined after the 1940s, the KKK had already succeeded in restricting Black opportunities for wealth and homeownership at a time of significant economic opportunity after the end of World War II.⁵⁵³

Although the 1968 Fair Housing Act made violence to prevent neighborhood integration a federal crime, and the U.S. Department of Justice prosecuted several cases, frequent attacks on Black Americans attempting to move into predominantly white areas continued into the 1980s, with 130 cases of move-in violence in 1989

⁵⁴² See Lee, *supra*.

⁵⁴³ Lee, *supra*.

⁵⁴⁴ Lee, *supra*.

⁵⁴⁵ Lee, *supra*.

⁵⁴⁶ Lee, *supra*.

⁵⁴⁷ Newkirk, *The Great Land Robbery* (Sept. 2019) The Atlantic, <https://www.theatlantic.com/As_magazine/archive/2019/09/this-land-was-our-land/594742/#Lucas> (as of Sept. 8, 2021).

⁵⁴⁸ Hinson, *supra*, at p. 916.

⁵⁴⁹ Fleischer, *Opinion: Want to tear down insidious monuments to racism and segregation? Bulldoze L.A. freeways* (June 24, 2020) Los Angeles Times, <<https://www.latimes.com/opinion/story/2020-06-24/bulldoze-la-freeways-racism-monument>> (as of Sept. 8, 2021).

⁵⁵⁰ Munoz and Manthey, *Black families own homes at a lower rate than white families in SoCal. Here’s why that matters*, (July 16, 2021) ABC 7 News, <<https://abc7.com/black-homeownership-gap-in-southern-california-real-estate-inglewood-los-angeles/10884320/>> (as of Sept. 8, 2021).

⁵⁵¹ Hudson, *supra*, at p. 206.

⁵⁵² Hudson, *supra*, at pp. 206-07.

⁵⁵³ Hudson, *supra*, at p. 207.

alone.⁵⁵⁴ Not until the late 1980s were a majority of these crimes prosecuted.⁵⁵⁵ The broad lack of enforcement sent a message that these crimes were tolerable, which emboldened perpetrators to continue their violent actions.⁵⁵⁶

C. Impact on Health and Family Life

Fear of racial terror, past and present, has also resulted in trans-generational trauma for Black Americans. Black families and communities were profoundly affected by lynchings.⁵⁵⁷ The constant threat of lynching affected interpersonal interactions.⁵⁵⁸ Family members of victims could not obtain justice out of fear that they too would be lynched, and they were often frightened to even attend a funeral of their lynched loved one.⁵⁵⁹ Images of mutilated bodies on public display or dragged through the streets traumatized the psyche of Black Americans.⁵⁶⁰ These images left an especially indelible impression on Black children, framing their view of the world as a dangerous and unpredictable place, and causing lifelong damage, including sleep disturbances, flashbacks, and emotional detachment.⁵⁶¹

These psychological traumas have extended across generations. Violence has reinforced white supremacist cultural and institutional systems, while the arbitrary nature of lynching socialized Black people to understand that any act of perceived insubordination could be a matter of life or death.⁵⁶² In this way, racial terror was a powerful tool for social, educational, and political control, as it encouraged Black people to change their own behavior and avoid opportunities for advancement, lest they risk being the victim of violence.⁵⁶³

The history of racial terror has influenced the use of violence by both white people and Black people in the present day.⁵⁶⁴ For example, in Mississippi and North Carolina, studies show that Black people are killed at a higher rate in counties that had more lynchings and anti-civil-rights violence.⁵⁶⁵ The legacy of racial terror encourages vigilante violence among white communities.⁵⁶⁶ And, in Black communities, the government's failure to protect Black Americans from lynching has fostered the use of violence for self-help.⁵⁶⁷ As a result, criminologists have linked higher rates of Black involvement in crime with the violent racial subordination of Black Americans.⁵⁶⁸

VII. Conclusion

[Short summary tying racial terror to enslavement]

⁵⁵⁴ Color of Law, *supra*, at p. 147.

⁵⁵⁵ Color of Law, *supra*, at p. 147.

⁵⁵⁶ Color of Law, *supra*, at pp. 257-58.

⁵⁵⁷ Ifill, *supra*, at p. 289.

⁵⁵⁸ Ifill, *supra*, at p. 289.

⁵⁵⁹ Ifill, *supra*, at p. 289.

⁵⁶⁰ Ifill, *supra*, at pp. 289-90.

⁵⁶¹ Ifill, *supra*, at p. 291.

⁵⁶² Ward, *supra*, at p. 607-08; Ifill, *supra*, at p. 287.

⁵⁶³ Ifill, *supra*, at p. 287.

⁵⁶⁴ Ward, *supra*, at p. 608.

⁵⁶⁵ Ward, *supra*, at p. 615.

⁵⁶⁶ Ward, *supra*, at p. 608.

⁵⁶⁷ Ward, *supra*, at p. 608.

⁵⁶⁸ Ward, *supra*, at pp. 608-09.

Lynchings and other forms of racial terror occurred in communities where Black Americans today remain marginalized, disproportionately poor, overrepresented in prisons and jails, and underrepresented in positions of influence. The traumatic experience of surviving mass violence creates insecurity, mistrust, and alienation—psychological harms that were amplified by the dangers inherent in navigating Southern racial boundaries.⁵⁶⁹ Lynchings in the American South were not isolated hate crimes committed by rogue vigilantes. Lynchings were targeted racial violence that formed part of a systematic campaign of terror perpetrated in furtherance of an unjust social order. Selective public memory compounds the harm of officials' complicity in lynching and maintains the otherness of Black people.⁵⁷⁰

The same is true of other forms of racial terror such as mob violence, torture, extrajudicial violence, sterilization and sexual violence, and economic and politically influenced terror. Racialized terror is woven into the fabric of America, and although many racial groups have been victims, perhaps no racial group has been targeted more than Black Americans. From the violence of enslavement to contemporary police killings, both actual and threatened violence against Black Americans has functioned to establish and maintain white supremacy.⁵⁷¹ Federal, state, and local governments have been complicit in the infliction of terror through silence, failure to hold the perpetrators accountable, and even on some occasions, endorsement of the actions. California is no exception; the state, its local governments, and its people have played a significant role in enabling racial terror and its legacy to persist here in California.

The tactics of white supremacy at any time in history are simultaneously overtly violent and subversively traumatic for Black Americans. Racial terror remains the constant backdrop and tool for other forms of discrimination intended to exert control of Black Americans—from redlining and segregated schools to healthcare and bank loans—that has prevented many Black Americans throughout history from living a dignified life of equal opportunity.

⁵⁶⁹ EJI 2015, *supra*, at p. 23.

⁵⁷⁰ EJI 2015, *supra*, at p. 23.

⁵⁷¹ See Hudson, *supra*, at p. 133.

Chapter 4. Political Disenfranchisement

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members.]

I. Introduction

Black Americans have pursued equal political participation since before the Civil War.¹ But the federal, state, and local governments of the United States have suppressed and continue to suppress Black votes and Black political power. The United States did not prohibit states from discriminating against Black male voters until almost a century after the nation's founding, and it denied Black women this protection from discrimination for almost a half century more.²

After the United States amended the Constitution to protect the voting rights of American citizens against racial and gender discrimination, for Black Americans, this right existed only on paper and not in reality for most of American history. White Americans terrorized Black voters with violence to prevent them from voting, while federal, state, and local governments ignored the violence, failed to prosecute offenders, or participated in the violence themselves.

States, especially in the South, passed vagrancy and curfew laws to criminalize Black Americans, strip away their right to vote, and prevent them from organizing politically. States found legal loopholes to get around the voting protections in the U.S. Constitution, including literacy tests, poll taxes, and other devices used to prevent Black Americans from voting in both general and primary elections. States also barred Black Americans from serving on juries, denying Black Americans other opportunities to serve in civic and public life.

These restrictions secured the power of white supremacists in local, state, and federal government, allowing them to block hundreds of civil rights laws and rewrite many of the country's most important pieces of legislation to exclude or discriminate against Black Americans. Over centuries, as Black activists struggled and made advances towards equal political participation, federal, state, and local governments throughout the United States continued to pass laws, issue court decisions, or take actions to smother Black political power.

In recent years, the Supreme Court has issued decisions eliminating the protections of the Voting Rights Act, as federal, state, and local officials have continued to take actions that impair Black Americans' ability to vote and express their political voice.³ Despite the historical advancements Black Americans have made in political participation, Black Americans remain underrepresented, both in elected office and in the policies enacted to meet Black communities' needs.

California imposed similar restrictions on Black political participation throughout its history. Though California professed to be a free state when it joined the union, white and Black Americans did not possess the same freedoms. California refused to ratify the Fourteenth and Fifteenth Amendments for nearly a century, and it

¹ Nat. Park Service, U.S. Dept. of the Interior, *Civil Rights in America: Racial Voting Rights* (2009), p. 4 <<https://tinyurl.com/3rupm86e>> (as of Nov. 8, 2021)

² *Id.* at p. 6; Darity and Mullen, *From Here to Equality* (2020), p. 92.

³ See *Brnovich v. Democratic Nat'l Comm.* (2021) 141 S. Ct. 2321; *Shelby Cnty. v. Holder* (2013) 570 U.S. 529.

built many of the same barriers to Black political participation as those used in the South, such as poll taxes, literacy tests, and the disenfranchisement of people convicted of felonies. The state also enacted other legal barriers, such as its law banning any non-white person from testifying in any court case involving a white person. While California eventually eliminated many of these restrictions, its adoption of these discriminatory practices has had longstanding effects on Black political participation, representation, and the current inequalities that persist within the state.

This chapter begins in section II by discussing the long history of white officials portraying Black political participation as a threat to undermine Black political power and maintain racial subordination. Section III discusses the early history of Black political participation, from America's founding to the end of Reconstruction. Section IV and V describes the many devices that local, state, and federal officials have used to suppress Black political power, as well as the voting rights legislation that the United States and California have enacted after centuries of Black sacrifice and struggle. Finally, this chapter ends in Section VI by describing the consequences of both past and present efforts to suppress Black political participation, and how the exclusion of Black Americans from political power have produced deep inequalities in the policies that shape America and the lives of Black Americans.

II. Political Demonization of Black Americans

White politicians have long portrayed Black political participation as a threat in order to undercut Black political power and maintain the racial hierarchy of enslavement, even after Emancipation.

During and after Reconstruction, white southern Democrats used fears of Black political power to propel themselves into office. For example, in 1870, West Virginia Democrats used the ratification of the Fifteenth Amendment to provoke fear that Black Americans would threaten the "white man's government."⁴ After Democrats won the governor's seat and control of the state legislature in West Virginia, one Republican observed that "[h]ostility to negro suffrage was the prime element of our defeat."⁵ In 1901, the President of the Alabama Constitutional Convention warned against the "menace of negro domination" to justify the state's efforts "to establish white supremacy in this State."⁶

White politicians continued to employ the same tactics throughout the 20th century and in recent years. Despite the nonviolent protests led by Dr. Martin Luther King, Jr. and others during the civil rights movement in the 1950s and 1960s, white Americans portrayed Black civil rights activists as violent rioters and criminals.⁷ Exploiting this racist imagery, then-Senator Richard Nixon promised "law and order" during the presidential campaign of 1968, preying on white fears of societal upheaval amidst the civil rights movement.⁸ This move

⁴ Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988), p. 417 ("Foner, Reconstruction").

⁵ *Ibid.*

⁶ Behrens, et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002* (2003) 109 *Am. J. Soc.* 559, 571.

⁷ Garrow, *supra*, p. 255; Cronin, *Martin Luther King Jr Cartoon Sheds Light on the Harsh Scrutiny He Faced from 1960s Media*, CBR.com (Sep. 2, 2020) <<https://tinyurl.com/3f7dwb98>> (as of Nov. 19, 2021).

⁸ Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Campaign* (2002) 64 *The Historian* 351, 351; McAdam and Kloos, *Race and the Modern GOP*, Politico (Sep. 25, 2014) <<https://tinyurl.com/ycx9d8hr>> (as of Dec. 10, 2021).

contributed to Nixon's victory in the 1968 election, beginning what became known as the "Southern Strategy": the Republican strategy to win votes from the South by appealing to the racial prejudice of white southerners.⁹

In 1981, Republican campaign strategist Lee Atwater described the evolution of the Southern Strategy, shifting from express racial discrimination to more indirect dog whistles:

You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, [B]lack get hurt worse than whites.... "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger."¹⁰

Lee Atwater continued this strategy in the presidential election of 1988. With George H.W. Bush trailing his rival by 15 points in the polls, Atwater convinced the campaign to shift gears and go on the attack.¹¹ The weapon they would use: a Black man named Willie Horton.¹²

Released from penitentiary in the state governed by Bush's rival, Willie Horton had attacked and raped a white woman.¹³ Preying on stereotypes and fears of Black criminality and Black assault on white womanhood, Atwater and the Bush campaign played television ads prominently displaying Horton's Black face over ominous warnings, to great success. In focus groups, half of prospective voters almost immediately switched to supporting Bush after seeing the ad.¹⁴ In practice, the ad helped transform Bush's 15 point deficit into a presidential victory, 426 electoral votes to 111.¹⁵ When critics pointed out the racial fearmongering of the Horton ad, the Bush campaign tried to distance itself from the advertisement.¹⁶

Today, the same stereotypical imagery persists in American politics. Echoing the language of elections past, Donald Trump declared himself the "law and order candidate."¹⁷ After the police murder of George Floyd in the summer of 2020, Trump called protesters in Minnesota "thugs" and said that "when the looting starts, the shooting starts," using the exact same phrase that a white Miami police chief repeated in response to Black protestors in 1968.¹⁸ And when peaceful protesters marched in D.C., the Trump administration met those protests with tear gas, smoke bombs, and beatings.¹⁹

⁹ Maxwell and Shields, *The Long Southern Strategy Explained: How Chasing White Voters in the South Changed American Politics* (2019), pp. 2-8.

¹⁰ Perlstein, *Exclusive: Lee Atwater's Famous 1981 Interview on the Southern Strategy*, *The Nation* (Nov. 13, 2012) <<https://tinyurl.com/wds6taz5>> (as of Nov. 19, 2021).

¹¹ Cramer, *What It Takes* (1992), p. 1648-50.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Federal Election Commission, *Federal Elections 88* (Jun. 1989) <<https://tinyurl.com/4834yhm4>> (as of Nov. 19, 2021).

¹⁶ Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh*, *N.Y. Times* (Dec. 3, 2018) <<https://tinyurl.com/bkraeeze>> (as of Nov. 19, 2021).

¹⁷ Nelson, *Trump: 'I am the Law and Order Candidate'*, *Politico* (Jul. 11, 2016) <<https://tinyurl.com/mssx22pf>> (as of Dec. 16, 2021).

¹⁸ *Ibid.*

¹⁹ Easley, *How Trump Cleared the Park Around the White House for a Photo Op*, *The Hill* (Jun. 1, 2020) <<https://tinyurl.com/3cmxrd6w>> (as of Dec. 16, 2021); Goldberg, *James Mattis Denounces President Trump, Describes Him as Threat to the Constitution*, *The Atlantic* (Jun. 3, 2020) <<https://tinyurl.com/2p9hjdix>> (as of Dec. 16, 2021).

III. Reconstruction and the Constitution

A. Nationally

From its beginning, the United States excluded enslaved Black people from American citizenship, declining to count them as full people. As discussed in Chapter 2 on enslavement, in 1789, the U.S. Constitution included a “Three Fifths Clause,” counting enslaved Black persons as “three[-]fifths of all other persons” when tallying state populations for the purpose of establishing the number of representatives each state would have in Congress, as well as the number of electoral votes each state would cast in a presidential election.²⁰

On the one hand, the Three-Fifths Clause dehumanized enslaved Black Americans by not counting them as a full person. On the other hand, by allowing proslavery southerners to partially count enslaved people toward their total number of electoral votes and representatives in Congress, even though enslaved people could not vote or express any political voice, the Constitution gave the states that enslaved them much more power than they would have had otherwise.

For example, southerner Thomas Jefferson would not have won the presidential election in 1801 without the additional electoral votes given to southern states based on the number of Black Americans they enslaved within their borders.²¹ Further, the manner in which the federal government counted the enslaved population of Black Americans erased their humanity. The 1850 and 1860 federal censuses did not list most enslaved people by name, as they did for white Americans, but by the name of their enslavers.²²

While denying enslaved Black Americans their citizenship, the United States also denied free Black Americans the right to vote. When the Framers signed the Constitution in 1787, they left voting laws to the states—whose laws protected the right to vote only for white, male property owners.²³ Though a few northern states would eventually extend the right to vote to Black Americans, by the time of the American Civil War, most states, including every southern state, prohibited Black Americans from voting.²⁴

During Reconstruction (1865 to 1877), the federal government aimed to give newly freed Black Americans access to basic civil rights. The Civil Rights Act of 1866 granted citizenship to anyone born in the United States regardless of color, or previous enslavement.²⁵ The Fourteenth Amendment made Black citizenship and civil rights permanent.²⁶ By creating birthright citizenship, the struggle against slavery would also open the door for countless U.S. born children of immigrants to add to America’s diversity.²⁷

²⁰ U.S. Const. art. I, § 2, cl. 3.

²¹ Amar, *The Troubling Reason the Electoral College Exists*, Time (Oct. 29, 2020) <<https://tinyurl.com/4frsj6ez>> (as of Jan. 12, 2021).

²² Campbell, *Making Black Los Angeles: Class, Gender, and Community, 1850-1917* (2016); U.S. Census Bureau, *History: 1850* <<https://tinyurl.com/465fmmnf>> (as of Jan. 11, 2022).

²³ Engerman and Sokoloff, *The Evolution of Suffrage Institutions in the New World* (2005) 65 J. Econ. History 891, 896-97; Keyssar, *The Right To Vote: The Contested History of Democracy in the United States* (2000), pp. 8-21, 54-60; Waldman, *The Fight to Vote* (2016), pp. 7-8.

²⁴ Nat. Park Service, *supra*, p. 4; Cobb and Jenkins, *Race and the Representation of Blacks’ Interests During Reconstruction* (2001) 54 Pol. Research Quarterly 181, 184.

²⁵ Foner, *Forever Free: The Story of Emancipation and Reconstruction* (First Vintage Books 2006), pp. 113-115 (“Foner, Forever Free”).

²⁶ *Id.* at pp. 117-118.

²⁷ Jones, *The Real Origins of Birthright Citizenship*, The Atlantic (Oct. 31, 2018) <<https://tinyurl.com/3kuffyp3>> (as of Nov. 19, 2021).

Congress also recognized that political rights were essential to Black civil and economic rights,²⁸ so the Fifteenth Amendment was ratified in 1870 and prohibited states from discriminating against voters based on “race, color, or previous condition of servitude.”²⁹

However, the Fourteenth and Fifteenth Amendments had limitations. The Fourteenth Amendment did not protect Black Americans’ right to vote. Instead, the Fourteenth Amendment only punished states that legally denied male citizens the right to vote by reducing their number of representatives in Congress,³⁰ a penalty that has never been enforced.³¹ While the Fifteenth Amendment prohibited states from denying a person’s right to vote on the basis of race, it contained no enforcement mechanism without an act of Congress.³²

In 1870 and 1871, Congress passed several Enforcement Acts, giving the federal government the authority to prosecute violations of the Fifteenth Amendment.³³ But in 1875, the U.S. Supreme Court held that because the Fourteenth and Fifteenth Amendment only empowered the federal government to prohibit discrimination by the states, it did not empower the federal government to prosecute the private white militants who used racial terror to suppress Black voting.³⁴ And to the extent that the Fifteenth Amendment protected Black men in the right to vote, it did not extend the same protection to Black women, who would have to wait another half century for the Nineteenth Amendment in 1920.³⁵

Black Americans responded by taking full advantage of their new political rights.³⁶ Black Americans held conventions across the country³⁷ and participated in state constitutional conventions to secure their voting rights.³⁸ Republicans in Congress increasingly began to believe that they needed to overhaul southern governments and ensure that ex-Confederates did not return to power.³⁹ As a result Congress passed a series of laws during 1867 to 1868 called the Reconstruction Acts, which required most ex-Confederate states to hold constitutional conventions and write new state constitutions acknowledging Black civil rights.⁴⁰

The Reconstruction Acts guaranteed Black men the right to vote for constitutional delegates and on the new constitutions.⁴¹ Across the South in 1867, Black turnout ranged from 70 percent in Georgia to 90 percent in Virginia, their votes were nearly unanimous in support of ballot measures to hold constitutional conventions to amend their state constitutions to guarantee equal rights.⁴² Hundreds of Black men served in the southern state constitutional conventions under the Reconstruction Acts, and they participated alongside white Republicans in writing new constitutions which protected equal voting rights, civil rights, and educational rights (although

²⁸ Foner, *Reconstruction*, *supra*, pp. 444-449.

²⁹ U.S. Const., amend. XV, § 1.

³⁰ U.S. Const., amend. XIV, § 2.

³¹ Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy* (2015) 76 Louisiana Law Rev. 149, 150, 178.

³² Darity and Mullen, *supra*, p. 92.

³³ Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870); Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (1871).

³⁴ *United States v. Cruikshank* (1875) 92 U.S. 542, 552-.

³⁵ U.S. Const. amend. XIX.

³⁶ Douglass, *An Appeal to Congress for Impartial Suffrage*, *The Atlantic* (1867) <<https://tinyurl.com/pr8yj5er>> (as of Nov. 9, 2021).

³⁷ Nat. Park Service, *supra*, pp. 5-6.

³⁸ Nat. Park Service, *supra*, pp. 5-6.

³⁹ Foner, *Forever Free*, *supra*, pp. 121-22.

⁴⁰ *Ibid.*

⁴¹ Nat. Park Service, *supra*, pp. 5-6.

⁴² Foner, *Forever Free*, *supra*, p. 143.

usually in segregated facilities) for Black Americans.⁴³ By 1868, more than 700,000 Black men were registered to vote in the South.⁴⁴ One white Republican in Alabama said that Black Americans “voted their entire walking strength—no one stayed at home that was able to come to the polls.”⁴⁵

With Black voters came Black elected officials. During Reconstruction, over 1,400 Black Americans held federal, state, or local office, and more than 600 served in state assemblies.⁴⁶ Many of these new Black officials were formerly enslaved, and many took seats formerly held by men who had enslaved others.⁴⁷ The ranks of elected Black officials included 16 Black men elected to Congress, 14 to the U.S. House of Representatives and two to the U.S. Senate.⁴⁸

The election of Black Americans into office, however, did not translate to full political representation. Black Americans took a lower share of elected seats in both state and federal office relative to their proportion of the electorate, and they held no major state positions in Texas, North Carolina, Alabama, Georgia, or Virginia during this period.⁴⁹ White politicians—including Republicans who had favored Emancipation and Black enfranchisement—also treated Black elected officials as junior partners in government.⁵⁰ In 1874, 16 Black politicians in Louisiana publicly complained of being excluded from “any knowledge of the confidential workings of the party and government” and “not infrequently humiliated in our intercourse with those whom we have exalted to power.”⁵¹

Over time, white northern support for Reconstruction collapsed. Southern Democrats intensified violent insurrection, and white northerners tired of the economic and military costs necessary to enforce equal rights.⁵² An economic depression in the 1870s further weakened the federal government’s resolve and undermined support for pro-Reconstruction officials in the south.⁵³ To regain support, President Ulysses S. Grant shared power with southern Democrats who opposed Reconstruction, causing one northerner to complain that the government was filling “every Dep[artment]” with southern Democrats to “placate the rebels and get their votes.”⁵⁴

These pressures came to a head in the presidential election of 1876, when both the candidates—Republican Rutherford B. Hayes and Democrat Samuel Tilden—claimed to have won due to contested votes in the southern states where election violence and fraud was high.⁵⁵ Southern Democrats contested the results, threatening revolt.⁵⁶ To avoid another civil war, the Republicans and Democrats reached a compromise: the Democrats stopped contesting the presidential election and the Republicans agreed to withdraw federal troops from key

⁴³ *Id.* at pp. 143-44.

⁴⁴ Cobb and Jenkins, *supra*, p. 184.

⁴⁵ Foner, *Forever Free*, *supra*, p. 143.

⁴⁶ Nat. Park Service, *supra*, p. 6; Black Officeholders in the South, <<https://tinyurl.com/5x7mhm6d>> (as of Nov. 19, 2021).

⁴⁷ Nat. Park Service, *supra*, p. 6.

⁴⁸ Nat. Park Service, *supra*, p. 6; Black Officeholders in the South, <<https://tinyurl.com/5x7mhm6d>> (as of Nov. 19, 2021).

⁴⁹ Foner, *Reconstruction*, *supra*, pp. 318, 539.

⁵⁰ *Id.* at pp. 544-45.

⁵¹ *Id.* at p. 538.

⁵² *Id.* at pp. 511-63.

⁵³ *Ibid.*

⁵⁴ *Id.* at p. 528.

⁵⁵ *Id.* at pp. 575-76.

⁵⁶ *Id.* at p. 576.

locations in the south, effectively ending Reconstruction.⁵⁷ As the chairman of the Kansas state Republican committee wrote, “I think the policy of the new administration will be to conciliate to the white men of the South. Carpetbaggers to the rear, and niggers take care of yourselves.”⁵⁸ An article published in *The Nation* predicted, “[t]he negro . . . will disappear from the field of national politics. Henceforth, the nation, as a nation, will have nothing more to do with him.”⁵⁹

B. California

The State of California entered the union in 1850, and its constitution proclaimed that “neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”⁶⁰ But that very same document gave only “white male citizen[s]” the right to vote.⁶¹ From the beginning, freedom in California meant something different for white and Black Californians. As detailed in Chapter 2 on enslavement, despite California’s prohibition on slavery, enslavers forced hundreds of enslaved Black Americans into the state.⁶² California became one of the few free states to pass a fugitive slave law, authorizing and even enforcing the ability of white Californians to kidnap and traffic Black Californians to southern enslaving states.⁶³

Meanwhile, free Black Californians faced other restrictions on their ability to participate in civic life. California banned Black Americans and other nonwhite people from testifying in court against a white person.⁶⁴ In some cases, this law allowed a white man to get away with murder. In 1854, the California Supreme Court overturned the murder conviction of a white man because he was convicted based upon the testimony of Chinese witnesses.⁶⁵

Reversing the murder conviction, the Court explained: “In using the words, ‘No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person,’ the Legislature . . . adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste.”⁶⁶ Admitting that California designed the law to protect white defendants from justice, California’s Supreme Court defended the law as a matter of public policy, warning that allowing any non-white person to testify “would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls,” a prospect that the Court viewed as an “actual and present danger.”⁶⁷

⁵⁷ *Id.* at pp. 581-82.

⁵⁸ *Id.* at p. 581.

⁵⁹ *Id.* at p. 582.

⁶⁰ Cal. Const. of 1849, art. I, § 18.

⁶¹ Cal. Const. of 1849, art. II, § 1; Katz, *Modern California is All about Voter Access. History reveals a Far Grimmer Voting-Rights Past*, L.A. Times (Nov. 3, 2020) <<https://tinyurl.com/tjcpa6xb>> (as of Nov. 16, 2021).

⁶² Smith, *California’s Last Slave Case*, N.Y. Times (Mar. 5, 2014) <<https://tinyurl.com/8zsvwesu>> (as of Nov. 18, 2021).

⁶³ Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California* (2011) 80 *Pacific Historical Rev.* 28, 31.

⁶⁴ Cal. Dept. of Education, *Key Points in Black History and the Gold Rush*, <<https://tinyurl.com/ptsdp9jh>> (as of Nov. 17, 2021); Hudson, *supra*, p. 8.

⁶⁵ *People v. Hall* (1854) 4 Cal. 399; Moore, “*We Feel the Want of Protection*”: *The Politics of Law and Race in California, 1848-1878* (2003) 81 *Cal. History* 96, 114.

⁶⁶ *Hall, supra*, 4 Cal. 399, 403.

⁶⁷ *Id.* at p. 404.

One case drew public attention to the law and its effects on Black Californians. In 1861, a white man named Rodney B. Schell robbed a Black-owned business.⁶⁸ When George W. Gordon, a Black barber, complained to the police, Schell shot and murdered Gordon in his own shop.⁶⁹ At Schell's murder trial, his attorneys used California's ban on non-white testimony to exclude the prosecution's key witness, hiring two "hairologists" who examined the witness's hair under a microscope and claimed that the witness had "African blood in his veins."⁷⁰ Consequently, the court excluded the key testimony, resulting in Schell's conviction for second-degree murder, rather than first-degree murder.⁷¹

A Black-owned local newspaper called the case a "Mockery of Justice" in "one of the most deliberate and cold-blooded murders that ever disgraced California, even in her rudest and most lawless days."⁷² One California legislator observed that Schell had murdered Gordon, knowing that Black testimony against him would be barred in court.⁷³ Another legislator proclaimed that the law banning Black testimony served as "a legislative license for the commission of crimes."⁷⁴ Though the Schell trial generated a firestorm of controversy, California's Legislature refused to change the law that year.⁷⁵

Many other Black Californians suffered crimes without recourse to testimony and justice in court. When Jim Howard, a white man, stole from a Black laundryman named Albert Grubbs, Grubbs testified and helped secure Howard's conviction for grand larceny.⁷⁶ On appeal, the Chief Justice of the California Supreme Court, Stephen J. Field—who would later become a Justice on the U.S. Supreme Court—overturned the conviction, declaring that California's law categorically barred any Black testimony, even if "crime may go unpunished."⁷⁷

Discriminated against by both the laws and those who would break it, many Black Californians, like Peter Lester—who was assaulted and robbed in his store but unable to testify against the perpetrators—left the state.⁷⁸ From San Francisco alone, some 200 Black families left during the 1850s in a mass exodus to British colonies in what is now Canada,⁷⁹ a substantial portion of the 4,000 total Black Americans who had settled in California between 1850 and 1860.⁸⁰

Other Black Californians organized in response to these restrictions. Black citizens formed the Colored Executive Committee and founded their own weekly newspaper, *Mirror of the Times*.⁸¹ Drawing from Black activism in other parts of the nation, Black Californians held the first of four "Colored Citizens' Conventions"

⁶⁸ Chandler, *supra*, p. 325.

⁶⁹ *Ibid.*

⁷⁰ Hudson, *supra*, pp. 37-38; see also Chandler, *supra*, p. 325.

⁷¹ Chandler, *supra*, p. 326.

⁷² Hudson, *supra*, p. 38.

⁷³ Chandler, *supra*, p. 326.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *People v. Howard* (1860) 17 Cal. 63, 64; Chandler, *supra*, at p. 324.

⁷⁷ *People v. Howard* (1860) 17 Cal. 63, 64; Chandler, *supra*, at p. 324.

⁷⁸ Adkins, *African Americans of San Francisco* (2012), p. 19.

⁷⁹ *Id.* at p. 20.

⁸⁰ Gates, Jr., *The African-American Migration Story*, PBS <<https://tinyurl.com/5sz6s7n>> (as of Nov. 18, 2021).

⁸¹ Chandler, *Friends in Time of Need: Republicans and Black Civil Rights in California During the Civil War Era* (1982) 24 J. of the Southwest 319, 320.

in 1855 at the St. Andrews African Methodist Episcopal Church in Sacramento.⁸² At this convention and later meetings, they advocated against slavery, urged repeal of California's law barring Black testimony against whites in state courts, and petitioned for the right to vote.⁸³

After an eight-year campaign, convention delegates convinced the California Legislature to repeal its ban on Black testimony in 1863.⁸⁴ As soon as the ban on Black testimony ended, Black Californians spearheaded legal efforts to protect their rights in court. Black women organized legal efforts to file charges against streetcar drivers who refused to pick up Black riders or harassed them on the car.⁸⁵

In other cases, Black testimony proved crucial to preventing Black Californians from being enslaved. Thirteen years after California entered the union as a free state, in 1863, an enslaver purchased and trafficked a 12-year-old Black girl, Edith, selling her to a farmer in Sacramento County.⁸⁶ But a free Black man named Daniel Blue intervened on her behalf, filing a case in court.⁸⁷ With his testimony and the testimony of other Black citizens, he persuaded the Sacramento probate judge to remove Edith from the enslaver's custody.⁸⁸

After the repeal of the ban on Black testimony in 1863, and the abolition of slavery in 1865, Black activists in California turned their attention to voting rights. The California Colored Citizens' Convention of 1865 petitioned the state legislature for a constitutional amendment to give Black Americans voting rights.⁸⁹ But when a Republican State Senator presented the petition to the state legislature, its members never discussed it.⁹⁰

In the following two years, Black activists drafted another petition asking the state legislature to grant voting rights to Black men, if approved by a two-thirds vote by the state assembly and the state senate.⁹¹ But by then, the Democrats had taken over the legislature after campaigning on anti-Black and anti-Chinese platforms.⁹² Black activists could not find a single member of the state legislature who would agree to present the petition for the state legislature's consideration.⁹³

California continued to deny equal rights for its Black citizens. When the United States adopted the Fourteenth Amendment to the United States Constitution in 1868, guaranteeing the equal protection of law to Black Americans, the California Legislature ignored the Amendment and never ratified it.⁹⁴ Similarly, California later

⁸² California African American Museum Web Staff, *#Blackhistory: On November 20, 1855, Delegates Representing Ten of California's Twenty-Seven Counties Met at St. Andrews AME Church in Sacramento for the First California Colored Convention*, California African American Museum (Nov. 20, 2019) <<https://tinyurl.com/4kxtcbcz>> (as of Nov. 16, 2021).

⁸³ ACLU of Northern California, *Gold Chains: The Hidden History of Slavery in California* <<https://tinyurl.com/2uzr2hs9>> (as of Nov. 16, 2021).

⁸⁴ *Ibid.*

⁸⁵ *Id.* at p. 8.

⁸⁶ Smith, *California's Last Slave Case*, N.Y. Times (Mar. 5, 2014) <<https://tinyurl.com/6exn32sc>> (as of Nov. 16, 2021).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Proceedings of the California State Convention of the Colored Citizens, Held in Sacramento on the 25th, 26th, 27th, and 28th of October, 1865* (1865), pp. 15-19 <<https://tinyurl.com/3h4vwtvc>> (as of Nov. 16, 2021).

⁹⁰ Shaffer, *California Reluctantly Implements the Fifteenth Amendment: White Californians Respond to Black Suffrage, March – June 1870*, Cal Poly Pomona (2020), p. 1 <<https://tinyurl.com/renx7uwx>> (as of Nov. 16, 2021).

⁹¹ *Petition*, Elevator (Oct. 11, 1867) p. 2 <<https://tinyurl.com/4z8fd5ra>> (as of Nov. 16, 2021).

⁹² Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (2013), pp. 209-11.

⁹³ *Our Petition*, Elevator (Mar. 27, 1868) p. 2 <<https://tinyurl.com/6nuzyhdf>> (as of Nov. 16, 2021).

⁹⁴ Waite, *Early California Lawmakers also Preached #Resistance — But Against Immigration*, L.A. Times (Aug. 3, 2018) <<https://tinyurl.com/2ycuxw78>> (as of Dec. 29, 2021).

refused to ratify the Fifteenth Amendment, which prohibited states from discriminating against voters on the basis of race.⁹⁵

Nevertheless, enough states voted for the Fifteenth Amendment to make it the law of the country in 1870, and upon its ratification,⁹⁶ Black Californians registered to vote in droves.⁹⁷ But California officials openly refused to abide by the Fifteenth Amendment. California's Attorney General Joseph Hamilton instructed county clerks not to register Black voters until Congress passed legislation commanding them to do so.⁹⁸

When Black Californians and their allies protested in response, in some areas, county clerks caved to public pressure and eventually permitted Black Californians to vote.⁹⁹ Others resisted more firmly. In southern California, Louis G. Green was the first Black Californian in Los Angeles who tried to register to vote.¹⁰⁰ When the Los Angeles County Clerk refused to allow him to do so, Green filed suit in court. The County Judge—who was the brother-in-law of the County Clerk being sued—upheld the Clerk's refusal to register Green.¹⁰¹

Recognizing the resistance to Black voting in California and other states, Congress enacted the Enforcement Act of 1870, a federal law imposing penalties for states who violated the Fifteenth Amendment.¹⁰² Only after the passage of this law did California officials submit and allow Black men to register to vote.¹⁰³ It would take California nearly another decade to change its constitution to partly conform to the Fifteenth Amendment's requirements in 1879,¹⁰⁴ and nearly another century to formally ratify the Fourteenth and Fifteenth Amendments to the U.S. Constitution.¹⁰⁵

IV. Devices Used to Suppress Black Political Participation

Though Black Americans strove to build and maintain the promise of Black citizenship after Emancipation, the end of Reconstruction left them unprotected against the white supremacists who had previously enslaved them. After Reconstruction, white Americans in both the North and South employed a host of devices to reassert white supremacy and suppress Black political power. As a result, Black Americans who had already been voting for many years were barred from voting.

A. Racial Terror to Suppress Black Political Power

As Chapter 3 on racial terror details, white Americans resorted to kidnapping, mass murder, and other forms of racial terror to reassert white supremacy and destroy Black political power all across the southern states.¹⁰⁶ The

⁹⁵ Goldberg, *California's Shameful 1870 Vote on Black Suffrage*, L.A. Times (Feb. 28, 2021), A. 18.

⁹⁶ Goldberg, *supra*.

⁹⁷ Shaffer, *supra*, pp. 41-65.

⁹⁸ *Report of the Attorney-General for the Years 1868 and 1869* (Sacramento: D.W. Gelwicks, c. 1870), pp. 6-7; Shaffer, *supra*, pp. 42-43.

⁹⁹ Shaffer, *supra*, at pp. 41-62.

¹⁰⁰ *Id.* at pp. 62-65.

¹⁰¹ *Ibid.*; Colman, *John Ballard and the African American Community in Los Angeles, 1850-1905* (2012) 94 Southern Cal. Quarterly 193, 215-17.

¹⁰² An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for other Purposes (May 31, 1870), ch. 114, U.S. Statutes at Large 16 (1870), 140-146.

¹⁰³ Shaffer, *supra*, at pp. 41-62.

¹⁰⁴ Cal. Const. of 1879, art. II, § 1.

¹⁰⁵ Smith, *California's Last Slave Case*, N.Y. Times (Mar. 5, 2014) <<https://tinyurl.com/6exn32sc>> (as of Nov. 16, 2021).

¹⁰⁶ See, e.g., Foner, *Reconstruction*, *supra*, pp. 569-76.

federal and Republican-run state governments tried to suppress this violence, but white local officials and law enforcement across the South often turned a blind eye or even participated in the violence themselves. Federal and state officials themselves have used their power to target and terrorize civil rights leaders.

Even during Reconstruction, about 10 percent of Black political officials received violent threats and suffered physical assaults.¹⁰⁷ At least 35 Black officials were murdered by the Ku Klux Klan or similar terrorist organizations.¹⁰⁸ Though the federal government intervened to stop early violence in Louisiana, white Americans in both the North and South began to protest federal military intervention in local affairs. According to one historian, “[t]he spectacle of soldiers ‘marching into the Hall . . . and expelling members at the point of bayonet’ aroused more Northern opposition than any previous federal action in the South.”¹⁰⁹

President Grant’s cabinet urged the President to “wash the hands of the Administration entirely of the whole business,” referring to the repeated white insurrections in Louisiana, and white political backlash made Congressional Republicans wary of further military intervention in the south.¹¹⁰ When the Republican Governor of Mississippi, a member of Grant’s own party, requested federal aid against white supremacist insurrection, President Grant wrote, “[t]he whole public are tired out with these annual autumnal outbreaks in the South . . . [and] are ready now to condemn any interference on the part of the Government.”¹¹¹ For much of American history, then, the federal government sacrificed the lives and rights of Black Americans for political stability while white Americans in the South wrought racial violence to oppress Black Americans.

Despite the many threats to their lives, Black activists organized in response to these campaigns of racial terror. They formed organizations like the National Association for the Advancement of Colored People (NAACP), a group of Black intellectuals and activists who partnered with white liberals to pursue Black civil rights and equality, pursuing legal challenges against many of the devices described throughout this chapter.¹¹² State governments sought to sabotage these efforts. Mississippi, for instance, created the Mississippi State Sovereignty Commission, an agency created to resist the civil rights movement and preserve racial segregation. The Commission planted clerical workers in the offices of civil rights attorneys, spied on civil rights organizations, obstructed Black voter registration, and encouraged police harassment of Black Americans.¹¹³

The federal government, at times, targeted and terrorized civil rights leaders as well. During the 1950s and 1960s, for instance, when Dr. Martin Luther King, Jr., urged nonviolent protest to pursue racial justice, Federal Bureau of Investigation (FBI) Director J. Edgar Hoover viewed Dr. King as a communist threat and ordered the electronic surveillance of Dr. King and his staff.¹¹⁴ While doing so, the FBI produced reports claiming that one of Dr. King’s advisors was a communist, suggesting that international communists might be controlling Dr. King.¹¹⁵ Though the FBI’s surveillance uncovered no evidence of communist influence, it uncovered evidence of Dr. King’s extramarital affairs, and used this information not only to try and discredit Dr. King as a leader of

¹⁰⁷ Foner, *Forever Free*, *supra*, p. 134.

¹⁰⁸ *Ibid.*

¹⁰⁹ Foner, *Reconstruction*, *supra*, p. 554.

¹¹⁰ Coffey, *The Reconstruction Years: The Tragic Aftermath of the War* (2014), p. 259.

¹¹¹ Foner, *Reconstruction*, *supra*, p. 560.

¹¹² Nat. Park Service, *supra*, p. 14.

¹¹³ Blackmon, *Silent Partner: How the South’s Fight to Uphold Segregation was Funded up North*, *Wall Street Journal* (Jun. 11, 1999), Eastern edition, A1.

¹¹⁴ Garrow, *Bearing the Cross* (Open Road Media 2015), p. 195.

¹¹⁵ Garrow, *Bearing the Cross* (Open Road Media 2015), p. 195.

the civil rights movement, but also to attempt to convince Dr. King to take his own life.¹¹⁶ “They are out to break me,” Dr. King confided to a friend, “[t]hey are out to get me, harass me, break my spirit.”¹¹⁷

The federal government continued to surveil and sabotage other Black activists and organizations. In the 1960s and 1970s, the federal government took extensive measures to surveil the Black Panther Party, using undercover agents to infiltrate the group and sow discord, contributing to its collapse.¹¹⁸ Though public exposure of the FBI’s surveillance activities forced the government to enact several reforms, those reforms weakened over time, and the FBI has reportedly resumed similar programs surveilling Black activists, including those in the Black Lives Matter movement.¹¹⁹

B. Black Codes and Vagrancy Laws

As discussed later in Chapter 11 on the legal system, southern states passed a series of laws between 1865 and 1866—which historians refer to collectively as the “Black Codes”—to criminalize freed Black Americans for engaging in ordinary activity and force them back into forms of enslaved labor.¹²⁰ During Reconstruction, Republicans in Congress managed to remove these Black Codes with the Civil Rights Act of 1866 and the Fourteenth Amendment.¹²¹ But after the end of Reconstruction, former Confederate states began passing a flurry of laws similar to the post-Civil War Black Codes, which, while racially neutral on their face, added up to slavery-like conditions in practice.¹²² Every former Confederate state except Tennessee enacted vagrancy laws, between 1890 and 1909, which criminalized “idle” or “disorderly” behavior, or prohibited “unlawful assembl[y],”¹²³ which states frequently used to criminalize Black gatherings, limiting the formation of Black businesses and spaces that provided the foundation for Black community and political consciousness.¹²⁴ By criminalizing Black Americans for everyday conduct, these laws suppressed Black political participation in two ways: Black Americans convicted of a crime could not vote or serve on juries, and Black Americans were prevented from organizing to protest these laws, because these laws made such gatherings illegal.¹²⁵

C. Literacy Tests

Because the Fifteenth Amendment to the United States Constitution declared that a person’s right to vote shall not be denied “on account of race, color, or previous condition of servitude,”¹²⁶ states created many laws designed to block Black voting without referring to race. One of these methods was the literacy test: voting

¹¹⁶ Garrow, *Bearing the Cross* (Open Road Media 2015), p. 374.

¹¹⁷ *Ibid.*

¹¹⁸ Morrison, *Decades Later, a New Look at the Black Panthers and Their Legacy*, Associated Press (Oct. 31, 2021) <<https://tinyurl.com/2p93n4e3>> (as of Dec. 16, 2021).

¹¹⁹ German, *The FBI Has a History of Targeting Black Activists*, *The Guardian* (Jun. 26, 2020) <<https://tinyurl.com/bdfay577>> (as of Jan. 3, 2022).

¹²⁰ Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions* (1998) 107 *Yale L. J.* 2249, 2258-61.

¹²¹ Foner, *Forever Free*, *supra*, pp. 109-111, 114-15, 163-64.

¹²² *Id.* at p. 202.

¹²³ See, e.g., Konvitz, *A Century of Civil Rights* (1989), p. 14.

¹²⁴ See Harris-Perry, *Barbershops, Bibles, and BET: Everyday Talk and Black Political Thought* (2010), pp. xvii-xxiii.

¹²⁵ Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt* (2012) 117 *Penn State Law Rev.* 350, 360-61; Goluboff, *The Forgotten Law that Gave Police Nearly Unlimited Power*, *Time* (Feb. 1, 2016) <<https://tinyurl.com/2bfvxx9j>> (as of Jan. 18, 2022); Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, *Prison Policy Initiative* (Feb. 18, 2021) <<https://tinyurl.com/y76spkdn>> (as of Jan. 3, 2022).

¹²⁶ U.S. Const. amend. XV, § 1.

registrars or poll workers would test a person’s reading or writing capabilities before permitting them to register or vote. Usually, these tests required a prospective voter to either write down a certain piece of text (such as a part of the Constitution) or to write down answers to written questions.¹²⁷ Following Reconstruction, at least 21 states in both the North and South used literacy tests to deny Black Americans their voting rights.¹²⁸

As described in Chapter [XX], states and local governments deprived Black Americans of educational resources and opportunities during enslavement and after Emancipation.¹²⁹ Consequently, states adopted literacy tests knowing that such barriers would primarily exclude Black voters.¹³⁰ At the South Carolina constitutional convention of 1895, Senator Ben Tillman explained that the literacy test was intended to take the vote away from “ignorant [B]lacks.”¹³¹ When Mississippi adopted literacy tests, among other voting restrictions, in its 1890 constitutional convention, the president of the convention declared: “Let us tell the truth if it bursts the bottom of the Universe. We came here to exclude the negro.”¹³²

Even when many Black Americans were well-equipped to pass ordinary literacy tests, states excluded Black voters by requiring them to satisfy more complex requirements than those required for white voters;¹³³ asking subjective questions that gave white officials the discretion to exclude Black voters;¹³⁴ or requiring Black voters to answer impossible questions, such as “how many bubbles are in a bar of soap?”¹³⁵ One Georgian official boasted, “I can keep the President of the United States from registering [to vote], if I want to. God, Himself, couldn’t understand that sentence [in the literacy test]. I, myself, am the judge.”¹³⁶

Black Americans challenged these literacy tests in court but met with little success. In 1898, the United States Supreme Court upheld Mississippi’s literacy test in a case called *Williams v. Mississippi*.¹³⁷ After an all-white jury convicted Henry Williams, a Black man, of murder, Williams appealed, arguing that he did not receive a fair trial because Blacks were excluded from the jury.¹³⁸

Because the jury list was drawn from the state’s voter registries, the Court examined whether Mississippi’s literacy tests had illegally blocked Black Americans from registering to vote.¹³⁹ The Court approved of the literacy tests, holding that the literacy test did not mention race and therefore did not discriminate based on race.¹⁴⁰ The strategy pursued by Mississippi and other states worked: states could pass racist laws designed to deny Black votes, and so long as the laws did not mention race, those laws would be upheld in court.

¹²⁷ See, e.g., United States Com. on Civil Rights, *Report of the United States Commission on Civil Rights* (1959) pp. 31-32, 67-68, 123-25, 144 <<https://tinyurl.com/2muef2ty>> (as of Nov. 11, 2021); Nat. Park Serv., *supra*, p. 12.

¹²⁸ Werdegar, *Constitutionality of Federal Legislation to Abolish Literacy Tests: Civil Rights Commission’s 1961 Report on Voting*, Editorial Note (1961) 30 Geo. Wash. Law Rev. 723, 727 & fn. 32.

¹²⁹ *Oregon v. Mitchell* (1970) 400 U.S. 112, 133.

¹³⁰ *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 333–34.

¹³¹ Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination* (2004) 57 Stan. L. Rev. 611, 621.

¹³² McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (1989), p. 41.

¹³³ U.S. Com. on Civil Rights, *Voting* (1961), p. 84 <<https://tinyurl.com/npuraz5n>> (as of Nov. 10, 2021).

¹³⁴ Nat. Park Service, *supra*, p. 12.

¹³⁵ *Ibid.*

¹³⁶ Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, Vol. 1 (Routledge 2017), p. 1325 fn. 34.

¹³⁷ *Williams v. Mississippi* (1898) 170 U.S. 213.

¹³⁸ *Williams v. Mississippi* (1898) 170 U.S. 213.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

With the Supreme Court's approval, states continued to use literacy tests to restrict Black voting through the 20th century.¹⁴¹ It took 100 years after the end of Reconstruction for the federal government to permanently ban literacy tests nationwide through an amendment to the Voting Rights Act in 1975.¹⁴² Despite this federal prohibition, some states, like North Carolina, still have unenforceable literacy tests on the books today.¹⁴³

Thus, while states enacted literacy tests after Reconstruction in the late 1800s, these voting restrictions lasted well until the late 20th century, shaping the lives of Americans who currently live and serve in public office. President Joseph Biden, and at least 80 out of the 100 current U.S. Senators, were alive when literacy tests were still legal in the United States.¹⁴⁴

D. Property Requirements and Poll Taxes

States also used property requirements and poll taxes to prevent Black Americans from voting. Beginning in early American colonial history, states required individuals to own a certain amount of land or property before they could vote.¹⁴⁵ After American independence, many more states got rid of or relaxed these laws, and many new states never adopted them at all.¹⁴⁶ But, to prevent free Black men from voting, many states began limiting voting only to white men.¹⁴⁷ The Fifteenth Amendment had forced states to eliminate this blatant racial discrimination, but with the end of Reconstruction, states in both the North and South reenacted these property restrictions or created new ones, imposing poll taxes to require potential voters to make a payment before they could cast their ballot.¹⁴⁸

While these laws had the effect of excluding all poor voters—white and Black alike—the law specifically exploited the fact that Black Americans, newly freed from slavery, often began their free lives without any wealth, preventing them from affording the costs of the poll tax. Additionally, some states, such as Alabama, required a person to pay poll taxes for prior elections in which they had not voted, a penalty that directly targeted Black Americans, who could not have voted until after Emancipation.¹⁴⁹

Despite repeated challenges from civil rights activists, poll taxes remained a persistent barrier to the right to vote until 1965.¹⁵⁰ In 1937, the U.S. Supreme Court upheld the use of state poll taxes, declaring that poll taxes did not deny any constitutional right because the “[p]rivilege of voting is . . . conferred by the state and . . . the state may condition suffrage as it deems appropriate.”¹⁵¹

¹⁴¹ Ervin, Jr., *Literacy Tests for Voters: A Case Study in Federalism* (1962) 27 *Law and Contemporary Problems* 481, 483 & fn. 7; Nat. Park Service, *supra*, p. 29.

¹⁴² Joaquin G. Avila, et al., *Voting Rights in California: 1982-2006*, *Southern Cal. Rev. of Law and Social Justice* (2007), p. 137.

¹⁴³ Robertson, *North Carolina Lawmakers Begin Pushing Literacy Test Repeal*, Associated Press (Mar. 30, 2021) <<https://tinyurl.com/2kvfntbr>> (as of Nov. 19, 2021).

¹⁴⁴ See Roberts, *This Senate is the Oldest in American History. Should we Do Anything About It?* *Wash. Post* (June 2, 2021) <<https://tinyurl.com/mf4avsv2>> (as of Nov. 11, 2021); United States Senate, Senators <<https://tinyurl.com/89kn68j6>> (as of Nov. 11, 2021).

¹⁴⁵ Waldman, *Fight to Vote* (2016), pp. 8, 11-13.

¹⁴⁶ Onuf, *Thomas Jefferson: The American Franchise*, Miller Center <<https://millercenter.org/president/jefferson/the-american-franchise>> (as of Jan. 14, 2021).

¹⁴⁷ *Ibid.*

¹⁴⁸ Walker, *The Poll Tax in the United States* (1923) 9 *The Bulletin of the Nat. Tax Association* 46, 47-48.

¹⁴⁹ Nat. Park Service, *supra*, p. 22.

¹⁵⁰ *Id.* at p. 22-23.

¹⁵¹ *Breedlove v. Suttles* (1937) 302 U.S. 277, 283.

Recognizing the effects poll taxes had on voting, Congress attempted to ban poll taxes in some fashion in 1942, 1943, 1945, and 1947.¹⁵² None of those laws passed the Senate due to southern senators' use of the filibuster—a Senate rule requiring a two-thirds majority before debate could end and a vote could be taken on a bill.¹⁵³ The southern senators' reasoning behind their defense of the poll tax was simple: the poll tax was one of the devices used to suppress Black voters and keep the senators in power.

Although the poll tax affected whites more than Blacks, the southern senators believed that repeal of the poll tax would provide momentum to removing other barriers blocking Black voting in the south.¹⁵⁴ It took decades more of activism and litigation before Congress prohibited poll taxes in 1965¹⁵⁵ and the Supreme Court ruled poll taxes to be unconstitutional in 1966.¹⁵⁶

E. Challenger Laws and Witness Requirements

To exclude Black voters, states also used “challenger laws” and laws requiring witnesses to attest to a voter's qualifications. Challenger laws allow private citizens to contest another person's qualifications to vote, usually by making a complaint before the local or state officials charged with registering voters or administering the polls during election day.¹⁵⁷ Many states enacted such laws before the Civil War, some as far back as the American Revolution.¹⁵⁸ Following Reconstruction, however, states in both the North and South used these laws to allow white supremacists to challenge, intimidate, and suppress Black votes.

Virginia enacted its first challenger law in 1870, a few months after the end of Reconstruction.¹⁵⁹ The state reenacted the law in 1904, following its 1901 to 1902 constitutional convention,¹⁶⁰ which the state held “mainly for the purpose of disenfranchising the Negro voter.”¹⁶¹

In Florida, lawmakers enacted laws in 1877 requiring voters challenged at the polls to produce two witnesses “personally known” to at least two polling officials.¹⁶² Because Florida's polling officials were almost exclusively white, few Black citizens could provide witnesses known to them, meaning that Florida's challenger law allowed any white citizen to block a Black voter from casting their ballot.¹⁶³ Though many of these challenger and witness laws have been modified through time, they remain prevalent today: as of 2021, 46 states have laws that permit private citizens to challenge other citizens' voting eligibility.¹⁶⁴

F. Grandfather Clauses

¹⁵² Nat. Park Service, *supra*, pp. 23-24.

¹⁵³ *Id.* at pp. 23-24.

¹⁵⁴ *Id.* at p. 23.

¹⁵⁵ 52 U.S.C. § 10306.

¹⁵⁶ *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 670.

¹⁵⁷ Riley, *Voter Challengers*, Brennan Center (2012), p. 1 <<https://tinyurl.com/w34k2c4u>> (as of Nov. 12, 2021).

¹⁵⁸ *Id.* at p. 1.

¹⁵⁹ *Id.* at p. 10.

¹⁶⁰ *Ibid.*

¹⁶¹ The Virginia Election: Convention Proposition Carried – To Disfranchise Negroes – Odd Features of the Voting, N.Y. Times, May 25, 1900, at 1.

¹⁶² Riley, *supra*, at p. 8.

¹⁶³ *Id.* at p. 8.

¹⁶⁴ *Id.* at p. 2.

Many southern states understood that the onerous voting requirements they imposed, if applied fairly, could exclude white voters, too. To ensure that these restrictions primarily excluded Black voters, a half-dozen states in the South created so-called grandfather clauses. Grandfather clauses allowed voters to vote, even if they could not pay the poll tax or otherwise would not have passed a literacy test, as long as they had been entitled to vote prior to 1866 or 1867, or were descended from someone who had been entitled to vote prior to 1866 or 1867.¹⁶⁵

In effect, this meant that Black Americans—who had not been eligible to vote prior to 1866 or 1867 in most of these states—would be the ones subject to the new voting restrictions. The Supreme Court ruled these grandfather clauses to be discriminatory and unconstitutional in 1915.¹⁶⁶ While grandfather clauses had a relatively shorter lifespan than literacy tests or poll taxes, they presented one of many tools used in combination with others to prevent Black Americans from exercising their right to vote, revealing how states enacted many of their supposedly race neutral laws with the purposeful design of disenfranchising Black voters.

G. Exclusion from State Primary Elections

White Americans also prevented Black voters from participating in state party primary elections. Since the late 1890s, political parties in the United States have held primary elections to allow voters to determine the candidates from their party who would run for office.¹⁶⁷ In 1910, state legislatures and state Democratic party chapters in the South created the “white primary,” excluding all Black voters from the state primary election process.¹⁶⁸

For states dominated by a single political party, determining who would run from that party essentially determined who would ultimately hold office. Because Democrats dominated state elections in the South in the late 1800s and early 1900s, the exclusion of Black voters from Democrat state primaries in the South during this period essentially excluded Black Americans from having any say in their elected representatives.¹⁶⁹

The NAACP brought legal challenges against the white primary and won a case in 1927 when the U.S. Supreme Court held it unconstitutional under the Fourteenth Amendment for a state government to pass laws excluding Black citizens from a state primary election.¹⁷⁰ However, because the Fourteenth Amendment applied only to state actions, southern Democratic party leaders skirted around the Supreme Court’s decision by excluding Black voters through the rules of its political party, which was considered a private organization at the time.¹⁷¹

¹⁶⁵ Greenblatt, *The Racial History of the ‘Grandfather Clause’*, NPR (Oct. 22, 2013) <<https://tinyurl.com/yckpzxms>> (as of Dec. 29, 2021); Nat. Park Service, *supra*, pp. 13, 15; United States Com. on Civil Rights, *Report of the United States Commission on Civil Rights* (1959) p. 109 <<https://tinyurl.com/2muef2ty>> (as of Nov. 11, 2021).

¹⁶⁶ *Guinn v. United States* (1915) 238 U.S. 347, 364.

¹⁶⁷ Hasen, *Do the People or the Parties Own the Electoral Process?* (2001) 149 U. Penn. Law Rev. 815, 821; Reynolds, *The Hustling Candidate and the Advent of the Direct Primary: A California Case Study* (2013) 12 *The Journal of the Gilded Age and Progressive Era* 31.

¹⁶⁸ Nat. Park Service, *supra*, p. 16.

¹⁶⁹ United States Com. on Civil Rights, *Report of the United States Commission on Civil Rights* (1959) p. 109 <<https://tinyurl.com/2muef2ty>> (as of Nov. 11, 2021).

¹⁷⁰ *Nixon v. Herndon* (1927) 273 U.S. 536, 541.

¹⁷¹ See *Grove v. Townsend* (1935) 295 U.S. 45, 50, overruled in part by *Smith v. Allwright* (1944) 321 U.S. 649.

In 1944, the Supreme Court closed the loophole and ruled that states could not allow private political parties to exclude Blacks from voting in state primaries.¹⁷² Following the end of the all-white primary, a record 35,000 Black Americans voted in the 1948 Democratic primary in South Carolina.¹⁷³

H. Laws Disqualifying People Convicted of Felonies from Voting

States throughout the country have long disqualified people convicted of felonies from voting. Together with America's discriminatory criminal justice system, described Chapter 11 on the legal system, states throughout America have used these laws to prevent Black Americans from voting and continue to do so today.

Laws denying people convicted of felonies their right to vote have existed since at least the colonial period of American history, finding roots in earlier English, European, and Roman law.¹⁷⁴ Although early U.S. state constitutions gave their legislatures the power to pass laws disenfranchising people who had committed crimes, many states—including Alabama, Arkansas, Georgia, Florida, and South Carolina—only passed such laws after the Civil War to deny Black Americans of their newly gained right to vote.¹⁷⁵

Following Reconstruction, state governments sought to maintain white supremacy by using vagrancy laws, curfews, and other restrictions to target Black Americans with criminal laws as a form of social control.¹⁷⁶ Because states targeted Black Americans for prosecution, and because convicted Black Americans were stripped of their ability to vote, states effectively used criminal laws to not only control Black Americans, but also to deprive them of their right to vote.

After the Civil War, the percentage of nonwhite people imprisoned nearly doubled between 1850 and 1870.¹⁷⁷ In Alabama, for example, two percent of the prison population was nonwhite in 1850, but by 1870, 74 percent of the prison population was nonwhite, even though the total nonwhite population increased by only three percent.¹⁷⁸ Ever since the Civil War era, states have imprisoned Black Americans at higher rates than white Americans.¹⁷⁹ One study examining historical data found that when more of the people imprisoned by a state are Black, the state is significantly more likely to enact laws removing their right to vote if they have been convicted of a felony.¹⁸⁰

Many states made clear that they targeted Black Americans with their laws removing the right to vote from people convicted of felonies. According to the North Carolina Democratic Party's Executive Committee Handbook in 1898, North Carolina's restriction originates from the state's efforts "to rescue the white people of the east from the curse of negro domination."¹⁸¹ The Mississippi constitutional convention in 1890 altered its

¹⁷² *Smith v. Allwright* (1944), 321 U.S. 649.

¹⁷³ Nat. Park Service, *supra*, p. 22.

¹⁷⁴ Behrens, et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002* (2003) 109 Am. J. Soc. 559, 562-63; see also Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy, and Politics* (2005) 32 Fordham Urb. L.J. 851, 852-53.

¹⁷⁵ Behrens, et al., *supra*, pp. 563, 566-69.

¹⁷⁶ See, e.g., Shofner, *Custom, Law, and History: The Enduring Influence of Florida's "Black Code"* (1977), 55 The Fla. Historical Quarterly 277, 278-83.

¹⁷⁷ Behrens, et al., *supra*, p. 598.

¹⁷⁸ Behrens, et al., *supra*, p. 598.

¹⁷⁹ *Id.* at p. 560.

¹⁸⁰ Manza and Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006), pp. 37-39, 235.

¹⁸¹ Levine, *A Black Woman Faces Prison Because of a Jim Crow-Era Plan to 'Protect White Voters'*, The Guardian (Dec. 16, 2019) <<https://tinyurl.com/mx32e328>> (as of Nov. 15, 2021).

disenfranchising provision from one that included “any crime” to one affecting only certain offenses like burglary or theft, a change that the Mississippi Supreme Court explained as one made “to obstruct” Black voting by targeting certain crimes the state believed that Black residents committed more frequently.¹⁸²

Other southern states expressly tied disenfranchisement to “furtive offenses . . . peculiar to the Negro's low economic and social status.”¹⁸³ Some scholars suggest that because denying the vote for those convicted of crimes was narrower in scope than literacy tests or poll taxes, and easier to justify than grandfather clauses, states used criminal disenfranchisement laws as “insurance” if courts decided to strike down other, more blatantly discriminatory laws.¹⁸⁴

Most of these disenfranchisement laws continue to exist across the country in some form to this day. Though the Supreme Court has recognized that “[c]itizenship is not a right that expires upon misbehavior,”¹⁸⁵ the Supreme Court has not extended that same logic to the right to vote.¹⁸⁶

In 1974, the Supreme Court upheld California’s law disenfranchising people convicted of felonies in a case called *Richardson v. Ramirez*, concluding that the removal of their voting rights is consistent with the Fourteenth Amendment.¹⁸⁷ Though the Supreme Court eventually struck down a part of Alabama’s disenfranchisement law a decade later, it only struck down a specific provision—applying to crimes of “moral turpitude”—that it found had the specific intent and impact of preventing Black citizens from voting.¹⁸⁸ In that limited decision, the Court expressly declined to reconsider its decision in *Richardson v. Ramirez*, which continues to generally permit the disenfranchisement of people convicted of felonies.¹⁸⁹

Today, people convicted of felonies—a disproportionate number of whom are Black—represent the largest single group of Americans disqualified from voting.¹⁹⁰ For example, although the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been Black or Latino.¹⁹¹ Another study found that states with greater Black and Latino prison populations are more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system.¹⁹²

As of 2020, approximately 5.2 million Americans are barred from voting due to laws that disenfranchise citizens convicted of felony offenses.¹⁹³ All states but Maine and Vermont have some restriction tied to felony conviction, probation, and parole.¹⁹⁴ And while some states restore the right to vote once people have completed

¹⁸² *Ratliff v. Beale* (1896) 20 So. 865, 868; Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination* (2004) 57 Stan. L. Rev. 611, 626-27.

¹⁸³ Goldman, *supra*.

¹⁸⁴ *Id.* at p. 626.

¹⁸⁵ *Trop v. Dulles* (1958) 365 U.S. 86, 92.

¹⁸⁶ *Reynolds v. Sims* (1964) 377 U.S. 533, 555.

¹⁸⁷ *Richardson v. Ramirez* (1974) 418 U.S. 24, 54.

¹⁸⁸ *Hunter v. Underwood* (1985) 471 U.S. 222, 228-33.

¹⁸⁹ See, e.g., *Jones v. Governor of Fla.* (11th Cir. 2020) 950 F.3d 795, 801.

¹⁹⁰ Goldman, *supra*, pp. 632–33.

¹⁹¹ Alexander, *The New Jim Crow* (2010), p. 98.

¹⁹² Goldman, *supra*, p. 663.

¹⁹³ Chung, *Voting Rights in the Era of Mass Incarceration: A Primer* (July 28, 2021) <<https://tinyurl.com/7ubb3utk>> (as of Nov. 11, 2021).

¹⁹⁴ *Ibid.*

their sentence, these states condition that restoration of rights upon a person paying all fines and fees associated with their sentence, an economic burden that scholars and voting rights advocates have described as a modern day poll tax.¹⁹⁵ In a country that professes a commitment to freedom, the country's rates of mass incarceration and the corresponding increase in disenfranchisement reflect a conflict between its democratic ideals and its actual practice.

I. Gerrymandering

States also manipulated the shape of voting districts, through a process called gerrymandering, to dilute the voting power of Black Americans. Generally, states divide their regions into districts for the election of certain local, state, and federal representatives. States can redraw those areas from year to year, and government officials have used this process to substantially dilute and weaken the political power of Black Americans.¹⁹⁶

Ordinarily, states draw electoral districts by drawing generally oval or square-shaped districts of neighboring communities with borders based on geographic barriers, like rivers and highways. However, politicians began manipulating this process by drawing electoral districts in more unnatural shapes to include more voters from a certain race or political party to ensure that group's victory in an election.

This process, known as "gerrymandering," is named after Elbridge Gerry, an American vice-president who, as Massachusetts Governor in 1812 redrew voting districts in a way that caused the Boston-area district to resemble a salamander. Or, as one local newspaper dubbed it, a Gerry-mander.¹⁹⁷ Gerrymandering has existed since this nation's infancy, and politicians have used it nearly as long to deny Black communities representation in government. After the end of Reconstruction, white government officials drew gerrymandered districts to purge Black politicians from state legislatures all across the south.¹⁹⁸

For example, although Black Americans made up a majority of South Carolina's population in the 1870s and 1880s, white government officials redrew the state's electoral map to pack nearly all of the state's Black neighborhoods into one of the state's seven districts that had a Black majority, and it included nearly all of the state's Black neighborhoods in the awkward shape of a snake.¹⁹⁹

Drawing the map this way had the effect of ensuring that only one of the state's seven legislators were Black, despite Black Americans making up more than 60 percent of the state's total population. White government officials drew similarly gerrymandered congressional districts across the south, including in North Carolina,

¹⁹⁵ Wood and Trivedi, *The Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls* (2007) 41 Clearinghouse Rev. 30, 31, 35-41.

¹⁹⁶ Cox and Holden, *Reconsidering Racial and Partisan Gerrymandering* (2011) 78 U. Chi. Law Rev. 553, 557-58; Crocker, *Congressional Redistricting: An Overview*, Congressional Research Service (Nov. 21, 2012) <<https://tinyurl.com/yv984hbd>> (as of Dec. 15, 2021). see also, e.g., *Rucho v. Common Cause* (2019) 139 S.Ct. 2484, 2491-93.

¹⁹⁷ Draper, *supra*; Li and Lo, *What is Extreme Gerrymandering*, Brennan Center (Mar. 22, 2019) <<https://tinyurl.com/y4kua7kz>> (as of Nov. 12, 2021).

¹⁹⁸ Hearings before House Com. on Jud., Subcom. on Civil & Constitutional Rights, on Extension of the Voting Rights Act, 97th Cong., 1st Sess., pp. 2013-2014 <<https://tinyurl.com/vtcnwe6h>> (as of Dec. 14, 2021).

¹⁹⁹ Hearings before House Com. on Jud., Subcom. on Civil & Constitutional Rights, on Extension of the Voting Rights Act, 97th Cong., 1st Sess., p. 2013 <<https://tinyurl.com/vtcnwe6h>> (as of Dec. 14, 2021).

Alabama, and Mississippi.²⁰⁰ The Mississippi government drew the Black electoral district in the shape of what one newspaper called a “shoestring.”²⁰¹

Gerrymandering continued in the 20th century. After World War II, a thriving Black community began organizing politically in Tuskegee, Alabama.²⁰² But white segregationists responded by proposing a bill to redraw the boundary lines of Tuskegee to exclude all neighborhoods with Black residents and exclude Black voters from having any input into the city’s elections.²⁰³ Black residents fought back, bringing a case that reached the Supreme Court in 1960, where the Court struck down the racially gerrymandered map as a violation of the Fourteenth and Fifteenth Amendments.²⁰⁴ A few years later, Congress enacted the Voting Rights Act in 1965, which prohibits states from diluting the voting strength of Black Americans, including through redistricting plans that impair the voting strength of Black communities.²⁰⁵

Despite prohibitions by both Congress and the Supreme Court, states continued to try and find ways to gerrymander state maps to limit Black representation. Some attempts have been more brazen. In the 1980s, Georgia State Representative Joe Mack Wilson declared, “I don’t want to draw nigger districts.”²⁰⁶ A little more than a decade later, the Supreme Court would strike down North Carolina’s efforts to gerrymander on the basis of race, stating it was “unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.”²⁰⁷ Meanwhile, states continue to engage in two other forms of legally sanctioned racial gerrymandering: partisan and prison gerrymandering.

Political or partisan gerrymandering refers to the process of drawing districts to benefit one political party over another.²⁰⁸ As of September 2021, 33 states allow partisan actors—state legislatures or their appointees—to redraw their districts.²⁰⁹ While those who engage in partisan gerrymandering claim not to directly target Black voters, the fact that most Black voters register to vote as Democrats, today, means that partisan gerrymandering often affects Black representation as well.

Though Black Americans had historically supported the Republican party through post-Reconstruction due to the party’s role in Emancipation and Reconstruction, the Republican party’s apathy and mistreatment toward Black Americans during the Hoover Administration opened the door to their entry into the Democratic party during the New Deal, as northern Democrats like President Franklin Roosevelt promised economic aid amidst the Great Depression.²¹⁰

²⁰⁰ Hearings before House Com. on Jud., Subcom. on Civil & Constitutional Rights, on Extension of the Voting Rights Act, 97th Cong., 1st Sess., p. 2013 <<https://tinyurl.com/vtcnwe6h>> (as of Dec. 14, 2021).

²⁰¹ *Chalmers and His Tale*, N.Y. Times (May 26, 1882) <<https://tinyurl.com/4bj6yweu>> (as of Jan. 18, 2022).

²⁰² Nat. Park Service, *supra*, p. 38.

²⁰³ Nat. Park Service, *supra*, p. 38.

²⁰⁴ *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 346-47.

²⁰⁵ *Thornburg v. Gingles* (1986) 478 U.S. 30, 47-51.

²⁰⁶ Draper, *supra*.

²⁰⁷ *Shaw v. Reno* (1993) 509 U.S. 630, 641.

²⁰⁸ *Ibid.*

²⁰⁹ Li, et al., *Who Draws the Maps?* Brennan Center for Justice (Sep. 16, 2021) <<https://tinyurl.com/4vtd3nyx>> (as of Dec. 29, 2021).

²¹⁰ Sears, *Black Americans and the New Deal* (1976); Nat. Park Service, *supra*, p. 19.

Black support for the Democratic party then surged in the 1960s, when Democratic President Lyndon B. Johnson ushered in the Civil Rights Act of 1964 and the Voting Rights Act of 1965.²¹¹ President Johnson's embrace of civil rights legislation caused many of the southern white supremacists in the Democratic party to defect to the Republican party, cementing Black support for Democrats to this day.²¹² From 1994 to 2019, over 80 percent of Black registered voters have leaned toward or identified as Democrats.²¹³

Because most Black voters today register to vote as Democrats, partisan gerrymandering harms Black representation. In the last decade, more than two dozen Black officials have had their districts redrawn in ways that could cost them their seats, leading the former chair of the Congressional Black Caucus to declare partisan gerrymandering a "five-alarm fire" for Black representation.²¹⁴

Moreover, unlike earlier forms of racial gerrymandering, neither Congress nor the U.S. Supreme Court have prohibited partisan gerrymandering.²¹⁵ As scholars and advocates have observed, the Supreme Court's refusal to strike down political gerrymandering permits legislators to get away with racial gerrymandering in places where race and party are highly correlated, simply by claiming that they made their redistricting decisions for partisan reasons, rather than racial ones.²¹⁶

Prison gerrymandering refers to the practice of counting incarcerated people as part of the population in the region imprisoning them, rather than the location of their actual community.²¹⁷ Because the government allocates greater numbers of political representatives and resources to places with greater populations, prison gerrymandering benefits districts that engage in mass incarceration, skewing resources and representation to areas with prisons at the expense of the communities to which those imprisoned people belong.

This process particularly affects Black Americans, who are disproportionately imprisoned—in 2019, Black Americans made up about 33 percent of the United States's imprisoned population, despite representing about 14 percent of the total population.²¹⁸ Given the effects of prison gerrymandering, advocates describe it as akin to or worse than the Constitution's Three-Fifths Clause, which counted enslaved people in the Census for the purpose of allowing states to amass more pro-slavery representatives, despite the fact that enslaved people were not allowed to vote and had no basic legal rights.²¹⁹

²¹¹ Apple, Jr., *G.O.P. Tries Hard to Win Black Votes, But Recent History Works Against It*, N.Y. Times (Sep. 19, 1996) <<https://tinyurl.com/2p9bvezd>> (as of Dec. 16, 2021); McAdam and Kloos, *Race and the Modern GOP*, Politico (Sep. 25, 2014) <<https://tinyurl.com/ycx9d8hr>> (as of Dec. 16, 2021).

²¹² *Ibid.*

²¹³ Igielnik and Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, Pew Research (Sep. 23, 2020) <<https://tinyurl.com/ywy3ebnm>> (as of Dec. 16, 2021).

²¹⁴ Corasaniti and Epstein, *Map by Map, G.O.P. Chips Away at Black Democrats' Power*, N.Y. Times (Dec. 18, 2021) <<https://tinyurl.com/2emx56n4>> (as of Jan. 3, 2022).

²¹⁵ *Rucho v. Common Cause* (2019) 139 S. Ct. 2484, 2500-08.

²¹⁶ Clarke and Greenbaum, *Gerrymandering Symposium: The Racial Implications of Yesterday's Partisan Gerrymandering Decision*, SCOTUSBlog (June 28, 2019) <<https://tinyurl.com/3h4mwbkv>> (as of Nov. 12, 2021); Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery* (2018) 49 Columbia Human Rights L. Rev. 255, 285.

²¹⁷ Bohrs, *Prison Gerrymandering and the 2020 Census*, Harvard Civil Rights-Civil Liberties L. Rev. (Nov. 15, 2019) <<https://tinyurl.com/7nrr8emt>> (as of Nov. 12, 2021).

²¹⁸ E. Ann Carson, *Prisoners in 2019*, Bureau of Justice Statistics (October 2020) table 3 <<https://tinyurl.com/2p96fwh5>> (as of Dec. 30, 2021).

²¹⁹ Blakinger, *What Is Prison Gerrymandering and How Does It Impact Elections? Criminologist John Pfaff Explains*, Houston Chronicle (Mar. 6, 2018) <<https://tinyurl.com/yudh54rt>> (as of Nov. 12, 2021).

J. The Myth of Voter Fraud and Voter ID Laws

Claims of voter fraud have also been used to justify laws that suppress Black voting—most prominently, voter identification (ID) laws. While voter fraud has long been invoked throughout American history to justify restrictions on voting, such claims have made a recent resurgence, including in the 2020 election, despite the lack of any evidence to support allegations of widespread fraud.²²⁰ In recent years, states have used this claim to enact a number of strict ID laws that disproportionately impact Black and other nonwhite voters, hindering their ability to vote.

States and politicians have invoked the specter of voter fraud since at least the late 1800s to justify the various rules they imposed disenfranchising Black and other nonwhite communities.²²¹ The Ku Klux Klan and other white supremacists claimed voter fraud to justify the violence they inflicted upon Black Americans. One southern historian claimed in 1901 that “the white man of the lately dominant class in the South . . . saw his former slaves repeating at elections,” and quoted with favor a white supremacist leader and his announcement that he and his militants had violently suppressed Black voters such that “[f]ew negroes voted that day; none twice.”²²² Thus, white supremacists have long used accusations of voter fraud as an excuse to justify the suppression of Black political participation.²²³

More recently, the idea of voter fraud and voter identification laws became popular following the 2000 election.²²⁴ The U.S. Attorney General at the time, John Ashcroft, pushed the U.S. Department of Justice to prioritize voter fraud as an issue,²²⁵ even though the U.S. Department of Justice itself found only a 0.00000132% rate of voter fraud.²²⁶

Congress enacted the Help America Vote Act in 2002, which required voter identification to register to vote and deferred to states’ requirements for voter identification. Many civil rights organizations opposed the bill for its discriminatory impact, arguing that the requirement would mirror a poll tax.²²⁷ In 2005, Georgia and Indiana became the first states to enact photo identification voting laws, opening the floodgates for similar laws throughout the country.²²⁸ In 2000, only 11 states required all voters to show some form of identification; this

²²⁰ Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, Associated Press (Dec. 14, 2021) <<https://tinyurl.com/y356y4c8>> (as of Dec. 28, 2021).

²²¹ Cunningham, *Who are to be the Electors? A Reflection on the History of Voter Registration in the United States* (1991) 9 Yale L. & Policy Rev. 370, 374, 379 & fn. 49, 383-85.

²²² Brown, *The Ku Klux Movement*, The Atlantic (May 1901) <<https://tinyurl.com/u59a9hcu>> (as of Nov. 12, 2021).

²²³ Cunningham, *supra*, pp. 376-77 & fn. 32.

²²⁴ Redden, *Changing Focus and Exposing a Solution: Using Section 2 of the Voting Rights Act to Defeat Tennessee's Voter Photo ID Law* (2013) 44 U. Mem. L. Rev. 229, 235-236; Zoch, *Then and Now: How 8 Election Policies Have Changed Since 2000*, Nat. Conference of State Legislatures (Feb. 16, 2021) <<https://tinyurl.com/3vcruzzyd>> (as of Nov. 12, 2021).

²²⁵ Klarman, *The Supreme Court 2019 Term Foreword: The Degradation of American Democracy — And the Court* (2020) 134 Harv. L. Rev. 1, 48.

²²⁶ See Minnite, *The Misleading Myth of Voter Fraud in American Elections*, Scholars Strategy Network (2014), pp. 1-2 <<https://tinyurl.com/23wz2m6v>> (as of Nov. 12, 2021).

²²⁷ See Ruda, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act* (2003) 31 Fordham Urb. L.J. 235, 246-253.

²²⁸ Klarman, *supra*, p. 49.

increased to 18 states in 2008²²⁹ and, as of 2021, 36 states have laws requesting or requiring voters to show identification at the polls.²³⁰

Although voter identification laws may appear race neutral, they disproportionately burden Black voters due to disparities in both access and enforcement. According to one nationwide study, 20 percent of Black Americans did not possess a valid photo ID, compared to seven percent of whites.²³¹ Due to segregation and unequal access, many elderly Black voters were not born in hospitals, resulting in many never being issued a birth certificate—and this fact, in turn, limits their ability to obtain other forms of photo identification.²³²

Additionally, states disproportionately enforce voter ID laws against Black voters. National studies have found that 70 percent of all Black voters were asked to show photo identification at the polls during the 2008 election, as opposed to only 51 percent of white voters.²³³ These disparities in enforcement forced Black voters to file provisional ballots at four times the rate of white voters.²³⁴ Provisional ballots, in turn, are more likely to go uncounted. In 2016, nearly 700,000, or 28.5 percent of all provisional ballots went uncounted; in 2018, nearly 790,000, or 42.6 percent of all provisional ballots were not counted.²³⁵

Additionally, citizens with ready access to voter identification might underestimate the burdens that voter ID requirements impose. But as the American Civil Liberties Union has calculated, for those who need to procure a voter ID, the combined cost of time, travel, and documentation ranges from \$75 to \$175,²³⁶ a steep cost to consider when poll taxes “of as little as \$1.50 have been deemed an unconstitutional burden on the right to vote.”²³⁷ Even obtaining “free” identification cards may require a person to not only purchase a birth certificate,²³⁸ but to travel to a DMV, which in some regions could be as far as 250 miles away.²³⁹

In many cases, states intentionally use voter ID laws to discriminate against Black voters and people with lower incomes, perpetuating America’s legacy of creating barriers to Black voting.²⁴⁰ For example, when crafting

²²⁹ Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. Louisville L. Rev. 57, 79-80 (2008).

²³⁰ Nat. Conference of State Legislatures, *Voter Identification Requirements: Voter ID Laws* (2021) <<https://tinyurl.com/5txr8tm>> (as of Nov. 12, 2021).

²³¹ Government Accountability Office, *Elections: Issues Related to State Voter Identification Laws* (Sep. 2014) <<https://tinyurl.com/yckzfmnf>> (as of Dec. 27, 2021).

²³² Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections* (2012) 64 Rutgers L. Rev. 1019, 1039.

²³³ Haygood, *supra*, pp. 1054-1056.

²³⁴ *Ibid.*

²³⁵ Desilver, *Most Mail and Provisional Ballots Got Counted in Past U.S. Elections—But Many Did Not*, Pew Research Center (Nov. 10, 2020) <<https://tinyurl.com/55s4phrj>> (as of Dec. 27, 2021).

²³⁶ American Civil Liberties Union, Fact Sheet on Voter ID Laws (2017), p. 1 <<https://tinyurl.com/4rz5yecx>> (as of Nov. 12, 2021).

²³⁷ Haygood, *supra*, p. 1051.

²³⁸ United States Gov. Accountability Office, *Issues Related to State Voter Identification Laws* (Sept. 2014), p. 32 <<https://tinyurl.com/3rx7uccd>> (as of Nov. 12, 2021).

²³⁹ Klarman, *supra*, p. 50; see also Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, Charles Hamilton Houston Institute for Race & Justice (2014), p. 21 <<https://tinyurl.com/dtwbj5s>> (as of Nov. 12, 2021).

²⁴⁰ Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right* (2013) 16 N.Y.U. J. Legis. & Pub. Pol’y 515, 552; see also Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests* (2014) 45 Columbia Human Rights L. Rev. 362, 366-367; Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy* (2009) 86 Denver U. L. Rev. 1023, 1025-26, 1038.

North Carolina’s voter identification laws, one state representative expressly asked a university official to provide information “about the number of Student ID cards that are created and the [percent] of those who are African American,” and a federal appeals court characterized these restrictions as targeting Black voters with “almost surgical precision.”²⁴¹

As one scholar points out, it is no coincidence that the states with the most rigid voter identification laws also happen to be states with substantial Black populations and a history of post-Reconstruction-style discrimination at the polls.²⁴² Multiple Republican strategists have admitted that voter ID laws have nothing to do with voter fraud, and are instead part of a strategy of ensuring that Democrats cannot vote.²⁴³ Because Black voters identify overwhelmingly with the Democratic Party,²⁴⁴ political strategists openly seeking to disenfranchise Democrats will necessarily target Black voters.²⁴⁵ Ultimately, scholars have found that strict voter ID laws substantially decrease voting turnout for Black and Latino voters, doubling the voting gap between white and Black voters.²⁴⁶

K. Exclusion from Juries

In addition to barring Black Americans from voting, post-Reconstruction states in both the North and South also excluded Black Americans from serving on juries. The Sixth Amendment to the United States Constitution guarantees criminal trials by an “impartial jury.”²⁴⁷ Juries serve the essential role of balancing government power by giving citizens the authority to determine a just outcome in a case of law.²⁴⁸

In the 1800s, many states, such as Tennessee and West Virginia, expressly allowed only white men to serve on juries.²⁴⁹ While many states in the north did not have laws excluding Black jurors, one historian observed that “[i]n most of the North, custom and prejudice . . . combined to exclude Negroes from jury service.”²⁵⁰ During Reconstruction, Congress partially undid these restrictions with the Civil Rights Act of 1875, which prohibited states from expressly discriminating based on race in the selection of juries in state court.²⁵¹

However, the Act did not address the many other methods that states used to exclude Black jurors.²⁵² For example, states ordinarily required a jury decision to be unanimous to determine whether someone is guilty or

²⁴¹ Wan, *Inside the Republican creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, Wash. Post, (2016) <<https://tinyurl.com/4bz34wtw>> (as of Nov. 12, 2021).

²⁴² Trotter, *supra*, p. 553.

²⁴³ See Bouie, *Republicans Admit Voter ID Laws Are Aimed at Democratic Voters*, The Daily Beast (July 11, 2017) <<https://tinyurl.com/wrxfvu>> (as of Nov. 12, 2021); Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. Times (Sept. 17, 2016) <<https://tinyurl.com/98k7b5zf>> (as of Nov. 12, 2021).

²⁴⁴ Pew Research Center, *Party affiliation among voters: 1992-2016*, (2016) <<https://tinyurl.com/2ed66d>> (as of Nov. 12, 2021).

²⁴⁵ See Wan, *supra*.

²⁴⁶ Hajnal, et al., *Voter Identification Laws and the Suppression of Minority Votes* (2017), p. 16 <<https://tinyurl.com/28pu9cr3>> (as of Dec. 27, 2021).

²⁴⁷ U.S. Const., amend. VI.

²⁴⁸ Amar, *Jury Service as Political Participation Akin to Voting* (1995) 80 Cornell Law Rev. 203, 218-21; *Ramos v. Louisiana* (2020) 140 S. Ct. 1390, 1394-97.

²⁴⁹ Hoag, *An Unbroken Thread: African-American Exclusion from Jury Service, Past and Present* (2020) 81 Louisiana Law Rev. 55, 58-59.

²⁵⁰ Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (1961), p. 94.

²⁵¹ *Strauder v. West Virginia* (1879) 100 U.S. 303.

²⁵² See Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (Nov. 2005), p. 15 <<https://tinyurl.com/bdhe2tpv>> (as of Dec. 15, 2021).

innocent of a crime.²⁵³ But this meant that the presence of a single Black juror could prevent a white jury from convicting a Black defendant. To get around this, states like Louisiana and Oregon passed laws allowing a jury to convict a defendant if only 10 of the 12 jurors voted to convict.²⁵⁴

As the U.S. Supreme Court observed in *Ramos v. Louisiana* (2020), states like Louisiana and Oregon removed jury unanimity requirements after Reconstruction “to ensure that African-American juror service would be meaningless,” since one or two Black jurors could not outvote a white majority.²⁵⁵ In many states, only registered voters can serve on juries, so because these states denied Black Americans the ability to register to vote, they denied them access to the jury box as well.²⁵⁶ Finally, many states excluded Black jurors through various state rules that allowed judges, court officials, and local prosecutors to prevent a person from serving on a jury without giving a reason.²⁵⁷ As discussed in Chapter 11 on the legal system, these methods produced deep disparities in the number of Black Americans convicted of crimes, including those who were wrongfully convicted.²⁵⁸

L. California

Though California amended its constitution in 1879 to allow nonwhite men to vote, the state adopted many laws similar to those adopted by northern and southern states to suppress the political participation of Black Americans.²⁵⁹ California added a poll tax into its constitution in 1879, requiring payment of an average half-day’s wage before someone could vote.²⁶⁰ The poll tax continued until repealed in 1914.²⁶¹ In 1894, California added a literacy test for voting to its constitution to prevent Chinese residents from voting.²⁶² But anti-Chinese and anti-Black racism in California frequently intertwined. The California state Democratic party, for instance, pledged in 1867 to establish “no Negro or Chinese suffrage,”²⁶³ and its racist pledge enabled Democrats to sweep state elections that year.²⁶⁴

In the years after World War II, the Black population in California rose dramatically²⁶⁵—with a growing presence in the state, Black communities in California continued pushing for greater political representation. But they faced resistance and retaliation along the way. California, like the federal government, frequently treated Black activism as a threat. In 1966, when civil rights protesters used the slogan of “Black power” to advocate for racial equality, the Republican Candidate for Lieutenant Governor, Robert Finch, declared that “it’s wrong, if . . . any minority, including the Negro people, think they can blackmail or blackjack their way

²⁵³ See *Ramos v. Louisiana* (2020) 140 S. Ct. 1390, 1396.

²⁵⁴ *Id.* at 1394.

²⁵⁵ *Ibid.*; Frampton, *The Jim Crow Jury* (2018) 71 Vanderbilt L. Rev 1593, 1605, 1607.

²⁵⁶ Nat. Park Service, *supra*, p. 13.

²⁵⁷ See, e.g., Frampton, *The Jim Crow Jury* (2018) 71 Vanderbilt L. Rev 1593, 1598; Hoag, *An Unbroken Thread: African-American Exclusion from Jury Service, Past and Present* (2020) 81 Louisiana Law Rev. 55, 62-63.

²⁵⁸ See generally Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, *supra*.

²⁵⁹ Katz, et al., *Reckoning with our Rights: The Evolution of Voter Access in California*, UCLA Luskin Center for History and Policy (Sept. 2020) pp. 3, 7 <<https://tinyurl.com/5xzhj32p>> (as of Nov. 17, 2021).

²⁶⁰ *Id.* at p. 9.

²⁶¹ *Ibid.*

²⁶² *Id.* at pp. 11-12.

²⁶³ Smith, *supra*.

²⁶⁴ *Ibid.*; Wheeler, *Black California: The History of African-Americans in the Golden State* (1993), p. 121.

²⁶⁵ Moore, *African Americans in California: A Brief Historiography* (1996) 75 Cal. History 194, 194.

into acceptance into our society, they're just dead wrong, and the American people will not tolerate this kind of thing."²⁶⁶

That same year, Huey P. Newton and Bobby Seale formed the Black Panther Party in Oakland, California, seeking Black economic empowerment and the end of police brutality.²⁶⁷ To pursue these goals, the Panthers adopted a number of community service programs, including health care clinics, a free breakfast program for school children,²⁶⁸ and police observation patrols.²⁶⁹

As with Dr. Martin Luther King, Jr., the federal government and California viewed the Black Panthers as a threat. Vice President Spiro Agnew labeled the Black Panthers an "anarchistic group of criminals."²⁷⁰ Federal Bureau of Investigation Director Hoover considered the Black Panthers the "number one threat to the security of the United States."²⁷¹ Through its counterintelligence program (COINTELPRO), the FBI surveilled and sabotaged the Black Panthers. The FBI sent anonymous, inflammatory letters to restaurants, grocery stores, and churches to dissuade them from providing food or facilities for the free breakfast program.²⁷²

To suppress the Black Panthers' newsletter activities, the FBI ordered the Internal Revenue Service to audit the organization and any income they received from distributing newsletters.²⁷³ Further, the FBI infiltrated the group with undercover agents and spread misinformation, paranoia, conflict, and distrust within the party.²⁷⁴ California, for its part, responded to the Panthers by enacting the Mulford Act, banning the possession of firearms in Oakland city limits, targeting the Black Panthers' efforts to carry firearms for self-defense.²⁷⁵ When Panthers protested, Californian law enforcement also repeatedly arrested Black Panther members on harassment and public disorder charges, disrupting the organization and sapping resources away from its community service initiatives.²⁷⁶ These efforts ultimately led to the organization's collapse in 1982.²⁷⁷

Like many states in the North and South, California also stripped individuals of their right to vote when they were convicted of a felony, embedding such a provision in its constitution since 1849.²⁷⁸ It took 125 years before California eventually changed this wholesale denial of voting rights in 1974, amending its constitution to

²⁶⁶ KNTV Channel 11 News Reels Aug. 23, 1966 <<https://tinyurl.com/7pbk5ajs>> (as of Dec. 16, 2021).

²⁶⁷ Morrison, *Decades Later, a New Look at the Black Panthers and Their Legacy*, Associated Press (Oct. 31, 2021) <<https://tinyurl.com/2p93n4e3>> (as of Dec. 16, 2021).

²⁶⁸ Blakemore, *How the Black Panthers' Breakfast Program Both Inspired and Threatened the Government*, History (Jan. 29, 2021) <<https://tinyurl.com/3t3uj56w>> (as of Dec. 16, 2021).

²⁶⁹ Jones, *The Political Repression of the Black Panther Party 1966-1971: The Case of the Oakland Bay Area* (1988) 18 J. of Black Studies 415, 417 (Jones, *The Political Repression of the Black Panther Party*).

²⁷⁰ *Id.* at p. 416.

²⁷¹ *Ibid.*

²⁷² *Id.* at pp. 428-31.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, Duke Center for Firearms Law (Apr. 8, 2020) <<https://tinyurl.com/3bbpuxtx>> (as of Dec. 30, 2021).

²⁷⁶ Jones, *The Political Repression of the Black Panther Party*, *supra*, pp. 421-25.

²⁷⁷ Morrison, *Decades Later, a New Look at the Black Panthers and Their Legacy*, Associated Press (Oct. 31, 2021) <<https://tinyurl.com/2p93n4e3>> (as of Dec. 16, 2021).

²⁷⁸ Cal. Const. of 1849, art. II, § 5.

allow individuals convicted of felonies to vote if they had completed their sentence and parole.²⁷⁹ In 2016, the state legislature restored voting rights to people convicted of a felony offense housed in jail, but not in prison.²⁸⁰

Still, in 2020, approximately 243,000 Californians were barred from voting due to a felony convictions.²⁸¹ Of that number, 50,000 (or about 20 percent) are Black.²⁸² Only recently, in 2020, did California voters approve Proposition 17, which amended the state’s constitution to restore the right to vote to all individuals who have completed their prison term, even if they are still on parole.²⁸³

V. Voting Rights Legislation

A. As Black Activists Fought for Civil Rights, White Americans Reacted with Violence

After the end of Reconstruction, Black Americans, facing increased threats to their liberty, organized and mobilized to assert their equal rights. Groups like the National Association for the Advancement of Colored People used protest and litigation to advance the civil rights of Black Americans and secure the rights guaranteed by the Fourteenth and Fifteenth Amendments.²⁸⁴ Much of the NAACP’s legal work focused on defending Black Americans from wrongful convictions and bringing lawsuits to hold white perpetrators of racial terror accountable for their crimes.²⁸⁵ The NAACP also brought legal challenges to end many of the devices states used to suppress Black political power, such as the all-white primary.²⁸⁶

In these efforts, NAACP lawyers played a critical role in using litigation to end racial segregation, most famously through *Brown v. Board of Education*, where the NAACP convinced the U.S. Supreme Court to strike down racial segregation in public schools as unconstitutional.²⁸⁷ In addition to its litigation, the organization lobbied the federal government to enact civil rights legislation, including anti-lynching laws, voting rights laws, and other civil rights laws that would ensure the equal protection of Black Americans.²⁸⁸

Black women, too, played a critical role in early Black activism. During the 1896 election in North Carolina, for instance, Sarah Dudley Pettey canvassed the Black sections of Raleigh to urge Black women to persuade their husbands, brothers, and sons to vote.²⁸⁹ In 1898, the “Organization of Colored Ladies” in Wilmington declared that for “Every Negro who refuses to register his name . . . that he may vote, we shall make it our business to

²⁷⁹ 7 Witkin, Summary 11th Constitutional Law § 277 (2021); see also *Ramirez v. Brown* (1974) 12 C.3d 912, 117 C.R. 562, 528 P.2d 378.

²⁸⁰ Uggen, et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement* The Sentencing Project (Oct. 6, 2016), p. 4 <<https://tinyurl.com/vsv8y9ds>> (as of Nov. 16, 2021).

²⁸¹ *Id.* at p. 16.

²⁸² *Id.* at p. 17.

²⁸³ McGreevy, *Proposition 17, Which Will Let Parolees Vote in California, Approved by Voters*, L.A. Times (Nov. 3, 2020) <<https://tinyurl.com/njfkds5>> (as of Nov. 18, 2021).

²⁸⁴ Meier and Bracey, Jr., *The NAACP as a Reform Movement, 1909-1965* (1993) 59 J. of Southern History 3, 4.

²⁸⁵ *Id.* at pp. 8-10.

²⁸⁶ *Id.* at pp. 4, 8, 10.

²⁸⁷ *Id.* at pp. 14-15, 25.

²⁸⁸

²⁸⁹ Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920* (1996), p. 102.

deal with him in a way that will not be pleasant. He shall be branded a white-livered coward who would sell his liberty.”²⁹⁰

When the United States ratified the Nineteenth Amendment in 1920, Black women registered in large numbers to vote.²⁹¹ For instance, in Kent County, Delaware, one local paper reported “unusually large” numbers of Black women who showed up to vote, though officials would prevent many of them—and many others across the country—from voting.²⁹²

World War II contributed to a surge in Black civil rights activism.²⁹³ The service and sacrifice of Black Americans—both abroad in the military and at home in factories and fields—underscored the moral imperative for equal treatment, especially given America’s war against the Nazism and white supremacy abroad.²⁹⁴

With renewed energy, Black organizations pushed to secure voting rights, continuing efforts to organize, educate, and register Black voters, despite the threats of violence and the other barriers that states had created after Reconstruction.²⁹⁵ Black women like Ella Baker led and directed civil rights campaigns and voter registration drives for some of the nation’s largest civil rights groups, including the NAACP, Southern Leadership Conference, and Student Nonviolent Coordinating Committee.²⁹⁶ In addition, interracial labor unions in the South played a part in registering Black voters.²⁹⁷ In 1947, Local 22 of the Food and Tobacco Workers in Winston-Salem, North Carolina helped register 3,000 Black residents in the city, helping elect the first Black alderman to the city’s board since Reconstruction.²⁹⁸

But Black veterans demanding equal treatment returned home to fierce resistance.²⁹⁹ In Decatur, Mississippi, a white senator, Senator Theodore Bilbo, warned Black residents to stay away from the polls for the Democratic primary in 1946, calling for “every red-blooded white man to use any means to keep the niggers away from the polls.”³⁰⁰

A mob of white people waving pistols turned five returning World War II veterans away from voting during that primary.³⁰¹ A group of civil rights organizations complained to the U.S. Senate about Senator Bilbo’s intimidation tactics, prompting a Senate committee to hold four days of hearings in Jackson, Mississippi.³⁰²

²⁹⁰ *Id.* at p. 107.

²⁹¹ Jones, *What the 19th Amendment Meant for Black Women*, Politico (Aug. 26, 2020) <<https://tinyurl.com/4b3fzjcj>> (as of Dec. 14, 2021); Nat. Park Service, *supra*, pp. 16-17.

²⁹² Jones, *For Black Women, the 19th Amendment Didn’t End Their Fight to Vote*, Nat. Geographic (Aug. 7, 2020) <<https://tinyurl.com/n3xbb7vu>> (as of Nov. 19, 2021).

²⁹³ Meier and Bracey, Jr., *supra*, p. 21.

²⁹⁴ Kluger, *Simple Justice* (First Vintage Books 2004), p. 12; Nat. Park Service, *supra*, p. 20.

²⁹⁵ Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (1986), pp. 95-103, 163-64.

²⁹⁶ Scelfo, *On MLK Day, Honor the Mother of the Civil Rights Movement, Too*, Time (Jan. 16, 2017) <<https://tinyurl.com/3epv8f3h>> (as of Nov. 19, 2021).

²⁹⁷ *Id.* at p. 27.

²⁹⁸ *Ibid.*

²⁹⁹ Nat. Park Service, *supra*, p. 28.

³⁰⁰ Fleegler, *Theodore G. Bilbo and the Decline of Public Racism, 1938-1947* (2006) 68 J. Miss. History 1, 1.

³⁰¹ *Id.* at p. 20.

³⁰² *Id.* at p. 22.

Two hundred Black Americans, most of them veterans, packed the federal courtroom in Jackson to share their experience of violence and voter suppression.³⁰³

Black Americans faced similar threats in other places. In March 1948, the Ku Klux Klan paraded around Wrightsville, Georgia, warning that “blood would flow” if Blacks tried to vote in the forthcoming election.³⁰⁴ Seven months later, two whites threatened Isaac Nixon, a Black veteran, telling him not to vote.³⁰⁵ He refused to heed their warning, cast his ballot shortly after sunrise, and by nightfall he had been murdered.³⁰⁶ Though Nixon’s murderers later stood trial, an all-white jury acquitted them.³⁰⁷

In Florida, on the Christmas Eve of 1951, the KKK bombed the home of the state’s NAACP director, murdering Harry T. Moore and his wife.³⁰⁸ During the 1963 civil rights protests in Birmingham, Alabama, white policemen and firefighters unleashed hounds and blasted protestors with high pressure water hoses that stripped the clothes off their backs.³⁰⁹

In Greenwood, Mississippi, white citizens and officials responded to Black voter registration efforts by cutting off food supply to Black communities, imprisoning Black people for “breach of peace,” setting fire to Black businesses, and firing gunshots at Black activists in their cars, their offices, and their homes.³¹⁰ When Black activists organized the Freedom Vote and the Freedom Summer of 1964 in Mississippi,³¹¹ local sheriffs arrested three activists and turned them over to KKK members, who proceeded to murder the activists, burn their car, and bury their remains.³¹²

On March 7, 1965, future Congressman John Lewis led some 600 protestors on a march from Selma to Montgomery, Alabama. That “Bloody Sunday,” Alabama state troopers attacked.³¹³ Awaiting the protestors on the Edmund Pettus Bridge, state troopers rushed into the crowd with nightsticks.³¹⁴ Troopers beat and bloodied protestors, knocking many unconscious.³¹⁵ Troopers fractured Lewis’s skull in the assault. “I thought I was going to die on that bridge,” he later recalled.³¹⁶ The bloodshed at Selma prompted outrage across the nation, becoming the tipping point that spurred the federal government to enact the Voting Rights Act that year.³¹⁷

B. The Voting Rights Act of 1965

³⁰³ Nat. Park Service, *supra*, p. 25.

³⁰⁴ *Id.* at p. 28.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ Garrow, *Bearing the Cross* (year), p. 249.

³¹⁰ Nat. Park Service, *supra*, pp. 50-52.

³¹¹ *Id.* at p. 44.

³¹² *Ibid.*

³¹³ History of Federal Voting Rights Laws, U.S. Dept. of Justice, <<https://tinyurl.com/yz7ruuvu>> (as of Nov. 9, 2021); Nat. Park Service, *supra*, pp. 65-68

³¹⁴ May, *Bending Toward Justice* (2013), p. 87.

³¹⁵ May, *Bending Toward Justice* (2013), p. 87.

³¹⁶ Rojas, *Selma Helped Define John Lewis’s Life*, N.Y. Times (Jul. 28, 2020) <<https://tinyurl.com/3b3pu9ss>> (as of Dec. 29, 2021).

³¹⁷ Nat. Park Service, *supra*, p. 70.

The centuries-long Black struggle for freedom led to the passage of the Voting Rights Act, a landmark law that prohibited many of the barriers described in this chapter, allowing millions of Black Americans to vote.³¹⁸ In 1964, prior to the protections of the Voting Rights Act, 57 percent of eligible Black Americans remained unregistered to vote.³¹⁹ The passage of the Voting Rights Act resulted in a 21 percent increase in Black voter registration—the largest gains were recorded in the south, where the percentage of registered Black voters increased from below 31 percent to over 66 percent by 1984.³²⁰

The Voting Rights Act empowered the United States Department of Justice to enforce voting rights, authorized individual voters to sue in federal court to enforce their voting rights, and authorized the federal government to send examiners to register voters.³²¹ Among the Act’s most important provisions:

- Section 2 of the Voting Rights Act prohibits any voting restriction that “results in” the denial of the right to vote based on race, regardless of whether a state intended to discriminate;³²²
- Section 4 of the law identified certain state and local governments that had a history of discrimination against Black Americans. State and local entities that demonstrated such past discrimination were “covered jurisdictions” subject to greater oversight from the federal government;³²³ and
- Section 5 provided that “covered jurisdictions” were required to obtain approval—or “preclearance”—from the Department of Justice or a federal court in Washington, D.C. before passing any voting rights related law. The covered jurisdiction had to demonstrate that the proposed voting change did not have a discriminatory purpose or a discriminatory effect on Black or other nonwhite voters.³²⁴

Altogether, these provisions represented what the United States Department of Justice called “the most successful piece of civil rights legislation ever adopted by the United States Congress,” due to its role in eliminating many of the devices that had been used to deny Americans their right to vote.³²⁵

Within the last decade, however, the United States Supreme Court has removed or weakened key pillars of the Voting Rights Act. In *Shelby County v. Holder* (2013), the Supreme struck down Section 4 of the Act as unconstitutional.³²⁶ And because Section 5’s preclearance requirements only applied to areas identified through Section 4, the Supreme Court effectively eliminated Section 5 as well. Though admitting that “voting discrimination still exists,” the Court felt that enough had been done because 40 years had passed and minority voting rates had improved.³²⁷

Thus, the Court found Section 4 to no longer be necessary, despite Congress’s renewal of Section 4 in 2006 by an overwhelming majority (the House voted 390 in favor to 33 opposed; the Senate passed it unanimously), and despite Congress’s finding that “40 years has not been a sufficient amount of time to eliminate the vestiges of

³¹⁸ Berman, *The Lost Promise of the Voting Rights Act*, The Atlantic (Aug. 5, 2015) <<https://tinyurl.com/4e765dy2>> (as of Nov. 17, 2021).

³¹⁹ *Id.* at p. 65

³²⁰ Tate, *From Protest to Politics: The New Black Voters in American Elections* (1998), p. 1.

³²¹ Nat. Park Service, *supra*, p. 69.

³²² 52 U.S.C. § 10301(a); see also SCOTUSBlog, *Section 2 of the Voting Rights Act: Vote Dilution and Vote Deprivation*, <<https://tinyurl.com/4f76e2s4>> (as of Nov. 15, 2021).

³²³ Avila, et al., *Voting Rights in California: 1982-2006* (2007) 17 Southern Cal. Rev. of Law and Social Justice 132, 137.

³²⁴ *Ibid.*

³²⁵ United States Dept. of Justice, *Introduction to Voting Rights Laws* <<https://tinyurl.com/2rfu8yu8>> (as of Nov. 15, 2021).

³²⁶ *Shelby Cnty. v. Holder* (2013) 570 U.S. 529.

³²⁷ *Id.* at pp. 547-57.

discrimination following nearly 100 years of disregard for the dictates of the 15th amendment[.]”³²⁸ The Court’s decision prompted Justice Ruth Bader Ginsburg to protest in dissent that striking down this provision of the Voting Rights Act “when it has worked and is continuing to work” is “like throwing away your umbrella in a rainstorm because you are not getting wet.”³²⁹

Eight years later, the Court weakened Section 2 of the Voting Rights Act as well. Though Section 2 prohibits any voting law that “results in” the denial of voting rights based on race, the Court, in *Brnovich v. Democratic National Committee*, rewrote the law to limit its reach.³³⁰ While Section 2 speaks only to voters’ rights—and the need to protect them against racial discrimination—the Supreme Court created a new requirement for courts to consider the “strength of the state interests.”³³¹ By inserting the state’s goals into the equation, the Supreme Court flipped the Voting Rights Act from a civil rights act into a balancing act, allowing voting rights to be sacrificed if a court believed the state’s goals to be worthy enough.³³²

The Court also declared that the legality of a voting restriction should be evaluated partly based on whether the law “has a long pedigree” or was in “widespread use” as of 1982, the year Congress amended the Voting Rights Act to prohibit laws that “result in” racially discriminatory denials of the right to vote.³³³ But as detailed in this chapter, many racially discriminatory voting restrictions have had a long and widespread pedigree in this nation’s history. Poll taxes and literacy tests existed for almost a 100 years—some restrictions even longer.³³⁴ By considering a voting restriction’s use in the past as a basis for accepting a law, the Supreme Court’s decision freezes voting rights as they were in the past, along with all the discriminatory history in it.

The Supreme Court’s elimination or weakening of the anti-discrimination protections in Sections 2, 4, and 5 of the Voting Rights Act has opened the floodgates for laws restricting voter access across the nation. Hours after the *Shelby County v. Holder* decision, Texas implemented a strict photo ID law that had previously been rejected under Section 5.³³⁵

That summer, the North Carolina legislature also passed a sweeping law that instituted a stringent photo ID requirement, eliminated same-day voting registration, and cut back on early voting.³³⁶ Over the four years following *Shelby County*, jurisdictions previously covered under Section 5 closed 1,173 polling places, many in districts with majority Latino and Black voters.³³⁷ States also limited voting hours, limited the ability to vote via mail-in ballots, and purged voter registration rolls.³³⁸

³²⁸ *Id.* at pp. 565, 593 (dis. opn. Ginsburg, J.).

³²⁹ *Id.* at p. 590 (dis. opn. Ginsburg, J.).

³³⁰ *Brnovich v. Democratic Nat. Com.* (2021) 141 S. Ct. 2321, 2337-2341.

³³¹ *Id.* at pp. 2339-40.

³³² *Brnovich v. Democratic National Committee* (2021) 135 Harv. L. Rev. 481; Charles and Fuentes-Rohwer, *The Court’s Voting-Rights Decision Was Worse than People Think*, *The Atlantic* (Jul. 8, 2021) <<https://tinyurl.com/3jffkesu>> (as of Nov. 15, 2021).

³³³ *Brnovich, supra*, 141 S. Ct. 2321, 2338-39.

³³⁴ Nat. Park Service, *supra*, p. 29.

³³⁵ Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, Brennan Center (Aug. 2, 2015) <<https://tinyurl.com/4bdk7mn2>> (as of Nov. 15, 2021).

³³⁶ Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, Brennan Center (Aug. 2, 2015) <<https://tinyurl.com/4bdk7mn2>> (as of Nov. 15, 2021).

³³⁷ The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sep. 2019) <<https://tinyurl.com/mrxfp97z>> (as of Dec. 28, 2021).

³³⁸ Brennan Center for Justice, *Voting Laws Roundup: December 2021* (Dec. 21, 2021) <<https://tinyurl.com/wwavtph6>> (as of Dec. 28, 2021); see *Brnovich v. Democratic Nat. Com.* (2021) 141 S. Ct. 2321, 2337-2341.

While these restrictions limited voting access for all Americans, they also targeted or specially affected Black Americans. The removal of polling places in Ohio ensured that “African Americans in Ohio wait[] in line for fifty-two minutes to vote, while whites wait[] only eighteen minutes.”³³⁹ After record turnout of Black voters in Georgia helped flip federal elections in favor of Democrats in 2020, Georgia’s Republican state legislature passed a law limiting drop boxes for mail ballots, introducing more rigid voter identification requirements for absentee ballots, and criminalizing the act of providing food or water to people waiting in line to vote.³⁴⁰ In a recent lawsuit filed in federal court, the U.S. Department of Justice asserts that Georgia enacted these restrictions specifically to target Black voters.³⁴¹

Overall, states across the country introduced 389 restrictive voting laws from January to May 2021, alone.³⁴² With the Supreme Court’s recent limitations of the Voting Rights Act, laws like Georgia’s are becoming the new norm across the country.³⁴³

C. California

In the latter half of the 20th century, California began taking steps to expand voting access. California encouraged county and volunteer voting registration efforts in the 1950s and 1960s, and it amended its constitution to eliminate its literacy test in 1970.³⁴⁴ In the 1970s, California relaxed its rules for requesting absentee ballots and for remaining on the voter registries from year to year.³⁴⁵ More recently, the state enacted the California Voting Rights Act in 2001, which permits citizens to file suit in state court to challenge racially discriminatory restrictions in at-large elections without having to demonstrate the higher evidentiary standards required under the federal Voting Rights Act.³⁴⁶

Despite the state’s efforts to advance voting access, the federal government has observed that California and some of its cities and counties have continued to engage in voting discrimination throughout the late 20th century. The U.S. Attorney General determined that California’s use of a statewide literacy test to restrict voting during the November 1968 election violated the prohibitions of the federal Voting Rights Act.³⁴⁷

From 1968 to 1976, the United States Department of Justice also identified Kings County, Monterey County, and Yuba County as engaging in discriminatory practices, monitoring these counties and objecting to various new voting restrictions proposed by these counties well into the 2000s.³⁴⁸ As another example, the United States Department of Justice objected to Merced County’s redistricting plan in 1992, a plan opposed by both Black

³³⁹ See Klarman, *supra*, pp. 59-60.

³⁴⁰ Fausset, et al., *Why the Georgia G.O.P.’s Voting Rollbacks Will Hit Black People Hard*, N.Y. Times (Mar. 25, 2021) <<https://tinyurl.com/282zh9s3>> (as of Nov. 15, 2021).

³⁴¹ U.S. Department of Justice, *Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law* (Jun. 25, 2021) <<https://tinyurl.com/465c2sxw>> (as of Dec. 30, 2021).

³⁴² State Voting Bills Tracker 2021, Brennan Center (May 28, 2021) <<https://tinyurl.com/44cbvphd>> (as of Nov. 16, 2021).

³⁴³ See Brennan Center for Justice, *Voting Laws Roundup: December 2021* (Dec. 21, 2021) <<https://tinyurl.com/wwavtph6>> (as of Dec. 28, 2021)

³⁴⁴ Katz, et al., *supra*, pp. 20-27.

³⁴⁵ *Ibid.*

³⁴⁶ Avila, et al., *Voting Rights in California: 1982-2006*, Southern Cal. Rev. of Law and Social Justice (2007), p. 152.

³⁴⁷ 35 Fed. Reg. § 12354 (1970); see *Lopez v. Monterey County* (1999) 525 U.S. 266, 271.

³⁴⁸ U.S. Dept. of Justice, Jurisdictions Previously Covered by Section 5 <<https://tinyurl.com/52bzcabu>> (as of Nov. 17, 2021); U.S. Dept. of Justice, Voting Determination Letters for California <<https://tinyurl.com/ycj2229w>> (as of Nov. 17, 2021).

and Latino communities because it would have denied them the opportunity to elect their preferred candidate.³⁴⁹ Thus, while California has enacted laws expanding voting rights, equal access to the ballot box continues to be an ongoing challenge in parts of the state.

VI. Effects of Restrictions on Black Political Participation

A. Before the Voting Rights Act of 1965

When adopting the numerous voting restrictions described in this chapter, states made their intent clear. As one Virginia Senator explained, these restrictions were meant “to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without impairing the numerical strength of the white electorate.”³⁵⁰

These methods proved effective. Once Louisiana adopted a number of these restrictive rules in its 1898 constitution, the number of Black voters in Louisiana plummeted from 130,000 to 5,000.³⁵¹ In Virginia, the number dropped from 147,000 to 21,000.³⁵² Mississippi’s constitutional convention cut Black voter enrollment from about 147,000 to around 8,600.³⁵³ In 1906, five years after Alabama designed its exclusionary rules, only two percent of Black voters remained on the state’s voter registries.³⁵⁴ With the suppression of Black votes, Black representation in Congress quickly dwindled. During Reconstruction, 16 Black men held seats in Congress.³⁵⁵ From 1887 to 1901, just five members of Congress—in either the House of Representatives and Senate—were Black.³⁵⁶ From 1901 to 1929, not a single Black American served in Congress.³⁵⁷ No Black congressman would be elected again from the South until the 1970s.³⁵⁸

These barriers prevented Black Americans from governing, while securing the power of southern white supremacists in Congress, who voted down civil rights legislation and embedded racism into federal laws that built modern America. Near the end of Reconstruction in the 1870s, white southerners formed the “Southern Bloc” in the Senate—a unified front of white Democratic Senators from the former confederate states.³⁵⁹ After the passage of the Fifteenth Amendment in 1870, progressive senators proposed hundreds of pieces of civil rights legislation to remedy discrimination against Black Americans in education, employment, housing, transportation, public accommodations, and voting.³⁶⁰ But for 87 years, every attempt but one died in Congress,

³⁴⁹ Assistant Attorney General John R. Dunne, letter to Merced County Clerk Kenneth L. Randol (Apr. 3, 1992) <<https://tinyurl.com/afp7w822>> (as of Nov. 17, 2021).

³⁵⁰ Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia: Held in the City of Richmond, June 12, 1901 to June 24, 1901, at 3076-77 (Hermitage Press 1906).

³⁵¹ Nat. Park Service, *supra*, p. 14.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Nat. Park Service, *supra*, p. 6; Black Officeholders in the South, <<https://tinyurl.com/5x7mhm6d>> (as of Nov. 19, 2021).

³⁵⁶ U.S. House of Representatives, Office of History and Preservation, Black Americans in Congress: 1870-2007 (2008), pp. 3-4 <<https://tinyurl.com/5v53mmfx>> (as of Nov. 18, 2021).

³⁵⁷ *Id.* at pp. 2, 4.

³⁵⁸ *Ibid.*

³⁵⁹ Caro, *Master of the Senate* (2009), pp. xiii-xiv; Grantham, *The Life and Death of the Solid South: A Political History* (1992).

³⁶⁰ Caro, *supra*, pp. xiii-xiv.

many blocked by the white “Southern Bloc” of the Senate, who vigilantly thwarted any effort to advance Black civil rights.³⁶¹

Not only did White southern lawmakers vote down civil rights legislation, they also rewrote watershed pieces of legislation to exclude Black Americans. Many historians and economists consider the New Deal responsible for creating the modern middle class and many of the programs that Americans depend upon today, such as Social Security.³⁶² But the New Deal excluded Black Americans from many of its benefits.³⁶³ At the time, 90 percent of the southern Black workforce, and 60 percent of nation’s total Black workforce, worked as farm laborers or domestic servants.³⁶⁴

During the legislative process to pass various parts of the New Deal, southerners on the Senate Finance Committee excluded farm laborers and domestic servants from programs providing Social Security, minimum wage, unemployment insurance, and workers’ compensation.³⁶⁵ As several historians explain, the exclusion of farm laborers and domestic servants was “racially coded ... Southern politicians, reported one architect of the new law, were determined to block any ‘entering wedge’ for federal interference with the handling of the Negro question.”³⁶⁶ Thus, southern politicians rewrote the New Deal to exclude Black Americans from its benefits, fearing that federal benefits would discourage Black workers from taking low-paying jobs in their fields, factories, and kitchens.³⁶⁷

In one of the final parts of the New Deal, the government spent \$95 billion in the Servicemen’s Readjustment Act of 1944 (GI Bill) to give millions of veterans returning from World War II the ability to attend college, receive job training, start businesses, and purchase homes.³⁶⁸ Yet, one report from the 1940s observed that it was “as though the GI Bill had been earmarked ‘For White Veterans Only.’”³⁶⁹

During drafting, the chair of the House Veterans Committee, a white supremacist Congressman from Mississippi, ensured that the GI Bill was administered by states instead of the federal government to guarantee that states could direct its funds solely to white veterans.³⁷⁰ Similar results arose in housing and healthcare. For both the Hill Burton Act, which underwrote the creation of a modern health care infrastructure,³⁷¹ and the

³⁶¹ *Ibid.*

³⁶² See, e.g., Katznelson, *When Affirmative Action was White* (2005), p. 113; Krugman, Paul Krugman - New Deal Created the Middle Class (Apr. 1, 2011) <<https://tinyurl.com/yvxj9djin>> (as of Jan. 18, 2022); Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (2005), p. 9.

³⁶³ Katznelson, *supra*, p. 113; California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Jones, 7:20-8:55 <<https://tinyurl.com/4smp9aek>> (as of Jan. 26, 2022).

³⁶⁴ Thomas, *The Hill-Burton Act and Civil Rights: Expanding Hospital Care for Black Southerners, 1939-1960* (2006) 72 *J. of Southern History* 823, 827-28; Lichtenstein, et al., *Who Built America? Working People and the Nation's Economy, Politics, Culture, and Society* (Vol. 2, 2000), p. 429.

³⁶⁵ Boyle, *The President Proposes* . . . , *N.Y. Times* (Apr. 5, 2013) <<https://tinyurl.com/re9e2rwh>> (as of Dec. 15, 2021); Kotz, ‘*When Affirmative Action was White*’: *Uncivil Rights*, *N.Y. Times* (Apr. 28, 2005) <<https://tinyurl.com/2p8k9fwx>> (as of Dec. 15, 2021); Lichtenstein, et al., *Who Built America? Working People and the Nation's Economy, Politics, Culture, and Society—Volume 2: Since 1877* (2000), p. 429.

³⁶⁶ Lichtenstein, et al., *supra*.

³⁶⁷ *Ibid.*

³⁶⁸ Kotz, *supra*.

³⁶⁹ Katznelson, *supra*, pp. 113-15; see also Blakemore, *How the GI Bill's Promise was Denied to a Million Black WWII Veterans*, *History* (Apr. 20, 2021) <<https://tinyurl.com/2p96ajyv>> (as of Dec. 15, 2021).

³⁷⁰ Katznelson, *supra*, p. 121.

³⁷¹ Thomas, *supra*, p. 823.

Housing Act of 1949, Congress included segregation clauses or rejected anti-discrimination clauses to avoid southern lawmakers' opposition, which otherwise would have doomed the legislation.³⁷²

Thus, by barring Black political participation after Reconstruction, white supremacists seized state, local, and federal power, perpetuated discriminatory policies, blocked efforts to redress discrimination, and excluded Black Americans from most of the major economic legislation that produced the modern economy of the United States.³⁷³

B. After the Voting Rights Act

Since the passage of the Voting Rights Act, Black voters have been among the most stable voting blocs, despite historic and ongoing efforts to restrict their ability to vote.³⁷⁴ Black support has proved critical, in particular, in modern elections. In the last three presidential elections, Black voter turnout was 67 percent in 2012, 60 percent in 2016, and 63 percent in 2020.³⁷⁵ Black voter turnout in each of these elections was higher than Latino and Asian Americans, and higher than white people in 2012.³⁷⁶ Though Black Americans represent about 12.4 percent of the U.S. population today,³⁷⁷ many political pundits recognized that the Black electorate played a significant role in determining the outcome in the presidential election in 2020.³⁷⁸

Nevertheless, these longstanding limitations on Black political participation have deeply shaped the lives of Black Americans. If the goal of political participation is to ensure a government is responsive to the needs of its citizens, Black political participation is particularly important to serve the needs of Black communities who experience the persisting effects of slavery and segregation. But the suppression of Black political participation has prevented Black Americans from exercising their democratic voice, perpetuating policies that entrench racial inequalities.

When Black Americans gain greater representation, Black Americans have a greater ability to request and enact policies that meet their economic and educational needs. One recent study—the first to examine the effects of Black politicians on public finances during Reconstruction—found that Reconstruction-era communities with more Black politicians had higher local tax revenue, as well as higher Black literacy rates.³⁷⁹ In other words, the study suggests that communities with more Black politicians increased their tax revenue, which in turn increased investment in local education and Black education.

³⁷² Von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949* (2000) 11 Housing Policy Debate 299, 309; Thomas, *supra*, p. 836.

³⁷³ Bateman, et al., *Southern Nation: Congress and White Supremacy After Reconstruction* (2018), p. 385.

³⁷⁴ Griffin, et al., *States of Change, How Demographic Change is Transforming the Republican Democratic Parties*, Center for American Progress (June 2019), pp. 9-10 <<https://tinyurl.com/ty38x4hs>> (as of Nov. 19, 2021); see also Ray and Whitlock, *Setting the Record Straight on Black Voter Turnout*, Brookings Institution (Sept. 12, 2019) <<https://tinyurl.com/vkadhec5>> (as of Nov. 8, 2021).

³⁷⁵ Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. Census Bureau (Apr. 29, 2021) <<https://tinyurl.com/he5d8hxr>> (as of Nov. 19, 2021).

³⁷⁶ *Ibid.*

³⁷⁷ Jones, et al., *2020 Census Illuminates Racial and Ethnic Composition of Country*, U.S. Census Bureau (Aug. 12, 2021) <<https://tinyurl.com/npnhbfp>> (as of Nov. 19, 2021).

³⁷⁸ Stafford, et al., *'This is Proof': Biden's Win Reveals Power of Black Voters*, Associated Press (Nov. 9, 2020) <<https://tinyurl.com/a8cxtv5k>> (as of Nov. 19, 2021); Wiltz, *2020: The Year Black Voters Said, 'Hold Up,'* Politico (Jan. 2, 2021) <<https://tinyurl.com/x5z6bcr>> (as of Nov. 19, 2021); Igielnik, et al., *Behind Biden's 2020 Victory*, Pew Research Center (Jun. 30, 2021) <<https://tinyurl.com/ks8jev4z>> (as of Nov. 19, 2021).

³⁷⁹ Logan, *Do Black Politicians Matter? Evidence from Reconstruction* (2020) 80 J. of Econ. History 1, 2-3, 22-33.

Another study found that the passage of the Voting Rights Act led to some reduction in racial wealth disparities, especially in covered jurisdictions subject to greater federal oversight.³⁸⁰ Comparing neighboring counties—where one county was a covered jurisdiction subject to heightened oversight under the Voting Rights Act, and the other was not—the study found that the Voting Rights Act narrowed the Black-white wage gap 5.5 percent between 1965 and 1970, a change driven primarily by increases in Black wages.³⁸¹

By protecting Black voting rights, the Act helped drive increases in wages by giving Black Americans greater voice to seek public employment opportunities and enabling Black Americans to ask for public funds to be invested in their communities.³⁸² The Act also allowed Black communities and their representatives to implement affirmative action and anti-discrimination laws to protect Black Americans and their ability to access equal employment opportunities and equal wages.³⁸³ According to the study, the Voting Rights Act contributed to about one-fifth of the overall decline in wage gap between Black and white Americans in the South between 1965 and 1970.³⁸⁴

Yet, Black Americans can secure the benefits of political participation only to the extent that government policies respond to their voices. Despite modern gains in political participation and representation—including Barack Obama, the first Black man to be elected President in 2008, and Kamala Harris, the first Black woman to be elected Vice President in 2020—Black Americans have not seen a similar rise in policies responsive to their needs.

Studies examining more recent years have shown that not only do Black Americans hold less political sway than white Americans when it comes to influencing the government, Black support for a policy actually decreases the chances that the government will enact it. Law Professor Nicholas O. Stephanopoulos conducted a study to measure the political sway held by different types of voters. Relying on a database collecting group preferences on more than 2,000 policy issues from 1981 to 2006, Stephanopoulos found that as white support for a policy increased from zero percent to 100 percent, the likelihood of the federal government adopting the policy rose from about 10 percent to 60 percent.³⁸⁵ However, when Black support for a policy increased from zero percent to 100 percent, the likelihood of the federal government adopting the policy fell from about 40 percent to 30 percent.³⁸⁶

Stephanopoulos found similar results regarding state policy. “Whether most Black voters are conservative or liberal, state legislative outcomes barely budge. But vary the views of white voters to an equivalent degree, and a state’s policies go from looking like Alabama’s to resembling Michigan’s,” even when considering the number of Black and white people that live in the state.³⁸⁷ Stephanopoulos also noted that the passage of landmark laws—such as the Civil Rights Acts of the 1960s—is not proof that Black Americans are adequately

³⁸⁰ Aneja and Avenancio-Leon, *The Effect of Political Power on Labor Market Equality: Evidence from the 1965 Voting Rights Act*, Wash. Center for Equitable Growth (Oct. 16, 2020) <<https://tinyurl.com/2cy7c3c7>> (as of Nov. 19, 2021).

³⁸¹ *Id.* at p. 17.

³⁸² *Id.* at pp. 23-30.

³⁸³ *Id.* at pp. 23-30.

³⁸⁴ *Id.* at p. 18.

³⁸⁵ Stephanopoulos, *Political Powerlessness* (2015) 90 N.Y.U. L. Rev. 1527, 1583.

³⁸⁶ *Ibid.*

³⁸⁷ Stephanopoulos, *The False Promise of Black Political Representation*, The Atlantic (Jun. 11, 2015) <<https://tinyurl.com/ss84zwhc>> (as of Nov. 19, 2021).

represented by the government, because “[i]t remains possible that the group loses on most other matters. Individual victories might conceal aggregate defeats.”³⁸⁸

Other researchers reached similar conclusions. John Griffin and Brian Newman published a book documenting a series of studies about how likely Congress will enact policies desired by different racial groups.³⁸⁹ For one study, Griffin and Newman used long-running opinion surveys to determine racial groups’ views on whether the federal government should increase or decrease spending in six areas, then compared the groups’ views to changes in spending that actually took place. Like Stephanopoulos, they found that Congressional spending is much less likely to reflect the views of Black and Latino Americans.³⁹⁰ Griffin and Newman also measured political responsiveness by examining the positions taken by members of Congress in their votes on legislation. Their review of those results, again, indicated that members of Congress were less responsive to their Black and Latino voters than to their white voters.³⁹¹

Recent events underscore the government’s failures to heed Black voices. For example, despite national and bipartisan support for police reform following the murder of George Floyd, Congress failed to enact any police reform legislation.³⁹² Similarly, Congress failed to pass any voting rights legislation—including bills with bipartisan support—to counteract the slew of state laws increasing voting restrictions after the 2020 election.³⁹³

Likewise, Congress has consistently failed to pass legislation redressing the economic disparities faced by Black Americans. Black American households, on average, still earn one-tenth of what white households do.³⁹⁴ Chapter 13 on the Wealth Gap delves into the wealth gap between Black and white families and its causes, many of these problems can be traced to the discriminatory laws and policies that continue to be felt today. Take, for example, housing segregation. Laws that historically enforced or sanctioned racial housing segregation have produced neighborhood segregation that persists today.³⁹⁵ Because modern life revolves around a family’s neighborhood—including access to employment, credit scores, housing values, the amount of funding for local schools or parks, and policing—the racist policies that produced neighborhood segregation have created a discriminatory foundation that other laws have been built upon.³⁹⁶

Although increased political representation can allow Black communities to try to change these systems, undoing these discriminatory systems is not a matter of flipping a switch. Discriminatory policies have piled

³⁸⁸ Stephanopoulos, *Political Powerlessness*, *supra*, at p. 1532.

³⁸⁹ Griffin and Newman, *Minority Report: Evaluating Political Equality in America* (2008).

³⁹⁰ *Id.* at pp. 64-69.

³⁹¹ *Id.* at pp. 81-107.

³⁹² Sonmez and DeBonis, *No Deal on Bill to Overhaul Policing in Aftermath of Protests Over Killing of Black Americans*, Wash. Post (Sep. 22, 2021) <<https://tinyurl.com/vvfuyrt3>> (as of Dec. 16, 2021); The Editorial Board, *Why National Police Reform Failed*, Wall Street Journal (Sep. 27, 2021) <<https://tinyurl.com/ffkj392s>> (as of Dec. 16, 2021).

³⁹³ Logan, *John Lewis Voting Rights Bill Fails in the Senate Amid Rise of GOP-Led State Restrictions*, L.A. Times (Nov. 3, 2021) <<https://tinyurl.com/2p9bfp5j>> (as of Dec. 16, 2021).

³⁹⁴ Rosalsky, *What a 1968 Report Tells Us about the Persistence of Racial Equality*, NPR (Jun. 9, 2020) <<https://tinyurl.com/zn9kyrw>> (as of Nov. 19, 2021).

³⁹⁵ Loh, et al., *The Great Real Estate Reset*, Brookings Institute (Dec. 16, 2020) <<https://tinyurl.com/3xsb29w7>> (as of Nov. 19, 2021); California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³⁹⁶ See, e.g., Godoy, *In U.S. Cities, The Health Effects of Past Housing Discrimination are Plain to See*, NPR (Nov. 19, 2020) <<https://tinyurl.com/3jpk3w78>> (as of Nov. 19, 2021); Mitchell and Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, National Community Reinvestment Coalition (Mar. 20, 2018) <<https://tinyurl.com/d59p42md>> (as of Nov. 19, 2021).

over decades and centuries, and undoing these systems is much like undoing the literal concrete underlying a city and its streets and sidewalks.³⁹⁷ It requires many years, if not decades, of durable and long-term commitment to both change the old system and design a new one. The sustained, long-term commitment required for change means that the election of any one or several Black politicians is not enough, alone, to fix the problematic policies at the root of racial inequalities.³⁹⁸ Political participation therefore represents just one piece of the puzzle when it comes to identifying the ongoing legacies of slavery, systemic discrimination, and what needs to be done to redress them.

C. California

During California's early history, Black Californians struggled to gain representation in political office or to have a voice in party politics. Beginning in 1870, most Black Californians belonged to the Republican Party, the party that had abolished slavery.³⁹⁹ But the white members of California's Republican Party ignored Black Californians' requests to serve in elected or appointed political offices.⁴⁰⁰ Some Black voters protested by joining the Democratic Party in the 1880s.⁴⁰¹ But Democrats, too, refused Black men the offices that they had promised in order to lure Black voters to their side.⁴⁰² Though Black men secured the formal right to vote in 1870, it would take nearly a half century before California's first Black legislator, Frederick M. Roberts, was elected to the California State Assembly in 1918.⁴⁰³ From 1918 to 1965, only six Black male Californians were elected to the California Legislature.⁴⁰⁴ California did not elect its first Black female legislator, Yvonne Brathwaite Burk, until 1966.⁴⁰⁵

In more recent years, California has made many strides in expanding voting rights access. As of January 2022, the number of Black elected officials in California's legislature is now proportional to the state's Black population.⁴⁰⁶ But as described in later chapters of this report, the state still has not addressed many of the socioeconomic disparities that have resulted from these longstanding barriers, disparities that profoundly shape the lives of Black Californians. While Black Californians may have a greater ability to vote in the ballot box today, Black Californians also have voted with their feet: many have left the state for opportunities elsewhere, reflecting continued failure to address their needs.⁴⁰⁷

VII. Conclusion

Despite the promise of American democracy, the United States has excluded Black Americans from equal participation in self-government. By doing so, government officials and private parties sought to recreate the

³⁹⁷ See generally Caro, *The Power Broker* (1974).

³⁹⁸ Guinier, *supra*, pp. 1134-1153.

³⁹⁹ Daniels, *Pioneer Urbanites: A Social and Cultural History of Black San Francisco* (1990), p. 50.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Id.* at pp. 50-51.

⁴⁰² *Ibid.*

⁴⁰³ California Legislative Black Caucus, Past Members <<https://tinyurl.com/5565rdvj>> (as of Nov. 18, 2021).

⁴⁰⁴ California Legislative Black Caucus, *supra*.

⁴⁰⁵ *Ibid.*; see also California Research Bureau, *Women of Color in California's Legislature* (Aug. 2015) <<https://tinyurl.com/dr4kyphd>> (as of Nov. 18, 2021).

⁴⁰⁶ Compare California Legislative Black Caucus, *supra*, with U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021).

⁴⁰⁷ Hepler, *The Hidden Toll of California's Black Exodus*, Cal Matters (Jul. 15, 2020) <<https://tinyurl.com/36y2783a>> (as of Dec. 30, 2021).

racial hierarchy that existed during enslavement. Though Black Americans organized to pursue their equal citizenship, government officials resisted, retaliated, and undercut Black political power through the many means and methods described in this chapter. Many of these methods persisted for nearly a century—others persist to this day. But all of these methods have limited the country’s efforts to redress the legacy of slavery and racial discrimination, producing deep inequalities in the politics and policies that shape America and the lives of Black Americans today.

DRAFT

Chapter 5. The Root of Many Evils: Residential Segregation

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

After the Civil War, federal, state, and local government officials, working with private individuals, actively segregated American land into Black and white neighborhoods. This housing segregation occurred over almost 200 years, and through a variety of different government strategies and policies. These government actions were intentional and they supplemented and intensified the actions of private individuals.

Immediately after the Civil War, the United States was less segregated than it is today.¹ Most Black Americans lived in the rural South, on or near the land on which they had been enslaved, in shacks or former slave quarters.² In the cities of the North and South, Black Americans mostly lived in racially mixed neighborhoods, even though Black residents lived in housing of worse quality and in back alleys.³

The average urban Black person in 1890 lived in a neighborhood that was only 27 percent Black.⁴ Since then, American federal, state, and local municipal governments amplified actions by private citizens to force Black Americans into urban ghettos, while helping white Americans buy single family homes in the suburbs. Rural American also became increasingly segregated, as Black residents left the rural South for economic opportunity and to escape racial violence and terrorism.⁵

As certain segregation methods were declared unconstitutional, federal, state, and local governments ignored them or thought up new ways to reach the same goals.⁶ Although the decisions of millions of private homeowners, real estate agents, and landlords settled Americans into segregated residential patterns, it was action by all levels of government which expanded and solidified these settlements into the segregated neighborhoods of today.

Between the 1900s and the 1930s, local governments actively planned cities to be racially segregated.⁷ The real estate industry promoted restrictive covenants, which were clauses written into deeds that prohibited nonwhite residents from living in the house.

By 1940, the average urban Black person lived in a neighborhood that was 43 percent Black.⁸ From the 1930s to the 1970s, the United States federal government built public housing for white Americans, but not Black Americans. The federal government helped white Americans, but not Black Americans buy houses in the suburbs. Throughout American history, up until the 1970s, white residents terrorized their Black neighbors by

¹ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

² [citation needed]

³ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

⁴ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

⁵ Logan, T., & Parman, J. (2017). The National Rise in Residential Segregation. *The Journal of Economic History*, 77(1), 127-170. doi:10.1017/S0022050717000079

⁶ [citation needed]

⁷ [citation needed]

⁸ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

destroying their property, bombing their houses, and burning crosses on their lawns to scare them away from living in white neighborhoods.

By 1970, the average urban Black person lived in a neighborhood that was 68 percent Black.⁹ Even after the passage of the Federal Housing Act, which outlawed housing discrimination, urban renewal and other uses of local government actions funded by the federal and state governments maintained residential segregation.¹⁰

The problem of segregation has never been corrected. America is as segregated in 2019 as it was in the 1940s, with the average urban Black person living in a neighborhood that is 44 percent black.¹¹

In California, the population of Black Americans remained small until World War II, when Black Americans moved to the state to find jobs in the war industry.¹² On the one hand, Southern California is an African American success story.¹³ As W.E.B. Du Bois wrote of Los Angeles and Pasadena in 1913, “Nowhere in the United States is the Negro so well and beautifully housed, nor the average efficiency and intelligence in the colored population so high.”¹⁴

In 1910, 36 percent of African Americans in Los Angeles owned homes, far more than most cities at the time.¹⁵ On the other hand, all success is relative. Federal, state, and local government in California helped create segregation through discriminatory federal housing policies, zoning ordinances, decisions on where to build schools and a discriminatory federal mortgage policy called redlining.¹⁶ As Robert Joseph Pershing Foster, a migrant from the small town of Monroe, Louisiana who moved to Los Angeles in the 1950s said of his first days in California, “I came all this way running from Jim Crow, and it slaps me straight in the face[.]”¹⁷

Like elsewhere in the country, the effects of these government policies at all levels continue to this day. In 2021, in Los Angeles only 34 percent of Black households owned homes,¹⁸ *less than in 1910*.

Section III of this chapter describes the history of U.S. Supreme Court decisions which allowed residential segregation to intensify over the last 170 years. Section IV describes the state of residential segregation at the end of the Civil War, before government and private action segregated the American landscape. Section V, VI and VII explains how migration patterns across the country led states, cities and communities to exclude Black Americans, how Black Americans establish their own communities in response and the racism that they faced in doing so. Sections VIII – XIII details the various mechanisms used by federal, state and local governments to segregated America throughout history. Sections XIV and XV describes the state of housing segregation today

⁹ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

¹⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Stephen Menendian, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹¹ Frey, *Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans* (Apr. 6, 2021) Brookings Institution <<https://www.brookings.edu/research/neighborhood-segregation-persists-for-black-latino-or-hispanic-and-asian-americans/>> (as of June 30, 2021).

¹² [citation needed]

¹³ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020) p. 2.

¹⁴ Du Bois, *Crisis*, July 1913 [pincite]

¹⁵ *Ibid.*

¹⁶ Rothstein, *supra*, at p. 11.

¹⁷ Wilkerson, p. 210

¹⁸ Munoz, *et. al.*, “Black families own homes at a lower rate than white families in SoCal. Here’s why that matters” abc7.com, <<https://tinyurl.com/4uyte5mc>> (as of Nov. 10, 2021).

and its effects. Section XVI concludes that residential segregation in America is a result of white supremacist beliefs created to support enslavement and is the root of many modern day racial disparities. Section XVII is an appendix of relevant data for reference.

III. Constitutionally Sanctioned Housing Discrimination

The reason that housing segregation has never been fixed in America is due in part to the Supreme Court. As discussed in Chapter 2 and 4, although the Civil Rights Act of 1866 and the Fourteenth Amendment to the U.S. Constitution banned actions that continued the effects of slavery, the Supreme Court of the United States decided in 1883 that the federal government could not prohibit racial discrimination by individual business owners and private parties. This ruling later applied to housing.¹⁹ As a result, government and private actors essentially ignored the Civil Rights Act of 1866 and Fourteenth Amendment protections against racial discrimination until Congress passed the Fair Housing Act in 1968.²⁰

The story did not end here. At the height of segregation in the 1970s, the U.S. Supreme Court popularized the myth that the American government had no role in creating housing segregation, and therefore should not and could not fix the personal choices of millions of private citizens.²¹ California law did not protect Black Californians any further than the federal government.²²

IV. The End of the Civil War

At the end of the Civil War, the country was less segregated than it was today and the residential segregation that did exist was different than it is today.²³ Immediately after the Civil War, between 1860 and 1900, almost 90 percent of Black Americans lived in the South,²⁴ and 80 percent of those who lived in the South lived in rural areas.²⁵ Many Black workers lived in former slave quarters, on the same plantation on which they had been enslaved.²⁶

Most modern-day scholars agree that white and Black Americans lived in the same geographic area in the cities at this time, although in unequal quality of housing.²⁷ White families lived in front streets and broad avenues and Black families generally could only live in backyards, alleys, side streets, or their houses were separated by physical barriers.²⁸ Impoverished shanty towns of unemployed Black Americans also appeared around southern cities²⁹ in undesirable areas like swamps, near city dumps, and next to cemeteries and railroad tracks.³⁰ “Ghettos

¹⁹ Rothstein, *supra*, at pp. viii-ix; see generally *The Civil Rights Cases*, (1883) 109 U.S. 3

²⁰ Rothstein, *supra*, at pp. viii-ix; see generally *The Civil Rights Cases*, (1883) 109 U.S. 3

²¹ Rothstein, *supra*, at p. xii.

²² [citation needed]

²³ Massey, *supra*, at page 20; see also, Cutler, *supra*.

²⁴ U.S. Census Bureau, Dept. of Commerce, *Black Population: 1790-1915* (1918) page 33.

²⁵ *Id.* at pages 89-90.

²⁶ *Id.* at 181; see also Ransom, *One Kind of Freedom: The Economic Consequences of Emancipation* (1977) page 56, Royce, *supra*, at page 181; Du Bois, *The Negro American Family* (1908) pages 45-50 (hereafter *The Negro American Family*).

²⁷ Massey, *American Apartheid: Segregation and the Making of the Underclass* (1993) page 21.

²⁸ Massey, *supra*, at page 25; see generally Grigoryeva and Ruef, *supra*; Logan and Martinez, *supra*.

²⁹ Foner, *Reconstruction: America's Unfinished Revolution* (1988) page 82; see also Logan and Martinez, *supra*, at page 6.

³⁰ Foner, *supra*, at page 82.

were built up in in nearly all Southern cities, not always sharply defined but pretty definite, and in these, Negroes must live[,]” wrote W.E.B. Du Bois.³¹

At the same time, less than 10 percent of Black Americans lived in the North and less than 0.4 percent lived in the western states.³² Most lived in urban areas³³ that were much more segregated by neighborhood than in the South,³⁴ and in worse housing conditions than white Americans.³⁵

In 1899, W.E.B. Du Bois’s landmark sociological study of Philadelphia summed up the situation: “Here is a people receiving a little lower wages than usual for less desirable work, and compelled, in order to do that work, to live in a little less pleasant quarters than most people, and pay for them somewhat higher rents.” Some families used up to 75 percent of their income on rent, as real estate agents raised the rent for Black tenants because they knew many landlords did not rent to Black tenants.³⁶ Most Black Americans living in the North were only able to find jobs serving white families, and thus were forced to pay higher rents in the more expensive neighborhoods close to their employers.³⁷

[Research to come: the state of segregation in California from ~1850 to 1900.] In 1890, California had four counties with fewer than 10 Black residents; there were eight such counties by 1930.³⁸

V. The Great Migration

Between 1870 and 1900, many Black Americans moved from rural to urban areas in the South, looking for better paying jobs.³⁹ Over the next seven decades, as violence targeting Black Americans intensified in the South and Southern states passed laws which relegated Black Americans in nearly every aspects of life to worse conditions than white Americans, the promise of better jobs and the illusion of racial equality pulled Black Americans out of the South to the North and the West.⁴⁰ This is called the Great Migration and, at its peak, 16,000 Black people left the South each month.⁴¹

Historians have identified three migration paths out of the South: the eastern path carried people from Florida, Georgia, the Carolinas, and Virginia to Washington D.C., Philadelphia, New York, and Boston.⁴² The Midwest path carried people from Mississippi, Alabama, Tennessee, and Arkansas to Cleveland, Detroit, Chicago Milwaukee, and Pittsburgh.⁴³ The western path carried people from Louisiana and Texas to California and the rest of the West Coast.⁴⁴ More Black people moved to California in the 1940s than in the entire previous

³¹ Du Bois, *Black reconstruction: an essay toward a history of the part which black folk played in the attempt to reconstruct democracy in America* (1935) page 682.

³² *Id.* at page 33.

³³ *Id.* at page 90.

³⁴ Massey, *supra*, at page 21.

³⁵ Massey, *supra*, at page 19; see also Foner, *supra*, at page 472.

³⁶ *Id.* at page 295.

³⁷ *The Philadelphia Negro*, *supra*, at pages 295-296.

³⁸ Loewen, p. 54-56

³⁹ Taylor, *The Environment and the People in American Cities, 1600s-1900s* (2009) p. 467.

⁴⁰ Taylor (2009), *supra*, at pp. 467-468.

⁴¹ Taylor (2009), *supra*, at p. 468.

⁴² Wilkerson, *The Warmth of Other Suns* (2010) p. 180

⁴³ Wilkerson, *The Warmth of Other Suns* (2010) p. 180

⁴⁴ Wilkerson, *The Warmth of Other Suns* (2010) p. 180

century of statehood combined.⁴⁵ The Black population of California mushroomed from 124,306 in 1940 to 1,400,143 in 1970.⁴⁶ By the end of the Great Migration in the 1970s, 47 percent of Black Americans lived outside of the South.⁴⁷ Historians have argued that the Great Migration led to an increase in racial violence in the North and West, and an intensification of residential segregation.⁴⁸

VI. Exclusion or Destruction of African Americans' Communities

A. Nationally

As Black Americans left the South, entire states like Indiana and Oregon outright banned Black Americans from living in the state.⁴⁹ Peter Burnett, who later became the first governor of the State of California, was involved in passing these Oregon laws to ban Black residents from living in Oregon.⁵⁰

In addition to entire states, many towns across the country became known as sundown towns, where Black Americans were not allowed to remain after dark.⁵¹ Although these rules were often unwritten, local sheriffs and armed, white mobs enforced them.⁵² Sundown towns were created largely between 1890 to 1940 and they legally continued to exist through 1968.⁵³ The sociologist James Loewen argued that most suburbs in America began as sundown towns and that the hometowns of nine out of the 32 candidates for president in the 20th century were sundown towns.⁵⁴ For example, Harry Truman grew up in Lamar, Missouri, a Jim Crow town of 3,000 without a single Black family.⁵⁵ George W. Bush lived in Highland Park, a sundown suburb of Dallas that only welcomed its first Black homeowners in 2003.⁵⁶

B. California

Much like Indiana and Oregon outright banned Black Americans from living in the state as they left the south,⁵⁷ California also tried to pass laws banning African Americans from settling in the state.⁵⁸ Although the laws did not pass, the California legislature, dominated by white southerners at the time, as discussed in Chapter 2, sent the clear message that African Americans were not welcome.⁵⁹

⁴⁵ Wilkerson, *The Warmth of Other Suns* (2010) p. 188

⁴⁶ [Citation needed] Gibson and Jung, *Historical Census Statistics on Population Totals by Race, 1790-1990. And By Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, U.S. Census, Table 19
<<https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf>> [as of Jan. 20, 2022.]

⁴⁷ Wilkerson, *The Warmth of Other Suns* (2010) p. 20.

⁴⁸ Taylor (2014), *supra*, at p. 153.

⁵¹ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2018) p. [pincite] (Loewen).

⁵² Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2018) p. [pincite]

⁵³ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2018) p. [pincite]

⁵⁴ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2018) p. [pincite]

⁵⁵ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2018) p. [pincite]

⁵⁶ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2018) p. [pincite]

⁵⁸ Hudson, *supra*, at [pincite]

⁵⁹ Hudson, *supra*, at [pincite]

Later, as residential segregation reached its height between 1940 to 1970, local governments and residents created scores of sundown towns and suburbs in California,⁶⁰ some by ordinance and some by force.⁶¹ Loewen found evidence that eight California counties effectively excluded Black people.⁶² White Californians rioted to expel Black residents from California towns.⁶³ According to Loewen's research, California had more sundown towns than the entire South, which Loewen attributes to the culture of racism in the South preferring to exploit rather than exclude Black residents.⁶⁴

California sundown towns included most of the suburbs of Los Angeles and San Francisco, and most of Orange County.⁶⁵ Some of these places gained a national reputation as sundown towns.⁶⁶ Loewen has collected research on numerous sundown towns throughout California.⁶⁷ A list of the sundown towns identified by Loewen is included in Table 3 in the Appendix to this chapter.

Fliers for the Maywood Colony, a suburban development surrounding Corning, California, announced: "GOOD PEOPLE - In most communities in California you'll find Chinese, Japs, Dagoes, Mexicans, and Negroes mixing up and working in competition with the white folks. Not so at Maywood Colony. Employment is not given to this element."⁶⁸

In South Pasadena, in the late 1940s, the city administration, local civic leaders, and realtors tried to cover South Pasadena with racially restrictive covenants.⁶⁹ A 1947 newspaper article noted the unusual and extreme extent of this effort; the goal was to blanket the entire city with racially restrictive covenants.⁷⁰

As a matter of official policy, Black Americans and other nonwhite persons were only allowed to work in South Pasadena if they left by dusk.⁷¹ Limited exceptions were made for live-in servants and caretakers, but they could not live in the city on their own, and often could not bring their children to live with them.⁷² This campaign to exclude all nonwhite residents from South Pasadena only failed after the Supreme Court ruled that racially restrictive covenants could not be enforced.⁷³

VII. Freedmen's Town

A. Nationally

Banned from settling in entire geographic areas, and escaping discrimination and racial violence, Black Americans began building all Black towns in the 19th Century in the Southwest, Midwest, and West.⁷⁴ Also

⁶⁰ Loewen, *supra*, at p. 76.

⁶¹ See, e.g., Loewen, *supra*, at pp. 9-10, 99-100

⁶² Loewen 76.

⁶³ See, e.g., Loewen, *supra*, at pp. 9-10

⁶⁴ Loewen, p. 70.

⁶⁵ Loewen, *supra*, at p. 76.

⁶⁶ Loewen, *supra*, at p. 276.

⁶⁷ See Loewen, *supra*, at pp. 5, 14, 23, 29, 78, 100, 102-03, 220, 236, 239-40, 255, 258, 282, 293, 333, 338, 340, 410.

⁶⁸ Quoted in Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2005) p. 49.

⁶⁹ Loewen, *supra*, at p. 258, 282.

⁷⁰ Loewen, *supra*, at p. 282.

⁷¹ Loewen, *supra*, at p. 258, 282.

⁷² Loewen, *supra*, at p. 282.

⁷³ Loewen, *supra*, at p. 258.

⁷⁴ Hudson, *supra*, at p. 98.

known as Freedmen’s Towns, these towns developed in order to, in the words of one Black town newspaper editor, exercise freedom “as freedom was understood by [Black Americans].”⁷⁵ Between 100 and 200 such towns were built between early-1800s and mid-1900s.⁷⁶ A particularly large number of Black Americans migrated to Kansas.⁷⁷ Oklahoma had over 30 all Black towns.⁷⁸ Other states with such towns included Texas, Iowa, New Mexico, and Michigan, as well as some in the former slave states of Alabama, Mississippi, Kentucky, and Tennessee.⁷⁹ Over time, these towns became less common, as they succumbed to the racist social and political systems around them.⁸⁰

B. California

Although there is not much research on this topic, some records suggest that there were at least 15 Black towns in California between 1850 and 1910.⁸¹ The best known and most successful was Allensworth, 40 miles north of Bakersfield.⁸² Allen Allensworth, a formerly enslaved Lieutenant Colonel from the U.S. Army founded Allentown with others.⁸³ The town attracted disillusioned Black migrants who had fled the South, but found a different type of discrimination in California.⁸⁴

Unlike other Black towns in California, Allensworth was self-governing and at the height of its success before the Great Depression, 300 families constructed churches, a library, a school, and a general store.⁸⁵ Black midwives cared for the health of the community as most doctors in nearby towns refused to take Black patients unless the patient was employed by a white rancher.⁸⁶

Allensworth spent more money on its schools than its neighboring school districts.⁸⁷ Cornelius Pope, who lived in Allensworth and attended school there as a child, remembered that his teacher Alworth Hall “welcomed [him] to the Allensworth School and with open arms and asked [sic], ‘Learn something for me today.’”⁸⁸ When Pope left Allensworth, “it didn’t take me long to find out that I was equal to the very best. I was just as powerful, could think just as good, there was nothing inferior about me. I was pretty hard to stop from there on in.”⁸⁹

⁷⁵ Stuckey, *Boley, Indian Territory: Exercising Freedom in the All-Black Town* (Fall 2017) Vol. 102 No. 4 *The Journal of African American History*, 492, 493.

⁷⁶ Hudson, *supra*, at p. 98.

⁷⁷ Arrington, *Exodusters*, National Park Service <<https://www.nps.gov/home/learn/historyculture/exodusters.htm>> (as of January 21, 2022).

⁷⁸ Hudson, *supra*, at p. 99.

⁷⁹ Hudson, *supra*, at p. 99.

⁸⁰ See Hudson, *supra*, at p. 98, Stuckey, *Boley, Indian Territory: Exercising Freedom in the All-Black Town* (Fall 2017) Vol. 102 No. 4 *The Journal of African American History*, 492, 508.

⁸¹ Cox, *The Archaeology of the Allensworth Hotel: Negotiating the System in Jim Crow America* (Sept. 2007) 10 *African Diaspora, Archaeology Newsletter*, at p. 11.

⁸² Hudson, *supra*, at pp. 94-95, 99-102.

⁸³ Hudson, *supra*, at pp. 94-95, 99-102.

⁸⁴ Hudson, *supra*, at pp. 94-95, 99-102.

⁸⁵ Hudson, *supra*, at [pincite]

⁸⁶ Hudson, *supra*, at [pincite]

⁸⁷ Hudson, *supra*, at p. 114.

⁸⁸ *Ibid.*

⁸⁹ *Id.* at p. 115.

Despite Allensworth's success, it was never truly independent and had to rely on the government and white owned companies that controlled the water, the railroad, and job markets.⁹⁰ In testimony to the Task Force, Terrence Dean argues that water, land, and railroad companies discriminated against the town, leading to its demise.⁹¹ The Pacific Farming Company, after first selling land plots to the Black settlers at inflated prices, then prohibited land sales to African Americans, which limited the town's growth.⁹² Despite its promises, the Pacific Water Company built only four water wells for Allensworth, compared to the 10 wells it built in a neighboring white town.⁹³ The water dried up within two years and was contaminated with alkaline at first, then arsenic in 1967.⁹⁴ The founders maintained that the settlers were victims of a racist scam and were sold land that would never have enough water.⁹⁵

When it was founded, Allensworth was on the Santa Fe railroad's main line, which allowed the town to derive revenue from the rail stop. In 1914, the rail line was diverted away from Allensworth.⁹⁶ Not being able to earn revenue from the railroad stop or farming alone, residents worked multiple jobs in the surrounding, discriminatory white communities.⁹⁷ Young people left the town to find jobs elsewhere, and Allensworth slowly died and disappeared as economic opportunities decreased and the water calcified.⁹⁸ It was established as a state park in 1974, but remained critically underfunded and unbuilt until the 2000s.⁹⁹

VIII. City Planning for Segregation

A. Nationally

1. Anti-Black Zoning Ordinances

From the Civil War into the 1960s, as local governments planned the layout of their cities, they used planning regulations called zoning to prevent Black Americans from living in certain neighborhoods. First, city officials in southern cities in the early 1900s passed Black and white zoning ordinances to ban Black Americans from living in white neighborhoods. When the U.S. Supreme Court found that these explicitly race-based zoning ordinances violated the federal Constitution in 1917, city officials used other zoning ordinances as proxies for race in order to maintain all-white neighborhoods.¹⁰⁰

From the 1860s to 1900s, when Black Americans first left the rural South for the urban South, racial violence escalated, leading to a number of large scale race riots and massacres across the South.¹⁰¹ Soon after, anti-Black

⁹⁰ Hudson, *supra*, at p. 106.

⁹¹ Dean, et. al, *The California Boomtown That Racism Destroyed: Allensworth's sad history helps explain today's America* (Sept. 30, 2021) <<https://tinyurl.com/ybms6ywa>> [as of Nov. 10, 2021], [citation to task force testimony]

⁹² Dean, et. al, *The California Boomtown That Racism Destroyed: Allensworth's sad history helps explain today's America* (Sept. 30, 2021) <<https://tinyurl.com/ybms6ywa>> [as of Nov. 10, 2021].

⁹³ Dean, et. al, *The California Boomtown That Racism Destroyed: Allensworth's sad history helps explain today's America* (Sept. 30, 2021) <<https://tinyurl.com/ybms6ywa>> [as of Nov. 10, 2021].

⁹⁴ *Id.* at pp. 105, 124.

⁹⁵ *Id.* at p. 95.

⁹⁶ Hudson, *supra*, at pp. 122, 125.

⁹⁷ Hudson, *supra*, at pp. 121-126.

⁹⁸ Hudson, *supra*, at p. 126.

⁹⁹ *Id.* at pp. 127-128.

¹⁰⁰ Cal. EPA, *Pollution and Prejudice: Redlining and Environmental Injustice in California* (Apr. 19, 2021) <<https://storymaps.arcgis.com/stories/f167b251809c43778a2f9f040f43d2f5>> [as of June 15, 2021].

¹⁰¹ Taylor (2014), *supra*, at p. 153.

zoning ordinances were enacted in Southern and border cities.¹⁰² In 1910, Baltimore enacted the city's anti-Black zoning ordinance, making it illegal for Black people to move to blocks that were more than half white, and vice versa.¹⁰³ Edgar Allan Poe, Baltimore's city attorney and grandnephew of the famous poet, declared that the zoning was constitutional, and the city's mayor stated, "Blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White majority."¹⁰⁴

Numerous other southern cities followed Baltimore's example, including Winston-Salem, Atlanta, Oklahoma City, Miami, Birmingham, Dade County (Miami), Charleston, Dallas, Louisville, New Orleans, Richmond, and St. Louis.¹⁰⁵ Although only about 10 percent of Black Americans lived in the North at this time, anti-Black ordinances were popular nationwide.¹⁰⁶ In 1915, *The New Republic* argued for residential racial segregation until, "Negroes ceased wanting to 'amalgamate' with whites"¹⁰⁷

Although the U.S. Supreme Court declared racial zoning ordinances unconstitutional in 1917, states and cities ignored the decision for years.¹⁰⁸ In 1927, Texas passed a law authorizing cities to pass ordinances segregating Blacks and white.¹⁰⁹ Other cities, like Atlanta, Austin, Kansas City, and Norfolk, made discriminatory zoning decisions based on official city planning maps that explicitly labeled neighborhoods Black, until as late as 1987.¹¹⁰

2. Company Towns

Beginning in the late 18th century, large corporations planned and built entire towns for their workers and attracted them with benefits including housing and mortgages.¹¹¹ Before the 1910s, these companies did not hire Black Americans and so denied Black Americans these opportunities to build wealth.¹¹² When companies began hiring African Americans after the Great Migration, these companies typically offered Black workers housing that was lower in quality.¹¹³

In company towns like Gary, Indiana and Sparrows Point in Baltimore County, Maryland, the best housing and jobs were reserved for American-born white managers.¹¹⁴ The worst jobs and the smallest, shabbiest housing went to Black Americans.¹¹⁵ In Sparrows Point, Maryland, the site of Bethlehem Steel, Black residents were segregated from white residents.¹¹⁶ Two room bungalows with outhouses originally constructed for Black

¹⁰² Taylor (2014), *supra*, at p. 152.

¹⁰³ Taylor (2014), *supra*, at pp. 155-156.

¹⁰⁴ Taylor (2014), *supra*, at p. 156-57.

¹⁰⁵ See Taylor (2014), *supra*, at pp. 159-192.

¹⁰⁶ Rothstein, *supra*, at p. 45.

¹⁰⁷ Rothstein, *supra*, at p. 45.

¹⁰⁸ Rothstein, *supra*, at pp. 46-47.

¹⁰⁹ Taylor (2014), *supra*, at p. 169.

¹¹⁰ Rothstein, *supra*, at pp. 47-48.

¹¹¹ *Id.* at pp. 152-157.

¹¹² Taylor (2009), *supra*, at 216

¹¹³ Taylor (2009), *supra*, at pp. 478-479.

¹¹⁴ Taylor (2009), *supra*, at pp. 479-480.

¹¹⁵ Taylor (2009), *supra*, at pp. 479-480.

¹¹⁶ Taylor (2009), *supra*, at p. 480.

workers, were given to white immigrants when there was a housing shortage.¹¹⁷ Blacks workers were forced to rent bunks in shanties that were originally intended as temporary housing.¹¹⁸

3. Racialized Neighborhood Zoning

After the Supreme Court declared explicit racial zoning unconstitutional in 1917, city officials developed new strategies to segregate Black residents from white residents by neighborhood.

The federal government joined this effort. In 1933, President Franklin D. Roosevelt’s appointment to the National Land Use Planning Committee, Alfred Bettman, explained that cities and states needed to establish planning commissions for zoning to “maintain the nation and the race.”¹¹⁹ These new zoning strategies included:

- City officials zoned neighborhoods for single family homes, without change for decades.¹²⁰ This prevented apartment complexes from being built, which effectively kept out Black Americans who were less likely to afford single family homes.¹²¹ Influential experts like Columbia Law School professor Ernst Freund stated that “the coming of colored people into a district” was the “more powerful” reason for the use of zoning, rather than the creation of single family neighborhoods.¹²² The United States Supreme Court decided that this type of zoning law was constitutional in 1977;¹²³
- City officials relaxed or did not enforce zoning laws against white residents, but strictly enforced them against Black Americans and other people of color and effectively chased Black Americans out of certain neighborhoods;¹²⁴
- City officials zoned Black residential communities as commercial or industrial regardless of their residential character.¹²⁵ This created a vicious cycle. Black residential communities zoned as commercial or industrial attracted polluting industries and lowered property values.¹²⁶ White families would be less likely to move into the industrial zone, as white families generally had more money;¹²⁷ As a result, it became increasingly difficult to remove the commercial or industrial zoning for these Black residential communities.¹²⁸
- City officials limited new buildings by banning or imposing large fees on new construction, apartment buildings, mobile homes, or factory-built houses,¹²⁹ a practice known as “snob zoning.”¹³⁰ Cities also

¹¹⁷ Taylor (2009), *supra*, at p. 480.

¹¹⁸ Taylor (2009), *supra*, at p. 480.

¹¹⁹ Rothstein, *supra*, at pp. 51-52.

¹²⁰ Taylor (2014), *supra*, at p. 164.

¹²¹ Taylor (2014), *supra*, at p. 164.

¹²² Rothstein, *supra*, at p. 52.

¹²³ *Arlington Heights v. Metropolitan Housing Dev. Corp.*, (1977) 429 U.S. 252

¹²⁴ Taylor (2014), *supra*, at p. 184.

¹²⁵ Taylor (2014), *supra*, at p. 184, 186.

¹²⁶ Taylor (2014), *supra*, at p. 184, 186.

¹²⁷ Taylor (2014), *supra*, at p. 184, 186.

¹²⁸ Taylor (2014), *supra*, at p. 184, 186.

¹²⁹ Taylor (2014), *supra*, at p. 185.

¹³⁰ Winkler, “‘Snob zoning’ is racial housing segregation by another name” *the Washington Post* <https://tinyurl.com/46n4ybxh> [as of Nov. 12, 2021].

demanded development or architectural specifications.¹³¹ These ordinances had the effect of keeping poor people, large families, older residents, single individuals, and people of color out of particular areas;¹³² and

- City officials used dead-end streets, highways, cemeteries, parks, industrial spaces, and rail lines to create boundaries between Black and white neighborhoods.¹³³ Black people were even prohibited from burying the dead in white cemeteries¹³⁴ and from using parks.¹³⁵

These strategies were often used in combination to maintain the segregated nature of a neighborhood. For example, in the St. Louis metropolitan area where 18-year-old Michael Brown was shot in 2014, city officials used a planning map that listed the race of each building's occupants to zone Black neighborhoods and the land next to Black neighborhoods for industrial development in 1919.¹³⁶ The author of the city planning map explained that the goal was to prevent the movement into "finer residential districts . . . by colored people."¹³⁷ In order to navigate the racial hostility that this segregation caused, Black Americans created their own maps, travel guides, and other publications.¹³⁸ Chapter 11 on the legal system further discusses this form of counter-mapping.

White neighborhoods were zoned as residential, and the single family homes in those neighborhoods used restrictive covenants, as discussed below, to prevent Black residents from moving in.¹³⁹ This ensured that the neighborhood stayed white.¹⁴⁰ The Black neighborhoods were zoned to permit polluting industry, liquor stores, and brothels, which were banned in white neighborhoods.¹⁴¹ Later, the federal government cited the fact that Black neighborhoods were close to industry and vice as a risk to property values.¹⁴² Based on the federal government's analysis, private banks refused mortgages to Black Americans in a process called redlining.¹⁴³

4. School Siting Policy

City officials used the decision of where to build a school as a way to concentrate Black Americans in poor neighborhoods with underfunded schools.¹⁴⁴ This strategy is referred to as a school siting policy. Cities first banned Black families from sending their children to white schools, then moved the only school that Black

¹³¹ Taylor (2014), *supra*, at p. 185.

¹³² Taylor (2014), *supra*, at p. 185.

¹³³ Taylor (2014), *supra*, at p. 164.

¹³⁴ The Persistent Racism of America's Cemeteries (Jan. 16, 2017) Slate <<https://slate.com/human-interest/2017/01/america-segregated-cemeteries-are-important-troves-of-forgotten-black-history.html>> (as of Jul. 2, 2021).

¹³⁵ Taylor [citation needed]

¹³⁶ Rothstein, *supra*, at p. 49.

¹³⁷ Rothstein, *supra*, at p. 49.

¹³⁸ See generally Alderman & Inwood, How Black Cartographers Put Racism on the Map, Next City (February 24, 2021)

<<https://nextcity.org/urbanist-news/how-black-cartographers-put-racism-on-the-map>> (as of January 24, 2022).

¹³⁹ Rothstein, *supra*, at p. 49.

¹⁴⁰ Rothstein, *supra*, at p. 49.

¹⁴¹ Rothstein, *supra*, at p. 50.

¹⁴² Rothstein, *supra*, at p. 50.

¹⁴³ Rothstein, *supra*, at p. 50.

¹⁴⁴ Rothstein, *supra*, at p. 132.

students were allowed to attend into designated Black neighborhoods and did not pay to transport Black students who lived outside the Black neighborhoods.¹⁴⁵

In 1928, the city of Austin, Texas, adopted a master plan to create a “negro district[,]”¹⁴⁶ which described this strategy as a “new mechanism to create segregation” in the city.¹⁴⁷ The mechanism worked well. In 1930, Wheatsville, a racially mixed community in Austin founded by a formerly enslaved person, was 16 percent Black.¹⁴⁸ In 1950, the Black population of Wheatsville was one percent.¹⁴⁹

After city officials segregated Austin, the “negro district”¹⁵⁰ on the east side had more unpaved streets, broken sewers, and fewer public transportation.¹⁵¹ The city did not enforce the residential zoning ordinances, so the neighborhood became increasingly industrial.¹⁵² City officials in Atlanta used segregation maps to guide the school board’s decisions on which schools to close and where to build new schools.¹⁵³

B. California

The first known attempt by an American city to segregate on the basis of race was in 1890 when the San Francisco Board of Supervisors voted unanimously to move all Chinese people within San Francisco to a neighborhood set aside for “offensive” and noisy businesses.¹⁵⁴

1. Northern California

In 1953, when the Ford Motor Company moved its plant to Milpitas, California, and the labor union tried to build housing for its Black workers, the city rezoned the site for industrial use.¹⁵⁵ The city also adopted a zoning ordinance banning apartment buildings.¹⁵⁶ Anaheim, Costa Mesa, Orange, and Santa Ana zoned Black residential communities as industrial to maintain neighborhood segregation.¹⁵⁷

In 1958, the Palo Alto school district chose not to build two integrated high schools to solve overcrowding problems, but instead built a new school in the heart of the segregated Black East Palo Alto neighborhood, further entrenching segregation in Palo Alto.¹⁵⁸

2. Southern California

In California, the then-prosperous Los Angeles neighborhood of Sugar Hill is another example of the effects of racialized zoning. Hattie McDaniel, the first African American to win an Oscar for her role as Mammy in *Gone*

¹⁴⁵ Rothstein, *supra*, at p. 132.

¹⁴⁶ Koch & Fowler, “A City Plan for Austin, Texas” (1928) p. 57

¹⁴⁷ Rothstein, *supra*, at pp. 132-133.

¹⁴⁸ Rothstein, *supra*, at pp. 132-133.

¹⁴⁹ Rothstein, *supra*, at pp. 132-133.

¹⁵⁰ Koch & Fowler, “A City Plan for Austin, Texas” (1928) p. 57

¹⁵¹ Rothstein, *supra*, at p. 133.

¹⁵² Rothstein, *supra*, at p. 133.

¹⁵³ Rothstein, *supra*, at p. 135.

¹⁵⁴ McClain, *In Re Lee Sing: The First Residential-Segregation Case*, (Jun. 1990) *Western Legal History*, p.179; *see also*, *In re Lee Sing* (C.C.D. Cal. 1890) 43 F. 359

¹⁵⁵ (Abrams 1966).

¹⁵⁶ Rothstein at p. 36.

¹⁵⁷ Taylor (2014), *supra*, at p. 186.

¹⁵⁸ Rothstein, *supra*, at 13

with the Wind, Norman Houston, co-founder of what became the largest Black owned insurance company in the West, and singer Ethel Waters lived in the neighborhood. Waters remembered the day she moved into her house: “During the day the moving men had brought my things, and when I saw that they had placed each chair and table exactly where I wanted, I burst into tears[.] ‘My house,’ I told myself. The only place I’ve ever owned all by myself ... I felt I was sitting on top of the world. I had a home at last.”¹⁵⁹

In 1945, the white neighborhood association sued to apply its restrictive covenant and evict the Black families living there.¹⁶⁰ When the white neighbors lost their lawsuit, the Los Angeles City Council stepped in and rezoned the neighborhood for rentals despite the protests of the affluent Black families living there.¹⁶¹ In 1954, the city built the Interstate 10 Santa Monica Freeway through Sugar Hill and succeeded, finally, in destroying the Black community.¹⁶²

When South Central Los Angeles became a Black community in the 1940s, it had a mix of industrial plants and residential homes.¹⁶³ The City of Los Angeles rezoned much of the neighborhood for commercial use.¹⁶⁴ A plant explosion killed five local residents, 15 white workers, and destroyed more than 100 homes.¹⁶⁵ When the pastor of a Black church protested the industrial zoning near his church, a city official replied, “Why don’t you people buy a church somewhere else?”¹⁶⁶

IX. Condemnation/Eminent Domain

From the 1855 construction of iconic Central Park in New York City to urban renewal in the 1970s, America built parks, highways, and new economic developments that destroyed Black or integrated neighborhoods. Government officials used a legal concept called eminent domain to confiscate private land owned by Black Americans for these public uses.¹⁶⁷ The U.S. constitution demands that the government pay the landowner “just compensation,” which is usually fair market value, but often a disputed sum.¹⁶⁸

These government decisions evicted Black Americans from their homes and destroyed Black wealth.¹⁶⁹ It shuttered thriving businesses¹⁷⁰ and severed community ties.¹⁷¹ Alfred Johnson, the executive director of the American Association of State Highway Officials and a lobbyist who worked on the 1956 Highway Act, put it this way: “Some city officials expressed the view in the mid-1950s that the urban Interstates would give them a good opportunity to get rid of the local niggertown.”¹⁷²

¹⁵⁹ Bogle, *Bright Boulevards, Bold Dreams* (2009) p. 263

¹⁶⁰ Rothstein, *supra*, at p. 131.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ [Citation needed]

¹⁶⁴ [Citation needed]

¹⁶⁵ [Citation needed]

¹⁶⁶ [Citation needed]

¹⁶⁷ Taylor (2014), *supra*, at p. 228.

¹⁶⁸ [Citation needed]

¹⁶⁹ [Citation needed]

¹⁷⁰ Fullilove (2007) *Eminent Domain and African Americans: What is the Price of the Commons?* Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 6

¹⁷¹ Fullilove (2007) *Eminent Domain and African Americans: What is the Price of the Commons?* Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 5

¹⁷² Rothstein, *supra*, at p. 128, internal quotations omitted.

Scholars disagree over whether federal, state, and local governments racially targeted Black neighborhoods for destruction, or whether these public works projects were situated in the area of least political resistance, which were incidentally Black neighborhoods.¹⁷³ Regardless of intention, the effect is clear: one study in 2007 found that between 1949 and 1973, 2,532 eminent domain projects in 992 cities displaced a million people, two-thirds of whom were Black.¹⁷⁴ Black Americans made up only 12 percent of the American population at the time, and so they were five times more likely to be displaced than they should have been when considering their portion of the population.¹⁷⁵

These government actions destroyed the social, political, cultural, and economic networks created by a neighborhood.¹⁷⁶ Evicted Black residents struggled to find a new place to live, as the compensation offered by the government was often not high enough to buy or rent in other parts of the city.¹⁷⁷ Evicted Black businesses lost their location and client base and were not usually compensated.¹⁷⁸ Urban renewal displaced cultural centers and in certain industries like jazz venues, it threatened the entire industry.¹⁷⁹ Forced evictions also are associated with increased risk of stress-related diseases like depression and heart attack.¹⁸⁰

A. Park Construction

The construction of parks in the United States has been used to harm Black people in many different ways. Parks have been used to destroy Black or integrated neighborhoods and act as a barrier between Black and white neighborhoods.¹⁸¹ The residents of these destroyed integrated neighborhoods were then resettled into segregated neighborhoods.¹⁸² Black neighborhoods themselves lacked green spaces, as discussed in Chapter 7 on the environment, leading to negative health effects. Black Americans were often banned from public spaces, as discussed in Chapter 9 on arts and culture.

Central Park in Manhattan was one of the most prominent examples of racial segregation by park construction. Cities across the country copied Central Park's policies, regulations, and design.¹⁸³ In 1855, about 1,600 people lived in the area in mixed race neighborhoods called Seneca Village, Yorkville, and Pigtown.¹⁸⁴ Even though state law at the time prevented Black New Yorkers from owning land, more than half the Black households

¹⁷³ Taylor (2014), *supra*, at pp. 228-229, 233.

¹⁷⁴ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 2

¹⁷⁵ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 2

¹⁷⁶ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 5

¹⁷⁷ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 5

¹⁷⁸ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 6

¹⁷⁹ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 6

¹⁸⁰ Fullilove (2007) Eminent Domain and African Americans: What is the Price of the Commons? Institute for Justice <https://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> (as of Jul. 7, 2021), at p. 5

¹⁸¹ Taylor (2009), *supra*, at p. 365

¹⁸² Taylor (2009), *supra*, at p. 365

¹⁸³ Taylor (2009), *supra*, at p. 292.

¹⁸⁴ Taylor (2009), *supra*, at p. 275, 366

owned their homes in Seneca Village.¹⁸⁵ The community included two Black churches and one racially mixed Episcopal church, a cemetery, and a Black school.¹⁸⁶ City officials destroyed all of it by 1857¹⁸⁷ to build Central Park with an all-white, male workforce.¹⁸⁸

In California, at least one current park is on the site of a formerly thriving Black neighborhood. On the land that is currently Belmar Park in Santa Monica, the City of Santa Monica took away and burned down the homes and businesses of people in the Black neighborhood of Belmar Triangle through eminent domain for the construction of the city's expanded civic center, auditorium, and the Los Angeles County Courthouse.¹⁸⁹ Now there us a park commemorating the neighborhood.¹⁹⁰

The 1938 Underwriting Manual issued by the U.S. Federal Housing Administration (FHA) states: "A location close to a public park or area of similar nature is usually well protected from infiltration of business and lower social occupancy coming from that direction."¹⁹¹

B. Slum Clearance

Throughout American history and across the country, government officials, who are often white (see discussion in Chapter 4 on political disenfranchisement), labeled Black communities as slums, regardless of what the neighborhood was actually like.¹⁹² This allowed government officials to demolish so-called "slums" to make way for commercial development, upscale residences, parks, universities, hospitals, and corporate headquarters.¹⁹³

The federal government funded this strategy with the 1934 Housing Act,¹⁹⁴ and then again, comprehensively, with the 1949 Housing Act, which provided \$13.5 billion for slum clearance and urban redevelopment between 1953 and 1986.¹⁹⁵ At the height of urban renewal in 1967, the government destroyed 404,000 housing units, but only built 41,580 as replacements.¹⁹⁶

For example, in 1953 the Memphis Housing Authority declared that 46 acres of middle-class Black-owned single-family homes was a slum and replaced it with 900 units of public housing.¹⁹⁷ Homeowners had paid off their mortgages, improved their homes, and created a neighborhood; "[t]he home owners are sick and distressed beyond measure," pleaded one resident in a letter to city authorities.¹⁹⁸

¹⁸⁵ Taylor (2009), *supra*, at p. 367

¹⁸⁶ Taylor (2009), *supra*, at p. 367

¹⁸⁷ Taylor (2009), *supra*, at p. 367

¹⁸⁸ Taylor (2009), *supra*, at p. 367

¹⁸⁹ Santa Monica Conservancy, Belmar Neighborhood <<https://www.smconservancy.org/property/belmar/>> (as of January 23, 2022).

¹⁹⁰ *Ibid.*

¹⁹¹ United States Federal Housing Administration *Underwriting Manual, Underwriting and Valuation Procedure Under Title II of the National Housing Act* (1938) at p. 934 -936.

¹⁹² Taylor (2014), *supra*, at p. 229. ("Comstock's (1912) study of housing conditions in Black neighborhoods in Chicago described the communities as slums, despite the fact that 72% of the housing was in good or fair repair and only 28% was in bad repair.")

¹⁹³ Taylor (2014), *supra*, at p. 229, 231, 246, 249.

¹⁹⁴ <https://www.pbs.org/kqed/fillmore/learning/time.html>

¹⁹⁵ Rusk, *Inside Game Outside Game* (1999) at p. 90.

¹⁹⁶ Johnson p. 595

¹⁹⁷ Darity Jr. & Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2020) pp. 221-222

¹⁹⁸ Darity Jr. & Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2020) pp. 221-222

In another example, after Black Americans rebuilt in Tulsa following the 1921 Tulsa massacre, city officials declared the Greenwood community to be a slum, and destroyed it again.¹⁹⁹ Highway construction and urban renewal also appear to have compounded the economic collapse of the Greenwood community.²⁰⁰

C. Freeway Construction

The Federal Aid Highway Act of 1956 built 41,000 miles of interstate highways and was the largest American public works program at the time.²⁰¹ By the 1960s, highway construction was destroying 37,000 urban housing units per year.²⁰² From 1956 until 1965, the federal government did not provide any assistance to people whose homes were destroyed.²⁰³ During the first 20 years of interstate highway construction, more than a million people were displaced.²⁰⁴

In 2021, the U.S. Secretary of Transportation acknowledged there is “racism physically built into some of our highways” because the federal highway system was built specifically to cut through neighborhoods where property values were lowest.²⁰⁵ In most cities, federal highways were routed through Black neighborhoods.²⁰⁶ For example, between 1948 and 1956, 86,000 people were displaced in Chicago, 66 percent of whom were Black, even though at the time, Black people only made up approximately 20 percent of the city’s population.²⁰⁷

In 1962, Detroit razed Black communities to build the Interstate 75 expressway, a plan that the U.S. Commission on Civil Rights warned in advance would displace 4,000 families, 87 percent of whom were Black.²⁰⁸ U.S. Department of Housing and Urban Development officials knew that they would destroy Black homes and did nothing to help these Black families.²⁰⁹ The government did little to help these mostly Black families, businesses, churches, and schools.²¹⁰

The formerly-thriving Black neighborhood of Greenwood in Tulsa, Oklahoma—infamous for the deadly anti-Black massacre of 1921—is now divided by Interstate Highway 244.²¹¹ Greenwood now has one block of businesses today.²¹² Before the highway’s construction, the neighborhood had 35 blocks of businesses and homes.²¹³ Whenever affirmative infrastructure of this sort is constructed in Black neighborhoods, the initial

¹⁹⁹ Darity Jr. & Mullen, *supra*, at p. 222.

²⁰⁰ Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma*, May 2020 <https://www.hrw.org/sites/default/files/media_2020/11/tulsa-reparations0520_web.pdf> (January 24, 2022).

²⁰¹ Congress Approves the Federal-Aid Highway Act, U.S. Senate <https://www.senate.gov/artandhistory/history/minute/Federal_Highway_Act.htm> (as of Jul. 7, 2021)

²⁰² Darity & Mullen, *supra*, at p. 223.

²⁰³ Sonksen, *Inglewood Today: The History of South Central Los Angeles and Its Struggle with Gentrification* (June 20, 2018) Univ. of Southern Cal. Lusk Center for Real Estate <https://lusk.usc.edu/news/inglewood-today-the-history-south-central-los-angeles-and-its-struggle-gentrification>> (as of Aug. 17, 2021).

²⁰⁴ Darity & Mullen, *supra*, at p. 223.

²⁰⁵ Ryan, Buttigieg says racism built into US infrastructure was a ‘conscious choice’, *The Grio* (Apr. 6, 2021) <https://thegrio.com/2021/04/06/pete-buttigieg-racism-us-infrastructure/> (as of Nov. 24, 2021).

²⁰⁶ Mohl, *supra*, at p. 2.

²⁰⁷ *Id.* at p. 250-251.

²⁰⁸ Rothstein, *supra*, at pp. 128-129.

²⁰⁹ Rothstein, *supra*, at pp. 128-129.

²¹⁰ Rothstein, *supra*, at p. 131.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ <https://www.bbc.com/news/world-us-canada-58106414>.

construction-related harms created are compounded by the environmental pollution that is created and generated on an ongoing basis.²¹⁴

Highway construction not only destroyed Black neighborhoods, government officials also used it to fence Black Americans into certain neighborhoods.²¹⁵ A federal manual recommends that “[a] high-speed traffic artery or a wide street parkway may prevent the expansion of inharmonious uses to a location on the opposite side of the street.”²¹⁶ The term “inharmonious racial groups” was a term used by the federal government to describe communities of color.²¹⁷

In Chicago, 28 identical 16-story apartment buildings known as the Robert Taylor Homes were a national symbol of failed public housing and concentrated poverty.²¹⁸ The project had been planned for 11,000 residents, but at its peak housed 27,000 residents, of whom 96 percent were African American.²¹⁹

The City of Chicago used the Day Ryan expressway to cut off the Robert Taylor Homes from the surrounding neighborhoods.²²⁰ Studies have shown that interstate highways also fenced in Black neighborhoods in Memphis, Richmond, Kansas City, Atlanta, Tulsa, and Charleston.²²¹

D. California

In California, eminent domain was used against Black communities, as well as other communities of color.

[To come: Discussion and analysis of California Redevelopment Act of 1945]

In Northern California, the Fillmore, in the Western Addition, was San Francisco’s most prominent Black neighborhood and business district.²²² Known as the Harlem of the West, the Fillmore was an integrated neighborhood²²³ that was famous for its jazz venues that hosted Ella Fitzgerald, Billie Holiday, and Louis Armstrong.²²⁴

City agencies declared that the Western Addition was blighted and began tearing it down in 1953.²²⁵ The plan was one of the largest projects of urban renewal on the West Coast.²²⁶ The City of San Francisco closed 883

²¹⁴ *Ibid.* (“Though activists from Syracuse to Los Angeles fought against the construction of these mega-roads, they were built anyway and left communities wrecked - bombarded with noise and pollution, and split down the middle.”)

²¹⁵ Taylor (2014), *supra*, at p. 178-179.

²¹⁶ Cal. EPA, *supra*, n.p.

²¹⁷ [citations needed]

²¹⁸ Hunt, *What Went Wrong with Public Housing in Chicago? A History of the Robert Taylor Homes*, Journal of the Illinois State Historical Society (Spring 2001), p. 96.

²¹⁹ [citations needed]

²²⁰ Taylor (2014), *supra*, at pp. 249-250.

²²¹ (Bayor, 2001)[pincite]

²²² Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008)

<<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

²²³ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008)

<<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

²²⁴ <https://www.pbs.org/kqed/learnmore/learning/time.html>

²²⁵ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008)

<<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

²²⁶ Taylor, How ‘Urban Renewal’ Decimated the Fillmore District, and Took Jazz With It, KQED (Jun. 25, 2020)

<<https://www.kqed.org/news/11825401/how-urban-renewal-decimated-the-fillmore-district-and-took-jazz-with-it>>

business, displaced 4,729 households, destroyed 2,500 Victorian homes²²⁷ and damaged the lives of nearly 20,000 people.²²⁸ “The agency would go to a house and give the head of household a certificate that said they would be given preference in housing built in the future,” Benjamin Ibarra, a spokesman for the agency, said in 2008. “But there wasn't a lot of housing built for a long time.”²²⁹ The San Francisco city government left the land empty for 40 years.²³⁰

In the Central Valley, [additional research to come.] On September 23 and 24, California residents Dawn Basciano and Jonathan Burgess testified before the Task Force that state officials built the Marshall Gold Discovery State Historic Park in Coloma, California on their family's land without compensation.²³¹ They also testified that the California Department of Parks and Recreation has not appropriately commemorated the history of the Black families who owned the land.²³²

In Southern California, the city of Manhattan Beach destroyed a racially integrated beach front neighborhood.²³³ Willa Bruce, who was Black, had purchased the beach front property in 1912 to run a lodge, café, and dance hall.²³⁴ Whites in the area tried to push her out by slashing her tires, setting fire to a mattress under her deck, and posting fake no trespassing and parking restrictions to chase away Black customers.²³⁵

In 1924, Manhattan Beach city officials confiscated the beach front property of several Black and white families, including the Bruces, citing an urgent need for a public park.²³⁶ The Bruces sued for \$120,000 and received \$14,500.²³⁷ The other families, Black and white, received between \$1,200 and \$4,200 per lot.²³⁸

²²⁷ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008) <<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

²²⁸ Taylor, *How 'Urban Renewal' Decimated the Fillmore District, and Took Jazz With It*, KQED (Jun. 25, 2020) <<https://www.kqed.org/news/11825401/how-urban-renewal-decimated-the-fillmore-district-and-took-jazz-with-it>>

²²⁹ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008) <<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

²³⁰ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008) <<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

²³¹ California Task Force to Study and Develop Reparation Proposals for African Americans (Sept. 23, 2021), Testimony of Jonathan Burgess, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021); California Task Force to Study and Develop Reparation Proposals for African Americans (Sept. 24, 2021), Testimony of Dawn Basciano, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²³² California Task Force to Study and Develop Reparation Proposals for African Americans (Sept. 23, 2021), Testimony of Jonathan Burgess, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021); California Task Force to Study and Develop Reparation Proposals for African Americans (Sept. 24, 2021), Testimony of Dawn Basciano, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²³³ The LAist, “Officials Lead Effort To Return Bruce's Beach To The Black Family It Was Taken From 100 Years Ago” April 9, 2021

²³⁴ Rosanna Xia, Los Angeles Times “Manhattan Beach was once home to Black beachgoers, but the city ran them out. Now it faces a reckoning” August 2, 2020

²³⁵ Rosanna Xia, Los Angeles Times “Manhattan Beach was once home to Black beachgoers, but the city ran them out. Now it faces a reckoning” August 2, 2020

²³⁶ Rosanna Xia, Los Angeles Times “Manhattan Beach was once home to Black beachgoers, but the city ran them out. Now it faces a reckoning” August 2, 2020

²³⁷ The LAist, “Officials Lead Effort To Return Bruce's Beach To The Black Family It Was Taken From 100 Years Ago” April 9, 2021

²³⁸ The LAist, “Officials Lead Effort To Return Bruce's Beach To The Black Family It Was Taken From 100 Years Ago” April 9, 2021

DRAFT FOR TASK FORCE MEMBER REVIEW
FOOTNOTES AND REFERENCES WILL BE COMPLETED AT A LATER DATE

According to the Bruce family lawyer, the city did not pay for years and barred them from purchasing new land in the area, forcing the Bruces to leave without any income.²³⁹

Like the Fillmore in San Francisco, the land lay vacant for decades until a park was built in the 1950s.²⁴⁰ The family moved to South Los Angeles and eventually left California.²⁴¹ Having lost their property, Willa and her husband Charles worked for other business owners for the remainder of their lives.²⁴² Estimates of the fair market value today of the Bruce family land is between \$40 million to \$70 million.²⁴³

In Southern California, in 1950, the Los Angeles City Planning Commission planned to demolish 11 blighted areas; all but one were majority Mexican American or African American neighborhoods.²⁴⁴ As noted above, the City of Los Angeles destroyed the prosperous Black neighborhood of Sugar Hill in 1954 by building the Interstate 10 freeway.²⁴⁵ Former residents said that the amount that the government paid for their homes was inadequate.²⁴⁶ Los Angeles did it again in 1968 by building the Century Freeway through the Black neighborhoods of Watts and Willowbrook, displacing 3,550 families, 117 businesses, parks, schools, and churches.²⁴⁷

The Interstate 210 freeway destroyed a Black business district and racially diverse communities in Pasadena in the 1950s.²⁴⁸ The city offered residents \$75,000 for their homes, less than the cost of purchasing a new home in Pasadena.²⁴⁹ The freeway forced 4,000 Black and Mexican American residents to move back to inner-city Los Angeles.²⁵⁰

Black Americans also experienced discrimination in spaces of leisure such as in California's beach cities, as described by Alison Rose Jefferson to the Task Force on December 8, 2021 Task Force.²⁵¹ Initially, Santa Monica was not only home to a Black American community and a tourist destination for Black Americans throughout the Los Angeles area.²⁵² But, in 1922, a Black investment group was blocked from developing a

²³⁹ The LAist, "Officials Lead Effort To Return Bruce's Beach To The Black Family It Was Taken From 100 Years Ago" April 9, 2021

²⁴⁰ Rosanna Xia, Los Angeles Times "Manhattan Beach was once home to Black beachgoers, but the city ran them out. Now it faces a reckoning" August 2, 2020

²⁴¹ Rosanna Xia, Los Angeles Times "A tale of two reckonings: how should manhattan Beach atone for its racist past?" March 28, 2021

²⁴² Rosanna Xia, Los Angeles Times "A tale of two reckonings: how should manhattan Beach atone for its racist past?" March 28, 2021

²⁴³ Rosanna Xia, Los Angeles Times "A tale of two reckonings: how should manhattan Beach atone for its racist past?" March 28, 2021

²⁴⁴ Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain* 21 Yale Law and Policy Review (2003) at p. 33-34

²⁴⁵ Rothstein, *supra*, at p. 131

²⁴⁶ <https://www.npr.org/2021/05/04/993605428/beneath-the-santa-monica-freeway-lies-the-erasure-of-sugar-hill> (as of Jul 7, 2021)

²⁴⁷ Raymond A. Mohl, "The Interstates and the Cities: Highways, Housing, and the Freeway Revolt" Poverty & Race Research Action Council 2002, p. 25

²⁴⁸ [citation]

²⁴⁹ Ramirez, *Black History in Pasadena a Noise Within* (Mar. 15, 2021) <<https://www.anoisewithin.org/black-history-in-pasadena/>> (as of Jul. 7, 2021)

²⁵⁰ Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt* Poverty & Race Research Action Council (2002) at p. 25

²⁵¹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Alison Rose Jefferson, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

²⁵² *Ibid.*

resort and amusement facility along the oceanfront.²⁵³ After the Black investors could not build the facility, white developers purchased the land and constructed the Casa del Mar and the Edgewater clubs in that area.²⁵⁴ Similarly, Black investors were also unable to build a planned Black membership-based club in Santa Monica as well in 1958 because the city took over the land through eminent domain proceedings for a purported parking lot.²⁵⁵ These investors asserted racial discrimination and attempted to stop the cities proceedings in court but lost.²⁵⁶ Now the upscale Viceroy hotel is located at the site.²⁵⁷

In addition to discrimination in places of leisure, several redevelopment projects throughout California have disrupted neighborhoods with large numbers of Black Americans. For example, in Fresno, the construction of highway 41 and 99 destroyed blocks of homes where Black families lived.²⁵⁸ In the Western Addition neighborhood of San Francisco, which had the highest numbers of African Americans in the city by the 1950s, redevelopment resulted in the evictions of approximately 8,000 individuals, most of whom were Black or Japanese Americans, to clear the area for new developments.²⁵⁹ In San Diego, much like in other parts of the state, the construction of freeways such as Interstate 5 disrupted Black American communities.²⁶⁰

X. Public Housing

The construction of government funded housing, or public housing, has contributed to housing segregation in two major ways throughout American history. First, from World War I until the 1950s, the federal government built high quality housing.²⁶¹ Generally, federal practices did not allow Black Americans to live in these high quality buildings, often building separate, low quality units for Black Americans.²⁶²

Then, from 1950s, as the federal government subsidized mortgages for white families to move to the suburbs and paid local governments to demolish racially integrated neighborhoods, it also built high-rise apartment buildings in urban neighborhoods that were cut off from the richer, white suburbs.²⁶³ These high-rise public housing projects concentrated poverty in Black neighborhoods in the inner city.²⁶⁴

A. High Quality Public Housing for White Americans

Private real estate development stalled during the Great Depression due to the lack of available credit. During the world wars, all available raw materials were directed towards military use and private housing construction was banned. By the end of World War II, these conditions created severe housing shortages for all Americans,

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ Tobias, *How Fresno is confronting its history of racism*, Cal Matters (June 17, 2020) <<https://calmatters.org/california-divide/2020/06/west-fresno-racism-black-communities/>> (as of January 24, 2022).

²⁵⁹ Montojo, at al., *Roots, Race, & Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area: A History of Racially Exclusionary Housing in the San Francisco Bay Area*, October 2, 2019 <<https://belonging.berkeley.edu/rootsraceplace>> (as of January 24, 2022).

²⁶⁰ Carrico & Jordan, Centre City Development Corporation Downtown San Diego African-American Heritage Study, (December 2004) <https://www.sandiego.gov/sites/default/files/ccdc_african-american_heritage_study.pdf> (as of January 24, 2022).

²⁶¹ Rothstein, *supra*, at page 45-47.

²⁶² *Id.* at page 70.

²⁶³ *Id.* at page 50.

²⁶⁴ *Id.* at page 50.

regardless of race.²⁶⁵ In response, the federal government built low-rise buildings for middle-class Americans that were scattered throughout the city, but did not subsidize the rent or maintenance.²⁶⁶ Instead, tenants paid full market price and for the building's maintenance,²⁶⁷ so the quality of public housing was high.²⁶⁸ Federal agencies funded public housing, which either barred Black Americans, or the housing available to Black Americans was segregated and in worse condition.

During World War I, the federal government-built housing for white workers in the war industries: 170,000 white workers and their families lived in 83 government-built housing projects across 26 states. The federal government did not allow Black workers to live in this federally built housing and forced Black workers into overpopulated slums.²⁶⁹ In 1933, the federal government created the Public Works Administration (PWA), which cleared slums and built houses using its "neighborhood composition rule" to require federal housing projects to maintain the racial make-up of the neighborhood.²⁷⁰

All across the country, in cities like Detroit, Indianapolis, Toledo, New York, Birmingham, and Miami, the PWA segregated Black residents from white residents either by project or by concentrating Black Americans into high density, low-income neighborhoods.²⁷¹ Another federal agency, the Tennessee Valley Authority, built 500 comfortable houses and leased them to its employees and construction workers.²⁷² The federal government banned Black federal workers from the houses who lived in low quality barracks instead.²⁷³

In 1937, the federal government revised its strategy and created the U.S. Housing Authority (USHA), which gave federal money to local governments to build public housing.²⁷⁴ Although the USHA manual stated that government housing projects should not segregate what were previously integrated neighborhoods, it also warned local officials not to build housing for white families "in areas now occupied by Negroes."²⁷⁵

During World War II, the federal government-built housing for white workers in the defense industry.²⁷⁶ Black workers were either left to live in slums or in lower quality segregated housing.²⁷⁷

B. Low Quality Housing for Black Americans

Beginning in the 1950s, the government began subsidizing the rent in public housing and allowed only families making less than a certain amount to live in the buildings.²⁷⁸ The buildings collected lower maintenance fees as a result and the quality of public housing deteriorated.²⁷⁹ The federal government helped white families move

²⁶⁵ Rothstein, *supra*, at page 11, 47.

²⁶⁶ Rothstein, *supra*, at page 47.

²⁶⁷ Rothstein, *supra*, at page 47.

²⁶⁸ *Id.* at page 70.

²⁶⁹ Rothstein, *supra*, at page 46.

²⁷⁰ *Id.* at page 49.

²⁷¹ *Id.* at page 49.

²⁷² *Id.* at page 47.

²⁷³ *Id.* at page 47.

²⁷⁴ *Id.* at pages 52-53.

²⁷⁵ *Id.* at page 53.

²⁷⁶ *Id.* at page 55.

²⁷⁷ *Ibid.*

²⁷⁸ *Id.* at page 71.

²⁷⁹ *Id.* at page 71.

out of the city and purchase single family homes in the suburbs by subsidizing their mortgage.²⁸⁰ Black families were prevented from moving into the suburbs due to the racist federal housing policies and restrictive covenants, discussed in the section on [cross reference].

The federal government began funding enormous, segregated high rise projects, like the Robert Taylor Homes in Chicago,²⁸¹ at the same time, a dozen states, including California, required local city approval of public housing projects.²⁸² In 1971, the Supreme Court ruled that this approval process did not violate the federal constitution,²⁸³ so middle-class white communities rejected public housing projects.²⁸⁴

By 1973, President Richard Nixon announced that public housing projects were “monstrous, depressing places—rundown, overcrowded, crime-ridden.”²⁸⁵ In 1984, investigative reporters from the Dallas Morning News visited federally-funded developments in 47 metropolitan areas.²⁸⁶ The reporters found that 10 million public housing residents were almost always segregated by race and that every housing project where the residents were mostly white was better maintained, and had decent facilities, amenities, and services. The housing projects with mostly Black residents did not.²⁸⁷

Although the Supreme Court of the United States decided in *Brown v. Board of Education* in 1954 that segregation was unconstitutional, Berchmans Fitzpatrick, general counsel of the federal housing agency at the time, responded to the decision by saying that the decision did not apply to housing.²⁸⁸ Civil rights activists tried to bring suits against government segregation in public housing and the federal government announced anti-discrimination policies in name only. In practice, it continued to segregate.

President John F. Kennedy tried to prohibit discrimination in housing by issuing Executive Order 11063, but the order only covered less than three percent of the total housing available in the United States.²⁸⁹ Finally, the federal government, outlawed housing discrimination in 1964 with the passage of the Civil Rights Act, which was re-enforced by the Fair Housing Act in 1968.²⁹⁰

The Civil Rights Act and the Fair Housing Act did not change the reality on the ground, as civil rights advocates continued to file lawsuits over decades alleging that city housing authorities continued to discriminate in cities like Dallas, San Francisco, Yonkers, and Baltimore.²⁹¹ In opinion after opinion, federal courts recognized that federal and local government created or maintained segregation.²⁹²

Following the recession of the 1990s, the government began to demolish these impoverished high rise public housing projects as part of multimillion dollar redevelopment efforts, often specifically choosing projects where

²⁸⁰ [citation needed]

²⁸¹ *Id.* at page 65.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Id.* at page 37.

²⁸⁶ *Id.* at page 67.

²⁸⁷ *Id.* at page 67.

²⁸⁸ *Id.* at page 66.

²⁸⁹ Taylor (2014) *supra*, at page 255.

²⁹⁰ [citations needed]

²⁹¹ [case law citations needed]

²⁹² *Ibid.*

Black families lived.²⁹³ In 2000, 48 percent of public housing residents were Black nationwide, but in cities like Birmingham, Detroit, Memphis, New Orleans, and Washington D.C., 99 percent of public housing residents were Black.²⁹⁴ Cities where housing prices have risen the fastest have been the most aggressive in tearing down public housing.²⁹⁵

These redevelopments have resulted in mostly white, but sometimes Black middle-class residents moving into and displacing low-income Black neighborhoods.²⁹⁶ These government funded public housing demolitions not only displace the Black residents in the demolished buildings, but they speed up the gentrification of the surrounding neighborhood, and displace more Black residents.²⁹⁷ Although scholars are unsure if these government demolitions cause the neighborhood to gentrify, research has shown that they are an important factor in the neighborhood's continued gentrification.²⁹⁸

The redevelopments usually have fewer units of public housing, so residents generally move to other low-income neighborhoods.²⁹⁹ This approach has produced mixed results.³⁰⁰ Although former residents report that they are more satisfied with the quality of their new housing and the reduction in crime, their children continue to attend racially and economically segregated schools, and their employment or income reportedly did not improve.³⁰¹

C. California

Segregation in California of Black Americans intensified during World War II when Black Americans arrived to work in the war industries. Unlike on the East Coast and in the Midwest, in California, because the Black population in California had been so small, there were no preset housing segregation patterns: Federal and local governments created segregation from a blank slate.³⁰²

Carey McWilliams, who had been California's housing commissioner in the early years of World War II, later wrote that "the federal government [had] in effect been planting the seeds of Jim Crow practices throughout the region under the guise of 'respecting local attitudes.'"³⁰³

In Northern California, one of the largest shipbuilders in the country during World War II was located in Richmond.³⁰⁴ From 1940 to 1945, Richmond's population increased from 24,000 to 100,000 with defense industry workers.³⁰⁵ Richmond's Black population increased from 270 in 1940 to 14,000 in 1945.³⁰⁶

²⁹³ Goetz, Edward. "Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities." *Urban Studies* 48, no. 8 (2011): 1581–1604, at pg. 1581. <http://www.jstor.org/stable/43081801>.

²⁹⁴ Goetz, Black and white, 1584.

²⁹⁵ Goetz 1581

²⁹⁶ Goetz, Black and White, at p. 1582-83, 1600

²⁹⁷ Goetz 1600

²⁹⁸ Goetz 1601

²⁹⁹ Goetz, Black and white, 1595.

³⁰⁰ Goetz 1585

³⁰¹ Goetz 1585

³⁰² [Rothstein, citations needed]

³⁰³ *Id.* at page 71-72.

³⁰⁴ *Id.* at page 29.

³⁰⁵ *Id.* at page 31.

³⁰⁶ *Id.* at page 31.

As with the rest of the country, the federal government paid for segregated housing to be built for defense workers during World War II.³⁰⁷ Housing available only to white workers was more likely to be better constructed, permanent, and further inland.³⁰⁸ The federal government issued low interest loans for white homeowners to remodel and subdivide their houses, and leased spare rooms for white workers to move in as tenants.³⁰⁹

Black housing was close to the shipbuilding site, badly constructed, and there simply was not enough of it.³¹⁰ While white workers lived in rooms paid for by the federal government, Black war workers lived in cardboard shacks, barns, tents, or open fields.³¹¹ By 1947, half of the 26,000 Black residents of Richmond were living in temporary housing.³¹²

The federal government then helped white families finance suburban homes and leave temporary apartments near the shipyard.³¹³ For example, the federal government contracted with a private developer to build a new suburb called Rollingwood and forbade the developer from selling any of Rollingwood's 700 houses to Black Americans.³¹⁴ In 1952, Wilbur Gary, a Black war veteran bought a house in Rollingwood, angering his white neighbors.³¹⁵ Three hundred white residents gathered in front of his house, shouted racial slurs, threw a brick through the window, and burned a cross on his front lawn.³¹⁶

Some Black workers bought land in unincorporated North Richmond, but could not get construction loans because unlike for white Americans, the federal government refused to insure bank loans for Black Americans.³¹⁷ Other Black families moved into the housing projects that white families had left behind.³¹⁸ By 1950, more than three-quarters of Richmond's Black population lived in the housing projects built during the war.³¹⁹

In 1942, the United States Navy demanded that the San Francisco Housing Authority segregate housing built for the 14,000 workers and their families at the Hunters Point Naval Shipyard.³²⁰ The San Francisco Housing Authority announced in 1942: "In the selection of tenants . . . [we shall] not insofar as possible enforce the commingling of races, but shall insofar as possible maintain and preserve the same racial composition which exists in the neighborhood where a project is located."³²¹

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Id.* at page 32.

³¹⁰ *Id.* at page 33.

³¹¹ *Id.* at page 33.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Id.* at page 32.

³¹⁵ Rothstein, at pg. 3

³¹⁶ Rothstein, at pg. 3

³¹⁷ *Id.* at pages 33-34.

³¹⁸ *Id.* at page 33.

³¹⁹ *Id.* at page 33.

³²⁰ *Id.* at page 57.

³²¹ *Id.* at page 60.

San Francisco built five other segregated projects during World War II, four for whites only.³²² Apartments earmarked for white workers only sat empty as Black workers waited on long waiting lists.³²³

One of the few integrated neighborhoods where Black Americans could live was the Western Addition,³²⁴ which was torn down later as part of urban renewal, discussed in the section on [cross reference]. When the federal government sent Japanese Americans living in the Western Addition to internment camps, African Americans moved in.³²⁵

In 1952, the National Association for the Advancement of Colored People sued the San Francisco Housing Authority for continuing to build whites only housing.³²⁶ The head of the agency testified that the city agency's intent was to "localize occupancy of Negroes" in the Western Addition and ensure that no African Americans would reside in projects inhabited by whites.³²⁷ The NAACP won its legal case, but the city agency continued to build segregated housing in San Francisco.³²⁸

In some areas in California, the demolition of public housing occurred without replacement housing for displaced Black Americans. For example, in Richmond, the city prioritized developments primarily occupied by Black families in its demolition plans.³²⁹ The city abandoned plans to build over 4,000 permanent public housing units.³³⁰ The demolition displaced 700 Black families from their homes in 1952 and only 16 percent of them could find a home in the private housing market.³³¹ By 1960, thousands of former public housing residents lost their homes.³³²

XI. Redlining

Redlining refers to a federal and local governmental practice, acting together with private banks, to systematically deny home loans to Black people.³³³ Redlining was accomplished at the federal level with three agencies: Federal Housing Administration, Veterans Administration (VA), and the Home Owners' Loan Corporation (HOLC).³³⁴ The FHA helped new homeowners buy houses, the VA helped veterans (World War II and others), and HOLC helped prevent foreclosures as a result of the Great Depression for existing homeowners.³³⁵

³²² *Id.* at page 59.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Id.* at page 61.

³²⁷ *Id.* at page 61.

³²⁸ *Id.* at page 62.

³²⁹ Montojo, et al., *supra*, at p. 41.

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*

³³³ [citation]

³³⁴ [citation]

³³⁵ Taylor (2014) *supra*, at page 236.

These three federal agencies helped millions of mostly white Americans buy houses by insuring and subsidizing mortgages, while refusing the same opportunity to Black Americans.³³⁶ Or, in the words of the federal agencies, exclusion was directed at “inharmonious racial group or nationality groups.”³³⁷

With a federally insured mortgage, the federal government protects lenders, like banks, against losing money. If the homeowner stops paying their mortgage, the federal government would step in and pay the bank the amount of the unpaid principal in the loan.³³⁸ As a result, banks were far more willing and likely to issue an insured mortgage to a white applicant, than an uninsured mortgage to a Black applicant.³³⁹

Enriched with these mortgages, white Americans moved out of America’s city centers, taking with them their middle-class tax bases into the suburbs and leaving urban poverty in its wake.³⁴⁰ Unable to access the same mortgages to reach the suburbs, Black Americans remained in the impoverished urban centers.³⁴¹

This practice continued legally until 1962, when President John F. Kennedy issued an executive order prohibiting the use of federal funds to support racial discrimination in newly constructed housing.³⁴² Between 1934 and 1962, the federal government had issued \$120 billion in home loans, 98 percent of which went to white people.³⁴³

Although redlining is no longer legal, its effects appear to endure. One study found associations between historically redlined neighborhoods and cancer, asthma, poor mental health, and people without health insurance.³⁴⁴ The same study also found that residents in historically redlined areas were close to twice as likely to have poor health when compared to areas that did not have redlining.³⁴⁵

A. Home Owners' Loan Corporation

The Home Owners' Loan Corporation refinanced tens of thousands of mortgages in danger of default or foreclosure and issued low-interest loans to help homeowners recover homes that were already foreclosed.³⁴⁶ Between July 1933 and June 1935, HOLC used \$3 billion to finance more than a million mortgages.³⁴⁷

HOLC examiners assessed real estate values and mortgage lending risks for 239 mid-sized cities between 1939 and 1945, and developed “Residential Security Maps” for the entire country.³⁴⁸

³³⁶ *Id.* at page 1.

³³⁷ *Id.* at page 1.

³³⁸ U.S. Dept. of Housing and Urban Development, *Program Offices: The Federal Housing Administration*, <https://www.hud.gov/program_offices/housing/fhahistory> (as of June 15, 2021).

³³⁹ [citation]

³⁴⁰ Robert E. Lang & Rebecca R. Sohmer *Legacy of the Housing Act of 1949: The Past, Present, and Future of Federal Housing and Urban Policy* (2000), 291-298, at p. 296

³⁴¹ [citation]

³⁴² *Id.* at page 139.

³⁴³ *Id.* at pages 1-2.

³⁴⁴ Nardone, et al., *Historical Redlining and Urban Health Today in U.S. Cities*, *Environmental Justice* Vol. 3 Number 4, 2020 <http://iurd.berkeley.edu/uploads/Nardone_Chiang_Corburn_2020_Redlining_Urban_Health.pdf> (as of January 24, 2022).

³⁴⁵ *Ibid.*

³⁴⁶ Taylor (2014) *supra*, at page 236.

³⁴⁷ Taylor (2014) *supra*, at page 236.

³⁴⁸ *Id.* at 237.

These maps rated neighborhoods from “A,” for the best neighborhoods, to “D,” the worst neighborhoods.³⁴⁹ Grade “A” was shaded in green on the maps and assigned to blocks in neighborhoods that were new and all white. HOLC assigned Grade “B,” shaded in blue, to stable, outlying, Jewish and white working-class neighborhoods. Grade “C” was for inner-city neighborhoods bordering mostly Black communities or neighborhoods that already had a small Black population and shaded yellow. Grade “D” was the worst category, and reserved for all-Black neighborhoods, even if it was middle class, and shaded in red.³⁵⁰ This process was called “redlining.”³⁵¹

Historians debate the level of direct influence these maps had on how banks made their decisions,³⁵² but generally agree that redlining resulted in the devaluation of Black homes across the entire country, making it difficult for Black Americans to buy, build, or renovate their homes.³⁵³

Along with the 1939 Federal Housing Administration Underwriting manual, the HOLC Residential Security Maps cemented the federal government’s support of the routine real estate industry practice of devaluing real estate owned by nonwhite property owners,³⁵⁴ a practice that continues to this day.³⁵⁵

Californian homeowner Paul Austin testified during the October 13, 2021 Task Force meeting that a home appraiser valued the property of he and his wife at just below \$1 million, which was much less than they expected because of significant improvements they had made to their home. They asked a friend to pretend to be his wife, removed anything in their house that would indicate their race, and hired a different appraiser. The new appraiser valued the property at just less than \$1.5 million, which was nearly half a million more than the previous estimate. Austin also testified his grandparents migrated from the South to the Marin City area during the 1940s to work in the shipyards, but were trapped in that area because of redlining. He also testified that his paternal grandparents secretly purchased land and built a home in Mill Valley because Black Americans were not allowed to buy property in the area.

B. Federal Housing Administration and Veterans Administration

Congress created the Federal Housing Administration in 1934 to insure bank mortgages for first time homeowners.³⁵⁶ Where the Home Owners' Loan Corporation reinforced segregation by creating the Residential Security Maps, the FHA issued the FHA Underwriting Manual.³⁵⁷ The 1936 Manual warned of the increased risk that a homeowner would not pay their mortgage in a neighborhood with “inharmonious racial groups.”³⁵⁸

The 1947 and 1958 versions of the FHA underwriting manual did not directly mention race, but instructed mortgage lenders to consider “physical and social attractiveness[]” and whether the families living in the

³⁴⁹ CalEPA, *supra*, at page 3.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² CalEPA, *supra*, at page 3, *see also*, <https://www.governing.com/context/redlining-didnt-happen-quite-the-way-we-thought-it-did>

³⁵³ Taylor (2014) *supra*, at page 237.

³⁵⁴ *Ibid.*

³⁵⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Paul Austin, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

³⁵⁶ CalEPA, *supra*, at page 4.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

neighborhoods were “congenial” when evaluating the credit risk.³⁵⁹ State-regulated insurance companies, like the Equitable Life Insurance Company and the Prudential Life Insurance Company, also declared that their policy was to not issue mortgages to whites in integrated neighborhoods.³⁶⁰

Because the FHA refused to insure mortgages for Black Americans, banks shouldered additional risk if they loaned to Black families rather than white families, so they essentially did not do so.³⁶¹ Between 1935 and 1950, the FHA administered 2,761,000 home mortgages and only about 50,000 were made available to nonwhite Americans.³⁶²

In addition to encouraging banks to discriminate against Black Americans in the credit assessment process, author Richard Rothstein argues that the FHA made its biggest impact when it financed the development of entire suburbs.³⁶³ When the FHA reviewed plans for suburban development projects it demanded that the real estate developer not sell houses to Black Americans and sometimes withheld approval of the projects if Black families lived in nearby neighborhoods.³⁶⁴ Once the real estate developer built the housing development to the federal government’s specifications, including a prohibition on selling to Black families, qualified white buyers did not need to have their new house appraised for the federal government to guarantee their mortgages.³⁶⁵ Without FHA or Veterans Administration financing, developers built inferior neighborhoods without community facilities like parks and playgrounds.³⁶⁶

Further discussion of the health impact of a lack of green space is discussed in Chapter 7 on the environment. Because Black Americans could not access mortgages, many houses in these neighborhoods were rental properties instead. Black families were deprived of this opportunity to build wealth.³⁶⁷ A 1967 study showed that out of 400,000 housing units in FHA-insured subdivisions, only 3.3 percent had been sold to Black families.³⁶⁸

After World War II, Congress passed the Servicemen’s Readjustment Act of 1944, commonly known as the GI Bill, offering education, small business and unemployment benefits to military veterans. The GI Bill also authorized the VA to insure mortgages for veterans as the FHA did for civilians. It adopted FHA housing policies, and VA appraisers relied on the FHA’s Underwriting Manual.³⁶⁹ The VA guaranteed approximately five million mortgages nationally.³⁷⁰ By 1950, the FHA and VA together were insuring half of all new mortgages nationwide.³⁷¹

³⁵⁹ *Ibid.*

³⁶⁰ Rothstein, *supra*, at page 41.

³⁶¹ [citation needed]

³⁶² Taylor (2014) at p. 241.

³⁶³ *Id.* at page 115.

³⁶⁴ *Id.* at page 117.

³⁶⁵ Rothstein at page 37.

³⁶⁶ *Id.* at page 120.

³⁶⁷ *Id.* at page 120.

³⁶⁸ U.S. Commission on Civil Rights, 1973

³⁶⁹ Rothstein, *supra*, at page 115.

³⁷⁰ Taylor (2014) *supra*, at page 239.

³⁷¹ Rothstein, *supra*, at page 115.

With Federal government approval, white veterans often did not need a down payment to buy a home.³⁷² Although the GI Bill itself did not contain “a single loophole for different treatment of white and [B]lack veterans[,]”³⁷³ reality was very different.³⁷⁴ The approval of GI Bill benefits for each individual application was tied to local VA centers staffed almost entirely by white employees, local banks, or public and private schools.³⁷⁵ As a Black veteran in Texas wrote to the NAACP: “NO NEGRO VETERAN is eligible for a loan.”³⁷⁶ The VA refused to keep racial records.³⁷⁷

An *Ebony* survey of 13 cities in Mississippi showed that by mid-1947, only two of the 3,229 VA-guaranteed loans went to Black veterans.³⁷⁸ In 1950, of the almost 70,000 VA mortgages issued in the New York-New Jersey area, “nonwhites” received less than 100.³⁷⁹ Many Black World War II veterans never applied for GI Bill guaranteed mortgages because they knew that they would not be approved because of race.³⁸⁰

C. California

The Home Owners' Loan Corporation maps described many Californian neighborhoods in racially discriminatory terms. In Berkeley, the HOLC characterized an area north of the University of California, Berkeley “as High Yellow [C], but for infiltration of Orientals and gradual infiltration of Negroes from south to north.”³⁸¹ In Pasadena: “This area is favorably located but is detrimentally affected by 10 owner occupant Negro families... Although the Negroes [sic] are said to be of the better class their presence has caused a wave of selling in the area and it seems inevitable that ownership and property values will drift to lower levels... The area is accorded a ‘high red’ solely on account of racial hazards. Otherwise a medial yellow grade would have been assigned.”³⁸² In Oakland: “Detrimental Influences: Predominance of Negroes and Orientals. Also mixed classes of wage earners and colored professional people.”³⁸³ In San Diego: There were “servant’s areas” of La Jolla and several areas “restricted to the Caucasian race.”³⁸⁴

Accordingly, many neighborhoods financed by the federal government were for white people only: Westlake in Daly City, south of San Francisco; Lakewood, south of Los Angeles; Westchester, south of Los Angeles and

³⁷² Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 115

³⁷³ Hurd, “Democracy Challenged,” *Opportunity* (Spring 1945) at p. 63.

³⁷⁴ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 113-115.

³⁷⁵ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 128

³⁷⁶ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 140

³⁷⁷ Cohen, *A Consumers’ Republic*, (2004) p. 171

³⁷⁸ Katznelson, *On Race and Policy History: A Dialogue about the B.I. Bill*, *Perspectives on Politics*

Vol. 6, No. 3 (Sep., 2008), at pg. 323

³⁷⁹ Cohen, *A Consumers’ Republic* (2004), p. 171

³⁸⁰ *Id.* at page 15.

³⁸¹ Nelson, et al., *Mapping Inequality: Redlining in New Deal America*, American Panorama, ed.

<<https://dsl.richmond.edu/panorama/>> (as of June 15, 2021).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ Beal, *Redlining in San Diego*, <<https://www.lisc.org/san-diego/impact/redlining-san-diego/>> (as of January 21, 2022).

developed by Kaiser Community Homes; Panorama City, in the San Fernando Valley; and the “Sunkist Gardens” development in Southeast Los Angeles.³⁸⁵

In Milpitas, the Federal Housing Administration approved subdivision plans, and real estate developers built homes that Black workers could not buy due to the restrictions demanded by the FHA, so Black families were forced to move to a segregated neighborhood or live in nearby Richmond.³⁸⁶ In Ladera, a neighborhood next to Stanford University, the FHA refused to finance the construction of a co-op suburb with Black members.³⁸⁷ Without the government insuring its mortgages, the co-op could not find financing to build their homes, so they gave up, and the land was sold to a private developer.³⁸⁸ Shortly after, the FHA approved the private developer’s plans, which contained a guarantee that no homes would be sold to Black families.³⁸⁹

In Northern California, from 1946 to 1960, 350,000 new homes were built with support from the FHA, but fewer than 100 of these homes went to Black people.³⁹⁰

Not only did federal agencies refused to insure mortgages to Black Americans, they also refused mortgages to white Americans who attempted to live alongside Black Americans.

In 1954, a resident of the white only neighborhood of East Palo Alto sold his house to a black family.³⁹¹ This sparked a phenomenon called blockbusting, in which local real estate agents exploited racial fears and manipulated white residents to sell their houses at a low price, then reselling the houses at a higher price to Black families.³⁹² As white residents fled the neighborhood, other white homeowners became desperate to sell their houses at even lower prices.³⁹³

A 1970 report concluded that the average markup Black families paid in blockbusted neighborhoods was from 80 to 100 percent higher than neighborhoods not undergoing racial change.³⁹⁴ In response to blockbusting in East Palo Alto, the California real estate commissioner stated that the commission did not regulate such “unethical practices.”³⁹⁵ FHA and Veterans Administration policies discouraged white residents from moving into neighborhoods in the process of being integrated like East Palo Alto at the time, since the government did not insure mortgages for white families in integrated neighborhoods where Black families lived.³⁹⁶ Within six years, the population of East Palo Alto was 82 percent Black, and housing conditions had deteriorated markedly.³⁹⁷

³⁸⁵ . Nelson, *supra*, at pp. 118-19.

³⁸⁶ Rothstein at page 37.

³⁸⁷ *Id.* at page 40.

³⁸⁸ *Id.* at page 40.

³⁸⁹ *Id.* at page 40.

³⁹⁰ Loewen p. 128

³⁹¹ Rothstein, *supra*, at page 41.

³⁹² <https://www.blackpast.org/african-american-history/blockbusting/>

³⁹³ <https://www.blackpast.org/african-american-history/blockbusting/>

³⁹⁴ <https://www.blackpast.org/african-american-history/blockbusting/>

³⁹⁵ *Ibid.*

³⁹⁶ Rothstein, *supra*, at page 41.

³⁹⁷ *Id.* at page 42.

In another example in 1958, a Black San Francisco schoolteacher named Alfred Simmons rented a house with a FHA-guaranteed mortgage from a fellow white schoolteacher in the Elmwood district of Berkeley.³⁹⁸ The Berkeley police chief requested that the Federal Bureau of Investigation investigate how Mr. Simmons came to live in an all-white community, and the FBI referred the case to the U.S. Attorney.³⁹⁹ The FHA advised the white homeowner that because he rented his house to a Black colleague, any future application from him “will be rejected on the basis of an Unsatisfactory Risk Determination made by this office on April 30, 1959.”⁴⁰⁰

XII. Racially Restrictive Covenants

Racially restrictive covenants are legally binding contracts, usually written into the deed, that prohibit nonwhite people from living on a property or in a neighborhood.⁴⁰¹ For example, a deed in 2010, in Fairhaven, Massachusetts included the following clause, introduced in 1946: “The said land shall not be sold, leased or rented to any person other than of the Caucasian race or to any entity of which any person other than that of said race shall be a member, stockholder, officer or director.”⁴⁰²

Racially restrictive covenants began appearing in the late nineteenth century and were first directed against Chinese and Punjabi residents in California.⁴⁰³ By 1900, developers began inserting them into the deeds of homes built in new subdivisions all across the country.⁴⁰⁴ Minneapolis, Minnesota had racially restrictive covenants as early as 1910 and late as 1955.⁴⁰⁵ Further, between 1923 and 1924, real estate boards in Milwaukee, Detroit, Kansas City, Los Angeles, and other cities prohibited their realtors from selling or renting property in white neighborhoods to Black Americans.⁴⁰⁶

In 1917, racial zoning, discussed earlier in this chapter, was declared unconstitutional by the Supreme Court,⁴⁰⁷ but the Supreme Court declared that racially restrictive covenants did not violate the constitution in 1926.⁴⁰⁸ The Supreme Court reasoned that the covenant was a contract between private individuals not subject to state control.⁴⁰⁹

Government officials began promoting racially restrictive covenants as an alternative, constitutional way to maintain segregation.⁴¹⁰ In 1931, President Herbert Hoover opened the President’s Conference on Home Building and Home Ownership by declaring that single-family homes were “expressions of racial longing” and “[t]hat our people should live in their own homes is a sentiment deep in the heart of our race.”⁴¹¹ Conference

³⁹⁸ *Id.* at page 111.

³⁹⁹ *Id.* at page 111.

⁴⁰⁰ *Ibid.*

⁴⁰¹ Taylor (2014) *supra*, at page 210.

⁴⁰² Taylor (2014) *supra*, at page 210.

⁴⁰³ Taylor, Toxic Communities: Environmental Racism, Industrial Pollution and Resident Mobility (2014) p.195.

⁴⁰⁴ Taylor (2014) *supra*, at page 193.

⁴⁰⁵ Ehrman-Solberg et al., Racial Covenants in Hennepin County, Retrieved from the Data Repository for the University of Minnesota <<https://doi.org/10.13020/a88t-yb14>> (as of January 21, 2022).

⁴⁰⁶ *Id.* at p. 155.

⁴⁰⁷ *Buchanan v. Warley* (1917) 245 U.S. 60.

⁴⁰⁸ *Corrigan v. Buckley* (1926) 271 U.S. 323.

⁴⁰⁹ *Corrigan v. Buckley* (1926) 271 U.S. 323.

⁴¹⁰ Rothstein, *supra*, at pp. 81-83.

⁴¹¹ *Id.* at page 103.

materials then recommended that all new neighborhoods include “appropriate restrictions,” such as barring the sale of homes to Black Americans.⁴¹²

Federal officials also recommended homeowners form “[r]estricted residential districts’ [which] may serve as protection against persons with whom your family won’t care to associate, provided the restrictions are enforced and are not merely temporary.”⁴¹³ These racially restrictive districts appeared soon afterwards and functioned like bylaws in a neighborhood association and a neighbor could sue to evict a Black family that bought a house in the neighborhood.⁴¹⁴

Scholars have found that wealthy white communities used restrictive covenants, while white working class communities used a combination of violence and covenants to keep Black Americans from moving into their neighborhoods.⁴¹⁵

Simultaneously, government actors and real estate agents often used different mechanisms to segregate a neighborhood. The 1936 Federal Housing Administration Underwriting Manual stated that zoning regulations alone are not enough “to assure a homogeneous and harmonious neighborhood. Recorded deed restrictions should strengthen and supplement zoning ordinances... Recommended restrictions include . . . [p]rohibition of the occupancy of properties except by the race for which they are intended [and a]ppropriate provisions for enforcement.”⁴¹⁶ The 1938 FHA Underwriting Manual stated clearly: “If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.”⁴¹⁷ The Veterans Administration also recommended and frequently demanded that racial covenants be added into the deeds of the mortgages it sponsored.⁴¹⁸

As a result, racially restrictive covenants appeared all over the country. By 1940, according to news reports quoted in the 1973 U.S. Commission on Civil Rights Report, 80 percent of homes in Los Angeles contained restrictive covenants barring Black families.⁴¹⁹ A survey of 300 developments built between 1935 and 1947 in the suburbs of New York City found that 56 percent of the 300 developments and 85 percent of larger subdivisions had racially restrictive covenants.⁴²⁰

The University of Chicago subsidized the home owners’ associations surrounding its campus. From 1933 to 1947, it spent \$100,000 on legal services to defend racially restrictive covenants and evict African Americans who moved into the neighborhood.⁴²¹

All over the country, white neighbors sued their Black neighbors to prevent them from moving into or to evict them from their legally purchased homes.⁴²² In 1942, the Oklahoma Supreme Court not only declared that the

⁴¹² Rothstein, *The Color of Law: A Forgotten History of How Out Government Segregated America* (2017) p. 82.

⁴¹³ *Id.* at p. 61.

⁴¹⁴ Rothstein, *supra*, at page 127.

⁴¹⁵ Plotkin’s (1999) ; Brooks’s (2002)

⁴¹⁶ Rothstein, *supra*, at p. 84.

⁴¹⁷ National Housing Act Underwriting Manual (Feb. 1938) Federal Housing Admin. ¶ 937, p. 110.

⁴¹⁸ Rothstein, *supra*, at p. 85.

⁴¹⁹ *Understanding Fair Housing*, U.S. Commission on Civil Rights, (Feb. 1973) at p. 4.

⁴²⁰ Rothstein, *supra*, at p. 79.

⁴²¹ *Id.* at p. 105.

⁴²² *See, e.g., Corrigan v. Buckley*, 271 U.S. 323; *Torrey v. Wolfes*, 6 Fed. 2d 702; *Russell v. Wallace*, 30 Fed. 2d 981; *Cornish v. O'Donogue*, 30 Fed. 2d 983; *Edwards v. West Woodridge Theater Co., Inc.*, 55 Fed. 2d 524; *Koehler v. Rowland*, 275 Mo. 573;

property purchased by a Black buyer was void due to a racial covenant, but it also ordered the Black buyer to pay for the court costs and attorney's fees of the white neighbor who sued.⁴²³ In Westlake in Daly City, California, the neighborhood fined a seller \$16,000 for selling to a Black family, greater than the typical home sale price.⁴²⁴

In 1948, the Supreme Court reversed course from its 1926 decision and held that although the government had no control over whether a racially restrictive covenant can be added to a deed, it is unconstitutional for American courts to recognize and enforce the covenants.⁴²⁵ Racially restrictive covenants were so widespread by then that three of the Supreme Court justices recused themselves from the case because they owned houses covered by racially restrictive covenants.⁴²⁶

Two weeks after the Court announced its decision, FHA commissioner Franklin D. Richards stated that the decision would "in no way affect the programs of this agency," which would make "no change in our basic concepts or procedures."⁴²⁷ Although the FHA and VA changed their policy on paper to stop insuring housing with racially restrictive covenants, they continued to do so in practice.⁴²⁸ In 1952, the FHA commissioner stated that "it was not the purpose of [the FHA] to forbid segregation or to deny the benefits of the National Housing Act to persons who might be unwilling to disregard race, color, or creed in the selection of their purchasers or tenants."⁴²⁹

Although racially restrictive covenants were declared unconstitutional in 1948, their popularity continued for decades.⁴³⁰ White residents of racially homogeneous neighborhoods continue to enforce them among themselves via coercive social norms.⁴³¹ John F. Kennedy, Ronald Reagan, and George W. Bush all lived in neighborhoods or homes with racially restrictive covenants.⁴³² The home that George W. Bush bought in 2008 was located where the neighborhood association enforced a racially restrictive covenant until 2000.⁴³³ In Myers Park, a neighborhood in Charlotte, North Carolina, the housing association appeared to be enforcing its racially restrictive covenant in 2010, when it added the covenant to its website.⁴³⁴

A. California

California pioneered the use of racially restrictive covenants and they were widely used throughout the state.⁴³⁵ Like the rest of the country, although racially restrictive covenants were private contracts, they worked in conjunction with federal policy to devalue Black property and prevent Black Americans from accessing home

Queensborough Land Co. v. Cazeaux (La.) 67 So. 641; Chandler v. Ziegler, 88 Colo. 1; Porter v. Johnson, 232 Mo. App. 1150; Steward v. Cronan, 105 Colo. 393,

⁴²³ *Lyons v. Wallen* (1942) 133 P.2d 555

⁴²⁴ Rothstein, *supra*, at p. 89.

⁴²⁵ *Shelley v. Kraemer* (1948) 334 US 1

⁴²⁶ Taylor (2014), *supra*, at p. 217.

⁴²⁷ Rothstein, *supra*, at p. 85.

⁴²⁸ Taylor (2014), *supra*, at p. 241.

⁴²⁹ Rothstein, *supra*, at p. 88.

⁴³⁰ Rose, *Hidden In Old Home Deeds, A Segregationist Past*, NPR (Feb. 6, 2010)

⁴³¹ [citation]

⁴³² Taylor (2014), *supra*, at pp. 223-224.

⁴³³ Taylor (2014), *supra*, at p. 224.

⁴³⁴ *Id.* at p. 223

⁴³⁵ [citation]

loans. The Home Owners' Loan Corporation maps for Pasadena devalued a neighborhood because its restrictive covenants had expired, potentially allowing Black Americans to move in: "This district was originally much smaller but constant infiltration into other sections as deed restrictions expired has create[d] [sic] a real menace which is greatly concerning property owners of Pasadena and Altadena."⁴³⁶

In southern California, after its founding in 1903, the Los Angeles Realty Board campaigned to attach racially restrictive land covenants on as many new developments as possible.⁴³⁷ Paul R. Williams, a prominent Black Los Angeles architect who designed houses for Frank Sinatra, Lucille Ball, Desi Arnaz, and Cary Grant, could not legally live in the neighborhoods he designed due to restrictive covenants.⁴³⁸ Williams taught himself to draw upside down because his white clients were uncomfortable sitting next to him and toured construction sites with hands clasped behind his back to avoid the situation where someone would refuse to shake a Black man's hand.⁴³⁹

From 1937 to 1948, more than 100 lawsuits attempted to enforce covenants and evict Black families from their homes in Los Angeles.⁴⁴⁰ In one 1947 case, a Black homeowner refused to leave the home he bought in violation of a covenant and he was jailed.⁴⁴¹ In Whittier, a Los Angeles suburb, the Quaker-affiliated Whittier College participated in a restrictive covenant applied to its neighborhood.⁴⁴²

In 1943, the city attorney of Culver City, an all-white suburb of Los Angeles, told a meeting of air raid wardens that when they went door to door to make sure families turned off the lights to avoid helping Japanese bombers find targets to also circulate documents in which homeowners promised not to sell or rent to African Americans.⁴⁴³

In 2000, a California law ordered homeowner associations to remove racial restrictions from their covenants and to enable individual homeowners to remove clauses from their deeds.⁴⁴⁴

XIII. Racial Terrorism

A. Nationally

[2 paragraph discussion of use of racial terror as a tool of segregation]

B. California

[Summary paragraph needed on use of racial terror as tool of segregation in CA]

⁴³⁶ [HOLC map citation]; California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Joseph Gibbons, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁴³⁷ Kilgore, Los Angeles Land Covenants, Redlining; Creation and Effects, Los Angeles Public Library (June 22, 2020) <<https://lapl.org/collections-resources/blogs/lapl/los-angeles-land-covenants-redlining-creation-and-effects>> (as of June 17, 2021).

⁴³⁸ Bates, *A Trailblazing Black Architect Who Helped Shape L.A.* (June 22, 2012) National Public Radio <<https://www.npr.org/2012/06/22/155442524/a-trailblazing-black-architect-who-helped-shape-l-a>> (as of June 15, 2021).

⁴³⁹ *Id.*

⁴⁴⁰ Rothstein, *supra*, at pp. 80-81.

⁴⁴¹ Rothstein, *supra*, at pp. 80-81.

⁴⁴² *Id.* at p. 105.

⁴⁴³ *Id.* at p. 82.

⁴⁴⁴ Taylor (2014), *supra*, at p. 225.

Violent incidents in California rose in the 1950s and 1960s, after courts found restrictive covenants were declared unenforceable.⁴⁴⁵

Ku Klux Klan terror and violence reached a peak in Los Angeles in the spring of 1946.⁴⁴⁶ Although KKK meetings were banned in California after the Shorts' murder in May 1946, the ban had little to no effect because no one enforced it.⁴⁴⁷ Of the 27 KKK actions (e.g., cross-burnings, fires, and threatening letters and phone calls) documented in Los Angeles in 1946, more than half occurred after the issuance of the ban.⁴⁴⁸ In a span of two weeks in May 1946, there were four separate actions, ranging from cross-burnings to severe physical beatings.⁴⁴⁹ One was targeted at a Black family that lived in an all-white neighborhood, and the others were targeted at white individuals who advocated against restrictive covenants.⁴⁵⁰ Law enforcement and the mayor shrugged off the violence as "pranks."⁴⁵¹ When concerned residents and members of social justice organizations approached the mayor to address the incidents, the mayor accused them of prejudice against the KKK.⁴⁵²

Los Angeles continued to be the epicenter of the violence in California, as Black residents who moved into white neighborhoods were met with verbal threats, cross-burnings, bombings, rock throwing, graffiti, and other acts of vandalism.⁴⁵³ Of the over 100 incidents of move-in bombings and vandalism that occurred in Los Angeles between 1950 and 1965, only one led to an arrest and prosecution.⁴⁵⁴

Los Angeles was not the only area where the KKK attacked Black homeowners. In 1946, for instance, a home built by a Black war veteran was burned down in Redwood City after threats and move-out demands.⁴⁵⁵ In 1952, in a white Bay Area neighborhood, a Black family became the target of death threats, violence, and intimidation by white residents after the family refused a buyout of their home.⁴⁵⁶ A KKK cross was placed on their lawn and a 300 to 400 person mob stoned their home and shouted threats.⁴⁵⁷ Though the action happened in front of law enforcement, officers refused to make any arrests.⁴⁵⁸ Even when the Governor, Attorney General, and local district attorney ordered the city police and county sheriff to provide the family with protection, protests and harassment continued for months without any arrests.⁴⁵⁹ And in the 1950s, the weekend home of a San Francisco NAACP leader was mysteriously burned down.⁴⁶⁰ The violence and subsequent silence

⁴⁴⁵ LOS ANGELES CITYWIDE HISTORIC CONTEXT STATEMENT Context: African American History of Los Angeles, City of Los Angeles Department of City Planning Office of Historic Resources (Feb. 2018) at p. 45.

⁴⁴⁶ Hudson, *supra*, at p. 203.

⁴⁴⁷ Hudson, *supra*, at p. 205.

⁴⁴⁸ Hudson, *supra*, at p. 205.

⁴⁴⁹ Hudson, *supra*, at p. 203.

⁴⁵⁰ Hudson, *supra*, at p. 203.

⁴⁵¹ Hudson, *supra*, at p. 203.

⁴⁵² Hudson, *supra*, at p. 203.

⁴⁵³ Color of Law, *supra*, at p. 257.

⁴⁵⁴ Color of Law, *supra*, at p. 257.

⁴⁵⁵ Haas, *supra*, at p. 27.

⁴⁵⁶ Haas, *supra*, at p. 27; Color of Law, *supra*, at p. 245.

⁴⁵⁷ Haas, *supra*, at p. 27; Color of Law, *supra*, at p. 245.

⁴⁵⁸ Haas, *supra*, at p. 27; Color of Law, *supra*, at p. 245.

⁴⁵⁹ Color of Law, *supra*, at p. 245.

⁴⁶⁰ Haas, *supra*, at p. 27.

surrounding the crimes committed against Black Californians demonstrates how white Californians viewed Black presence and homeownership as a threat to white dominance.⁴⁶¹

XIV. Housing Segregation Today

Housing segregation and its effects have never been adequately remedied in the United States.⁴⁶² The racist housing policies and practices of the federal, state, and local governments have amplified private action, and continues to shape the American landscape today.⁴⁶³

Although residential segregation between Black and white Americans in the United States peaked between 1960 and 1970,⁴⁶⁴ America is more segregated today for Black Americans than it was in 1940. While in 1940, the typical Black person lived in a neighborhood that was 40 percent white, in 2010, the typical Black person lived in a neighborhood that was 35 percent white.⁴⁶⁵ By contrast, in 2010, the typical white person lived in a neighborhood that was 75 percent white.⁴⁶⁶ Even though white areas have become less solidly white since 1980, they have not become significantly more Black.⁴⁶⁷ Today, 90 percent of Black Americans live in cities,⁴⁶⁸ and 41 percent of the Black population of American metro areas live in city neighborhoods that are majority Black.⁴⁶⁹

Housing segregation is more intractable than other forms of segregation and discrimination, like employment and entertainment.⁴⁷⁰ Moving from an urban apartment to a suburban single family home is more difficult than registering to vote, eating at a restaurant, or even being bussed to a nearby school, and requires potentially generations of effort.⁴⁷¹ The Fair Housing Act of 1968 prohibited future discrimination, but did not fix the structures put in place by 100 years of discriminatory government policies.⁴⁷² Richard Rothstein argues that residential desegregation requires a massive effort of social engineering.⁴⁷³

No such massive effort has occurred. Instead, the Supreme Court has created a rule that makes private lawsuits fighting housing discrimination more difficult,⁴⁷⁴ and housing discrimination persists in new and different ways.⁴⁷⁵ Policies that may not seem to discriminate at first glance have reinforced the structures put in place by past racist government actions.⁴⁷⁶

A. The Supreme Court

⁴⁶¹ Hudson, *supra*, at pp. 168, 207.

⁴⁶² The Roots of Structural Racism [pincite]

⁴⁶³ Rothstein 177

⁴⁶⁴ Logan & Stults, The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census (Mar. 2011) p. 2

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Id.* at 3

⁴⁶⁷ *See ibid.*

⁴⁶⁸ Perry et al., *supra* note 15, at p. 10.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Rothstein, *supra*, at p. 177

⁴⁷¹ Rothstein, *supra*, at p. 179

⁴⁷² Rothstein, *supra*, at p. 180

⁴⁷³ Rothstein, *supra*, at p. 178

⁴⁷⁴ Rothstein, *supra*, at pp. 53-54

⁴⁷⁵ Rothstein, *supra*, at pp. 179-180

⁴⁷⁶ Rothstein, *supra*, at p. 180

In 1977, the Supreme Court upheld a zoning ordinance in a mostly white suburb of Chicago, which banned the construction of apartment buildings anywhere except next to a commercial area.⁴⁷⁷ The neighborhood in question had been zoned for single family houses without change since 1959.⁴⁷⁸ This zoning ordinance effectively prevented lower income residents and people of color, including Black families, from moving into the neighborhood.⁴⁷⁹

Even though there was evidence that white residents who lobbied the city council had racial intent, the Supreme Court decided that the city council members themselves had no discriminatory intent when it voted for the zoning ordinance.⁴⁸⁰ With *Arlington Heights* and the cases that followed, the Supreme Court essentially announced a rule that in order to prove that a law, regulation, or practice is unconstitutional, plaintiffs must prove that the decision makers intended to discriminate.⁴⁸¹

This line of Supreme Court cases has made proving current housing discrimination and erasure of the effects of old government policies of housing segregation very difficult.⁴⁸² In other words, it very difficult to bring a successful housing discrimination lawsuit.

B. Continued Housing Discrimination

Mortgage and housing discrimination continues in many forms today. Researchers continue to find that Black residents are charged higher prices for identical units in the same neighborhood as white residents.⁴⁸³ Lenders use predatory lending practices more often in predominantly Black than white neighborhoods.⁴⁸⁴ Indeed, homeowners in segregated Black neighborhoods are more likely to have subprime mortgages.⁴⁸⁵

Before 2008, Black and Latino borrowers were four times more likely to receive a more expensive mortgage than white borrowers, a practice called reverse redlining.⁴⁸⁶ Big banks across the country used reverse redlining to target communities of color with higher interest rates and fees.⁴⁸⁷ Before 2008, banks specifically targeted Black and Hispanic homeowners to advertise toxic subprime mortgages and other predatory practices that

⁴⁷⁷

⁴⁷⁸ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S. 252, 255

⁴⁷⁹ *Arlington Heights* pincite

⁴⁸⁰ *Arlington Heights* pincite

⁴⁸¹

⁴⁸² Rothstein 177

⁴⁸³ Early, Dirk et al., *Racial Rent Differences in U.S. Housing Markets* (2019) 59 J. Regional Sci. 669, 671, Early et al., supra note 3, at 670.

⁴⁸⁴ <https://www.jstor.org/stable/24361645>

⁴⁸⁵ Derek S. Hyra, Gregory D. Squires, Robert N. Renner & David S. Kirk (2013) *Metropolitan Segregation and the Subprime Lending Crisis*, *Housing Policy Debate*, 23:1, 177-198, DOI: 10.1080/10511482.2012.697912

⁴⁸⁶ <https://www.jstor.org/stable/24361645>

⁴⁸⁷ See, e.g., *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, USDOJ (Dec. 21, 2011) <<https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>> (as of Jul. 12, 2021), Powell, *Memphis Accuses Wells Fargo of Discriminating Against Blacks*, *The New York Times* (Dec. 30, 2009), *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* USDOJ (Jul. 12, 2012) <<https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>> (as of Jul. 12, 2012).

triggered the Great Recession.⁴⁸⁸ Black homeowners received toxic subprime mortgages at three times the rate of white mortgage lenders.⁴⁸⁹

In Memphis, employees of Wells Fargo Bank referred to these loans as “ghetto loans[,]” and bank supervisors targeted Black zip codes because they believed that residents “weren’t savvy enough[.]”⁴⁹⁰ According to the U.S. Department of Justice in 2010, the more segregated a community, the more likely lenders targeted the homeowners for toxic loans, and the more likely the home was foreclosed.⁴⁹¹

As a result, Black and Latino homeowners, were hit particularly hard by the 2008 crisis.⁴⁹² From 2001 to 2019, the rate of Black homeownership declined five times as much as the homeownership rate for white families,⁴⁹³ erasing all the gains made since the passage of the Fair Housing Act in 1968.⁴⁹⁴ Homes in Black neighborhoods were more likely to be foreclosed than homes in white neighborhoods.⁴⁹⁵ By 2011, a quarter of Black homeowners had either lost their homes to foreclosure or were “seriously delinquent” on their mortgages.⁴⁹⁶

In settling a lawsuit against the Countrywide mortgage company, the federal Secretary of Housing and Urban Development said that due to Countrywide’s discriminatory practices, “[f]rom Jamaica, Queens, New York, to Oakland, California, strong, middle-class African American neighborhoods saw nearly two decades of gains reversed in a matter of not years—but months.”⁴⁹⁷

Despite multiple lawsuits brought by the U.S. Department of Justice⁴⁹⁸ and by cities like Baltimore,⁴⁹⁹ Memphis,⁵⁰⁰ and Cleveland,⁵⁰¹ the mortgage industry continues to discriminate against Black home buyers. From July 2019 to June 2020, Black mortgage applicants were 2.5 times more likely than white applicants to be rejected for mortgages.⁵⁰² Studies continue to show that Black mortgage borrowers pay more in financing fees,⁵⁰³ mortgage insurance,⁵⁰⁴ and property taxes.⁵⁰⁵

⁴⁸⁸ Rothstein, *supra*, at p. 111.

⁴⁸⁹ Rothstein 111

⁴⁹⁰ Rothstein 112

⁴⁹¹ <https://www.nytimes.com/2010/05/31/business/economy/31memphis.html>

⁴⁹² *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020).

⁴⁹³ McCargo, *A Five-Point Strategy for Reducing the Black Homeownership Gap* (Feb. 14, 2019) Urban Institute <<https://urbn.is/3haMKGv>> (as of June 25, 2021).

⁴⁹⁴ Goodman et al., *Are Gains in Black Homeownership History?* (Feb. 14, 2017) <<https://urbn.is/35UOPBg>> (as of June 25, 2021).

⁴⁹⁵ Mikhitarian, *How the Housing Bust Widened the Wealth Gap for Communities of Color* (Apr. 25, 2019) Zillow <<https://bit.ly/3wZoaij>> (as of June 25, 2021).

⁴⁹⁶ Memorandum: A Review of the State of and Barriers to Minority Homeownership, before House Com. On Financial Services, 116th Cong., 1st Sess., at p. 2 (2019), memorandum prior to hearing.

⁴⁹⁷ Remarks of Sec. Donovan during Countrywide Settlement Press Conference, U.S. Dept. Justice (Dec. 21, 2011).

⁴⁹⁸ [citation to complaint]

⁴⁹⁹ [citation to complaint]

⁵⁰⁰ [citation to complaint]

⁵⁰¹ [citation to complaint]

⁵⁰² <https://www.nar.realtor/newsroom/nar-finds-black-home-buyers-more-than-twice-as-likely-to-have-student-loan-debt-be-rejected-for>

⁵⁰³ <https://www.nytimes.com/2021/08/17/realestate/new-york-black-homeowners.html>

⁵⁰⁴ <https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf>

⁵⁰⁵ <https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf>

Compared to white buyers, Black home buyers go into more debt for homes that are valued less.⁵⁰⁶ Black homeowners who apply to refinance their homes are denied over 30 percent of the time, compared to 17 percent of white homeowners.⁵⁰⁷ This makes it more difficult for Black homeowners to make necessary repairs to their homes and to move out of dilapidated homes.⁵⁰⁸ These trends have continued even as mortgage lending has become more automated and internet based in recent years.⁵⁰⁹

C. California

California remains racially segregated,⁵¹⁰ although Black-white segregation has decreased since 1980 in cities like Los Angeles, Oakland, and Riverside.⁵¹¹

There is also evidence that lenders discriminate against Black Americans in California. For example, one study found that in 2019, despite making up 5.5 percent of the state's population, Black Californians received only 3.28 percent of home purchase loans.⁵¹² The magnitude of this disparity varies across metro areas in the state.⁵¹³ Another study found that in 2013, Black Californians made up 2.7 percent of all home mortgage loan applicants, received 2.4 percent of all home mortgage loans originated, and received 1.7 percent of all home mortgage loan dollars in the state.⁵¹⁴

XV. Effects

Once federal, state, and local governments, along with private actors, segregated the American landscape, they directed resources to white neighborhoods, and neglected Black neighborhoods. In 1967, President Lyndon B. Johnson appointed the National Advisory Commission on Civil Disorders to investigate the causes of the racial violence in the summer of 1967.⁵¹⁵ The report concluded that: “[S]egregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans.”⁵¹⁶ The subsequent chapters on environment and infrastructure, education, health, labor, and wealth will discuss these issues in detail.

Segregated black communities have less access to public transit and must deal with longer commute times, which contributes to higher rates of unemployment among Black Americans.⁵¹⁷ In the past, local governments delayed providing public services like water and sewage at first.⁵¹⁸ Once the services were eventually provided

⁵⁰⁶ <https://www.urban.org/urban-wire/three-differences-between-black-and-white-homeownership-add-housing-wealth-gap>

⁵⁰⁷ <https://www.lendingtree.com/home/mortgage/lendingtree-study-black-homebuyers-more-likely-to-be-denied-mortgages-than-other-homebuyers/>

⁵⁰⁸ Taylor (2014), *supra*, at p. 153, 179-180, 183, *see also* Carter, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) at p. 37

⁵⁰⁹ <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>

⁵¹⁰ https://belonging.gis-cdn.net/us_seggregation_map/?year=2020&bounds=42.81%2C-101.46%2C31.93%2C-131.48&geoid=42020

⁵¹¹ Logan & Stults, *supra* note 19, at pp. 6-9. See Appendix A for segregation measurements in these cities.

⁵¹² Elhalaby, Greenlining Inst., Home Lending to Communities of Color in California (Nov. 2020) p. 7.

⁵¹³ See Appendix A for data on inequity in home purchase loans in California metro areas.

⁵¹⁴ Werblin et al., Greenlining Inst., Locked Out of the Market: Poor Access to Home Loans for Californians of Color (June 2017) p. 9.

⁵¹⁵ National Advisory Commission on Civil Disorders (1967). The Kerner Report. Princeton University Press. p. 2.

⁵¹⁶ National Advisory Commission on Civil Disorders (1967). The Kerner Report. Princeton University Press. p. 2.

⁵¹⁷ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities;>

<https://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities/sanchez-moving-to-equity-transportation-policies.pdf>

⁵¹⁸ [https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf;](https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf)

to Black neighborhoods, they were provided less often.⁵¹⁹ Today, many all-black neighborhoods depend on aging water and sewage infrastructure and unreliable supplies.⁵²⁰ Local governments did not invest as much in road and street services in black neighborhoods, and the roads are less safe for pedestrians and cyclists.⁵²¹

Black communities pay more for energy because they live in older energy-inefficient homes.⁵²² Oil and gas extractions are more likely to be in Black neighborhoods, leading to environmental pollution.⁵²³ Segregated black neighborhoods are less likely to have access to parks and greenspace, and are less likely to have tree cover.⁵²⁴ Tree cover cools neighborhoods during the summer and absorbs air pollution. Higher temperatures during the summer results in more heat related illnesses and exposure to more air pollution results in respiratory illness, both which occur more often in segregated neighborhoods.⁵²⁵ A lack of greenspace also deprives Black communities, and especially poor Black communities, of the benefits of nature, especially beneficial for child development.⁵²⁶

Segregation has concentrated poverty in Black and Latino neighborhoods in America, and is associated with worse outcomes in almost every aspect of life. Neighborhood poverty rates are three times higher in segregated communities of color than in white neighborhoods.⁵²⁷ Segregation is associated with lower high school graduation, lower earnings, and single motherhood among Black Americans.⁵²⁸ Residents of segregated neighborhoods have more illnesses and die younger.⁵²⁹ Residential segregation is a major contributing factor to the Black and white wealth gap, as discussed in Chapter 13 on wealth. Homes in segregated black neighborhoods tends to be older, smaller, and on more densely settled lots than in disproportionately white neighborhoods.⁵³⁰ According to U.S. Census Bureau, the median home value in majority Black neighborhoods is \$149,217, while the median home value in neighborhoods that are less than one percent Black is \$306,511.⁵³¹ School districts are funded by local tax bases, which are determined by home values, so Black and Latino segregated local districts receive less funds, fewer resources, and less experienced teachers than white school districts. Further, as Joseph Gibbons testified during the December 7, 2021 Task Force meeting, gentrification

⁵¹⁹ https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf;

⁵²⁰ <https://oehha.ca.gov/media/downloads/water/report/hrtwachievinghrtw2021f.pdf>

⁵²¹ <https://www.brookings.edu/blog/the-avenue/2019/08/28/to-build-safe-streets-we-need-to-address-racism-in-urban-design/>;

https://www.apha.org/~media/files/pdf/topics/environment/built_environment/srtsnp_equitytransp_factsheet2015.ashx

⁵²² <https://www.sierraclub.org/sierra/redlining-restorative-justice>

⁵²³ <https://naacp.org/resources/fumes-across-fence-line-health-impacts-air-pollution-oil-gas-facilities-african-american>

⁵²⁴ <https://www.tpl.org/parks-and-an-equitable-recovery-parkscore-report>;

<https://www.sciencedirect.com/science/article/abs/pii/S0169204616300846>; Borunda, How ‘Nature Deprived’ Neighborhoods Impact the Health of People of Color, (July 29, 2020) Nat. Geographic <<https://www.nationalgeographic.com/science/article/how-nature-deprived-neighborhoods-impact-health-people-of-color>> (as of June 22, 2021).

⁵²⁵ Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure* (Mar. 2019) Proceedings of the National Academy of Sciences <<https://pubmed.ncbi.nlm.nih.gov/30858319/>> (as of June 22, 2021).

⁵²⁶ *Id.*

⁵²⁷ <https://belonging.berkeley.edu/roots-structural-racism>

⁵²⁸ Carter, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) at p. 37

⁵²⁹ Richardson et al., Nat. Community Reinvestment Coalition, The Lasting Impact of Historic “Redlining” on Neighborhood Health: Higher Prevalence of COVID-19 Risk Factors (2020) pp. 23, 26-27.

⁵³⁰ *Id.* at 13.

⁵³¹ *Id.* at 11.

has many negative effects on Black Americans beyond the obvious displacement of Black Americans, such as higher rates of stress and other adverse health effects.⁵³²

Some researchers have argued that segregation plays an important role in the racial disparity among unhoused individuals.⁵³³ Throughout American history, significant numbers of Black Americans have been unhoused,⁵³⁴ although specific data based on race is not always available.⁵³⁵ The story of Black Americans experiencing homelessness has often been left out, underreported, or misrepresented.⁵³⁶

Many enslaved people seeking freedom became unhoused after escaping bondage.⁵³⁷ After the Civil War, close to four million Black Americans were unhoused.⁵³⁸ [to come: potential additional research.] Black Americans were hit the hardest during the Great Depression, were excluded from many private agencies offering aid and the benefits of the New Deal, and many became unhoused.⁵³⁹ During the Post World War II period, between nine to 40 percent of Skid Row residents were Black men, depending on the city.⁵⁴⁰ However, the number of Black Americans who have been unhoused is relatively small when considering the number of impoverished or unemployed Black Americans.⁵⁴¹ Scholars have attributed this to the robust family and neighborhood support systems of Black communities.⁵⁴²

In the last 50 years, the number of Black unhoused individuals has risen.⁵⁴³ Black Americans now make up 39 percent of people experiencing homelessness and 53 percent of families experiencing homelessness with children.⁵⁴⁴ Scholars have attributed this to the compounding harms of urban renewal,⁵⁴⁵ loss of blue collar jobs,⁵⁴⁶ the crack cocaine epidemic,⁵⁴⁷ historical and continued housing discrimination,⁵⁴⁸ mass incarceration,⁵⁴⁹ lack of access to health insurance and mental health services,⁵⁵⁰ and lack of affordable housing.⁵⁵¹

⁵³² California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Joseph Gibbons, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁵³³ Carter, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) at p. 37; <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html>

⁵³⁴ Johnson, African Americans and Homelessness: Moving Through History, *Journal of Black Studies* (2010) vol. 40, no. 4 pp. 583–605 <www.jstor.org/stable/40648529> [as of July 23, 2021]

⁵³⁵ Johnson 596.

⁵³⁶ Johnson 601

⁵³⁷ Johnson, African Americans and Homelessness: Moving Through History, *Journal of Black Studies* (2010) vol. 40, no. 4 pp. 583–605, p. 584 <www.jstor.org/stable/40648529> [as of July 23, 2021]

⁵³⁸ Johnson, p. 587.

⁵³⁹ Johnson p. 592-93

⁵⁴⁰ Johnson 596

⁵⁴¹ Johnson 596

⁵⁴² Johnson 596

⁵⁴³ Johnson 600

⁵⁴⁴ The 2020 Annual Homeless Assessment Report (AHAR) to Congress, p1

⁵⁴⁵ Johnson 600

⁵⁴⁶ Johnson 600

⁵⁴⁷ Johnson 600

⁵⁴⁸ “Housing Discrimination against Racial and Ethnic Minorities 2012,” HUD. 2013

⁵⁴⁹ <https://core.ac.uk/download/pdf/6350111.pdf>

⁵⁵⁰ https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2017.pdf

⁵⁵¹ <https://www.thecommunityguide.org/sites/default/files/publications/he-AJPM-evrev-housing.pdf> at p.

Due to the effects of government segregation policy,⁵⁵² Black Americans earn less and are more likely to be renters than white Americans, making them more vulnerable to homelessness. In general, renters are more likely to be homeless.⁵⁵³ Because government policies have historically crippled the ability of Black households to purchase houses, they are more likely to be renters than white households.⁵⁵⁴ One study found that Black renters continue to pay more than white renters for similar housing in similar neighborhoods.⁵⁵⁵

Because Black families are more likely to be impoverished, the housing shortage is more likely to affect Black households.⁵⁵⁶ In the country, there are only 37 rental homes for every 100 extremely low-income renter households, defined as households with incomes at or below the poverty level, or 30 percent of the median income of the geographic area.⁵⁵⁷ Twenty percent of Black households are extremely low-income renters, compared with six percent of white non-Hispanic households.⁵⁵⁸

Black families are more likely to be rent burdened, which is generally defined as a household that spends more than 30 percent of monthly income on housing.⁵⁵⁹ Although the percentage of rent-burdened Black families has decreased in the past five years, a majority of Black renter families in 2019, the last year for which data is available, still spent over 30 percent of their income on rent.⁵⁶⁰

A. California

State and local urban renewal, highway construction, and gentrification have destroyed Black communities throughout the state. In the 1960s, vibrant communities like San Francisco's Fillmore district and Los Angeles's Sugar Hill have been reduced to rubble or an eight lane highway. Today, segregated neighborhoods in California are often populated by a mix of Black and Hispanic residents,⁵⁶¹ and are more vulnerable to be displaced by gentrification.⁵⁶²

One study found that five of the 20 most rapidly gentrifying cities from 2013 to 2017 were in California: San Francisco-Oakland (1), San Jose (8), Sacramento (10), San Diego (14), and Los Angeles (15).⁵⁶³ In many California cities today, gentrification (characterized by "economic and demographic shifts in historically disinvested neighborhoods") is concentrated in formerly redlined neighborhoods.⁵⁶⁴ Close to 90 percent of currently gentrifying areas in San Francisco were formerly redlined or rated "definitely declining" by the Home Owners' Loan Corporation, as were 83 percent of gentrifying areas in the East Bay and 87 percent of gentrifying

⁵⁵² <https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness>

⁵⁵³ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁵⁵⁴ Rothstein, *supra*, at pp. 180-183.

⁵⁵⁵ *Id.* at 671.

⁵⁵⁶ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁵⁵⁷ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁵⁵⁸ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁵⁵⁹ American Housing Survey Data.

⁵⁶⁰ American Housing Survey Data.

⁵⁶¹ <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html>

⁵⁶² *Redlining and Gentrification*, University of California Berkeley Urban Displacement Project <<https://bit.ly/3h6XCFd>> (as of June 25, 2021).

⁵⁶³ Richardson et al., *Gentrification and Divestment 2020* (June 2020) Nat. Community Reinvestment Coalition <<https://ncrc.org/gentrification20/>> (as of June 25, 2021).

⁵⁶⁴ *Redlining and Gentrification*, University of California Berkeley Urban Displacement Project <<https://bit.ly/3h6XCFd>> (as of June 25, 2021).

areas in San Jose.⁵⁶⁵ According to the U.S. census, in the 1970s, 10 percent of San Francisco’s population identified as Black, compared to five percent today.⁵⁶⁶

Darrell Owens testified during the December 7, 2021 Task Force meeting that census data shows that Black Americans have been displaced from California for decades.⁵⁶⁷ In particular and more recently, Blacks are leaving Alameda County and Los Angeles County.⁵⁶⁸ [additional research to come:
<https://calmatters.org/projects/california-black-population-exodus/>]

In writing about the gentrification of her historically Black neighborhood of Inglewood in Los Angeles, Erin Aubry Kaplan says, “Black presence has value — in every sense of the word, and on its own terms. That value should make the casual displacement of Black people untenable, even immoral.”⁵⁶⁹

More Californians experience homelessness than any other state in the country.⁵⁷⁰ Nearly a quarter of all unhoused Americans live in California.⁵⁷¹ Black Californians experiencing homelessness is a more acute crisis than in the rest of the country. Black people account for 6.5 percent of Californians but nearly 40 percent of the state’s unhoused individuals.⁵⁷² Nationally, Black people account for 13.4 percent of the population and are 39.4 percent of the unhoused population.⁵⁷³

In addition to experiencing homelessness, as with the rest of the country, Black Californians are more likely to be renters than white Californians.⁵⁷⁴ In the last decade, Black Californians were less likely to own a home than in the 1960s, when housing discrimination was legal.⁵⁷⁵ The Black homeownership rate in California has dropped almost 10 percent since 2004 and has not recovered.⁵⁷⁶ Sixty-eight percent of white Californians own a home, compared with 41 percent of Black Californians.⁵⁷⁷ Fifty-eight percent of the state’s Black renters spent more than 30 percent of their household income on rent.⁵⁷⁸ In certain neighborhoods like South Los Angeles,

⁵⁶⁵ *Ibid.*

⁵⁶⁶ <https://www.kqed.org/news/11825401/how-urban-renewal-decimated-the-fillmore-district-and-took-jazz-with-it>

⁵⁶⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Darrell Owens, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁵⁶⁸ *Ibid.*

⁵⁶⁹ Kaplan, *Is My Little Library Contributing to the Gentrification of my Black Neighborhood?* N.Y. Times, Dec. 5, 2021 <<https://www.nytimes.com/2021/12/05/opinion/gentrification-los-angeles-little-library.html>> (as of January 20, 2022).

⁵⁷⁰ <https://www.usich.gov/homelessness-statistics/ca/>

⁵⁷¹ <https://www.usich.gov/homelessness-statistics/ca/>

⁵⁷² Cimini, *Black people disproportionately homeless in California*, CalMatters (Oct. 5, 2019) <<https://calmatters.org/california-divide/2019/10/black-people-disproportionately-homeless-in-california/>> (as of Jul. 12, 2021).

⁵⁷³ Cimini, *Black people disproportionately homeless in California*, CalMatters (Oct. 5, 2019) <<https://calmatters.org/california-divide/2019/10/black-people-disproportionately-homeless-in-california/>> (as of Jul. 12, 2021).

⁵⁷⁴ *Snapshot of Tenants in California* (2019) Tenants Together <<https://bit.ly/3vWuPIZ>> (as of June 25, 2021); Cal. Assem. Coms. On Housing & Community Development and Banking & Finance, *Addressing Racial Disparities in Housing Background Paper* (Mar. 25, 2021) p. 4.

⁵⁷⁵ <https://www.calhfa.ca.gov/community/buildingblackwealth.htm>

⁵⁷⁶ *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020).

⁵⁷⁷ *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020).

⁵⁷⁸ *Snapshot of Tenants in California* (2019) Tenants Together <<https://bit.ly/3vWuPIZ>> (as of June 25, 2021); Cal. Assem. Coms. On Housing & Community Development and Banking & Finance, *Addressing Racial Disparities in Housing Background Paper* (Mar. 25, 2021) p. 4.

over half of Black households pay more than 50 percent of their income on rent.⁵⁷⁹ As a likely result, despite constituting five percent of the state’s population, Black Californians comprise nearly 40 percent of unhoused Californians. As Brandon Greene testified during the December 7, 2021 Task Force meeting, Black Americans are disproportionately represented among the unhoused population throughout California.⁵⁸⁰ Further, according to Greene, anti-homeless laws exclude Black Americans from public spaces—like Jim Crow laws—by empowering police to remove unhoused individuals from public spaces.⁵⁸¹

As with the rest of the country, segregated neighborhoods have fewer access to public transportation by design.⁵⁸² For example, the Bay Area Rapid Transit (BART) trains run for almost three miles without stopping through Oakland’s San Antonio, the most racially diverse and densest part of the Bay Area.⁵⁸³ In contrast, Walnut Creek and Pleasant Hill are less than half as dense in comparison, but the BART stations are only 1.75 miles apart.⁵⁸⁴ The city designed the BART in the late 1960s to carry white commuters from the suburbs to their urban jobs, bypassing poor Black neighborhoods.⁵⁸⁵

Segregated communities have less greenspace and are more polluted. Fifty-two percent of Black Californians live in areas deprived of nature, compared to 23 percent of white Californians.⁵⁸⁶ Their streets and sidewalks are more dangerous.⁵⁸⁷ Segregated neighborhoods in California are more impoverished⁵⁸⁸ and the homes are undervalued.

The typical Californian Black-owned home is worth 86 percent as much as the typical U.S. home, while the typical white-owned home is worth 108 percent as much as the typical U.S. home.⁵⁸⁹ And a study has found that in the Los Angeles-Long Beach-Anaheim and San Francisco-Oakland-Hayward metropolitan areas, houses in majority Black neighborhoods are devalued by 17.1 percent and 27.1 percent, respectively.⁵⁹⁰ This makes it particularly vulnerable to gentrification.⁵⁹¹

XVI. Conclusion

[Summary discussion linking housing segregation and discrimination to enslavement.] Federal, state, and local governments across the country and in California, along with private actors, created separate and unequal cities and neighborhoods for Black and white Americans. Led by the federal government, local governments passed

⁵⁷⁹ <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html>

⁵⁸⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Brandon Greene, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁵⁸¹ *Ibid.*

⁵⁸² <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁵⁸³ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁵⁸⁴ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁵⁸⁵ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁵⁸⁶ Rowland-Shea et al., *The Nature Gap: Confronting Racial and Economic Disparities in the Destruction and Protection of Nature in America* (July 21, 2020, 7:30 AM) Center for American Progress

<<https://www.americanprogress.org/issues/green/reports/2020/07/21/487787/the-nature-gap/>> (as of June 22, 2021).

⁵⁸⁷ [citation]

⁵⁸⁸ <https://www.cato.org/study/overview-poverty-inequality-california#who-are-californias-poor>

⁵⁸⁹ Manhertz, *supra* note 16.

⁵⁹⁰ Perry et al., *The Devaluation of Assets in Black Neighborhoods* (Nov. 27, 2018) Brookings <<https://brook.gs/35T7qNY>> (as of June 25, 2021).

⁵⁹¹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Joseph Gibbons, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

zoning ordinances and state courts enforced racially restrictive covenants to exclude Black Americans from neighborhoods. These actions were amplified by federal housing policy.

When white supremacists burned crosses, bombed houses, harassed, and terrorized Black families moving into white neighborhoods, local governments rarely investigated and prosecuted the perpetrators. Funded by the federal government, local governments first built quality public housing exclusively for white Americans, then built and neglected enormous apartment complexes that concentrated poverty in Black neighborhoods. In the last three decades, local governments then chose to demolish these housing projects, intensifying gentrification and once again displacing Black Americans.

This gentrification is part of a long history of displacement of Black Americans. Erin Aubry Kaplan, a resident of the historically Black neighborhood of Inglewood, California wrote:

“I thought about how fragile my feeling of being settled is. It didn’t matter that I own my house, as many of my neighbors do. Generations of racism, Jim Crow, disinvestment and redlining have meant that we don’t really control our own spaces. In that moment, I had been overwhelmed by a kind of fear, one that’s connected to the historical reality of Black people being run off the land they lived on, expelled by force, high prices or some whim of white people.”⁵⁹²

As Kaplan describes, wherever Black Americans settled and prospered throughout American history, federal, state, and local governments, along with private actors, used numerous mechanisms: park and highway construction, slum clearance, and urban renewal to destroy those communities. Across the country, the federal government helped white Americans buy single family homes in the suburbs while crippling the ability for Black Americans to access home loans and buy houses in the neighborhoods that white families left behind.

Almost 150 years of active, conscious federal, state, and local government action and neglect of duty has resulted in compounded harms that are unique to Black Americans.⁵⁹³ Housing segregation stole wealth from Black Americans, while building the wealth of white Americans (discussed in Chapter 13). Once segregated, government actors turned urban Black neighborhoods into ghettos by depriving them of public services (discussed in Chapter 7), school funding (discussed in Chapter 6), and encouraged polluting industries to move in (discussed in Chapter 7). As a result, Black Americans suffer higher rates of asthma and other diseases (discussed in Chapter 8). Housing segregation partially created the foundation and exacerbated the over-policing of Black neighborhoods, resulting in the injury and death of Black Americans at the hands of police (discussed in Chapter 12).

These harms have never been adequately remedied.

⁵⁹² Kaplan, *supra*.

⁵⁹³ [citation needed]

XVII. Appendix

Table 1: Racial Disparities in Home Values, 2020 (Studied CA Metros)⁵⁹⁴

Metro Area	Value of the Typical Black-Owned Home as a Percentage of the Value of the Typical US Home (%)	Value of the Typical White-Owned Home as a Percentage of the Value of the Typical US Home (%)
Statewide	86	108
Los Angeles	81	118
Riverside	99	101
Sacramento	93	101
San Diego	81	106
San Francisco	78	107
San Jose	81	108

Table 2: Gap in Black and White Homeownership Rates in Formerly Greenlined Neighborhoods, 1980 vs. 2017 (Studied CA Metros)⁵⁹⁵

Metro Area	1980			2017		
	BHR (%)	WHR (%)	Gap	BHR (%)	WHR (%)	Gap
Fresno	31.4	71.2	39.8 points	2.5	62.6	60.1 points
Los Angeles	49.8	69.1	19.3 points	46.2	67.1	20.9 points
Oakland	76.9	82.6	5.7 points	84.1	85.9	1.8 points
Sacramento	35.7	79.5	43.8 points	16.7	73.4	56.7 points
San Diego	7.9	64.0	56.1 points	17.0	60.9	43.9 points
San Jose	9.9	58.8	48.9 points	41.1	60.5	19.4 points

Table 2c: Gap in Median Home Equity in Formerly Greenlined and Formerly Redlined Neighborhoods, 2019 (Studied CA Metros)⁵⁹⁶

Metro Area	Median Home Equity in Formerly Greenlined Neighborhoods (\$)	Median Home Equity in Formerly Redlined Neighborhoods (\$)	Gap (% difference)
Fresno	282,000	158,000	78
Los Angeles	1,111,000	587,000	89
Oakland	1,300,000	752,000	73
Sacramento	778,000	522,000	49
San Diego	1,058,000	471,000	125
San Jose	1,329,000	854,000	56

⁵⁹⁴ Manhertz, *Home Value Disparities Between Races are Shrinking, but Remain Very Wide* (Dec. 19, 2020) Zillow <<https://bit.ly/3jbhrxT>>.

⁵⁹⁵ Anderson, *Redlining's Legacy of Inequality: \$212,000 Less Home Equity, Low Homeownership Rates for Black Families* (Oct. 15, 2020) Redfin <<https://bit.ly/3jjHXVN>> (as of June 25, 2021)..

⁵⁹⁶ Anderson, *Redlining's Legacy of Inequality: \$212,000 Less Home Equity, Low Homeownership Rates for Black Families* (Oct. 15, 2020) Redfin <<https://bit.ly/3jjHXVN>> (as of June 25, 2021)..

Table 3 Sundown Towns identified in California from *Sundown Towns: A Hidden Dimension of American Racism* by James Loewen

- Brea⁵⁹⁷
- Bishop⁵⁹⁸
- Burbank⁵⁹⁹
- Maywood Colony, Corning⁶⁰⁰
- Culver City⁶⁰¹
- Glendale⁶⁰²
- Hawthorne⁶⁰³
- La Jolla⁶⁰⁴
- Numerous suburbs of Los Angeles⁶⁰⁵
- Palos Verdes Estates⁶⁰⁶
- Richmond⁶⁰⁷
- San Marino⁶⁰⁸
- South Pasadena⁶⁰⁹
- Taft⁶¹⁰
- Tarzana⁶¹¹

⁵⁹⁷ Loewen pp. 102-03; see also p. 293

⁵⁹⁸ Loewen p. 338

⁵⁹⁹ Loewen p. 100, 239-240

⁶⁰⁰ Loewen p. 29

⁶⁰¹ Loewen, 112

⁶⁰² Loewen 236, 255

⁶⁰³ Loewen 23, 333

⁶⁰⁴ Loewen, 5

⁶⁰⁵ Loewen 276

⁶⁰⁶ Loewen 258

⁶⁰⁷ Loewen 239

⁶⁰⁸ Loewen 340

⁶⁰⁹ Loewen 258

⁶¹⁰ Loewen 410

⁶¹¹ Loewen 14

Chapter 6. Separate and Unequal Education

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

A. Nationally

A quality education is the foundation for a good job, income growth, and, in the words of the Supreme Court of California, “for the preservation of the rights and liberties of the people.”¹ The amount of income a family’s previous generation produces also determines whether the next generation’s family can afford to live in a community with well-funded schools. During slavery, the government of the United States of America at all levels, including the government of the State of California, deprived 11 generations of Black Americans of the benefits of education.

After slavery, governments in the United States required Black children to attend segregated schools with far fewer resources and funding than the schools white children attended. These unequal education conditions continue in many schools today. Because research shows that parents with higher levels of education have children who achieve higher levels of education, the benefits of a good education—better jobs and higher income—build up over generations. Just as benefits mount and increase, so too, do the harms. For hundreds of years, governments at all levels in America have inflicted these multi-generational, ongoing, and compounding harms upon Black children, and they have never made sufficient amends.

During the slavery era, in order to control the Black enslaved people who toiled to build the wealth of this country, enslaving states denied education to nearly all enslaved people. Black enslaved people who tried to educate themselves did so at extraordinary risk and against insurmountable odds. Punishment for attending clandestine schools included whipping and threats of maiming. Free states of the North and Midwest segregated their schools and limited or denied freed Blacks access. At the same time, tax dollars collected from the textiles and other cotton-based products manufactured in the North using cotton picked by Black enslaved people helped pay for our country’s Northern public schools, which almost exclusively taught white children. In some parts of the North and Midwest, white people burned down or forced Black schools to close, and were often not punished. With very rare exceptions, Black Americans could not go to college.

After the Civil War, southern states and others on the borders denied education to free Black people to maintain a servant class and prevent Black people from voting. Until 1945, state governments legally segregated Black children into principally one-room schoolhouses that, in the South, often had no books, desks, chairs, or even working windows, and no separation of grade levels. Local government officials conspired with southern businesses and landowners to arrest and effectively re-enslave more than 100,000 Black children and adults on trumped up charges, forcing them into mass incarceration and hard labor to work off fines and denying any

¹ *Piper v. Big Pine Sch. Dist. of Inyo Cty.* (1924) 193 Cal. 664, 668, 673-74.

children their education.

The Ku Klux Klan and other white terrorist groups, whose membership included government officials, destroyed Black schools. White-controlled legislatures funded Black public schools with far less tax revenue than white public schools. Black teachers received lower wages, and Black children received fewer months of schooling per year and fewer years of schooling per lifetime than white children. In the rest of the country, government supported housing segregation and neighborhood-based school assignment policies sent most Black children to schools that were separate from white students and unequal with respect to both funding and resources. [Research to come: a compelling detail of segregated schools pre-Brown in the North, or add in a colorful contemporary quotation].

Most state funded and private white colleges and universities refused to admit Black students, so Black Americans founded what we now refer to as Historically Black Colleges and Universities, or HBCUs, to provide opportunities for higher education. After World War II, the federal government paid for white veterans to go to college under the Servicemen's Readjustment Act of 1944 (GI Bill), but state and local administrators directed most Black veterans into vocational programs instead of higher education and would not permit Black veterans to use the GI Bill to attend white colleges.

The Supreme Court's landmark 1954 case, *Brown v. Board of Education*, which outlawed school segregation on paper, did little to solve the problem. Many white people and white-dominated school boards throughout the country aggressively resisted integration. White-led legislatures provided money in the form of freedom of choice vouchers for white students to attend over 3,000 newly created private schools for white students. In at least one Virginia school district, they shut down public schools and transferred money and resources to newly opened white-only private schools. As southern schools desegregated, in formerly all Black public schools, officials fired large numbers of Black teachers and administrators and replaced them with white teachers and administrators.

In addition, while education segregation was written into law in the south, in the rest of the country, government actors also created school segregation, but in a different way. All over the country, government housing and school boundary and siting policies allowed white people to create segregated communities with their own local and higher tax bases dedicated to funding better-resourced white schools. In 1974, the Supreme Court allowed school segregation to continue when it occurs as a result of housing segregation and school-boundary lines drawn between cities that preserve segregation in schools. As a result, *Brown v. Board of Education* did not mark the end of segregation, as some Americans believe. Even though *Brown* determined that school segregation was illegal, many public schools in the United States never integrated in the first place or were integrated and then re-segregated. By the late 1980s, which was considered the peak of integration, schools remained or were returning to being predominantly white and predominantly Black.² Today, the vast majority of Black children remain locked into schools separate from their white peers, and possibly more unequal than

² Bell, *Silent Covenants*, *supra*, at fn. 19, p. 110; Orfield, *Schools More Separate: Consequences of A Decade of Resegregation*, The Civil Rights Project, Harvard University (July, 2001) pp. 1-2 <<https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf>> (as of July 1, 2021) (hereafter *Schools More Separate*); see also Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 62, p. 6 (“Intense segregation, in 90-100% non-White schools, fell very sharply from 78% of Black students in 1968 to 24% in the South stated by 1988, but [by 2020] has risen back to 37%[.]”).

the schools that their grandparents had attended under Jim Crow.

Even in integrated schools teaching Black and white children, mostly white school officials segregated Black and white students into separate classes and programs within the school. This is a practice called “tracking,” which continues today. Research shows that Black students are more often assigned to less challenging classes with fewer resources, because of their race instead of a lack of ability. Students graduating from these lower tracks do not have the same opportunities after high school graduation. Meanwhile, white students in the same school are more often placed in “gifted” and “talented” tracks, even though just as many Black students are also gifted and talented.

In colleges, universities, and graduate programs, the National Guard deployed to several southern universities to protect the first Black students from white violence after the passage of the Civil Rights Act of 1964. For about 40 years after the Civil Rights Act, white colleges and universities slowly increased the number of Black students attending their schools. However, in more recent years, the overall number of Black students attending college has declined.

B. California

Before the Civil War, California also denied education to Black Americans or forced them to attend segregated schools with far fewer resources and funding than the schools white children attended, but the means used were different. California allowed white southerners to enslave hundreds of Black people, including children, who then could not attend school, and denied these enslaved children an education. California required Black Californians to pay taxes that funded better schools for whites, while forcing free Black children to attend segregated, substandard schools. For a period of time, California law also allowed public school districts to refuse to teach Black children even in a segregated school, if fewer than 10 students lived in the district, and also denied state funding to any schools that taught Black children.

Although California law stopped requiring Black children to attend poorer segregated schools in 1890, federal, state, and local housing policies penned Black families into segregated neighborhoods. Government officials then created less obvious, but equally effective policies to keep Black children in mostly Black, underfunded schools.

Today, in California and in America, many Black students continue to attend unequally funded, under-resourced, and highly segregated public schools due to government policies that continue to segregate many schools and school funding by neighborhood. Black students have less access to college prep classes, and are more likely to be suspended and kicked out of school than their white peers. As a result, Black students are more likely to drop out and get funneled into the juvenile justice system.

Recently, California has tried to change its education system to be more equal by creating an equity index to spend more money on schools that serve our poorest students. However, the system does not ensure that the money is actually spent on those students, many of whom are Black children.

Section III of this Chapter focuses on the period of legalized enslavement of Black Americans through the Civil War and the government-supported laws, policies, and practices in the South, North, and in California that resulted in the denial and deprivation of education to Black Americans during that period. Section IV of this Chapters focuses on the period after the Civil War until the present and the government-supported laws, policies, and practices in across the country and in California that established and cemented the segregated and unequal primary and secondary schooling that the vast majority of Black students experience, even today.

Section V of this Chapter focuses on higher education and the government-supported laws, policies, and practices across the country and in California that denied Black Americans equal access to higher education. Section VI of this Chapter focuses on the ways in which the teaching of our nation’s history has excluded Black Americans and their experiences and how the absence of curricula and literature books that are inclusive of Black student has a negative impact on education. Section VII of this Chapter concludes with a summary of the ongoing and compounding harms caused to Black Americans through the denial of education and deprivation of equal educational opportunity that began during enslavement and continues today.

III. Prohibition and Denial of Education During Slavery – 1619 to 1865

[Summary paragraph needed here very short explanation of the state of the education system during this time period, that it was state by state, no compulsory education, etc. , the methods used by gov’ts to deny Black people education.]

A. America’s Leaders Promote Racist Pseudoscience

In *Notes on the State of Virginia*, Thomas Jefferson “proposed that black inferiority – ‘in the endowments of both body and mind’ – might be an unchangeable law of nature.”³ Some scholars argue that Jefferson’s statements became an important first document of racist scientific theories that were popular in the decades before the Civil War.⁴ Some of the so-called “race scientists” graduated from elite northern colleges and claimed that Black people were subhuman and not descendants of Adam and Eve to support, as one scholar argues, “the self-image of the nation’s white supremacist majority.”⁵

Even Abraham Lincoln also believed that white people were superior to Black people, stating in his famous debate with Stephen Douglas: “I as much as any other man am in favor of having the superior position assigned to the white race.”⁶ Other early leaders of America, including Thomas Jefferson, Abraham Lincoln, and Benjamin Rush, a Founding Father who has been called the father of American psychiatry, endorsed these false ideas about the inferiority of Black Americans that served to justify education prohibitions.⁷ Scientists later proved that these “race scientists” were wrong in the racist theories used by government officials and private citizens to justify slavery and discrimination.⁸ (See also Chapter 12 on health, which discusses studies finding no biological difference between Black and white people.) A recent 2019 *Education Week* survey suggests that these racist theories live on among America’s teachers today. The survey found that 40 percent of American teachers believe incorrectly that genetics is “a slight factor” in explaining why white students do better in school

³ Farrow et al., *Complicity: How the North Promoted, Prolonged, and Profited from Slavery* (2005) p. 181 (hereafter *Complicity*).

⁴ Farrow et al., *Complicity*, *supra*, at fn. 3, p. 181.

⁵ Farrow et al., *Complicity*, *supra*, at fn. 3, p. 181-82.

⁶ Farrow et al., *Complicity*, *supra*, at fn. 3, p. 191.

⁷ Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. Schools* (2006) 35 *Educational Researcher* 3, 6 (hereafter *Achievement Gap to the Education Gap*); History News Network, *Columbian College of Arts & Sciences, The George Washington University, Psychiatry Confronts Its Racist Past, and Tries to Make Amends* (Apr. 30, 2021) <<https://historynewsnetwork.org/article/180130>> (as of February 9, 2022).

⁸ Farrow et al., *Complicity*, *supra*, at fn. 3, p. 191.

than Black students.⁹

B. The South

During more than 250 years of slavery, state governments prohibited education of Black Americans, except for certain religious education.¹⁰ In fact, the institution of slavery depended, in part, on enslaved Black people remaining uneducated.¹¹ Frederick Douglass' former enslaver forbade him from learning to read, as "[a] nigger should know nothing but to obey his master--to do as he is told to do."¹²

Most enslaving states formally outlawed teaching an enslaved person to read or write as early as 1739.¹³ Enslaved people caught learning to read or write in states where this was outlawed could face prison, public whipping, or be threatened with having a finger or arm cut off.¹⁴ When religious education was permitted, it generally taught enslaved people basic reading but not writing, because learning to write could help an enslaved person escape.¹⁵ Some enslaved Black Americans sought out instruction provided in secret. For example, Douglass secretly taught other enslaved people how to read, and described "[t]he work of instructing my dear fellow-slaves" as "the sweetest engagement with which I was ever blessed. We loved each other, and to leave them at the close of the Sabbath was a severe cross indeed."¹⁶ As a result of such secret lessons taught by enslaved people, free Black Americans, and some white Americans,¹⁷ about 10 percent of Black Americans in the South learned to read by 1865.¹⁸

C. The Rest of the Country

In the North, Black Americans were more likely to have basic reading and writing skills. Black Americans sometimes attended schools that were mostly segregated, either through government policy or local practice.¹⁹

⁹ Burnette II, *Do America's Public Schools Owe Black People Reparations?*, Education Week (Sept. 23, 2020) <<https://www.edweek.org/leadership/do-americas-public-schools-owe-black-people-reparations/2020/09>> (as of June 21, 2021) (hereafter *Do America's Public Schools?*).

¹⁰ Sambol-Tosco, *The Slave Experience: Education, Arts & Culture*, Thirteen (2004) p. 2

<<https://www.thirteen.org/wnet/slavery/experience/education/history2.html>> (as of March 5, 2021) (hereafter *The Slave Experience*);

¹¹ Woodson, *The Education of the Negro Prior to 1861: A History of the Education of the Colored People of the United States from the Beginning of Slavery to the Civil War* (1919) Introduction (hereafter *Education of the Negro Prior to 1861*); Albanese, *The Plantation School* (1976);

¹² Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1845) Electronic Edition, pp. 33, 81.

¹³ Woodson, *Education of the Negro Prior to 1861*, *supra*, at fn. 11, pp. 193-96, 70-92; Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 5.

¹⁴ Span, *Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America* (2005) 131 Counterpoints 26, 31-32, 47-48.

¹⁵ Woodson, *Education of the Negro Prior to 1861*, *supra*, at fn. 11, p. 70-92.

¹⁶ Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1845) Electronic Edition, pp. 33, 81.

¹⁷ Langhorne, *The African American Community: Circumventing the Compulsory Education System* (2000) 33 *Beverly Hills Bar Assn. J.* 12, 13-17.

¹⁸ Bracey, *The Significance of Historically Black Colleges and Universities (HBCUs) in the 21st Century: Will Such Institutions of Higher Learning Survive?* (2017) 76 *Am. J. Econ. & Socio.* 670, 671 (hereafter *Significance of HBCUs*).

¹⁹ Sambol-Tosco, *The Slave Experience*, *supra*, at fn. 3, p. 2; Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (2004) p. 52 (hereafter *Silent Covenants*).

In some places, state and local officials prohibited Black Americans from opening schools, and white Americans harassed and threatened teachers of Black students until they stopped teaching. In some places, white Americans also vandalized schools for Black students or burnt them to the ground.²⁰ For example, in 1832, Prudence Crandall, a white schoolmaster, allowed Sarah Harris, a Black student, to enroll in Crandall's small Connecticut school run out of her home until Crandall was forced out of her home by white townspeople.²¹ After white parents withdrew their children, Crandall decided to open her school to other interested Black students from Connecticut and other nearby states.²² Crandall eventually enrolled 20 Black students.²³

On May 24, 1833, the Connecticut legislature passed a "Black Law," prohibiting any school from teaching Black students from outside the state without permission.²⁴ Local officials arrested Crandall because she kept her school open. She spent the night in jail and charges were brought against her. Then, in January 1834, vandals set the school on fire.²⁵ Crandall finally closed the school in September 1834 after white townspeople broke 90 panes of glass on her home using iron bars.²⁶ This was the second unsuccessful attempt to establish a school for Black students in the state.²⁷

While Black Americans were enslaved and banned from schooling in the South, their labor helped pay for public schools in some states in the North.²⁸ Enslaved people worked for free in the South picking cotton, and their labor in the South created great wealth for the textile manufacturers in the North. By the early 1830s, New England mills consumed such large quantities of cotton from the South—78 million pounds of cotton fiber per year—that the United States became the second largest producer of textiles in the world.²⁹ This textile industry in the North paid taxes. These taxes helped to fund the public schools in New England. During slavery, due to government policies and local practices, very few Black students were permitted to attend these public schools, even though the labor of Black Americans enslaved in the South helped fund them. During this time, the federal government also supported enslavers kidnapping Black Americans in the North who had escaped from slavery to re-enslave them in the South, where they were again denied education.³⁰ See Chapter 2 on enslavement for

²⁰ Woodson, *Education of the Negro Prior to 1861*, *supra*, at fn. 11, Introduction; Sambol-Tosco, *The Slave Experience*, *supra*, at fn. 10, p. 2. In 1857, the Supreme Court held in *Dred Scott* that Black people were not citizens and, as such, gave the states express permission to deny Black people equal rights, including to education. *Scott v. Sandford* (1857) 60 U.S. 393.

²¹ May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 52-53 <<https://www.gutenberg.org/files/50313/50313-h/50313-h.htm#hp39>> (as of June 24, 2021).

²² May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 52-53 <<https://www.gutenberg.org/files/50313/50313-h/50313-h.htm#hp39>> (as of June 24, 2021).

²³ May, *Some Recollections of Our Antislavery Conflict* (1869) p. 50.

²⁴ May, *Some Recollections of Our Antislavery Conflict* (1869) p. 52.

²⁵ May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 70-71.

²⁶ May, *Some Recollections of Our Antislavery Conflict* (1869) p. 71.

²⁷ May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 71-72.

²⁸ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 6 (noting that by 1860, New England was home to 472 cotton mills and between 1830 and 1840, Northern mills consumed more than 100 million pounds of Southern cotton); Oast, *Institutional Slavery: Slaveholding Churches, Schools, Colleges, and Businesses in Virginia, 1680–1860* (2016) p. 51.

²⁹ Encyclopedia.com, *Impact of Slavery on the Northern Economy* <[Impact of Slavery on the Northern Economy | Encyclopedia.com](https://www.encyclopedia.com/impact-of-slavery-on-the-northern-economy)> (as of January 26, 2022.).

³⁰ Farrow et al., *Complicity*, *supra*, at fn. 3, p. 139.

further discussion of related issues.

During the 1800s, it was legal for colleges and universities to refuse to admit Black students, so Black students generally could not receive an education beyond high school.³¹ In response, free Black Americans, often affiliated with Black churches, established the first Black colleges and universities.³² Until the early 1900s these schools mostly offered middle and high school level education to Black Americans who had been prohibited from attending school.³³ By the eve of the Civil War, only 28 of the nation's nearly four million newly freed enslaved people had received bachelor's degrees from American colleges.³⁴

D. California

California became a state in 1850, a decade before the onset of the Civil War. Despite the anti-enslavement clause in California's constitution, enslavers brought several hundred Black enslaved people to California and denied them education.³⁵ The early California legislature, dominated by white southerners from enslaving states, revised the school laws to enforce segregated schooling.³⁶ (See Chapter 2 on enslavement.) These state lawmakers successfully enforced segregated schools to avoid racial intermixing.³⁷ California's State Superintendent of Public Instruction Andrew Jackson Moulder, who served from 1857 to 1862 stated: "[I]f this attempt to force Africans, Chinese, and the Diggers [Native Americans] into our schools is persisted in, it must result in the ruin of our school."³⁸

Moulder helped pass a California law in 1855 that withheld state funds from schools that taught Black and Chinese children.³⁹ So, although California taxed Black people to pay for the state's public schools, Black

³¹ Woodson, *The Education of the Negro Prior to 1861*, *supra*, at fn. 11, Introduction.

³² Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 676; Office for Civil Rights, *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. Dept. of Ed. (Mar. 1991) <<https://www2.ed.gov/about/offices/list/ocr/docs/hq9511.html>> (as of June 21, 2021) (hereafter *HBCUs and Desegregation*).

³³ Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 676; Office for Civil Rights, *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. Dept. of Ed. (Mar. 1991) <<https://www2.ed.gov/about/offices/list/ocr/docs/hq9511.html>> (as of June 21, 2021) (hereafter *HBCUs and Desegregation*).

³⁴ Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts* (2009) 80 *J. of Higher Ed.* 389, 393 (hereafter *Access and Equity*); Roebuck & Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* (1993) p. 22 ("only twenty-eight blacks received baccalaureate degrees . . . prior to the Civil War.")

³⁵ Hudson, *West of Jim Crow: The Fight Against California's Color Line* (2020) p. 22-23 (hereafter *West of Jim Crow*); see, e.g., *In re Perkins* (1852) 2 Cal. 424, 437-441, 454-457 (upholding 1852 Fugitive Slave Act, affirming that enslavers who brought enslaved persons from other states were not affected by the anti-slavery clause in the constitution); Gold Chains: The Hidden History of Slavery in California, ACLU <<https://www.aclunc.org/sites/goldchains/explore/gold-rush.html>> (as of June 24, 2021).

³⁶ E.g., *Don Wilson Builders v. Superior Ct. for Los Angeles County* (1963) 220 Cal. App. 2d 77, 89 (dis. opn. of Fourt, J.) ["California history indicates that at the time the state was organized in 1849 and for some several years thereafter many southerners were influential in the state government and otherwise and their influence is reflected in many statutes. The statutes of 1850, ch. 140, p. 424, set forth the law against miscegenation and such remained the law in one form or another until 1948 []."]; Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California* (2011) 80 *Pacific Historical Rev.* 28, 49-50.

³⁷ Hudson, *West of Jim Crow*, *supra*, at fn. 35, pp. 19, 31.

³⁸ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 32 (citing Moulder, *Annual Report of the State Superintendent of Public Instruction* (1858) p. 14, San Francisco Public Library Archives).

³⁹ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 32; Hendrick, *Education of Non-Whites in California, 1849-1970* (1977) p. 7;

Californian's taxes only paid for the education of white children, and they had no right to education for their own children. As early as 1855, the law also calculated how much the State of California would fund a school "in proportion to the number of white children" in each county, so that local governments would not receive any extra money from the state when they taught a Black student.⁴⁰

Because of both of these laws, local governments, instead of the state, paid to educate nonwhite students. And local governments that ran schools for Black students generally provided less funding and resources for Black schools in comparison to white schools. For example, six years after the first all-Black school was established in 1854 in the basement of a San Francisco church,⁴¹ the San Francisco School Superintendent George Tait stated to his school board that: "[T]he room occupied by this school for the past few years is disgraceful to any civilized community" and was "squalid, dark, and unhealthy."⁴²

In 1864, the state changed the law to allow school districts to separate Black students into all-Black schools if requested in writing by "the parents or guardians of ten or more colored children."⁴³ And, this meant that California law also allowed public school districts to refuse to teach Black children at all, if fewer than 10 students lived in the district. In 1866, the state changed the law again to allow white parents to prevent Black students from attending their children's schools, if a majority of parents objected in writing.⁴⁴

Because of these state laws, Black children were forced into separate schools or out of the public-school system altogether. In response, Black Californians in Sacramento, Oakland, and San Francisco led efforts to organize church-based schools, private schools, and separate free-standing public schools.⁴⁵

In the mid-1860s, Black students across California were also generally denied access to public middle and high schools. Few public middle and high schools existed at the time, and California refused to fund and provide separate public middle and high schools for Black students, in part, because of the 1864 state law that permitted school districts not to provide a school where Black students were few in number.⁴⁶

IV. Unequal Primary and Secondary Education

A. Nationally

For the first decade after the Civil War, Black voters, recently enfranchised, and the politicians they elected, successfully fought for and built the South's public-school system. As they did, Black students could attend schools in their communities. However, government expansion of schooling for illiterate Black Americans

Wollenberg, *All Deliberate Speed*, *supra*, at fn. **Error! Bookmark not defined.**, p. 12, n. 10; see Stats. 1855, ch. 185, § 12, p. 232.

⁴⁰ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 32; Hendrick, *Education of Non-Whites in California, 1849-1970* (1977) p. 7;

Wollenberg, *All Deliberate Speed*, *supra*, at fn. **Error! Bookmark not defined.**, p. 12, n. 10; see Stats. 1855, ch. 185, § 12, p. 232.

⁴¹ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 10.

⁴² Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 11.

⁴³ Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975* (1975) p. 14 (hereafter *All Deliberate Speed*).

⁴⁴ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 14.

⁴⁵ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 32.

⁴⁶ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 16.

threatened white economic domination.⁴⁷ According to J.L.M. Curry, an Alabama state legislator in 1889, “[e]ducation would spoil a good plow hand.”⁴⁸ So, even as educational opportunity for Black people in former enslaving states expanded, white-led governments and organizations created a web of government-approved policies and tactics, including burning schools down, to continue to deny Black people education and maintain legalized school segregation.⁴⁹

Denying education or quality education to Black Americans was also critical to denying Black Americans political power and maintaining white political supremacy.⁵⁰ For example, most former enslaving states suppressed the Black vote by imposing a “literacy test” for voters and selectively enforcing it against Black people.⁵¹ (See Chapter 4 on political disenfranchisement.) The vast majority of the policies and practices that created unequal and segregated schools for Black Americans in the South lasted another 100 years. And many continue to live on today in different forms, and their effects are still evident.

B. Racial Terror

In the immediate aftermath of the Civil War, the vast majority of Black people lived in the South. Formerly enslaved Black Americans identified education as essential. Black-dominated Reconstruction-era legislatures in the South passed laws to create the public education system in the South. “The whites [in the South] had always regarded the public school system of the North with contempt. The [Black] freedman introduced and established it and it stands today a living testimony to his faith that education is necessary to social welfare,” said Colonel Richard P. Hallowell, Union Army and Pennsylvania Freedmen’s Relief Association.⁵²

Black men, recently allowed to vote and hold political office, helped draft new state constitutions in the South that mandated public education.⁵³ They served on and during Reconstruction, generally dominated state legislatures that passed the bills to provide funding to the new schools. Black political leaders worked in

⁴⁷ Burnette II, *Do America’s Public Schools?*, *supra*, fn. 9; *Jim Crow Laws* (Feb. 21, 2021) History <<https://www.history.com/topics/early-20th-century-us/jim-crow-laws>> (as of June 21, 2021); see also *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 310-13, 311, fn. 10 (noting that Southern states “rapidly instituted racial segregation in their public schools” following the Civil War and discussing the interplay between efforts to restrict literacy and efforts to restrict the vote)..

⁴⁸ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) pp. 121-122, fn. 40 (hereafter *Slavery by Another Name*).

⁴⁹ See National Geographic, *The Black Codes and Jim Crow Laws* <<https://www.nationalgeographic.org/encyclopedia/black-codes-and-jim-crow-laws/>> (as of June 24, 2021).

⁵⁰ Du Bois, *The Souls of Black Folk: Essays and Sketches* (2d ed. 1903); Tyack & Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South* (1986), 94 Am. J. Ed. 236, 238-239, 250-252; Anderson, *The Education of Blacks in the South, 1860-1935* (1988) pp. 95-96 (“From the vantage point of the southern white majority, any system of universal education for blacks, even industrial education, would potentially lead to universal suffrage.”).

⁵¹ Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (2017) p. 273; Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) pp. 121-122 (hereafter *Slavery by Another Name*); Greenblatt, *The Racial History of the ‘Grandfather Clause’*, NPR (Oct. 22, 2013) <<https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause>> (as of July 15, 2020).

⁵² Du Bois, et al., *The Common School and the Negro American: Report of a Social Study*, Atlanta University (May 30, 1911) p. 22.

⁵³ Du Bois & Dill, *The Common School and the Negro American*, Report (1911) p. 22 (hereafter *The Common School*) <<https://catalog.hathitrust.org/Record/000442258/Home>> (as of June 18, 2021); John Hope Franklin, *Reconstruction after the Civil War* (2d ed., 1994) pp. 107-113.

interracial political coalitions with white Republicans (generally poor whites or Northern transplants) to establish the South's public-school system, what historians have called "the crown of Reconstruction."⁵⁴ Prior to this time, only Tennessee had a system of public schooling. The Freedmen's Bureau Act of 1865 also helped set-up some schools for Black people who had been newly freed.⁵⁵ Unfortunately, the federal government ended the Freedman's Bureau Act after just three years.⁵⁶

As discussed in Chapter 3 on racial terror, after federal troops withdrew from the South in 1877, for the next century, government officials supported private citizens who terrorized Black Americans and Black institutions with impunity. White Americans burned a number of Black schools and churches housing Black schools to the ground.⁵⁷ White-American-led post-reconstruction governments closed Black public schools and fired Black teachers.⁵⁸ A unanimous Supreme Court effectively authorized the elimination of high school for Black students.⁵⁹ Hundreds of thousands of Black youth and adults were essentially re-enslaved on trumped up charges upheld by federal and local judges and police, and forced to labor for white-led U.S. companies and plantation owners under conditions that were as brutal, or even more so, than those endured during slavery.⁶⁰ A number of those re-enslaved were pre-teens and teenagers, some were children under the age of 10.⁶¹ All were denied education. See Chapter 11 on the legal system for further discussion of related issues.

C. Segregation by Law

From the mid-1860s to 1954, Jim Crow laws operating in 17 former enslaving states forced Black Americans into segregated and unequal schools.⁶² By the 1880s, a series of U.S. Supreme Court cases had severely limited the federal government's power to enforce Reconstruction civil rights legislation intended to protect Black Americans, leaving enforcement in the hands of white-led state and local governments.⁶³ This cleared the way for the Supreme Court in 1896 to endorse the idea that requiring Black Americans to be "separate" from whites

⁵⁴ Burnette II, *Do America's Public Schools?*, *supra*, fn. 9.

⁵⁵ United States Senate, *Freedmen's Bureau Acts of 1865 and 1866*

<<https://www.cop.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm>> (as of June 18, 2021); see also Du Bois & Dill, *The Common School*, *supra*, at fn. 53, p. 19.

⁵⁶ *Id.*

⁵⁷ Coates, *The Case for Reparations*, *The Atlantic* (Jun. 2014) <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>> (as of June 21, 2021); Du Bois & Dill, *The Common School*, *supra*, at fn. 53, p. 117 (in 1909 in one county in Georgia, "five school houses for colored children, with their contents, have been burned" and over the last few years "burning of Negro school houses . . . by white neighbors had been frequent in the gulf states.").

⁵⁸ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 91; Darity Jr. & Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2020) p. 287 (hereafter *From Here to Equality*).

⁵⁹ *Cummings v. Board of Ed. of Richmond County* (1899) 175 U.S. 528, 530, 542 (court will not intervene in case where county closed a Black high school and used the "funds in hand", including tax dollars from Black residents, to support a white high school to which Black students were denied entry).

⁶⁰ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 93.

⁶¹ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 93, 97.

⁶² Orfield & Jarvie, *Black Segregation Matters: School Resegregation and Black Educational Opportunity*, UCLA Civil Rights Project/Proyecto Derechos Civiles (Dec. 2020) pp. 4-6 <<https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf>> (as of July 1, 2021) (hereafter *Black Segregation Matters*).

⁶³ E.g., *United States v. Stanley* (Civil Rights Cases) (1883) 109 U.S. 3, 13, 25.

in nearly every facet of life could be consistent with equality.⁶⁴ During the long period of segregation, Black Americans attended schools that were intentionally under-resourced and structured for the purpose of maintaining a servant class.⁶⁵

D. Double-Taxation for Black Schools.

After Reconstruction, white former enslavers created a state tax system designed to underfund education for Black Americans. Former Confederate states only allowed state tax revenues actually paid by Black taxpayers to pay for Black schools and public services for Black communities.⁶⁶ Under this system, no white taxpayer paid for the education of a Black child, but Black Americans paid for the education of both Black and white children. This dual-tax system created huge differences in the amount of money spent to educate Black and white children. In practice, in the early 1900s, Black Americans had to pay double. In addition to state taxes, white government officials also charged Black property owners exorbitant taxes, some of which went to white-only schools. In the 1930s, a local school superintendent in Louisiana reported bluntly: “We have twice as many colored children of school age as we have white, and we use their money. Colored children are mighty profitable to us.”⁶⁷

Then, the same Black Americans were forced to donate additional land and money to support Black schools because the state did not send enough money for Black schools.⁶⁸ For example, when in the 1930s a fire destroyed classroom furniture and equipment in a Louisiana school, according to a local newspaper, the city refused to pay to replace any of the destroyed items, instead the tax dollars were given to the white school and Black parents would have to raise the money to repair the school.⁶⁹

E. Inferior Resources, Funding, and Time

By the late 1890s, Black Americans in former slaveholding states had “been shunted into their own inferior . . . schools” through an “unfettered grab by white supremacists,” according to historians.⁷⁰ The schools they attended were often in terrible condition and lacking in basic facilities, such as desks and chairs and working windows. These schools generally included fewer grades or, sometimes, no grades at all.⁷¹ White school authorities intentionally selected the least-qualified teaching applicants and pushed a curriculum focused on

⁶⁴ *Plessy v. Ferguson* (1896) 137 U.S. 537, 546-548, 550-552.

⁶⁵ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 5.

⁶⁶ Thornton III, *Fiscal Policy and the Failure of Radical Reconstruction in the Lower South* in *Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward* (1982) p. 377; Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 105; Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (2014) pp. 415-416.

⁶⁷ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁶⁸ Anderson, *The Education of Blacks in the South, 1860-1935* (1988) pp. 183-84; Du Bois & Dill, *The Common School*, *supra*, at fn. 53, pp. 7-8 (Black people “themselves have purchased school sites, school houses and school furniture, thus being a peculiar way double taxed” and are “paying into the school fund” in taxes much more than they are receiving in “actual appropriations for school facilities.”).

⁶⁹ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁷⁰ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 157.

⁷¹ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 5.

“industrial work,” e.g., canning, sewing, and woodworking.⁷² In May 1911, after completing a study of the conditions Black schools across the South, W.E.B. Du Bois concluded that the state of segregated elementary schools for Black Americans in the South and in border states is in “a deplorable condition,” worse off than 20 years prior “with poorer teaching, less supervision and comparatively few facilities.”⁷³

The disparities in funding were also severe. White schools received on average five to eight times more government funding than Black schools in nearly all former enslaving states.⁷⁴ In Louisiana in the 1930s, white teachers and principals made an average salary of \$1,165 per year while Black teachers and principals made about \$499 per year, forty-three percent of the amount that white teachers were paid.⁷⁵ In Mississippi, white teachers and principals made \$630 per year, while Black teachers were paid a third of that, \$215.⁷⁶ For Black teachers, as Isabel Wilkerson writes in *The Warmth of Other Suns*, this meant “even the most promising of colored people, having received next to nothing in material assets from their slave foreparents, had to labor with the knowledge that they were now being underpaid by more than half, that they were so behind it would be all but impossible to accumulate the assets their white counterparts could, and that they would, by definition, have less to leave succeeding generations than similar white families.”⁷⁷

In addition, the number of months Black students attended school was generally fewer than white students, e.g., four months in comparison to eight months for white students.⁷⁸ The causes included lack of sufficient funding for schools in rural communities, where many Black Americans lived, white farm owners forcing Black children to work in the fields (or their sharecropping parents needing assistance), and government limits on the number of months that a Black school would be funded in comparison to a white school.⁷⁹

For example, in his 2014 article in the *Atlantic*, Ta-Nehisi Coates recounts the story of Clyde Ross, a student who was encouraged to attend a more challenging Black school outside of his community built with funds from a philanthropist and resources amassed by Black community members, who also donated physical labor to actually build the schools.⁸⁰ The school was too far away from Ross’ home for him to walk there and get back

⁷² Du Bois & Dill, *The Common School*, *supra*, at fn. 53, pp. 100-107.

⁷³ Du Bois, et al., *The Common School And the Negro American*, Report of a Social Study, Atlanta University (May 30, 1911) p. 7.

⁷⁴ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 15 (citing Mark Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), pp. 5-6); Darity Jr. & Mullen, *From Here to Equality*, *supra*, at fn. 58, p. 291 (citing Horace Mann Bond, *The Education of the Negro in the American Social Order*, 46); Du Bois & Dill, *The Common School*, *supra*, at fn. 53, pp. 29-31; 118 (report that in Mississippi counties draw their share of funding according to the number of white and black children but spend the money almost exclusively on the white children).

⁷⁵ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁷⁶ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁷⁷ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁷⁸ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 106; Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 5; Brooker, *The Education of Black Children in the Jim Crow South*, *America’s Black Holocaust Museum: Bringing Our History to Light* <<https://www.abhmuseum.org/education-for-blacks-in-the-jim-crow-south/>> (as of June 18, 2021); Du Bois & Dill, *The Common School*, *supra*, at fn. 53, pp. 52-54; 58, 101 (describing differences in months of operation for black and white schools in Georgia and South Carolina).

⁷⁹ *Id.*

⁸⁰ *The Rosenwald Schools: Progressive Era Philanthropy in the Segregated South* (Teaching with Historic Places), National Park Service, <<https://www.nps.gov/articles/the-rosenwald-schools-progressive-era-philanthropy-in-the-segregated-south-teaching-with-historic-places.htm>> (as of January 26, 2022).

in time to work in the fields. Local white children had a school bus. But Ross and other Black children did not. So, Ross lost out on the opportunity for a better education.⁸¹ For many Black students, the school that Ross was encouraged to attend was the first ever available to them in their community. In yet another way, Black Americans paid twice. They devoted funds and their own labor to build a school for their children while also paying taxes that supported better schools for white students.

In spite of concerted state efforts to deny them equal educational opportunities, Black southerners achieved a literacy rate of 43 percent by 1890, a rate of growth that far surpassed the rise of literacy in Spain and Italy during the same period and that continued to rise in nearly all southern states in the early 1900s.⁸² Yet, researchers have found that the “legacies of slavery” compounded by the many obstacles that Black children faced in acquiring education show a correlation with high rates of illiteracy among Black Americans nearly 80 years after slavery ended.⁸³

F. Resistance to Integration

In 1951, Black students led the fight for desegregation⁸⁴ and, in 1954, the Supreme Court declared race-based segregation in public schools unconstitutional in its *Brown v. Board of Education* decision.⁸⁵ Although many Americans believed that the Supreme Court’s *Brown* decision was the end of school segregation, it was not. After the *Brown* decision, all across the country many white Americans and white state and local governments refused to implement the Court’s order. And the Federal government failed to adequately enforce the order and protect Black teachers, school administrators, and students.

In former enslaving states, white-controlled government school boards, and state and municipal governments almost universally refused to comply with *Brown* in what historians have called the “era of massive resistance.”⁸⁶ On May 12, 1956, 90 percent of the south’s Congressional delegation signed the “Southern

⁸¹ Coates, *The Case for Reparation* (The Atlantic Magazine) (2014) <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>> (as of Nov. 19, 2021).

⁸² National Center for Education Statistics, *National Assessment of Adult Literacy, 120 Years of Literacy* <https://nces.ed.gov/naal/lit_history.asp> (as of January 26, 2022) (Black literacy rose from 20 percent in 1870 to 70 percent by 1910, close to 80 percent by 1920); Du Bois & Dill, *The Common School*, *supra*, at fn. 53, p. 16; see Tapia et al., *The Uneven Transition Toward Universal Literacy in Spain, 1860-1930* (2019) National Bureau of Economic Research (Working Paper No. 173) p. 26 (Spain’s literacy rate was 38.1% in 1887 and 44.8% in 1990); Tapia et al., *Two Stories, One Fate: Age-Heaping and Literacy in Spain, 1877-1930* (2018) National Bureau of Economic Research (Working Paper No. 139) p. 18 (literacy rate in Italy was similarly poor as Spain and was below 50% in the nineteenth century); .

⁸³ Bertocchi & Dimico, *The Racial Gap in Education and the Legacy of Slavery* (2012) 40 J. Comp. Econ. 581, 581-582, (hereafter the *Racial Gap in Education*).

⁸⁴ Burnette II, *Do America’s Public Schools?*, *supra*, at fn. 9.

⁸⁵ *Brown v. Board of Education* (1954) 347 U.S. 483, 495. The idea that segregated schools were “equal” was unfounded—segregated public schools for Black students provided unequal education in nearly every category when compared to public schools for white students. See Margo, *Race and Schooling in the South 1880-1950: An Economic History* (1990) pp. 18-20.

⁸⁶ Horsford & McKenzie, ‘Sometimes I feel like the Problems Started with Desegregation’: Exploring Black Superintendent Perspectives on Desegregation Policy (2008) 21 Int. J. of Qualitative Studies in Ed. 443, 444 (hereafter *Exploring Black Superintendent Perspectives*); see, e.g., *Griffin v. County School Bd.* (1964) 377 U.S. 218, 221 (school districts closed public schools rather than integrate, cut off funding for public schools and instead provided private vouchers for private schools, then delayed adoption of integration plan); *Green v. County School Bd.* (1968) 391 U.S. 430, 433 (Green) (school board automatically reassigned

Manifesto” pledging to fight integration using any means at their disposal.⁸⁷ These lawmakers and others in southern states made good on their promise.

Some white Americans in the South used violence, harassment, and threats to stop integration. They attacked Black students and terrorized some Black families who dared to enroll their children in white public schools. For example, in Arkansas, on September 4, 1957, when nine Black students went to enroll in Little Rock’s all-white Central High School, Arkansas Governor Orval Faubus ordered the Arkansas National Guard to form a blockade around the school’s front door to keep the students out. The National Association for the Advancement of Colored People had to get a federal court order to make the National Guard stand down. But even with the court’s order, the students were still not safe to enter because of the threat of white mob violence. Only after Dr. Martin Luther King, Jr. sent a plea for protection to President Eisenhower, did the federal government act. The federal government brought in 1,000 Army paratroopers and ordered the National Guard to provide an escort for the students as they entered the school. Twenty-one days after the nine Black students—now known as the “Little Rock Nine”—first tried to attend the high school, they were finally able to enter. As they walked in, angry white crowds of students and adults yelled racial insults and threw objects at them. Rather than allow integration to go forward in other schools, Governor Faubus then closed all public high schools in Little Rock for the 1958 to 1959 school year.⁸⁸ Throughout their time in the school, the Little Rock Nine reported enduring severe harassment, including physical violence from some white students. Several years later on the eve of graduation, the home of Carlotta Walls, one of the Little Rock Nine was bombed by white supremacists.⁸⁹

In Mississippi when then-NAACP civil rights attorney Derrick Bell filed a lawsuit to integrate one community’s schools, he described how nightriders came through the community firing guns into Black homes. Black Americans who signed petitions to integrate the schools lost their jobs or had their credit cut off by merchants. Because of the severe intimidation and harassment by the white community, only one Black family was ultimately willing to send their child to the white school. When the child, Debra, arrived at school, a large crowd jeered and marshals had to escort her into the school. Debra’s father lost his job the same day, and white

children to schools they had attended the prior year, preventing integration); *Goss v. Bd. of Educ.* (1963) 373 U.S. 683, 686-687 (school board allowed students to request to be transferred if they had been assigned to a school previously attended only by members of a different race).

⁸⁷ Driver, *Supremacies and the Southern Manifesto* (2014) 92 Tex. L. Rev. 1053, 1054, 1066-1067, 1079 (nineteen out of the twenty-two Southern senators signed the Manifesto and declared their aim to reverse *Brown* using all lawful means); see Ogletree, *Tulsa Reparations: The Survivor’s Story* (2004) 24 B.C. Third World L.J. 13, 22 (noting that “[s]ince the end of slavery, whites have resisted the challenge of integration and found more or less sophisticated ways by which to resist the efforts of African Americans to participate on equal terms in American society”).

⁸⁸ Equal Justice Initiative, Supreme Court Bans School Segregation, Sparking Massive White Resistance <<https://calendar.eji.org/racial-injustice/>> (as of May 5, 2021); Southern Poverty Law Center, Little Rock Nine: Decades-long battle for school equity began with nine Black students facing angry white mob (Sept. 25, 2020)<<https://www.splcenter.org/news/2020/09/25/little-rock-nine-decades-long-battle-school-equity-began-nine-black-students-facing-angry>>(as of Nov. 19, 2021).

⁸⁹ Ross & Key, In the wake of Central High crisis, crime and injustice, Arkansas Times (Oct. 27, 2020)<<https://arktimes.com/history/2020/10/27/in-the-wake-of-the-central-high-crisis-crime-and-injustice>> (as of Nov. 19, 2021).

Americans attempted to burn their house down.⁹⁰

Southern states also passed laws to close both white and Black public schools, deny state money for any schools that integrated, and then provided vouchers or “freedom-of-choice” to over 3,000 newly created private schools for white students.⁹¹ For several years, Black students in certain areas in the South had no school to attend at all.⁹² In Georgia, Governor Herman Talmadge, who fiercely opposed public school integration, told the public at a press conference that the only solution to a public school segregation ban was “abolition of the public school system.”⁹³

The Supreme Court also contributed to the slow progress of desegregation. When asked to decide how quickly school districts across the country must desegregate, the Supreme Court answered that schools could do so with “all deliberate speed.”⁹⁴ One federal judge who heard cases filed by Black Americans challenging the failure to desegregate schools for almost 10 years, concluded that the effect of the Supreme Court’s decision was to “sacrifice[] individual and immediate vindication of the newly discovered rights of blacks to a desegregated education in favor of a remedy more palatable to whites.”⁹⁵

Because of all of these government acts, legal school segregation in many places in the South continued into the 1960s and little desegregation of schools took place.⁹⁶ In five Deep South states, 1.4 million Black school children continued to attend a segregated school until the fall of 1960, when integration efforts finally began.⁹⁷

G. Mass Firings of Black Educators

Federal government and court failure to adequately enforce the *Brown v. Board of Education* decision had other negative consequences.⁹⁸ Southern states engaged in en masse firing of Black teachers and administrators without cause to prevent a white administrator and teacher with the same or overlapping position as a Black administrator or teacher at the newly integrated school from losing their job.⁹⁹ In 1955, a federal government

⁹⁰ Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*, Oxford University Press (2004), p. 100-102.

⁹¹ Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature* in *Review of Research in Education* (1991) p. 335; Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 86, pp. 448-49; Bell, *Silent Covenants*, *supra*, at fn. 19, pp. 97, 100, 102.

⁹² E.g., Equal Justice Initiative, *Georgia Governor Proposes Abolition of Public School System to Avoid Integration* <<https://calendar.eji.org/racial-injustice/dec/18>> (as of Nov. 19, 2021).

⁹³ E.g., Equal Justice Initiative, *Georgia Governor Proposes Abolition of Public School System to Avoid Integration* <<https://calendar.eji.org/racial-injustice/dec/18>> (as of May 5, 2021).

⁹⁴ *Brown v. Bd. of Educ.* (1955) 349 U.S. 294, 300.

⁹⁵ Carter, *The Warren Court and Desegregation* (1968) 67 Mich. L. Rev. 237, 243; Bell, *Silent Covenants*, *supra*, at fn. 19, p. 95.

⁹⁶ See *Alexander v. Holmes County Bd. of Educ.* (1969) 396 U.S. 19, 20-21.

⁹⁷ Equal Justice Initiative, *Supreme Court Bans School Segregation, Sparking Massive White Resistance* <<https://calendar.eji.org/racial-injustice/may/17>> (as of May 5, 2021).

⁹⁸ Tate et al., *The Brown Decision Revisited: Mathematizing a Social Problem* in *Beyond Desegregation: The Politics of Quality in African American Schooling* (1996) pp. 29-52; Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown* (2004) 33 *Education Researcher* 3, 6 (noting that one of consequences of *Brown* included the “job loss and demotions for Black teachers and administrators”).

⁹⁹ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 86, p. 447. Approximately 82,000 Black teachers were teaching 2 million Black children in America in 1954. Toppo, *Thousands of Black Teachers Lost Jobs*, USA Today (April 28,

staff attorney responded to the firing of Black teachers, stating that: “In a war, there must be some casualties, and perhaps the black teachers will be the casualties in the fight for equal education of black students.”¹⁰⁰

One Black educator affected by the firings, told researchers that in his community the teachers’ college for Black Americans was closed in the name of integration, and many of the professors who taught there were required to go teach in the high schools. The president of the Black college was “given a central office do-nothing position and then someone with a Master’s degree, a [White] high school principal, was named president of [the newly desegregated teachers college].”¹⁰¹

Mass firing of Black educators deeply affected the economic, social, and cultural structure of the Black community because many middle-class Black people served in education.¹⁰² It is estimated that Black communities lost millions of dollars as a result. For example, in 1970-71, the Black community in 17 southern states lost an estimated \$240 million in salaries.¹⁰³

The mass firings also have had long-standing repercussions, as the presence of Black principals and superintendents remain disproportionately low across America in relation to the number of Black public-school students.¹⁰⁴ Studies show that students who have teachers who look like them do better in school than those who do not. Black students with at least one Black teacher by third grade are 13 percent more likely to graduate high school and 19 percent more likely to enroll in college than Black students who had no Black teachers.¹⁰⁵ However, about 80 percent of teachers and principals and 90 percent of superintendents nationwide are white.¹⁰⁶

2004) <https://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2_x.htm> (as of June 21, 2021).

¹⁰⁰ Toppo, *Thousands of Black Teachers Lost Jobs*, USA Today (Apr. 28, 2004) (citing United States Health, Education and Welfare Department 1955 attorney’s statement).

¹⁰¹ Horsford & McKenzie, ‘Sometimes I feel like the Problems Started with Desegregation’: Exploring Black Superintendent Perspectives on Desegregation Policy (2008) 21 Int. J. of Qualitative Studies in Ed. 443, 449.

¹⁰² Horsford & McKenzie, Exploring Black Superintendent Perspectives, *supra*, at fn. 86, p. 449; Tillman, (Un)Intended Consequences?: The Impact of the Brown v. Board of Education Decision on the Employment Status of Black Educators (2004) 36 Educ. & Urban Soc. 280, 287-288 (hereafter Un)Intended Consequences); Will, 65 Years After ‘Brown v. Board,’ Where Are All the Black Educators?, Education Week (May 14, 2019) <<https://www.edweek.org/policy-politics/65-years-after-brown-v-board-where-are-all-the-black-educators/2019/05>> (as of June 23, 2021); Ethridge, Impact of the 1954 Brown vs. Topeka Board of Education Decision on Black Educators, 30 Negro Ed. Rev. 217, 223 (hereafter Impact of the Brown decision).

¹⁰³ Fultz, The Displacement of Black Educators Post-Brown: An Overview and Analysis (2004) 44 Hist. Ed. Q. 11, 37 ((hereafter Displacement of Black Educators); see Tillman, (Un)Intended Consequences, *supra*, at fn. 102, p. 288 (noting that firing of Black educators affected their communities economically); Ethridge, Impact of the Brown decision, *supra*, at fn. 102, p. 224.

¹⁰⁴ Fultz, *The Displacement of Black Educators*, *supra*, at fn. 103, pp. 28–29; Tillman, (Un)Intended Consequences, *supra*, at fn. 102, p. 294; Toppo, *Thousands of Black Teachers Lost Jobs*, USA Today (Apr. 28, 2004)

<https://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2_x.htm> (as of June 23, 2021); see Jones-Wilson, *Race, Realities, and American Educators: Two Sides of the Coin* (1990) 59 J. of Negro Ed. 119, 121; Walker, *The Architects of Black Schooling in the Segregated South: The Case of One Principal Leader* (2003) 19 J. of Curriculum & Supervision 54, 56.

¹⁰⁵ Johns Hopkins University, *With Just One Black Teacher, Black Students More Likely to Graduate* (April 5, 2017) <<https://releases.jhu.edu/2017/04/05/with-just-one-black-teacher-black-students-more-likely-to-graduate/>> (as of June 21, 2021); Gershenson et al, *The Long-Run Impacts of Same-Race Teachers* (Nov. 2018) National Bureau of Economic Research (Working Paper No. 25254) pp. 1-2, 33 (finding that Black students with at least one Black teacher in K-3 are 13% more likely to graduate high school and 19% more likely to enroll in college than their Black peers who had no Black teachers).

¹⁰⁶ Will, *Still Mostly White and Female: New Federal Data on the Teaching Profession*, Education Week (Apr. 14, 2020) <<https://www.edweek.org/leadership/still-mostly-white-and-female-new-federal-data-on-the-teaching-profession/2020/04>> (as of June

Black teachers represent just seven percent and Black male teachers represent just two percent of the teaching force,¹⁰⁷ yet 15 percent of public school students are Black students.¹⁰⁸ Many Black students will go through their educational careers without having a Black teacher.

H. Other Government-Implemented Tools to Segregate Schools

Whereas in the South, Jim Crow laws prohibited Black students from attending schools with white students, in the rest of the country, government actors largely used different but nearly as effective tools to create segregated schools for Black students with less funding and resources. First, federal, state and local housing segregation policies, including redlining and restrictive covenants as described in Chapter 5 on housing, forced the vast majority of Black Americans to live in separate communities from white Americans.¹⁰⁹ School and government officials then assigned Black and white students to attend different schools based on where they lived. In this way, segregated schools were created and maintained.

The schools that Black students attended then received less funding and resources than the schools that white students attended. This occurred because public schools generally obtained a large portion of money from local property taxes raised within the city where the schools were located. So, the amount of funding for the school district and school depended on how much could be raised by taxes in each local, segregated community.

The more expensive the properties in a school district, the more money a school district received. When the federal government along with private actors devalued Black-owned properties, through redlining, they also locked Black students into schools that received far less funding for their schools than the white families in nearby neighborhoods with a higher property tax base.¹¹⁰

21, 2021); Gewertz, *Survey of Mostly-White Educators Finds 1 in 5 Think Textbooks Accurately Reflect People of Color*, Education Week (June 29, 2020) <<https://www.edweek.org/teaching-learning/survey-of-mostly-white-educators-finds-1-in-5-think-textbooks-accurately-reflect-people-of-color/2020/06>> (as of June 22, 2021) (hereafter *Survey of Mostly-White Educators*); U.S. Department of Education, *The State of Racial Diversity in the Educator Workforce* (2016) pp. 2, 6

<<https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf>> (as of June 21, 2021).

¹⁰⁷ Will, *Still Mostly White and Female: New Federal Data on the Teaching Profession*, Education Week (Apr. 14, 2020)

<<https://www.edweek.org/leadership/still-mostly-white-and-female-new-federal-data-on-the-teaching-profession/2020/04>> (as of June

21, 2021); Gewertz, *Survey of Mostly-White Educators Finds 1 in 5 Think Textbooks Accurately Reflect People of Color*, Education

Week (June 29, 2020) <[https://www.edweek.org/teaching-learning/survey-of-mostly-white-educators-finds-1-in-5-think-textbooks-](https://www.edweek.org/teaching-learning/survey-of-mostly-white-educators-finds-1-in-5-think-textbooks-accurately-reflect-people-of-color/2020/06)

[accurately-reflect-people-of-color/2020/06](https://www.edweek.org/teaching-learning/survey-of-mostly-white-educators-finds-1-in-5-think-textbooks-accurately-reflect-people-of-color/2020/06)> (as of June 22, 2021) (hereafter *Survey of Mostly-White Educators*); U.S. Department of

Education, *The State of Racial Diversity in the Educator Workforce* (2016) pp. 2, 6

<<https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf>> (as of June 21, 2021).

¹⁰⁸ National School Boards Association, *Black Students in the Condition of Education 2020* (June 23, 2020)

<https://nsba.org/Perspectives/2020/black-students-condition-education> (as of January 26, 2022).

¹⁰⁹ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) pp. 28, 36, 73, 79

(hereafter *The Color of Law*); Ramsey, *The Troubled History of American Education after the Brown Decision*, *The American*

Historian <<https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/>> (as

of July 7, 2020).

¹¹⁰ Burnette II, *As Districts Seek Revenue Due to Pandemic, Black Homeowners May Feel the Biggest Hit*, Education Week (July 23,

2020) <<https://www.edweek.org/leadership/do-americas-public-schools-owe-black-people-reparations/2020/09>> (as of June 22,

2021); Oliver & Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995) pp. 8-9, 20;

Guastaferrro, *Why Racial Inequities in America's Schools are Rooted in Housing Policies of the Past*, USA Today (Nov. 2,

And some cities' schools outside of the South were also segregated by law for a number of years after the Civil War. For example, segregated schools were not banned until 1920 in New York City.¹¹¹ In general, the quality of education received by Black students in these segregated schools was not equal to the quality of education received by white students, because schools largely attended by Black students were underfunded and provided with fewer resources.¹¹²

Even after the *Brown v. Board of Education* decision, highly segregated schools fostered through official actions—government implemented housing segregation and school district boundary and assignment policies—also remained largely the rule.¹¹³ White protests against integration, including some that involved violence against Black Americans integrating schools, occurred in different places across the country. For example, in February of 1964, after 460,000 Black and Puerto Rican students and their parents called on the New York City Board of Education to integrate majority-student of color schools that were so overcrowded they operated on split shifts—with the school day lasting only four hours for students, and so underfunded that they had inferior facilities and less experienced teachers—10,000 white New Yorkers staged a counter-protest.¹¹⁴ Milton Galamison, a civil rights activist and pastor of Siloam Presbyterian Church in Bedford-Stuyvesant, who helped lead the protest to integrate the schools stated: “Nobody can do these children more harm than these children are being done every day in this public school system.”¹¹⁵

The United States Commission on Civil Rights 1967 study, *Racial Isolation in Public Schools*, confirmed the nation-wide problem, finding that “violence against [Black people] continues to be a deterrent to school desegregation.”¹¹⁶ The report also found that Black children suffer serious harm when they must attend racially segregated schools, “whatever the source of that segregation might be.”¹¹⁷

In 1968, the Kerner Commission warned President Lyndon Johnson that the nation was “moving toward two societies, one black, one white—separate and unequal” as a result of “[w]hite racism” and white supremacist institutions.¹¹⁸ After a short period of active coordinated federal effort to enforce desegregation rights from 1965 to 1969, the Nixon Administration curtailed enforcement of the 1964 Civil Rights Act.¹¹⁹ By the 1980s,

2020) <<https://www.usatoday.com/story/opinion/2020/11/02/how-redlining-still-hurts-black-latino-students-public-schools-column/6083342002/>> (as of June 23, 2021) (hereafter Why Racial Inequities are Rooted in Housing Policies).

¹¹¹ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021).

¹¹² Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021); [additional citations needed because this only discusses New York]

¹¹³ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 106; Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 146.

¹¹⁴ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021).

¹¹⁵ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021).

¹¹⁶ Equal Justice Initiative, *Resistance to School Desegregation* (March 1, 2014) <<https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/>> (as of June 21, 2021).

¹¹⁷ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, pp. 147-48.

¹¹⁸ Report of the National Advisory Commission on Civil Disorders: Summary of Report (1968) pp. 1, 5-6 <<http://www.eisenhowerfoundation.org/docs/kerner.pdf>> (as of June 21, 2021).

¹¹⁹ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 110.

roughly half of the nation’s children of color resided in the 20 or 30 largest school districts.¹²⁰ In urban areas, white Americans continued to fight vehemently against integration. For example, in Boston, schools that served Black children were poorly equipped and understaffed, and badly underfunded. They received about two-thirds the amount of funding received by schools in white neighborhoods.¹²¹ In 1977, after Black families filed suit and a court ordered the city to desegregate its schools, white mobs threw bricks, bottles, and eggs at buses carrying black students to majority-white schools, injuring nine children.¹²²

As white Americans moved into the suburbs, redlining, restrictive covenants, and even violence prevented many Black Americans from doing the same. Suburban school district officials drew their boundaries at the city and suburb line, which ensured that Black students living in the inner city would be required to attend inner-city schools, while white children living in the suburbs attended suburban schools. In larger school districts in cities, unless a court desegregation order was in place, districts continued to assign students to schools based on the schools in their neighborhoods. Because the neighborhoods remained segregated by race, the schools continued to be segregated, too.

Intentional segregation in housing by federal and local government actors and the drawing of school district boundaries to mirror school segregation and funding inequities was well-known and documented. But, in 1974, when Black parents asked the Supreme Court to order 53 suburban school districts to participate in the desegregation of the predominantly Black and very under-resourced Detroit city school system, the Court said no.¹²³ Because the Supreme Court refused to address the government-supported residential segregation that forced Black Americans to attend a small subset of American schools, integration was stopped at the city-suburb line.¹²⁴ Today, the Detroit city school system remains segregated—approximately 80 percent Black—and severely underfunded and under-resourced.¹²⁵

Then, in 1977, the Supreme Court made it hard for Black Americans to challenge housing decisions, which, in their effect, kept many Black Americans from moving into largely white residential areas.¹²⁶ Professor Derrick Bell noted that the federal government and local governments created racially isolated communities, which in turn “created single-race schools” and then the Supreme Court “insulated these schools from court

¹²⁰ Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 62, p. 9 [note, find correct cite, this one is not correct]; see also *Schools More Separate*, *infra*, at fn. 124 at p. 25 (26 central cities house districts which enroll 1/10 of the nation’s students, but only a minute fraction of the nation’s white student; five school districts were more than 90% nonwhite, while a large majority of the others had less than one-fifth white students).

¹²¹ Boston Research Center, Encyclopedia of Boston, Desegregation Busing <https://bostonresearchcenter.org/projects_files/eob/single-entry-busing.html> (as of January 26, 2022.)

¹²² History, This Day in History, *Violence erupts in Boston over desegregation busing* <https://www.history.com/this-day-in-history/violence-in-boston-over-racial-busing>> (as of January 26, 2022); Bubar, *The Jim Crowe North*, Upfront: The New York Times (March 9 2020), <<https://upfront.scholastic.com/issues/2019-20/030920/the-jim-crowe-north.html#1300L>>(as of January 26, 2022).

¹²³ *Milliken v. Bradley* (1974) 418 U.S. 717.

¹²⁴ See e.g., Bell, *Silent Covenants*, *supra*, at fn. 19, p. 112.

¹²⁵ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 111; Goldstein, *Detroit Students Have a Constitutional Right to Literacy*, *Court Rules*, The New York Times (April 27, 2020) <<https://www.nytimes.com/2020/04/27/us/detroit-literacy-lawsuit-schools.html>> (as of June 22, 2021).

¹²⁶ Rothstein, *The Color of Law*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 82.

challenges.”¹²⁷ After these Supreme Court opinions, lower court judges began to declare school districts desegregated even when the percentage of Black students increased after white Americans moved to the suburbs aided by housing policies that continued to discriminate against Black Americans.¹²⁸ In general, these federal courts would not find that it was against the law for Black students to attend schools that received far less funding and had far fewer resources than those schools attended mostly by white students.¹²⁹

By the late 1980s, which was considered the peak of integration, schools remained or were returning to being predominantly white and predominantly non-white.¹³⁰ Ten years later things had gotten worse. On July 17, 2001, Harvard University’s Civil Rights Project published a study concluding that school districts across the nation had re-segregated or were re-segregating at an alarming rate, particularly in the South.¹³¹ The study linked this re-segregation to a series of Supreme Court cases decided in the early 1990s, which made it easier for school districts to remain segregated.¹³²

In 2007, the Supreme Court eliminated school districts’ ability to use certain types of voluntary local desegregation plans.¹³³ Five years later a study found that school segregation across the nation was substantially worse than at the high point of desegregation in 1988, and that the typical Black student was in a school where almost two out of every three classmates (64 percent) are low-income, nearly double the level of schools of the typical white or Asian student.¹³⁴

Studies in the last five years continue to find that segregated and unequally resourced schools remain the reality for the vast majority of Black students and other students of color.¹³⁵ However, they also note the extraordinary gains that Black students have made, in spite of remaining in segregated and unequally funded and resourced

¹²⁷ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 96.

¹²⁸ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 115; Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 62, pp. 12-13.

¹²⁹ *Id.*

¹³⁰ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 110; Orfield, *Schools More Separate: Consequences of A Decade of Resegregation*, The Civil Rights Project, Harvard University (July, 2001) pp. 1-2 < <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf>> (as of July 1, 2021) (hereafter *Schools More Separate*); see also Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 62, p. 6 (“Intense segregation, in 90-100% non-White schools, fell very sharply from 78% of Black students in 1968 to 24% in the South stated by 1988, but [by 2020] has risen back to 37%[.]”).

¹³¹ Orfield, *Schools More Separate*, *supra*, at fn. 130, pp. 15-44.

¹³² *Id.* (citing *Board of Education of Oklahoma City vs. Dowell* (1991), *Freeman v. Pitts* (1992), and *Missouri v. Jenkins* (1995).)

¹³³ *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 551 U.S. 701.

¹³⁴ Orfield & Siegel-Hawley, *E Pluribus . . . Separation, Deepening Double Segregation for More Students*, UCLA Civil Rights Project/Proyecto Derechos Civiles (Sept. 2012) p. xviii < <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/>>(as of July 1, 2021).

¹³⁵ Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, New York Times (May 2, 2019) < <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html>> (as of June 21, 2021) [“More than half of the nation’s schoolchildren are in racially concentrated districts, where over 75 percent of students are either white or nonwhite.”]; Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 687; Toppo, *GAO Study: Segregation Worsening in U.S. Schools*, USA Today (May 17, 2016)

<<https://www.usatoday.com/story/news/2016/05/17/gao-study-segregation-worsening-us-schools/84508438/>> (as of June 22, 2021); Guastafarro, *Why Racial Inequities are Rooted in Housing Policies*, *supra*, at fn. **Error! Bookmark not defined.** (discussing study showing that predominantly nonwhite school districts received \$23 billion less in state and local funding than majority white school districts in 2016); Orfield & Jarvie, *Black Segregation Matters*, *supra*. at fn. 62, pp. 6, 28.

schools. Before the *Brown* decision, less than a fourth of Black students had graduated from high school; now about nine-tenths of Black students are graduating.¹³⁶

I. Tracking

After *Brown v. Board of Education*, in districts and schools that were marginally integrated, Black students faced segregation by other means. School officials were more likely to place Black students into special education programs and inferior vocational, non-diploma, and alternative school tracks than white students. And school officials were more likely to place white students into gifted or accelerated programs than Black students. This practice where educators group students by what they view as the student's abilities is commonly referred to as "tracking."¹³⁷

Studies have shown that tracking, which continues today, is correlated with race,¹³⁸ and eliminates the benefits of integration for Black students, like access to college classes and high-quality curriculum.¹³⁹

Researchers explain that teachers, the vast majority of whom are white, function as primary gatekeepers in gifted and talented identification, and are less likely to refer Black students for gifted programs than white students with similar levels of academic achievement.¹⁴⁰ Black students tracked out of the mainstream program are often re-segregated in another classroom within the school or in a setting in another school location.¹⁴¹

¹³⁶ Orfield & Jarvie, *Black Segregation Matters*, *supra*. at fn. 62, p. 28.

¹³⁷ Education Week, *Tracking* (Sept. 21, 2004) <<https://www.edweek.org/leadership/tracking/2004/09>> (as of June 24, 2021); Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science* (1990) p. 18-19 & fn. 6 (“[W]e are dealing with *teachers perceptions* of ability—we cannot assume that ability means the same thing from teacher to teacher, or from school to school.”) (hereafter *Multiplying Inequalities*); Anderson & Oakes, *The Truth About Tracking in The Big Lies of School Reform: Finding Better Solutions for the Futile Public Education* (2014) p. 113-114 (describing the arbitrary nature of tracking) (hereafter *The Truth About Tracking*).

¹³⁸ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 86, p. 452; Oakes, *Two Cities' Tracking and Within-School Segregation* (1995) 96 *Teachers College Record* 681 <<https://www.tcrecord.org/books/pdf.asp?ContentID=49>> (as of June 24, 2021); Oakes, *Keeping Track: How Schools Structure Inequality* (2005) pp. 11-12, 40, 64-65; Oakes et al., *Detracking: The Social Construction of Ability, Cultural Politics, and Resistance to Reform* (1997) 98 *Teachers College Record* 482, 490-491, 496-500; Artiles et al., *Culturally Diverse Students in Special Education: Legacies and Prospects*, in *Handbook of Research on Multicultural Education* (2d ed. 2004) p. 716 (finding that many students because of factors including race are disproportionately referred and placed in special education programs); Conger, *Within-School Segregation in an Urban School District* (2005) 27 *Ed. Eval. & Policy Analysis* 225, 237-238; Saddler, *The Impact of Brown on African American Students: A Critical Race Theoretical Perspective* (2005) 37 *Ed. Studies* 41, 44 (observing that Black students are three times more likely to be placed in special education classes and more likely to be placed in vocational tracks); Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science* (1990) pp. 18-25;

¹³⁹ Bell, *Silent Covenants*, *supra*, at fn. 19, p. 112; see Kohli & Quartz, *Modern-Day Segregation in Public Schools*, *The Atlantic*, (Nov. 18, 2014); Mathis, *Moving Beyond Tracking*, National Education Policy Center (May 2013) (“[Tracking] generally plays out in a discriminatory way, segregating students by race and socio-economic status.”) <<https://nepc.colorado.edu/sites/default/files/pb-options-10-tracking.pdf>> (as of June 25, 2021) (hereafter *Moving Beyond Tracking*).

¹⁴⁰ Darity, *From Here to Equality*, *supra*, at fn. 58, p. 292; Oakes, *Multiplying Inequalities*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 18, 23; Anderson & Oakes, *The Truth About Tracking*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 118 (discussing their research finding that “African American and Latino students were much less likely than White or Asian students *with the same test scores* to be placed in high-ability classes”) (hereafter *The Truth About Tracking*).

¹⁴¹ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 86, p. 451.

Those placed in “lower tracks” do not receive the same quality of education—they often receive less resources and opportunities.¹⁴²

At the October 12, 2021 Task Force hearing, Professor Rucker Johnson testified to the harms of segregation within schools, including harm to student’s health, mental health, school success, and income growth, telling the panel “[t]oo often even when we see what look like diverse schools there are segregated classrooms” and “racialized tracking.”¹⁴³

J. Unequal and Segregated Schools Persist

As of the early 2000s and through today, the vast majority of Black children remain locked into schools separate from their white peers, and possibly more unequal than the schools that their grandparents had attended under Jim Crow.¹⁴⁴ The U.S. Government Accountability Office found that, 60 years after *Brown v. Board of Education*, Black students are increasingly attending segregated, high-poverty schools where they face multiple educational disparities.¹⁴⁵ The U.S. Department of Education’s Office of Civil Rights data between 2014 through 2018 shows the same disparities—large and persistent opportunity gaps and fewer education resources for Black students.¹⁴⁶ Black students are less likely to attend schools that offer advanced coursework and math and science courses,¹⁴⁷ and less likely to be placed in gifted and talented programs. Another found that Black students who had been on an accelerated math track consistent with their white and Asian peers were

¹⁴² Anderson & Oakes, *The Truth About Tracking*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 114-118 (“in every aspect of what makes for a quality education, kids in lower tracks typically get less than those in higher tracks and gifted programs”); Mathis, *Moving Beyond Tracking*, *supra*, at fn. 139 (“Low-track classes tend to have watered-down curriculum, less experienced teachers, lowered expectations, more discipline problems, and less engaging lessons.”) <<https://nepc.colorado.edu/sites/default/files/pb-options-10-tracking.pdf>> (as of June 25, 2021); Oakes, *Multiplying Inequalities*, *supra*, at fn. **Error! Bookmark not defined.**, pp. ix-xi, 104-105 (“Students judged to have low ability may get less because they are thought to need less (they are considered unable to benefit) or deserve less (they are considered unwilling to benefit)”).

¹⁴³ AB 3121: Reparations Task Force Hearing (October 12, 2021)<<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

¹⁴⁴ Bell, *Silent Covenants*, *supra*, at fn. 19, pp. 115, 161; Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 9 (“If we are unwilling to desegregate our schools and unwilling to fund them equitably, we find ourselves not only backing away from the promise of the *Brown* decision but literally refusing even to take *Plessy* seriously. At least a serious consideration of *Plessy* would make us look at funding inequities.”); Kozol, *Savage Inequalities: Children in American Schools* (1991) 3; Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* (2005) 18-21.

¹⁴⁵ U.S. Government Accountability Office, GAO-20-494, K-12 Education: School Districts Frequently Identified Multiple Building Systems Needing Updates or Replacement (June 2020) <<https://www.gao.gov/products/gao-20-494>> (as of July 1, 2021).

¹⁴⁶ Shores et al., *Categorical Inequalities Between Black and White Students are Common in US Schools—But They Don’t Have to Be*, Brookings (Feb. 21, 2020) <<https://www.brookings.edu/blog/brown-center-chalkboard/2020/02/21/categorical-inequalities-between-black-and-white-students-are-common-in-us-schools-but-they-dont-have-to-be/>> (as of June 21, 2021).

¹⁴⁷ Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 688; Kerr, Report Finds Segregation in Education on the Rise, AP News (May 17, 2016) <<https://apnews.com/article/fb57033de174464c92031d7c1989ea03>> (as of June 23, 2021); Office for Civil Rights, 2015-16 Civil Rights Data Collection: Stem Course Taking, U.S. Dept. of Ed. (2018) at p. 5 fig.4 <<https://ocrdata.ed.gov/assets/downloads/stem-course-taking.pdf>> (as of July 1, 2021); Compare College Board, AP Cohort Data Report: Graduating Class of 2020, at 20 (2020), <https://reports.collegeboard.org/pdf/2020-ap-cohort-data-report.pdf> with Handwerk et al., Access to Success: Patterns of Advanced Placement Participation in U.S. High Schools 7 (July 2008) <www.ets.org/Media/Research/pdf/PIC-ACCESS.pdf> (as of July 1, 2021) (Black students were 14.2% of all public high school seniors in 2020, but only 8.3% of students nationwide who took an AP exam—an increase of only 1.3% since 2006).

disproportionately removed from that track, so that in high school they were no longer being placed with the highest achievers—reinforcing racial inequality.¹⁴⁸ Black students are also more likely to attend schools with large class sizes and teachers with the least amount of experience and qualifications, and that employ law enforcement officers but no counselors.¹⁴⁹

In addition, because Black students more often have less qualified teachers than their white peers, they fall further behind in school, and some researchers believe this is one reason for their excess placement in classes that support students with disabilities. In other words, even though they have only fallen behind because they have not received high quality instruction, schools believe incorrectly that they may have a learning or other disability.¹⁵⁰ These school placement and resource allocation decisions matter for student achievement and post-K-12 school outcomes.¹⁵¹

Severe funding disparities between schools serving white students and those serving Black students persist as well.¹⁵² Many school districts across the country today continue to be funded primarily by property taxes raised from the school district’s local community, even though neighborhoods continue to be segregated by race and

¹⁴⁸ Irizarry, On Track or Derailed? Race, Advanced Math, and the Transition to High School, American Sociological Association, pp. 12-13 (2021) <https://journals.sagepub.com/doi/pdf/10.1177/2378023120980293> (as of January 28, 2022).

¹⁴⁹ Hammond, *Inequality in Teaching and Schooling: How Opportunity is Rationed to Students of Color* in *The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in Health Professions* (2001) pp. 208-209; Grissom & Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs* (2016) 2 *Aera Open* 1, 1-2; The Education Trust, *Inequities in Advanced Coursework: What’s Driving Them and What Leaders Can Do* (2019), at p. 8 (“Our analysis [of the 2015-16 CRDC data] shows that although Black students make up 16% of elementary schoolers, they make up only 9% of students in gifted and talented programs.”); U.S. Dept. of Ed., Office for Civil Rights, Dear Colleague Letter: Resource Comparability, U.S. Dept. of Ed. (Oct. 1, 2014) at p. 4 <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (as of July 1, 2021); Office for Civil Rights, 2011-12 Civil Rights Data Collection, Data Snapshot: Teacher Equity, U.S. Dept. of Ed. (2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-Teacher-Equity-Snapshot.pdf>. [National Center for Education Statistics](https://nces.ed.gov/ipeds/data/2011-12/crdc/data-snapshots/teacher-equity) > (as of July 1, 2021); Adamson & Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, 20 *Ed. Policy Analysis Archives* 1, 30-32 (2012); Whitaker et al., *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students*, ACLU (2019) p. 7 (finding that students of color are more likely to attend schools with law enforcement officers, be referred to law enforcement, and be arrested, and “students who attend schools with high percentages of Black students . . . are more likely to attend schools with tough security measures like metal detectors, random ‘contraband’ sweeps, security guards, and security cameras”) <<https://www.aclu.org/report/cops-and-no-counselors>> (as of June 23, 2021) (hereafter *Cops and No Counselors*).

¹⁵⁰ Powers et al., *Twenty-five Years after Larry P.: The California Response to Overrepresentation of African Americans in Special Education* (2004) 9 *The California School Psychologist* 145, 155 (hereafter *Twenty-five Years after Larry P.*)

¹⁵¹ E.g., Office for Civil Rights, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students*, U.S. Dept. of Ed. (2021) p. 10 (citing Shores et al., *Categorical Inequality in Black and White: Linking Disproportionality across Multiple Educational Outcomes*, 57 *Am. Ed. Research J.* 2089, 2097 (2020)).

¹⁵² Bellan, *\$23 Billion: Education Funding Report Reveals Less Money for City Kids*, Bloomberg.com (March 27, 2019) <<https://www.bloomberg.com/news/articles/2019-03-27/why-city-kids-get-less-money-for-their-education>> (as of June 21, 2021); Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? \$23 Billion, Report Says*, *The New York Times* (Feb. 27, 2019) <<https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html>> (as of June 21, 2021); Carey, *Rich Schools, Poor Schools and a Biden Plan*, *The New York Times* (June 9, 2021) (reporting that “districts where more than 75 percent of students are white receive \$23 billion more per year than districts where more than 75 percent of students are not white — even though there are more students in predominantly nonwhite districts”) <<https://www.nytimes.com/2021/06/09/upshot/biden-school-funding.html?smid=em-share>> (as of June 25, 2021).

income. Federal and state governments have not filled the gaps between high- and low-income districts. According to a study by EdBuild, “[n]ationally, predominantly white school districts get \$23 billion more than their nonwhite peers, despite serving a similar number of children” and there is a “\$1,500 per student gap between white districts . . . and equally disadvantaged nonwhite districts.”¹⁵³ This funding differential matters: more school funding improves education quality.¹⁵⁴ In underfunded schools, students also face health and other risks because of the decrepit conditions of their school buildings.¹⁵⁵

K. Discriminatory Use of Discipline and the School-to-Prison Track or Pipeline

Black students are disproportionately subjected to exclusionary discipline with devastating consequences, which include significantly higher risk of dropout and juvenile justice involvement.¹⁵⁶ Over the last three decades, research has shown that Black students are far more likely than white students to be suspended, even when controlling for income level.¹⁵⁷ And this disproportionate discipline also extends to preschool, where Department of Education data from the 2013-14 school year showed that Black preschoolers made up 18

¹⁵³ EdBuild, \$23 Billion (Feb. 2019) pp. 4-5 <<https://edbuild.org/content/23-billion/full-report.pdf>> (as of June 25, 2021).

¹⁵⁴ Carey, *Rich Schools, Poor Schools and a Biden Plan*, The New York Times (June 9, 2021)

<<https://www.nytimes.com/2021/06/09/upshot/biden-school-funding.html?smid=em-share>> (as of June 25, 2021); Cary & Harris, *It Turns Out Spending More Probably Does Improve Education*, The New York Times (Dec. 12, 2016)

<<https://www.nytimes.com/2016/12/12/nyregion/it-turns-out-spending-more-probably-does-improve-education.html>> (as of June 25, 2021); Lafortune et al., *School Finance Reform and the Distribution of Student Achievement* (2018) 10 Am. Econ. J.: Applied Econ. 1, 24 (finding that “money can and does matter in education”).

¹⁵⁵ Reparations 4 Slavery, *The Movement for Black Lives* <<https://reparations4slavery.com/the-movement-for-black-lives/>> (as of June 21, 2021); Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 86, p. 444 (citing Kozol 1991); Bell, *Silent Covenants*, *supra*, at fn. 19, p. 129; Vazquez-Martinez et al., *Unsafe School Facilities Reinforce Educational Inequities Among Marginalized Students*, Brookings Institute (Sept. 1, 2020) <https://www.brookings.edu/blog/brown-center-chalkboard/2020/09/01/unsafe-school-facilities-reinforce-educational-inequities-among-marginalized-students/> (as of July 1, 2021); U.S. Government Accountability Office, *GAO-20-494, K-12 Education: School Districts Frequently Identified Multiple Building Systems Needing Updates or Replacement* (June 2020) <<https://www.gao.gov/products/gao-20-494>> (as of July 1, 2021).

¹⁵⁶ Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After School Suspension*, Youth & Soc’y (Jan. 17, 2018) (finding that suspended youth were less likely to have graduated from college or high school, and were more likely to have been arrested and on probation); Gordan, *Disproportionality in Student Discipline: Connecting Policy to Research*, Brookings (Jan. 18, 2018) <<https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/>> (as of June 21, 2021) (hereafter *Disproportionality in Student Discipline*); Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California: What the 2016-2017 Rates Tell Us about Progress*, The Center for Civil Rights Remedies (2018) pp. 7-9, 12; Losen & Whitaker, *Lost Instruction: The Disparate Impact of the School Discipline Gap in California*, The Center for Civil Rights Remedies (2017) pp. 8-9; The Council on State Gov. & Pub. Policy Research Inst. at Tex. A&M Univ., *Breaking Schools’ Rules: A Statewide Study on How School Discipline Relates to Students’ Success and Juvenile Justice Involvement* (July 2011) <<http://csgjusticecenter.org/youth/breaking-schools-rules-report/>> (as of July 1, 2021).

¹⁵⁷ Gordan, *Disproportionality in Student Discipline*, *supra*, at fn. 156; Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (2002) 34 Urban Rev. 317, 318-319, 333 (finding that “[c]ontrary to the socioeconomic hypothesis, the current investigation demonstrates that significant racial disparities in school discipline remain even after controlling for socioeconomic status”); see CADRE et al., *Redefining Dignity in Our Schools: A Shadow Report on School-Wide Positive Behavior Support Implementation in South Los Angeles, 2007-2010* (June, 2010) pp. 6-7, 12; *Into New Rules for Schools: Remote Learning Means Remote School Discipline. But Not All Kids Are Treated Equally*, MCNBC (Sept. 14, 2020) <<https://www.msnbc.com/podcast/new-rules-school-n1240087>> (as of June 25, 2021).

percent of preschoolers, but nearly half of all out-of-school suspensions.¹⁵⁸ Overall, Black students made up approximately 16 percent of enrollment, yet they accounted for 39 percent of suspensions nationally during the 2013-14 school year.¹⁵⁹ And Black students were four times more likely to be suspended than their white peers during the 2017-18 school year.¹⁶⁰ Some researchers have shown that even when you control for the type of student misbehavior, Black students are suspended and expelled at far higher rates than their white peers. In short, even when white students and Black students misbehave in the same or similar ways, Black students are more likely to be removed from school for the behavior than their white peers who do the same or similar things.¹⁶¹ Researchers have also found that the difference in suspension rates between white and Black students accounts for as much as one-fifth of the achievement gap between Black and white students, so if Black students were suspended less then we should see achievement levels go up.¹⁶²

In addition, Black students are more likely to attend schools with law enforcement on campus and significant security measures, such as metal detectors, random security sweeps and searches, security guards, and security cameras.¹⁶³ Having a large police presence and heightened surveillance measures on campus can lead to students feeling less bonded to school adults, less engaged in school, more fearful and less trusting of school officials and police, and left with a feeling of alienation because students perceive that the adults on campus inherently do not trust them.¹⁶⁴

That schools serving mostly Black students have more law enforcement and fewer counselors is one reason that Black students have more contact with and are also disproportionately referred by schools to law enforcement. Arrests of Black students are higher in schools with a police officer on campus, even when controlling for school-wide academic achievement, racial/ethnic composition, urbanicity, and student misconduct.¹⁶⁵ In the 2015-16 school year, Black students made-up 15 percent of students enrolled in America's public schools but

¹⁵⁸ National Public Radio, Code Switch, *Black Preschoolers Far More Likely to Be Suspended* (March 21, 2014) <<https://www.npr.org/sections/codeswitch/2014/03/21/292456211/black-preschoolers-far-more-likely-to-be-suspended>> (as of January 26, 2022).

¹⁵⁹ Gordan, Disproportionality in Student Discipline, *supra*, at fn. 156; U.S. Government Accountability Office, GAO 18 258, *Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018).

¹⁶⁰ Office for Civil Rights, Civil Rights Data Collection (for 2017-18), U.S. Dept. of Ed. (Oct. 14, 2020)

<<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2017-18.html>> (as of July 1, 2021); see also Green et al., 'A Battle for the Souls of Black Girls', *The New York Times* (Oct. 1, 2020) ("The disproportionate discipline rates among girls indicate what researchers have long said about all Black children: It is not that they misbehave more than their peers, but their behaviors may be judged more harshly") <<https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html>> (as of June 25, 2021).

¹⁶¹ Rocque & Paternoster, Understanding the Antecedents of the 'School-to-Jail' Link: The relationship between race and school discipline (2011) 101 *The J. of Crim. L. & Criminology* 633, 653-54.

¹⁶² Morris & Perry, The Punishment Gap: School Suspension and Racial Disparities in Achievement (2016) 63 *J. Social Problems* 68, 68-69.

¹⁶³ Whitaker et al., *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students*, ACLU (2019) p. 7 <<https://www.aclu.org/report/cops-and-no-counselors>> (as of June 23, 2021) (hereafter *Cops and No Counselors*)

¹⁶⁴ E.g., ACLU, *The Right to Remain A Student: How California School Policies Fail to Protect and Serve*, p. 14 (Oct. 2016) <https://www.aclunc.org/sites/default/files/20161019-the_right_to_remain_a_student-aclu_california_0.pdf> (as of January 28, 2022).

¹⁶⁵ Servoss & Finn, *Security in American Schools: Are Schools Safer?* Presentation to Alberti Center for Bullying Abuse Prevention Colloquium Series (Nov. 8, 2015).

31 percent of referrals and arrests, and they were twice as likely to be referred or arrested than their white peers in 2018-19.¹⁶⁶ And Black girls are three times more likely than white girls to receive referrals to law enforcement.¹⁶⁷ There is also evidence that Black students are more likely to be subjected to excessive force by officers in schools.¹⁶⁸ One arrest during school have can severe consequences for a student's future, as it doubles a high school student's likelihood of dropout and increases their likelihood of incarceration as adults.¹⁶⁹

Disproportionality in discipline—and the school-to-prison pipeline such disproportionality begets—has been attributed to biases, implicit or otherwise, that school officials may carry into the schoolhouse. Research shows that these biases about Black students, which can result in discriminatory disciplinary decisions, may also exacerbate the achievement gap by decreasing expectations and opportunities.¹⁷⁰ In addition, when students perceive an unfair distribution of punishment, an environment of anxiety is created, with achievement outcomes decreasing and students reporting less of a sense of belonging.¹⁷¹ Consistent research has identified alternatives to exclusionary discipline, such as School-Wide Positive Behavior Interventions and Supports and social emotional learning lessons for students that improve educational outcomes, faculty cohesion, school safety, and teacher morale, but many school districts have not implemented these alternatives.¹⁷² Furthermore,

¹⁶⁶ Office for Civil Rights, *2015-16 Civil Rights Data Collection: School Climate and Safety*, U.S. Dept. of Ed. (2018) <<https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>> (as of June 22, 2021); Robles-Ramamurthy & Watson, *Examining Racial Disparities in Juvenile Justice* (2019) 47 J. Am. Academy of Psych. & L. 48 (hereafter *Examining Racial Disparities*); U.S. Dept. of Ed., *Civil Rights Data Collection*(for 2017-18) (Oct. 14, 2020) <<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2017-18.html>> (as of July 1, 2021).

¹⁶⁷ Green et al., 'A Battle for the Souls of Black Girls', *supra*, at fn. 160.

¹⁶⁸ E.g., California Department of Justice, Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 22, 2021).

¹⁶⁹ E.g., ACLU, *The Right to Remain A Student: How California School Policies Fail to Protect and Serve*, p. 14 (Oct. 2016) <https://www.aclunc.org/sites/default/files/20161019-the_right_to_remain_a_student-aclu_california_0.pdf> (as of January 28, 2022).

¹⁷⁰ See, e.g., Gilliam et al., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, Yale Child Study Center (Sept. 28, 2016) <https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf> (as of June 22, 2021); Dee, *A Teacher Like Me: Does Race, Ethnicity, or Gender Matter?* (2005) 95 Am. Econ. Rev. 158; Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society* (2006) 94 Cal. L.Rev. 1169; Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* (2006) 17 Psychological Sci. 383; Greenwald & Kriegar, *Implicit Bias: Scientific Foundations* (2006) 94 Cal. L.Rev. 945; see also Dasgupta, *Implicit In Group Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations* (2004) 17 Soc. Justice Rsch. 146, 155 (discussing “[a]lmost a hundred studies” verifying the existence and importance of implicit bias in understanding racial stereotyping that results in different treatment on the basis of race or other protected categories); Gordan *Disproportionality in Student Discipline*, *supra*, at fn. 156.

¹⁷¹ Bottiani et al., *A Multilevel Examination of Racial Disparities in High School Discipline: Black and White Adolescents' Perceived Equity, School Belonging, and Adjustment Problems* (2017) 109 J. Ed. Psych. 532, 532-533; Bottiani et al., *Inequality in Black and White High School Students' Perceptions of School Support: An Examination of Race in Context* (2016) 45 J. Youth Adolescence 1176, 1176-1177; Perry & Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools* (2014) 79 Am. Sociological Rev. 1067, 1084.

¹⁷² Gordan, *Disproportionality in Student Discipline*, *supra*, at fn. 156; Bradshaw et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary Schools* (2010) 12 J. Positive Behav. Interventions 133; Luiselli et al., *Longitudinal Evaluation of Behavior Support Intervention in a Public Middle School* (2002) 4 J. Positive Behav. Interventions 184; OSI Baltimore, *Restorative Practices in Baltimore City Schools: Research Updates and Implementation Guide* (Sept. 2020) pp. 6-8 (finding that studies are continuing to

intergenerational exposure to trauma related to racism has been linked to higher incidences of depression, anxiety, and other mental health conditions in legacy Black American communities compared with other groups, including African immigrants, who have not experienced multigenerational slavery and institutionalized racism.¹⁷³ Yet, schools have not consistently recognized these harms by focusing on things that have been shown to help, such as mental health services and a trauma-informed education approach, and instead have increased security and police presence in schools with large numbers of Black students.¹⁷⁴

The impact of the school-to-prison pipeline is also reflected in data over decades showing that, nationally, Black youth and adults are incarcerated at a disproportionately high rate compared with white youth and adults.¹⁷⁵ (See Chapter 11 on the legal system.) Once in the system, education provided to Black students in juvenile facilities is often substandard and youth in adult facilities may receive no education at all.¹⁷⁶

L. California

From the Civil War until the present, Black Americans attending school in California have been forced to endure the same segregated and unequal education conditions endured by Black Americans in the rest of the nation. In the early years, school segregation was required by state law. Later, the methods to maintain segregated and unequal schools—which included implementing housing policies that segregate communities by race and drawing school attendance lines and siting schools—have largely mirrored the methods employed in other states outside of the South.

1. Segregated and Unequal Education Systems

In 1866, California law was amended to “allow ‘colored’ children to attend” school with white children in areas where there were not enough children of color to create a separate school, unless the “majority of white parents objected in writing.”¹⁷⁷ However, this change was short-lived because a California Superintendent of Public Instruction who believed in segregation and a governor who refused to abide by the Fourteenth and Fifteenth Amendments won the subsequent election.¹⁷⁸

In 1870, California law was amended to read that that every school shall be open for the admission of white

confirm that restorative approaches result in positive outcomes and are associated with “decreases in harmful exclusionary discipline and improvements in school climate”) <<https://www.osibaltimore.org/wp-content/uploads/2020/09/RP-Report-2020-FINAL.pdf>> .

¹⁷³ Jackson et al., Intergenerational Resilience in Response to the Stress and Trauma of Enslavement and Chronic Exposure to Institutionalized Racism (2018) 4 J. of Clinical Epigenetics 1, 4.

¹⁷⁴ See, *supra*, at Section B.

¹⁷⁵ Lu, *Michelle Alexander: More Black Men in Prison Than Were Enslaved in 1850: Clearly, Colorblindness Hasn't Gotten Us Very Far*, Colorlines (Mar. 30, 2011) <<https://www.colorlines.com/articles/michelle-alexander-more-black-men-prison-were-enslaved-1850>> (as of June 22, 2021); Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (hereafter, *The New Jim Crow*); Robles-Ramamurthy, *Examining Racial Disparities*, *supra*, at fn. 166.

¹⁷⁶ Alexander, *The New Jim Crow*, *supra*, at fn. 175; The Sentencing Project, *Youth Reentry* (June 14, 2012) <<https://www.sentencingproject.org/publications/youth-reentry/>> (as of June 22, 2021).

¹⁷⁷ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 34; An Act to Provide for a System of Common Schools, Stats. 1866, ch. 342, § 57, p. 398.

¹⁷⁸ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 34.

children residing within the school district—and that the “education of children of African descent and Indian children shall be provided for in separate schools,” and that schools with “fewer than ten students of color” can “educate them in separate schools or in any other manner.”¹⁷⁹ The Oakland School Board interpreted state law as no longer requiring a school for Black children and, in 1871, abruptly closed its “colored school,” which had been operating since 1866.¹⁸⁰

On September 22, 1872, after the principal of San Francisco’s white-only Broadway public school denied 11-year-old Mary Frances Ward entrance and told her to attend the separate, all-black public school, she and her parents filed suit in California court.¹⁸¹ The California Supreme Court upheld the system of segregated schools with a caveat.¹⁸² Where no separate school existed, the Court concluded that Black children could attend white schools.¹⁸³ Soon after, state law was conformed to the *Ward* decision—“children of African descent, and Indian children” must be educated in separate schools but if districts “fail to provide such separate schools, then such children must be admitted into schools for white children.”¹⁸⁴

In 1874, documents show there were 23 “colored schools” in California, but “conditions had worsened for many of the state’s black youths,” because they were “poorly equipped” and Black teachers were paid less than white teachers to work in Black schools.¹⁸⁵ One year later in 1875, the San Francisco School Board ended school segregation based on Board policy, principally due to the cost of maintaining segregated schools.¹⁸⁶ In 1880, the legislature removed school segregation for Black students from state education law. The amended law stated that schools “must be open” for “all children,” except “children of filthy or vicious habits, or children suffering from contagious or infectious diseases.”¹⁸⁷

Nevertheless, 10 years later, in 1890, 12-year-old Arthur Wysinger was denied admission to Visalia’s “Little White” public school on account of race. The school for nonwhite Americans was manifestly unequal to the school for white Americans.¹⁸⁸ Visalia built a new two-story school for white children and forced Black students to attend school in a barn.

Arthur Wysinger’s father, Edmond, both Black and Native American, had been brought to California as an enslaved person during the gold rush and eventually bought his freedom. Edmond became a part-time preacher and laborer and always stressed the value of education for his six children. Edmond wanted to send his son to the newly constructed school, but officials said his son could only attend the one held in the barn. Edmond sued.

¹⁷⁹ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 36; Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, pp. 18, 20; see also *Don Wilson Builders v. Superior Court of Los Angeles County* (1963) 220 Cal.App.2d 77, 90 (dis. opn. of Fourt, J.) (describing statutes and regulation stating that children of African or Indian descent shall not be admitted into schools for white children).

¹⁸⁰ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 17.

¹⁸¹ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 8.

¹⁸² *Ward v. Flood* (1874) 58 Cal. 42.

¹⁸³ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 38; Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, pp. 23-24.

¹⁸⁴ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 24.

¹⁸⁵ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 34.

¹⁸⁶ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 25.

¹⁸⁷ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 25.

¹⁸⁸ Bailey, *Hidden History: Edmond Wysinger*, YourCentralValley.com (Feb. 14, 2017) <<https://www.yourcentralvalley.com/feature-edmond-wysinger/>> (as of June 22, 2021).

The California Supreme Court held in favor of Edmond, but he died before he could see his son enroll in the “Little White” school. The Supreme Court found that the 1880 education law allowed a Black student to attend any local public school.¹⁸⁹ However, the Court also recognized the state legislature’s right to re-impose segregated schools whenever it wished.¹⁹⁰

Despite the decision, California continued to have racially segregated schools, even though California did not have Jim Crow laws. Just as education segregation existed in the North because of government-supported housing segregation, so too it existed in California. Government-supported housing discrimination in the form of restrictive covenants on properties, redlining, and white-only housing perpetuated school segregation. The federal government intentionally financed the creation of neighborhoods segregated by race—funding white-only public housing, redlining communities to deny homeownership loans to Black Americans, and promoting racially-restrictive housing covenants. (See Chapter 5 on housing.) And racially-restrictive covenants, enforced by California courts until 1947, were inserted into property titles as early as the 1890s and became rampant in the 1910s, “effectively turning neighborhoods across the state white-only.”¹⁹¹ Districts then assigned students to schools based on the segregated neighborhood where they lived or gerrymandered district boundaries to create segregated schools. School districts also zoned and constructed schools and drew school attendance boundaries in ways that created schools segregated by race.¹⁹² In addition, in the 1940s and 1950s, when Black homeowners tried to break the color lines, they came under attack by the Ku Klux Klan.¹⁹³

On March 2, 1945, five Mexican-American families on behalf of 5,000 other families sued the Westminster School District in Orange County because the school district forced their children to attend a different set of schools with fewer resources than the children of white families.¹⁹⁴ Two years later, the federal court of appeal in California ruled that California education law did not permit separate schools for Mexican children, so creation of segregated schools for Mexican children was arbitrary and not allowed under federal law.¹⁹⁵ This case is called the *Mendez* case after the family who led the filing of the lawsuit. At the time of this lawsuit, most Black students in the state were also attending schools with all Black or nearly all Black children.

Because California law also did not permit the creation of separate schools for Black students, this case meant that where a school district had purposefully created a segregated school by, for example, creating school attendance boundaries around a Black neighborhood, this too was illegal. The lawyers who filed *Brown v. Board of Education* relied on the cases filed by Wysinger and Mendez and the other four Mexican-American families to help convince the Supreme Court to hold that separate schooling was unconstitutional. Also, as a

¹⁸⁹ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 25 (citing *Wysinger v. Crookshank* (1890) 82 Cal. 588, 592–93.)

¹⁹⁰ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 26. The state legislature did so later in its history to re-create for separates schools for Asians and Native Americans; also some legislators attempted to do so again for Black children, but the legislation failed. *Id.*

¹⁹¹ Hudson, *West of Jim Crow*, *supra*, at fn. 35, p. 61, fn. 11 & 12.

¹⁹² Rothstein, *The Color of Law*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 28, 36, 73, 79, 123, 132; Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 62, pp. 12-13.

¹⁹³ Hudson, *West of Jim Crow*, *supra*, at fn. 35, pp. 167, 199.

¹⁹⁴ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 125.

¹⁹⁵ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 127; *Westminster Sch. Dist. of Orange County v. Mendez* (9th Cir. 1947) 161 F. 2d 774.

result of the *Mendez* decision, on June 14, 1947, the last of California’s school segregation laws, which applied to Asian American and Native American children, was repealed.¹⁹⁶

Even after the *Wysinger* and *Mendez* decision, and the *Brown* decision in 1954, local cities and school boards refused to take proactive steps to desegregate schools. For example, they did not change the school-site attendance boundaries that had been drawn to reflect racially segregated neighborhoods and that created racially segregated schools. Many also did not take proactive steps to allow students to attend other schools outside their racially segregated neighborhoods or, if they did, they did not provide adequate transportation to get to the school in the white neighborhood.

In the years after *Brown*, California leaders and the state’s school board acknowledged that local school segregation continued and was illegal, but the problem was not fixed. In 1962, California’s Board of Education acknowledged the ongoing problem of highly segregated schools and directed local districts to “exert all effort to avoid and eliminate segregation . . .”¹⁹⁷ In 1964, prominent civil rights attorney Loren Miller confirmed that rampant segregation by race existed in California schools when he told an assembly of western governors, “[M]ore [Black] children attend all-Negro schools in Los Angeles than in Jackson, Mississippi and Little Rock, Arkansas, combined.”¹⁹⁸

Statewide racial school census data taken in 1966 also confirmed the high levels of segregated schools: 85 percent of Black Americans attended predominantly minority schools, whereas only 12 percent of Black students and 39 percent of white students attended racially balanced schools.¹⁹⁹ To address this segregation, California Attorney General Stanley Mosk advocated for explicit consideration of race in formulating a plan to eliminate it, because to ignore race one would have to “not merely conclude the Constitution is colorblind, but that it is totally blind.”²⁰⁰

Unfortunately, many local school boards and districts did not take the necessary steps to integrate schools, and so Black and Latino families and their advocates filed lawsuits and asked California courts to order school districts to integrate.²⁰¹ In the 1960s and 70s, Los Angeles, San Francisco, Pasadena, San Diego, Inglewood, and Richmond school districts, among others, faced court desegregation orders. Berkeley and Riverside initiated busing programs.²⁰²

Despite these orders, majority-white California was able to undermine efforts to integrate schools through desegregation of communities when, in November 1964, 65 percent of voters passed Proposition 14, allowing property sellers, landlords, and agents to continue to segregate communities—and, thereby, schools—on racial

¹⁹⁶ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 108.

¹⁹⁷ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 143.

¹⁹⁸ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020), 255 (citing Loren Miller, “Civil Rights and State’s Rights,” 1964 Address to Western Governors, folder 8, box 29, Loren Miller Papers).

¹⁹⁹ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 144.

²⁰⁰ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, p. 143.

²⁰¹ E.g., *Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280, 284-285 (Los Angeles); *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 881-882 (Pasadena).

²⁰² See e.g., Wollenberg, *All Deliberate Speed*, *supra*, at fn. 39, pp. 148-164.

grounds when selling or renting accommodations, as they had been permitted to do before 1963.²⁰³ The highest courts ultimately struck the law down in 1967, but private racially restrictive covenants continued to be used by private owners to prevent Black people from moving into white neighborhoods with better funded and resourced schools.²⁰⁴ See Chapter 5 on housing for further discussion of related issues.

In addition, Californians successfully passed laws to limit the tools courts could use to order schools to desegregate. Because neighborhoods continued to be segregated by race, one of the main tools that courts used to desegregate schools was to have Black and white students attend schools outside of their neighborhoods via bus transportation to the new schools. But many white Californians strongly opposed integration plans, especially court-ordered ones that required Black people or other students of color to be bused to attend their white schools or vice versa. And, in 1979, majority-white Californians passed Proposition 1, a law that stopped courts from ordering school desegregation plans, unless families or students suing to desegregate the schools could prove that intentional discrimination by school officials caused the segregation or a federal court could impose the same order.²⁰⁵

The law, upheld by the United States Supreme Court, limited the ability of California courts to integrate schools that were segregated in fact, for example due to racially segregated neighborhoods, but not by a California law.²⁰⁶ Then, throughout the mid- to late-1970s, courts overturned, limited, or got rid of desegregation orders in many California districts, as the Supreme Court and Congress further restricted the use of remedies like busing and school reassignment to integrate schools.²⁰⁷ In a few cases, such as in Berkeley, schools remained relatively integrated because school districts continued busing students and using school-selection processes designed to achieve integration, even without a desegregation order.²⁰⁸

But, in the vast majority of California school districts, schools either re-segregated or were never integrated, and so segregated schooling persists today. As of 2003, California was one of the four most segregated states for Black students.²⁰⁹ As of 2014, California was identified as the third most segregated state for Black students, and a state where Black and Latino students are strongly concentrated in schools that have far lower quality and resources than their white and Asian peers.²¹⁰ As of 2020, California remained in the top 10 most segregated states for Black students, but had moved to number six in the national ranking.²¹¹

In a recent case, the state found that the segregation that persisted in a Bay Area school district was by design. For example, the California Attorney General's office found in 2019 that the Sausalito Marin City school board

²⁰³ Cal. Const. art. I, § 26, as adopted November 3, 1964.

²⁰⁴ Reft, *How Prop 14 Shaped California's Racial Covenants*, KCET, <https://www.kcet.org/shows/city-rising/how-prop-14-shaped-californias-racial-covenants>>(as of June 30, 2021).

²⁰⁵ See Cal. Const., art. I, § 7; School Assignment and Transportation of Pupils, California Proposition 1 (1979).

²⁰⁶ *Crawford v. Bd. of Educ.* (1982) 458 U.S. 527, 535-536.

²⁰⁷ *Butt v. California* (1992) 4 Cal. 4th 668, 684; Orfield & Ee, *Segregating California's Future: Inequality and Its Alternative 60 Years after Brown v. Board of Education*, The Civil Rights Project, University of California Los Angeles (May 14, 2014) p. 3.

²⁰⁸ [add citation]

²⁰⁹ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 9 (citations omitted).

²¹⁰ Orfield & Ee, *Segregating California's Future: Inequality and Its Alternative 60 Years after Brown v. Board of Education*, The Civil Rights Project, University of California Los Angeles (May 14, 2014) p. 3.

²¹¹ Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 62, pp. 30-31, Tables 13 and 14.

had segregated its schools, leaving the vast majority of Black students in an underfunded and underresourced school while providing a better-funded and resourced charter school for the majority of white students.²¹²

2. Separate and Unequal Education Conditions Persist

In California's highly segregated schools, schools mostly attended by white and Asian children receive more funding and resources than schools mostly attended by Black and Latino children. Throughout the 20th century, school districts in California, like those across the nation, financed their operations mainly with local property tax revenue and limited amounts of state and federal funding. This system allowed richer, white neighborhoods to better fund their schools districts than poorer, largely Black neighborhoods.²¹³ In 1971, the California Supreme Court decided that this education funding system was discriminatory because, according to the Supreme Court, it made "the quality of a child's education a function of the wealth of his parents and neighbors."²¹⁴

In 1978, voters passed Proposition 13, which decreased the amount of local property tax revenues and increased the amount of state funding for K-12 education. In 1988, voters then approved Proposition 98, which requires the state to dedicate at least 40 percent of its General Fund to K-14 education each year.²¹⁵ These measures still did not solve the issue, and Black parents and students and other parents and students of color have continued to challenge funding inequities in court.

In late April 1991, the Richmond Unified School District, which served a high proportion of Black students, announced that it would close its schools six weeks early on May 1, 1991 due to a budget shortfall. As discussed in Chapter 5 on housing, federal housing policies, and local officials segregated Richmond and made it extremely difficult for Black residents to move to the suburbs after World War II.²¹⁶ Richmond parents sued, and the state Supreme Court decided that the closure did not meet the minimum level of education required by the state constitution.²¹⁷ In the late 1990s, in the Compton Unified School District, which served mostly Black students, a teacher described the deplorable conditions in a temporary school building in Compton where she taught: "[T]he wooden beams across the ceiling were being eaten by termites, a fine layer of wood dust covered the students desks every morning. Maggots crawled in a cracked and collapsing area of the floor near my desk... The blue metal window coverings on the outsides of the windows were shut permanently, blocking all sunlight."²¹⁸ In 2000, students were part of a lawsuit, *Williams v. California*, again alleging that schools serving majority Black, Latino, and low-income students across the state failed to provide access to even the most

²¹² California Department of Justice, *Attorney General Becerra: Sausalito Marin City District Agrees to End Segregation in Its Schools*, Press Release (Aug. 9, 2019) <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-sausalito-marin-city-school-district-agrees-end>> (as of June 22, 2021).

²¹³ Murphy & Paluch, *Financing California's Public Schools*, Public Policy Institute of California (Nov. 2018) <<https://www.ppic.org/publication/financing-californias-public-schools/>> (as of June 18, 2021).

²¹⁴ *Serrano v. Priest* (1971) 5 Cal. 3d 584, 589.

²¹⁵ Murphy & Paluch, *Financing California's Public Schools*, *supra*, at fn. 213.

²¹⁶ Color of Law pg. 6-10

²¹⁷ *Butt v. State of California*, 4 Cal. 4th 668 (1992).

²¹⁸ Sarah Sentilles (2005) *Taught by America: A Story of Struggle and Hope In Compton*, pg. 72.

rudimentary learning tools: school books, safe and decent facilities, and qualified teachers.²¹⁹ The lawsuit ultimately settled in 2004, with \$138 million in state funds to provide instructional materials to schools, \$800 million for facility repairs, and \$50 million to create a complaint and oversight system to check to see if schools were providing the basics of an education.²²⁰ However, California’s unequal funding system continued to mean that Black and Latino students, and low-income students had far fewer schools resources.

In 2013, the state tried to address the inequalities in school funding by giving more money to schools that have higher numbers of low-income, homeless, and foster youth. This change in the way funding was provided to school district is referred to as the “equity index” and is part of the state’s Local Control Funding Formula that provides approximately 58 percent of the funding that California public schools receive each year.²²¹ The state’s funding formula does not focus on Black students specifically or require schools to ensure that the funding is spent on the high needs students within the district.²²² Because about 32 percent of the funding for California schools still comes from local property taxes, and wealthier communities with higher property values can more easily raise additional funds through local bonds and donations, rich and often more predominantly white neighborhoods continue to fund their schools at greater levels.²²³

At the October 2021 Task Force hearing, Kawika Smith, who graduated from Verbum Dei High School in Watts, a historic Black neighborhood of Los Angeles, testified about two high schools in Los Angeles. In the predominantly Black high school, Black students went without paper for three months simply because the school was underfunded. In the other school, extra funding allowed the school to purchase a fountain. Smith told the Task Force, “I strongly believe that we need to revisit the property tax laws and algorithms for how schools are funded . . . I can only imagine if that money was redirected into the Black school where they needed the money – what that could have meant for [those] Black students.”²²⁴

As in the rest of the country, unequal funding translates to unequal opportunities. Schools with fewer resources mean fewer Advanced Placement and college preparation courses, which means that Black students attending those schools are less competitive for college and university admission and may not have taken the courses necessary—called A-G courses in California—to go to a four-year state University. Within districts and

²¹⁹ Cal. Dept. of Ed., *The Williams Case – An Explanation* <<https://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp>> (as of July 1, 2021).

²²⁰ California Department of Education, *The Williams Case – An Explanation* <<https://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp>> (as of January 28, 2022).

²²¹ Murphy & Paluch, *Financing California’s Public Schools*, *supra*, at fn. 213.

²²² Auditor of the State of California, *K-12 Local Control Funding: The State’s Approach Has Not Ensured that Significant Funding Is Benefiting Students as Intended to Close Achievement Gaps* (Nov. 2019) p. 15 (finding that the implementation of the Local Control Funding Formula “has not yet proven effective at increasing transparency and accountability” and noting that “state law does not explicitly require districts to use unspent supplemental and concentration funds in the following year to benefit intended student groups”).

²²³ Murphy & Paluch, *Financing California’s Public Schools*, *supra*, at fn. 169; Cano, *Data exclusive: With California school bonds, the rich get richer and the poor, not so much*, *Cal Matters* (June 23, 2020) (districts with the highest concentrations of wealthier students average more than twice as many local bond dollars per student since 1998 as most impoverished district and can benefit from as much as \$270,000 per pupil in local bond money over the last 20 years) <<https://calmatters.org/education/2018/10/california-school-bonds-favor-richer-communities/>> (as of January 28, 2022).

²²⁴ AB 3121: Reparations Task Force Hearing (October 12, 2021)<<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

schools, Black students continue to be placed in vocational tracks and out of accelerated, Science, Technology, Engineering, and Mathematics and Advanced Placement programs.²²⁵ In addition, Black students in California are disproportionately likely to be identified as having a learning disability, at nearly twice the rate of Black students nationwide.²²⁶ “Where we failed is discontinuing those efforts to integrate our schools, to invest in them equitably, and to begin in the pre-K years,” Dr. Rucker Johnson, Professor of Public Policy at Berkeley told the Task Force.²²⁷

Recent studies have shown the importance of having at least one teacher who looks like you.²²⁸ But the percentage of Black teachers in California declined from 5.1 percent in 1997-98 to four percent in 2016-17, even though Black students made up 5.6 percent of California’s student population.²²⁹ Black men comprise one percent of California’s teaching force.²³⁰

Furthermore, in California, while suspensions have decreased significantly statewide since 2013, Black students continue to be suspended at three times the rate of white students,²³¹ and lose nearly four times the number of days of instruction to suspensions and expulsions as white students.²³² Suspensions for subjective offenses, such as willful defiance or disruption—which can include anything from failing to take a hat off in class to talking in class—are a persistent but declining source of disproportionate discipline due to recent legislation limiting use for these reasons.

In recent stipulated judgments reached with four different California school districts, the California Attorney

²²⁵ The Education Trust West, *Black Minds Matter: Supporting the Educational Success of Black Children in California* (Oct. 2015) pp. 14-16.

²²⁶ Powers et al., *Twenty-five Years after Larry P.*, *supra*, at fn. 150, p. 153-54.

²²⁷ AB 3121: Reparations Task Force Hearing (October 12, 2021) <<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

²²⁸ Assem. Com. on Ed., Analysis of Assem. Bill 520 (2021-2022 Reg. Sess.) as amended March 25, 2021, p. 6-7 (research shows that “[t]eachers of color boost the academic performance of students of color”); Freeburg, *Despite Progress, California’s Teach Force Far From Reflecting Diversity of Students*, EdSource.org (April 25, 2018) <https://edsources.org/2018/despite-progress-californias-teaching-force-far-from-reflecting-diversity-of-students/596536> (as of January 28, 2022).

²²⁹ California Department of Education, *Fingertip Facts on Education in California (2019-2020)* <<https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp>> (as of January 28, 2022); Assem. Com. on Ed., Analysis of Assem. Bill 520 (2021-2022 Reg. Sess.) as amended March 25, 2021, p. 6; California Department of Education, *State Superintendent Tony Thurmond, Assemblymember Mike Gipson, Educators and Scholars Urge Support for First-of-its-Kind Legislation to Diversify the Teaching Workforce* (Apr. 13, 2021) <<https://www.cde.ca.gov/nr/ne/yr21/yr21rel27.asp>> (as of June 25, 2021);

²³⁰ Sentinel News Service, *Gipson Bill Supports Male Educators of Color: AB 520 Diversifies Teaching Workforce*, Los Angeles Sentinel (Apr. 15, 2021) <<https://lasentinel.net/gipson-bill-supports-male-educators-of-color-ab-520-diversifies-teaching-workforce.html>> (as of June 22, 2021).

²³¹ California Department of Education, *State Superintendent Torlakson Announces 2018 Rates for High School Graduation, Suspension and Chronic Absenteeism* (Nov. 19, 2018) <<https://www.cde.ca.gov/nr/ne/yr18/yr18rel76.asp>> (as of June 22, 2021).

²³² Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California*, The Civil Rights Project (Sept. 18, 2018) p. 5 <<http://www.civilrightsproject.ucla.edu/research/k-12education/school-discipline/the-unequal-impact-of-suspension-on-the-opportunity-to-learn-in-ca/>> (as of June 22, 2021); see also Office for Civil Rights, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, U.S. Dept. of Ed. (June 2021) <<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>> (as of June 24, 2021) (finding that “Black pre-school students were expelled at rates that were more than twice their share (38.2%) of total pre-school enrollment (18.2%)”).

General’s office identified racial disparities in discipline for Black students with harmful negative impacts.²³³ For example, the Attorney General’s investigation of the Barstow Unified School District found that Black middle and high school students were 79 and 78 percent, respectively, more likely, to be suspended out of school than similarly situated white students, and the rate of days Black students were punished was 168 percent greater in elementary, 37.9 percent greater in middle school, and 54.5 percent greater in high school than their white peers.²³⁴

In California, Black students are also disproportionately referred by schools to law enforcement.²³⁵ A case investigated by the California Attorney General’s Office found that, since 1991, school resource officers in the Stockton Unified School District had arrested 34,000 students, including 1,600 under 10 years old, with many minor misbehaviors turned into criminal offenses, disproportionality impacting Black and Latino students, and students with disabilities.²³⁶

A number of high-profile reported cases have also raised concerns that Black children in California face increased risk of invasive searches and excessive use of force in schools. In one reported case, during school hours, a police officer handcuffed a five-year-old Black boy with zip ties and charged him with battery because he “resisted” being arrested.²³⁷ The American Civil Liberties Union has also reported a number of incidents. In one, a Black student in a Los Angeles school was partially strip-searched in the presence of a male officer—a vice principal forced an “eighth grade girl to pull her bra away from her body and shake it” and when she “tried to cover her breast for modesty, the vice-principal pulled her hands away.”²³⁸ In another filed case, school police were alleged to have handcuffed and placed a 13-year-old Black student on probation after he was playing a makeshift game of soccer with an orange.²³⁹ In yet another, the ACLU reported that a school police

²³³ California Department of Justice, Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 24, 2021); California Department of Justice, Attorney General Becerra Secures Settlements with Barstow and Oroville School Districts to Address Discriminatory Treatment of Students Based on Race and Disability Status, Press Release (Aug. 25, 2020) <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-settlements-barstow-and-oroville-school>> (as of June 24, 2021).

²³⁴ People of the State of California v. Barstow Unified School District, No. 20STCV3228, Complaint filed Aug. 25, 2020, p. 6-7.

²³⁵ U.S. Commission on Civil Rights, Beyond Suspension: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, Briefing Report (2019) pp. 10–11, 49, 66; Whitaker, et al., Cops and No Counselors, *supra*, at fn. 149, pp. 5, 35 (analyzing 2015-16 academic year data collected by U.S. Department of Education and finding that California had a 44 percent increase in referral to law enforcement from 2013-14 to 2015-16); Black Organizing Project et al., From Report Card to Criminal Record: The Impact of Policing Oakland Youth (Aug. 2013) p. 17 (“While Blacks make up only 30.5 percent of the student population, they make up more than 70 percent of all Oakland School Police arrests.”);

²³⁶ California Department of Justice, Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 24, 2021).

²³⁷ Manoucheri, *5-Year-Old Handcuffed, Charged With Battery On Officer*, KCRA (Feb. 9, 2012) <<https://www.kcra.com/article/5-year-old-handcuffed-charged-with-battery-on-officer/6395087>> (as of June 25, 2021); see Males, *California Decision Aims to End Aggressive Policing in Schools*, *Yes! Magazine* (Feb. 14, 2019) <<https://www.yesmagazine.org/democracy/2019/02/14/california-decision-aims-to-end-aggressive-policing-in-schools>> (as of June 25, 2021); Nelson et al., *The Right to Remain a Student: How California School Police Fail to Protect and Serve*, ACLU of California (Oct. 2016) p. 13 (hereafter *The Right To Remain a Student*).

²³⁸ Nelson et al., *The Right to Remain a Student*, *supra*, at fn. 237, p. 14-15.

²³⁹ *Sigma Beta Xi, Inc. v. County of Riverside* (July 1, 2018) Case No. 5:18-cv-01399, at ¶ 83.

officer who told a Black high school student that it was wrong to be gay and wear boy's clothes, subsequently pushed her against the wall and handcuffed her for telling the officer that "it was also wrong that white people like the officer enslaved her people."²⁴⁰ Subsequent to the incident, the same officer "continued to harass [her], routinely patting her down and demanding that she turn out her bag."²⁴¹

Jacob "Blacc" Jackson, the Los Angeles Youth Commissioner explained to the Task Force during its October 2021 hearing how he was placed in an abusive adoptive home and lost his older brother in a police shooting but was focused on "finish[ing] high school [at Crenshaw High] and pass[ing] all of [his classes]."²⁴² When, at school, Jackson made a mistake in dealing with a substitute teacher, instead of the teacher, counselors, and school administrators trying to work with him, he was questioned, threatened, and handcuffed by school police for an incident he had already apologized for. The school police officer told Jackson that "they would always be watching me. They said you're just like everybody else at this school . . . I felt scared and anxious and unclear about what to do." Jackson felt he could not stay at his high school and told the Task Force that, "What I wish the school [had] provided for me when I was there was real counselors, after-school programs, real nurses, Black people history, peace building, and [transformative justice] practice."

In general, research shows that school officials are more likely to refer Black students like Jackson to law enforcement for minor behavior than white students.²⁴³ Such contacts with law enforcement increase a student's feeling of isolation, and contributes to the school-to-prison pipeline and the disproportionate rates of Black people in our criminal justice system.²⁴⁴

Once in the juvenile justice system, Black students face an increased likelihood of dropout due to inconsistent education access and adequacy of instruction.²⁴⁵ (See Chapter 11 on the legal system.) For Black students charged with offenses that result in a transfer to the state prison system, few can access and complete higher education.²⁴⁶

²⁴⁰ Nelson et al., *The Right to Remain a Student: How California School Police Fail to Protect and Serve*, ACLU of California (Oct. 2016) p. 13.

²⁴¹ Nelson et al., *The Right to Remain a Student: How California School Police Fail to Protect and Serve*, ACLU of California (Oct. 2016) p. 13.

²⁴² AB 3121: Reparations Task Force Hearing (October 12, 2021) <<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

²⁴³ See, *supra*, at fn. 121.

²⁴⁴ See, *supra*, at fn. 156; Harris et al., *California's Prison Population*, Public Policy Institute of California (July 2019) <<https://www.ppic.org/publication/californias-prison-population/>> (as of July 24, 2020) (California numbers reflecting disproportionate representation of Black people).

²⁴⁵ See also, *supra*, at fn. 156; see also Ferriss, *Black Oakland Youth Arrested, but Not Charged, in Stunning Numbers, Report Says*, The Center for Public Integrity (Aug. 28, 2013) (reporting that "between 2008 and 2012, black children represented 29 percent of Oakland's school-age population but 78 percent of the more than 13,680 juveniles arrested") <<https://publicintegrity.org/education/black-oakland-youth-arrested-but-not-charged-in-stunning-numbers-report-says/>> (as of June 25, 2021).

²⁴⁶ Burke, *Report Outlines Barriers to Education for Formerly Incarcerated in Calif.*, Inside Higher Ed (Feb. 5, 2021) <<https://www.insidehighered.com/quicktakes/2021/02/05/report-outlines-barriers-education-formerly-incarcerated-calif>> (as of June 22, 2021).

V. Unequal Higher Education

Until *Brown v. Board of Education*, white colleges and universities largely refused to admit Black people.²⁴⁷ In response, Black Americans raised funding to develop Historically Black Colleges and Universities. In the early 1900s, the federal government began to provide funding and land to open HBCUs, but it had to pass through white-controlled state legislatures. However, these historically Black institutions have been unequally funded in comparison to similar historically white institutions throughout American history.

After World War II, the GI Bill paid for veterans to attend college, graduate school, and go through training programs.²⁴⁸ Although the GI Bill should have helped Black and white veterans equally, due to Black veterans exclusion from white colleges and local white officials steering Black veterans into vocational programs, it actually increased the racial higher education gap between Black and white Americans.²⁴⁹ Even today, Black military veterans continue to face discriminatory barriers that can result in unequal access to education benefits available to veterans. In addition, although the Civil Rights Act of 1964 again promised some relief through a prohibition on discrimination in higher education programs receiving federal funds and some colleges and universities took affirmative action to remedy prior-discrimination in college admissions, gains were short-lived due to Supreme Court decisions and, in California, passage of Proposition 209, which prohibited race from being used as a factor in admissions.

A. Unequal Funding for Historically Black Colleges and Universities

Prior to the Civil War, a few colleges for free Black Americans existed in the north, and none in the south.²⁵⁰ In 1862, the federal government under the first Morrill Act granted federal land and funding to states to open colleges and universities, but Black Americans were generally not allowed to attend.²⁵¹ After the Civil War ended in 1865, the Freedmen's Bureau began establishing Black colleges staffed by Civil War veterans with the support of white and Black religious missionaries.²⁵² White missionaries funded Black education in order to Christianize the "menace" of uneducated enslaved people.²⁵³ These colleges were in name only and, like many white colleges at the time, generally provided only primary and secondary education.²⁵⁴

In 1890, Congress passed the second Morrill Act and required states to provide higher education to Black

²⁴⁷ Allen, et. al, *Historically Black Colleges and Universities: Honoring the Past, Engaging the Present, Touching the Future*, *The Journal of Negro Education*, Vol. 76, No. 3 (Summer 2007), 263 at p. 264.

²⁴⁸ History.com, G.I. Bill (June 7, 2019) <https://www.history.com/topics/world-war-ii/gi-bill> (as of January 28, 2022).

²⁴⁹ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* *The Journal of Blacks in Higher Education* No. 41 (Autumn, 2003), pp. 36-37 (2 pages), see also, Sarah Turner and John Bound, *Closing the Gap or Widening the Divide: The Effects of the GI Bill and World War II on the Educational outcomes of Black Americans*, *Journal of Economic History*, March 2003.

²⁵⁰ Gasman at p. 11

²⁵¹ Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts* (2009) 80 *J. Higher Ed.* 389, 395; Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 33; see also Croft, *The U.S. Land-Grant University System: An Overview*, *Congressional Research Services* (2019) p. 3.

²⁵² Gasman, *Envisioning Black Colleges* at p. 11

²⁵³ Gasman, at p. 11

²⁵⁴ Gasman at p. 11

students as the states had for white students.²⁵⁵ In the north, where Black students were allowed to attend colleges and universities in extremely limited numbers, they often were not allowed to fully participate in the way that white, male students participated.²⁵⁶

In order to continue receiving federal funding, former enslaving states, where the majority of Black Americans lived, created segregated public Black colleges as it had segregated primary and secondary school.²⁵⁷ White-controlled legislatures underfunded Black colleges and universities, provided substandard facilities, and did not provide adequate resources to train faculty.²⁵⁸ White-controlled southern legislatures limited curriculum to mechanical, agricultural, and industrial arts, helping maintain Black Americans as a servant underclass to build white wealth.²⁵⁹

Few graduate programs admitted Black students, although after World War II, the NAACP successfully sued to expand graduate education opportunities for Black students.²⁶⁰ Although a few Black people were allowed to attend predominantly white institutions, 90 percent of all Black degree-holders in the late 1940s had been educated at Historically Black Colleges and Universities. On the eve of the 1954 *Brown v. Board of Education* decision, Black people were less than one percent of entering first-year students at predominantly white institutions.²⁶¹

Even after the *Brown* decision, white government officials in the south used state power to prohibit integration efforts, including in Mississippi.²⁶² In 1959, Clyde Kennard, a 31-year-old Black veteran of the Korean War, who ran a small poultry farm, applied to Mississippi Southern College, now the University of Southern Mississippi.²⁶³ The university president reported Kennard's intention to apply to the Mississippi Sovereignty Commission, a state agency led by the governor of Mississippi, which was created in order to preserve segregation.²⁶⁴ After refusing to back down from applying to the university, even after the Mississippi governor

²⁵⁵ Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts* (2009) 80 *J. Higher Ed.* 389, 395; Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 33; see also Croft, *The U.S. Land-Grant University System: An Overview*, Congressional Research Services (2019) p. 3.

²⁵⁶ Synnott, *The half-opened door: Discrimination and admissions at Harvard, Yale and Princeton, 1900-1970* (1979); Horowitz, *Campus life: Undergraduate cultures from the end of the eighteenth century to the present* (1987)

²⁵⁷ Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 673; Harper et al., *Access and Equity*, *supra*, at fn. 34, p. 395; Gasman, *Envisioning Black Colleges: A History of the United Negro College Fund* (2007) p. 12 (hereafter *Envisioning Black Colleges*).

²⁵⁸ Harper et al., *Access and Equity*, *supra*, at fn. 34, p. 395-396; Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 674.

²⁵⁹ Harper et al., *Access and Equity*, *supra*, at fn. 34, p. 394; Allen & Jewell, *A Backward Glance Forward: Past, Present and Future Perspectives on Historically Black Colleges and Universities* (2002) 25 *Rev. Higher Ed.* 241, 244-245; Anderson, *The Education of Blacks in the South, 1860-1935* (1988) p. 122; Gasman, *Envisioning Black Colleges*, *supra*, at fn 257. at 13.

²⁶⁰ *Sipuel v. Board of Regents of University of Oklahoma* (1948) 332 U.S. 631 (state must offer schooling for Black students as soon as it provided it for white students); *McLaurin v. Oklahoma State Regents for Higher Ed.* (1950) 339 U.S. 637 (black students must receive the same treatment as white students); *Sweatt v. Painter* (1950) 339 U.S. 629 (state must provide facilities of comparable quality for black and white students).

²⁶¹ Harper et al., *Access and Equity*, *supra*, at fn. 34, p. 396.

²⁶² Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 685 (citing Harper et al., *Access and Equity*, *supra*, at fn. 34, p. 397).

²⁶³ Tierney, William G. "The Parameters of Affirmative Action: Equity and Excellence in the Academy." *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, pp. 165-96, at p. 168 <https://doi.org/10.2307/1170625>.

²⁶⁴ <https://slaverybyanothername.com/other-writings/silent-partner-how-the-souths-fight-to-uphold-segregation-was-funded-up-north/>;

requested that he withdraw his application, Kennard's local cooperative foreclosed on his farm and local government officials arrested and falsely convicted him for stealing \$25 of chicken feed.²⁶⁵ Kennard was sentenced to seven years on a chain gang, where he picked cotton, and was fed food leftover from what the white prisoners ate.²⁶⁶ Kennard died of misdiagnosed and untreated colon cancer in 1963.²⁶⁷

Segregated higher education continued into the 1970s. In 1969 and 1970, the federal department of education concluded that Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia operated segregated colleges and universities and, in 1970, the NAACP sued the federal department of education for failing to force these institutions to desegregate.²⁶⁸ By the late 1970s, many years after the Civil Rights Act of 1964 at least 17 southern states were still operating racially segregated higher education systems.²⁶⁹ A number of public HBCUs closed or merged with traditionally white institutions, but most black college students continued to attend HBCUs.²⁷⁰ HBCUs continued to struggle with poorer facilities and budgets compared with traditionally white institutions; some lacked adequate libraries and scientific and research equipment.²⁷¹

Despite the underfunding, through the 1970s, private and public HBCUs educated a large proportion of the Black American middle class.²⁷² In 2006, HBCUs made up three percent of higher education but enrolled 14 percent of Black undergraduates, and graduated 28 percent of all Black undergraduate students who earned a degree.²⁷³ Seventy percent of America's Black doctors, 35 percent of Black lawyers, and 50 percent of Black engineers and teachers have a degree from an HBCU.²⁷⁴ For Black students, HBCUs can provide an empowering, family-like environment of small classes and close relationships with faculty and students away from racial tensions experienced off campus.²⁷⁵

<https://www.mshistorynow.mdah.ms.gov/issue/clyde-kennard-a-little-known-civil-rights-pioneer>

²⁶⁵ Tierney, William G. "The Parameters of Affirmative Action: Equity and Excellence in the Academy." Review of Educational Research, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, pp. 165–96, at p. 168 <https://doi.org/10.2307/1170625>; <https://www.mississippihistory.org/sites/default/files/kennard.pdf>

²⁶⁶ Jerry Mitchell, Story of false arrest called civil rights movement's saddest, CLARION LEDGER, December 31, 2005

²⁶⁷ <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/ms/clyde-kennard.html>

²⁶⁸ Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 33, *Adams v. Califano*, 430 F.Supp. 118 (US District Court DC 1977).

²⁶⁹ Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 689; Fox, *T. Marshall Hahn Jr., Who Remade Virginia Tech as President, Dies at 89*, New York Times (June 4, 2016) <<https://www.nytimes.com/2016/06/05/us/t-marshall-hahn-jr-who-remade-virginia-tech-as-president-dies-at-89.html>> (as of June 22, 2021); Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 33.

²⁷⁰ Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 33.

²⁷¹ Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 33.

²⁷² <https://www.aaup.org/article/historically-black-colleges-and-universities-time-economic-crisis#.YedKeP7MK70>

²⁷³ American Association of University Professors, 2006, at 5

²⁷⁴ Johnson, et. al, *Historically Black Colleges and Universities (HBCUs) in the Twenty First Century: An Exploratory Case Study Analysis of their Mission, Race, Gender & Class* Vol. 24, No. 3-4, *Immigration, HBCUs, Criminology, and Education Issues* (2017), pp. 44-67

²⁷⁵ Johnson, et. al, *Historically Black Colleges and Universities (HBCUs) in the Twenty First Century: An Exploratory Case Study Analysis of their Mission, Race, Gender & Class* Vol. 24, No. 3-4, *Immigration, HBCUs, Criminology, and Education Issues* (2017), 45-67, at p. 48, see also <https://www.aaup.org/article/historically-black-colleges-and-universities-time-economic-crisis#.YedKeP7MK70>.

Today, increased access for Black students to all colleges and universities has led to a relative decrease in enrollment to HBCUs.²⁷⁶ While Black enrollment at HBCUs increased by 17 percent between 1976 and 2018, the total number of Black students enrolled in all degree-granting postsecondary institutions more than doubled during this period.²⁷⁷ In 2018, there were 101 HBCUs located in 19 states, including one in Los Angeles, the Charles R. Drew University of Medicine and Science.²⁷⁸ However, funding for HBCUs continues to be uneven and is tied to a state's fiscal health.²⁷⁹ Reports in 2008 and 2014 concluded that state governments continue to deprioritize funding public HBCUs, leading to predominately white universities receiving more funding per student than HBCUs.²⁸⁰ In 2008, for example, the University of North Carolina at Chapel Hill received about \$15,700 in state funding per student.²⁸¹ But students at historically Black North Carolina Agricultural and Technical State University received about \$7,800 in state funding per student.²⁸² In 2020, the federal government increased funding for HBCUs, but many HBCUs have closed in recent years due to financial issues, a trend that has worsened during the COVID-19 pandemic.²⁸³

B. Unequal Access to the GI Bill

Due to expanded education opportunities and funding under the GI Bill, between 1950 and 1975, Black student college enrollment increased from 83,000 to 666,000 students.²⁸⁴ However, in comparison to white veterans who used GI Bill benefits to go to college, government officials, overall, prevented Black veterans from accessing the full education benefits available to them.²⁸⁵

At the end of World War II, the vast majority of Black veterans returned to their residence in the southern states.²⁸⁶ Universities in the South did not accept Black students, and white state legislatures did not increase funding to Historically Black Colleges and Universities to meet increased demand from returning veterans.²⁸⁷

²⁷⁶ <https://www.aaup.org/article/challenges-and-possibilities-hbcus-after-covid-19-pandemic#.YedZuf7MK70>

²⁷⁷ National Center for Education Statistics, Historically Black Colleges and Universities <<https://nces.ed.gov/fastfacts/display.asp?id=667>> (as of July 2, 2021).

²⁷⁸ Id.

²⁷⁹ Ortega, A., Swinton, O.H. Business Cycles and HBCU Appropriations. *J Econ Race Policy* 1, 176–195 (2018). <https://doi.org/10.1007/s41996-018-0009-5>

²⁸⁰ Boland, W., & Gasman, M. (2014). America's Public HBCUs: A Four State Comparison of Institutional Capacity and State Funding Priorities. Penn Center for Minority Serving Institutions, Retrieved from https://repository.upenn.edu/gse_pubs/340; Belkin, Maryland to Pay Four Black Colleges \$577 Million, *Wall Street Journal* (Mar. 24, 2021) <<https://www.wsj.com/articles/maryland-to-pay-four-black-colleges-577-million-11616627378>> (as of June 22, 2021).

²⁸¹ Minor, J.T. (2008). Contemporary HBCUs: Considering institutional capacity and state priorities. A research report. Michigan State University, College of Education, Department of Educational Administration. East Lansing, MI.

²⁸² Minor, J.T. (2008). Contemporary HBCUs: Considering institutional capacity and state priorities. A research report. Michigan State University, College of Education, Department of Educational Administration. East Lansing, MI.

²⁸³ <https://www.aaup.org/article/challenges-and-possibilities-hbcus-after-covid-19-pandemic#.YedZuf7MK70>;

<https://www.chicagoreporter.com/1-in-10-hbcus-were-financially-fragile-before-covid-19-endangered-all-colleges-and-universities/>
²⁸⁴ Allen 2002

²⁸⁵ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), *The Journal of Blacks in Higher Education*, No. 41, p. 36.

²⁸⁶ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), *The Journal of Blacks in Higher Education*, No. 41, p. 36.

²⁸⁷ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), *The Journal of Blacks in Higher Education*, No. 41, p. 36.

Many HBCUs had huge waiting lists of a year or more.²⁸⁸ In the North, where less than a quarter of Black Americans lived at the time, although public universities admitted Black students, many private colleges and universities continued to reject Black students, or only admitted them in tiny numbers.²⁸⁹ Local Veterans Administration officials in the south were overwhelmingly white, and steered Black people to vocational programs that funneled them to menial jobs or prohibited use of the GI Bill to pay for college.²⁹⁰ Only 12 percent of Black veterans were able to use the GI bill to enroll in college, compared to 26 percent for veterans as a whole.²⁹¹ Although Black Americans used the educational benefits of the GI Bill more often than white Americans did, they could not use those benefits for college, like white Americans could, because they were denied entrance to white colleges and universities and often steered away from college degree programs and into vocational tracks.²⁹² As a result, the educational and economic gap between whites and Black Americans widened.²⁹³ See Chapter 13 on wealth for further discussion of related issues.

Today, discrimination in access to healthcare, employment, and housing continues to limit access to education benefits in the GI Bill for Black veterans compared to white veterans.²⁹⁴ While Black Americans make up 16.9 percent of the U.S. active duty force, studies show that Black veterans are not utilizing their benefits as much as white or Asian American veterans due to the aforementioned barriers.²⁹⁵

C. Deficiencies of Affirmative Action

The idea of affirmative action began as a concept with President John F. Kennedy issuing an executive order in 1961 requiring that federal contractors “take affirmative action to ensure that applicants are treated equally

Education, No. 41, p. 36.

²⁸⁸ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), *The Journal of Blacks in Higher Education*, No. 41, p. 36.

²⁸⁹ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), *The Journal of Blacks in Higher Education*, No. 41, p. 37.

²⁹⁰ Turner & Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans* (2003) 63 *J. of Econ. Hist.* 145, 151-154, 172.

²⁹¹ Katznelson, *When Affirmative Action was White: An Untold History of Racial Inequality in Twentieth-Century America* (2005) pp. 131-132 (hereafter *When Affirmative Action was White*); Blakemore, *How the GI Bill’s Promise was Denied to a Million Black WWII Veterans*, *History* (Apr. 20, 2021) <<https://www.history.com/news/gi-bill-black-wwii-veterans-benefits>> (as of July 7, 2020); Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 674-675; Herbold, *Never a Level Playing Field: Blacks and the GI Bill* (1994) 6 *J. of Blacks in Higher Ed.* 104; Katznelson, *When Affirmative Action was White*, *supra*, at fn. 291, pp. 129-130; Onkst, *‘First a Negro . . . Incidentally a Veteran’: Black World War Two Veterans and the G. I. Bill of Rights in the Deep South, 1944–1948* (1998) 31 *J. of So. His.* 517, 519-20, 523-24; Darity, *From Here to Equality*, *supra*, at fn. 58, p. 311; Turner & Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans* (2003) 63 *J. of Econ. Hist.* 145, 151-154, 172.

²⁹² See, *supra*, at fn. 291.

²⁹³ Katznelson, *When Affirmative Action was White*, *supra*, at fn. 291, pp. 134; Bracey, *Significance of HBCUs*, *supra*, at fn. 18, p. 675.

²⁹⁴ Ottley, *Empty Promise: Black American Veterans and the New GI Bill* (2014) 144 *New Directors for Adult & Continuing Ed.* 79, 79.

²⁹⁵ Ottley, *Empty Promise: Black American Veterans and the New GI Bill* (2014) 144 *New Directors for Adult & Continuing Ed.* 79, 79-81, 86-87 (according to the US Department of Housing and Urban Development, “nearly 56% of all homeless veterans are Black or Hispanic males”).

without regard to their race, color, religion, sex, or national origin,” and establishing the President’s Committee on Equal Employment Opportunity.²⁹⁶ Three years later, Congress had passed the Civil Rights Act of 1964 to ban discrimination on the basis of race, color, and national origin not only in employment, but also in education.²⁹⁷ With respect to employment, the federal department of labor ordered all federal contractors to prepare affirmative action plans including goals and timetables to improve the employment standing of specific groups of people, including Black Americans.²⁹⁸

In the late 1960s and 1970s, some colleges and graduate schools began to develop similar affirmative action policies to increase the number of Black and other underrepresented students.²⁹⁹ After the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, civil rights leaders made a big push for colleges to admit more Black students.³⁰⁰ In 1969, the next school year, the number of Black students admitted to America’s elite universities rose sharply, some by more than 100 percent.³⁰¹

The lawsuits came quickly. In 1971, two years after schools adopted affirmative action policies, a white student sued the University of Washington Law School, citing reverse racism as the reason for his rejection.³⁰² Because of this case, Harvard alumni believed that “semiliterate blacks are being accepted at the expense of white geniuses[,]” said David L. Evans, associate dean of admissions at Harvard in 1975.

By 1978, when the former nearly all white colleges and universities were still admitting fewer Black students than Black high school graduates, the Supreme Court decided in the *Regents of the University of California v. Bakke*, to limit states’ and universities’ ability to take race-based affirmative actions to address education discrimination.³⁰³ The Supreme Court declared that the policy of the University of California at Davis’s medical school to set aside 16 of 100 total seats for “minority groups” like Black Americans was unconstitutional because it prevented white students from competing for the 16 seats set aside.³⁰⁴ The Supreme Court declared in *Bakke* and subsequent cases that if a college or university wanted to have a more diverse class of students or make up for the history of discrimination against Black Americans in the United States then it could only take

²⁹⁶ Annenberg Classroom, JFK Calls for Government ‘Affirmative Action’, Executive Order 10925 <https://www.annenbergclassroom.org/timeline_event/jfk-calls-government-affirmative-action/> (as of January 28, 2022); Tierney, William G. “The Parameters of Affirmative Action: Equity and Excellence in the Academy.” *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, pp. 165–96, at p. 167 <https://doi.org/10.2307/1170625>.

²⁹⁷ Tierney, William G. “The Parameters of Affirmative Action: Equity and Excellence in the Academy.” *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, pp. 165–96, at p. 167 <https://doi.org/10.2307/1170625>.

²⁹⁸ Tierney, William G. “The Parameters of Affirmative Action: Equity and Excellence in the Academy.” *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, pp. 165–96, at p. 167 <https://doi.org/10.2307/1170625>.

²⁹⁹ https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/

³⁰⁰ <https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>

³⁰¹ <https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>

³⁰² <https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>

³⁰³ *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 307.

³⁰⁴ *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 307.

race into account as a factor among many and with limitations.³⁰⁵

In doing so, the Supreme Court rejected affirmative action programs, like Davis's program, that were intended to compensate Black students (and other racial minority groups) for the ways that federal, state, and local government had discriminated against them in education for more than 200 years, solely on account of their race. Instead, the Supreme Court described the American history of discrimination as "societal discrimination" that is "amorphous and ageless into the past[.]" which colleges and universities could not fix through programs like the one at Davis.³⁰⁶ At the same time, federal courts have not struck down university and college admissions policies, which provide a preference for legacy admissions, students whose parents, grandparents, and great grandparents attended the university or college.³⁰⁷ The argument is that such preferences are not race-based, but this does not grapple with the fact that white legacies may have received a preference in admission because they did not need to compete with Black students who were excluded from the admissions pool for centuries.³⁰⁸ Critics of the current way that colleges and universities practice affirmative action as sanctioned by the Supreme Court argue that using student diversity as a reason to include race as a factor does not address the original intention of desegregation or break down structural barriers for Black students.³⁰⁹

The percentage of Black college students has risen in the past 50 years, but it has dipped recently. The percentage of American college students who are Black increased from 10 percent in 1976 to 14 percent in 2017, but has dropped since from its high of 15 percent in 2011.³¹⁰ College enrollment rates for Black 18- to 24-year-old Americans still lag behind those for Asian and white Americans of the same age.³¹¹ A 2020 study found that, since 2000, the percentage of Black students enrolled has decreased at nearly 60 percent of the 101 most selective public colleges and universities.³¹² Researchers identify that one cause of declining enrollment is a focus on standardized testing as an admissions requirement because the scores from such testing do not reflect the potential or ability of Black students but rather the inequities that Black students experience throughout their education career, from less access to high-quality early education to a greater likelihood of attending schools with less funding, fewer experienced teachers, and fewer rigorous course options.³¹³ Other causes for declining

³⁰⁵ E.g., *Grutter v. Bollinger* (2003) 539 U.S. 306; *Gratz v. Bollinger* (2003) 539 U.S. 244.

³⁰⁶ *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 307.

³⁰⁷ Jack, *A Separate and Unequal System of College Admissions*, *The New York Times* (Sept. 16, 2020) [legacy students have a 25% percent higher chance of admission than nonlegacy with the same SAT scores]

<<https://www.nytimes.com/2020/09/15/books/review/seligo-korn-levitz-college-admissions.html>> (as of June 22, 2021).

³⁰⁸ Jack, *A Separate and Unequal System of College Admissions*, *The New York Times* (Sept. 16, 2020) [legacy students have a 25% percent higher chance of admission than nonlegacy with the same SAT scores]

<<https://www.nytimes.com/2020/09/15/books/review/seligo-korn-levitz-college-admissions.html>> (as of June 22, 2021).

³⁰⁹ https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/

³¹⁰ National Center for Education Statistics, *Fast Facts* <<https://nces.ed.gov/fastfacts/display.asp?id=98>> (as of June 18, 2021).

³¹¹ https://nces.ed.gov/programs/coe/pdf/coe_cpb.pdf

³¹² Nichols, *Segregation Forever?: The Continued Underrepresentation of Black and Latino Undergraduates at the Nation's 101 Most Selective Public Colleges and Universities*, *The Education Trust* (July 21, 2020), p. 3 <<https://edtrust.org/resource/segregation-forever/?emci=041bef3d-b3ca-ea11-9b05-00155d03bda0&emdi=4d05e95b-07cb-ea11-9b05-00155d03bda0&ceid=310222>> (as of June 22, 2021) (hereinafter *Segregation Forever?*).

³¹³ *Segregation Forever?*, *supra*, fn. 306, at pp. 7-8

enrollment include closure of for-profit colleges and declines at two-year public colleges due to unemployment, both types of colleges where Black students are overrepresented.³¹⁴

D. California

In 1996, California voters passed Proposition 209, which eliminated consideration of race in public education admissions, regardless of long-standing segregation and past discrimination.³¹⁵ This has had significant impacts on Black and other students of color in California.³¹⁶ In 2020, a University of California, Berkeley study found that this affirmative action ban has harmed Black and Latino students by significantly reducing enrollment across the University of California campuses and lowering their graduation rates.³¹⁷

An earlier 2006 study found that Black admissions had plummeted since the ban on affirmative action, particularly at the University of California, Los Angeles and U.C. Berkeley.³¹⁸ In 2020, the President of the University of California Student Association, Varsha Sarveshwar, commented that, “[t]he exclusion of Black and Latinx students from selective colleges and universities is nothing short of a crisis. . . . 7 out of 9 UC undergraduate campuses receive D and F grades in access for Black and Latinx students.”³¹⁹ Sarveshwar called on higher education leaders and policymakers to “move beyond public commitments to diversity – and act decisively to ensure that access is truly equitable.”³²⁰

The continued nature of the uneven playing field was highlighted in a recent legal settlement between student and community groups and the University of California.³²¹ The lawsuit, leading up to the settlement, was brought by then 19-year-old Kawika Smith, a high school student from South Los Angeles, and asserted that the use of SAT and ACT scores in admissions and university scholarship decisions may be discriminatory because

³¹⁴ Zahneis, *Why Has Black-Student Enrollment Fallen?*, The Chronicle of Higher Education (Aug. 18, 2019) <<https://www.chronicle.com/article/why-has-black-student-enrollment-fallen/>> (as of June 22, 2021).

³¹⁵ *Hopwood v. University of Texas* (5th Cir. 1996) 78 F.3d 932; Southern Education Foundation, *Miles To Go: A Report on Black Students and Postsecondary Education in the South* (1998) p. 50.

³¹⁶ *Hopwood v. University of Texas* (5th Cir. 1996) 78 F.3d 932; Southern Education Foundation, *Miles To Go: A Report on Black Students and Postsecondary Education in the South* (1998) p. 50.

³¹⁷ Watanabe, *Prop. 209's Affirmative Action Ban Down Down Black and Latino UC Enrollment and Wages, Study Finds*, MSN (Aug. 22, 2020) <<https://www.msn.com/en-us/news/us/prop-209-s-affirmative-action-ban-drove-down-black-and-latino-uc-enrollment-and-wages-study-finds/ar-BB18g9DD>> (as of June 22, 2021); Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, Center for Studies in Higher Education, U.C. Berkeley (Aug. 2020) <<https://cshe.berkeley.edu/publications/affirmative-action-mismatch-and-economic-mobility-after-california%E2%80%99s-proposition-209>> (as of June 22, 2021); Harper et al., *Access and Equity*, *supra*, at fn. 34, p. 401.

³¹⁸ Korry, *Black Student Enrollment at UCLA Plunges: Fallout from Prop. 209*, NPR (July 24, 2006) <<https://www.npr.org/templates/story/story.php?storyId=5563891>> (as of June 22, 2021).

³¹⁹ Nichols, *Segregation Forever?*, The Education Trust (July 21, 2020) <[Segregation Forever? - The Education Trust \(edtrust.org\)](https://www.edtrust.org/segregation-forever/)> (as of January 28, 2022).

³²⁰ Nichols, *Segregation Forever?*, The Education Trust (July 21, 2020) <[Segregation Forever? - The Education Trust \(edtrust.org\)](https://www.edtrust.org/segregation-forever/)> (as of January 28, 2022).

³²¹ McDonnell Nieto del Rio, *University of California Will No Longer Consider SAT and ACT Scores*, The New York Times (May 15, 2021) <<https://www.nytimes.com/2021/05/15/us/SAT-scores-uc-university-of-california.html?referringSource=articleShare>> (as of June 18, 2021).

they are proxies for wealth and race, and only exacerbate the gaps that exist due to unequal exam preparation between schools and based on whether parents can pay for private test tutors.³²² In addition, research has shown that Black students may perform poorly on standardized tests not because of genetic or cultural differences, but because negative stereotypes raise doubts and high-pressure anxieties in a test-taker's mind.³²³ Kawika Smith, told the Task Force at its October 2021 hearing that when he thought back to the day he took the SAT, he was “immediately met with this memory of feeling that I wasn’t worthy or capable of being in a collegiate environment, and this singular test determined that I would not be eligible for scholarship opportunities despite my academic achievements and having been in need of financial support to afford college[.]”³²⁴ The legal settlement with the University California ensures that SAT and ACT scores will not be used in admission and scholarship decisions until spring 2025.³²⁵

VI. Teaching Inaccurate History

Researchers and historians have raised significant concerns that the American education system is failing to teach a complete and accurate history of slavery and structural racism, along with the significant role that Black Americans had in developing this nation’s wealth without compensation. Dr. David Yacovone, a historian at Harvard University’s Hutchins Center for African & African American Research who has been studying United States history textbooks from 1839 to the 1980s found that many textbooks taught that white people were superior to Black people and downplayed, minimized, or justified slavery based on a racial caste system, with Black Americans appearing “only as a problem.”³²⁶ Dr. Yacovone explained that in the older history textbooks “[w]hite supremacy is a toxin. . . . injected . . . into the mind of many generations of Americans.”³²⁷

In addition, a 2018 study, *Teaching Hard History: American Slavery*, surveyed social studies teachers across the country and found that 97 percent agreed that learning about slavery is essential, but that there is a lack of deep coverage on the topic; 58 percent reported dissatisfaction with their textbooks; and 39 percent reported their

³²² McDonnell Nieto del Rio, *University of California Will No Longer Consider SAT and ACT Scores*, The New York Times (May 15, 2021) <<https://www.nytimes.com/2021/05/15/us/SAT-scores-uc-university-of-california.html?referringSource=articleShare>> (as of June 18, 2021).

³²⁴ AB 3121: Reparations Task Force Hearing (October 12, 2021)<<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

³²⁵ McDonnell Nieto del Rio, *University of California Will No Longer Consider SAT and ACT Scores*, The New York Times (May 15, 2021) <<https://www.nytimes.com/2021/05/15/us/SAT-scores-uc-university-of-california.html?referringSource=articleShare>> (as of June 18, 2021).

³²⁶ Benz, *Teaching White Supremacy: How Textbooks Have Shaped Our Attitudes on Race*, Huffington Post (Nov. 20, 2017) <https://www.huffpost.com/entry/teaching-white-supremacy-how-textbooks-have-shaped_b_5a0e4f65e4b023121e0e9142> (as of June 22, 2021); Stewart, ‘We are Committing Educational Malpractice,’ *Why Slavery is Mistaught—And Worse—In American Schools*, The New York Times Magazine (Aug. 19, 2019) <<https://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html?searchResultPosition=3>> (as of June 22, 2021).

³²⁷ Mineo, *How Textbooks Taught White Supremacy*, The Harvard Gazette (Sept. 4, 2020)<<https://news.harvard.edu/gazette/story/2020/09/harvard-historian-examines-how-textbooks-taught-white-supremacy/>> (as of Nov. 22, 2021).

state offered little or no support for teaching about slavery.³²⁸ The study gave an average score of 46 percent with respect to whether 10 popular U.S. history textbooks provide comprehensive coverage of slavery and enslaved people. The study also found that only eight percent of 1,000 American high school seniors surveyed could identify slavery as the central cause of the Civil War.³²⁹ To ensure that schools accurately teach American history, Dr. Yacovone recommends “teach[ing] the truth about slavery as a central institution in America’s origins, as the cause of the Civil War, and about its legacy that still lives on.”³³⁰

In Texas, the state that uses the largest amount of textbooks, thereby shaping the textbook industry, the Board of Education, rather than historians, began changing the history books to refer to formally enslaved people as workers.³³¹ In schools, students of color, including Black students, are less likely to see books with characters that share their cultural background and textbooks that reflect their experiences.³³² Many educators recognize that textbooks do not accurately and fully reflect experiences of people of color; only one in five educators, the vast majority of whom were white, in a June 2020 nationwide survey thought so.³³³ Educators of color were more likely find textbooks lacking.³³⁴ In 2020, Connecticut became the first state in the nation to require high schools to offer African-American, Black, Puerto Rican, and Latino studies.³³⁵

There is continued opposition to discussing the truth about slavery. Republicans in multiple states and in Congress have introduced bills to cut funding from schools that choose to use curriculum derived from the New York Times’ Pulitzer Prize-winning *1619* series of essays challenging readers to think about slavery as foundational to the nation’s origin story. They argue inclusion of this history delegitimizes the idea of the U.S. as a nation founded on principles of liberty and freedom and creates racial divisions.³³⁶ In addition, the concept that schools may be teaching students critical race theory—a core idea of which is that race is a social construct

³²⁸ Shuster, *Teaching Hard History: American Slavery*, Southern Poverty Law Center (2018) pp. 9-10 <<https://www.learningforjustice.org/sites/default/files/2020-08/TT-2007-Teaching-Hard-History-Report.pdf>> (as of June 22, 2021) (hereafter *Teaching Hard History*).

³²⁹ Shuster, *Teaching Hard History*, *supra*, at fn. 328, pp. 9-10; see also Washington, *Diversity in Schools Must Include Curriculum*, The Century Foundation (“Studies have shown that most students lack a basic understanding of such things as slavery. . . .”) <<https://tcf.org/content/commentary/diversity-schools-must-include-curriculum/?session=1>> (as of June 24, 2021).

³³⁰ Mineo, *How Textbooks Taught White Supremacy*, *The Harvard Gazette* (Sept. 4, 2020) <<https://news.harvard.edu/gazette/story/2020/09/harvard-historian-examines-how-textbooks-taught-white-supremacy/>> (as of Nov. 22, 2021).

³³¹ Isensee, *Why Calling Slaves ‘Workers’ is More than an Editing Error*, NPR (Oct. 23, 2015) <<https://www.npr.org/sections/ed/2015/10/23/450826208/why-calling-slaves-workers-is-more-than-an-editing-error>> (as of June 22, 2021).

³³² Schwartz, *Teachers Push for Books with More Diversity, Fewer Stereotypes*, *Education Week* (June 11, 2019) <<https://www.edweek.org/teaching-learning/teachers-push-for-books-with-more-diversity-fewer-stereotypes/2019/06>> (as of June 22, 2021); Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 107.

³³³ Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 107.

³³⁴ Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 107.

³³⁵ Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 107.

³³⁶ Kaur, *Bills in Several States Would Cut Funding to Schools that Teach the 1619 Project. But They Mostly Aren’t Going Anywhere*, *The Philadelphia Tribune* (Feb. 11, 2021) <https://www.phillytrib.com/news/bills-in-several-states-would-cut-funding-to-schools-that-teach-the-1619-project-but/article_90cd9c12-6c6c-11eb-ac9a-1b1eb28e00a2.html> (as of June 22, 2021); Bernstein, *Republican Lawmakers Introduce Bill to Defund ‘1619 Project’ Curricula in Schools*, *National Review* (July 14, 2021) <<https://www.nationalreview.com/2021/07/14/republican-lawmakers-introduce-bill-to-defund-1619-project-curricula-in-schools/>> (as of Nov. 22, 2021).

embedded in legal systems and policies—is under attack across the nation by groups that say it divides Americans and places the blame on white Americans for current and historical harm to Black Americans and other nonwhite Americans.³³⁷ But Randi Weingarten, the President of the American Federation of Teachers, one of the nation’s largest teaching unions, has said that teaching critical race theory is really about teaching “the truth” and pledged to defend any teacher “who gets in trouble for teaching honest history . . . Teaching the truth is not radical or wrong. Distorting history and threatening educators for teaching the truth is what is truly radical and wrong.”³³⁸ Weingarten publicly stated that those attacking critical race theory have other motives: “labeling any discussion of race, racism or discrimination as critical race theory to try to make it toxic” and “to deprive students of a robust understanding of our common history.”³³⁹

A. California

California student groups have long-raised concerns that the complete history of racism and segregation in the state and across the nation has been left out of textbooks, and that leaders from diverse backgrounds who helped create this nation and California are not reflected.³⁴⁰ “It isn’t just white heroes like Christopher Columbus or folks like George Washington or Thomas Jefferson. There was a lot more history behind it and we don’t learn a lot about the other important figures that contributed to making American into what it is,” Alvin Lee, President of Generation Up, a 4,000-member California student organization, shared with legislators considering how to change California’s history textbooks to better reflect the contributions of its diverse people. One state legislator who has advocated to ensure that California’s elementary and secondary schools teach a curriculum that reflects the history of Black Americans and other people of color, explained that: “Knowledge of our history plays a critical role in showing who we become” and “students [are more engaged] when they [see] themselves reflected in the coursework.”³⁴¹

Among other things, California’s approach to teaching about slavery has been critiqued. In 2018, a classroom teacher made headlines for staging a classroom simulation of conditions on a slaver’s ship to provide a “unique learning experience.”³⁴² A study by Southern Poverty Law Center found that California did a better job than other states in teaching slavery, but highlighted concerns with the approach of teaching about Harriet Tubman in second grade two years before slavery is taught and failing to discuss how false ideas of white economic and

³³⁷ Sawchuk, What is Critical Race Theory, and Why is It Under Attack? (May 18, 2021) EdSource <

<https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> (as of January 21, 2021).

³³⁸ Murakami, Teachers union vows to defend critical race theory in classrooms: ‘Truth is not radical’, The Washington Times (July 6, 2021) < <https://www.washingtontimes.com/news/2021/jul/6/teachers-union-vows-defend-critical-race-theory-cl/> > (January 28, 2022).

³³⁹ Murakami, Teachers union vows to defend critical race theory in classrooms: ‘Truth is not radical’, The Washington Times (July 6, 2021) < <https://www.washingtontimes.com/news/2021/jul/6/teachers-union-vows-defend-critical-race-theory-cl/> > (January 28, 2022).

³⁴⁰ E.g., Martinez, *Newsom’s Veto of Ethnic Studies Requirement Stirs Applause, Disappointment*, KCRA (Oct. 1, 2020)

<<https://www.kcra.com/article/newsoms-veto-of-ethnic-studies-requirement-stirs-applause-disappointment/34243062#>> (as of June 22, 2021) (hereafter *Newsom’s Veto of Ethnic Studies Requirement*); Harris, *A Roadmap for Reparations*, *supra*, at fn. **Error!**

Bookmark not defined.

³⁴¹ Assembly Member Medina, author, A.B. 1331, Analysis, Assembly Committee on Education (2019).

³⁴² Branigin, *Calif. High School Sparks Criticism for Using Slave-Ship Role-Play to Teach Students History*, The Root (Sept. 18, 2017) <<http://www.theroot.com/calif-high-school-sparks-criticism-for-using-slave-shi-1818512323>> (as of June 22, 2021).

political supremacy fueled and perpetuated slavery as an institution.³⁴³

In addition, research has shown that because school curricula often do not include content that reflects the experience, culture, and history of Black students, they and other students whose experience, culture, and history is not reflected, suffer.³⁴⁴ When Black students do not see their experiences and history reflected in the school curricula, this leads to a feeling that they are not important and even invisible and voiceless in the classroom.³⁴⁵ And while culturally responsive teacher training is one way to help Black students and other students of color feel welcomed, included, and valued in schools, teacher preparation is inadequate in training teachers to be culturally-responsive and to carry those practices into the classroom in both the way they teach and the materials they use when they teach.³⁴⁶

One other way to increase diversity in curriculum is by adding ethnic studies courses. “Ethnic studies” is a term used to encompass Black, Chicano, Latino, Native, and Asian American studies, and was developed in response to lack of representation of people from these groups in curricula taught in U.S. schools, colleges, and universities. Generally, ethnic studies is not taught in California elementary and secondary schools, despite known academic performance and attendance benefits.³⁴⁷ In 2016-17, only a small number—17,354 K-12 students statewide—were enrolled in ethnic studies courses.³⁴⁸ One reason for this: Only 51 percent of the 777 ethnic studies courses in social science in 2016-17 were approved as meeting A-G state university admissions requirements.³⁴⁹

This may be changing. In 2016, California state law mandated creation of a voluntary K-12 ethnic studies curriculum. Recently, on March 22, 2021, the State Board of Education approved the model ethnic studies

³⁴³ Shuster, *Teaching Hard History*, *supra*, at fn. 328, p. 12.

³⁴⁴ Adam, *When Authenticity Goes Missing: How Monocultural Children’s Literature is Silencing the Voices and Contributing to Invisibility of Children from Minority Backgrounds* (Jan. 15, 2021) *Education Sciences* 11, 32;

³⁴⁵ NEED BOOK CITATION, Chapter 1, p. 6 (citing Ali, Rohindra, & Coll, 2008; Boekaerts, 1998; Ladson-Billings, 1995).

³⁴⁶ NEED BOOK CITATION, Chapter 1, pp. 7-8 (citing Castagno & Brayboy, 2008; Hsaio, 2015; Ellerbrock, Cruz, Vasquez, & Howes, 2016; Ladson-Billings, 2000; Ladson-Billings, 2014; Renner et al., 2004; Siwatu, 2007; Thompson, 2015a; Villegas & Lucas, 2007; Zhao, Meyer, & Meyer, 2009; Irving & Hudley, 2008; Hsaio, 2015; Kaluanpur & Harry, 1997; Kea & Utley, 1998; Ladson-Billings, 2000; Ladson-Billings, 2006; Renner et al., 2004; Singh, 2011; Villegas & Lucas, 2002; Zhao, Meyer, & Meyer, 2009).

³⁴⁷ Dee, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, Stanford Center for Education Policy Analysis, Work Paper No. 16-01 (assignment to an ethnic studies court in ninth grade in high school increased ninth-grade student attendance by 21 percentage points, GPA by 14 grade points, and credits earned by 23).

³⁴⁸ Assem. Com. on Ed., *Analysis of Assem. Bill No. 331 (2019-2020 Reg. Sess.)* p. 4 -5 (hereafter *Analysis of AB 331*); see also San Francisco Board of Education Approves K-12 Black Studies Curriculum, Press Release (Oct. 20, 2020)[discussing 2016 Stanford Graduate School of Education study demonstrating that San Francisco’s implementation of a year-long ethnic studies course boosted attendance by 21 percentage points and academic performance by 1.4 grade points]<<https://www.sfusd.edu/about/news/current-news/board-of-education-approves-k-12-black-studies-curriculum>>(as of June 15, 2021) .

³⁴⁹ *Analysis of AB 331*, *supra*, at fn. 348, p. 4.

curriculum.³⁵⁰ However, in 2019, a California bill to mandate ethnic studies in all K-12 schools was vetoed.³⁵¹ Nevertheless, several districts have recently made completion of a course in ethnic studies a graduation requirement, including Montebello, Sacramento City, and Coachella.³⁵² In 2020, San Francisco approved development of a K-12 Black studies curriculum.³⁵³

At the higher education level, in 1969, after a student-led strike, the California State University (CSU) system established the first and only school of Ethnic Studies in the nation at San Francisco State University.³⁵⁴ Since that time, 22 of 23 CSU campuses have maintained some level of ethnic studies, but a recent legislative analysis suggested that 53 percent of CSU students had not taken a course between 2015 to 2018.³⁵⁵

In August 2020, Governor Newsom signed Assembly Bill 1460, which, beginning in 2024 to 2025, requires a three credit ethnic studies course for graduation, the first change to the CSU's general education curriculum in over 40 years.³⁵⁶ Legislative findings in support of the bill's passage included that white students and students of color benefit from taking ethnic studies courses, which "play an important role in building an inclusive multicultural democracy."³⁵⁷ In discussing the importance of the bill's passage, Senator Steven Bradford, the bill's co-author commented, "Ethnic studies is critical in learning our contributions to America and telling the true story of our rich history."³⁵⁸

VII. Conclusion

³⁵⁰ Asmelash, *After Years of Debate, California Finally Adopts Ethnic Studies Model Curriculum*, CNN (Mar. 22, 2021) <<https://www.cnn.com/2021/03/22/us/california-ethnic-studies-high-school-trnd/index.html?form=MY01SV&OCID=MY01SV>> (as of June 22, 2021) (hereafter *California Finally Adopts Ethnic Studies Curriculum*); see also California Department of Education, *State Board of Education Approves Historic Ethnic Studies Guidance for High Schools* (Mar. 18, 2021) <<https://www.cde.ca.gov/nr/ne/yr21/yr211rel21.asp>> (as of June 22, 2021).

³⁵¹ Martinez, *Newsom's Veto of Ethnic Studies Requirement*, *supra*, at fn. 340.

³⁵² Analysis of AB 331, *supra*, at fn. 348, 4; see Smith, *Orange County Debates Ethnic Studies: Vital learnings or 'Anti-White' Divisiveness?*, *Lost Angeles Times* (Apr. 28, 2021) <https://www.latimes.com/california/story/2021-04-28/ethnic-studies-slammed-as-anti-white-in-orange-county?utm_id=28151&sfmc_id=805927> (as of June 25, 2021) (while there's been oppositions by critics who argue ethnic studies promotes hate and victimization, students have shown support for an ethnic studies requirement, with one student sharing that such courses are "important 'because it tells the stories that help us belong'").

³⁵³ SFUSD, *Board of Education Approves K-12 Black Studies Curriculum*, Press Release (Oct. 20, 2020) <<https://www.sfusd.edu/about/news/current-news/board-of-education-approves-k-12-black-studies-curriculum>> (as of June 22, 2021); San Francisco Board of Education, Res. No. 208-25A2 In Support of Creating a K-12 Black Studies Curriculum that Honors Black Lives, Fully Represents the Contributions of Black People in Global Society, and Advances the Ideology of Black Liberation for Black Scholars in the San Francisco Unified School District, as adopted Oct. 20, 2020; Asmelash, *California Finally Adopts Ethnic Studies Curriculum*, *supra*, at fn. 350.

³⁵⁴ Assem. Com. on Higher Ed., Analysis of Assem. Bill No. 1460 (2019-2020 Reg. Sess.) as amended Mar. 21, 2019, p. 2. ("Commencing in 1968, CSU campuses responded to student demands and struggles and developed Ethnic studies units in different forms. Some institutions like San Francisco State created a school, which later became a College of Ethnic Studies.").

³⁵⁵ Assem. Floor, Analysis on Assem. Bill No. 1460 (2019-2020 Reg. Sess.) Feb. 11, 2020, p. 3.

³⁵⁶ Assem. Bill No. 1460 (2019-2020 Reg. Sess.); *California Requires Ethnic Studies for University System*, KCRA (Aug. 17, 2020) <<https://www.kcra.com/article/california-requires-ethnic-studies-for-university-system/33629400>> (as of June 22, 2021).

³⁵⁷ AB 1460 (Aug. 17, 2020).

³⁵⁸ Press Release, Senator Steven Bradford, Co-author, AB 1460 <<https://sd35.senate.ca.gov/news/2020-08-19-governor-signs-bill-require-ethnic-studies-california-state-university>> (as of June 25, 2021).

[Summary tying education to enslavement]

Because government acts have denied the vast majority of Black Americans continued access to education and high quality and well-funded schools from enslavement until the present, they have suffered a number of injuries, including lower levels of high school graduation, achievement, and college access and completion. These injuries widened the gap between Black and white wealth in America. The COVID-19 pandemic has made the education injuries even worse, because far more Black students than white student live in poverty, and students living in poverty have had less access to the technology needed to participate in remote schooling.³⁵⁹ California and the nation have not adequately accounted for the harmful intergenerational effects of education discrimination and denial.

The trend of a decrease in the Black-white academic gap has come to an end in recent years, confirming the persistence of deeply-rooted racial disparities despite the observed process of convergence.³⁶⁰ In California, over the past decade, average math and reading test scores rose for all student groups, except Black students. In districts where the gap narrowed most, data showed less socioeconomic inequality among students, more spending per pupil by the district, and fewer disparities in access to experienced teachers.³⁶¹ The gap also continues to exist in graduation rates, but it has reduced considerably nationwide and in California since the 1960s.³⁶² Whereas the gap in admission to and graduation from college and graduate schools has remained stagnant, with Black Americans half as likely as white Americans to have a college degree.³⁶³

Due to intergenerational denials of equal educational opportunity, Black people have also been denied a number of other benefits, including a positive link between one's own schooling and the schooling received by one's

³⁵⁹ Harris, *A Roadmap for Reparations*, *supra*, at fn. **Error! Bookmark not defined.**; Office for Civil Rights, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*, U.S. Dept. of Ed. (2021) pp. 2, 12-17 (finding that “the COVID-19 pandemic has had a strikingly negative impact on academic growth for many students of color, widening the pre-existing disparities” and that the “gap continued to widen sharply through winter 2021 for many Black and Latinx students”)

<<https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>> (as of June 25, 2021).

³⁶⁰ Bertocchi & Dimico, *Racial Gap in Education*, *supra*, at fn. 83; Jones, *New Data Shines Light on Student Achievement Progress – And Gaps – In California and US*, EdSource (Feb. 8, 2021) <<https://edsources.org/2021/new-data-shines-light-on-student-achievement-progress-and-gaps-in-california-and-u-s/648321>> (as of June 22, 2021) (hereafter *New Data Shines Light on Student Achievement*).

³⁶¹ Jones, *New Data Shines Light on Student Achievement*, *supra*, at fn. 360.

³⁶² Jones et al., *50 Years After the Kerner Commission: African Americans Are Better Off in Many Ways But Are Still Disadvantaged By Racial Inequality*, Economic Policy Institute (Feb. 26, 2018) <<https://www.epi.org/publication/50-years-after-the-kerner-commission/>> (as of June 22, 2021); California Department of Education, *California Department of Education Releases 2019-20 High School Graduation and Dropout Rates* (Dec. 11, 2020) <<https://www.cde.ca.gov/nr/ne/yr20/yr20rel101.asp>> (as of June 22, 2021).

³⁶³ Agrawal, *Black Students Are Succeeding in College at Higher Rates, But Far Behind White Peers, Report Says*, Los Angeles Times (Feb. 24, 2021) <latimes.com/california/story/2021-02-24/black-students-are-succeeding-in-college-at-higher-rates-but-far-behind-white-peers-report-says> (as of June 22, 2021); Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 4; Orfield et al., *Losing our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis*, The Civil Rights Project at Harvard University et al. (2004) <<https://civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/losing-our-future-how-minority-youth-are-being-left-behind-by-the-graduation-rate-crisis/orfield-losing-our-future-2004.pdf>> (as of June 22, 2021); Bridgeland et al., *The Silent Epidemic: Perspectives of High School Dropouts* (2006) p. 1.

children.³⁶⁴ More schooling is associated with higher earnings.³⁶⁵ However, white and Black Americans with the same educational level do not have the same level of wealth.³⁶⁶ White college graduates have seven times more wealth than their Black college graduate counterparts, even when you assume that the white and Black college graduates are in jobs making the same amount of money.³⁶⁷ Black American college graduates also have two-thirds of the net worth of white Americans who never finished high school.³⁶⁸ And Black college graduates continue to suffer higher unemployment rates than white college graduates.³⁶⁹

³⁶⁴ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 5 (citations and quotations omitted).

³⁶⁵ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 7, p. 6; Tamborini et al., *Education and Lifetime Earnings in the United States* (2015) 54 *Demography* 1383, 1385-1386.

³⁶⁶ Altonji & Doraszelski, *The Role of Permanent Income and Demographics in Black/White Differences in Wealth* (2005) 40 *J. Human Resources* 1, 9.

³⁶⁷ Broyles, *A Conversations About the Racial Wealth Gap—And How to Address it*, Brookings (June 18, 2019) <<https://www.brookings.edu/blog/brookings-now/2019/06/18/a-conversation-about-the-racial-wealth-gap-and-how-to-address-it/>> (as of June 22, 2021).

³⁶⁸ Hicks, et al., *Still Running Up the Down Escalator: How Narratives Shape our Understanding of Racial Wealthy Inequality*, p. 13, Insight Center for Community Economic Development, Duke University (2021) <https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf> (as of January 28, 2022).

³⁶⁹ E.g., Gould & Cooke, *Unemployment for Young Black Grads is Still Worse Than it was For Young White Grades in the Aftermath of the Recession*, Economic Policy Institute (May 11, 2016) <<https://www.epi.org/publication/unemployment-for-young-black-grads-is-still-worse-than-it-was-for-young-white-grads-in-the-aftermath-of-the-recession/>> (as of June 22, 2021).

Chapter 7. Racism in Environment and Infrastructure

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

The legacy of slavery, Jim Crow, and government policies known as redlining have created environmental impacts that have harmed and continue to harm Black Americans. First, government policies forced Black Americans to live in poor-quality housing, exposing them to disproportionate amounts of lead poisoning¹ and increasing their risks of infectious disease,² including COVID-19.³ Outside of their homes, Black Americans are also exposed to far more pollutants than white Americans, partially because redlining explicitly grouped Black Americans and other “inharmonious racial groups” with polluting sources.⁴ Second, government actors developed infrastructure projects, like highways and parks, in ways that destroyed and segregated Black communities, and also failed to provide or repair public services like sewage lines and water pipes.⁵ Finally, Black Americans and their homes are more vulnerable than white Americans to the dangerous effects of extreme weather patterns like heat waves and hurricanes, disparities which are made worse by manmade climate change.⁶

Section III of this chapter addresses the substandard housing and overcrowding problems faced by Black Americans throughout American history caused by government practices including redlining. Section IV of the chapter addresses discusses the environmental pollutants to which Black Americans are exposed as result of similar and related government practices, which disproportionately continues to subject Black Americans to hazardous waste management, oil and gas production, automobile and diesel fumes. Section V addresses the discriminatory choices made by government actors in implementing infrastructure development and related public services, which consistently have disadvantaged Black Americans. Section VI address the discriminatory impacts of climate change, which are experienced disproportionately by Black Americans as a result of government actions and policies that have imposed those harms on them.

¹ See, e.g., Haslam, Robert, Lead poisoning, *Paediatrics & Child Health* Vol. 8,8 (2003): 509-10; Tong Shilu, von Schirnding, Yasmin & Prapamontol, Tippawan, *Environmental Lead Exposure: A Public Health Problem of Global Dimensions*, *Bulletin of the World Health Organization*, 2000, 78 (9).

² WHO Housing and Health Guidelines. Geneva: World Health Organization (2018), Household crowding; Krieger, J., & Higgins, D. L. (2002), Housing and health: time again for public health action. *American journal of public health*.

³ Jackie Botts and Lo Bénichou, *The Neighborhoods Where COVID Collides with Overcrowded Homes*, *Cal Matters* (June 12, 2020).

⁴ *Pollution and Prejudice*, CalEPA, January 25, 2021, p. 6.

⁵ Jeremy S. Hoffman, Vivek Shandas, Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas Climate 2020*, 8(1), 12; Published: 13 January 2020; Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 270.

⁶ Hoffman et al, *supra*.

III. Substandard Housing and Overcrowding

Throughout American history and to this day, Black Americans have lived in housing of worse quality than white Americans, and paid more to live in it.⁷

A. Nationally

Starting in the early 20th century, as Black Americans primarily rented housing in urban areas, they were consistently charged higher rents than white people.⁸ Before the federal Fair Housing Act made housing discrimination based on race illegal, landlords would freely admit that they needed to charge Black renters higher rent because white renters did not want to share an apartment building with Black Americans.⁹ To pay for the higher rents, Black families often took in lodgers or shared apartments, which created additional overcrowding.¹⁰

In modern times, about 2.6 million (7.5 percent) non-Hispanic Blacks and 5.9 million white people (2.8 percent) live in substandard housing in America, which is defined largely in relation to the housing's susceptibility to waterborne and airborne communicable diseases.¹¹ Black households are still twice as likely as white households to lack indoor plumbing nationwide.¹² Black households are more poorly ventilated than white households in general, leading to excess moisture that supports the growth of mold and vermin, which can lead to or exacerbate asthma and other breathing issues.¹³

Black families also still experience overcrowded housing—generally defined as having more than 1.5 or two persons per room living in a household—at three times the rates of white Americans.¹⁴ Overcrowded housing is linked with physical and mental health problems, including higher rates of exposure to household lead poisoning.¹⁵ This association may be correlative rather than causative, since overcrowded housing is more likely to be older housing, and also more likely to house low-income workers in heavy industries that may cause them to bring lead dust and other contaminants into the household.¹⁶ Overcrowding has similarly shown to increase the risk of spread of infectious diseases, such as tuberculosis, diarrhea, and infectious

⁷ Rothstein, *The Color of Law* (2017) pp. vii-xvii; Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, at 153, 179-180, 183; see also Carter, *From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) p. 37.

⁸ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, at 60, 173, 208, 280.

⁹ *Id.* at 210, 280.

¹⁰ *Ibid.*

¹¹ Jacobs D. E. (2011). Environmental health disparities in housing. *American journal of public health*, 101 Suppl 1(Suppl 1), S115–S122. <https://doi.org/10.2105/AJPH.2010.300058>.

¹² Nicole Acevedo, When it comes to access to clean water, 'race is still strongest determinant,' report says, *NBC News* (Nov. 27, 2019).

¹³ Jacobs D. E. (2011). Environmental health disparities in housing. *American journal of public health*, 101 Suppl 1(Suppl 1), S115–S122. <https://doi.org/10.2105/AJPH.2010.300058>.

¹⁴ U.S. Dep't of Housing and Urban Dev., Office of Policy Dev. and Research, *Measuring Overcrowding in Housing* (2007), at 18.

¹⁵ See, e.g., Haslam, Robert, *Lead poisoning, Paediatrics & Child Health* Vol. 8,8 (2003): 509-10; Tong Shilu, von Schirnding, Yasmin & Prapamontol, Tippawan, *Environmental Lead Exposure: A Public Health Problem of Global Dimensions*, *Bulletin of the World Health Organization*, 2000, 78 (9).

¹⁶ *Ibid.*

respiratory illnesses.¹⁷ Although most studies on the link between overcrowding and infectious disease spread are correlative, the close proximity of, and inability to distance from, fellow household residents is almost certainly causal.¹⁸ At least one recent study demonstrated that overcrowding and other poor housing conditions correlated with dramatically greater incidence and mortality of COVID-19 infections across the country.¹⁹

Overcrowded housing also is linked with various mental health issues, including psychological distress, alcohol abuse, depression, and sleep disorders.²⁰ Living in overcrowded housing is also associated with social withdrawal and feelings of helplessness,²¹ as well as an increase in hostility among household residents due to the lack of privacy and time to oneself.²²

Overcrowded housing also harms school performance for children, which has lasting impacts on their educational attainment.²³ Living in a house with too many people makes it difficult to find a quiet place to study,²⁴ and even a quiet place to sleep.²⁵ Children in crowded houses are more likely to catch infectious diseases from others in their household, making it more likely for the child to stay home from school.²⁶ Children from overcrowded homes are more likely to be held back a grade,²⁷ they show reduced math and reading test scores,²⁸ and they demonstrate higher rates of behavioral problems such as bullying and other disruptive behaviors.²⁹ Moreover, some international research has found that children and adolescents in overcrowded housing are more likely to engage in violent behavior in the home,³⁰ as well as to be victims of sexual abuse.³¹

¹⁷ WHO Housing and Health Guidelines. Geneva: World Health Organization (2018), Household crowding; Krieger, J., & Higgins, D. L. (2002), Housing and health: time again for public health action. *American journal of public health*.

¹⁸ *Id.* at 30.

¹⁹ Ahmad K, Erqou S, Shah N, Nazir U, Morrison AR, Choudhary G, et al. (2020), Association of poor housing conditions with COVID-19 incidence and mortality across US counties. *PLoS ONE* 15(11).

²⁰ WHO Housing and Health Guidelines, *supra*, at 28-29.

²¹ W.C. Regoeczi, "Crowding in Context: An Examination of the Differential Responses of Men and Women to High-Density Living Environments," *Journal of Health and Social Behavior*, 49 (2008): 254-68; "When Context Matters: A Multilevel Analysis of Household and Neighborhood Crowding on Aggression and Withdrawal," *Journal of Environmental Psychology*, 23 (2003): 457-70.

²² Earle Chambers et al, MacArthur Foundation: How Housing Matters - The Link between Housing, Neighborhood, and Mental Health (2014).

²³ Claudia D. Solari and Robert D. Mare, Housing Crowding Effects on Children's Wellbeing, *Soc Sci Res.* 2012 Mar; 41(2): 464-476.

²⁴ *Id.* at 3.

²⁵ *Ibid.*

²⁶ *Ibid.*; see also Kate Cimini and Jacky Botts, Cal Matters, Close Quarters: California's Overcrowded homes fuel spread of coronavirus among workers (June 12, 2020).

²⁷ Goux D, Maurin E. The Effect of Overcrowded Housing on Children's Performance at School. *Journal of Public Economics*. 2005; 89:797-819.

²⁸ Claudia D. Solari and Robert D. Mare, Housing Crowding Effects on Children's Wellbeing, *Soc Sci Res.* 2012 Mar; 41(2): 464-476, at 10.

²⁹ Evans GW, Saegert S, Harris R. Residential Density and Psychological Health among Children in Low-Income Families. *Environment and Behavior*. 2001; 33(2):165-180.

³⁰ Makinde, O., Björkqvist, K., & Österman, K. (2016). Overcrowding as a risk factor for domestic violence and antisocial behaviour among adolescents in Ejigbo, Lagos, Nigeria. *Global mental health (Cambridge, England)*, 3, e16. <https://doi.org/10.1017/gmh.2016.10>

³¹ Cant RL, O'Donnell M, Sims S, Harries M. Overcrowded housing: One of a constellation of vulnerabilities for child sexual abuse. *Child Abuse Negl.* 2019 Jul;93:239-248. doi: 10.1016/j.chiabu.2019.05.010. Epub 2019 May 22. PMID: 31128453.

B. California

California displays the same racial disparities regarding overcrowded housing as the rest of America.³² The most recent data provided by the California Department of Public Health reveals that Black Californians are approximately 2.5 times more likely to live in housing considered “overcrowded,” and 2.8 times more likely to live in housing considered “severely overcrowded,” compared to white Californians.³³

Black Californians have also been forced to live in substandard housing, sometimes as a direct result of government action. One particularly egregious historical example is the federal government’s building of public housing in Richmond to accommodate ship workers during World War II, which was officially and explicitly segregated.³⁴ As part of those efforts, the federal government put programs in place that enabled white workers to access permanent, residential housing, but offered Black workers no permanent housing.³⁵ While some Black workers were able to find low-quality long-term housing in areas of the East Bay, others lived in barns, minimal shelter like tents or cardboard shacks, or even without any shelter in open fields.³⁶

In California specifically, the problem of overcrowded housing has been linked to the rapid spread of COVID-19 in neighborhoods with a higher number of Black residents, such as the Salinas Valley, South Los Angeles, and Oakland.³⁷ Neighborhoods with overcrowded housing in California had rates of COVID-19 that were 3.7 times higher than neighborhoods without overcrowded housing.³⁸

IV. Environmental Pollutants

U.S. government policies, as discussed in Chapter 5 on housing, penned Black Americans into poorer neighborhoods with polluting industries, garbage dumps, and other sources of toxic health harms.³⁹ Local governments zoned Black neighborhoods as industrial instead of residential specifically to segregate Black residents from white residents. White neighborhoods frequently were zoned by local entities to explicitly ensure that few industrial or polluting business could locate within them, again pushing environmental pollution into Black neighborhoods.⁴⁰ Redlined and segregated Black neighborhoods were cheaper for polluting industries to build on. This became a downward spiral: the more garbage dumps and sewer treatment plants a neighborhood had, the cheaper the land was, and the more likely that other polluting industries would move in.⁴¹ Without access to the mortgages and loans available to white Americans, Black homeowners also had less money to maintain and improve their homes, which made housing conditions

³² Jacobs D. E., *supra*.

³³ California Department of Public Health, Office of Health Equity, Housing Overcrowding, <https://www.cdph.ca.gov/Programs/OHE/Pages/HCI-Housing-Overcrowding.aspx>.

³⁴ Rothstein, *The Color of Law* (2017) pp. 5-6.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ Kate Cimini and Jacky Botts, *Cal Matters*, Close Quarters: California’s Overcrowded homes fuel spread of coronavirus among workers (June 12, 2020) (noting that West Adams, a mostly Black and Latino neighborhood of Los Angeles, has much higher rates of overcrowding and of COVID-19 cases).

³⁸ Jackie Botts and Lo Bénichou, *The Neighborhoods Where COVID Collides with Overcrowded Homes*, *Cal Matters* (June 12, 2020).

³⁹ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, at 503.

⁴⁰ *Pollution and Prejudice*, CalEPA, January 25, 2021, p. 6-7.

⁴¹ *Id.* at 6; Taylor, *supra* at 1269-1271.

worse and prevented Black Americans from moving away from polluting sources.⁴² Black communities across the country still experience higher rates of pollution and the negative health outcomes caused by exposure to pollutants.⁴³

A. Sources of Environmental Pollution

Black Americans are exposed to greater pollution from virtually every polluting source when compared to white Americans, including hazardous waste, heavy industry, vehicle traffic, and construction—all of which can be partially attributed to redlining and other historical discrimination.⁴⁴

1. Hazardous Waste

One source of pollution that has been continuously prevalent in Black communities is hazardous waste sites. This pollution has been shown to correlate with increased rates of asthma, cancer, lung disease, and heart disease.⁴⁵ For example, in 2020, the *New York Times Magazine* profiled the story of Kilynn Johnson, a Black resident of Philadelphia, who developed asthma as a child and eventually gallbladder cancer after growing up in a largely Black neighborhood proximate to hazardous waste facilities and oil refineries.⁴⁶ After recovering from surgery and chemotherapy, Johnson and a neighbor documented over two dozen close relatives who were diagnosed with some form of cancer, many rare, and many at unusually young ages.⁴⁷

Black Americans have long been disproportionately exposed to these harms. As of 1983, approximately three out of every four communities in which hazardous waste landfills were found were predominantly Black.⁴⁸ In 1991, the federal Environmental Protection Agency (EPA) acknowledged that a disproportionate number of toxic waste facilities were found in Black neighborhoods throughout the country.⁴⁹ More recently, a study in 2007 analyzed 38 states and found Black Americans disproportionately live in neighborhoods that host hazardous waste facilities, and are twice as likely as white Americans to live near a hazardous waste facility.⁵⁰ As of 2020, Black Americans are still 75 percent more likely to live near facilities that handle hazardous waste.⁵¹

Moreover, studies have shown that that the EPA’s handling of toxic waste clean-up sites—i.e., so-called “Superfund” sites, or former industrial sites polluted with dangerous levels of hazardous waste—has

⁴² Ibid.

⁴³ See, e.g., Hayley Munguia, *Environmental Racism: Why Long Beach Residents of Color Have Worse Health Outcomes*, PRESS TELEGRAM (Mar. 8, 2021), <https://www.presstelegram.com/2021/03/08/environmental-racism-why-long-beach-residents-of-color-have-worse-health-outcomes>.

⁴⁴ Tabuchi & Popovich, *People of Color Breathe More Hazardous Air. The Sources Are Everywhere* (Apr. 28, 2021) N.Y. Times <<https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>> [as of June 21, 2021].

⁴⁵ Linda Villarosa, *Pollution is Killing Black Americans – This Community Fought Back*, *New York Times Magazine* (July 28, 2020).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Rothstein, *supra* at 56.

⁴⁹ *Id.* at 56.

⁵⁰ Saha, *A Current Appraisal of Toxic Wastes and Race in the United States in Toxic Wastes and Race at Twenty: 1987-2007* (2007) p. 58.

⁵¹ Villarosa, *supra*.

consistently favored white communities over minority communities, and an external audit of the handling of discrimination complaints by the EPA determined that the agency failed to adequately respond to those complaints.⁵² From 1985 to 1991, fines assessed by the EPA against polluters in minority zip codes were approximately 46 percent lower than in white zip codes.⁵³ The EPA also took longer to address hazardous sites in minority communities than in white ones, and polluters were required to undertake more stringent cleanup measures in white communities.⁵⁴

2. Oil and Gas Pollution

The oil and gas industry, as permitted by governmental entities, has also imposed disproportionate environmental harms on Black Americans. Oil and gas extraction is associated with various carcinogenic pollutants, including benzene.⁵⁵ Studies have shown that living near these sources elevates one's cancer risk.⁵⁶ Black communities across the country are 75 percent more likely to live near oil and gas extraction and refining facilities than other Americans.⁵⁷ Black Americans are also more likely than any other group to live near fracking facilities, which create similar pollution to more traditional oil and gas facilities.⁵⁸ The natural gas produced via fracking contains various toxins and carcinogens, including hexane, benzene, and hydrogen sulfide.⁵⁹ These dangerous, cancer-causing chemicals are emitted at the initial facilities that gather natural gas, at points along the systems that move the from those facilities, and at the destination plants at which they are processed, all of which occur disproportionately in Black neighborhoods.⁶⁰ Moreover, as Black Americans have grown increasingly involved in the fight against oil and gas pollution in their communities, fossil fuel companies have pushed back by arguing that the fight for environmental justice would particularly *harm* black communities by robbing them of oil and gas-related jobs, including through a false report that the National Association for the Advancement of Colored People was opposed to a clean energy plan.⁶¹

3. Automobile Traffic

Although not specific to one particular industry, Black Americans are also subject to disproportionate environmental harms as a result of automobile traffic. Black Americans generally live in areas with more than double the traffic density of white neighborhoods, and experience the highest traffic density of any

⁵² Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 99-100.

⁵³ *Ibid.*.

⁵⁴ *Ibid.*

⁵⁵ Garcia-Gonzalez et al. 2019. Hazardous Air Pollutants Associated with Upstream Oil and Natural Gas Development: A Critical Synthesis of Current Peer-Reviewed Literature. *Annual Review of Public Health*, 40, 283-304.

⁵⁶ Johnston et al. 2019. Impact of upstream oil extraction and environmental public health: A review of the evidence. *Sci Total Environ*, 20, 657, 187-199. <https://pubmed.ncbi.nlm.nih.gov/30537580/>

⁵⁷ Nathalie Baptiste, *Mother Jones*, Study: Black People Are 75 Percent More Likely to Live Near Toxic Oil and Gas Facilities (Nov. 14, 2007).

⁵⁸ Klara Zwickl, *The Demographics of Fracking: A Spatial Analysis for four U.S. States*, *Ecological Economics*, Volume 161, 2019, Pages 202-215.

⁵⁹ Leslie Flieschman & Marcus Franklin, *Fumes Across the Fenceline: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, NAACP & Clean Air Task Force (2017) 13.

⁶⁰ *Ibid.*

⁶¹ Nikayla Jefferson & Leah C. Stokes, *Our Racist Fossil Fuel Energy System*, *Boston Globe* (Jul. 17, 2020); see also Hiroko Tabuchi, *How One Firm Drove Influence Campaigns Nationwide for Big Oil*, *New York Times* (Nov. 11, 2020).

racial or ethnic group.⁶² As a result, Black Americans are exposed to more on-road sources of carcinogenic pollution than any other racial or ethnic group.⁶³ Auto pollution includes, among other things, exposure to nitrogen dioxide (NO₂), which contributes to asthma and other respiratory ailments and generally reduces lung function.⁶⁴ While exposure to NO₂ is decreasing across all races in the United States, the percentage increased exposure experienced by Black Americans as compared to white Americans has changed little.⁶⁵ Moreover, among all pollution sources nationwide, Black Americans are more disproportionately exposed to air pollution attributable to construction than as to any other air pollution source.⁶⁶

4. Lead

Also not specific to any industry, lead pollution is disproportionately high in Black communities that were officially segregated through federal redlining.⁶⁷ Although this has been known for decades, commentators have noted that “surprisingly little research” has examined the extent of the problem.⁶⁸ This toxic lead exposure comes from myriad sources that are found in greater amounts in Black neighborhoods, including toxic industrial sites near to residences.⁶⁹ Exposure to lead from outside the home can be through lead water pipes, gasoline exhaust, and nearby smelting plants.⁷⁰ Even though most smelting plants that created lead pollution have been closed since the 1960s, soil pollution surrounding these facilities remains an active problem.⁷¹ Nationally, Black children are three times as likely to have elevated blood rates of lead, and these patterns have persisted even as lead exposure rates have decreased for children of other races and ethnicities.⁷² These disparities are even more dramatic in some areas with older housing stock. For example, a 2004 report found that in Chicago, Black children were five to 12 times as likely to exhibit lead poisoning than white children.⁷³ This is at least partially because Black Chicagoans are disproportionately located in older housing stock with deteriorating lead-based paint.⁷⁴

⁶² Pratt, G. C., Vadali, M. L., Kvale, D. L., & Ellickson, K. M., *International Journal of Environmental Research and Public Health* (2015). Traffic, Air pollution, Minority and Socio-Economic Status: Addressing Inequities in Exposure and Risk.

⁶³ *Ibid*; see also Apelberg BJ, Buckley TJ, White RH. Socioeconomic and racial disparities in cancer risk from air toxics in Maryland. *Environ Health Perspect.* 2005; 113: 693-699.

⁶⁴ United States Environmental Protection Agency, Nitrogen Dioxide (NO₂) Pollution, Basic Information about NO₂, <https://www.epa.gov/no2-pollution/basic-information-about-no2>.

⁶⁵ Lara P. Clark, Dylan B. Millet, and Julian D. Marshall, Changes in Transportation-Related Air Pollution Exposures by Race-Ethnicity and Socioeconomic Status: Outdoor Nitrogen Dioxide in the United States in 2000 and 2010, *Environmental Health Perspectives* Vol. 125 (9) (2017), <https://doi.org/10.1289/EHP959>.

⁶⁶ Tabuchi & Popovich, People of Color Breathe More Hazardous Air. The Sources Are Everywhere (Apr. 28, 2021) *N.Y. Times* <<https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>> [as of June 21, 2021].

⁶⁷ Christopher Muller et al., Environmental Inequality: The Social Causes and Consequences of Lead Exposure, *ANNUAL REV. SOCIOLOG.* (2018), <https://escholarship.org/content/qt7z15t63g/qt7z15t63g.pdf>.

⁶⁸ Sampson, R., & Winter, A. (2016). THE RACIAL ECOLOGY OF LEAD POISONING: Toxic Inequality in Chicago Neighborhoods, 1995-2013. *Du Bois Review: Social Science Research on Race*, 13(2), 261-283. doi:10.1017/S1742058X16000151.

⁶⁹ *Ibid*.

⁷⁰ *Id.* at 265.

⁷¹ *Id.* at 266.

⁷² Emily Benfer, Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color, 41 *HARV. ENV. L. REV.* 494, 504-05 (2017); Sampson & Ritter, *supra*.

⁷³ Chicago Department of Public Health & Loyola University Chicago Civitas ChildLaw Center, *Lead Safe Chicago: A Plan to Eliminate Childhood Lead Poisoning in Chicago by 2010* (June 30, 2004).

⁷⁴ Sampson & Ritter, *supra*.

All of these forms of environmental pollution have serious health consequences, resulting in chronic illnesses like diabetes, asthma, and heart disease, and affecting maternal health and educational outcomes.⁷⁵ Unsurprisingly, Black Americans suffer disproportionately from these health problems.⁷⁶ Moreover, these health consequences persist long after exposure, with at least one study showing substantial central nervous system deficits 10 years after childhood exposures.⁷⁷ For further discussion of disparities in health outcomes not specific to environmental pollution, see Chapter 12 on health.

B. California

Historically, federal public housing was explicitly created to segregate Black Californians into areas with obviously greater pollution burdens due to immediately adjacent polluting sources. For example, when the federal government built public housing in Richmond to accommodate ship workers, as discussed above, it placed temporary housing for Black workers by the railroad tracks and shipbuilding areas, subjecting them to particulate matter (e.g., small cancer-causing particles associated with diesel exhaust) and industrial pollution, but built higher quality housing for white workers further inland.⁷⁸

Many areas within California still demonstrate racial disparities traceable to state and federal government action. A 1994 study found that the “dirtiest” zip code in all of California was in a largely Black and Latino neighborhood of East Los Angeles.⁷⁹ Neighborhoods that were explicitly redlined by federal agencies in the 1930s—ranging from South Stockton to West Oakland to Wilmington in Los Angeles—continue to have some of the highest average pollution levels in the state.⁸⁰

The historically Black area of Bayview-Hunters Point in San Francisco has a long history of environmental racism, with Black residents subjected to myriad environmental harms, including radioactive contamination from a nearby shipyard, not experienced by whiter, wealthier areas within San Francisco.⁸¹ Moreover, recent environmental remediation efforts have come hand-in-hand with a substantial decline in the percentage of Black residents.⁸² Starting in the 20th century, Black residents of the neighborhood were displaced by white and Asian-American residents.⁸³ Although this has largely been attributed to the “dot com” boom and rising housing prices across San Francisco, scholars have offered a variety of more discriminatory factors that drove Black residents out.⁸⁴ These include the San Francisco Housing Authority’s demolition of public

⁷⁵ Access to Safe Drinking Water, Public Policy Institute of America (2021), <https://www.ppic.org/publication/access-to-safe-drinking-water>.

⁷⁶ *Ibid.* See also NAACP, WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA’S CITIES (2019), https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf.

⁷⁷ Needleman HL, Schell A, Bellinger D, Leviton A, Allred EN. The long-term effects of exposure to low doses of lead in childhood. An 11-year follow-up report. *N Engl J Med.* 1990 Jan 11;322(2):83-8. doi: 10.1056/NEJM199001113220203. PMID: 2294437.

⁷⁸ Rothstein, *The Color of Law* (2017) pp. 5-6.

⁷⁹ Kay, J., 1994, *California’s Endangered Communities of Color*, In R. Bullard, editor, *Unequal Protection*. San Francisco, CA: Sierra Club Books, 155-188.

⁸⁰ Pollution and Prejudice, CalEPA, January 25, 2021, p. 10.

⁸¹ Helen H. Kang, Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification, 26 *Mich. J. Race & L.* 23, 31-34 (2021); Testimony of Helen Kang, California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021).

⁸² Kang, *supra*. At 31-34.

⁸³ *Id.* at 31-32.

⁸⁴ *Id.* at 32.

housing, the San Francisco Police Department’s enforcement of gang injunctions, and the issuance of subprime mortgage loans.⁸⁵ As one Black long-time resident described it, the formerly-polluted community in which she had long lived is now dramatically cleaner, but is no longer meant for “her or for her grandchildren.”⁸⁶

Similarly, the divisions between the wealthier, white “hills” of Oakland, California, and the poorer, Black “flats” that were first established by federal redlining have remained today, with Black residents of the low-lying areas still subject to far greater environmental pollutants.⁸⁷ In Oakland’s earlier days, redlining placed Black Californians in these “flats” adjacent to various heavy industries and manufacturing centers, acknowledging that the housing available was of low quality and subject to noticeable industrial “odors.”⁸⁸ From the 1950s through the 1980s, substantial freeway construction projects placed substantial pollution burdens on all of the low-lying areas in Oakland, including in the few parks and other green space available to them.⁸⁹ Residents of these areas continue to experience quantifiably greater health consequences, such as emergency room visits due to asthma.⁹⁰

These patterns exist across California with respect to facilities that handle hazardous waste. Los Angeles has 1.2 million people living near facilities that handle hazardous waste, and 91 percent of them are people of color.⁹¹ Black Americans live near hazardous waste facilities at rates higher than other people of color as a whole.⁹² This is true elsewhere in California, leading to increased lifetime cancer risks for Black Californians that correlate with exposure to outdoor air toxins.⁹³

As is the case nationwide, the oil and gas industry disproportionately affects Black Californians. More than two million Californians live within 2,500 feet of an unplugged oil or gas well, with greater percentages of Black Americans living near these sources of pollution than the California population as a whole.⁹⁴ Aside from the exposure to carcinogenic chemicals involved with oil and gas production, toxic residues brought up by subterranean drilling can contaminate local aquifers that supply drinking water.⁹⁵ In the greater Los Angeles Area, notable oil production exists in Inglewood, Baldwin Hills, and Culver City—all areas which

⁸⁵ *Ibid.*

⁸⁶ *Id.* at 33.

⁸⁷ Testimony of C.N.E. Corbin, California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021); C.N.E. Corbin, *In Red, Black, and Green: The Political Ecological Eras of Oakland from 1937-2020* (unpublished draft manuscript provided by author).

⁸⁸ Corbin, *supra*, at 11.

⁸⁹ *Id.* at 21.

⁹⁰ Anthony L. Nardone et al., “Associations between Historical Residential Redlining and Current Age-Adjusted Rates of Emergency Department Visits Due to Asthma across Eight Cities in California: An Ecological Study,” *The Lancet Planetary Health* 4, no. 1 (January 1, 2020): e24–31.

⁹¹ Janet Wilson, California Has Largest Number of Minorities Near Hazardous Waste, *L.A. TIMES* (Apr. 12, 2007), <https://www.latimes.com/archives/la-xpm-2007-apr-12-me-toxic12-story.html>.

⁹² Robert D. Bullard et al., *Toxic Wastes and Race at Twenty, 1987—2007, A Report Prepared for the United Church of Christ Justice & Witness Ministries* (2007) at 80 (showing that while people of color broadly are overrepresented in neighborhoods adjacent to toxic waste facilities by approximately 38 percent, Black residents are overrepresented by approximately 45 percent).

⁹³ Rachel Morell-Forsch et al., *Environmental Justice and Regional Inequality in Southern California: Implications for Future Research*, 110 *ENVTL HEALTH PERSPECTIVES* 149 (2002).

⁹⁴ *The Toxic Legacy of Old Oil Wells: California’s Multibillion-Dollar Problem*, *L.A. TIMES* (2020), <https://www.latimes.com/projects/california-oil-well-drilling-idle-cleanup>.

⁹⁵ *Ibid.*

have a substantially greater Black population than Los Angeles generally.⁹⁶ Similar patterns exist in the San Francisco Bay Area, with major oil production facilities in Richmond and Martinez, again areas that are disproportionately Black when compared to the broader Bay Area.⁹⁷ Moreover, advocates have argued that public officials are more responsive to oil and gas-related health concerns from residents of whiter, wealthier neighborhoods, noting that the methane leak in the wealthy Porter Ranch neighborhood of Los Angeles elicited a massive, statewide response while hundreds of significant health complaints related to the AllenCo drilling site in largely Black Jefferson Park were ignored for years.⁹⁸

Even as to industries that do not inherently involve toxic or carcinogenic materials, increased rates of truck traffic and general industrial activity also lead to higher rates of heavy metal contamination of local soils.⁹⁹ Those soils are disproportionately found in the backyards, playgrounds, and urban gardens of Black Californians.¹⁰⁰ This heavy metal contamination poses a wide array of serious health consequences, including increased susceptibility to asthma, inflammation, pregnancy complications, high blood pressure, osteoporosis, kidney damage, and even Parkinson's disease.¹⁰¹ It also can prevent safe urban gardening in neighborhoods that would desperately benefit from it.¹⁰² On average Black Californians breathe in about 40 percent more particulate matter from cars, trucks, and buses than white Californians.¹⁰³ Black Californians are exposed to a higher amount of PM 2.5—fine particles emitted by diesel engines—at a rate 43 percent higher than white Californians, the highest rate of any racial or ethnic group.¹⁰⁴ Black Californians also are exposed to disproportionately high levels of air pollution from other infrastructure-related non-mobile sources, such as shipyards, factories, warehouses, and aviation.¹⁰⁵ These sources of air pollution are a primary reason that African Americans have the highest rates of asthma among all groups in California,¹⁰⁶ leading to asthma-related deaths at two to three times the rates of any other racial or ethnic group.¹⁰⁷ Exposure to small particulate matter from cars, trucks, and buses is also tied to increased risk of heart and lung disease.¹⁰⁸

⁹⁶ NAACP & Clean Air Task Force, *Fumes Across the Fence Line* (2017), <https://naacp.org/resources/fumes-across-fence-line-health-impacts-air-pollution-oil-gas-facilities-african-american>.

⁹⁷ See Naveena Sadasivam, *Bay Area Regulators Just Delivered on a Promise to Help Frontline Communities Breathe Easier*, GRIST (Jul. 22, 2021), <https://grist.org/regulation/bay-area-refinery-emissions-richmond-chevron-pbf-particulate-matter-baaqmd>.

⁹⁸ See *Fumes Across the Fence Line*, *supra* at 20.

⁹⁹ See Nathan McClintock, *Assessing Soil Lead Contamination at Multiple Scales in Oakland, California: Implications for Urban Agriculture and Environmental Justice* (2012), https://pdxscholar.library.pdx.edu/usp_fac/94/; Shahir Masri et al., *Risk Assessment of Soil Heavy Metal Contamination at the Census Tract Level in the City of Santa Ana, CA: Implications for Health and Environmental Justice* (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8224146>.

¹⁰⁰ *Ibid.*

¹⁰¹ Masri et al, *supra*.

¹⁰² McClintock, *supra*, at 460-61.

¹⁰³ *People of Color and the Poor Disproportionately Exposed to Air Pollution, Study Finds*, Claudia Boyd-Barrett, CAL. HEALTH REPORT (Feb. 8, 2019), <https://www.calhealthreport.org/2019/02/08/people-of-color-and-the-poor-disproportionately-exposed-to-air-pollution-study-finds>.

¹⁰⁴ David Reichmuth, Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in California* (2019).

¹⁰⁵ Boyd-Barrett, *supra*.

¹⁰⁶ Ying-Ying Meng et. al., *California's Racial and Ethnic Minorities More Adversely Affected by Asthma*, UCLA (2007), <http://healthpolicy.ucla.edu/publications/Documents/PDF/California%27s%20Racial%20and%20Ethnic%20Minorities%20More%20Adversely%20Affected%20by%20Asthma.pdf>.

¹⁰⁷ Milet et al., *The Burden of Asthma in California: A Surveillance Report* (June 2007) p. 5.

¹⁰⁸ Reichmuth, Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in California: Fact Sheet* (Jan. 28, 2019) p. 1.

V. Infrastructure and Public Services

Nationally and within California, Black Americans have suffered disproportionate environmental harms as a result of both governmental investment and neglect relating to infrastructure and public services.

A. Neglect of Drinking Water Delivery Systems

While Black communities across the U.S. face these infrastructure disparities daily, the crisis of water quality and lead poisoning in Flint, Michigan, was notable as a particularly egregious example of governmental neglect and cost-savings leading to the poisoning of a Black community.¹⁰⁹

The now majority-Black city of Flint, Michigan, in Genesee County, was originally populated largely by white workers for the General Motors (GM) corporation, which recruited workers in the 1920s and 30s through housing it built itself and then sold subject to restrictive covenants preventing sale to nonwhite persons.¹¹⁰ Private discrimination was cemented and continued through federal redlining in the 1940s, as GM also discriminated in the jobs it offered to the few Black residents of Flint, who generally worked as janitorial staff.¹¹¹ However, starting in the 1960s as a larger Black population arrived, pockets of Flint experienced “white flight,” which accelerated dramatically across Flint through the 1970s as the automotive industry suffered.¹¹² These demographic changes, however, cannot be solely explained by the tribulations of automobile manufacturing, since Flint’s population decreased at a percentage nearly 10 times the percentage decrease of Genesee County, which was heavily invested in the automotive industry across all its towns and cities.¹¹³ As Michigan’s Civil Rights Commission has itself acknowledged, the expansion of neighborhoods in Flint that did not explicitly or implicitly exclude Black residents made “white flight” a logical and indeed rewarded practice: because integration often lead to decreased property values, “[t]hose who fled were rewarded financially,” while “[t]hose who stayed paid a price.”¹¹⁴ These incentives mimicked and repeated the explicit treatment of Black Americans as a “nuisance” by the federal government during redlining.¹¹⁵ Similarly, government officials generally ignored the widespread, and often illegal, exclusion of Black Americans from other nearby suburbs, making it impossible for Black residents of Flint to make the “logical” choice to flee that white residents were making.¹¹⁶

In 2014, the entire City of Flint decided to switch its drinking water source from Detroit’s system to the Flint River to save money.¹¹⁷ Residents thereafter complained for months that their water both tasted and appeared worse, but city and state officials continued to maintain the water was safe for human consumption, even as they explicitly chose not to test the water’s safety.¹¹⁸ After a leaked report from the

¹⁰⁹ Tamar Meshel, *Environmental Justice in the United States: The Human Right to Water*, 8 WASH. J. ENVTL. L. & POL’Y 264, 270-72 (2018).

¹¹⁰ *Systemic Racism Through the Lens of Flint*, Michigan Civil Rights Commission (2017) at 26-27.

¹¹¹ *Id.* at 25, 28.

¹¹² *Id.* at 56-57, 68-69.

¹¹³ *Id.* at 24.

¹¹⁴ *Id.* at 58.

¹¹⁵ *Id.* at 59.

¹¹⁶ *Id.* at 59-60.

¹¹⁷ Melissa Denchak, *National Resources Defense Council, Flint Water Crisis: Everything You Need to Know* (2018).

¹¹⁸ Merrit Kennedy, *National Public Radio, Lead-Laced Water In Flint: A Step-By-Step Look At The Makings Of A Crisis* (2018).

U.S. Environmental Protection Agency reported high levels of lead seepage from older lead pipe systems due to the corrosivity of the Flint River water, state officials continued to falsely maintain the levels were safe and called the federal report an “outlier.”¹¹⁹ By the time Flint switched back to Detroit’s water system, children were exposed to massive amounts of lead, with potentially irreversible health consequences for both young children and those exposed in utero through their mothers. Those consequences include learning and intellectual disabilities and behavioral problems.¹²⁰ Again, because Flint had become a majority-Black city at the time of the crisis, these impacts were experienced by Black Michiganders far more so than other groups: even in 2019, after years of attention and remediation, Flint’s water still had higher rates of lead than 98 percent of the rest of the state.¹²¹

Studies showed that rates of lead pollution in Flint’s children approximately doubled as a result of the crisis, while both state officials and Michigan Governor Rick Snyder continued to downplay the issue.¹²² The Michigan State Attorney General has attributed responsibility for the crisis to all levels of state and local government, filing criminal charges against various state and local officials including former Governor Snyder.¹²³ The charges range from perjury, related to actions designed to cover up malfeasance, to manslaughter.¹²⁴

B. Failure to Construct and Maintain Sewage Systems

Historically, Black Americans were subjected to environmental and health consequences as a result of failure to equitably construct sewer and other waste management systems. Originally, U.S. cities relied on private waterworks.¹²⁵ By the mid-19th century, cities across America had begun substantial investment in constructing modern, sanitary sewer and garbage removal systems.¹²⁶ However, Black neighborhoods were not provided with such systems as early—or at all—as compared to white neighborhoods.¹²⁷ In fact, the impetus for provision of such services to Black neighborhoods was sometimes to prevent diseases that resulted from the *lack* of such services from crossing from Black neighborhoods into white ones.¹²⁸ Rates of illness and death resulting from poor sewage disposal dramatically diverged for Black and white Americans as the latter gained access to effective sewage systems while the former did not.¹²⁹ For example, in early 20th century New York, Black residents were forced to live in lowland areas near drainage pools for sewage while white residents lived on higher ground with better drainage.¹³⁰ As a result, Black people died from malaria at much higher rates than white people and experienced higher rates of diseases like dysentery and

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ron Fonger, Flint Water Has More Lead Than 98 Percent of State, Despite Snyder's Claim, MLive-The Flint Journal (Jan. 19, 2019).

¹²² Kennedy, *supra*.

¹²³ Brakkton Booker, National Public Radio, Ex-Michigan Gov. Rick Snyder And 8 Others Criminally Charged In Flint Water Crisis (2021).

¹²⁴ Ibid.

¹²⁵ Coti Montag, NAACP Legal Defense and Educational Fund, Inc., Water/Color: A Study of Race & The Water Affordability Crisis in America’s Cities (2019), 7.

¹²⁶ Taylor, Dorceta E., The Environment and the People in American Cities, 1600s-1900s, 270.

¹²⁷ *Id.* at 94.; Montag, *supra* at 12.

¹²⁸ Taylor, *supra* at 94.; Montag, *supra* at 10.

¹²⁹ Taylor, *supra* at 94.

¹³⁰ Ibid.

typhoid.¹³¹ Similar patterns existed across the South as well.¹³² And across the nation, as residential segregation increased throughout the 20th century, Black neighborhoods actually *lost* access to water and sewer municipal services, since it enabled municipalities to more easily prioritize white over Black neighborhoods for better services.¹³³ Nor are these disparities solely historical. As recently as 2019, New York City acknowledged its responsibility for a massive leak caused by a collapsed pipe in a largely Black neighborhood of Queens, which flooded 127 homes with raw sewage. Many of these houses were destroyed or severely damaged, losses that were not covered by basic homeowners or rental insurance.¹³⁴

C. Energy

Black Americans nationally are subject to disproportionately-high costs and disproportionately-poorer service with respect to the electrical grid. Black households in America spend more on residential energy bills than white households, even when controlling for income, household size, and other possibly-relevant factors.¹³⁵ Across the country, Black Americans shoulder energy burdens that are disproportionately larger than any other racial group, meaning they spend a larger portion of their income on energy.¹³⁶ This is true in major California cities as well, such as Los Angeles and San Francisco.¹³⁷ These disproportionate costs are partially attributable to Black Americans living in older, energy-inefficient homes as a result of the legacy of redlining and other discriminatory housing policies.¹³⁸ Low-income Black Americans are also twice as likely to have their utility service shut off as similarly-low-income white Americans,¹³⁹ which advocates have argued are the result of inflexible shut-off regulations and disproportionate energy burdens.¹⁴⁰

Because of lower rates of home ownership in the Black community, Black Americans also often cannot take advantage of programs aimed at lessening energy burdens that require home ownership to utilize, such as home solar panels¹⁴¹ or installation of free charging stations for electric vehicles.¹⁴² And as discussed in more detail above, Black Americans also suffer disproportionate burdens related to the production of

¹³¹ *Ibid.*

¹³² *Id.* at 96.

¹³³ Montag, *supra* at 3.

¹³⁴ Katie Van Syckle, Raw Sewage Flooded Their Homes. They're Still Waiting for Help, N. Y. Times (Apr. 15, 2021).

¹³⁵ Eva Lyubich, The Race Gap in Residential Energy Expenditures, The Energy Institute at Haas Business School, UC Berkeley (June 21, 2020).

¹³⁶ Ariel Drehobl, American Council for an Energy-Efficient Economy, Lifting the High Energy Burden in America's Largest Cities: How Energy Efficiency Can Improve Low-Income and Underserved Communities (April 20, 2016).

¹³⁷ See Energy Burdens in Los Angeles, American Council for an Energy-Efficient Economy, https://www.aceee.org/sites/default/files/pdfs/aceee-01_energy_burden_-_los_angeles.pdf (Sept. 2020); Energy Burdens in San Francisco, American Council for an Energy-Efficient Economy, https://www.aceee.org/sites/default/files/pdfs/aceee-01_energy_burden_-_san_francisco.pdf (Sept. 2020).

¹³⁸ Sharonda Williams-Tack, From Redlining to Restorative Justice: Anti-Black Racism and Energy Insecurity Go Hand in Hand in America, *Sierra*, The Magazine of the Sierra Club (Feb 21 2021)

¹³⁹ Kathiann M. Kowalski, Energy News Network, Racial Disparities Persist in Electric Service. Is 'Willful Blindness' to Blame? (July 1, 2020).

¹⁴⁰ See, e.g., Josie B. H. Pickens and Robert W. Ballenger, This Pa. law on utility shutoffs unfairly impacts Black and Brown people. It must be repealed, *Pennsylvania Capital-Star* (Aug. 7, 2020);

¹⁴¹ Deborah A. Sunter, Sergio Castellanos & Daniel M. Kammen, Disparities in Rooftop Photovoltaics Deployment in the United States by Race and Ethnicity, *Nature Sustainability* volume 2, pages71–76 (2019).

¹⁴² See Access to Clean Mobility, GRID Alternatives, <https://gridalternatives.org/what-we-do/clean-mobility#:~:text=The%20Clean%20Vehicle%20Rebate%20Project,to%20qualifying%20low%2Dincome%20consumers.>

energy, as power plants—including those fired by coal—continue to be disproportionately located in their neighborhoods, producing particulate matter emissions that cause damage to the heart, lungs, and brain.¹⁴³

D. Transportation

[to come: integration of TF witness testimony.]

Federal, state, and local governments have consistently failed to offer equitable transit options for urban Black communities. [Summary paragraph regarding transportation segregation across the country, including its genesis in Massachusetts as the first segregation law.] This history of government segregation set the stage for unequal transportation for Black Americans that continues to the present.

At the turn of the century, subsidized by government funds, private companies constructed mass transit systems in America's cities.¹⁴⁴ Until around the 1950s, nearly all transit was built and operated by private companies.¹⁴⁵ Many transit companies struggled to remain profitable in the 1920s, especially after the Depression.¹⁴⁶ The widespread adoption of the automobile combined with white Americans' move to the suburbs, as described in Chapter [XX], resulted in the companies' financial failure.¹⁴⁷ Government and private actors erected barriers to prevent Black Americans from moving to the suburbs. Public transit systems cut back services as masses of white riders left the system, and never expanded to the suburbs.¹⁴⁸ Poorer, Black workers without cars could not follow.¹⁴⁹ When manufacturing and industrial jobs moved from urban centers to suburban or rural areas, urban Black workers were often unable to follow due to lack of transportation options.¹⁵⁰

In 1968, Dr. Martin Luther King, Jr., described how city planning decisions result in transportation systems that failed Black communities: "Urban transit systems in most American cities . . . have become a genuine civil rights issue—and a valid one—because the layout of rapid-transit systems determines the accessibility

¹⁴³ Maninder P. S. Thind, Christopher W. Tessum, Inês L. Azevedo, and Julian D. Marshall, Fine Particulate Air Pollution from Electricity Generation in the US: Health Impacts by Race, Income, and Geography, *Environmental Science & Technology* 2019 53 (23), 14010-14019.

¹⁴⁴ English, "Why Did America Give Up on Mass Transit? (Don't Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand." (Aug. 31, 2018) *Bloomberg CityLab* <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁴⁵ English, "Why Did America Give Up on Mass Transit? (Don't Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand." (Aug. 31, 2018) *Bloomberg CityLab* <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁴⁶ English, "Why Did America Give Up on Mass Transit? (Don't Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand." (Aug. 31, 2018) *Bloomberg CityLab* <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁴⁷ English, "Why Did America Give Up on Mass Transit? (Don't Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand." (Aug. 31, 2018) *Bloomberg CityLab* <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁴⁸ English, "Why Did America Give Up on Mass Transit? (Don't Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand." (Aug. 31, 2018) *Bloomberg CityLab* <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁴⁹ English, "Why Did America Give Up on Mass Transit? (Don't Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand." (Aug. 31, 2018) *Bloomberg CityLab* <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁵⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

of jobs to the African-American community. If transportation systems in American cities could be laid out so as to provide an opportunity for poor people to get meaningful employment, then they could begin to move into the mainstream of American life.”¹⁵¹

The federal government has been aware of this failure to support transportation for the Black urban workforce, but has not provided a remedy. In 1968, the report of the National Advisory Commission on Civil Disorders, also known as the Kerner Commission report, studied the causes and effects of riots in U.S. cities. In order to enhance employment opportunities for central-city residents, the report recommended the creation of improved transportation links between Black urban neighborhoods and new job locations in the suburbs.¹⁵²

In the 1960s and 70s, the federal government began providing funding for public transit, and many municipalities took control of transit operations. However, scholars argue that these revitalized agencies built a segregated system. [to come: additional details].¹⁵³

This system continues to operate today. Black Americans still rely on public transit to get to work at much higher rates than white workers. Black workers commute by public transit at nearly four times the rate of white workers.¹⁵⁴ Moreover, Black workers on average experience higher commute times than white workers, both nationally and in California.¹⁵⁵ Finally, since most fares are usually flat, they operate regressively—that is, low income people pay a higher share of their monthly salary on transit, which disproportionately impacts Black Americans and other people of color.¹⁵⁶ Thus, due to government decision-making regarding fares, those who rely on public transit to get to work, more often Black workers, are often paying a monetary penalty in addition to a time penalty, when they are able to use transit to get to jobs at all.

E. Internet and the Digital Divide

[Additional research to come and to incorporate testimony from January hearing and witness testimony.]

¹⁵¹ Martin Luther King, Jr., “A Testament of Hope,” reprinted in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (James Melvin Washington ed., 1991) pp. 326–27.

¹⁵² National Advisory Commission on Civil Disorders (1968) cited in Sanchez, Stolz & Ma, *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities* (2003) The Civil Rights Project at Harvard University, p. 3.

¹⁵³ Spieler, “Racism has shaped public transit, and it’s riddled with inequities” (Aug. 24, 2020) Rice Kinder Institute for Urban Research < <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>>.

¹⁵⁴ Austin, “To Move Is To Thrive: Public Transit and Economic Opportunity for People of Color” (Nov. 15, 2017) *Demos* <https://www.demos.org/research/move-thrive-public-transit-and-economic-opportunity-people-color>.

¹⁵⁵ Austin, “To Move Is To Thrive: Public Transit and Economic Opportunity for People of Color” (Nov. 15, 2017) *Demos* <https://www.demos.org/research/move-thrive-public-transit-and-economic-opportunity-people-color>; https://nationalequityatlas.org/indicators/Commute_time#/.

¹⁵⁶ Morgan, “Can Variable Transit Fares Increase Equity?” (Jan. 28, 2019) *Chicago Policy Review* < <https://chicagopolicyreview.org/2019/01/28/can-variable-transit-fares-increase-equity/>>; Brown, “Fair fares? How flat and variable fares affect transit equity in Los Angeles” (2018) Case Studies on Transport Policy.

F. California

California authorized segregated public transportation at least until 1864.¹⁵⁷ California and its municipalities have made choices about how and where to undertake infrastructure projects that have imposed disproportionate harms on Black communities. While the California Environmental Quality Act of 1970 and Title VI of the Civil Rights Act of 1964 require state and municipal agencies to consider racially disparate impacts of infrastructure projects, the historical damage caused by highways in particular has contributed to higher exposure to air pollution among communities of color. Chapter 5 on housing provides more information on the disparate health impacts of affirmative infrastructure investment in California.

As with the federal government, California's government historically neglected water infrastructure as it applied to Black Californians. One example is California's treatment of Black families fleeing the dust bowl. These families left the prairie states and came to farmland across California starting in the 1930s, experiencing widespread infrastructure discrimination from state and local governments.¹⁵⁸ For example, Black Californians in the San Joaquin Valley were excluded from most urban areas with access to clean water as a result of explicit redlining policies, racially-restrictive housing covenants, and even racially-motivated violence.¹⁵⁹ The neighboring towns of Dos Palos and South Dos Palos in Merced County serve as a stark example: while the white community of Dos Palos had access to sewer and water infrastructure, the predominantly Black community in South Dos Palos had no running water or indoor plumbing.¹⁶⁰ The same was true of the largely-Black community of Teviston, adjacent to the white community of Pixley, both in Tulare County.¹⁶¹ Again, this discrimination is not ancient history: the town of Lanare, also formed by Black families fleeing the Dust Bowl, had no running water at all until the 1970s, and was subjected to dangerous levels of arsenic in the water even after wells and pipes were drilled.¹⁶² The town's residents did not get access to clean drinking until 2019.¹⁶³

Black neighborhoods in California still suffer extremely high rates of water pollution in the water provided through government infrastructure. In 2019, the *New York Times* reported that as many as 1,000 community water systems in California may be at high risk of failing to deliver potable water, with a disproportionate number of these systems located in low-income areas that tend to be disproportionately Black.¹⁶⁴

¹⁵⁷ Alexandra, "A Century Before Rosa Parks, She Fought Segregated Transit in SF" (Mar. 12, 2009) KQED <<https://www.kqed.org/pop/108474/rebel-girls-from-bay-area-history-charlotte-l-brown-gold-rush-era-civil-rights-champion>>.

¹⁵⁸ Hall, Black Farmworkers in the Central Valley: Escaping Jim Crow for a Subtler Kind of Racism (Feb. 22, 2019) KQED, <https://www.kqed.org/news/11727455/black-farmworkers-in-the-central-valley-escaping-jim-crow-for-a-subtler-kind-of-racism>.

¹⁵⁹ London et al, UC Davis Center for Climate Change, *The Struggle for Water Justice in California's San Joaquin Valley* (2018) at 10.

¹⁶⁰ *Ibid.*

¹⁶¹ Jose A. Del Real, How Racism Ripples Through Rural California's Pipes (Nov. 29, 2019), *N.Y. Times*.

¹⁶² Cowan & Del Real, Why Thousands of Californians Don't Have Clean Drinking Water (Dec. 6, 2019), *N.Y. Times*, <https://www.nytimes.com/2019/12/06/us/lanare-drinking-water-central-valley.html>.

¹⁶³ *Ibid.*

¹⁶⁴ Jose A. Del Real, *The Crisis Lurking in Californians' Taps: How 1,000 Water Systems May Be at Risk*, *N.Y. TIMES* (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/the-crisis-lurking-in-californians-taps-how-1000-water-systems-may-be-at-risk.html>.

California's Environmental Protection Agency has also acknowledged that contamination of water sources disproportionately impacts communities of color.¹⁶⁵

At times, government entities were explicit in weaponizing infrastructure against Black Californians. For example, in the 1950s, a developer in Milpitas, a town north of San Jose, sought to build a large housing development open to both white and Black homebuyers.¹⁶⁶ He managed to overcome several zoning-related obstacles only to discover that the Milpitas City Council had increased the sewer connection fee more than tenfold explicitly to thwart the development.¹⁶⁷

Transportation discrimination impacts Black Californians as well. In 1965, the California Governor created the McCone Commission to examine causes of civil unrest in Los Angeles in 1965, identifying “inadequate and costly” transportation as contributing to high rates of unemployment among the Black urban population.

California has not designed its transportation system to address this need. In fact, the state has chosen the opposite. Design of public transit by major municipalities in the state often catered to largely white suburban residents, who were seen as needing better options in order to “choose” transit. For example, Oakland's San Antonio neighborhood, the most racially diverse in the city and one of the densest parts of the Bay Area, sees the Bay Area Rapid Transit (BART) train travel for nearly three miles without stopping.¹⁶⁸ By contrast, in suburban Walnut Creek and Pleasant Hill, which are less than half as dense, BART stations are only 1 ¾ miles apart. “BART was literally designed (in the late 1960s) to speed white suburban commuters past Black inner-city residents.”¹⁶⁹ This purposeful decision by the government left Black residents without the same transit options to reach jobs, and limited economic mobility and opportunity.

In Oakland, a \$484 million elevated “people mover,” which connects BART to the airport, lost federal funding because it was found to have a discriminatory impact; its construction led to the elimination of a bus route in the minority neighborhoods it bypasses.¹⁷⁰ But, though the project lost federal funding, it still went ahead, and the Oakland neighborhood still lost its bus line.

¹⁶⁵ CALEPA, *ACHIEVING THE HUMAN RIGHT TO WATER IN CALIFORNIA* (2021), <https://oehha.ca.gov/media/downloads/water/report/hrtwachievinghrtw2021f.pdf>. Although all people of color are disproportionately impacted in California, the problem is particularly salient among Latinx communities because of poor water supplies in and around farmworker communities that are largely Latinx.

¹⁶⁶ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 117-21.

¹⁶⁷ *Ibid.*

¹⁶⁸ Spieler, “Racism has shaped public transit, and it’s riddled with inequities” (Aug. 24, 2020) Rice Kinder Institute for Urban Research < <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>>.

¹⁶⁹ Spieler, “Racism has shaped public transit, and it’s riddled with inequities” (Aug. 24, 2020) Rice Kinder Institute for Urban Research < <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>>.

¹⁷⁰ Ramey, “America’s Unfair Rules of the Road: How our transportation system discriminates against the most vulnerable” (Feb. 27, 2015) *Slate* <https://slate.com/news-and-politics/2015/02/americas-transportation-system-discriminates-against-minorities-and-poor-federal-funding-for-roads-buses-and-mass-transit-still-segregates-americans.html>.

VI. Climate Change Disproportionately Harms Black Americans

Research on the concrete and worsening effects of climate change has made clear that harmful health and environment-related effects of climate change will be experienced by all Americans.¹⁷¹ Increased range and incidence of infectious disease vectors like ticks, mosquitos, and avian borne pathogens, and decreased food quality and security.¹⁷² Rising sea levels will damage coastal communities, and reduce water quality and availability.¹⁷³ Extreme weather events, like floods, storms, fires, and extreme heat waves, are projected to occur more frequently and more severely.¹⁷⁴ All Americans will be at risk of these harms, but not all will face that risk equally. Communities that are already socially and economically struggling, including the urban poor, communities of color, the elderly and children, agricultural workers, and rural communities, will shoulder a disproportionate burden of these hazards.¹⁷⁵

A. Nationally

Nationally, formerly redlined areas consistently show hotter temperatures than other areas.¹⁷⁶ Therefore, climate change is certain to exacerbate existing, historically-codified disparities that track existing housing-related harms experienced by Black Americans.¹⁷⁷ In particular, so-called “heat islands,” which will worsen due to climate change, exist where built-up urban areas have few trees, vegetation, or parks that serve to dissipate or reflect heat, and instead have pavement and building materials that absorb and retain it.¹⁷⁸ Federal Environmental Protection Agency studies have found that the heat island effect can cause urban areas to be up to seven degrees hotter than outlying areas during the day, and up to five degrees hotter at night.¹⁷⁹ Black Americans disproportionately live in such heat islands, experiencing higher temperatures on extreme heat days due to a lack of adequate tree cover.¹⁸⁰ In a study of 108 urban areas nationwide, including several in California, the formerly-redlined neighborhoods of nearly every city studied were hotter than the non-redlined neighborhoods, some by nearly 13 degrees.¹⁸¹ Even aside from tree cover, other features of the urban landscape in Black neighborhoods—most notably, roadways and large building

¹⁷¹ Off. of Environmental Health Hazard Assessment, Indicators of Climate Change in California: Environmental Justice Impacts (2010), page 6 <<https://oehha.ca.gov/media/downloads/climate-change/document/climatechangeej123110.pdf>> (as of June 16, 2021).

¹⁷² *Id.* at 3.

¹⁷³ *Id.* at 3.

¹⁷⁴ *Id.* at 4; Cal. Dept. of Public Health, Preparing California for Extreme Heat (2013), page 8 <https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CCHEP-General/CDPH-EPA-2013-Preparing-CA-for-Extreme-Heat_ADA.pdf> (as of June 17, 2021).

¹⁷⁵ *Id.* at 2; see also Anthony Rogers-Wright, Getting to the Roots: Requisites for Climate Reparations at 5 (Powerpoint Presentation, California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021).

¹⁷⁶ Jeremy S. Hoffman, Vivek Shandas, Nicholas Pendleton, The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas Climate 2020, 8(1), 12; Published: 13 January 2020.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Environmental Protection Agency, Learn About Heat Islands, <<https://www.epa.gov/heatislands/learn-about-heat-islands>> (as of June 18, 2021).

¹⁸⁰ See Brad Plumer & Nadja Popovich, How Decades of Racist Housing Policy Left Neighborhoods Sweltering, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html>; see also Dexter H. Locke et al., Residential Housing Segregation and Urban Tree Canopy in 37 US Cities (2021), <https://www.nature.com/articles/s42949-021-00022-0>.

¹⁸¹ Hoffman et al, *supra*.

complexes—also absorb and slowly release heat, which also exacerbate heat islands and their effects as discussed above.¹⁸² The greater presence of trees in a community has been shown to correlate with lower asthma rates, fewer hospital visits during heat waves, and generally improved mental health for the community’s residents.¹⁸³ Conversely, the heightened temperatures in “heat islands” has led to higher rates of heat-related adverse pregnancy consequences for Black women, including premature births and still births.¹⁸⁴

The association between parks and green space with wealthier, whiter neighborhoods is so strong that even modern efforts to add green space to largely Black neighborhoods sometimes involve racist narratives, with local efforts portraying green revitalization plans as benefiting primarily white residents even in Black neighborhoods.¹⁸⁵ Such revitalization plans can also lead to backlash suffered by the Black residents of the neighborhoods targeted by them, when Black residents in neighborhoods that are gentrifying are treated as suspicious by local government and new residents when they take advantage of newly-constructed parks and other green space.¹⁸⁶ Black residents of areas without tree cover have also faced gentrification and unaffordability as a consequence, intentional or inadvertent, of local government efforts to add green space.¹⁸⁷

B. California

Black Californians experience these disproportionate harms in many ways, many attributable to the decisions of state and local governments. As is the case nationally, redlining had the effect of clustering Black Californians in urban centers that often constitute heat islands, the worsening heat waves caused by climate change will impose disproportionate health burdens on Black Californians.¹⁸⁸ A 2009 report published by the University of Southern California, “The Climate Gap,” found that Black residents of Los Angeles were already almost twice as likely to die during a heat wave as other residents because of the “heat islands” attributable to a history of redlining and segregation.¹⁸⁹

According to the California Department of Public Health, Black Californians are 52 percent more likely than white Californians to live in areas where more than half the ground is covered by impervious surfaces

¹⁸² *Ibid.*

¹⁸³ Tim Arango, “Turn Off the Sunshine”: Why Shade Is a Mark of Privilege in Los Angeles, *NY TIMES* (Dec. 1, 2019), <https://www.nytimes.com/2019/12/01/us/los-angeles-shade-climate-change.html>.

¹⁸⁴ Christopher Flavelle, Climate Change Tied to Pregnancy Risks, Affecting Black Mothers Most, *NY Times* (Jan. 18, 2020).

¹⁸⁵ C.N.E. Corbin, Rendering Gentrification and Erasing Race: Sustainable Development & The (Re)visioning of Oakland, California as a Green City 17 (unpublished draft manuscript provided by author) (noting that city documents portraying green revitalization plans for West Oakland “display a different and more affluent whiter population and a greener landscape, thus a depiction of green gentrification expressed in these municipal images”).

¹⁸⁶ *Id.* at 8 (noting that “Black and Brown bodies [] can and have also been rendered as trespassers, criminalized, and met by state violence historically and currently when in parks.”).

¹⁸⁷ See, e.g., Helen H. Kang, Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification, 26 *Mich. J. Race & L.* 23, 31-34 (2021). One displaced resident put it follows: “When you sit [in] a room full of poor folks on one side and homeowners on the other side, who are trying to bring all of this . . . ‘greening’ into our areas . . . And I’m saying, Good Lord! We’re black, we’re not stupid.” *Id.* at 34.

¹⁸⁸ Rachel Morello-Frosch et al., *The Climate Gap Report* (2009), page 5

https://dornsife.usc.edu/assets/sites/242/docs/ClimateGapReport_full_report_web.pdf (as of June 17, 2021), reporting that Black Angelinos are twice as likely to die from a heat wave than other Angelinos.

¹⁸⁹ *Ibid.*

like asphalt and concrete, and where more than half the population lacks tree canopy—by definition, the characteristics of a heat island.¹⁹⁰ This disparity is particularly pronounced in the Greater Los Angeles Area, where wealthier white areas have triple the amount of tree cover compared to poorer Black neighborhoods.¹⁹¹ This may be directly attributable to government action, since the City of Los Angeles intentionally kept tree growth to a minimum in Black communities where police officers expressed a concern—realistic or not—that trees could serve as places to hide drugs or weapons.¹⁹²

The California Department of Public Health has warned that, as heat waves begin earlier in the season and last longer, heat-related deaths are growing disproportionately more common for certain racial or ethnic groups, particularly Black Californians.¹⁹³ Exacerbating these harms, Black Californians are less likely to have air conditioning or a car to access cooler areas or government-sponsored cooling stations, and are more likely to have one or more chronic health conditions.¹⁹⁴ For example, in South Los Angeles, a disproportionately Black area, nearly three-fifths of households did not have air conditioning in 2020, a number which has not substantially changed over the past decade even as heat waves worsened.¹⁹⁵ These patterns have been seen across the state during heat waves, in which Black Californians consistently experience heightened rates of emergency medical visits and hospitalizations compared to white Californians.¹⁹⁶

I. Conclusion

[Summary tying the chapter discussed to enslavement]

¹⁹⁰ Off. of Health Equity, Cal. Dept. of Public Health, Climate Change & Health Equity: Issue Brief (2019) page 2 <https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CCHEP-General/CDPH_CC-and-Health-Equity-Issue-Brief.pdf> (as of June 17, 2021).

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Off. of Health Equity, Cal. Dept. of Public Health, Climate Change & Health Equity: Issue Brief (2019) page 2 <https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CCHEP-General/CDPH_CC-and-Health-Equity-Issue-Brief.pdf> (as of June 17, 2021).

¹⁹⁴ *Id.* at 2

¹⁹⁵ Smith, *How Communities of Color are Hurt Most by Climate Change*, Forbes (June 7, 2021) <<https://www.forbes.com/advisor/personal-finance/communities-of-color-and-climate-change/>> (as of June 18, 2021), referencing Chen, Ban-Weiss & Sanders, *Utilizing smart-meter data to project impacts of urban warming on residential electricity use for vulnerable populations in Southern California* (2020) 15 Environmental Research Letters 064001 at 6.

¹⁹⁶ See, e.g., Knowlton, Kim et al. “The 2006 California heat wave: impacts on hospitalizations and emergency department visits.” *Environmental health perspectives* vol. 117,1 (2009): 61-7. doi:10.1289/ehp.11594; Rupa Basu, Bart D. Ostro, A Multicounty Analysis Identifying the Populations Vulnerable to Mortality Associated with High Ambient Temperature in California, *American Journal of Epidemiology*, Volume 168, Issue 6, 15 September 2008, Pages 632–637, <https://doi.org/10.1093/aje/kwn170>; Shonkoff S, Morello-Frosch R, Pastor M, Sadd J. Environmental health and equity impacts from climate change and mitigation policies in California: a review of the literature. California, USA: California Environmental Protection Agency; 2009.

8. Pathologizing Black Families

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

Starting over 400 years ago, the federal and state governments of our country have decimated Black families, both through their own official action and inaction, as well as through creating and supporting systems in which private actors enacted racist policies and practices. After the end of the legal enslavement of Black Americans, the apprenticeship system and segregation laws denied Black Americans the stability and safety of the family unit. In the past century, child welfare systems have based decisions on racist beliefs about Black Americans.

As a result, these government-run systems have excluded Black Americans from receiving benefits and targeted Black families for investigations of child mistreatment and neglect. Further, these systems have placed Black children in foster care structures at much higher rates than white families. Meanwhile, the criminal and juvenile justice systems have intensified these harms to Black families by imprisoning large numbers of Black men and Black children, and thereby separating Black families. All of these actions have systematically worked to deny Black Americans the opportunities to form stable, supportive family structures, and have often further stereotyped, stigmatized, and pathologized Black Americans for the differences in the Black family that resulted.

Section III addresses the treatment—and decimation—of family structure among Black enslaved persons during the slavery era of American history. Section IV discusses the Black family from emancipation until the Civil Rights Era, during which government structures and policies empowered the continued enslavement of Black children, excluded both Black women and Black men from healthy parenting relationships, and continued to deny the legitimacy—both literal and figurative—of Black marriages and children, so as to ensure white wealth was not dispersed to them. Section V addresses the Moynihan Report, which blamed Black families and proposed deeply problematic solutions to remedy the injustices experienced by Black Americans. Section VI and VII lays out the history of the foster care and other child welfare systems in America, discussing the myriad ways in which that system further attacked the Black family and denied them resources afforded to other Americans. Section VIII addresses the criminalization of Black youth, who are targeted consistently both within and outside of schools, further breaking families apart. Section IX addresses issues relating to Black victims of domestic violence, who are doubted and excluded from assistance in ways that many white victims are not.

III. Enslavement

Throughout the slavery era of American history, federal and state governments empowered and protected white enslavers in their destruction of Black family structures by treating enslaved people as chattel, incapable and unworthy of family love, care, and support.

A. The Transatlantic Slave Trade and Reproductive Slavery

As Frederick Douglass observed over 250 years ago, “[g]enealogical trees do not flourish among slaves.”¹ The section of this outline addressing the history of slavery includes many details about how Black Africans were treated as part of the middle passage and onward, but discussion of how the process treated families in particular is merited here.

The vast majority of the nearly 400,000 enslaved persons brought over from Africa were children or young adults, and more than a quarter were children.² Upon the arrival of enslaved people in the United States, private parties and state governments maintained no familial records of Black Americans, replacing their names with those of their new enslavers.³ Throughout an enslaved person’s life, once they arrived in the United States, they were called by the names of their enslavers. This had the effect of erasing an individual’s identity, severing them from their family, but also making it extremely difficult for them to find each other after emancipation. See Chapter 2 on enslavement for more detailed information about this process.

Federal and state governments passed laws that protected enslavers’ ability to destroy Black families and use Black women and their children as a way to increase the wealth of white Americans. Before 1662, English law governing the American colonies dictated that children followed the enslaved status of their fathers, which meant that the children of enslaved women impregnated by their white enslavers were considered free persons upon their birth, entitled to full protection of the law.⁴ As early as 1662, the colonial government of Virginia passed a law stating that all children born to enslaved mothers were enslaved themselves, regardless of whether or not the father was white, Black, enslaved, or free.⁵ This law facilitated an additional source of wealth as slave owners used these children to settle debts, pass on larger bequests to heirs, or enrich themselves further in some way.⁶ [To be expanded with discussion of how other states treated children born to an enslaved mother.]

The United States outlawed bringing enslaved people into the country in 1807.⁷ The only legal way to increase the number of enslaved people and free labor for the American economy was therefore through domestic birth of new enslaved persons. This created a financial incentive for impregnating Black women and girls and carrying the pregnancies to term.⁸ Thus rape and forced pregnancies of Black women were not only tools of terror, but also a means of creating more enslaved people and further enriching the enslaver.⁹

¹ My Bondage and My Freedom, Frederick Douglass (1855).

² Henry Louis Gates, Jr., How Many Slaves Landed in the U.S., PBS.org (citing David Eltis & David Richardson, Trans-Atlantic Slave Trade Database, available at <https://www.slavevoyages.org/voyage/database>); Stacey Patton, Corporal punishment in Black communities: Not an intrinsic cultural tradition but racial trauma, American Psychological Association (April 2017).

³ See generally Nicole Ellis, Lost Lineage: The Quest to Identify Black Americans' Roots, Washington Post (Feb. 25, 2020).

⁴ *Id.* at 20.

⁵ Briggs, Taking Children: A History of American Terror (2020) 19.

⁶ *Id.* at 43.

⁷ Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426, Chap. 22.

⁸ Testimony of Dr. Jacqueline Jones, *supra*; Briggs, *supra*, at 19; Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2004).

⁹ See Testimony of Dr. Jacqueline Jones, California Task Force to Study and Develop Reparation Proposals for African Americans 3 (October 13, 2021); Deborah Gray White, *Ar’n’t I a Woman? Female Slaves in the Plantation South* (New York: W. W. Norton,

Professor Daina Ramey Berry has argued that this sexual slavery served to provide great benefits to both government and private actors within both the Southern and Northern States, as successful private industry and state tax wealth across the country were dependent on the continued labor and reproduction of Black bodies.¹⁰ In the North, maritime industry, merchants, textile manufacturers, and even consumers of cheap cloth were all heavily dependent on the southern cotton plantation economy, which was fundamentally premised on the sexual slavery of Black women—and therefore on the decimation of Black families.¹¹ Indeed, as Professor Berry has noted, the fecundity of young Black women was a central feature in auctions of enslaved people, which emphasized early childbirth along with other valuable skills like housekeeping and clothes-mending.¹² Moreover, enslavers would look forward to the birth of new enslaved children, but not as a parent would; rather than recording details of each newborn’s humanity, enslavers would literally “appraise” them with a monetary value, one that typically increased as they aged.¹³

B. Marriage Between Enslaved People

American governments prohibited or did not recognize marriage between enslaved people. Across the Southern enslaving states, enslaved persons were generally prohibited by law from entering any legally-binding marriage.¹⁴ Abolitionist William Goodell described the way that American law treated the families of enslaved people in 1853 as: “The slave has no rights. Of course, he or she cannot have the rights of a husband, a wife. The slave is a chattel, and chattels do not marry. ‘The slave is not ranked among sentient beings, but among things;’ and things are not married.”¹⁵ Tennessee was the only enslaving state that allowed for marriage between enslaved persons, but even then the law required consent of the enslavers for the marriage to be valid.¹⁶ Because enslaved persons were not considered to be human beings under the law, they could not enter into legal contracts.¹⁷ Therefore, they could neither own nor transfer property, which is what American law recognized their husbands, wives, and children to be.¹⁸

The North Carolina Supreme Court in 1858 said: “The relation between slaves is essentially different from that of man and wife joined in lawful wedlock,” because “with slaves it may be dissolved at the pleasure of either party, or by the sale of one or both, depending upon the caprice or necessity of the owners.”¹⁹ Their

1985); Rachel A. Feinstein, *When Rape was Legal: The Untold History of Sexual violence during Slavery* (New York: Routledge, 2019).

¹⁰ See Daina Ramey Berry, *The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Boston: Beacon Press, 2017).

¹¹ *Id.*; Testimony of Dr. Jacqueline Jones, *supra*.

¹² Berry, *supra* at 10-11.

¹³ *Id.* at 5-6.

¹⁴ Darlene Goring, *The History of Slave Marriage in the United States*, 39 J. Marshall L. Rev. 299, 299, 302-304 (2006).

¹⁵ William Goodell, *The American Slave Code in Theory and Practice: Its Distinctive Features Shown by its Statutes, Judicial Decisions, & Illustrative Facts* (1853).

¹⁶ *Id.* at 314-315.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Howard v. Howard*, 51 N.C. 235, 240 (N.C. 1858)

condition was compatible only with a form of “concubinage, voluntary on the part of the slaves, and permissive on that of the master.”²⁰

These attitudes and legal mandates were not limited to the South. One notable example is the case of Basil Campbell, who at the time of his death in 1906 was one of the wealthiest Black men in California.²¹ He arrived to California from Missouri in 1854 as an enslaved person, forcibly removed from his wife and two children, who never saw him again.²² After his death, his two adult sons from his marriage in Missouri sued to seek their inheritance, leading three different courts, including the California Supreme Court, to reject their claims.²³ Indeed, one appellate court held—nearly 50 years after the legal emancipation of enslaved Black Americans—that describing Campbell’s marriage to his enslaved wife as a marriage would make a “mockery” of the institution.²⁴

C. Interracial Marriage

Laws prohibiting interracial marriage, known as anti-miscegenation laws, devalued Black families. The earliest known anti-miscegenation law, passed in 1661 in the Colony of Maryland, stated that a white woman who married a Black man became an enslaved person herself.²⁵ Other colonies followed suit to prohibit interracial marriage during slavery.²⁶ However, from slavery through the Jim Crow era, American society accepted white men having sexual relationships with Black women, especially when those women were treated as the property of white men. The children of these interracial relationships were often enslaved and could not inherit their white father’s wealth.²⁷

Fears of interracial marriage have often led to violence. In 1834, a false rumor that abolitionist ministers had married an interracial couple led to 11 days of racial terror in New York City.²⁸ Mobs attacked a mixed-race gathering of the American Anti-Slavery Society and destroyed Black churches, homes, schools, and businesses, as well as the homes and churches of leading abolitionists.²⁹ A similar incident occurred in Philadelphia in 1838.³⁰

Punishments for interracial marriage varied by state, but prior to the Civil War white Americans were punished more often than Black Americans. Scholars have argued that this reflects anti-Black racist attitudes that, depending on the circumstance, Black people were sometimes considered “too irresponsible

²⁰ *Ibid.*

²¹ Smith, Stacey L.. *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction*, University of North Carolina Press, 231 (2013).

²² *Id.* at 231-32.

²³ *Id.* at 232-33.

²⁴ *Id.* at 233.

²⁵ Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California* (2000) 33 U.C. Davis L.Rev. 795, 798.

²⁶ Viñas-Nelson, *Interracial Marriage in “Post-Racial” America* (Sept. 2017) *Origins* <<https://origins.osu.edu/article/interracial-marriage-post-racial-america>> (as of Aug. 13, 2021).

²⁷ Kwon, *Interracial Marriages Among Asian Americans in the U.S. West, 1880–1954* (2011) page 13.

²⁸ Viñas-Nelson, *supra*.

²⁹ Viñas-Nelson, *supra*.

³⁰ *Ibid.*

and too inferior to punish” and “it was whites’ responsibility to protect the purity of their own bloodlines.”³¹ Punishments for Black Americans, however, were severe, including whippings, fines, exile, or even enslavement if they were free at the time of their violation of the law.³² Although it is unclear how often anti-miscegenation laws were enforced, evidence suggests that they were used to make examples of high-visibility interracial couples, who were considered a threat to public order.³³

D. Parent-Child Relationships

Enslavement inherently treated enslaved Black Americans as fungible chattel, which meant that the separation of parents and children was both central to enslavers’ prioritization of profits and also used as a threat to quell potential rebellion. This was justified by the enslavers in various ways. For example, Thomas R.R. Cobb, a legal scholar who drafted parts of the Georgia legal code of 1861,³⁴ claimed that the Black mother “suffers little” when her children are stolen from her, since she lacked maternal feelings.³⁵ Cobb helped write principles of white supremacy into Georgia law, including a provision that presumed Black Americans were slaves unless proven otherwise.³⁶

From their birth, enslaved children were considered property of the enslaver, and therefore enslavers dictated much of a young child’s life and upbringing.³⁷ From the time of birth, enslavers would strip away parental rights, often not even allowing the birth parents to choose the newborn’s name.³⁸ Very soon after giving birth, enslaved mothers were expected to return to work and leave their children with extended family members or an older enslaved woman who was assigned the role to watch over children on the plantation.³⁹ Even if an enslaved parent had some control over their child’s life, the enslaver held the highest authority and could make final decisions as to who would take care of the child, what activities they participated in, or whether they would be separated from their family by selling the parent or child to a different enslaver.⁴⁰ As a result of many children and parents being separated through chattel sales, orphaned children were often adopted and cared for by friends, extended family, or the enslaved community as a whole.⁴¹

³¹ Kennedy, *supra* at 220.

³² *Id.* to 221-22.

³³ Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009) pages 135–36.

³⁴ McCash, William B (1978). "Thomas Cobb and the Codification of Georgia Law". *The Georgia Historical Quarterly*. 62 (1): 9–23. JSTOR 40580436.

³⁵ Briggs, *supra*, at 25-26.

³⁶ Andrew P. Morriss, "Georgia Code (1861)," in *Slavery in the United States: A Social, Political, And Historical Encyclopedia*, vol. 2, ed. Junius P. Rodriguez (Santa Barbara: ABC-CLIO, 2007), 314-315.

³⁷ Crew et al., *Slave Culture: A Documentary Collection of the Slave Narratives from the Federal Writers’ Project* (2014) pp.191. Please see the Health chapter for further discussion of the process of birthing and the work demands placed on new mothers.

³⁸ *Id.* at 193.

³⁹ *Id.* at 194.

⁴⁰ *Id.* at 193

⁴¹ *Id.* at 194.

DRAFT FOR TASK FORCE MEMBER REVIEW
FOOTNOTES AND REFERENCES WILL BE COMPLETED AT A LATER DATE

Enslaved children typically received no formal education and were expected to work as soon as they were physically able, forced to work in the fields as young as eight.⁴² They often worked in a similar capacity as the adults, working fields, tending animals, cleaning and serving in their enslavers' houses, and taking care of younger children.⁴³ State law and agents legally entitled enslavers to separate enslaved parents and children at any time, meaning they could already be located at different plantations at the time of the child's birth.⁴⁴ In some southern states, approximately one-third of enslaved children were separated from one or both parents.⁴⁵ Harriet Mason, an enslaved woman forced to separate from her family at age seven, related that she "used to say I wish I'd died when I was little."⁴⁶ Members of a family could be separately sold as enslavers fell into debt or wanted to raise profits.⁴⁷ A southern Black enslaved person had a 30 percent chance of being sold in his or her lifetime.⁴⁸ A quarter of trades of enslaved persons across state lines destroyed a first marriage, while approximately half destroyed a nuclear family by separating immediate family members.⁴⁹ "I have borne thirteen children and seen most all sold off into slavery, and when I cried out with a mother's grief, none but Jesus heard[.]" said the abolitionist Sojourner Truth, who was bought and sold four times.⁵⁰ Truth escaped slavery with her infant daughter in 1826, and won a court case in 1828 to recover her son.⁵¹

Opponents of slavery, including those in the federal government, recognized how it decimated the families of Black Americans. In advocating for the abolition of slavery, U.S. Senator James Harlan of Iowa stated that slavery effected "the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents."⁵² Indeed, scholars have argued that the anguish caused by this family separation was another method to prevent rebellion, as the threat of family separation coerced enslaved people into working without complaint.⁵³ The horrors of family separation during slavery were highlighted by abolitionists as a central strategy to enlist people to their cause.⁵⁴ Near the end of the slavery era, in the 1850s, some southern states responded to public horror at child separation by passing laws prohibiting the taking of infants from their enslaved mothers.⁵⁵ Modern scholars analyzing this development have argued

⁴² Steven Mintz, *Childhood and Transatlantic Slavery, Children and Youth in History* <<https://chnm.gmu.edu/cyh/case-studies/57>> (as of Dec. 8, 2021).

⁴³ Nat'l Park Serv., *African American Children* <<https://www.nps.gov/articles/african-american-children.htm>> (as of Aug. 23, 2021).

⁴⁴ Gutman, *supra*.

⁴⁵ Tadman, *The Hidden History of Slave Trading in Antebellum South Carolina: John Springs III and Other "Gentlemen Dealing in Slaves"* (Jan. 1996) 97 *S.C. Hist. Mag.* 6, 15.

⁴⁶ Holden, *Slavery and America's Legacy of Family Separation* (July 25, 2018) *Black Perspectives* <<https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation>> (as of Aug. 24, 2021).

⁴⁷ *Id.* at 16.

⁴⁸ Ta-Nehisi Coates, *The Case for Reparations*, *The Atlantic* (June 2014).

⁴⁹ *Ibid.*

⁵⁰ *Id.* at 20 (quoting from Gilbert, Titus, and Susan B. Anthony Collection, *Sojourner Truth*, 134).

⁵¹ Nat'l Park Serv., *Sojourner Truth* <<https://www.nps.gov/people/sojourner-truth.htm>> (as of Dec. 2, 2021).

⁵² Briggs, *supra*, at 18 (quoting *Congressional Globe*, 28th Congress, 1st Session 1439 (1864)).

⁵³ Briggs, *supra*, at 19.

⁵⁴ Briggs, *supra*, at 17–28 (noting that slave narratives "dwelt often on the question of child taking").

⁵⁵ Andrew Billingsley, Jeanne M. Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1972).

these laws were not passed out of concern for Black Americans, but to assuage public outrage in order to maintain slavery.⁵⁶

E. Extended Family Kinship Structures

In order to cope with the destruction of their nuclear family, enslaved people created deep, extended supportive relationships with other enslaved people.⁵⁷ Some historians have argued that the extended kinship structures of Black enslaved people mirrored similar structures in their native West African homelands.⁵⁸ The role of Black grandparents, other extended relatives, and older Black caregivers who were not biologically related took on particular importance,⁵⁹ with Black grandmothers often serving as a central figure within a plantation ensuring the care of all children of enslaved parents who were sold to other enslavers, killed, or otherwise removed from their nuclear families.⁶⁰ The reliance of Black mothers and Black Americans on extended kinship networks was a necessity for mere survival, beginning in the slavery era and continued through Jim Crow and other forms of discrimination.⁶¹

Early Black historians argued that the legacy of slavery created “disorganization and instability” in Black families for generations.⁶² In 1899 and again in 1909, prominent sociologist and social critic W.E.B. Du Bois published detailed, fact-driven analyses of Black families, demonstrating the myriad ways in which a lack of economic means and opportunities after emancipation imposed ongoing and crippling challenges to Black families in both the North and South.⁶³ In 1932, sociologist E. Franklin Frazier argued that the slavery-era state-sanctioned decimation of Black familial and ancestral traditions left Black families ill-suited to adapt to the drastic changes early 20th-century urbanization imposed upon it.⁶⁴ As discussed further below, these consequences of slavery were later used, devoid of their historical antecedents, to claim that the Black family structure was inherently dysfunctional and thereby to blame Black Americans for the inequities they faced.

IV. Black Families from Emancipation to the Civil Rights Era, 1865 to 1960

After slavery, states continued to impose or sanction policies and practices that discriminated against Black families. Before the women’s liberation movement of the late 1960s redefined the role of women in society,⁶⁵ women were expected to take care of children and the home.⁶⁶ Only men were expected to

⁵⁶ *Id.*; Briggs, *supra*, at 27.

⁵⁷ See, e.g., Gutman, *supra*, at 212-216; Hunter, Tera, *Bound in Wedlock: Slave and Free Black Marriage in the Nineteenth Century*. United States: Harvard University Press (2017).

⁵⁸ Melville J. Herskovits, *The Myth of the Negro Past* 167-86 (1941).

⁵⁹ Zanita E. Fenton, In *A World Not Their Own: The Adoption of Black Children* (1993) 10 *Harv. BlackLetter J.* 39, 42.

⁶⁰ Sonia Gipson Rankin, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care* (2002) 10 *Elder L.J.* 153, 157.

⁶¹ See Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy* (1995) 68 *Temp. L. Rev.* 1649, 1660 (citing, *inter alia*, Gutman, *supra*).

⁶² *The Origins of African-American Family Structure*, Steven Ruggles.

⁶³ W.E.B. Du Bois, *The Philadelphia Negro* (1899); W.E.B. Du Bois, *The Negro American Family* (1909).

⁶⁴ E. Franklin Frazier, *Ethnic Family Patterns: The Negro Family in the United States* (1932).

⁶⁵ Evans, *Feminist Theory Today: An Introduction to Second-Wave Feminism* (1995), p. 13.

⁶⁶ See *Craig v. Boren* (1976) 429 U.S. 190, 198-99; Beal, *Double Jeopardy: To be Black and Female* (2008) 8 *Meridians* 166, 167.

participate in the public sphere.⁶⁷ For Black women, these expectations imposed impossible burdens. Black women were expected to be mothers and wives, but white society expected Black women to be their servants and exploited workers.⁶⁸ Black women “burned the candle at both ends” to do both.⁶⁹ This has taken a heavy toll on Black women, both physically and emotionally, with larger repercussions for Black families.

For Black men, traditional gender roles dictated that they must dominate and lead, acting as the head of the family.⁷⁰ Under these norms of masculinity, society expected men be stoic figures, enduring all injury without emotion or complaint.⁷¹ These expectations, too, demanded the impossible from Black men, as society expected them to accept the indignities of discrimination without complaint.⁷² When Black men responded to discrimination in anger—one of the few emotions society expected of and allowed for men to exhibit—Black men were criminalized and treated as threats, feeding the stereotypes imposed upon them.⁷³ This, too, has taken a toll on Black men and their families.⁷⁴

A. Black Parenthood

During this time, prevailing gender norms defined fathers as breadwinners and mothers as caretakers at home.⁷⁵ But racial discrimination combined with these gender expectations to place heavier burdens on Black families and Black parenthood. As described in greater detail in Chapter 13 on wealth, government and private actors discriminated against Black men seeking employment, restricting them to ill-paid menial jobs and limiting their ability to earn income to support their families.⁷⁶ At times, this required Black men to direct their children to work to ensure that the family could survive.⁷⁷ Black children, therefore, often could not pursue schooling or their own goals and dreams.⁷⁸

Because discrimination limited Black men’s employment opportunities, Black women also had to seek work to supplement the family’s income even where white women did not.⁷⁹ This required Black women to play the social roles of both men and women, taking care of children and the household while working jobs at the

⁶⁷ Beal, *supra*, at p. 167, Jones, *Labor of Love, Labor of Sorrow: Black Women, Work and the Family from Slavery to the Present* (1985), pp. 62-66.

⁶⁸ See California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Jones, 1:30-1:45, 5:47-7:00, 11:38-12:51 <<https://tinyurl.com/4smp9aek>> (as of Jan. 26, 2022) (hereinafter “Testimony of Jones”); Campbell, *Making Black Los Angeles: Class, Gender, and Community, 1850-1917* (2016), pp. 39–68.

⁶⁹ Campbell, *supra*.

⁷⁰ Hooks, *The Will to Change: Men, Masculinity, and Love* (2004), pp. 5-10, 18-35.

⁷¹ *Ibid.*

⁷² See generally Smith, et al., *Racial Battle Fatigue and the MisEducation of Black Men: Racial Microaggressions, Societal Problems, and Environmental Stress* (2011) 80 *J. of Negro Education* 63.

⁷³ *Id.* at pp. 127-29; Wingfield, *The Modern Mammy and the Angry Black Man* (2007) 14 *Race, Gender & Class* 196, 198-99.

⁷⁴ Hooks, *supra*, at pp. 127-29; see generally Smith, et al., *supra*.

⁷⁵ See, e.g., Jones, *supra*, pp. 58-64.

⁷⁶ Testimony of Jones, *supra*, 13:15-13:26; see also Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 2003); Susan Benson, *Counter Cultures: Saleswomen, Managers, and Customers in American Department Stores, 1890-1940* (Urbana: University of Illinois Press, 1986).

⁷⁷ Jones, *supra*, at p. 64.

⁷⁸ *Id.* at pp. 64-65.

⁷⁹ Testimony of Jones, *supra*, 1:30-1:45, 5:47-7:00, 11:38-12:51.

same time.⁸⁰ The Freedmen’s Bureau, a government agency established to aid the transition of enslaved people to freedom, singled out Black women as subset of poor women who were supposed to work rather than remaining at home.⁸¹ For example, South Carolina Freedman Bureau agent John de Forest criticized the “myriads of [Black] women who once earned their own living [who] now have aspirations to be like white ladies and, instead of using the hoe, pass the days in dawdling over their trivial housework[.]”⁸² Thus, a higher percentage of Black married women worked than their white counterparts.⁸³

This systematically denied Black children the care of their mothers when compared to white children whose mothers could more often choose to stay home and provide care.⁸⁴ Black women were generally denied opportunities in public-facing retail jobs or professional secretarial work with traditional nine-to-five work schedules.⁸⁵ Instead, they were generally only given opportunities to serve as domestic caregivers and maids, often living in the homes of their white employers and on call at all hours.⁸⁶ These roles, therefore, literally took the individual work of caring and mothering from Black women and gave it to the children of white families, often preventing Black mothers from even living with their children.⁸⁷

B. Interracial Marriage

Anti-miscegenation laws continued to apply after the fall of slavery. The passage of the Fourteenth Amendment after the Civil War was acknowledged, even by its proponents, to leave in place laws prohibiting interracial marriage so long as they treated a black person the same way they treated a white person—that is, so long as it prohibited interracial marriage equally for members of both races.⁸⁸ In 1883, the Supreme Court upheld the constitutionality of such laws, and myriad state courts also rejected state challenges to them through the mid-20th century.⁸⁹ Members of Congress in areas where such laws were very popular also introduced ultimately unsuccessful constitutional amendments in 1871, 1912, and 1928 to ban interracial marriage nationwide.⁹⁰ Eventually, a total of 38 states established such laws.⁹¹

⁸⁰ *Ibid.*

⁸¹ Testimony of Jacqueline Jones, *supra*; Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work and the Family from Slavery to the Present* (New York: Basic Books, 2010), *supra*, pp. 4352-76.

⁸² *Id.* at p. 59.

⁸³ Testimony of Jones, *supra*; see also Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 2003); Susan Benson, *Counter Cultures: Saleswomen, Managers, and Customers in American Department Stores, 1890-1940* (Urbana: University of Illinois Press, 1986).

⁸⁴ *Ibid.*

⁸⁵ Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), 222-232.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Stein, *supra*, at 628.

⁸⁹ *Pace v. Alabama* (1883) 106 U.S. 583; Stein, *supra*, 82 Wash. U. L.Q. at page 629; Note, *Constitutionality of State Anti-miscegenation Statutes* (1951) 5 *Southwestern L.J.* 452, 453 (“Precedent being established, the state courts uniformly upheld these laws for over half a century until [*Perez v. Sharp*].”).

⁹⁰ Stein, *supra*, at 629–30.

⁹¹ Cruz & Berson, *Laws that Banned Mixed Marriages* (May 2010) Ferris State University – Jim Crow Museum of Racist Memorabilia <<https://www.ferris.edu/HTMLS/news/jimcrow/question/2010/may.htm>> (as of Aug. 13, 2021); Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage* (2004) 82 Wash. U. L.Q. 611, 628, footnote 82. In

Racism and white supremacy lay at the foundation of the popularity of these laws. Many scholars argue that the white-dominated state governments passed anti-miscegenation laws to prevent Black Americans—enslaved or otherwise—from accumulating wealth, in addition to controlling women’s sexuality.⁹² In America’s earliest days, white colonists were also concerned with possible mixing of African Americans and Native Americans, given that an alliance of both groups might provide sufficient strength to rise against slavery and other forms of economic oppression.⁹³

The most direct concern was a passing on of white wealth to interracial offspring through inheritance or probate laws, undermining race-based social stratification.⁹⁴ Children of legally-unrecognized interracial marriages were almost always excluded from economic benefits they would have received if their parents were both white. The children were legally considered “bastards,” and had no claim to the estates of their biological fathers, nor could the man or woman in such a “void” marriage claim alimony, child support, death benefits, or any inheritance.⁹⁵

White relatives also had a strong motivation to ensure these statutes were strictly and aggressively enforced, since a sibling who might inherit nothing on the death of a married brother or sister could inherit that sibling’s wealth by proving that the sibling’s spouse was Black, and therefore that the marriage was void.⁹⁶ Anti-miscegenation laws continued to explicitly deny economic benefits—especially in probate, i.e., a judicial process whereby a will is “proven” in court—to Black Americans who would have otherwise received them, since, by operation of law, assets of those who died without wills would be inherited by spouses.⁹⁷

Government officials and white militants enforced bans on sexual intimacy between Black men and white women with particular intensity due to the overlapping aims of maintaining racial hierarchy and policing white women’s bodies.⁹⁸ The Ku Klux Klan, an all-male group, claimed one of its purposes was to treat white women as the “special objects of [its] regard and protection.”⁹⁹ Yet they abused, raped, and mutilated white women who fraternized with Black men.¹⁰⁰

This combination of racial antagonism toward Black men and patriarchal policing of white womanhood meant that Black men were special targets for violence after any interactions with white women. In Alabama in 1929, for example, Elijah Fields, a 50-year-old Black man, and Ollie Roden, a 25-year-old

addition, Washington, Kansas, and New Mexico “prohibited interracial marriages when they were territories, but repealed them when they became states.” *Ibid.*

⁹² Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities* (2007) 41 L. & Soc. Rev. 587, 594, Viñas-Nelson, *supra*.

⁹³ Cruz & Berson, *supra*.

⁹⁴ *Id.* at 594.

⁹⁵ Kennedy, *Interracial Intimacies* (2003), at 222.

⁹⁶ *Ibid.*

⁹⁷ Kennedy, *Interracial Intimacies* (2003) page 222.

⁹⁸ Angyal, *I Don’t Want to be an Excuse for Racist Violence Anymore*, *New Republic* (June 22, 2015) <<https://tinyurl.com/2p9dp8a3>> (as of Jan. 26, 2022); Hodes, *The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War* (1993) 3 J. of the History of Sexuality 402, 408-12, 417.

⁹⁹ Hodes, *supra*, at p. 409.

¹⁰⁰ *Id.* at pp. 410-11.

white woman, were both arrested and tried for violation of the state’s anti-miscegenation law, which also prohibited cohabitation.¹⁰¹ An Alabama jury convicted Fields even though Roden’s father testified that he had only asked Fields to drive his daughter, who was incontinent and suffering from open sores, from a hospital to a boardinghouse.¹⁰² The state sentenced Fields to two to three years in prison, although it was later reversed on appeal.¹⁰³ White mobs also enforced these laws and norms through extra-judicial violence, e.g., lynchings.¹⁰⁴ Perhaps the most infamous—and arguably most representative—example of such violence is the murder of Emmett Till, a 14-year-old Black child who was tortured and killed by two white men for allegedly whistling at a white woman in 1955 in Mississippi.¹⁰⁵ For an in-depth discussion of related issues, please see Chapter 3 on racial terror.

In 1967, in *Loving v. Virginia*, the U.S. Supreme Court finally struck down all anti-miscegenation laws as unconstitutional.¹⁰⁶

C. Continued Enslavement of Black Children Through Apprenticeship

The so-called “apprenticeship system” had existed in some form since the late 1700s, but the legality of slavery meant it was not necessary to ensure the forced and unpaid labor of enslaved children.¹⁰⁷ However, even during the slavery era it was used to exploit the labor of *free* Black children, including in enslaving states. For example, records reveal that in 1857 a three-year-old free Black boy named Charles Bell was bound to an apprenticeship in Frederick County, Maryland, until the age of 21, through an agreement between local county officials and Nathaniel C. Lupton, which makes no mention of his parents.¹⁰⁸

After emancipation, this system became a powerful tool of continued oppression by allowing former enslavers to effectively require Black children to continue working at the plantations at which they were formerly enslaved, keeping Black girls until they were 18 and Black boys until they were 21.¹⁰⁹ Although it is not known precisely how many children were effectively re-enslaved through apprenticeship, certainly many thousands of children in the South were taken from their recently-freed parents who had no reliable means to provide financial support.¹¹⁰

¹⁰¹ *Id.* at 214.

¹⁰² *Ibid.*

¹⁰³ *Id.* at 25.

¹⁰⁴ *Ibid.*

¹⁰⁵ Press Release, Dep’t of Justice, Justice Dep’t to Investigate 1955 Emmett Till Murder (May 10, 2004), available at http://www.justice.gov/opa/pr/2004/May/04_crt_311.htm.

¹⁰⁶ (1967) 388 U.S. 1.

¹⁰⁷ Margaret A. Burnham, Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum (1996) 18 *Cardozo L. Rev.* 433, 437.

¹⁰⁸ Mason, Mary Anne, *The Uncommon Wealth: Voices from the Library of Virginia, The Farmer’s Apprentice: African American Indentures of Apprenticeship In Virginia* (May 27, 2020).

¹⁰⁹ Testimony of Jaqueline Jones and Cheryl Grills, California Task Force to Study and Develop Reparation Proposals for African Americans 3 (October 13, 2021).

¹¹⁰ Burnham, *supra* at 436.

Court cases throughout the second half of the 19th century document occasionally-successful attempts of parents to free their children from this de facto form of slavery, but also reveal the continued success of the system writ large at profiting from the enslavement of Black children.¹¹¹

Immediately after emancipation, the desire of white former enslavers to continue to exploit children, both sexually and as a cheap source of labor, often motivated them to gain control of Black minors by refusing to free them when their parents were freed, either through apprenticeship laws or through outright kidnapping.¹¹² Many southern Black children in the apprenticeship system continued the traditional enslavement era labor of picking cotton.¹¹³

The apprenticeship laws supported the removal of Black children from their families.¹¹⁴ These laws even allowed white former enslavers to gain legal custody of Black children by claiming their parents were incapable of supporting them, which of course, many were, as a result of Jim Crow and ongoing racist disenfranchisement.¹¹⁵ Black families often suffered economic harm in addition to the trauma of losing a child in this way since Black farming families relied upon children to assist in agricultural work.¹¹⁶

Southern white people continuously defended the apprenticeship system as benevolent in nature. One Maryland newspaper, for example, described the system in 1864 as being “prompted by feelings of humanity towards these unfortunate young ones.”¹¹⁷ One Texas judge similarly described the Texas apprenticeship system as granting “justice to these children” by placing them in “good comfortable homes” where they would receive “some education.”¹¹⁸

State and local courts were intimately involved in empowering this injustice. So-called “orphan” courts across the southern states, which were typically run by pro-slavery judges, bound an estimated 10,000 children of freed Black men and women to these apprenticeships, which for all intents and purposes were an extension of their forced labor under slavery, operating to the benefit of the children’s former enslavers.¹¹⁹ Chief Justice of the United States Supreme Court Salmon Chase noted, in an 1867 case, that under the Maryland apprenticeship system “younger persons were bound as apprentices, usually, if not always, to their late masters.”¹²⁰ This legal dispute arose because, under Maryland law, anyone seeking to apprentice a white child was required to provide an education, and could not involuntarily “transfer” the apprenticed child to another.

¹¹¹ *Id.* at 439-448.

¹¹² Smallwood, *Emancipation and the Black Family: A Case Study in Texas* (1977) 57 Soc. Sci. Q. 849, 851.

¹¹³ Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland* (1988) 62 Ag. Hist. 57, 63

¹¹⁴ Smallwood, *supra* at 851.

¹¹⁵ Fuke, *supra*, at 63.

¹¹⁶ *Id.* at 63, 67.

¹¹⁷ *Id.* at 63-64.

¹¹⁸ Mary Farmer-Kaiser, *Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation* 106 (2010).

¹¹⁹ Jessica Dixon Weaver, *The Changing Tides of Adoption: Why Marriage, Race, and Family Identity Still Matter* (2018) 71 SMU L. Rev. 159, 168; Gutman, *supra*, at 402-410.

¹²⁰ *In re Turner* (C.C.D. Md. 1867) 24 F.Cas. 337, 339.

However, Black children subjected to apprenticeship were not provided these rights, and in fact were described overtly as a “property and interest.”¹²¹ A young Black girl named Elizabeth Turner, was apprenticed as a “house servant” at the age of eight, a mere two days after her emancipation.¹²² She challenged her apprenticeship because of the explicit racial differences between the apprenticeship statutes.¹²³ The Supreme Court resolved the dispute by holding that no Black child could be bound to an apprenticeship, which lacked the protections afforded to white children, making the obvious but important observation that “the alleged apprenticeship in the present case is involuntary servitude, within the meaning of . . . the [thirteenth] amendment.”¹²⁴

Although this decision meant freedom for Elizabeth Turner, few southern trial courts followed Justice Chase’s approach, and the re-enslavement of Black youth continued in the South generally unabated.¹²⁵ Since apprenticeship laws empowered these local courts to determine the capacity of Black parents to raise their children, white former enslavers often easily convinced white judges that the children would be better off placed with them.¹²⁶ Scholars have noted that these attitudes have continued through modern family court and child welfare systems, which continue to apply three presumptions that are racist in practice: 1) That the state knows how to raise Black children better than their parents; 2) That poverty inherently renders parents unfit to raise their children; and 3) That menial or vocational work was the proper lot of black youth, rather than academic education.¹²⁷

The federal government similarly left these abuses unaddressed through official action. The Fair Labor Standards Act of 1938, a federal law that dramatically restricted the employment of child workers, explicitly exempted both agricultural and domestic work, which was then largely done by Black workers.¹²⁸ The United States Congress intentionally excluded these industries from labor protections for the purpose of denying Black workers the labor protections given to white workers.¹²⁹ See Chapter 10 on labor for further discussion of related issues.

D. Impacts of the Great Migration on the Black Family

In the first half of the 20th century, millions of Black Americans left the Jim Crow South in search of greater opportunity in urban centers in the North and the West. This was, in part, because these cities already had some existing Black social networks and possibly relatives with whom southern Black

¹²¹ Ibid.

¹²² Burnham, *supra* at 439-440.

¹²³ In re Turner, *supra* at 339.

¹²⁴ Ibid.

¹²⁵ Burnham, *supra* at 442-43.

¹²⁶ Fuke, Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland (1988) 62 *Ag. Hist.* 57, 63.

¹²⁷ See, e.g., Burnham, *supra* at 439.

¹²⁸ Fair Labor Standards Act of 1938 29 U.S.C. § 203.

¹²⁹ Testimony of Rebecca Dixon, National Employment Law Project, From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act, Hearing before the U.S. House of Representatives Education and Labor Committee, Workforce Protections Subcommittee (May 3, 2021).

Americans could connect.¹³⁰ Older studies theorized that Black migrants during the Great Migration had disorganized family structures in the South, which they brought with them when they migrated to the North, contributing to higher rates of single parenthood and childbirth outside of marriage.¹³¹ Many Black families sent one parent, northwards or westwards first, with the rest of the family to follow months or years later.¹³²

In 1966, Black scholar and sociologist E. Franklin Frazier argued that enslaved Black Americans had coped with the realities of slavery by relying upon matrilinear extended support networks—i.e., Black “Grandmothers,” both actual and figurative, and other caregivers—which were not available in the urban North and West after the Great Migration, leading to the existence of families that were considered to be “dysfunctional” and “problematic” without this extended familial and institutional support.¹³³ These ideas were overtly cited and central to the conclusions in the Moynihan Report, which is discussed further below.¹³⁴

Modern scholarship disputed these conclusions, noting that Black migrants from the South were more likely than Black Americans already living in the North to have children living with two parents, married women living with their spouses, and fewer mothers that had never married.¹³⁵ They were also less likely than northern Black Americans to receive welfare payments, contradicting claims in the Moynihan Report, which is discussed further below, that the higher welfare payments in the North drew migrants from the South.¹³⁶

E. California

California had an anti-miscegenation statute even as other nearby states, like Oregon, did not.¹³⁷ In fact, California enacted an anti-miscegenation law in its very first legislative session in 1850.¹³⁸ It initially singled out “negroes and mulattos” as the sole group which was prohibited from marrying “whites,” following the national trend of disenfranchising Black people from entering into legally-recognized marriages with white Americans.¹³⁹ Although the law was based in slavery-era motivations for prohibiting such marriages, other racial groups facing waves of societal discrimination in California were targeted by later amendments to the original statute. California legislators exported its ban on interracial marriage to other states: In 1939, California legislators convinced the Utah legislature to add “Malay” to its state anti-

¹³⁰ James N. Gregory, *The Southern Diaspora: How the Great Migrations of Black and White Southerners Transformed America*. Chapel Hill: University of North Carolina Press (2005).

¹³¹ Stewart E. Tolney, *The Great Migration and Changes in the Northern Black Family, 1940 to 1990*, *Social Forces*, Jun., Vol. 75, No. 4 (1997).

¹³² See, e.g., Wilkerson, *The Warmth of Other Suns* (2010), pp. 6, 240-41.

¹³³ *Id.* at 1218 (citing E. Franklin Frazier, *The Negro Family in the United States* (1966)).

¹³⁴ *Id.* at 1219.

¹³⁵ *Id.* at 1221-32.

¹³⁶ *Id.* at 1232.

¹³⁷ Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009) pages 193.

¹³⁸ Stats. 1850, ch. 140, § 3, page 424. The act, “An Act regulating marriages,” is actually older than the state itself: it passed on April 22, 1850, just over four months before California was granted official statehood.

¹³⁹ *Ibid.*

miscegenation law in order to avoid having to recognize marriages between Filipino Americans and white people performed in Utah.¹⁴⁰

It was not until 1948 that the California anti-miscegenation law was struck down by the California Supreme Court.¹⁴¹ At oral argument, in defense of the law, the lawyer for Los Angeles County asserted that “it has been shown that the white race is superior physically and mentally to the black race, and the intermarriage of these races results in a lessening of physical vitality and mentality in their offspring” and that “people who enter into miscegenous marriages are usually from the lower walks of both races... generally people who are lost to shame.”¹⁴² Even after the law was struck down as unconstitutional, the California legislature repeatedly refused to repeal the law. It was not until *11 years* later that the California legislature finally repealed the statute, following consistent pressure from the National Association for the Advancement of Colored People.¹⁴³

V. The Moynihan Report

Few developments in the past half-century have been as impactful, or arguably as harmful, to America’s perception of Black families as the “Moynihan Report” of 1965.

A. Drafting and Content of the Moynihan Report

In the midst of the civil rights movement, in 1965, Daniel Moynihan, an Assistant Secretary of Labor researching policies as part of the Johnson Administration’s “War on Poverty,” drafted what was originally an internal Department of Labor Report entitled, “The Negro Family: The Case For National Action.”¹⁴⁴ As described in the introduction of the report, one of its primary purposes was to analyze the Black American family structure, which Moynihan saw as the fundamental problem underlying the gap in income, standards of living, and education between Black Americans and other groups.¹⁴⁵

The report described numerous ways that the historical legacy of slavery and institutional racism created lasting, harmful effects on Black Americans and the Black family.¹⁴⁶ However, while acknowledging the impacts of these historical realities, the report essentially claimed that the high rates of single motherhood in Black families in America were a, if not *the*, primary reason for the continued failure of Black Americans to achieve full and equal access to success in America.¹⁴⁷ It further asserted that such equality could only be achieved by changing the culture of Black Americans, and particularly of Black men, who had been “feminized” and rendered inadequate workers through being raised without male role models.¹⁴⁸

¹⁴⁰ Pascoe, *supra*, at page 195.

¹⁴¹ *Perez v. Sharp* (1948) 32 Cal.2d 711

¹⁴² Pascoe, *supra*, at 217.

¹⁴³ Volpp, *supra*, 33 U.C. Davis L.Rev. at page 824; Pascoe, *supra*, at page 242.

¹⁴⁴ Daniel Moynihan, Office of Policy Planning and Research, United States Department of Labor, *The Negro Family: The Case For National Action* (1965) (“Moynihan Report”);

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*; Daniel Geary, *The Moynihan Report: An Annotated Edition*, *The Atlantic* (Sept. 14, 2015).

Even when advocating for governmental intervention to assist Black Americans, the Moynihan Report still portrayed them as helpless but for the intervention of white Americans, describing what Moynihan called the “pathology” of Black America as “capable of perpetuating itself without assistance from the white world.”¹⁴⁹ Although the Moynihan Report relied heavily on scholarship previously published by Black scholars, and linked the poverty experienced by Black Americans to the historical traumas of slavery, it also argued that the Civil Rights Act and equality of opportunity would not resolve them.¹⁵⁰

Instead, the Moynihan Report asserted that “[t]he gap between the Negro and other groups in American society is widening. The fundamental problem, in which this is most clearly the case, is that of family structure.”¹⁵¹ Moynihan argued, for example, that the prevalence of single motherhood in Black families created “a matriarchal structure which . . . seriously retards the progress of the group as a whole.”¹⁵²

The overt sexism and gender-stereotyping of the report also led to further hostility towards Black women serving as leaders in the Civil Rights movement.¹⁵³ Contemporary Black women leaders were outraged that Moynihan explicitly advocated for improved governmental job opportunities for Black men over Black women to ensure male “breadwinners.”

Trailblazing advocate Pauli Murray stated that Moynihan’s criticism of Black women in the workforce was “bitterly ironic,” as criticism “for their efforts to overcome a handicap not of their own making.”¹⁵⁴ Indeed, Murray and others sharply contested that greater emphasis on traditional roles of “matriarch” and “patriarch” was somehow the solution to Black poverty and racism, claiming it was merely a continuation of the “Jane Crow” mentality that had long restricted Black women from most areas of the workforce.¹⁵⁵

Ultimately, no national effort resulted from the Moynihan Report. President Johnson called for a White House conference in its wake, which occurred in November of 1965. At that point, the report had engendered so much controversy that Moynihan himself was largely sidelined at the conference, having recently left the administration.¹⁵⁶

B. The Contemporary Response of Black Leaders to the Moynihan Report

Largely in response to the Moynihan Report, President Johnson famously acknowledged the unique challenges created by the legacy of state-sanctioned slavery and discrimination when he publicly stated,

¹⁴⁹ *Id.* at 47 (describing the “pathology” of Black America as “capable of perpetuating itself without assistance from the white world.”).

¹⁵⁰ Geary, *supra.*; see also Jessica Dixon Weaver, African-American Grandmothers: Does the Gender-Entrapment Theory Apply? Essay Response to Professor Beth Richie (2011) 37 Wash. U. J.L. & Pol’y 153, 161; Dean Robinson, “The Black Family” and US Social Policy: Moynihan’s Unintended Legacy?, *Revue Française d’études Américaines* (Sept 2003).

¹⁵¹ Moynihan Report at 3.

¹⁵² Moynihan Report at 9.

¹⁵³ *Ibid.*; Kristin Waters, Some Core Themes of Black Feminism, in *Black Women’s Intellectual Traditions: Speaking Their Minds* 377 (Kristin Waters & Carol B. Conaway eds., 2007).

¹⁵⁴ Geary, *supra.*

¹⁵⁵ Daniel Geary, Moynihan’s Anti-Feminism, *Jacobin Magazine* (July 1, 2015).

¹⁵⁶ *Ibid.*

“Negro poverty is not white poverty.”¹⁵⁷ Nevertheless, his administration followed that announcement with few meaningful efforts to address disparities of Black Americans.¹⁵⁸

Johnson did, however, convene a group of well-respected civil rights leaders to address Black poverty, which produced a report proposing that the federal government spend billions of dollars to ensure jobs, universal health insurance, and a basic minimum income paid to all Americans, regardless of race.¹⁵⁹ Their approach did not acknowledge that the American government has harmed Black Americans in a unique way, since they believed proposals solely aimed at helping Black Americans were likely to succeed.¹⁶⁰ Nevertheless, none of their recommendations ultimately manifested in any federal legislation from the Johnson Administration or otherwise.¹⁶¹

C. Impacts on Public Discourse and Social Policy

Scholars have consistently criticized the Moynihan Report for blaming the victim, and it was predictably seized by those who sought to explain away economic and social justice as a natural consequence of the culture and supposed irresponsibility of Black Americans.¹⁶² For some politicians and government actors, the Moynihan Report justified a stance that Black Americans were unworthy of public assistance because their own culture was to blame for their economic plight.¹⁶³

Also criticized as sexist was Moynihan’s suggestion that every young Black man should join the armed forces, which would provide Black men with a much-needed “world away from women, a world run by strong men of unquestioned authority, where discipline, if harsh, is nonetheless orderly and predictable.”¹⁶⁴ This recommendation was made as American involvement in the Vietnam War was beginning to escalate, at a time in which Black men were underrepresented in the Armed Forces, at least partially because they failed the Armed Forces Qualification Test at disproportionately high rates. Moynihan’s analysis and recommendation lead to Secretary of Defense Robert McNamara’s “Project 100,000,” a program ostensibly designed to allow greater access to the U.S. Military for those who initially failed the qualifications test.¹⁶⁵ Project 100,000 ultimately served as a successful recruitment tool for Black soldiers in the Vietnam War—fully 40 percent of those recruited were Black, nearly four times the percentage of Black Americans.¹⁶⁶ Despite the success of voluntary recruitment through Project 100,000, Black men were also

¹⁵⁷ Moynihan Report at 9; *see also* Geary, *supra*.

¹⁵⁸ *Ibid*.

¹⁵⁹ A. Philip Randolph and Bayard Rustin, A Freedom Budget for All Americans (Annotated), *The Atlantic* (Feb., 2018).

¹⁶⁰ Coates, *supra*.

¹⁶¹ Randolph and Rustin, *supra*.

¹⁶² *See, e.g.*, William Ryan, *BLAMING THE VICTIM* xii (Vintage Books ed. 1976); Gary Peller, *The Moynihan Report, Self-Help, and Black Power*, 8 *Geo. J.L. & Mod. Critical Race Persp.* 39, 41 (2016)

¹⁶³ Weaver, *supra*, at 161.

¹⁶⁴ *Id.* at 42.

¹⁶⁵ Geary, *supra*.

¹⁶⁶ Andrew R. Chow & Josiah Bates, *As Da 5 Bloods Hits Netflix, Black Vietnam Veterans Recall the Real Injustices They Faced During and After the War*, *Time Magazine* (June 12, 2020).

disproportionately drafted, comprising 16.3 percent of drafted soldiers.¹⁶⁷ This, of course, further devastated the Black families of these men, thousands of whom were rendered widows and orphans by their deaths.¹⁶⁸

Although the Moynihan Report and its central conclusions were immediately controversial and contested, President Johnson adopted its language and central focus in decrying the “breakdown of the Negro family structure” as fundamental to the challenges faced by Black Americans.¹⁶⁹ Several high-profile scholars also used the conclusions of the Moynihan Report to advocate against the very social welfare programs for which Moynihan himself had advocated to help Black Americans out of poverty. These included Arthur Jensen and Charles Murray—best known for their deeply controversial book “The Bell Curve”—who argued that attainment gaps between Black and white Americans were attributable to innate differences in intelligence between races, a position Moynihan explicitly rejected.¹⁷⁰

Later scholars argued the Moynihan Report misattributed or exaggerated the impact of Black single parenthood, leading to widespread stigmatization and blame of Black single-parent families by politicians inclined to ignore its recommendations for providing actual assistance to Black Americans in need.¹⁷¹ For example, prominent social scientist Donna Franklin has argued that the family instability Moynihan focused on was largely attributable to the employment landscape in the North, where domestic labor as maids and child caregivers was widely available and consistent but Black men had few similar opportunities.¹⁷²

This same observation was made nearly half a century prior to the Moynihan Report by W.E.B. Du Bois, but was seemingly ignored by the report.¹⁷³ Relatedly, Franklin noted that the prevalence of “single mothers” in the Black community during the timeframe studied by Moynihan was at least partially due to the exclusion of Black children from adoption services, meaning that single Black women *had* to become “single mothers” when giving birth. From 1940 to 1960, 70 percent of white single mothers gave up their children for adoption, but only five percent or fewer of Black single mothers did so.¹⁷⁴ As Ta-Nehisi Coates put it in his argument in support of reparations, the report helped create “the myth . . . that fatherhood is the great antidote to all that ails black people.”¹⁷⁵

The severe curtailment of federal welfare programs in the 1990s, as well as the imposition of punitive “welfare to work” requirements, have been seen by many as attributable to the mainstreaming of these ideological themes, even as Moynihan himself, then a Senator, and others expressed surprise and opposition

¹⁶⁷ Ibid.

¹⁶⁸ Geary, *supra*.

¹⁶⁹ Robinson, *supra*.

¹⁷⁰ *Id.* (citing Charles Murray, *Losing Ground* (1984); Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994); see Russell Jacoby & Naomi Glauberman, *The Bell Curve Debate* (1995) (accumulating critical studies undermining the central premises of “The Bell Curve.”); Geary, *supra*.

¹⁷¹ See, e.g., Stephen Steinberg, *The Moynihan Report at Fifty*, *Boston Review* (June 24, 2015).

¹⁷² Donna Franklin, *Ensuring Inequality: The Structural Transformation of the African-American Family* 39 (1997).

¹⁷³ Du Bois (1908), *supra* at 36.

¹⁷⁴ *Id.* at 138.

¹⁷⁵ Coates, *supra*.

to these developments.¹⁷⁶ [to come: potentially more historical evidence linking ideas from the Moynihan report to the 1980s/1990s pushback on welfare and similar policy outcomes.]

VI. The Welfare System: Assistance to Families

Throughout its history, the American welfare system has both explicitly and implicitly discriminated against Black women and families.

A. 1900 to 1935: State “Mothers’ Pensions”

States across America developed centralized welfare systems in the early 1900s to provide economic aid to low-income single mothers taking care of their children, comprising monthly monetary payments paid to the mothers meant to ensure a basic standard of living to care for the mother and child.¹⁷⁷ By 1930, all but two of the 48 existing states had created these “mothers’ pensions,” i.e., support payments to single mothers, across the North and South.¹⁷⁸

Throughout the era of mothers’ pensions, within both northern and southern states, many county administrators found various ways to exclude Black women from receiving them. Southern states consistently avoided giving aid to single mothers when the recipients were Black.¹⁷⁹ These programs discriminated against Black mothers, despite their greater economic need on average.¹⁸⁰

This approach was in line with southern state officials’ administration of federal public works programs; such officials generally argued that Black Americans should not need or be given relief so long as there remained menial jobs available to them.¹⁸¹ Consistent with this, research has shown that between 1910 and 1920, the states in the American South that enacted no “mothers’ pensions” were those with greatest percentage of Black single mothers.¹⁸² Similarly, states that had higher Black single motherhood rates were slower to enact such pensions and/or less generous with them when they were enacted.¹⁸³

Many states also implemented standards that would disproportionately disqualify Black women, such as barring unmarried mothers from receiving benefits.¹⁸⁴ Many states across the nation solely provided mothers’ pensions to widows, thereby excluding unmarried mothers who were disproportionately Black women.¹⁸⁵ Even nominally race-neutral programs were often racist in their administration, since discretion in administering these programs was often left to “line officials (judges as well as county agencies)” who

¹⁷⁶ *Id.* (noting that then-Senator Moynihan was “adamantly opposed” to the elimination of the modern federal welfare program in 1996); Robinson, *supra*;

¹⁷⁷ Ctr. on Budget & Pol’y Priorities, TANF Policies Reflect Racist Legacy of Cash Assistance 10 (2021).

¹⁷⁸ Ethan G. Sribnick & Sara Johnsen, *Institute for Children, Poverty & Homelessness*, The Historical Perspective: Mothers’ Pensions, 29 (2012).

¹⁷⁹ Moehling, *supra*, at 12-18, table 9 (analyzing data from Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia).

¹⁸⁰ *Id.*

¹⁸¹ Testimony of Jacqueline Jones, *supra*; Jones, Labor of Love, 163-194.

¹⁸² Moehling, *supra*, at 12-18, table 9.

¹⁸³ *Ibid.*

¹⁸⁴ Gallo, Marrying Poor: Women’s Citizenship, Race, and TANF Policies (2012) 19 UCLA Women’s L.J. 61, 80.

¹⁸⁵ Moehling, *supra* at 17.

made decisions “to separate the worthy mothers from the unworthy” and about whether to provide benefits at all.¹⁸⁶

A welfare field supervisor in the 1930s explained that the withholding of welfare payments from Black mothers was to prevent them from staying at home caring for their children and to instead force them into the work place.¹⁸⁷ This reflected the attitude of the white community that Black women should be forced to continue engaging in seasonal labor jobs or domestic service rather than receive any aid.¹⁸⁸

A survey of all mothers’ pensions across states in 1931 found that 96 percent of recipients were white; only three percent went to Black mothers.¹⁸⁹ All the states of the Deep South—Arkansas, Florida, Louisiana, Mississippi, North Carolina, Tennessee, and Texas—created “mothers’ pension” programs, but provided almost no assistance to Black single mothers. Across these seven states in 1931, only 39 Black families received mothers’ pensions, compared to 2,957 white families.¹⁹⁰

B. 1935 Onwards: Federal Aid to Dependent Children and Modern Welfare

In 1935, the Social Security Act created a federal program similar to the state mothers’ pensions known as “Aid to Dependent Children,” later renamed “Aid to Families with Dependent Children.”¹⁹¹ In the 1950s, the federal government established payment programs to help poor Americans, popularly known as welfare. These programs administered by state government agents, who often denied welfare benefits to Black families by claiming that their homes were immoral, typically because children were born out of wedlock.¹⁹² For example, in 1960 the Louisiana government removed 23,000 children from its state welfare rolls solely because their parents were not married, which was disproportionately the case among Black families.¹⁹³

In response, the federal government prohibited states from denying welfare benefits solely because a child was born to unmarried parents, and required them to make individualized determinations as to whether a family was “unsuitable” for welfare and to provide service interventions to such families.¹⁹⁴ Although the intent of this rule, which became known as “Flemming Rule,” was ostensibly to ensure that children had their basic needs met whether or not their parents were married, the effect was to perversely push more Black children into foster care, as many state welfare officials investigated Black families and determined that their “unsuitable” home conditions merited removal of the children, often due simply to the poverty of

¹⁸⁶ Handler & Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* 70 (1991).

¹⁸⁷ Briggs, *supra*, at 31.

¹⁸⁸ *Ibid.*

¹⁸⁹ Moehling, *Mothers’ Pensions and Female Headship* (2002) pages 7, 10.

¹⁹⁰ Ctr. on Budget & Pol’y Priorities, *TANF Policies Reflect Racist Legacy of Cash Assistance* 10 (2021).

¹⁹¹ Title IV, Social Security Act, Publ. L. 74-271, 49 Stat. 620 (1935).

¹⁹² Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule* (1997) 76 *Child Welfare* 9, 11.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Ibid.*

the family.¹⁹⁵ Again, scholars have noted that these policies were in many ways a continuation of the local courts during apprenticeship removing children from Black parents for similar reasons.¹⁹⁶

Southern states implemented the Flemming Rule in ways that were particularly racist towards Black families. For example, when Florida passed a “suitable home” statute in 1960 to comply with the Flemming Rule, the largely white state welfare worker staff investigated and challenged the “suitability” of approximately 13,000 families already receiving welfare assistance.¹⁹⁷ Of these 13,000 families, only nine families were white, even though welfare recipients as a whole were 39 percent white.¹⁹⁸ These 13,000 families were thereafter pressured to relinquish their children or forfeit their welfare benefits. Of these families, only 168 gave in and agreed to place their children in state care so that they could continue to receive welfare benefits. State workers expressed surprise at this, based on racist beliefs that Black women had little maternal connection to their children.¹⁹⁹

In modern times, the welfare system of cash assistance has remained biased against Black Americans. In 1996, as part of a public movement against so-called “welfare moms,” Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, which created the Temporary Assistance to Needy Families program, a system of federal funds sent to the states.²⁰⁰ This system awards fixed dollar amounts to each state, but allows them to spend that money how they see fit, so long as they are consistent with federal goals. Those goals include, but are not limited to, providing cash assistance to needy families and ending the dependence of needy parents on government benefits.²⁰¹

This system has allowed states to craft policies that determine who is eligible for assistance, and these state policies tend to disqualify Black families from receiving cash assistance at a higher rate than other racial and ethnic groups.²⁰² For example, seven states have policies that completely ban individuals with any drug-related convictions from eligibility for cash assistance.²⁰³ As discussed in Chapter [XX], Black Americans are much more likely than white individuals to be convicted of drug offenses due to discrimination in the criminal justice system. Therefore, these restrictions are more likely to burden poor Black Americans, whether or not they were intended to do so.²⁰⁴ Similarly, 11 states still maintain “family cap” policies that originated in “welfare mom” stereotypes, which deny benefit increases when welfare recipients have another child, and which have disproportionate impacts on Black families that tend to be larger than white families.²⁰⁵

¹⁹⁵ *Id.* at 20-21.

¹⁹⁶ See, e.g., Burnham, *supra* at 439.

¹⁹⁷ Briggs, *supra*, at 38.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Public Law 104-193 (Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

²⁰¹ *Ibid.*

²⁰² Ctr. on Budget & Pol’y Priorities, TANF Policies Reflect Racist Legacy of Cash Assistance (2021) page 30.

²⁰³ *Ibid.* at 32.

²⁰⁴ Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, New York: Vera Institute of Justice (2018) page 6.

²⁰⁵ Ctr. on Budget & Pol’y Priorities, TANF Policies Reflect Racist Legacy of Cash Assistance (2021) page 31.

One other notable change has emerged in very recent times. Because the law gives states the power to spend federal money on programs other than direct cash assistance, states have a motivation to minimize cash assistance so they can spend more on other programs that might otherwise drain state coffers.²⁰⁶ Over the past 20 years there has been a dramatic reduction in the percentage of federal money spent on cash assistance. In 1997, fully 71 percent of federal money was spent on welfare benefits nationwide, whereas in 2019 states spent only 21 percent of their federal money on such benefits.²⁰⁷ Again, Black Americans suffered disproportionately from this shift, as states with larger percentages of Black residents have tended to spend the least percentage of their federal funds on welfare benefits.²⁰⁸

C. California

While much of the national discussion above applies to states other than California, it is worth noting that historically California did provide “mother’s pensions” solely to widows, disproportionately awarding these benefits to white single mothers because of the greater percentage of unwed parenthood in the Black community.²⁰⁹ Moreover, the modern critique of the so-called “Welfare Queen” arguably was popularized by then-California Governor Ronald Reagan in 1976, who ran for President in part on a promise to cut welfare benefits, which he had previously done as Governor of California.²¹⁰

[To come: how California spends TANF block grants]

VII. Foster Care Systems and Other Forms of Child Welfare

Historically and through today, Black families have faced racism in the child welfare system. After the Civil War, government agencies refused to care for Black orphans in the same way as white orphans, both in the form of exclusionary practices for Black orphans and disproportionate scrutiny from those tasked with ensuring child safety. As of 2019, Black children “accounted for roughly 14 percent of the child population [but] 23 percent of the foster care population.”²¹¹

Studies have shown that this disparity is likely not attributable to Black parents mistreating their children at greater rate, but rather to many other factors.²¹² Some studies that have found slightly higher rates of mistreatment, which scholars have argued is due to the fact that Black families are more likely to be poor,

²⁰⁶ *Id.* at 32.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Moehling, *supra* at 17.

²¹⁰ Ctr. on Budget & Pol’y Priorities, TANF Policies Reflect Racist Legacy of Cash Assistance (2021) page 20; 8 Wallace Turner, “Reagan Cuts \$503-Million From the Budget Passed by California Legislature,” *New York Times*, July 4, 1971, <https://www.nytimes.com/1971/07/04/archives/reagan-cuts-503million-from-the-budget-passed-bycalifornia.html>.

²¹¹ Children’s Bureau, *Child Welfare Practice to Address Racial Disproportionality and Disparity* 2-3 (Apr. 2021).

²¹² Cooper, *Racial Bias in American Foster Care: The National Debate* (2013) 97 *Marq. L.Rev.* 215, 230; Sedlak, A. J., & Broadhurst, D. (1996). *Third national incidence study of child abuse and neglect: Final report*. Washington, DC: U.S. Department of Health and Human Services; Dettlaff, Alan J., Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt, and Leonard Burton, *It Is Not a Broken System, It Is a System That Needs to Be Broken: The UpEND Movement to Abolish the Child Welfare System*, *Journal of Public Child Welfare* 14, no. 5 (October 19, 2020): 500–517.

and the stresses of poverty are correlated with child mistreatment.²¹³ An official study of the U.S. Department of Health and Human Services found in 1996 that the disproportionality of Black children being taken from their parents and placed in foster care “does not derive from inherent differences in the rates at which they are abused or neglected,” but rather reflects the “differential attention” received by Black children “along the child welfare service pathway.”²¹⁴

A. Foster Care and Adoption Throughout American History

Both during and for many decades after the slavery era, Black children were systematically excluded from orphanages and other resources designed to care for poor children.²¹⁵ Instead, some free Black children were placed in charitable housing for homeless or very low-income adults, where they faced abuse and were sometimes “indentured” into forced labor, effectively re-enslaving them.²¹⁶ Non-governmental Black child welfare organizations were sometimes established to help some Black children rejected from private and public entities that only assisted white children.²¹⁷ For example, Pittsburgh’s Home for Colored Children was founded after a young Black girl, Nellie Grant, wandered the streets after being rejected from the city’s childcare institutions because she was Black.²¹⁸

Scholars have argued that more Black children end up in foster care because adoption services believed that Black children were “unadoptable” due to the preferences of the white families which they served to adopt white children.²¹⁹ After governmental child adoption services were officially open to Black children, most were not still given the same opportunities as white families because adoption agencies catered to the preferences of white families.²²⁰ Non-governmental agencies similarly excluded Black children by catering to the private adoption market, which was largely affluent and white.²²¹ When these adoption institutions failed to place Black children with families, they generally attributed that failure to the children themselves and stigmatized them as “unadoptable.”²²² These institutions thereby ignored their many decades of excluding Black children and their inexperience in serving them as factors in their inability to place Black children in their care.²²³

²¹³ Sedlak, A. J., McPherson, K., & Das, B. (2010). Supplementary analyses of race differences in child maltreatment rates in the NIS-4. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families; Sedlak, A. J., Mettenburg, J., Basena, M., Petta, I., McPherson, K., Greene, A., & Li, S. (2010). Fourth national incidence study of child abuse and neglect (NIS-4): Report to congress. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families; Bartholet, E. (2011). Race & child welfare: Disproportionality, disparity, discrimination: Re-assessing the facts, re-thinking the policy options.

²¹⁴ Detlaff (2020), *supra* (quoting congressionally-mandated national incidence study of 1996).

²¹⁵ Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act (2006)* 1 Nw. J. L. & Soc. Pol’y 303; JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 67 (1978).

²¹⁶ Hogan & Siu, *Minority Children and the Child Welfare System: An Historical Perspective* (1988) 33 Soc. Work 493, 493.

²¹⁷ *Id.* at 494.

²¹⁸ Ramey, *Child Care in Black and White* (2012) pages 159–61.

²¹⁹ See Billingsley & Giovannoni, *Children of the Storm* (1972) pages 132–34.

²²⁰ White, *supra*; Landner, *supra*, at 67–68.

²²¹ *Ibid.*

²²² Zanita E. Fenton, *In A World Not Their Own: The Adoption of Black Children* (1993) 10 Harv. Black Letter J. 39, 42.

²²³ Lander, *supra* at 67–68 (citing Andrew Billingsley & Jeanne Giovanni, *Research Perspectives on Interracial Adoption*, in *RACE RESEARCH & REASON: SOCIAL WORK PERSPECTIVES* 139–73 (Roger Willer ed., 1969).)

State government systems that take children from caregivers believed to be unfit and place them in other environments designed to ensure their safety developed after World War II. From the inception of such programs, state agencies removed Black children from their families and placed them into foster care far more often than white children. Between the years of 1945 and 1961, the number of nonwhite children in child welfare caseloads almost doubled, increasing from 14 percent to 27 percent.²²⁴ Twenty-four percent of the children supported by government systems in 1961 were Black, which is relatively substantial when considering the population percentages: white persons constituted 88.6 percent of the total population in the United States in 1960.²²⁵

As the modern foster care system developed, various governmental policies have placed Black youth at greater risk of being taken from their families. As discussed above, until the 1950s, poor Black families continued to be denied benefits available to other poor Americans based on federal policies, and then were faced with potential removal of their children into foster care because of “unsuitable” home conditions.²²⁶

The criminalization of Black Americans through the “War on Drugs” also contributed to increasing numbers of Black children being removed from families and placed into the foster care system, as Black men in particular were disproportionately arrested for minor crimes, breaking apart families and often leaving children in the care of extended relatives or strangers.²²⁷ Child welfare agencies tasked with ensuring child safety also often pay particular attention to families experiencing homelessness and housing instability, which Black Americans experience at disproportionately high rates. Unification of a child with their parents can also be delayed by housing instability.²²⁸ From 1945 to 1982, the percentage of minority children in foster care rose from 17 percent to 47 percent, with 80 percent of minority children being Black.²²⁹

Scholars have found that racial discrimination exists at every stage of the child welfare process. State agencies are more likely to be involved with Black families than with white families.²³⁰ Black parents are more likely to be investigated than other families, because neighbors, teachers, and bystanders are more likely to report Black families than white families, likely due to their own racial biases.²³¹

Studies have shown that when equally poor Black and white families are compared, even where the families are considered to be at equal risk for future abuse, state agencies are more likely to remove Black than white children from their families.²³² A 2008 study found that Black children were *77 percent more likely* than

²²⁴ Roberts, Dorothy E. *Shattered Bonds: The Color of Child Welfare*. Basic Civitas Books, 2002, 27.

²²⁵ Bureau, US Census. “1960 Census of the Population: Supplementary Reports: Race of the Population of the United States, by States: 1960.” *Census.gov*, 8 Oct. 2021, <https://www.census.gov/library/publications/1961/dec/pc-s1-10.html>.

²²⁶ Lawrence-Webb, African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule (1997) 76 *Child Welfare* 9-21.

²²⁷ Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers (2012) 59 *UCLA L. Rev.* 1474, 1480–81.

²²⁸ *Ibid.*

²²⁹ Sen. Select Com. on Indian Affairs, Hearing on Oversight on the Implementation of the Indian Child Welfare Act of 1978 (Apr. 25, 1984) page 35–36.

²³⁰ *Id.*

²³¹ Dettlaff, *supra*; Children’s Bureau, Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3 (Apr. 2021).

²³² Dettlaff, A. J., Rivaux, S. R., Baumann, D. J., Fluke, J. D., Rycraft, J. R., & James, J. (2011). Disentangling substantiation: The influence of race, income, and risk on the substantiation decision in child welfare. *Children and Youth Services Review*, 33, 1630–1637; Miller, M. (2008). Racial disproportionality in Washington State’s child welfare system. Olympia: Washington State Institute

similarly-situated white children to be removed from their homes as opposed to receiving in-home services.²³³ Black children placed in foster care spend more time there, and are less likely to reunify with their families.²³⁴ All other factors being equal, Black parents are more likely than white parents to have their parental rights terminated.²³⁵

As recently as 2017, the *New York Times* documented extensive qualitative evidence of racist foster care interventions in New York City, in which Black mothers not only had their children taken away, but also faced criminal consequences for circumstances that clearly did not merit any such punishment.²³⁶ One Black woman, who remained anonymous in the article, called emergency services when she went into premature labor, but then realized her boyfriend would not be reachable unless she walked to his location. She left her six-year-old-daughter alone at her apartment and walked to get her boyfriend, returning 40 minutes later to find emergency services and police. Immediately after giving birth, she was handcuffed and placed under arrest for child endangerment, and both of her children—including her newborn baby—were placed in foster care.²³⁷ Scholars argue that the refusal of some academics to consider the narrative experiences of Black parents facing foster care interventions may reflect further pathologizing of Black families akin to the Moynihan Report.²³⁸

B. Consequences of Foster Care Disparities

The lived experiences of children involved with the foster care system can be significantly affected by it, and therefore an understanding of Black Americans' disproportionate representation within that system is vital. For example, Brittany Clark spent 12 years in state care. At age seven, she was placed as the only girl in a long-term home, during which she experienced physical and sexual abuse.²³⁹ After five years at this placement, Clark was relocated and spent the remainder of her time in foster care moving from home to home, learning that many individuals involved in fostering are motivated by the financial reward and not the ideal of positively impacting a child's life.²⁴⁰ This instability, lack of control over circumstances, and repeated loss of connection with trusted members of a child's life has lasting effects on foster children.²⁴¹

for Public Policy; Rivaux, S. L., James, J., Wittenstrom, K., Baumann, D., Sheets, J., Henry, J., & Jeffries, V. (2008). The intersection of race, poverty, and risk: Understanding the decision to provide services to clients and to remove children, *Child Welfare*, 87, 151–168.

²³³ Rivaux, *supra*.

²³⁴ *Ibid*.

²³⁵ Children's Bureau, Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3 (Apr. 2021).

²³⁶ Stephanie Clifford & Jessica Silver-Greenberg, Foster Care as Punishment: The New Reality of 'Jane Crow', *New York Times* (July 21, 2017).

²³⁷ *Id*.

²³⁸ Detlaff (2020), *supra*.

²³⁹ Clark, Brittany. "My Experiences in Foster Care." *Children's Rights*, 24 May 2015, <https://www.childrensrights.org/my-experiences-in-foster-care/>.

²⁴⁰ *Ibid*. Clark, Brittany. "My Experiences in Foster Care." *Children's Rights*, 24 May 2015, <https://www.childrensrights.org/my-experiences-in-foster-care/>.

²⁴¹ Williams-Mbengue, Nina. "The Social and Emotional Well-Being of Children in Foster Care." *National Conference of State Legislatures*, 2.

Foster children as a group—in which Black children are vastly overrepresented—demonstrate various long term negative outcomes when compared to children not involved in the foster care system. Compared to youth nationally, children who age out of foster care are less likely to be employed or employed regularly, and earn far less, than young adults who were not in the foster care system.²⁴² By age 26, only three to four percent of young adults who aged out of foster care earn a college degree.²⁴³ One in five of these youth will become homeless after turning 18.²⁴⁴ Only *half* will obtain *any* employment by 24.²⁴⁵ Over 70 percent of female foster youth will become pregnant by 21, and one in four former foster youth will experience Post-Traumatic Stress Disorder.²⁴⁶

Children in foster care are also far more likely to be involved with the criminal justice system. Some children taken from their families are placed in correctional facilities, and within this group, Black children were placed in various penal facilities at rates much higher than white children.²⁴⁷ Approximately 25 percent of children in foster care will become involved with the criminal justice system within two years of leaving foster care, and over half of youth currently in foster care experience an arrest, conviction, or stay at a correctional facility by the age of 17.²⁴⁸ For children who have been moved through multiple foster care placements, the risk is even higher, with one study indicating that over *90 percent* of foster youth who move five or more times will end up in the juvenile justice system.²⁴⁹ Foster youth, particularly girls, are especially targeted by sex traffickers, and the criminalization of sex work can funnel these victims of modern-day slavery into the criminal justice system.²⁵⁰

As a result of these severe disadvantages faced by foster youth, some modern scholars have advocated for the abolition of the modern “Child Protective Services” agency, arguing that it is inherently racist and should be replaced with a child protection model that implements policies and procedures designed from the ground-up to exclude racist presumptions.²⁵¹

C. California

California’s Child Welfare system historically exhibited, and continues to exhibit, the same disparities between Black and white families that are discussed above at the national level, generally in even more extreme forms. For example, Black children in California make up 23 percent of the foster population, while

²⁴² Urban Inst., *Coming of Age: Employment Outcomes for Youth Who Age Out of Foster Care Through Their Middle Twenties* (2008) page 28.

²⁴³ Squiers, *Aging Out of Foster Care: 18 and On Your Own* (Mar. 30, 2017) Shared Justice <<https://www.sharedjustice.org/most-recent/2017/3/30/aging-out-of-foster-care-18-and-on-your-own>> (as of Aug. 24, 2021).

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ Billingsley & Giovannoni, *supra*, at page 88.

²⁴⁸ Palcheck, *Child Welfare and the Criminal System: Impact, Overlap, Potential Solutions* (Mar. 24, 2021), Georgetown J. on Poverty L. & Pol’y <<https://www.law.georgetown.edu/poverty-journal/blog/child-welfare-and-the-criminal-system-impact-overlap-potential-solutions/>> (as of Aug. 25, 2021).

²⁴⁹ *Ibid.*

²⁵⁰ Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works* (May 25, 2018), TeenVogue <<https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works>> (as of Aug. 25, 2021).

²⁵¹ *E.g.*, Dettlaff *et al.*, *supra*, at 500–517.

only *six percent* of the general child population.²⁵² Nationally, these percentages are 24 percent and 15 percent, meaning that, in California, Black children are more than twice as overrepresented in foster care when compared to the national average.²⁵³

A 2015 study ranked California among the top five worst states in terms of Black disproportionality in foster care.²⁵⁴ Some counties in California—both urban and rural—have shockingly higher disparities even compared to the statewide average. In San Francisco County, which is largely urban and has nearly 900,000 residents, the percentage of Black children in foster care in 2018 was over *20 times* the rate of white children.²⁵⁵ In Yolo County, which is largely rural and has approximately 200,000 residents, the percentage of Black children in foster care in 2018 was nearly *10 times* the rate of white children.²⁵⁶

Similar to national statistics, a 2003 study showed that, even when normalizing for other relevant factors like poverty, Black children in California are more likely to be removed from their caretakers and placed in foster care than either white or Latino children.²⁵⁷ Black children in California are approximately twice as likely as white children to experience a Child Protective Services investigation, and approximately three times as likely to spend some time in foster care or experience a termination in parental rights.²⁵⁸ California youth who enter foster care also consistently exhibit various achievement gaps compared to children not involved with foster care, further exacerbating existing disparities for Black Americans. By age 24, California foster youth who age out of foster care earn less than half what an average 24-year-old earns nationally.²⁵⁹ Only 53 percent of foster youth in California graduate high school on time, compared with 83 percent of all youth in California.²⁶⁰

California has made some recent attempts to address these dramatic disparities between foster youth and those not in the foster system, though little has been done to specifically target the racial disparities discussed above. In September 2021, California Assembly Bill 12 was passed into law, enabling foster youth to remain in care through age 21 as a tool to help increase foster youth college attendance rates and address some of the negative consequences of youth aging out of care at 18 with no sources of support.²⁶¹ In

²⁵² Children in Foster Care, by Race/Ethnicity (2018) KidsData <<https://www.kidsdata.org/topic/22/foster-in-care-race/table>> (as of Aug. 27, 2021).

²⁵³ *Compare Ibid with Children's Bureau, Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3* (Apr. 2021).

²⁵⁴ Tiano, Los Angeles' Plan to Address the Overrepresentation of Black and LGBTQ Youth in Foster Care (May 22, 2019) *The Imprint* <<https://imprintnews.org/news-2/1-a-s-plan-to-address-the-overrepresentation-of-black-and-lgbtq-youth-in-foster-care/35125>> (as of Aug. 25, 2021).

²⁵⁵ Children in Foster Care, by Race/Ethnicity (2018) KidsData <<https://www.kidsdata.org/topic/22/foster-in-care-race/table>> (as of Aug. 27, 2021).

²⁵⁶ *Ibid.*

²⁵⁷ Needell et al., *Black Children and Foster Care Placement in California* (2003) 25 *Children & Youth Servs. Rev.* 393, 405.

²⁵⁸ Lurie, *Child Protective Services Investigates Half of All Black Children in California* (Apr. 26, 2021) *Mother Jones* <<https://www.motherjones.com/crime-justice/2021/04/child-protective-services-investigates-half-of-all-black-children-in-california>> (as of Aug. 27, 2021).

²⁵⁹ Urban Inst., *Coming of Age: Employment Outcomes for Youth Who Age Out of Foster Care Through Their Middle Twenties* (2008) page 8.

²⁶⁰ Children's L. Ctr., *Foster Care Facts* <<https://www.clccal.org/resources/foster-care-facts>> (as of Aug. 27, 2021).

²⁶¹ Leecia Welch, *National Center for Youth Law, California's AB 12: Historic Step Toward Helping Foster Youth Attend College, But Much Work Ahead* <<https://youthlaw.org/publication/californias-ab-12-historic-step-toward-helping-foster-youth-attend-college-but-much-work-ahead/>> (as of Nov. 9, 2021).

July 2021, California lawmakers approved the first ever state-funded plan to guarantee monthly cash payments to youth leaving the foster system.²⁶² All University of California, California State University, and California Community College campuses now have foster youth programs designed to provide help and support to former foster youth on their campuses.²⁶³ Explicitly addressing the racial disproportionality in Los Angeles County’s foster care system, the Los Angeles County Board of Supervisors created an “office of equity” within the agency administering the foster care system.²⁶⁴ It was created, however, with “no proposed budget or more specific mandates on the office in terms of actual services it will provide.”²⁶⁵

VIII. Criminalization of Black Youth

Black youth have been exposed to the criminal legal system at disproportionate rates in American society since the founding of this country as a result of racism and over-policing.²⁶⁶ In recent years, these disparities have often gotten worse, rather than better.²⁶⁷ In 2018, while Black youth made up 16 percent of the youth population, the rate of arrest of Black youth was 2.6 times that of white youth, and Black youth accounted for 50 percent of all youth arrests for violent crimes.²⁶⁸

Once charged with a crime, Black youth are at risk of harsher prosecution, detention, and punishment.²⁶⁹ Black youth are transferred to adult court at a much higher rate than white youth. In 2018, while Black youth only accounted for 35 percent of all cases, they made up more than 51 percent of transfers from the juvenile court system to adult court.²⁷⁰ Black girls are 3.5 times more likely to be incarcerated than their white peers.²⁷¹ Black girls also comprise 34 percent of girls in residential placements, but accounted for 15 percent of the female youth population.²⁷² A 2016 study found that for youth serving life without parole sentences in the United States, twice as many individuals were Black as white.²⁷³

²⁶² Beam, California Approves 1st State-funded Guaranteed Income for Former Foster Youth (July 15, 2021) Youth Today <<https://youthtoday.org/2021/07/california-approves-1st-state-funded-guaranteed-income-for-former-foster-youth>> (as of Aug. 19, 2021).

²⁶³ Univ. of Cal., Current and Former Foster Youth <<https://admission.universityofcalifornia.edu/campuses-majors/campus-programs-and-support-services/current-and-former-foster-youth.html>> (as of Nov. 9, 2021); Cal. State Univ., Resources for Foster Youth <<https://www2.calstate.edu/attend/student-services/foster-youth>> (as of Aug. 24, 2021); Cal. Comm. Colleges, Foster Youth Success Initiatives <<https://www.cccco.edu/About-Us/Chancellors-Office/Divisions/Educational-Services-and-Support/Student-Service/What-we-do/Foster-Youth-Success-Initiatives>> (as of Nov. 9, 2021).

²⁶⁴ Tiano, *supra*.

²⁶⁵ *Ibid*.

²⁶⁶ Kristin Henning, *The Rage of Innocence: How America Criminalizes Black Youth* at xv (Pantheon Books, 2021); Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Juvenile Arrest Rates by Race, 1980-2018* (Washington, D.C.: U.S. Department of Justice, 2019); Charles Puzzanchera, “Juvenile Arrests, 2018,” *Juvenile Justice Statistics National Report Series Bulletin*, June 2020.

²⁶⁷ *Id*.

²⁶⁸ *Id.* at xvi; Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Juvenile Arrest Rates by Race, 1980-2018* (Washington, D.C.: U.S. Department of Justice, 2019).

²⁶⁹ Henning, *supra* note 1, at xvi.

²⁷⁰ *Id*.

²⁷¹ *Id.* at 105; Fact Sheet: Incarcerated Women and Girls, Sentencing Project, June 2019.

²⁷² *Id.* at 105.

²⁷³ *Id.* at 246.

Law enforcement and other government agencies across America often treat Black youth as adults, or as less than human, in myriad ways. Research confirms that law enforcement often overestimates the age of Black youth when they are suspected of a felony based on contact with police.²⁷⁴ One study found that Black boys are perceived as older than they are and less innocent than their white peers²⁷⁵

A. School Policing

In all 50 states, public schools, including elementary schools, employ student resource officers, which often do not go by the title of police.²⁷⁶ Proponents of school policing have long tied this practice to fears after deadly mass shootings in places like Columbine, while some scholars have argued its prevalence is linked to white fear of Black youth under the guise of protecting school children.²⁷⁷ In either case, over the past several decades the number of law enforcement officers on school campuses throughout the United States has skyrocketed.

In 1975, the number of U.S. schools with police presence on campus was only one percent.²⁷⁸ By 2016, there were 27,000 school resource officers patrolling U.S. schools, up from about 9,400 in 1997. This equated to sworn officers in approximately three percent of elementary schools, 67.6 percent of middle schools, and 72 percent of high schools in the 2017-18 school year.²⁷⁹ This is at least partially due to a dramatic increase in federal funding for school police. Congress passed the Violent Crime Control and Law Enforcement Act in 1994 to increase federal involvement in school policing and safety.²⁸⁰ The law provided massive federal aid for policing at the state and local level and in schools.²⁸¹

Black students are more likely than white students to attend schools with law enforcement and be arrested at school. In the 2015-16 school year, Black students were arrested at three times the rate of white students, while only comprising 15 percent of the population in schools. This disparity widens for Black girls, who make up 17 percent of the school population, but are arrested at 3.3 times the rate of white girls.²⁸²

Moreover, schools have historically disciplined clothing trends popular among Black youth, including “sagging,” oversized, and baggy clothes.²⁸³ Police played a role in creating a narrative in schools that sagging was a symbol of gang activity, and school officials proceeded to ban sagging as a way to prevent

²⁷⁴ *Id.* at 28.

²⁷⁵ “The Essence of Innocence: Consequences of Dehumanizing Black Children,” *Journal of Personality and Social Psychology*, published online Feb. 24, 2014; Phillip Atiba Goff, PhD, and Matthew Christian Jackson, PhD; University of California, Los Angeles; Brooke Allison, PhD, and Lewis Di Leone, PhD, National Center for Post-Traumatic Stress Disorder, Boston; Carmen Marie Culotta, PhD, Pennsylvania State University; and Natalie Ann DiTomasso, JD, University of Pennsylvania.

²⁷⁶ Henning, *supra* note 1, at 123.

²⁷⁷ *Id.* at 127.

²⁷⁸ *Id.* at 124.

²⁷⁹ *Ibid.*

²⁸⁰ *Id.* at 130; U.S. Code, Gun-Free Schools Act of 1994 § 7151 (1994); Violent Crime Control and Law Enforcement Act (H.R. 3355), 1994; U.S. Department of Justice, Office of Community Oriented Policing Services, “About.”

²⁸¹ *Id.*

²⁸² *Id.* at 132.

²⁸³ Henning, *supra*, at 53.

gang violence, graffiti, and create “safe” environments for kids, thereby further targeting Black youth.²⁸⁴ See Chapter 6 on education for more information on the so-called “school to prison pipeline.”

One in five students in the U.S. will develop mental health challenges that rise to the level of a diagnosis.²⁸⁵ Yet, around the country, schools are more likely to employ law enforcement than mental health counselors, and Black students are three times more likely than their white peers to have police in their school but no psychologist.²⁸⁶ Black male youth with disabilities in the 2015-16 school year had an arrest rate of five times the rate of the whole population.²⁸⁷

B. The Juvenile Justice System

Outside of schools, Black youth face disproportionate harms through various aspects of the juvenile justice system. A 2021 study by researchers from the University of California, Berkeley, found that Black youth in the 10 to 14 age group are injured in police-related incidents at 5.3 times the rate for boys, and 6.7 times the rate for girls, compared to their white peers.²⁸⁸ The study suggested that especially among Black girls, this disparity could be due to how Black girls are “adultified” compared to white girls and perceived of as older.²⁸⁹

More broadly, as discussed in Chapter 11 of this report, Black American youth are more than four times as likely to be detained or committed in juvenile facilities as their white peers.²⁹⁰ Studies show that youth who are stopped more frequently by police are more likely to report feelings such as anger, fear, and stigma, and shame.²⁹¹ More invasive stops led to increased feelings of emotional distress and trauma, including posttraumatic stress after the stop.²⁹² Stress among youth involved in police stops is not contingent on whether they were engaging in any misconduct.²⁹³

The “War on Drugs” in the 1980s and 90s had an outsized impact on Black youth. Studies have shown that white youth use drugs at the same or higher rate as Black youth, but Black youth are disproportionately prosecuted through drug cases in juvenile courts.²⁹⁴ Again, this was largely enabled by the federal government. In 1990, Congress passed legislation authorizing Department of Defense resources to be used to combat drug activity by state and local agencies, including public schools.²⁹⁵ In 2014, schools in states

²⁸⁴ *Id.* at 52.

²⁸⁵ *Id.* at 137

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 138

²⁸⁸ Deepa Shivaram, *Black Kids In California More Likely To Be Hospitalized For Police-Related Injuries*, NPR (Sept. 9, 2021); Farkas K, Duarte CD, Ahern J. Injuries to Children and Adolescents by Law Enforcement: An Analysis of California Emergency Department Visits and Hospitalizations, 2005-2017. *JAMA Pediatr.* Published online September 07, 2021.

²⁸⁹ *Id.*

²⁹⁰ Puzzanchera et al., *Easy Access to Juvenile Populations: 1990-2019*. National Center for Juvenile Justice (2020)

<<https://www.ojjdp.gov/ojstatbb/ezapop>> [as of Jan. 28, 2021].

²⁹¹ Shivaram, *supra*, at 214.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 14; Sarah Hockenberry and Charles Puzzanchera, *Juvenile Court Statistics 2018* (Pittsburgh: National Center for Juvenile Justice, 2020), 21.

²⁹⁵ Henning, *supra*, at 124.

such as California, Florida, and Texas reported receiving military-grade equipment through the department's program.²⁹⁶

Once in the juvenile justice system, outreach to families is inadequate.²⁹⁷ Police and facility outreach to parents is usually limited to notice that their child has an upcoming court appearance, without more information such as why an arrest was made or the circumstances of their child's confinement.²⁹⁸ The bail system for youth in the criminal legal system is also deeply flawed. Courts rarely consider what a family can actually afford when setting bail, and bail is regularly set between \$100 to \$500 for children.²⁹⁹

C. California

The issues discussed above apply to California's history and present treatment of Black youth, although there has been some modern pushback to these approaches.

Recent California Attorney General investigations and settlements with California school districts, e.g., the Barstow Unified School District, the Oroville City Elementary School District, and the Oroville Union High School District are all representative of continued targeting of Black youth.³⁰⁰ Investigations at these districts showed that Black students were more likely to be punished and/or suspended, and were subjected to greater punishments, than similarly-situated peers of other races.³⁰¹

Other districts have taken proactive steps to change outdated approaches. For example, the Oakland school board voted to remove security officers from schools in June 2020.³⁰² Before this vote, school officer practices were governed by a policy and procedure manual that described them as having a "calming presence" in the school.³⁰³ The manual also included authorization for officers to restrain students, search students and their property, and even detain individuals if they had reason to believe a crime had been committed.³⁰⁴ All of these powers, and the school police enforcing them, have disproportionate harmful impacts on Black students. California-specific research has determined that schools with larger police presences lead to decreased instruction for Black students, likely because police discipline and monitoring contributes to a climate that is incompatible with learning.³⁰⁵

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 247.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 275.

³⁰⁰ Press Release, Attorney General Becerra Secures Settlements with Barstow and Oroville School Districts to Address Discriminatory Treatment of Students Based on Race and Disability Status (Aug. 25, 2020).

³⁰¹ *Ibid.*

³⁰² Henning, *supra*, at 134.

³⁰³ *Id.*; Antwan Wilson and Jeff Godown, *School Security Officer Policy and Procedures Manual* (Oakland: Oakland School District, June 29, 2016).

³⁰⁴ *Id.*

³⁰⁵ Henning, *supra*, at 141; Daniel J. Losen and Paul Martinez, *Is California Doing Enough to Close the School Discipline Gap?* (Los Angeles: Civil Rights Project, 2020); Daniel J. Losen and Paul Martinez, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* (Los Angeles: Civil Rights Project, 2020), 33–34; Benjamin W. Fisher and Emily A. Hennessy, "School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-analysis," *Adolescent Research Review* 1, no. 3 (Aug. 2016); Weisburst, "Patrolling Public Schools."

Nevertheless, California still allows law enforcement discretion to add youth over the age of 12 to a gang database as long as two of the following factors—under certain limitations and requirements—are found: admission of gang activity, identification of a gang tattoo, frequent identification in a “gang area,” any known association with gang members, clothing associated with a gang, arrest for typical gang activity, or display of gang signals.³⁰⁶ In California, public defenders and youth advocates estimate that police have tracked children as young as 10 for suspected gang activity.³⁰⁷

In one high-profile incident related to the policing of Black children, in May 2019, police in Sacramento chased down a Black 12-year-old child who they claimed was asking people to buy goods he was selling, and forcefully detained him while he was calling for his mom.³⁰⁸ One police officer covered his face with a mesh sack and forced him on the ground with a knee on his back while an officer put a knee on his thigh.³⁰⁹

IX. Domestic Violence in Black Families

Black women experience intimate partner violence at greater rates, and in more traumatic ways, than other women on average. [to come: additional research on male victims and LGBTQ victims of DV/IPV.] The American Bar Association estimated that, in 2000, Black females experienced intimate partner violence at a rate 35 percent higher than that of white women.³¹⁰ Black women are three times as likely to be murdered by a partner or ex-partner than women of other racial groups.³¹¹ Even among victims of intimate partner violence, Black women experience more traumatic forms of violence on average as compared to white women.³¹² Despite these acknowledged disparities and the obvious importance of addressing them, very little academic or practical attention has been paid towards specific interventions or assistance models that are explicitly catered to Black women.³¹³

[to come: more contextualized discussion regarding scholars’ research arguing that heightened rates of male-on-female violence in the Black community may be attributable to a history of racial oppression.]

Existing racial discrimination, including that of government and institutional actors, are at least partially to blame for some disparities experienced by Black victims of domestic violence. For example, studies have shown Black women are less likely to seek assistance from social services agencies because of substantial distrust of what actions those agencies will take, especially given the disparities discussed earlier in this

³⁰⁶ *Id.* At 78.

³⁰⁷ *Id.* at 79.

³⁰⁸ *Id.* at 220

³⁰⁹ *Id.*

³¹⁰ Callie Marie Rennison & Sarah Welchans, U.S. Dep’t of Justice, Bureau of Justice Statistics, Intimate Partner Violence (May, 2000).

³¹¹ Langley, M., & Sugarmann, J. (2014, January). Black homicide victimization in the United States: An analysis of 2011 homicide data. Retrieved on March 24, 2014 from Violence Policy Center <http://www.vpc.org/studies/blackhomicide14.pdf>

³¹² Seng, J. S., Kohn-Wood, L., McPherson, M. D., & Sperlich, M. (2011). Disparity in posttraumatic stress disorder diagnosis among African American pregnant women. *Archives of Women’s Mental Health*, 14(4), 295-306.

³¹³ Natalie Jones & Christine W. Thorpe, Domestic Violence and the Impacts on African American Women: A Brief Overview on Race, Class, and Root Causes in the United States, *OMNES : The Journal of Multicultural Society* 2016, Vol. 7, No. 1, pp. 22-36, <http://dx.doi.org/10.15685/omnes.2016.07.1.22>.

report regarding removal of children from Black families.³¹⁴ Relatedly, studies have borne out this distrust, as actors within both the social services agencies and the judicial system have unfairly disregarded Black victims as “loud, angry, bossy, welfare queens immune to violence.”³¹⁵ Similarly, Black women are less likely to seek help from police because they expect to be disbelieved, based on extensive histories of distrust from local police and other governmental agents.³¹⁶ Studies also suggest that Black female victims of abuse are sometimes reluctant to report abuse by Black men to the “white legal system” even when police intervention is appropriate, given their long exposure to inequities within that system for Black Americans.³¹⁷ A lack of cultural understanding and the distrust of Black victims of police and social services has consistently been a major challenge among those tasked with helping victims of intimate partner violence.³¹⁸

A. California

[To come: research regarding intimate partner violence in California]

X. Conclusion

[Summary paragraph linking issues discussed in this chapter to enslavement]

³¹⁴ Sumter, M. (2006). Domestic violence and diversity: A call for multicultural services, *Journal of Health and Human Services Administration*, 29(2), 173-190.

³¹⁵ Sokoloff, N. J., & Dupont, I. (2005). Domestic violence at the intersections of race, class, and gender challenges: Contributions to understanding violence against marginalized women in diverse communities. *Violence against Women*, 11(1), 38-64.

³¹⁶ Carbone-Lopez, K., Slocum, L. A., & Kruttschnitt, C. (2015). “Police wouldn’t give you no help” Female offenders on reporting sexual assault to police. *Violence against Women*, 22(3), 1-31.

³¹⁷ Richie, B. (2012). *Arrested justice: Black women, violence, and America’s prison nation*. New York: New York University Press; Manetta, A. A. (1999). Interpersonal violence and suicidal behavior in midlife African American women, *Journal of Black Studies*, 29, 518.

³¹⁸ Asbury, J. African-American women in violent relationships: An exploration of cultural differences. In R. L. Hampton (Ed.), *Violence in the Black family: Correlates and consequences* (1987) 86-106; Hampton, R. L., & Yung, B. R., *Violence in communities of color: Where we were, where we are, and where we need to be?* In R. L. Hampton, P. Jenkins, & T. P. Gullotta (Eds.), *Preventing violence in America* (1996) 53-86.

Chapter 9. Control Over Spiritual, Creative, and Cultural Life

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

At its inception, the United States created a series of laws and policies that denied Black Americans the ability to freely practice their spiritual traditions, create and own art, and engage in sports and leisure activities.¹ During the period of enslavement, state governments controlled and dictated the forms and content of Black American artistic and cultural production and attempted to suppress practices of faith and spirituality.² Following the end of the enslavement period, governments and politicians embraced minstrelsy, which was the popular racist and stereotypical depiction of Black Americans through song, dance, and film.³ Government support of minstrelsy, which was enormously profitable, encouraged white Americans to laugh at, disregard, and reimagine the enslavement of Black Americans as harmless and entertaining.⁴

Federal and state governments failed to protect Black artists, culture-makers, and media-makers from discrimination and simultaneously promoted discriminatory narratives.⁵ State governments, including the State of California, forced Black artists to perform in segregated venues.⁶ The federal government actively discriminated against Black Americans during wars, and projected a false image of respect for Black soldiers in propaganda.⁷ Federal and state governments allowed white Americans to steal Black American art and culture with impunity—depriving Black creators of valuable copyright and patent protections.⁸ State governments encouraged segregation and discrimination against Black American athletes.⁹ State governments denied Black American entrepreneurs and culture-makers access to leisure sites, business licenses, and funding for leisure activities.¹⁰ State governments memorialized the Confederacy as just and heroic through monument building,

¹ [citation needed.]

² [citation needed.]

³ [citation needed.]

⁴ [citation needed.]

⁵ [citation needed.]

⁶ [citation needed.]

⁷ [citation needed.]

⁸ [citation needed.]

⁹ [citation needed.]

¹⁰ [citation needed.]

while suppressing the nation’s actual history.¹¹ States censored cinematic depictions of discrimination against and integration of Black people into white society.¹²

There has been no freedom of religion for Black Americans in the United States. Initially, state governments engaged in open violence against Black Americans of faith and later took no action as white supremacists openly attacked Black faith practices and leaders.¹³ Today, they engage in surveillance and policing tactics against Black faith communities.¹⁴ The government has also silenced racial justice narratives.¹⁵ This has contributed to an American mainstream culture that endlessly replicates narratives of Black inferiority.¹⁶ Black Americans experienced cultural oppression and were simultaneously unable to freely practice their faiths.¹⁷ Today, Black American artists, culture-makers, presenters, entrepreneurs, and communities of faith continue to experience a denial of the ability to freely pursue creative and spiritual endeavors that empower and uplift Black communities.¹⁸

Section II discusses religion and faith. Section III describes the anti-Black narratives in American culture. Section IV discusses discrimination against Black artists. Section V and VI discusses government censorship and deprivation of intellectual property. Section VII and VIII discusses discrimination against Black athletes and restraints on recreation by Black Americans.

III. Black Faith and Spiritual Traditions

Black places of worship have historically been centers of community and political power.¹⁹ Throughout history, federal and state governments have banned, limited, and interfered with the faith practices and traditions of Black Americans because of the power that the Black community derived from their faith practices and places of worship.²⁰ During enslavement, state governments restricted the right of enslaved people to practice their faiths, sometimes inflicting violence and death upon enslaved people who dared to openly practice their faith for fear that it would lead to rebellion.²¹ White churches also benefited from enslavement by participating in the enslavement of Black people, dispersing their families, stealing their labor, and leasing them to expand

¹¹ [citation needed.]

¹² [citation needed.]

¹³ [citation needed.]

¹⁴ [citation needed.]

¹⁵ [citation needed.]

¹⁶ [citation needed.]

¹⁷ [citation needed.]

¹⁸ [citation needed.]

¹⁹ Gates.

²⁰ Id.

²¹ Id.

enterprise and cover costs.²² Following the end of enslavement, white Americans bombed and destroyed Black churches openly, without suffering any legal consequences—inflicting racial terror upon Black American communities and attempting to suppress their practice of faith.²³ Federal and state governments have actively persecuted Black Americans of faith, particularly during the civil rights movement in response to the resistance to white supremacy that these Black Americans inspired.²⁴

Enslaved people had no first amendment right to freely exercise their faith.²⁵ State governments restricted, controlled, and punished enslaved people for practicing their faith and spiritual traditions because they were seen as a threat to the system of enslavement.²⁶ Enslaved people practiced numerous spiritual traditions that originated from a variety of worship styles and practices on the African continent.²⁷ Many enslaved people were practicing Muslims and maintained their faith and religious practices at great cost.²⁸ Laws that restricted worship for enslaved people greatly impacted the ability of Muslim enslaved people to pray as frequently as mandated by Islamic tradition.²⁹

Enslavers were determined to enforce docility, illiteracy, obedience, and perpetuate the system of slavery.³⁰ Under British common law, Christians could not hold other Christians in slavery.³¹ Initially, conversion to Christianity was an accepted path to freedom.³² As enslavers needed more labor to grow tobacco and the cost of white indentures from Europe increased, Black Americans who converted to Christianity no longer received the same rights as white Christians.³³ Virginia passed a law in 1667 stating that enslaved people who became baptized would not be “exempt from bondage.”³⁴ Over time, enslaved people who accepted Christianity fused it with African spiritual traditions such as dancing, drumming, and singing.³⁵ However, antiliteracy laws were passed to ensure that enslaved people could not learn to read or write.³⁶ Key stories from the Bible were censored by enslavers so that enslaved people would not hear them and be inspired to rebel.³⁷ Some enslavers

²² [citation needed]

²³ [citation needed]

²⁴ [citation needed]

²⁵ [citation needed]

²⁶ [citation needed]

²⁷ Id. Chapter 1.

²⁸ [citation needed]

²⁹ Khaled Beydoun, *Antebellum Islam Special Tribute Issue: Title VII of the Civil Rights Act of 1964*, *Howard Law Journal*, 146.

³⁰ [citation needed]

³¹ [citation needed]

³² [citation needed]

³³ [citation needed]

³⁴ [citation needed]

³⁵ [citation needed]

³⁶ [citation needed]

³⁷ [citation needed]

required that a white person be present during any religious gathering of enslaved people to censor and control what was being preached.³⁸

The system of enslavement used violence, censorship, and law to control how enslaved people practiced their faith.³⁹ Black preachers would be whipped if caught preaching to a Black gathering, and enslaved people would be punished for praying out loud.⁴⁰ Many enslaved people would put their mouths to the ground and pray in low voices, so that enslavers could not detect their prayers.⁴¹ Some enslavers took away copies of the Bible from enslaved people.⁴² One of the earliest Black churches, the First African Baptist Church, was built in Savannah, Georgia.⁴³ A Black preacher, Andrew Bryan, who preached there was whipped, and jailed twice by white enslavers for holding meetings after dark in defiance of a city law.⁴⁴

White-led religious institutions profited from the labor of enslaved people and discriminated against Black Americans who joined them. Some Catholic religious orders, like the Jesuits, used the labor of enslaved people to run farms, vineyards, textile mills, and ranches.⁴⁵ The Jesuits used enslaved labor to subsidize education at Jesuit institutions such as Georgetown University, which sold enslaved people to establish financial footing and pay off debts.⁴⁶ Episcopalian churches were built by wealth accumulated from enslavement and early bishops were enslavers—on the eve of the civil war, the church refused to condemn enslavement.⁴⁷ Synagogues were also built by the labor of enslaved people.⁴⁸ In the early 1800s, many enslaved people joined the Methodist Church, which opposed enslavement, but still discriminated against its Black members.⁴⁹ White-led churches, like the Methodist Church, forced Black congregants to sit in segregated pews.⁵⁰ Black preachers and congregants went on to found Black denominations independent of white-led churches, such as the African

³⁸ [citation needed]

³⁹ [citation needed]

⁴⁰ [citation needed]

⁴¹ [citation needed]

⁴² [citation needed]

⁴³ [citation needed]

⁴⁴ [citation needed]

⁴⁵ [citation needed]

⁴⁶ In the early 1800s, many enslaved people joined the Methodist Church, which opposed slavery, but still discriminated against its Black members.⁴⁶ White-led churches, like the Methodist Church, forced Black congregants to sit in segregated pews.⁴⁶ Black preachers and congregants went on to found Black denominations independent of white-led churches, such as the African Methodist Episcopal Church.⁴⁶

⁴⁷ <https://apnews.com/article/race-and-ethnicity-new-york-slavery-minnesota-native-americans-4c7dbcae990bd11dee5a5710c63ece25>.

⁴⁸ <https://www.usnews.com/news/best-states/south-carolina/articles/2021-09-11/sc-synagogue-remembers-enslaved-black-people-who-built-it>.

⁴⁹ [citation needed]

⁵⁰ [citation needed]

Methodist Episcopal Church.⁵¹

In South Carolina, enslaved people formed an independent abolitionist church, called Hampstead (or African) Church in 1817.⁵² They learned to read and write in violation of South Carolina law.⁵³ In 1818, Charleston police arrested 140 members of the church and forcibly shut down their church.⁵⁴ Two years later, Charleston authorities accused one lay preacher at the church, Denmark Vesey, of planning an uprising.⁵⁵ The city of Charleston executed Vesey along with 35 other enslaved people and later demolished the church.⁵⁶ In 1831, Nat Turner, a preacher in Virginia, led approximately 40 enslaved people in a rebellion, which resulted in the execution of 55 enslaved people and the murder of 200 enslaved people by white vigilantes.⁵⁷ Enslavers sought to suppress enslaved peoples' faith—for fear that this faith would generate power that would threaten the entire system of enslavement.⁵⁸

During enslavement and the Civil War, Black spiritual and religious traditions inspired rebellion, artistic inspiration, and powerful leadership.⁵⁹ Enslaved people and Black soldiers sang spirituals—Protestant hymns fused with African musical styles that touched on suffering, justice, sorrow, retribution, freedom, joy, and hope.⁶⁰ Black spiritual and religious traditions inspired rebellions of enslaved people, sustained the Underground Railroad, trained abolitionist orators, and produced Black political leaders during Reconstruction and after.⁶¹ Black churches played an important role in educating, providing resources, and employing newly freed people after the Civil War—particularly because federal and state governments failed to do so.⁶² Black religious leaders and churches were targets of racially motivated violence by white supremacists, who acted with impunity, during the Jim Crow era.⁶³ Most early schools for free people were housed in Black churches.⁶⁴ Black churches generated Black-authored magazines, established mutual aid societies and banks, and offered

⁵¹ [citation needed]

⁵² [citation needed]

⁵³ [citation needed]

⁵⁴ [citation needed]

⁵⁵ <https://www.npr.org/sections/codeswitch/2015/06/18/415465656/denmark-vesey-and-the-history-of-charleston-s-mother-emanuel-church>

⁵⁶ [citation needed]

⁵⁷ [citation needed]

⁵⁸ [citation needed]

⁵⁹ [citation needed]

⁶⁰ [citation needed]

⁶¹ [citation needed]

⁶² [citation needed]

⁶³ [citation needed]

⁶⁴ [citation needed]

antiracist toys to Black children.⁶⁵

White Confederates engaged in racist backlash following the Civil War by targeting Black sacred symbolic spaces to maintain white supremacy.⁶⁶ White mobs engaged in church burnings and lynching with impunity, following the Civil War.⁶⁷ During the Great Migration, when many Black Americans left the South due to racial terror, Black churches in their new home cities provided access to employment, healthcare, and financial aid for these migrants who arrived with minimal resources or support.⁶⁸ The church provided refuge for Black communities from persecution and violence.⁶⁹

Black sacred spirituals, hymns, gospel music, and freedom songs deeply influenced 20th-century American popular music.⁷⁰ Many acclaimed and influential American musical artists began their careers in Black church choirs.⁷¹ Black churches birthed gospel music—sound rooted in spirituals sung during slavery, integrated with chanting, clapping, and group participation.⁷² Gospel choirs began broadcasting on public radio stations and church memberships grew to thousands.⁷³ Much of the music of the civil rights movement was inspired by gospel and congregational hymns.⁷⁴

Black spirituality and religion were central to the civil rights movement, a movement during which many Black preachers, congregants, churchgoers, Black Muslims, and other spiritual Black people faced state persecution for advocating for equal rights.⁷⁵ The Black church powered economic boycott campaigns, antilynching protests, and was the birthplace and meeting place for the civil rights movement.⁷⁶ Influential leaders of the civil rights movement, such as Dr. Martin Luther King, Jr., drew on the traditions of earlier Black preachers and the pulpit to inspire thousands to action.⁷⁷ Dr. Martin Luther King, Jr. came from a family of preachers and was a Baptist leader in the South. He was one among many civil rights leaders in the South who were connected to the Black church. Dr. King was arrested and incarcerated numerous times by the State of Alabama for engaging

⁶⁵ [citation needed]

⁶⁶ [citation needed]

⁶⁷ [citation needed]

⁶⁸ [citation needed]

⁶⁹ [citation needed]

⁷⁰ [citation needed]

⁷¹ [citation needed]

⁷² [citation needed]

⁷³ [citation needed]

⁷⁴ [citation needed]

⁷⁵ [citation needed]

⁷⁶ [citation needed]

⁷⁷ [citation needed]

in civil disobedience.⁷⁸ The Federal Bureau of Investigation surveilled him to try to publicly discredit him.⁷⁹ When many Black churchgoers and people of faith continued to peacefully protest after his arrest, they were attacked by the police in Birmingham with dogs and high-pressure fire hoses.⁸⁰

Many Black churches were burned and bombed during the civil rights movement.⁸¹ During the 1964 Freedom Summer in Mississippi, 37 Black churches were burned or bombed during a 10-week period.⁸² White supremacists killed four Black girls between the ages of 11 and 14 during the bombing of the Sixteenth Street Baptist Church in Alabama.⁸³ The Sixteenth Street Baptist Church was a prominent church that functioned as a meeting place, social center, and lecture hall for the Black community.⁸⁴ It served as the headquarters for mass meetings and rallies during the civil rights movement, becoming a focal point for white hostility.⁸⁵ At the time, the governor of Alabama was a vocal segregationist and was using the Alabama National Guard to block court-ordered desegregation.⁸⁶ The FBI started an investigation, but no charges were filed for the bombing of the church.⁸⁷

Churches functioned as sites for voter registration at a time when Grandfather clauses and other laws, poll taxes, literacy tests, and credible threats from white terrorists blocked Black people from exercising their right to vote.⁸⁸ Four churches were bombed by white supremacists in Montgomery, Alabama alone in 1957, during activists' efforts to integrate public bus services in the city.⁸⁹ For more information, see Chapter 4 on political disenfranchisement.

Malcolm X, a Black Muslim leader, was a key figure in the civil rights movement. He was a spokesperson and public representative for the Nation of Islam.⁹⁰ He advocated for Black liberation from white supremacy and

⁷⁸ David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 1993.

⁷⁹ <https://kinginstitute.stanford.edu/encyclopedia/federal-bureau-investigation-fbi>.

⁸⁰ *Id.*

⁸¹ [citation needed]

⁸² [citation needed]

⁸³ [citation needed]

⁸⁴ <https://www.nps.gov/articles/16thstreetbaptist.htm>.

⁸⁵ <https://www.nps.gov/articles/16thstreetbaptist.htm>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ [citation needed]

⁸⁹ Those properties were the Holt Street Baptist Church, Bell Street Baptist Church, Trinity Lutheran Church parsonage, and First Baptist Church, which was pastored by Ralph Abernethy. <https://www.upi.com/Archives/1957/01/10/Four-Negro-churches-bombed-in-Alabama/8346918225410/> and <https://kinginstitute.stanford.edu/encyclopedia/black-churches-and-parsonages-montgomery-bombed-king-and-abernathy-return-southern>

⁹⁰ <https://www.pbs.org/wgbh/pages/frontline/godinamerica/people/malcolm-x.html#:~:text=A%20charismatic%20and%20powerful%20speaker,in%20New%20York%20City's%20Harlem.>

experienced heavy and constant surveillance by the FBI.⁹¹ Many Black members of the Nation of Islam were also heavily surveilled and monitored by the FBI and local authorities.⁹² In 1943, many were incarcerated for pulling their children out of public school and enrolling them in alternative schools.⁹³

Local and state police, prison psychologists and wardens, state commissioners and prison inspectors, and the FBI surveilled, intimidated, and harassed Black Americans throughout the 20th century.⁹⁴ The FBI surveillance program that targeted many Black people of faith who were resistance leaders was known as COINTELPRO—derived from Counter Intelligence Program.⁹⁵ The FBI has continued to surveil and monitor Black Muslims and other Black people of faith—labelling them as “extremists.”⁹⁶ Under the guise of safeguarding national security and preventing domestic terrorism, the FBI has engaged in racial and religious profiling of Black American Muslims due to Islamophobia and anti-Blackness.⁹⁷ By labelling Black American Muslims as “dangerous extremists,” the FBI can justify interfering with the practice of Black Muslim faith and block their ability to organize for liberation.⁹⁸

In recent years, Black churches, places of worship, and Black Americans themselves, continue to suffer from state sanctioned surveillance, harassment, and attacks.⁹⁹ In June of 2015, a white supremacist entered Mother Emmanuel African Methodist Episcopal Church in Charleston, South Carolina and shot and killed nine Black parishioners while they were engaged in a Bible study session.¹⁰⁰ This was the same church built by Denmark Vesey, the Black preacher who had dared to educate enslaved people and had been killed for his preaching almost 200 years earlier.¹⁰¹ Following the shooting, President Barack Obama implored the South Carolina legislature to remove the Confederate flag from the state capitol, a symbol which emboldened white supremacists to engage in anti-Black violence.¹⁰²

A. California

The State of California has engaged in religious discrimination against Black Californians. Black churches were

⁹¹ Garrett Felber, *Those Who Know Don't Say: The Nation of Islam, The Black Freedom Movement, and the Carceral State*, UNC Press, 2020.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ <https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/>.

⁹⁷ [citation needed.]

⁹⁸ [citation needed.]

⁹⁹ [citation needed.]

¹⁰⁰ [citation needed.]

¹⁰¹ [citation needed.]

¹⁰² [citation needed.]

targeted by state and local authorities and Black people were prohibited from freely practicing their faith. In 1914, at the Azusa Street Mission, a Black Pentecostal Church in Los Angeles, Los Angeles Police Department officers were permanently stationed at the church and would interrupt or shut down services that they thought were too loud or conducted too late in the day.¹⁰³ Black American Muslims also experience religious discrimination in California. In 1958, the California Department of Corrections and Rehabilitation (CDCR) released Administrative Bulletin No. 58/16 titled, “Special Procedures for Muslim Inmates,” the first administrative bulletin targeting people who were perceived as black militants.¹⁰⁴ It singled out Nation of Islam members, the majority of whom are Black American Muslims, as the first to be systematically segregated from the general population of incarcerated people.¹⁰⁵ Nation of Islam members brought lawsuits against CDCR in 1965, commonly arguing that, “No other inmates are given solitary confinement for praying to God, or subject to punishment for the practice of their religious beliefs.”¹⁰⁶ At the time, many Black Americans prisoners converted to Islam while in prison, a trend that frightened correctional officers, wardens, and prison officials.¹⁰⁷ Officials believed that incarcerated Black American Muslims were particularly difficult to control and would politicize the incarcerated Black American population.¹⁰⁸ Though the State of California does not collect data on religion for its prison population, there are ongoing concerns that many Black Muslims incarcerated in California may continue to experience discrimination.¹⁰⁹

IV. Anti-Black Narratives in Arts and Culture

The federal government has produced and promoted anti-Black narratives through a series of racist and white supremacist cultural projects across time.¹¹⁰ For example, the U.S. government participated in racist depictions of Black people in the form of blackface minstrelsy following the end of slavery. The government endorsed racist and prejudiced depictions of Black Americans and mocked the reality of racism experienced by Black communities.¹¹¹ Minstrelsy was a comedic performance of “Blackness” by white Americans in exaggerated costumes and black make-up, known as blackface.¹¹² White Americans distorted the hair and facial features of

¹⁰³ Cecil M. Robeck, *The Azusa Street Mission and Revival: The Birth of the Global Pentecostal Movement*, 2006, p. 18

¹⁰⁴ <https://tif.ssrc.org/2018/05/30/solitary-confinement-and-the-nation-of-islam/>.

¹⁰⁵ <https://tif.ssrc.org/2018/05/30/solitary-confinement-and-the-nation-of-islam/>.

¹⁰⁶ *Williford v. California* 1965).

¹⁰⁷ <https://tif.ssrc.org/2018/05/30/solitary-confinement-and-the-nation-of-islam/>.

¹⁰⁸ *Id.*

¹⁰⁹ [citation needed.]

¹¹⁰ [citation]

¹¹¹ <https://nmaahc.si.edu/blog-post/blackface-birth-american-stereotype>. See also Donald Bogle, *Toms, Coons, Mulattoes, Mammies and Bucks: An Interpretive History of Blacks in Films* _____ and *Bright Boulevard, Bold Dreams: The Story of Black Hollywood*

¹¹² *Id.*

Black Americans and demeaned their language and accents, mannerisms, and character.¹¹³ The first minstrel shows were performed in the 1830s in New York by white performers with blackened faces and tattered clothing who imitated negative and damaging impressions of black people demanded by the shows' creators.¹¹⁴ These performances characterized Black Americans as lazy, ignorant, superstitious, hypersexual, and prone to thievery and cowardice.¹¹⁵

Thomas Dartmouth Rice developed the first popularly known blackface character, "Jim Crow," in 1830.¹¹⁶ By 1845, the popularity of the minstrel show led to the creation of an entertainment industry that thrived on prejudicial stereotypes against Black Americans.¹¹⁷ Blackface minstrelsy grew in popularity after the end of the Civil War alongside growing racial hatred, and the "Jim Crow" laws that proliferated across the country immediately after the end of the war took their name from this primary character in minstrel shows.¹¹⁸ Minstrel performances eventually expanded beyond the stage and entered radio and television airwaves, as well as movie theaters.¹¹⁹ Popular American film actors, such as Shirley Temple, Judy Garland, and Mickey Rooney, performed in blackface from the 1930s to 1950s.¹²⁰ The minstrel performance became a cross-generational racial parody and stereotype made for white amusement.¹²¹ The participation, performance, and consumption of minstrelsy relied on racialized stereotypes that aimed to dehumanize Black Americans.¹²² This dehumanizing allowed white Americans to secure their own positive identity.¹²³ Minstrelsy continuously repeated and entrenched this dehumanization into national and local culture at large.¹²⁴ Watching and engaging in demeaning depictions of Black Americans, like blackface performances, was even a common pastime for U.S. presidents.¹²⁵

The federal government endorsed dehumanizing narratives of Black Americans as violent and propagated white supremacist narratives of the Ku Klux Klan as saviors of the nation through the medium of cinema.¹²⁶ *The Birth*

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id.

¹²² <https://publichistoryproject.wisc.edu/blackface-minstrelsy-and-racist-entertainment/>.

¹²³ Id.

¹²⁴ Id.

¹²⁵ https://www.washingtonpost.com/outlook/yes-politicians-wore-blackface-it-used-to-be-all-american-fun/2019/02/08/821b268c-2b0d-11e9-b011-d8500644dc98_story.html.

¹²⁶ [citation.]

of a Nation, which bore its origin title *The Clansman*, for its first month of screenings, is an unapologetically racist 1915 silent film directed by D.W. Griffith.¹²⁷ The film, which premiered in Los Angeles at Clune’s Auditorium, takes place between the Civil War and Reconstruction.¹²⁸ Essentially a powerful propaganda tool, it glorifies the rise of the KKK, the white supremacist terrorist group, and depicts them as white saviors attempting to “restore order” to the nation.¹²⁹ Woodrow Wilson had the film shown at the White House—a federal government endorsement of white supremacy and anti-Blackness.¹³⁰

From the silent film era through the 1950s, the U.S. Department of Agriculture (USDA) was the preeminent filmmaking agency in the federal government.¹³¹ The USDA produced documentaries that were distributed across the nation.¹³² The films produced by the USDA reinforced problematic racial stereotypes against Black communities.¹³³ USDA motion pictures supported separate-but-equal laws and customs.¹³⁴

Government war propaganda during World War II employed the strategic use of motion pictures to encourage Black Americans to enlist in the U.S. Army.¹³⁵ This propaganda achieved two intertwined objectives, a false image of American democracy and the reinforcement of racist stereotypes about Black people.¹³⁶ The Office of War Information, a government censorship agency, blocked racial depictions of discrimination against nonwhite people to show a falsely ideal racial democracy.¹³⁷ The Office of War Information also approved blackface and jokes perpetuating and relying upon Black stereotypes, while at the same time rejecting depictions of segregation and discrimination.¹³⁸

Federal and state governments have constructed racist monuments on state property and altered school curriculum—glorifying slavery and white supremacy, perpetuating the “Lost Cause” myth, and erasing Black history.¹³⁹ State and local governments have collaborated with the United Daughters of the Confederacy, which

¹²⁷ [citation.]

¹²⁸ [citation.]

¹²⁹ [citation.]

¹³⁰ [citation.]

¹³¹ <https://openjournals.uwaterloo.ca/index.php/kinema/article/view/1290/1670>.

¹³² Id.

¹³³ <https://www.bloomsburycollections.com/book/documenting-racism-african-americans-in-us-department-of-agriculture-documentaries-1921-42/>.

¹³⁴ Id.

¹³⁵ Clayton R. Koppes & George D. Black, *Blacks, Loyalty, and Motion-Picture Propaganda in World War II*, *The Journal of American History* 383 (1986).

¹³⁶ See Clayton R. Koppes & George D. Black, *Blacks, Loyalty, and Motion-Picture Propaganda in World War II*, *The Journal of American History* 383 (1986).

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ *Dixies Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture*

seeks to memorialize and preserve Confederate culture for future generations,¹⁴⁰ to memorialize the “Lost Cause” myth—that the rebels were patriots and not traitors to the nation.¹⁴¹ The project of producing *dismemory*—organized and systematic efforts to manipulate and distort the nation’s history—began immediately after the end of the Civil War.¹⁴² From 1900 to 1920, a wave of *dismemory* projects occurred across the nation.¹⁴³ These included erecting Confederate monuments, many of them placed on courthouse grounds; naming schools, streets, and military bases after Confederate officers; and lobbying Congress for holidays.¹⁴⁴ The construction of these monuments coincided with a historical period in which increased racial terror through lynching and violence against Black people was at an all-time high.¹⁴⁵ (See Chapter 3 on racial terror for more information.) Monument construction has coincided with moments in which Black communities seem to gain some political power or voice.¹⁴⁶ The Supreme Court ruling of *Brown v. Board of Education*, which declared segregation unconstitutional, and the civil rights movement triggered another wave of Confederate monuments across the country.¹⁴⁷

Federal and state governments have enacted laws to protect Confederate monuments and other monuments to white supremacy.¹⁴⁸ Alabama, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia recently enacted these laws between 2012 to 2017.¹⁴⁹ In 2009, the U.S. Supreme Court also protected government monuments from free speech challenges in *Pleasant Grove City v. Sumnum*—a protection that includes Confederate monuments.¹⁵⁰

Government-funded museums, such as the Smithsonian, hold thousands of remains of deceased Black Americans. These remains were systematically collected by physicians who engaged in racist pseudoscientific research.¹⁵¹ White-led museums and art galleries have historically shut out Black artists and Black culture—engaging in the syndrome of “separate-but-unequal programming.”¹⁵² Institutions that receive government funding, such as the Metropolitan Museum of Art in New York, have excluded Black artists seeking to display

¹⁴⁰ Dixies Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture

¹⁴¹ Id.

¹⁴² [citation].

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ <https://itsartlaw.org/2019/12/02/shaping-history-monument-toppling-racial-justice-and-the-law/>.

¹⁴⁶ [citation.]

¹⁴⁷ Id.

¹⁴⁸ [citation.]

¹⁴⁹ [citation.]

¹⁵⁰ [citation.]

¹⁵¹ <https://theconversation.com/us-museums-hold-the-remains-of-thousands-of-black-people-156558>; ; <https://www.nytimes.com/2021/04/20/arts/design/museums-bones-smithsonian.html?referringSource=articleShare>.

¹⁵² <https://www.artnews.com/art-in-america/features/maurice-berger-are-art-museums-racist-1202682524/>.

their work in museums.¹⁵³

Black Americans were denied access to the mainstream media for much of American history, which has historically influenced federal law, policy, and action.¹⁵⁴ Their lack of control was evident in the white press, which routinely denigrated Black people, questioning their integrity and morality.¹⁵⁵ By portraying Black people as less than human, the white popular press justified white terror and stripping Black Americans of civil rights. Mainstream white newspapers historically depicted Black men as rapists, setting the stage for them to be hung, shot, or burned alive in public squares all over the South.¹⁵⁶ These newspapers incited hellish episodes of violence during which white mobs murdered at will, sometimes destroying entire Black communities, during the late 19th and early 20th centuries.¹⁵⁷ Since the 2000s, many newspapers have historically apologized for blatantly racist news coverage over a more than century-long period that encompasses the collapse of Reconstruction, the rise of Jim Crow, the two world wars, the civil rights movement, the Vietnam era, and beyond.¹⁵⁸

The first Black newspaper was formed in 1827, entitled *Freedom's Journal*.¹⁵⁹ *Freedom's Journal* was the first of many subsequent Black newspapers and publications that would be formed throughout the United States.¹⁶⁰ These publications advocated for liberation and rights, demonstrated racial pride, and informed readers of events affecting the Black American community.¹⁶¹ The editors of small, struggling Black publications often risked their lives to refute what they rightly saw as white supremacist propaganda masquerading as news.¹⁶² Ida B. Wells was a journalist for the Memphis weekly known as *The Free Speech*.¹⁶³ She conducted investigations, finding that mobs regularly lynched innocent victims as part of a racial terror regime.¹⁶⁴ This was work that should have been done by federal and state law enforcement agencies. She found that the Black men who were charged with raping white women were often involved in consensual relationships with them.¹⁶⁵ After she published her findings in an editorial, a white mob burned down the office of *The Free Speech*, suffering no

¹⁵³ [citation.]

¹⁵⁴ [citation.]

¹⁵⁵ <https://www.nytimes.com/2021/07/10/opinion/sunday/white-newspapers-african-americans.html?referringSource=articleShare>.

¹⁵⁶ <https://www.nytimes.com/2021/07/10/opinion/sunday/white-newspapers-african-americans.html?referringSource=articleShare>.

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ [citation.]

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Id.

legal consequences.¹⁶⁶ Black newspapers like *The Baltimore Afro-American*, *The Chicago Defender*, and *The Pittsburgh Courier* served as a corrective to the lies of the white press, while incubating and advancing the early civil rights movement.¹⁶⁷

Black Americans were often invisible in white press and mainstream media, unless they were alleged to have committed crimes.¹⁶⁸ They were often denied courtesy titles such as Mrs. and Mr., which were given to white Americans.¹⁶⁹ When Black Americans were cast in television shows, they acted out narratives crafted by white Americans that pigeonholed them in roles as domestics, criminals, brutes, or lazy and deceitful.¹⁷⁰ In 1945, John H. Johnson established *Ebony* magazine—one of the first magazines to be founded by and operated for Black Americans.¹⁷¹ *Ebony* highlighted historical figures who had been left out of textbooks.¹⁷² The magazine also worked with corporations who sought to advertise to Black American communities.¹⁷³ In 1979, Robert Johnson (no relation to John H. Johnson), a cable industry lobbyist, started a television channel called Black Entertainment Television (BET).¹⁷⁴ By the 1990s, he sold BET to Viacom for \$2.3 billion, making him the first Black American billionaire in U.S. history.¹⁷⁵

American television has a sordid history of creating television shows and series that reinforce racism against Black Americans and are written, conceived, and produced by white Americans.¹⁷⁶ White Hollywood has been complicit in the racist practices that thwarted Black freedom struggles.¹⁷⁷ The first Black sitcom originated from a radio program called Amos ‘n’ Andy, in the 1940s, in which two white men portrayed Black characters.¹⁷⁸ According to testimony by Dr. Darnell Hunt before the California Task Force to Study and Develop Reparation Proposals for African Americans, “[C]rime procedurals were found to routinely glamourize policing and to legitimize the criminal justice system, while downplaying the degree to which Black Americans are racially profiled and victimized by both. This finding is particularly alarming given what we know about the normalizing effects of media, about the potential for media, in this case, to condition police officers, prosecutors, juries, judges, and/or vigilantes to perceive Black bodies as a threat, and police violence against

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ <https://www.nytimes.com/2019/08/11/opinion/ebony-jet-magazine.html>.

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ <https://www.npr.org/2017/12/14/570526158/live-episode-black-entertainment-television-robert-johnson>.

¹⁷⁶ <https://moody.utexas.edu/news/black-television-through-years>.

¹⁷⁷ Id.

¹⁷⁸ <https://moody.utexas.edu/news/black-television-through-years>.

them as justified.”¹⁷⁹ This is important because, as Erika Alexander stated in her testimony, “[s]tory is the conduit to our mind, but once the seed is planted, it is the quickest way to our heart.”¹⁸⁰

The television industry was almost entirely white for many of its initial decades.¹⁸¹ Black writers and actors in the 1970s faced exclusion at nearly every turn.¹⁸² Television executives held the racist presumption that white writers could write for any audience, but Black writers only could contribute to Black shows.¹⁸³ The Black screenwriters who are employed by mainstream television networks are often tasked with crafting stereotypical narratives of Black people and story lines that are acceptable to white showrunners, studio executives, and viewers.¹⁸⁴ In 2005, the gap in median annual salary between white and Black writers in the television industry was nearly \$15,000.¹⁸⁵ According to a 2017 survey of the television industry, 91 percent of shows are led by white showrunners.¹⁸⁶ Only 1.3 percent of U.S. full-power commercial TV stations were Black-owned in 2019.¹⁸⁷ Black Americans are largely underrepresented in the entertainment industry.¹⁸⁸ While they comprise 12.4% of the general population in 2020, Black Americans only constituted 3.9% of major studio heads, 6.8% of network CEOs.¹⁸⁹ They comprised 4.5% of broadcast show creators, and 7.4 % of digital show creators for the 2019-2020 season.¹⁹⁰ Federal and state governments have neglected to address the anti-Black discrimination in the entertainment industry.¹⁹¹

The federal government has also engaged in discriminatory regulation of the media, which has harmed Black media professionals and business owners.¹⁹² The buying practices of radio advertisers in the U.S. have been characterized by the Federal Communications Commission (FCC) as racially discriminatory—minority

¹⁷⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁸⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Erika Alexander, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁸¹ Id.

¹⁸² Id.

¹⁸³ Id.

¹⁸⁴ <https://www.theatlantic.com/magazine/archive/2021/10/the-unwritten-rules-of-black-tv/619816/>.

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ <https://www.freepress.net/news/press-releases/fcc-media-ownership-report-underscores-agencys-historical-exclusion-black>.

¹⁸⁸ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁸⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁹⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁹¹ Id.

¹⁹² [citation.]

broadcasting stations earn 63 percent less than other stations with comparable market shares.¹⁹³ Despite this, the FCC has failed to enact regulations to protect Black radio stations and media businesses.¹⁹⁴ Of the 11,000 commercial radio stations across the country, fewer than 180 are owned by Black Americans—about 1.6 percent of the total.¹⁹⁵ Carole Cutting is a Black radio station owner who started a jazz station in 1999 in Springfield, Massachusetts—where there were no Black-owned radio stations.¹⁹⁶ She went through a 15-year legal battle to be able to finally get her broadcast license and is the only Black American to own a commercial radio station, AM or FM, in New England.¹⁹⁷

In 2020, the National Association of Black-Owned Broadcasters called on Congress to pass a bill that would reinstate a tax incentive to encourage people to sell radio stations to members of minority communities and women.¹⁹⁸ The legislation would bring back a tax break enacted in 1978 to account for the history of racism in broadcast licensing.¹⁹⁹ In the years it was in effect, minority ownership increased, however, in 1995, the tax incentive was overturned by Congress.²⁰⁰ Black Americans have proposed that the FCC approve a new technology called radio geo-targeting—that would allow radio stations to provide geographic-specific traffic, weather, public interest information, and advertising to their local communities.²⁰¹ Geo-targeting would allow Black radio stations to better engage listeners, allow for more Black ownership, and more effectively reach Black-American communities.²⁰² As of September 2021, the proposal was pending FCC approval.²⁰³

State and federal governments have neglected addressing racism on social media and the internet. Black women’s work is routinely appropriated by others online, without attribution, which has the effect of erasing their intellectual output.²⁰⁴ They also are subjected to impersonation and “blackfishing,” where non-Black people pretend to be Black on social media.²⁰⁵ A modern day version of blackface. This allows non-Black people to take ownership of Black culture and profit off of fashion, culture, and beauty trends developed by

¹⁹³ Id.

¹⁹⁴ Robert Millar, Racism is in the Air: The THE FCC's MANDATE TO PROTECT MINORITIES FROM GETTING SHORTCHANGED BY ADVERTISERS

¹⁹⁵ <https://www.wbur.org/hereandnow/2020/07/22/black-owned-radio-stations>.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id.

²⁰¹ <https://thehill.com/opinion/civil-rights/574203-the-fcc-must-act-to-promote-minority-owned-broadcasting>.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ <https://www.papermag.com/white-women-blackfishing-instagram-2619714094.html?rebelltitem=10#rebelltitem10>. See also incidences where white men and women engage in this racist activity. <https://www.newsweek.com/blackfishing-meaning-definition-explained-1637979>.

Black Americans, particularly Black women, who are ironically subjected to disproportionate harassment online.²⁰⁶ In 2018, Amnesty International and Element AI found that Black women on Twitter were 84 percent more likely than white women to receive hateful tweets.²⁰⁷ Despite this harassment, Black women online are innovators who contribute greatly to digital cultural spaces.²⁰⁸ The voices of Black activists who speak on racism are disproportionately stifled on Facebook.²⁰⁹ Facebook rarely takes action on repeated reports of racial slurs, violent threats, and harassment campaigns targeting Black users. Thus far, state and federal governments have failed to pass antiracist legislation to protect Black users on social media.

A. California

The State of California has promoted blackface minstrelsy, funded confederate monuments, and neglected to enforce the civil rights of Black American artists, culture makers, and media makers.²¹⁰ California hosted more demeaning characterizations of Black people in the form of blackface shows per capita than any other state in the post-Civil War period. In the 1850s, blackface minstrelsy dominated entertainment in San Francisco.²¹¹ Minstrel songs were played during a banquet for the new University of California president in **X year**.²¹²

California has been home to racist monument and memorial construction for centuries. The Native Sons of the Golden West is a California organization that has erected racist monuments throughout the state.²¹³ It was formed on July 11, 1865 with the goal of honoring the Forty Niners, the first white people to settle in California and take advantage of the gold rush and has erected monuments through the state.²¹⁴ In the 1920s, the Native Sons of the Golden West Grand President wrote that “California was given by God to a white people, and with God’s strength we want to keep it as He gave it to us.”²¹⁵ The organization was backed by prominent political figures such as 37th President Richard Nixon and Chief Justice Earl Warren.²¹⁶ The United Daughters of the Confederacy had 14 chapters across California²¹⁷ and erected plaques, monuments, and other memorials dedicated to Confederate generals and soldiers across California, such as in Monterey and San Diego,

²⁰⁶ Id.

²⁰⁷ <https://decoders.amnesty.org/projects/troll-patrol/findings>.

²⁰⁸ <https://www.bitchmedia.org/article/black-women-face-racism-on-tiktok>.

²⁰⁹ <https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/>.

²¹⁰ [citation]

²¹¹ Lynn M. Hudson, *West of Jim Crow: The Fight Against California’s Color Line 50* (Uni. of Ill. Press 2020).

²¹² *Id.* at 53.

²¹³ <https://www.sfchronicle.com/news/article/Historic-wrongs-on-a-pedestal-Ugly-past-12713662.php>

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ <https://calmatters.org/multimedia/video/2020/07/california-history-confederate-monuments/>

throughout the 1940s and 1950.²¹⁸

California has erected a great number of Confederate monuments, including a dozen or more state markers and cemetery memorials.²¹⁹ Some of these monuments were erected by southern veterans of the Confederacy who moved to southern California after the Civil War and sought to memorialize their service through the creation of monuments.²²⁰ The Mendocino coastal town of Fort Bragg is named after a Confederate army general and enslaver, founded by a lieutenant who named the town after his former commander.²²¹ Thus far, the city council has refused to change the name.²²² In 2004, the Sons of Confederate Veterans erected a nine-foot monument in memory of the Confederate soldiers who settled in Orange County, which remains to this day.²²³

In the radio, film, and television industries, California has neglected to adequately address widespread discrimination. Out of the hundreds of radio stations in California, only two are Black owned.²²⁴ The State of California has, overall, neglected to enforce the civil rights of Black people or address the widespread practice of anti-Black discrimination in Hollywood.²²⁵ Black Americans have been depicted in crude stereotypical film roles in Hollywood: as servants, rapists, and enslaved people—or they were barred from roles in films altogether.²²⁶ The 1939 box office smash *Gone with the Wind*, still the highest grossing film, continues to shape the nation’s understanding of the Civil War and Reconstruction.²²⁷

The *Los Angeles Times* apologized for being “an institution deeply rooted in white supremacy” for most of its history and admitted to a record that included indifference and “outright hostility” toward the city’s nonwhite population—acknowledging the underrepresentation of Black journalists in the newsroom.²²⁸ For instance, the *Times* won a Pulitzer Prize for its coverage of the August 1965 civil unrest in Watts. While much of the Watts story’s content was reported by a 24-year-old Black advertising messenger, Robert Richardson, the reporters and editors of record were nearly all white.²²⁹ Richardson covered the disturbances, driving to the scene and phoning in his reports.²³⁰ He was designated a “reporter trainee” after the riots but was only provided minimal

²¹⁸ [citation]

²¹⁹ Id.

²²⁰ Id.

²²¹ <https://www.latimes.com/california/story/2020-06-26/california-statues-confederate-name-changes-racism>.

²²² Id.

²²³ Id.

²²⁴ <https://www.sacbee.com/news/equity-lab/representation/article248848004.html>.

²²⁵ <https://www.theatlantic.com/entertainment/archive/2019/02/what-the-hollywood-jim-crow-looks-like-today-oscars-2019-maryann-erigha/583453>.

²²⁶ Id.

²²⁷ Id.

²²⁸ <https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-apology-racism>.

²²⁹ Id.

²³⁰ Id.

mentorship or opportunities to enhance his skills. He left the paper the following year.²³¹

In contrast, California's Black newspapers hired Black reporters and writers and invested in them, while the state government failed to prevent discrimination in mainstream media in California. From 1850 to 1870, the earliest Black newspapers published in California included *The Mirror of the Times*, *The Pacific Appeal*, and *The Elevator*.²³² These newspapers emphasized civil rights, community, and racial politics.²³³ Writers and editors were free to be activists and journalists.²³⁴ *The California Eagle* was founded in 1879 and helped ease Black Americans' transition to the west—providing them with housing and job information, and other information essential to surviving in a new environment.²³⁵ With Charlotta Spears Bass at the helm, over the years, the *Eagle* protested racism in the motion picture industry, in the military, and successfully waged battles against discriminatory hiring in Los Angeles—work that should have been done by the state government.²³⁶

California's Social Media Transparency and Accountability Act of 2021, Assembly Bill 587, requires social media platforms to publicly disclose their corporate policies regarding online hate, disinformation, extremism, harassment, and foreign interference, as well as key metrics and data regarding the enforcement of those policies.²³⁷ However, the bill only applies to social media companies that have at least \$100 million in revenue—which would exclude many websites where racist commentary and discourse is highly prevalent, such as Parler.²³⁸ As a result, California's attempts to address white supremacy and racism targeted at Black Americans online may still leave many vulnerable to abuse.

V. Discrimination Against Black Artists and Culture

Black artists have faced intense discrimination and restriction in the United States since the era of slavery.²³⁹ During the period of enslavement, enslaved people faced legal restrictions from many state governments while creating arts, crafts, and engaging in education.²⁴⁰ Many enslaved people were highly talented craftspeople and artists, including seamstresses and tailors, blacksmiths, woodcutters, and musicians of all types.²⁴¹ They

²³¹ Id.

²³² <https://coloredconventions.org/california-equality/life-and-politics/black-newspapers/>.

²³³ https://www.pbs.org/blackpress/news_bios/ca_eagle.html.

²³⁴ Id.

²³⁵ https://www.pbs.org/blackpress/news_bios/ca_eagle.html.

²³⁶ https://www.pbs.org/blackpress/news_bios/ca_eagle.html.

²³⁷ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB587.

²³⁸ <https://www.theguardian.com/commentisfree/2021/jan/12/parler-racism-hate-found-on-app>;
<https://calmatters.org/politics/2021/05/california-social-media-regulations-2021/>.

²³⁹ [citation.]

²⁴⁰ Kimberly Sambol-Tosco, *Education, Arts, & Culture*, SLAVERY AND THE MAKING OF AM., <https://www.thirteen.org/wnet/slavery/experience/education/history2.html> (last updated 2004).

²⁴¹ Id.

fabricated architectural materials, furnishings, musical instruments, such as banjos, and handicrafts, like baskets and rugs.²⁴² Only rarely were enslaved craftspeople or artists allowed to receive part of their earnings when they were hired out or leased to individuals or institutions for their labor and production; instead, most of the money went to the people who had enslaved them.²⁴³ Free Black American artists did engage in self-expression during the period of enslavement, however they had to rely on outside resources or wealthy white patrons to support their careers.²⁴⁴

Many white enslavers were suspicious of the subversive potential of Black art—just as they were suspicious of Black faith.²⁴⁵ In 1739, South Carolina prohibited dancing and drumming by enslaved people for fear that it would incite rebellions.²⁴⁶ Concerned that literate enslaved people could travel through white society more easily and be exposed to ideas of freedom and incite insurrections, southern enslavers banned enslaved people from learning to read or write.²⁴⁷ Since enslaved people were not allowed to read or write, they developed traditions of song and dance to pass along subversive messages and resist slavery—and to share routes for escape.²⁴⁸ Enslaved people sang, danced, and played a variety of musical instruments—often forced by their enslavers to perform for their guests or to entertain whites at a music venue for a fee their “owners” collected.²⁴⁹ Yet, through work songs and other musical expressions, call and response, and plaintive cries and hollering, enslaved people coordinated labor, communicated with one another, and commented on the oppression they suffered.²⁵⁰

Black artists were subject to segregation by custom and by law, enforced by state and local governments.²⁵¹ Black musicians were forced to join segregated local chapters of professional musician associations, which were segregated due to racism in the music industry.²⁵² They were prohibited from employment in city symphonies, radio stations, and clubs outside of segregated Black neighborhoods—due to racist employers, unions, and police enforcement of segregation.²⁵³ Concert venues were often segregated due to racist

²⁴² Id.

²⁴³ Id.

²⁴⁴ <https://nationalhumanitiescenter.org/pds/maai/identity/text5/text5read.htm>.

²⁴⁵ [citation.]

²⁴⁶ [citation.]

²⁴⁷ [citation.]

²⁴⁸ <https://www.nps.gov/articles/000/the-superpower-of-singing-music-and-the-struggle-against-slavery.htm>.

²⁴⁹ Candace G. Hines, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 Mich. J Race & L. 463, 474 (2005) (citing Ortiz Walton, *Music: Black White & Blue; A Sociological Survey of the Use and Misuse of Afro-American Music 2* (1972).

²⁵⁰ [citation.]

²⁵¹ [citation.]

²⁵² [citation.]

²⁵³ Amy Absher, *The Black Musician and the White City: Race and Music in Chicago, 1900-1967*, 44 (2014).

customs.²⁵⁴

Black rock and roll musicians were subject to arbitrary, racist rules.²⁵⁵ They could not make eye contact with white Americans who were usually standing right in front of the stage, while Black Americans were confined to balconies.²⁵⁶ Black musicians also could not stay at many hotels, were banned from restaurants, and were often served rotten food at others.²⁵⁷ Such customs were enforced by state and local police.²⁵⁸ Black artists who challenged segregation were met with violence or death—for example, a musician in Georgia was brutally beaten for refusing to say “sir” in response to a white man’s question at a concert in 1951.²⁵⁹ Black artists were driven from white towns in the south, barred from performing, and chased by white people brandishing guns.²⁶⁰ Governments failed to investigate or prosecute such racist violence.²⁶¹

Despite creating and innovating styles of music, such as blues, gospel, rhythm and blues, soul, jazz, rock and roll, and disco, Black musicians and artists suffered from limited opportunities for financial success.²⁶² White artists appropriated and profited from their music.²⁶³ This appropriation was so pervasive that many Americans did not understand that these art forms were invented by Black artists—governments did not attempt to enforce laws against white appropriators who stole Black music.²⁶⁴ As white musicians began to appropriate jazz, opportunities for Black musicians were severely limited in the recording industry in the 1930s.²⁶⁵ Lucrative concert circuits featured very few Black musicians and bands.²⁶⁶ Independent Black-owned record companies, such as Motown Records in Detroit, bloomed in the 1960s.²⁶⁷ However, by the 1970s, Black-owned and Black-oriented record companies came under the influence of major white mainstream record companies and corporations.²⁶⁸

Black Americans have historically been discriminated against by governments and employers for their fashion,

²⁵⁴ Rolling stone article.

²⁵⁵ Id.

²⁵⁶ Id.

²⁵⁷ Id.

²⁵⁸ Id.

²⁵⁹ Id.

²⁶⁰ Id.

²⁶¹ [citation.]

²⁶² [citation.]

²⁶³ [citation.]

²⁶⁴ [citation.]

²⁶⁵ [citation.]

²⁶⁶ [citation.]

²⁶⁷ [citation.]

²⁶⁸ [citation.]

hair, and appearance.²⁶⁹ The United States Army did not allow Black Americans to wear their hair in locs (locks, dreads, or dreadlocks) until 2017.²⁷⁰ Black women in the army had been forced to straighten their hair with chemicals or hot irons, wear expensive and uncomfortable wigs, or cut their hair off to abide by the army's hair regulations.²⁷¹ State and local governments have criminalized, fined, banned, and violently attacked Black people for their dress, their fashion, and their hair.²⁷² Florida, New Jersey, and Tennessee passed laws in 2014, which prohibited sagging clothes in public places, and instituted a significant fine or jail sentence if an individual was caught sagging pants.²⁷³ Sagging originated in Black youth and hip hop culture and is a style of wearing pants low, exposing underwear.²⁷⁴ In 2007, Shreveport Louisiana passed a law banning sagging, resulting in Black men being 96 percent of those arrested for sagging.²⁷⁵ Schools have removed Black American students for hairstyles that have violated their dress codes.²⁷⁶ A Black student at a Texas school was told that he could not attend his prom because his locs were too long.²⁷⁷ The CROWN Act, which stands for Creating a Respectful and Open World for Natural Hair, would prohibit discrimination based on hair texture or hairstyle.²⁷⁸ While this act has been introduced in Congress, it has not yet passed. At the local level, 17 states have voted against CROWN legislation.²⁷⁹

Many Black American fashion designers who were influential in American fashion history, whose clients included first ladies and government officials, suffered from racism that was sanctioned by federal and state governments.²⁸⁰ Elizabeth Keckley was a Black woman and fashion designer who dressed the first lady, Mary Todd Lincoln. Keckley was born an enslaved person and suffered violence and sexual assault from white enslavers.²⁸¹ Keckley worked as a seamstress for several years, attempting to raise money to pay back the loans she used to purchase her freedom.²⁸² She faced legal restrictions in establishing her business—including the requirement that a white man vouch for her freedom.²⁸³ Ann Cole Lowe was a Black woman and fashion designer, who designed the wedding dress Jacqueline Bouvier wore when she married Senator John. F.

²⁶⁹ [citation.]

²⁷⁰ <https://www.armytimes.com/news/your-army/2017/01/30/soldiers-cheer-army-s-decision-to-authorize-dreadlocks-in-uniform/>.

²⁷¹ Id.

²⁷² [citation.]

²⁷³ Id.

²⁷⁴ <https://fortune.com/2021/09/07/balenciaga-1200-sagging-pants-decried-as-racist-online/>.

²⁷⁵ <https://www.shreveporttimes.com/story/news/2019/06/02/black-men-make-up-96-percent-sagging-arrests-shreveport/1285063001/>.

²⁷⁶ [citation.]

²⁷⁷ <https://www.harpersbazaar.com/beauty/hair/a34050252/crown-act-hair-discrimination-explained/>.

²⁷⁸ Id.

²⁷⁹ Id.

²⁸⁰ [citation.]

²⁸¹ [citation.]

²⁸² <https://www.whitehousehistory.org/from-slavery-to-the-white-house-the-extraordinary-life-of-elizabeth-keckly>.

²⁸³ Id.

Kennedy—one of the most imitated bridal gown styles to this day—along with many other gowns for an exclusive clientele.²⁸⁴ Lowe worked as a seamstress with her mother on a plantation in Alabama and later made dresses for wealthy white women in the South.²⁸⁵ She could not get credit or rent a workspace in the business district in the South, and was forced to operate out of a segregated neighborhood.²⁸⁶ Ann Lowe did not receive recognition in the fashion industry, despite her well-loved designs.

Rap music, one of the most culturally potent and commercially successful forms of Black expression in the latter half of the 20th century, has been criminalized by federal, state, and local governments.²⁸⁷ Black artists have been falsely accused of drug possession. They have been killed, beaten, injured, and criminalized.²⁸⁸ Rap lyrics and videos have been used in criminal trials to associate Black artists with crimes and to prove the substance of threats or incitements to violence.²⁸⁹ One scholar found hundreds of cases in which rap lyrics have been used as evidence in criminal prosecutions.²⁹⁰ The Second Circuit Court of Appeals has permitted prosecutors to introduce rap music videos as evidence in criminal trials.²⁹¹ Quoting from rap lyrics and videos has led to black students being disciplined.²⁹² The Arkansas Supreme Court upheld a school’s decision to discipline a student for making a “terroristic threat,” according to the school, when he handed another student a paper with written rap lyrics.²⁹³

Law enforcement agencies and local governments have attempted to chill or criminalize the sale of rap albums based on their content, sometimes cancelling rap performances outright.²⁹⁴ For example, law enforcement agencies attempted to suppress the music of Compton rap group N.W.A.’s 1988 debut album, “Straight Outta Compton,” and particularly their song “Fuck Tha Police.”²⁹⁵ In 1989, the Assistant Director of the Federal Bureau of Investigation Office of Public Affairs sent a letter to the distributor of the album, criticizing the

²⁸⁴ <https://www.newyorker.com/magazine/2021/03/29/ann-lowes-barrier-breaking-mid-century-couture>.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Dennis, *The Music of Mass Incarceration* (2020) American Bar Association

<https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/music-mass-incarceration/> (as of Aug. 9, 2021).

²⁸⁸ *Id.*

²⁸⁹ [citation.]

²⁹⁰ [citation.]

²⁹¹ Hudson Jr., *Rap Music and the First Amendment* (2009) First Amendment Encyclopedia <<https://www.mtsu.edu/first-amendment/article/1582/rap-music-and-the-first-amendment>>; see, e.g., *United States v. Herron* (2d Cir. 2014) 2 F.Supp.3d 391. [DOUBLE CHECK CITATION 762 Fed.Appx. 25.]

²⁹² *Id.*

²⁹³ Hudson Jr., *supra* note 42; *Jones v. State* (Ark. 2002) 64 S.W.3d 728.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

group’s lyrics regarding law enforcement and making the record label “aware of the FBI’s position relative to this song and its message.”²⁹⁶ The Attorney General of Minnesota also attempted to prosecute record stores that sold the album to minors.²⁹⁷ During a 1989 N.W.A. concert in Detroit, law enforcement in the crowd, which reportedly contained 200 police officers, rushed the stage and ended the concert early.²⁹⁸

A. California

In California, Black artists suffered from discrimination and segregation. City governments decimated thriving Black neighborhoods with vibrant artistic communities. In California, Black musicians and artists suffered from segregation and displacement. California theaters denied entry to Black patrons.²⁹⁹ For example, Charles Green, a Black American man, was denied entry into X theater and then sued the theater owner in X year.³⁰⁰ Decades later, from the 1930s to 1960s, Black projectionists and other movie house workers fought for employment and equal wages at movie houses—striking, negotiating, and picketing in the face of violent confrontations with local police.³⁰¹ In San Francisco, Black American artists had limited opportunities due to segregation.³⁰² The bassist, Vernon Alley, described “the time in San Francisco when black bands couldn’t play east of Van Ness Avenue, and that’s true. I was a part of it.”³⁰³ Alley stated that white musicians’ unions fought against Black musicians who attempted to play in downtown San Francisco.³⁰⁴ Many Black musicians struggled to make a living by playing behind curtains for tourists or out of sight at strip clubs.³⁰⁵ The state openly allowed segregation and discrimination against Black musicians, workers, and artists.³⁰⁶

The state has failed, overall, to adequately engage in civil rights enforcement in the motion picture industry.³⁰⁷ In 1940, when Hattie McDaniel became the first Black actor to receive an Academy Award, she was forced to

²⁹⁶ Hochman, *Compton Rappers Versus the Letter of the Law: FBI Claims Song by N.W.A. Advocates Violence on Police*, L.A. Times (Oct. 5, 1989) <<https://www.latimes.com/archives/la-xpm-1989-10-05-ca-1046-story.html>> (as of Aug. 9, 2021); Letter from Milt Ahlerich, Ass’t Dir., Off. Pub. Aff., FBI, to Gui Manganiello, Nat’l Promotions Dir., Priority Records (Aug. 1, 1989).

²⁹⁷ Holmes & Subsaeng, *When N.W.A. Terrified White America* (2017) Daily Beast <<https://www.thedailybeast.com/when-nwa-terrified-white-america>> (as of Aug. 9, 2021).

²⁹⁸ Counts, *Retired Detroit Sergeant Recalls Telling N.W.A. They Couldn’t Play ‘F*** Tha Police’ at 1989 Concert* (2015) MLive <<https://www.mlive.com/news/ann-arbor/2015/08/former-detroit-sergeant-recall.html>> (as of Aug. 9, 2021).

²⁹⁹ *Id.* at 51.

³⁰⁰ *Id.*

³⁰¹ Ellen C. Scott, *CINEMA CIVIL RIGHTS: REGULATION, REPRESSION, AND RACE IN THE CLASSICAL HOLLYWOOD ERA 68* (Rutgers Univ. Press 2015).

³⁰² https://www.foundsf.org/index.php?title=Racism_in_the_Clubs.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ [citation.]

sit at a separate table because the hotel in which the awards ceremony was held did not allow Black people into the building.³⁰⁸ Today, research has shown that Hollywood studio executives associate casting Black actors with financial risk.³⁰⁹ Hollywood studios market films with Black actors for small, specific audiences, and films with white actors for large, general audiences.³¹⁰ In a vicious circle, Black-led films are characterized as economically inviable; therefore, their research, development, and production are underfunded, which translates into minimal marketing and distribution budgets and results in low ticket sales and profits.³¹¹ The entertainment industry has an obligation to comply with federal and state civil rights laws, which prohibit discrimination by all business establishments—particularly when Black employees within the motion picture industry are experiencing discrimination today.³¹²

For a brief period in the 1940s and 1950s, the Fillmore neighborhood in San Francisco was home to a vibrant Black American community and referred to by locals as “the Harlem of the West.”³¹³ The Fillmore contained 183 black-owned businesses, including 29 jazz, blues, and supper clubs.³¹⁴ The most famous jazz singers and musicians of the time came to perform, including Charlie Parker, John Coltrane, Miles Davis, Dizzy Gillespie, Billie Holiday, and Dexter Gordon.³¹⁵ In the 1950s and 1960s, the City of San Francisco tore down Black-owned jazz clubs and businesses and built an expressway through the district in the name of “redevelopment.”³¹⁶ See Chapter 5 on housing for more information.

In the 1930s and 1940s, the zoot suit, a particular style of suit with a long coat and loose pants, became an icon of resistance against assimilation for communities of color.³¹⁷ The increase in migration of Mexican Americans and Black Americans to Los Angeles resulted in the growth of interracial communities of color, which were targeted by the Los Angeles Police Department.³¹⁸ To confront the dehumanizing social and economic conditions imposed by the wartime political economy, local officials, and the mainstream press, the zoot suit became a symbol of resistance for those who wore it.³¹⁹ However, in the eyes of state officials and law

³⁰⁸ Id.

³⁰⁹ Id.

³¹⁰ Id.

³¹¹ Id.

³¹² <https://oag.ca.gov/civil>; <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1045&context=airl>.

³¹³ <https://cupola.gettysburg.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1000&context=afsfac>.

³¹⁴ <https://www.sfchronicle.com/opinion/openforum/article/San-Francisco-continues-destruction-of-its-black-7382364.php>.

³¹⁵ Id.

³¹⁶ [citation.]

³¹⁷ Luis Alvarez, *THE POWER OF THE ZOOT: YOUTH CULTURE AND RESISTANCE DURING WORLD WAR II* 6 (Uni. Cal. Press)

³¹⁸ Id. at 27.

³¹⁹ Alvarez, *supra*, at 79.

enforcement, the zoot suit and those who wore it were labelled as criminal and hypersexual.³²⁰

Black Americans in Los Angeles were victims of the mob violence and criminalization by local police that preceded and followed the Zoot Suit Riots of Los Angeles.³²¹ In June 1943, the Zoot Suit Riots of Los Angeles stemmed from tensions between white servicemen at the new Naval Reserve Armory and local Mexican-American youth.³²² Riots broke out as gangs of white sailors attacked brown and Black youth in zoot suits.³²³ On the worst day of the riots, white soldiers and civilians poured into Los Angeles and attacked the Black neighborhoods of Watts, as well as other neighborhoods around Los Angeles.³²⁴ All 94 nonwhite civilians who were seriously injured were arrested by the Los Angeles Police Department, compared to only two of the 18 white servicemen who participated.³²⁵ The police arrested and jailed Mexican-American and Black-American victims of the mobs rather than the white sailors.³²⁶ The Los Angeles Police Department engaged in preventative enforcement based on racial profiling, targeting Black Americans among other communities in Los Angeles.³²⁷ Law enforcement efforts to publicize crackdowns on youth resulted in hundreds of arrests in the summer of 1942.³²⁸ This show of force was designed to reassure white middle classes that wartime police forces could maintain law and order by rounding up innocent youth of color, many of whom were Black.³²⁹

Local governments in California have discriminated against, punished, and penalized Black students for their fashion, hairstyle, and appearance.³³⁰ In March 2018, at Tenaya Middle School in Fresno, school officials pulled a Black student out of class for a haircut with shaved-in designs.³³¹ They cited a dress code policy and separated him from other students. They also prevented him from going to lunch with his peers because they feared it would be too “distracting.”³³² In 2015, a Black biracial student was not allowed to attend school in Clovis because his hair was too long, in violation of the school dress code.³³³ The student was given a warning, a subsequent lunch detention, two hours of after school detention, a four-hour after school detention, and three

³²⁰ [citation.]

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 179.

³²⁵ *Id.* at 180.

³²⁶ *Id.*

³²⁷ *Id.* at 71.

³²⁸ *Id.* at 71-72.

³²⁹ *Id.* at 72.

³³⁰ [citation.]

³³¹ [citation.]

³³² <https://www.fresnobee.com/news/local/education-lab/article203981704.html>.

³³³ <https://www.aclunc.org/blog/longhairdontcare-unless-you-live-clovis>.

additional unofficial violations.³³⁴

State-funded California museums have excluded Black art from their institutions. In 2019, the Los Angeles Museum of Contemporary Art began an informal audit of its collection to increase the representation of Black Artists.³³⁵ In 2020, the museum announced a list of new acquisitions that included Black artists such as Lauren Halsey, LaToya Ruby Frazier, and Senga Nengudi.³³⁶ The University of California, Los Angeles's Hammer Museum engaged in a similar audit. In July 2020, the longest tenured curator at the San Francisco Museum of Modern Art resigned after stating that he did not believe in discrimination.³³⁷ The resignation was related to a larger problem at the museum with respect to racial equality.³³⁸ The museum's staff is only four percent Black and employees report that key leadership positions are dominated by white Americans.³³⁹

California has also criminalized Black rap artists. Many cities, including the city of Los Angeles, have established a hip-hop task force, or a special unit of police officers that targets rap artists in the city.³⁴⁰ For over 20 years, California courts allowed rap lyrics to be used as evidence related to street gang activity.³⁴¹

VI. Racist Censorship

State censorship of depictions of Black Americans in movies, art, and books was constitutional until 1952.³⁴² To maintain the lie of white cultural supremacy, state governments censored Black American artistic work that was critical of American institutions, deemed subversive, or threatened white supremacy.³⁴³ In this vein, California public institutions have banned and censored the work of Black authors.³⁴⁴

The institutions that regulated cinema, including the Production Code Administration, state censorship boards, and film studios themselves, produced a warped and racist view of Black American life in cinema.³⁴⁵ State

³³⁴ Id.

³³⁵ LA Times article.

³³⁶ Id.

³³⁷ <https://www.nytimes.com/2020/07/22/arts/design/sfmoma-gary-garrels-resignation.html>

³³⁸ Id.

³³⁹ Id.

³⁴⁰ https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/music-mass-incarceration/.

³⁴¹ (People v. Olguin (1994) 31 Cal.App.,4th 1355).

³⁴² [citation.]

³⁴³ [citation]

³⁴⁴ [citation.]

³⁴⁵ Ellen C. Scott, CINEMA CIVIL RIGHTS: REGULATION, REPRESSION, AND RACE IN THE CLASSICAL HOLLYWOOD ERA 68 (Rutgers Univ. Press 2015).

government censorship was strongest from 1915 to 1952.³⁴⁶ States with active censorship boards focused on censoring miscegenation, the depiction of Black women’s sexuality, depictions of racial discrimination and lynching, and depictions of integration.³⁴⁷ States engaged in censorship to generate cultural narratives that upheld white supremacy, and rendered it invisible to the public—erasing depictions of Black power, humanity, and anti-Black state violence.³⁴⁸ After the U.S. Supreme Court banned state censorship in 1952, Hollywood began to casually depict violence against Black Americans on screen.³⁴⁹ Scholars argue that the proliferation of these scenes has helped normalize anti-Black violence in society.³⁵⁰

States and local governments have engaged in racist censorship of books written by Black authors, primarily in public schools and in prisons.³⁵¹ Many public high schools across the nation have banned acclaimed novels written by Black authors.³⁵² Toni Morrison’s acclaimed novels have been banned for “depicting the inappropriate topic of...racism,” and for being “filthy,” in 1998 in Florida, and 2007 in Kentucky.³⁵³ Texas law prohibits teachers from portraying slavery and racism as “anything other than deviations from, betrayals of, or failures to live up to the authentic founding principles of the United States,”—explicitly prohibiting the *New York Times’s* 1619 Project, which places Black Americans and the consequences of slavery at the center of American history.³⁵⁴ In 2021, in York, Pennsylvania, an all-white school board banned books related to racial justice, which mentioned key Black civil rights leaders, such as Rosa Parks and Dr. Martin Luther King, Jr.—stating that they “may lean more toward indoctrination rather than age-appropriate academic content.”³⁵⁵ After sustained protests from community members, students, and teachers, the school board reversed the ban.³⁵⁶

State officials across the country have banned books on the enslavement of Black people, civil rights, and novels by Black authors in prisons and carceral settings.³⁵⁷ For example, as of 2021, Wisconsin bans Ralph Ginzburg’s *100 Years of Lynching*, but allows incarcerated people to read Adolf Hitler’s *Mein Kampf*—presumably the first was banned for obscenity and yet the latter was deemed to be acceptable.³⁵⁸ Florida banned the Equal Justice Initiative’s *Lynching in America* report—one of the most comprehensive reports available on

³⁴⁶ Id.

³⁴⁷ Id.

³⁴⁸ [citation.]

³⁴⁹ [citation.]

³⁵⁰ [citation.]

³⁵¹ [citation.]

³⁵² [citation.]

³⁵³ [citation.]

³⁵⁴ <https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html>.

³⁵⁵ <https://www.nytimes.com/2021/10/02/us/york-pennsylvania-school-books.html>.

³⁵⁶ Id.

³⁵⁷ <https://eji.org/news/banning-books-in-prisons/>.

³⁵⁸ Id.

the lynching of Black Americans—because it was supposedly a threat to prison security.³⁵⁹

A. California

In the 1930s, Black activists protested pro-lynching films at movie theaters, fought against Hollywood’s depictions of Black people, and tried to use film to promote the fight for civil rights. Early films that depicted lynching scenes included *Frisco Kid* (1935), *Barbary Coast* (1935), *Fury* (1936), and *They Won’t Forget* (1937).³⁶⁰ These films made Black Americans “nauseous” because they glorified and applauded lynching—even when the person being lynched was not Black.³⁶¹ These films encouraged and justified lynching at a time when the lynching of Black Americans was still highly prevalent.³⁶²

Many public schools and prisons in California have censored the literature of Black authors. The Oakland Board of Education banned Alice Walker’s book *The Color Purple* in 1984, due to “troubling ideas about race relations, man’s relationship to God, African history, and human sexuality”—approving it only after nine months of community advocacy.³⁶³ At Irvington High School in Fremont, Richard Wright’s novel *Native Son*, was banned for being “unnecessarily violent” in 1998.³⁶⁴ At the state level, the California Department of Corrections and Rehabilitation still maintains a list of banned books for its prisons, many of which are by Black authors.³⁶⁵ For example, CDCR, as recently as 2019, had reportedly banned *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from the Colonial Times to the Present* by Harriet Washington, which is cited in this report.³⁶⁶

VII. Deprivation of Black Intellectual Property

Throughout American history, federal and state governments historically deprived Black American artists and innovators of intellectual property rights, copyright protections, and patent protections resulting in intellectual and cultural theft and exploitation. The federal government’s copyright laws routinely deprived Black American artists of legal protection because this regime allowed art created by Black artists to be appropriated and stolen by white artists.³⁶⁷ As a result of complex and convoluted requirements of the 1909 Copyright Act, artists

³⁵⁹ Id.

³⁶⁰ Ellen C. Scott, *CINEMA CIVIL RIGHTS: REGULATION, REPRESSION, AND RACE IN THE CLASSICAL HOLLYWOOD ERA* 155 (Rutgers Univ. Press 2015).

³⁶¹ Id.

³⁶² Id.

³⁶³ <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/classics>.

³⁶⁴ [citation.]

³⁶⁵ EJI.

³⁶⁶ <https://www.prisonlegalnews.org/media/publications/CDCR - disapproved publications list through June 2019.pdf>.

³⁶⁷ K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT, L.J. 339, 340 (1999).

unfamiliar with legal requirements could easily find their works injected into the public domain.³⁶⁸ This resulted in the loss of economic rights and copyright protection—which resulted in generations of lost wealth for Black Americans.³⁶⁹ Additionally, the federal and state governments have not legally allowed descendants of enslaved people to own art made by their enslaved ancestors or photographs taken of their enslaved ancestors—depriving them of rightful earnings.³⁷⁰

Even though Black people were leaders in invention, they could not access patent protections due to institutional racism and state-sanctioned anti-Black discrimination and violence.³⁷¹ There are estimates that racial violence accounts for 1,100 missing patents won by Black Americans.³⁷² Cyrus McCormick received a patent for the mechanical reaper, even though it was actually invented by Jo Anderson, a man who was enslaved by the McCormick family.³⁷³ Obtaining a patent was difficult and expensive, and some Black inventors could not obtain legal assistance.³⁷⁴ Some patent applications were rejected, possibly based on racial discrimination.³⁷⁵ To avoid potential discrimination, some Black Americans relied on white partners as proxies in their patent applications.³⁷⁶ One such inventor was Henry Boyd, who purchased his freedom in 1826 prior to inventing a new type of bed frame.³⁷⁷ Boyd partnered with a white man who applied for the patent in his own name.³⁷⁸

Obtaining a patent was more difficult for Black artists and innovators because it often involved working with white lawyers who engaged in racist and unfair dealings—and the federal government took no action to ensure that Black innovators' patents were properly documented and preserved.³⁷⁹ Black innovators faced additional professional and financial barriers, in addition to racism, that white innovators did not face.³⁸⁰ In 1913, the U.S. Patent Office surveyed approximately 8,000 registered patent attorneys and found 1,200 inventions attributed to people of Black American ancestry.³⁸¹ However, the Office was only able to confirm 800 of them—a large

³⁶⁸ [citation.]

³⁶⁹ *Id.* at 354

³⁷⁰ <https://www.nytimes.com/2019/03/22/arts/slave-photos-harvard-lawsuit.html>;

<https://www.nytimes.com/1993/10/07/nyregion/settlement-over-artwork-by-an-ex-slave.html>

³⁷¹ <https://www.brookings.edu/research/the-black-innovators-who-elevated-the-united-states-reassessing-the-golden-age-of-invention/>.

³⁷² <https://www.jstor.org/stable/44113425>.

³⁷³ https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/colorblind-patent-system-black-inventors/.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ [citation.]

³⁸⁰ [citation.]

³⁸¹ [citation.]

undercount because attorneys reported failing to recall the names or inventions of some of their Black clients.³⁸² This failure to recall the names of Black inventors and their inventions resulted in Black American inventors being cheated out of profits, royalties, and rewards for their creative work.³⁸³

Government-enforced racial segregation and disinvestment in Black communities resulted in a dearth of resources that crippled Black invention. These racist practices suppressed the ability of Black Americans to receive patents for their inventions.³⁸⁴ Today, Black patentees are underrepresented in America.³⁸⁵ There are wide disparities between the number of U.S. patents issued to Black inventors and the total number of patents issued in general.³⁸⁶ For example, one 2010 study found that from 1970 to 2006, Black American inventors received six patents per million people, compared to 235 patents per million for all U.S. inventors.³⁸⁷ According to Professor Kevin J. Greene’s testimony before the California Task Force to Study and Develop Reparation Proposals for African Americans, American copyright law disadvantages Black American creators because it enables appropriation and under-compensation.³⁸⁸ There are significant disparities in how Black and white music performers have been compensated for copyright use.³⁸⁹ Professor Greene stated, “It’s not just some problem that happened 200 years ago, it’s a problem that’s ongoing and happening today.”³⁹⁰

VIII. Discrimination Against Black Athletes

The history of sports in the United States is one of racial discrimination, segregation, and the exploitation of Black male and female athletes—a history in which governments have played a significant role. Following the end of slavery, most Black athletes were forced to compete in segregated teams, sports, and organizations.³⁹¹ Prior to World War II, some Black Americans played sports at white universities—where they were picked for their talent, yet ridiculed and mistreated by white students.³⁹² Despite the inherent inequality of segregation,

³⁸² [citation.]

³⁸³ [citation.]

³⁸⁴ Id.

³⁸⁵ https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/colorblind-patent-system-black-inventors/.

³⁸⁶ Id.

³⁸⁷ Id.

³⁸⁸ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Professor Kevin J. Greene, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

³⁸⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Professor Kevin J. Greene, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

³⁹⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Professor Kevin J. Greene, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

³⁹¹ [citation.]

³⁹² https://www.jstor.org/stable/41819345?mag=the-uneasy-history-of-integrated-sports-in-america&seq=8#metadata_info_tab_contents.

Black colleges and their football programs thrived in the mid-20th century.³⁹³ Many Americans believed Historically Black Colleges and Universities were of lower quality than white higher education institutions, so athletic achievement was a way to dispute this narrative.³⁹⁴ HBCUs had fewer material resources but produced high numbers of professional athletes—particularly in football.³⁹⁵ White college and university administrators, athletic directors, and coaches led racial integration in sports in the 1960s, driven, in part, by the profits that could be made from Black athletic talent that was drawn away from HBCUs.³⁹⁶

The reintegration of sports was a long and slow process because white Americans who held positions of power were hesitant to break the tradition of segregation.³⁹⁷ Most major college athletics programs did not allow Black players until 1947.³⁹⁸ Black pre-professional college athletes who attended majority white academic institutions suffered from discrimination and poor housing.³⁹⁹ The ability of Black students to successfully play on college teams depended on the integration of higher education, whether coaches of other teams were willing to play against teams with Black athletes, and whether such teams would viciously attack Black athletes.⁴⁰⁰ For instance, Black football players from the University of California, Los Angeles could not stay in hotels, eat at restaurants in Texas, or play in the segregated South.⁴⁰¹ Additionally, Black college football also depended upon the identification of talented players and recruitment of them from secondary schools.⁴⁰² However, even in “integrated” high schools, there were limits on the number of Black players who could be on a team or court at one time.⁴⁰³ The ‘gentlemen’s agreement’ was a standard, unwritten rule that allowed coaches to bench Black athletes during intercollegiate contests with all-white colleges and universities.⁴⁰⁴ In 1955, Georgia’s Governor asked the State Board of Regents to prohibit Georgia’s all-white football teams from playing against teams with Black players.⁴⁰⁵

During the 1960s, the government and the sports industry punished Black athletes who engaged in racial justice

³⁹³ <https://www.theringer.com/2019/9/19/20873575/black-college-football-golden-age>.

³⁹⁴ Id.

³⁹⁵ Id.

³⁹⁶ https://www.jstor.org/stable/41819345?mag=the-uneasy-history-of-integrated-sports-in-america&seq=8#metadata_info_tab_contents.

³⁹⁷ [citation]

³⁹⁸ <https://newsletter.alumni.ucla.edu/connect/2021/feb/black-bruin-history/default.htm>.

³⁹⁹ [citation].

⁴⁰⁰ [citation].

⁴⁰¹ [citation needed]

⁴⁰² [citation].

⁴⁰³ [citation].

⁴⁰⁴ [citation].

⁴⁰⁵ [citation].

and political protests, or resisted racial oppression.⁴⁰⁶ Muhammad Ali, a Black American Muslim boxing champion, was stripped of his world heavyweight title for refusing to be drafted into the U.S. armed forces.⁴⁰⁷ When explaining why he would not join the army, he pointed out the irony of being drafted to fight on behalf a nation in which he was subjected to racial oppression.⁴⁰⁸ “My conscience won’t let me go shoot my brother, or some darker people. . . for big powerful America,” he said.⁴⁰⁹ “They never called me nigger, they never lynched me, they didn’t put no dogs on me, they didn’t rob me of my nationality, rape and kill my mother and father. . . Shoot them for what?”⁴¹⁰ Ali was charged with a felony, fined, and banned from boxing.⁴¹¹ Later the Supreme Court would overturn his conviction. Justice John Harlan stated that the government had misinterpreted the doctrine of Black Muslims by not recognizing Ali as a conscientious objector.⁴¹² Ali experienced racial and religious discrimination by the government—which refused to recognize his religious beliefs and punished him for his resistance to racism.

Black American Olympic athletes have faced racial discrimination in athletics.⁴¹³ The Amateur Sports Act of 1978, gave the United States Olympic and Paralympic Committee, a private organization, exclusive jurisdiction over all matters related to the Olympics.⁴¹⁴ The federal government has provided funding for the Olympics when they are held in the United States.⁴¹⁵ In 1968, Black Californian track athletes, Tommie Smith and John Carlos, protested the lack of Black Americans on the United States Olympic Committee, as well as the stripping of Muhammad Ali’s heavyweight belt at the Olympics. They raised their black gloved fists in a Black power salute during the National Anthem, while standing on the victory podiums of the Olympic Games.⁴¹⁶ Subsequently, the International Olympic Committee kicked them out of the Olympic Village and banned protest during the Olympics.⁴¹⁷ When Smith and Carlos returned to America, their families received death threats.⁴¹⁸ Today, many Black American Olympic athletes are discriminated against—from being suspended for legal

⁴⁰⁶ <https://www.washingtonpost.com/news/retropolis/wp/2018/06/15/shoot-them-for-what-how-muhammad-ali-won-his-greatest-fight/>.

⁴⁰⁷ Id.

⁴⁰⁸ Id.

⁴⁰⁹ Id.

⁴¹⁰ Id.

⁴¹¹ Id.

⁴¹² Id.

⁴¹³ https://www.jstor.org/stable/41819345?mag=the-uneasy-history-of-integrated-sports-in-america&seq=12#metadata_info_tab_contents.

⁴¹⁴ <https://www.vox.com/the-goods/22586868/olympics-athletes-pay-medal-sponsors-ioc>.

⁴¹⁵ <https://www.gao.gov/assets/ggd-00-183.pdf>

⁴¹⁶ <https://arthurashe.ucla.edu/tommie-smith-and-john-carlos/>.

⁴¹⁷ [citation.]

⁴¹⁸ <https://arthurashe.ucla.edu/tommie-smith-and-john-carlos/>.

marijuana use to being forbidden from wearing swimming caps designed for natural Black hair.⁴¹⁹ Most Olympic athletes, many of whom are Black Americans, live in poverty and receive little compensation for their hard work—while high-ranking Olympic committee executives and organizers are compensated generously, due to the billions of dollars in profit from sponsorships, donations, and broadcasting rights.⁴²⁰

Similarly, studies have shown that the National Collegiate Athletic Association (NCAA) allows white students and coaches to profit off the labor of poor Black students, many of whom live below the federal poverty line—and the United States Supreme Court has supported this through caselaw.⁴²¹ The NCAA prohibits college athletes from being compensated for their labor.⁴²² Many public universities, which are government funded, generate millions of dollars in revenue due to football and basketball teams that are part of the NCAA.⁴²³ Black students constitute nearly 60 percent of the rosters of football and basketball teams, and just 11 percent of the rosters of all other sports.⁴²⁴ Black American athletes who risk their health and safety to play these sports while in school do not receive any compensation.⁴²⁵ Much of the money generated by football and basketball athletes is spent on salaries for coaches and administrators and on the construction of lavish facilities.⁴²⁶ However, millions of dollars also flow each year to such “nonrevenue” sports as tennis, sailing, and crew—which are primarily played by white athletes.⁴²⁷

Black Americans began to play baseball in the late 1800s and historically joined professional teams with white players.⁴²⁸ However, racism and Jim Crow laws forced them to leave these teams by 1900.⁴²⁹ Discrimination against Black baseball players forced Black players to develop a separate baseball league, called the National Negro League.⁴³⁰ In 1920, an organized league structure was formed by Black businesspeople and athletes in Kansas City, Missouri.⁴³¹ Rival leagues formed in eastern and southern states, bringing black baseball to major urban centers and rural country sides in the U.S.⁴³² The leagues maintained a high level of professional skill and

⁴¹⁹ <https://www.aclu.org/news/racial-justice/simone-biles-shacarri-richardson-and-how-the-olympics-failed-black-women/>.

⁴²⁰ <https://www.vox.com/the-goods/22586868/olympics-athletes-pay-medal-sponsors-ioc>; <https://www.politico.eu/article/the-olympic-color-barrier-rio-2016-racism-sport/>.

⁴²¹ <https://www.washingtonpost.com/business/2020/09/07/ncaa-student-athletes-pay-equity/>;

<https://drexel.edu/now/archive/2011/September/Study-College-Athletes-Worth-Six-Figures-Live-Below-Federal-Poverty-Line/>.

⁴²² Id.

⁴²³ Id.

⁴²⁴ Id.

⁴²⁵ Id.

⁴²⁶ Id.

⁴²⁷ Id.

⁴²⁸ [citation.]

⁴²⁹ [citation.]

⁴³⁰ [citation.]

⁴³¹ [citation.]

⁴³² [citation.]

became centerpieces for economic development in many black communities.⁴³³ In 1945, the Jim Crow policies of baseball changed when Branch Rickey signed Jackie Robinson of the Negro League's Kansas City Monarchs to a contract that would bring Robinson into the major leagues in 1947.⁴³⁴

Football has a history of racial discrimination in the United States, sanctioned by state and federal governments.⁴³⁵ In particular, the National Football League (NFL) has historically and continues to engage in anti-Black discrimination with impunity.⁴³⁶ Just 13 Black players participated in professional football before 1900 and only 27 more through 1914.⁴³⁷ More recently, the NFL has engaged in racist practices against Black athletes—many of whom suffered brain injuries while playing professional football.⁴³⁸ The NFL used “race-norming”—a racist medical practice where Black players were assumed to have lower cognitive function than white players as part of a dementia test to determine payouts in a brain injury settlement.⁴³⁹

Tennis, like football, was originally a sport for elite white men.⁴⁴⁰ Due to segregation laws, most tennis clubs explicitly or implicitly prohibited Black Americans from participation.⁴⁴¹ Public courts were not fairly distributed in Black neighborhoods or accessible to Black players.⁴⁴² Today, prominent Black American women tennis players, like Serena Williams, are more likely to be disciplined, fined, and criticized while playing.⁴⁴³

There is also a long history of racism in basketball, like in many other sports, which has harmed Black American athletes.⁴⁴⁴ In the early 1950s, the National Basketball Association (NBA) had an unspoken rule that there could not be more than two Black players on a team, later that number was expanded to three.⁴⁴⁵ More recently, in 2020, Black American women in the Women’s National Basketball Association went on strike to protest anti-Black police violence—building upon a long history of protests for racial justice.⁴⁴⁶ Following the lead of Black women, Black male professional basketball players in the NBA protested anti-Black police

⁴³³ [citation.]

⁴³⁴ <https://www.loc.gov/collections/jackie-robinson-baseball/articles-and-essays/baseball-the-color-line-and-jackie-robinson/1940-to-1946/#:~:text=In%201945%2C%20when%20Rickey%20approached,segregated%20public%20schools%20in%201954..>

⁴³⁵ [citation.]

⁴³⁶ [citation.]

⁴³⁷ [citation.]

⁴³⁸ <https://www.npr.org/2021/06/02/1002627309/nfl-says-it-will-halt-race-norming-and-review-brain-injury-claims>.

⁴³⁹ <https://www.vox.com/22528334/race-norming-medical-racism>.

⁴⁴⁰ <https://arthurashe.ucla.edu/2021/03/11/before-the-open-era-african-americans-in-tennis-during-the-50s-and-60s/>.

⁴⁴¹ Id.

⁴⁴² Id.

⁴⁴³ <https://www.bbc.com/news/world-us-canada-45476500>.

⁴⁴⁴ <https://theundefeated.com/features/excerpt-basketball-a-love-story-battle-for-racial-equality/>.

⁴⁴⁵ Id.

⁴⁴⁶ Id.

violence in a historic strike—refusing to play games and talk to journalists.⁴⁴⁷ Due to their efforts, sports arenas in areas with large Black American communities were turned into voting locations for the 2020 general election to allow for safe, in-person voting—work that should have been done by federal and state governments.⁴⁴⁸ See Chapter 4 on political disenfranchisement for more.

Due to biased decision making, Black Americans have been denied opportunities to become head coaches—despite their overrepresentation as athletes in male sports.⁴⁴⁹ As of 2009, only 3.4 percent, four of 119 schools in the Division I college football employ Black coaches. This is 10 times less than the proportion of college players who are Black, 37 percent in 1990 and 45.9 percent in 2008. As of January 2022, there was only one Black head coach in the NFL.⁴⁵⁰ NFL owners, who are almost all white, go out of their way to extend opportunities to white coaching candidates, while Black candidates are overlooked and deemed expendable.⁴⁵¹ Federal or state governments have failed to adequately engage in civil rights enforcement in this area.

There have long been inequalities between men’s and women’s sports—however, for Black American women, this is compounded by race.⁴⁵² One of the first women’s track teams in the United States began at the all-Black Tuskegee Institute in 1929.⁴⁵³ Three years later, two Black American women, Louise Stokes and Tidye Pickett, qualified for the 1932 Olympics in track and field but were not allowed to participate due to their race.⁴⁵⁴ Title IX of the Education Amendments of 1972 (Title IX) changed the landscape for women’s sports. It requires any program or activity that receives federal financial assistance, including sports, to provide equal opportunities to all genders.⁴⁵⁵ Title IX resulted in a significant increase in women athletes, however, the percentage of women in coaching positions greatly declined.⁴⁵⁶ Today, Black women represent 88 percent of professional women’s basketball, but there are no Black women in head coaching positions.⁴⁵⁷ Despite Title IX’s legal guarantee of equal opportunity, Black parents have reported more sports programs for boys than girls in their communities.⁴⁵⁸ Fifty-three percent of white girls are most likely to be involved with sports at age six or

⁴⁴⁷ <https://globalnews.ca/news/7303593/nba-nhl-protests-anti-racism/>.

⁴⁴⁸ <https://globalnews.ca/news/7303593/nba-nhl-protests-anti-racism/>.

⁴⁴⁹ <https://today.tamu.edu/2022/01/24/why-most-nfl-head-coaches-are-white-behind-the-nfls-abysmal-record-on-diversity/>.

⁴⁵⁰ Id.

⁴⁵¹ <https://money.cnn.com/2018/05/18/news/nfl-nba-mlb-owners-diversity/index.html>

⁴⁵² <https://thehill.com/changing-america/respect/diversity-inclusion/521709-wnba-star-says-womens-basketball-isnt-popular>.

⁴⁵³ <https://www.history.com/topics/black-history/black-women-in-sports>.

⁴⁵⁴ <https://www.history.com/topics/black-history/black-women-in-sports>.

⁴⁵⁵ <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/her-life-depends-on-it-women-of-color-brief-full-citations-final.pdf>.

⁴⁵⁶ Id.

⁴⁵⁷ <https://www.swishappeal.com/wnba/2020/1/8/21056860/wnba-no-black-women-head-coaches-noelle-quinn-camille-little>.

⁴⁵⁸ <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/her-life-depends-on-it-women-of-color-brief-full-citations-final.pdf>.

younger, while only 29 percent of Black girls are.⁴⁵⁹ Due to the lack of Title IX enforcement that centers Black American women, they have suffered the consequences of both racism and sexism in the sports industry—including underrepresentation in sports leadership and limited access to sports in general.

A. California

Many Black football players experienced discrimination in California’s colleges and universities.⁴⁶⁰ The University of Southern California did not permit black athletes to play until the 1930s.⁴⁶¹ While the University of California, Los Angeles did allow Black players to play in starting positions on its football team, the Los Angeles community was not as accepting of Black athletes.⁴⁶² At San Jose State College, Black athletes reportedly faced discrimination in athletics, such as overbearing coaches, a lack of academic assistance, exploitative demands made on Black participants, prejudice outside of the sport, and hostility in the campus Greek system and the local community.⁴⁶³ Professor Harry Edwards, who helped organize Black athletes against discrimination was called “unfit to teach” by California governor and later president, Ronald Reagan.⁴⁶⁴

Black athletes have often protested discrimination in sports in California. In the 1960s, Black football players at the University of California, Berkeley refused to participate in training, protesting over-recruitment of Black students for certain positions while cutting scholarship support, as well as the lack of Black quarterbacks nationally.⁴⁶⁵ At the professional level, Black football players continue to face consequences for antiracist protest. Take for instance Colin Kaepernick, a Black Californian who was the quarterback for the San Francisco 49ers.⁴⁶⁶ In 2016, he kneeled during the National Anthem in protest of anti-Black police violence. Subsequently, the President of the United States, said that he should, “Find a country that works better for him.”⁴⁶⁷ The National Football League then stated that it would fine teams whose players did not stand for the National Anthem.⁴⁶⁸ Kaepernick was ultimately told he would be released from his contract by the general manager and coach of the 49ers.⁴⁶⁹ Since then, all NFL teams have refused to sign Kaepernick on as a player,

⁴⁵⁹ <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/her-life-depends-on-it-women-of-color-brief-full-citations-final.pdf>.

⁴⁶⁰ [citation.]

⁴⁶¹ [citation.]

⁴⁶² [citation.]

⁴⁶³ [citation.]

⁴⁶⁴ [citation.]

⁴⁶⁵ [citation needed.]

⁴⁶⁶ <https://www.nbcsports.com/bayarea/49ers/colin-kaepernicks-nfl-absence-notable-despite-roger-goodells-claims>.

⁴⁶⁷ <https://slate.com/news-and-politics/2019/07/trump-kaepernick-find-another-country-megan-rapinoe.html>.

⁴⁶⁸ <https://www.nbcsports.com/bayarea/49ers/colin-kaepernicks-nfl-absence-notable-despite-roger-goodells-claims>.

⁴⁶⁹ Id.

despite his clear record of success and athleticism.⁴⁷⁰

In California, the state government cut funding for sports programs supporting Black youth in 1995. At the time, California's governor cut \$50,000 in state support from Midnight Basketball, a program started in Oakland for underserved youth as a late-night option for recreation.⁴⁷¹ The University of California system has also reproduced racial inequities in its revenue-generating athletic programs.⁴⁷² It has some of the lowest graduation rates for Black male student athletes, who comprise a large majority of the male student athlete population, in comparison to overall graduation rates.⁴⁷³ As of 2018, the Black male student-athlete graduation rate for the University of California, Berkeley was 39 percent, much lower than the 91 percent graduation rate for students overall.⁴⁷⁴ The graduation rate for Black male student-athletes at the University of California, Los Angeles was 52 percent, while the overall graduation rate was 91 percent.⁴⁷⁵ Black male student-athletes rarely accrue the benefits of higher education, beyond athletics.⁴⁷⁶ Black athletes report that coaches prioritize athletic accomplishment over academic engagement and discouraged participation in activities beyond their sport.⁴⁷⁷ Though many Black athletes aspire to become professional players, the NFL and National Basketball Association draft fewer than two percent of student athletes each year.⁴⁷⁸ The University of California system pressures Black student-athletes to labor for its highly profitable athletic programs while they receive no compensation, risk damage to their health, and divert their focus from their education—all for the unlikely chance at being drafted into professional sports.

IX. Restraints on Black Leisure and Recreation

Across the United States, state and local governments have prohibited Black Americans from participating in leisure.⁴⁷⁹ Public parks, recreation centers, and pools⁴⁸⁰ and the passageways to access them⁴⁸¹ are located away from Black communities, restricted, or closed. Further, various government statutes, including anti-cruising,

⁴⁷⁰ Id.

⁴⁷¹ Austin, "Not Just for the Fun of It!" *Governmental Restraints on Black Leisure, Social Inequality, and Privatization of Public Space* (1998) Faculty Scholarship at Penn Law, p. 675 <https://scholarship.law.upenn.edu/faculty_scholarship/814>. 700.

⁴⁷² <https://abfe.issuelab.org/resources/29858/29858.pdf>.

⁴⁷³ Id.

⁴⁷⁴ Id.

⁴⁷⁵ Id.

⁴⁷⁶ Id.

⁴⁷⁷ Id.

⁴⁷⁸ Id.

⁴⁷⁹ https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1813&context=faculty_scholarship.

⁴⁸⁰ Id.

⁴⁸¹ Id.

anti-gathering, and curfew laws, have often targeted Black Americans’ ability to enjoy leisure time.⁴⁸²

A. California

The State of California engaged in racist restrictions on Black business owners through zoning ordinances, licensing laws, fire and safety codes, and anti-nuisance provisions, which discriminated against Black business owners and their Black customers.⁴⁸³ Racist state actions against predominantly Black leisure sites, included denying liquor or food licenses and heightened police surveillance at Black-owned bars and restaurants.⁴⁸⁴ In *Shaw v. California Dept of Alcoholic Beverage Control*, Black tavern owners brought a civil rights action against the California Department of Alcoholic Beverage Control and the City of San Jose in X year.⁴⁸⁵ The Black tavern owners sued for violation of their civil rights based upon improper revocation of their liquor license and discriminatory enforcement of the law.⁴⁸⁶ The Black tavern owners stated that the city police discriminated against them and policed their tavern consistently, with officers entering almost 18 times a day.⁴⁸⁷ The police collected “evidence,” which the Department of Alcoholic Beverage Control used to revoke their liquor license.⁴⁸⁸ This led to the closure of the tavern due to low customer turnout. The court agreed that the loss of the bar’s liquor license was due to racially discriminatory harassment by the San Jose police force.⁴⁸⁹

Cities in California also used eminent domain to seize the land of Black business owners who sought to establish leisure enterprises.⁴⁹⁰ The Manhattan Beach authorities in Southern California, prohibited the growth and development of Black-owned leisure businesses, such as Bruce’s Beach.⁴⁹¹ In 1912, Ms. Willa “Willie” Bruce purchased two lots near Manhattan Beach from white real estate brokers for \$1,225. She developed the land with a cottage, food establishment, and store—called Bruce’s Lodge.⁴⁹² The lodge was popular with Black Los Angeles residents.⁴⁹³ By 1926, six other Black families had bought property near the lodge for vacation homes.⁴⁹⁴ This caused many white neighbors and beachgoers to complain, harass, and attack the Black

⁴⁸² *Id.*
⁴⁸³ [citation.]
⁴⁸⁴ [citation.]
⁴⁸⁵ [citation.]
⁴⁸⁶ [citation.]
⁴⁸⁷ [citation.]
⁴⁸⁸ [citation.]
⁴⁸⁹ Austin, “Not Just for the Fun of It!” *Governmental Restraints on Black Leisure, Social Inequality, and Privatization of Public Space* (1998) Faculty Scholarship at Penn Law, p. 675 <https://scholarship.law.upenn.edu/faculty_scholarship/814>.
⁴⁹⁰ [citation.]
⁴⁹¹ [citation.]
⁴⁹² Jefferson, *Living the California Dream: African American Leisure Sites During Jim Crow Era* (2020) pp. 34-35
⁴⁹³ *Id.*
⁴⁹⁴ *Id.*

beachgoers, their families, and their establishments.⁴⁹⁵ The Manhattan Beach Board of Trustees and a white Manhattan Beach resident threatened to report Bruce’s Beach for allegedly selling liquor during the prohibition, so that all the people on Bruce’s property could be arrested.⁴⁹⁶

In 1924, Manhattan Beach authorities enacted new laws with fines and penalties for violations of parking and zoning laws to discourage Black visitors.⁴⁹⁷ For example, “10 minute only” parking signage was put up to prevent visitors from staying because parking would be extremely limited.⁴⁹⁸ Ordinance 273 prevented “bathhouses” in same area as Bruce’s, so there could be no further bathhouse developments or expansions at the beach.⁴⁹⁹ In 1924, Manhattan Beach authorities used eminent domain to condemn the beach as a public park under the Park and Playground Act of 1909.⁵⁰⁰ This action was petitioned for by white citizens in the area, and backed by Ku Klux Klan members, including those who befriended Board of Trustee members.⁵⁰¹ Today, the two parcels of land that were part of Bruce’s Beach are worth an estimated \$75 million.⁵⁰² In 2021, California Governor Gavin Newsom signed Senate Bill 796, authorizing the county to transfer the land back to the Bruce family after nearly 100 years.⁵⁰³ The Los Angeles County Board of Supervisors voted unanimously to begin the process of transferring the land.⁵⁰⁴

Local governments in the State of California restricted access to public pools for Black Californians.⁵⁰⁵ The Brookside Plunge was a public pool in Pasadena, which opened on July 4, 1914. It was initially only open to nonwhite individuals on Wednesday afternoons and evenings.⁵⁰⁶ Eventually, it only opened for a shorter time—on Tuesdays between 2pm and 5pm—in retaliation to a legal challenge from Black taxpayers in the area.⁵⁰⁷ The Los Angeles branch of the National Association for the Advancement of Colored People sued the city following the denial of six Black men to the pool.⁵⁰⁸ Though they won, Pasadena closed the pool until the NAACP secured an injunction forcing the pool to reopen in 1947 with no racial restrictions.⁵⁰⁹ The pool site suffered

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at p. 40.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at p. 42.

⁵⁰² <https://www.npr.org/2021/10/10/1043821492/black-americans-land-history>.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ [citation.]

⁵⁰⁶ [citation.]

⁵⁰⁷ Winton, *Suit Accusing Coach of Racism Stirs Bitter Memories of Pool’s Past*, Los Angeles Time <<https://www.latimes.com/archives/la-xpm-2001-apr-16-me-51719-story.html>> (as of July 6, 2021).

⁵⁰⁸ [citation.]

⁵⁰⁹ *Id.*

from a lack of financial support and closed in 1983, leading a local swim coach and several donors to form the AAF Rose Bowl Aquatic Center.⁵¹⁰ This center was supposed to be open to all, but discouraged access for Black people due to the “country club” atmosphere.⁵¹¹ The Pasadena city council ignored this issue and allowed the formation of the center with public funds.⁵¹²

City and county police departments in California engaged in targeted harassment of Black owned businesses that provided leisure opportunities to Black Californians.⁵¹³ In 1927, the Parkridge Country Club in the City of Corona was originally a white-only private club that was sold to a group of Black entrepreneurs.⁵¹⁴ The Black entrepreneurs wanted Black people to enjoy suburban lifestyles without racist backlash or racist restriction.⁵¹⁵ However, the Los Angeles County Sheriff’s Department reportedly harassed Black visitors at the site.⁵¹⁶ The department ticketed over 200 Black visitors for minor parking or traffic violations to deter profits and customers at the club during Memorial Day Weekend.⁵¹⁷ Actions like these contributed to the group and club going into bankruptcy. Soon thereafter, the city took over the property and turned it into a housing development.⁵¹⁸

Cities across California have engaged in racially restrictive city-wide curfews, anti-cruising regulations, and policing of public gatherings, often targeting Black youth and young adults simply for existing or being present in an area.⁵¹⁹ An Oakland ordinance was passed in 1995 to control weekend gatherings of young Black people at Lake Merritt. It prohibited passing between two close checkpoints.⁵²⁰ Discriminatory policing of Black gathering has resulted in over-policing of Black-majority communities and events.⁵²¹ For instance, the City of Oakland postponed First Friday, an inclusive gathering of Oakland’s communities to support artists and economic activity in the area—which a large proportion of Black residents attend.⁵²² The event was postponed due to fears that the 4th of July holiday may “spark too much violence.”⁵²³

X. Conclusion

[Summary tying discrimination to enslavement.]

Black Americans have suffered from discrimination in faith, art, sport, leisure, fashion, literature, media, and

⁵¹⁰ [citation.]

⁵¹¹ [citation.]

⁵¹² [citation.]

⁵¹³ [citation.]

⁵¹⁴ *Id.*

⁵¹⁵ [citation.]

⁵¹⁶ [citation.]

⁵¹⁷ Jefferson, *supra*, pp. 169-170.

⁵¹⁸ U.C.L.A Library Digital Collections, Parkridge Country Club, Corona, 1925-1928
<<https://digital.library.ucla.edu/catalog/ark:/21198/z1zc9m24>> (as of June 23, 2021).

⁵¹⁹ [citation.]

⁵²⁰ *Id.* at p. 679. <https://www.sfgate.com/news/article/Cruising-Crackdown-Considered-Oakland-hopes-to-3036232.php>.

⁵²¹ [citation.]

⁵²² <https://www.oaklandfirstfridays.org/about>.

⁵²³ [citation.]

music. The United States has historically denied Black Americans the right to practice their faith freely, own their intellectual and artistic property, engage in leisure activities without restriction, and receive fair compensation for their athletic talent. State and federal governments have endorsed blackface minstrelsy, promoted racist cinematic depictions of Black Americans, allowed segregation in arts and culture, denied patents to Black inventors, and punished Black Americans for using their faith, their creativity, and their athletic prowess to protest racial injustice.

DRAFT

Chapter 10. Stolen Labor and Hindered Opportunity

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

During enslavement, American government at all levels enabled and benefitted from the direct theft of Black Americans' labor. Since then, federal, state, and local government actions directly segregated and discriminated against Black Americans and also paved the way for private discrimination in labor. Federal, state, and local laws and policies, including those of California, have expressly limited how Black Americans work and what work they do. Federal laws have also protected white workers while denying the same protections to Black workers, setting up and allowing private discrimination. Government and private discrimination have contributed to the inability of Black Americans to build wealth over generations. Although progress has been made, Black workers continue to face serious discrimination today.

Around the time of the Civil War, state and local governments passed laws known as the Black Codes and "Jim Crow" laws. While these laws touched all aspects of life, one of their main goals was to control how Black Americans earned a living in order to maintain Black Americans as a servant class for white Americans. These laws limited Black Americans' job opportunities and salaries and their ability to provide for their families.

The federal government itself directly discriminated against Black workers. Black workers were routinely excluded from federal employment until 1861 and, in 1913, President Woodrow Wilson allowed for the federal workforce be segregated. The segregated federal government demoted and relegated Black workers to lower paid jobs, and, for instance, forced Black workers to use separate toilets in the Treasury and Interior Departments. Although the military offered an opportunity for upward mobility for Black Americans, its ranks remained segregated until 1960, with lower pay and rank for Black service members. Even as the overall proportion of Black service members has grown, military leadership has remained overwhelmingly white, with only two Black officials out of 41 total holding four-star rank in 2020.

Although the federal government throughout history has passed laws, implemented policies, and made progress in protecting workers, its efforts were often limited in time and impact, and often left out Black workers due to compromises with racist southern legislators. After the Civil War, the Freedmen's Bureau provided for the welfare of previously enslaved Black Americans, but it did so in a manner that reinforced racist notions, and lasted only seven years before being dismantled by Congress under pressure from white southerners. The federal government failed to prevent white Americans from using violence and terror to limit Black Americans' ability to earn a living, and certified unions that excluded Black workers. Federal labor protections under the New Deal, which aimed to help American workers' economic prospects, excluded or harmed Black Americans.

The Civil Rights Act of 1964 included Title VII, which largely banned discrimination on the basis of race in employment. However, it did not remedy the discriminatory workplace structures that have accumulated for hundreds of years. In 1977, the Supreme Court limited these federal protections to only instances where an employee can prove that their employer intended to discriminate against them, an extremely high standard. Federal government affirmative action plans created in the 1970s did lead to an increase in the rate of minority

employment in businesses that contracted with the federal government in those years, , but an organized backlash has narrowed the scope and impact of these programs since in the early 1980s. Despite some progress in preventing labor discrimination against Black workers, the federal government has made little to no effort to address the harms of past government action.

Research has produced evidence that, as a result of the legacy of enslavement and subsequent and ongoing discrimination, white workers are paid more than Black workers, and Black and white workers are concentrated in different types of jobs.¹ As of 2019, median Black wages were equivalent to only 75.6 percent of white wages, falling from a height of 79.2 percent in 2000. Researchers estimate that between one-quarter to one-third of the wage gap between Black and white workers is due to racial discrimination.² Without a safety net of savings, Black Americans can be more vulnerable to upheavals in the labor market and less able to advocate for higher wages or other benefits. As of 2020, 19.5 percent of Black Americans were living in poverty compared to 8.2 percent of non-Hispanic white Americans.³ Out of the 2021 Fortune 500 companies, only five of the chief executive officers of those companies were Black Americans.⁴ In 2020, Black Americans held only 8.7 percent of the board seats in Fortune 500 companies.⁵

Similar patterns of government neglect and discrimination exist in California. Black workers did not hold many government jobs in the state until World War II. When Bay Area Rapid Transit was built in 1967, no skilled black workers were hired because the National Labor Relations Board (NLRB)-certified unions did not admit Black members. BART, though a government agency, refused to use its power to insist on non-discrimination policies by the unions. In 1996, California changed its constitution to ban the use of affirmative action in government employment and education with Proposition 209. These and other government actions directly prevented Black Americans from receiving the same wages and career opportunities as white Americans received with government support.

This chapter recounts this long history and the continuing impact of discrimination in labor and employment. Section III provides a brief summary of enslavement, a subject explored in greater detail in Chapter [XX]. Section IV discusses discrimination in the laws enacted and government programs carried out from the Civil War forward as well as government support of private discrimination in labor and employment. Section IV also includes discussion of the advances and limitations of civil rights laws. Section V outlines the history of discrimination in government employment. The effects still seen today from centuries of discrimination are summarized in Section VI.

III. Enslavement

The story of Black Americans in the United States begins with stolen labor. The purpose of enslavement was to exploit the fruits of Black labor for the benefit of mostly white Americans. For a full discussion of enslavement,

¹ Reskin, Barbara. "The Race Discrimination System." Annual Review of Sociology, vol. 38, Annual Reviews, 2012, pp. 17–35, <http://www.jstor.org/stable/23254585>. P. 21

² Charles & Guryan 2011; Fryer et al, 2011

³ Shrider et al, Income and Poverty in the United States 2020, United States Census (September 2021), <https://tinyurl.com/y3wbrvfx> (as of Jan 24, 2022).

⁴ Kurt, *Corporate Leadership by Race*, Investopedia (July 21, 2021), <https://tinyurl.com/mr25xv4n> (as of Jan 24, 2022).

⁵ Press Release, *Fortune 500 Boards Still Decades Away from Representation Parallel to the Presence of Women and Minorities in the US Population*, Deloitte (June 8, 2021), <https://tinyurl.com/46535v2x> (as of Jan 24, 2022).

please see Chapter [XX]. The labor of enslaved Black Americans built the infrastructure of the nation, filled the nation's coffers, and produced its main agricultural products for domestic consumption and export.⁶

Federal and state law treated Black Americans themselves as commodities to be sold by enslavers.⁷ This system exploited the labor and love of Black mothers to recreate and grow the enslaved labor force.⁸ Between 1619 and 1808, 300,000 men, women, and children were trafficked to what would become the United States.⁹ By 1865, 3.9 million enslaved Black Americans lived in the United States.¹⁰

Local, state, and federal governments collected taxes on all this condoned economic activity.¹¹ Enslavement effectively led to separate labor markets for Black and white Americans.¹² White workers had access to a larger and more desirable selection of jobs, while free Black workers were relegated to menial labor.¹³ Frederick Douglass observed, "Finding my trade of no immediate benefit, I threw off my calking habiliments, and prepared myself to do any kind of work I could get to do."¹⁴

Although there were fewer legal limitations on Black Americans in the North, white workers were more motivated to reduce competition from Black Americans.¹⁵ Less threatened by free Black workers in the South, white employers were more likely to employ Black workers in skilled jobs than free Black wage earners in the North.¹⁶ In 1850, the number of free Black men employed as artisans was between 12 and 18 percent in Washington, D.C., Baltimore, and Louisville, but the figure was over 60 percent in New Orleans and Charleston.¹⁷

⁶ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. xiv; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Daina Ramey Berry, *The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Boston: Beacon Press, 2017); Edward Baptist, *The Half has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2016); Sven Beckert, *Empire of Cotton: A Global History* (New York: Vintage Books, 2015); Sven Beckert and Seth Rockman, eds., *Slavery's Capitalism: A New History of American Economic Development* (Philadelphia: University of Pennsylvania Press, 2018).

⁷ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. xiv; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Daina Ramey Berry, *The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Boston: Beacon Press, 2017); Edward Baptist, *The Half has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2016); Sven Beckert, *Empire of Cotton: A Global History* (New York: Vintage Books, 2015); Sven Beckert and Seth Rockman, eds., *Slavery's Capitalism: A New History of American Economic Development* (Philadelphia: University of Pennsylvania Press, 2018).

⁸ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Deborah Gray White, *Ar'n't I a Woman? Female Slaves in the Plantation South* (New York: W. W. Norton, 1985); Rachel A. Feinstein, *When Rape was Legal: The Untold History of Sexual violence during Slavery* (New York: Routledge, 2019); Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2004).

⁹ Philip Curtin, *The Atlantic Slave Trade: A Census* (Madison: University of Wisconsin Press, 1972).

¹⁰ U.S. Census

¹¹ [citation needed]

¹² Jones, *American Work: Four Centuries of Black and White Labor* (1998) pp. 258-59.

¹³ Jones, *American Work: Four Centuries of Black and White Labor* (1998) pp. 258-59.

¹⁴ Douglas, *Narrative of the Life of Frederick Douglass: An American Slave* (1968) pp. 117-18.

¹⁵ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 260.

¹⁶ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 260.

¹⁷ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 260.

A. California

As discussed in Chapter [XX], enslavement existed in California into the mid-1860s.¹⁸ Enslavers brought enslaved Black Americans with them when they moved west.¹⁹ Additionally, California passed its own fugitive slave law in 1852 and, for the three years it was in force, it was harsher than the federal fugitive slave law and prevented courts from recognizing the freedom of those fleeing to California.²⁰ California at the time strongly discouraged free Black Americans from entering its territories.²¹ However, free Black Americans worked as fur traders, scouts, cowboys, and miners.²²

IV. Discriminatory Laws and Government Support of Private Discrimination

Following the Civil War, Congress created programs to benefit Black Americans and passed statutes to protect their rights. But fierce opposition from white government officials undermined these programs and led to their premature end—while the Supreme Court undermined statutory protections, allowing state and local legislatures to impose segregation.

Throughout American history and as discussed in the preceding chapters, local and state governments with the tacit approval of the federal government passed many laws restricting Black conduct. The Black Codes and Jim Crow laws aimed to consolidate and maintain economic and political power generally in the hands of white Americans by controlling the type of work available to Black Americans, and how that work is performed.²³ This governmental discrimination against Black Americans supported private employment discrimination.²⁴ Until the Great Migration, as discussed in Chapter [xx], the majority of Black Americans lived in the South, and the majority of southern Black families did not own land and were exploited by white landowners in the sharecropping system.²⁵ Black women were mostly relegated to domestic service jobs until well into the 20th century.²⁶

When the federal government aimed to improve labor conditions in the 1930s with the New Deal, federal policies and programs often failed to benefit, or even harmed Black Americans, often by design. New Deal programs purposefully linked benefits like healthcare, paid vacations, pensions, tuition benefits, social security, and unemployment benefits to employment with large corporations, which at the time, generally did not hire Black workers.²⁷ Southern senators from states that passed laws to prevent Black workers from voting were instrumental in structuring the New Deal to exclude industries in which most Black workers were employed, like agriculture, personal services, and casual labor.

¹⁸ <https://opinionator.blogs.nytimes.com/2014/03/05/californias-last-slave-case/>

¹⁹ Wilkerson, *Warmth of other suns*, 231

²⁰ Stats. 1852, ch. 33, § 1, pp. 67-68 <<https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1852/1852.PDF>> (as of Dec. 28, 2021); Wills, *Slavery in a Free State: The Case of California* (Feb. 25, 2021) JSTOR Daily <<https://daily.jstor.org/slavery-in-a-free-state-the-case-of-california/>> (as of Dec. 28, 2021).

²¹ Wilkerson, *Warmth of other suns*, 231

²² Wilkerson, *Warmth of other suns*, 231

²³ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) pp. 18-22.

²⁴ [citation needed]

²⁵ Jacqueline Jones, *The Dispossessed: America's Underclasses from the Civil War to the Present* (New York: Basic Books, 1992).

²⁶ Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* (New York: vintage, 2011); Jones, *Labor of Love*, 131-62.

²⁷ [citation needed]

When the federal government tried to remedy the racism faced by Black workers, the actions often lacked power to enact real change and often lasted only a short time.

A. Freedmen's Bureau: Short-Lived Paternalism

In the wake of the Civil War, the federal government created programs to aid Black Americans and statutes to protect their rights. However, both failed to live up to their promise to give Black Americans equal access to economic and labor opportunities or remedy the harms of slavery.

Immediately before the end of the Civil War, Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as the “Freedmen’s Bureau,” to provide for the welfare of formerly enslaved Black Americans, including through “issues of provisions, clothing, and fuel, as [necessary] for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children,” according to the statute.²⁸ The Freedmen’s Bureau had the authority to supervise labor relations in the South, with the mandate to provide education, medical care, and legal protections for formerly enslaved Black Americans, along with the authority to rent out and eventually sell allotments of abandoned or confiscated land to free Black Americans.²⁹

The original goal of the Freedmen’s Bureau Act was the more radical notion of allowing Black Americans the means to become self-sufficient.³⁰ In the closing days of the Civil War, on January 16, 1865, as Union General William Tecumseh Sherman marched through Georgia, he issued Special Field Order No. 15 “providing that each negro might have forty acres at a low price on long credit.”³¹ Many free Black Americans and northern Republicans believed that land reform in the South—granting formerly enslaved Black Americans access to their own land—is the true way that formerly enslaved people can be free from their enslavers.³² The resulting independent Black farmers would provide a power base for a new social and political order in the postwar South.³³

This new vision of social relations in the South was opposed by southerners and northerners who opposed enslavement but did not believe in full equality for Black Americans.³⁴ A large number of Black landowners would threaten plantations, and the southern economy and social system.³⁵ White capitalists in the North and South believed that Black freedom should mean Black workers continuing to work on a plantation, although they would now be paid.³⁶ They did not believe that Black Americans should be able to independently support themselves.³⁷ After the assassination of Abraham Lincoln, Andrew Johnson became president—and President

²⁸ Freedmen’s Bureau Bill (Act of March 3, 1865, Chap. XC, 13 Stat. 507), <http://www.freedmen.umd.edu/fbact.htm>.

²⁹ Reich, *A Working People: A History of African American Workers since Emancipation* (2013) p. 13.

³⁰ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 16, citing Fleming, “Forty Acres and a Mule,” *North American Review* 182 (1906): 729, <http://www.jstor.org/stable/25105565>.

³¹ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 16, citing Fleming, “Forty Acres and a Mule,” *North American Review* 182 (1906): 729, <http://www.jstor.org/stable/25105565>.

³² Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 12.

³³ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 12.

³⁴ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) pp. 13-14.

³⁵ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 12.

³⁶ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 19.

³⁷ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 19.

Johnson supported this view, proclaiming that he would act to keep America “a white man’s government.”³⁸

Although the Freedmen’s Bureau tried to assert and protect the rights of the formerly enslaved, the Bureau under President Johnson perpetuated racist stereotypes, paternalistic attitudes, and continued to limit Black Americans’ economic and social power.

Bureau agents often viewed formerly enslaved Black Americans as children, unprepared for freedom, and needing to be taught the importance of work and wages.³⁹ The Freedmen’s Bureau abandoned the possibility of land reform in the South, and focused on labor relations between Black and white southerners instead.⁴⁰ Bureau agents did protect Black workers’ rights by invalidating enslavement-like labor contracts and enforced contracts or settled wage disputes at the end of the harvest season.⁴¹

However, the Bureau also harmed Black Americans by acting on the racist belief that Black Americans avoided work, and it was the Bureau’s responsibility to reform such laziness.⁴² One commander noted that emancipation only meant “liberty to work, work or starve.”⁴³ General O.O. Howard, director of the Freedmen’s Bureau, stated that Black Americans must enter into labor contracts regardless of the contract terms because any Black man “who can work has no right to support by the government.”⁴⁴ To this end, Bureau agents withheld social services and food in order to force Black Americans into labor contracts,⁴⁵ prosecuted Black workers who broke labor contracts, and enforced vagrancy laws to prevent Black Americans from moving away.⁴⁶ The Bureau allowed plantation owners to deduct unfairly large sums for supplies and rations, until many workers would receive little wages at all.⁴⁷ The wage guidelines for Black workers provided less pay for Black women regardless of their productive capacity.⁴⁸

Nonetheless, the Freedmen’s Bureau met severe resistance from southern politicians. In 1866, President Andrew Johnson vetoed the bill extending its existence past one year, and it was only enacted once Congress overrode the veto.⁴⁹ Six years later, in 1872, Congress bowed to pressure from white southerners and dismantled the Bureau.⁵⁰

B. Black Codes Controlled Black Workers

Immediately after the Civil War, “Black Codes,” passed by state and local governments in both the North and the South, governed the conduct of free Black Americans. Free Black Americans posed a threat to the racial hierarchy of slavery, and Black Codes were a range of laws to maintain the lower status of Black Americans through restrictions on movement and activity, often in order to compel them to work in menial jobs for low

³⁸ Johnson, *The Papers of Andrew Johnson*, vol. 10: February-July 1866 (Bergeron, ed. 1992), pp. 174-175.

³⁹ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 15.

⁴⁰ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 18.

⁴¹ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 14.

⁴² California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁴³ Trotter, *Workers on Arrival: Black Labor in the Making of America* (2019) p. 56.

⁴⁴ Trotter, *Workers on Arrival: Black Labor in the Making of America* (2019) p. 56.

⁴⁵ Trotter, *Workers on Arrival: Black Labor in the Making of America* (2019) p. 56.

⁴⁶ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 15.

⁴⁷ Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st Ed. (1985) pp. 54-55.

⁴⁸ Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st Ed. (1985) p. 62.

⁴⁹ Freedmen’s Bureau (Jun. 1, 2010, updated Oct. 3, 2018) <https://www.history.com/topics/black-history/freedmens-bureau>.

⁵⁰ Freedmen’s Bureau (Jun. 1, 2010, updated Oct. 3, 2018) <https://www.history.com/topics/black-history/freedmens-bureau>.

pay.⁵¹

Some jurisdictions used Black Codes to limit opportunities available to Black Americans. In South Carolina, Black Americans were required to apply for a permit to do work that was not agriculture.⁵² These codes often reinforced enslavement, even after it had been outlawed. The Thirteenth Amendment to the Constitution outlawed the institution of slavery, but it allowed involuntary servitude as a punishment for a crime. Mostly southern state and local governments used this loophole to develop a system of laws, often built around vagrancy laws, that turned Black Americans into criminals, and then allowed the government to turn those labeled “criminals” into de facto enslaved persons, forced to labor without pay or freedom of movement.⁵³ Vagrancy laws, passed by numerous states, criminalized unemployment. An 1865 Mississippi law required Black Americans to enter into a labor contract with white employers by January 1 of every year or risk being in violation.⁵⁴ The punishment for violation was a criminal conviction allowing the state or locality to force the Black American to work without pay.⁵⁵ This system of re-enslavement is discussed in depth in Chapter [xx].

C. The Supreme Court Announces “Separate but Equal”

In 1866, Congress overrode President Johnson’s veto to pass the Civil Rights Act of 1866, the first federal legislation banning discrimination on the basis of race.⁵⁶ As discussed in other chapters, the Civil Rights Act of 1866 was aimed at ensuring that Black Americans had the same legal rights as white Americans. It did not create a mechanism for enforcement.⁵⁷

However, the Civil Rights Act of 1875 penalized businesses and other public accommodations that discriminated against Black Americans.⁵⁸ This protection lasted only eight years, before the Supreme Court in 1883 decided in the *Civil Rights Cases* that the Fourteenth Amendment did not apply to private parties.⁵⁹

The decision allowed private employers and other businesses to openly discriminate against Black Americans with no repercussions.⁶⁰ Together with *Plessy v. Ferguson* in 1896, which condoned the doctrine of “separate but equal,” the Supreme Court created the ability for both private and public employers to entrench an inferior labor market for Black workers, with lower wages, fewer protections, and limited opportunities for advancement for the next 100 years.⁶¹

D. Lack of Government Protection from Violence Enabled Private Discrimination

In both the North and the South, federal, state, and local governments neglected their duty to protect Black workers from violence as a tactic to limit their job opportunities. While often committed by private actors,

⁵¹ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) pp. 18-22.

⁵² Wilkerson, *Warmth of Other Suns* p. 216

⁵³ Blackmon, *Slavery by Another Name: the Re-Enslavement of Black Americans from the Civil War to World War II* (2009) pp. 1, 53.

⁵⁴ Blackmon, *Slavery by Another Name: the Re-Enslavement of Black Americans from the Civil War to World War II* (2009) pp., 53.

⁵⁵ *Id.* at p. 53.

⁵⁶ Castel, Albert E. (1979). *The Presidency of Andrew Johnson*. American Presidency. Lawrence, Kan.: The Regents Press of Kansas. p. 71; John Hope Franklin, *Civil Rights Act of 1866 Revisited* (1989). Available at: <http://repository.uchastings.edu/tobriner/15>

⁵⁷ [citation]

⁵⁸ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 37.

⁵⁹ 109 U.S. 3 (1883).

⁶⁰ [citation]

⁶¹ [citation]

government discrimination and failure to seriously prosecute racial violence accepted its use to limit economic opportunities of Black Americans.

[to come: potential addition research, including discussion of lack of protection in the civil legal system for contract enforcement, etc.]

E. Legal Segregation Buttressed Private Discrimination

During the brief period of Reconstruction following the end of the Civil War until the 1870s, radical Republicans in the federal government passed laws increasing Black Americans' economic and labor freedom. This included rights to change employers, keep a portion of crops grown through cooperative labor, and change locations.⁶² But this progress was temporary.

After the Union army withdrew from the South, as discussed in Chapters [xx, yy, and zz] on enslavement, political disenfranchisement, and racial terror, respectively, southern states passed laws and white Americans used racial terror and violence to prevent Black Americans from voting. The southern Democrats took back control of state and local governments across much of the South and built a power base in the federal government.⁶³ In the South, state and local governments passed laws that created a legally enforced system of segregation.⁶⁴ The federal government supported this system with a series of Supreme Court decisions culminating with *Plessy v. Ferguson*'s official acceptance of "separate but equal" Jim Crow segregation regimes in 1896.⁶⁵

Segregation affected all aspects of Black Americans' lives, including voting, marriage education, transportation, access to public accommodations, and labor and working conditions.⁶⁶ For example, South Carolina passed a statute that essentially required employers to create two separate work spaces, as it forbid white textile workers from working in the same room or using the same entrances, exits, pay windows, doorways, stairways, or windows at the same time as black workers.⁶⁷ Textile workers in South Carolina could not use the same "water buckets, pails, cups dippers or glasses" as white workers.⁶⁸ Not only did such laws directly regulate the labor of Black Americans, they also made it more expensive to hire Black workers when such additional facilities were required.⁶⁹ In order to be compliant with state law, an employer would need to pay twice for compliant facilities if they hired any Black workers.⁷⁰ Many employers simply refused to hire any Black workers.⁷¹ As a result, most of the jobs available to Black Americans were menial and service jobs.⁷²

⁶² Trotter, *Workers on Arrival: Black Labor in the Making of America* (2019) p. 56.

⁶³ Trotter, *Workers on Arrival: Black Labor in the Making of America* (2019) p. 56..

⁶⁴ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 58.

⁶⁵ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017), pp. 37-38; *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶⁶ *Warmth of Other Suns*, p. 472

⁶⁷ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017), p. 38.

⁶⁸ Wilkerson, *Warmth of Other Suns, the Epic Story of America's Great Migration* (2010), p. 472

⁶⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁷⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁷¹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁷² Wilkerson, *Caste*

State and local governments' refusal to enforce the economic and civil rights of Black Americans in contract and employment disputes allowed white Americans to exploit and discriminate against Black Americans. Black Americans in the South mostly remained in agriculture, in a sharecropping or tenant farming system.⁷³ Sharecropping and tenant farming emerged in the late 1860s and lasted into the 1940s, and tied Black workers to agricultural work rather than skilled labor.⁷⁴ A sharecropping or tenancy arrangement typically involved Black workers and tenants paying rent to a white farmer while living and working on the rented land. The tenant farmers purchased supplies—including seed, fertilizer, and tools—on credit from plantation stores that then attached significant markups to the supplies and charged high interest rates, often locking the tenant farmers into a permanent state of debt.⁷⁵ Tenants were required to pay off all debts before leaving the farm, and landlords enforced these requirements with threats of violence.⁷⁶

Although the sharecropping system also exploited poor white farmers, an added layer of racial terror plagued Black sharecroppers, with no hope of government or legal protection. In the South, a Black American challenged a white American at the risk of severe violence, or death.⁷⁷ For example, in 1948, two white Americans beat a Black tenant farmer in Louise, Mississippi because the Black farmer had asked for a receipt after paying for his water bill.⁷⁸ If a Black farmer tried to sell extra agricultural product without permission to someone who was not their landlord, he could be whipped or killed.⁷⁹ “They could never leave as long as they owed the master... [t]hat made the planter as much master as any master during slavery, because the sharecropper was bound to him, belonged to him, almost like a slave[.]” a former sharecropper told Isabel Wilkerson, the Pulitzer Prize-winning journalist and author of both *The Warmth of Other Suns: The Epic Story of America's Great Migration* and *Caste: The Origins of Our Discontents*.⁸⁰

“One reason for preferring Negro to white labor on plantations is the inability of the Negro to make or enforce demands for a just statement or any statement at all. He may hope for protection, justice, honesty from his landlord, but he cannot demand them. There is no force to back up a demand, neither the law, the vote nor public opinion.... Even the most fair and most just of the Whites are prone to accept the dishonest landlord as part of the system,” wrote anthropologist Hortense Powdermaker.⁸¹

[to come: additional research to discuss history of discrimination in the civil law system, including support of wage theft discussion.]

Black Litigants in the Antebellum South, Kimberly M. Welch

<https://law.stanford.edu/wp-content/uploads/2018/02/Coleman-FINAL.pdf>

⁷³ [citation needed]

⁷⁴ Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st ed. (1985) p. 61; “Slavery by Another Name: Sharecropping” <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/>.

⁷⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁷⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁷⁷ *Warmth of other suns*, p. 50-51

⁷⁸ *Warmth of other suns* p. 51

⁷⁹ *Warmth of other suns*, p. 58

⁸⁰ *Warmth of other suns*, p. 58

⁸¹ *Warmth of other suns*, p. 58

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455525

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947079

Elsewhere in the country, the Great Migration, as discussed in detail in Chapter [XX], brought Black Americans from the South to the North, Midwest, and West. “Blacks, though native born, were arriving as the poorest people from the poorest section of the country with the least access to the worst education[,]” wrote Wilkerson.⁸² Excluded even from better paid menial jobs, Black workers in the North and West earned the least money when compared with white immigrants at the time. Black Americans had an annual income of \$1,628.⁸³ Italian immigrants made \$2,295, Czechs made \$2,339, Poles made \$2,419, and Russians made \$2,717.⁸⁴

Until well into the 20th century, Black women could mostly only find work as domestic servants for white employers.⁸⁵ Following the Civil War, new career opportunities opened up for women in the fields of teaching and nursing.⁸⁶ Black women who entered these professions could only work in segregated facilities.⁸⁷ A few decades later, private employers hired mostly white women as receptionists, department store clerks, and telephone and machine operators.⁸⁸ Black women took over household work as white women, including white immigrant women, moved into these better paying jobs with set work hours.⁸⁹

In both the North and the South, Black female labor participation rates were double those of American-born white women and triple those of immigrant women. During the first half of the 20th century, the number of white female domestic workers fell from 1.3 million to 542,000, while Black women went from accounting for 30 percent of household workers around 1900 to about 60 percent of household workers at the end of World War II.⁹⁰ Some Black women working as servants lived in their employer’s homes and were on call 24 hours a day.⁹¹ Other Black women resorted to what was colloquially referred to as “slave markets” where they gathered on street corners early in the morning to wait for white housewives to bid on them for as little as fifteen cents an hour.⁹² One woman at a Chicago “slave market” reported that she made as much money as she would picking cotton in the field.⁹³

F. Exclusion from Unions

Legal segregation laws not only confined Black workers in the South, but also impacted the economy of the entire country⁹⁴ and the rights of worker of all races.⁹⁵ Unions have a lengthy history in the United States as

⁸² Warmth of others suns, p. 408

⁸³ Warmth of other suns, p. 408

⁸⁴ Warmth of other suns, p. 408

⁸⁵ Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st ed. (1985) p. 74.

⁸⁶ Jones Testimony, October Task Force Hearing.

⁸⁷ Darlene Clark Hine, *Black Women in White: Racial Conflict and Cooperation in the Nursing Profession, 1890-1950* (Bloomington: Indiana University Press, 1989); Adam Fairclough, *A Class of their Own: Black Teachers in the Segregated South* (Cambridge: Belknap Press, 2007).

⁸⁸ Jones Testimony, October Task Force Hearing.

⁸⁹ Jones Testimony, October Task Force Hearing.

⁹⁰ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) pp. 91-92.

⁹¹ Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st ed. (1985) p. 74.

⁹² Warmth of other suns, 326

⁹³ Warmth of other suns, 326

⁹⁴ Wilkerson, *Warmth of other suns*, 310

⁹⁵ Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), 222-232.

craftsmen have long joined together to solve problems related to their craft.⁹⁶ In the 18th century, strikes, labor organizing, and collective bargaining developed at the same time, and the first authenticated strike was called in 1786 by Philadelphia printers.⁹⁷ Unions reached their peak during World War II, as unions grew at the rate of approximately one million workers per year.⁹⁸

Prior to World War II, many unions refused to accept Black people as members.⁹⁹ Since before the Civil War, white workers have claimed that Black workers were not suited to skilled labor in order to avoid competition for jobs.¹⁰⁰ In the North, companies and unions did not hire Black workers because white workers refused to work beside them, and for the sake of morale, the companies and unions would not force the issue.¹⁰¹ White workers sometimes walked off the job to force their employers to rid their workplace of Black employees.¹⁰²

In 1902, Black workers scarcely made up three percent of members in unions.¹⁰³ In response, Black workers sometimes formed their own unions.¹⁰⁴ For example, in 1869, Black delegates attended the Colored National Labor Union convention in Washington, D.C., which was a counterpart to the white National Labor Union.¹⁰⁵

Government action sometimes supported labor unions' discrimination against Black workers.¹⁰⁶ For example, when the city of St. Louis built a segregated hospital for Black patients, white union members protested the hiring of a single Black tile setter.¹⁰⁷ The city fired the contractor and did not hire any contractor that employed Black workers.¹⁰⁸

Segregation made contact between Black and white workers almost impossible, and reflected and intensified racial tension between workers.¹⁰⁹ Legal segregation not only held down the wages of Black working-class Americans, it also prevented working class white workers from demanding higher pay, as long as Black workers could always be forced to work for less.¹¹⁰

⁹⁶ Reedy, Theodore Winter. *Brief History of the American Labor Movement*. United States: U.S. Government Printing Office, 1951, pg 1.

⁹⁷ Reedy, Theodore Winter. *Brief History of the American Labor Movement*. United States: U.S. Government Printing Office, 1951, pg 3.

⁹⁸ Reedy, Theodore Winter. *Brief History of the American Labor Movement*. United States: U.S. Government Printing Office, 1951, pg 29.

⁹⁹ Reedy, Theodore Winter. *Brief History of the American Labor Movement*. United States: U.S. Government Printing Office, 1951, pg 30.

¹⁰⁰ Jones, *American Work: Four Centuries of Black and White Labor* (1998) pp. 221-22; Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st ed. (1985) p. 56.

¹⁰¹ Warmth of other suns, 310

¹⁰² Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present*, 1st Ed. (1985) p. 148

¹⁰³ History.com Editors. "Labor Movement." *History.com*, A&E Television Networks, 29 Oct. 2009, <https://www.history.com/topics/19th-century/labor>.

¹⁰⁴ Cassidy, James. "African Americans and the American Labor Movement." *National Archives and Records Administration*, National Archives and Records Administration, 7 Dec. 2017, <https://www.archives.gov/publications/prologue/1997/summer/american-labor-movement.html>.

¹⁰⁵ Cassidy, James. "African Americans and the American Labor Movement." *National Archives and Records Administration*, National Archives and Records Administration, 7 Dec. 2017, <https://www.archives.gov/publications/prologue/1997/summer/american-labor-movement.html>.

¹⁰⁶ Rothstein p. 155

¹⁰⁷ Rothstein p. 155

¹⁰⁸ Rothstein p. 155

¹⁰⁹ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) pp. 58-59.

¹¹⁰ Wilkerson, *Warmth of other suns*, 310

Scholars have argued that this discouraged white and Black workers from working together for better working conditions by pitting Black workers against white workers.¹¹¹ For example, beginning in the 1880s, Black and white tenant farmers and sharecroppers began to join biracial political parties to challenge the political and business elite of the South.¹¹² Scholars such as Jacqueline Jones, who testified before the Task Force, have argued that legal segregation and private racial discrimination were used to disrupt this burgeoning biracial political force.¹¹³

For example, before the Civil War, Black women, men, and children worked in the South. After the war, southern textile-mill owners reserved those jobs for white families, and advertised hazardous mill work as a welcome escape from sharecropping.¹¹⁴ This drove a wedge between the Black and white rural poor.¹¹⁵

G. Discrimination in Promotion and Pay

During the World War I, Black workers began to make headway in previously white workplaces and industries. Black men took blue collar jobs previously held by immigrants who had shifted employment to the war effort; Black women took jobs previously held by white women and boys.¹¹⁶ Black workers might earn four times more doing industrial labor in the North than they earned doing agricultural labor in the South.¹¹⁷ As discussed in Chapter [XX], these job opportunities in the North and West led approximately three million Black Americans to migrate from the South between World War I and World War II, and another five million to move between 1940 and 1980.¹¹⁸

Wherever they landed in the North, the Midwest, or the West, Black Americans found more discrimination, which translated into racial job ceilings, pay differentials, and segregation by job type.¹¹⁹ For example, Ford Motor Company refused to employ Black workers at a level above general labor outside of the Detroit area, and in the Chicago stockyards Black workers were excluded from jobs as foremen, as they were not permitted to supervise white workers.¹²⁰

Black workers were categorized in lower-level jobs “helping” white workers, who would simply supervise work while taking home the higher wage.¹²¹ One Black employee at the Firestone Company’s Memphis plant described how: “You’d be classified as a ‘helper,’ but you’d be doing all the work. The white man would get the high wage . . . [but] he’d just be sittin’ there watchin’.”¹²² As a result, Black workers were penalized both with lower wages and fewer advancement opportunities.

Black workers were often only hired in jobs that were far more physically dangerous.¹²³ For example, Ford

¹¹¹ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) pp. 58-59.

¹¹² Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), 222-232.

¹¹³ Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), 222-232.

¹¹⁴ Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), 222-232.

¹¹⁵ Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), 222-232.

¹¹⁶ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 319.

¹¹⁷ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 78.

¹¹⁸ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 78.

¹¹⁹ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 86.

¹²⁰ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 87.

¹²¹ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 87.

¹²² Quoted in Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 88.

¹²³ Thomas, *Life for Us is What We Make it: Building Black Community in Detroit, 1915-1945* (1992) pp. 106-107.

Motor Company's foundry, where many Black workers were employed, had a lack of safety equipment, poor ventilation, and management-induced speed-ups that lead to worker injury and death.¹²⁴ One foundry worker described others finished a shift "so matted and covered with oil and dirt that no skin showed. . . . we could [only] tell a friend by his voice."¹²⁵

This pattern continued across manufacturing sectors for decades. Black workers were limited to lower-paying categories, barred from supervisory roles, and denied opportunities for advancement. For example, by 1970, one-fifth of autoworkers in Detroit were Black, but Black workers remained all but completely excluded from higher-level positions.¹²⁶ In 1968, Black autoworkers formed the Dodge Revolutionary Union Movement to protest racism at the plant. A writer in the organization's newsletter laid out the stark segregation and discrimination then present at the plant: "(1) 95% of all foremen in the plants are white; (2) 99% of all the general foremen are white; (3) 100% of all plant superintendents are white; (4) 90% of all skilled tradesmen are white; (5) 90% of all apprentices are white . . . systematically all of the easier jobs are held by whites; (7) Whenever whites are on harder jobs they have helpers; (8) When black workers miss a day they are required to bring 3 doctors' excuses as to why they missed work; (9) . . . seniority is also a racist concept, since black workers were systematically denied employment for years at the plant."¹²⁷

This trend was not limited to manufacturing. In 1950, salaries of college educated workers, in both the North and South, were significantly lower for Black Americans across industries. For example, Black managers averaged an annual salary of around \$1,400, while white managers averaged closer to \$3,500.¹²⁸ Discrepancies like this existed in professional, teaching, farming, clerical, sales, and skilled technician occupations as well.¹²⁹

H. Exclusion from New Deal Protections

In the 1930s, the federal government under President Franklin D. Roosevelt sought to remake the relationship between employer and employees.¹³⁰ The New Deal transformed American society and set in motion the creation of the middle class—but only for white Americans.¹³¹ The New Deal reshaped the understanding of the role of the federal government in providing for American citizens.¹³² Programs funded under the New Deal infused a huge amount of capital into the economy. It is estimated that the federal government spent over \$26 billion on various New Deal public works programs between 1933 and 1939.¹³³

Southern Democrats, who rose to power by preventing Black Americans from voting through a combination of violence and voter suppression laws, forced President Roosevelt to essentially exclude Black Americans from

¹²⁴ Thomas, *Life for Us is What We Make it: Building Black Community in Detroit, 1915-1945* (1992) pp. 106-107.

¹²⁵ Thomas, *Life for Us is What We Make it: Building Black Community in Detroit, 1915-1945* (1992) pp. 106-107.

¹²⁶ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 367.

¹²⁷ Quoted in Gewschwender, *Class, Race, and Worker Insurgency: the Leave of Revolutionary Black Workers* (1977) p. 91.

¹²⁸ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of William Spriggs, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), Presentation slide 12.

¹²⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of William Spriggs, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), Presentation slide 12.

¹³⁰ Jacqueline Jones Testimony, Task Force Hearing October.

¹³¹ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 101.

¹³² Walker & Gray Brechin, "The Living New Deal: The Unsung Benefits of the New Deal for the United States and California" (2010) IRL Working Paper No. 220-10, pp. 23-28, <http://irle.berkeley.edu/workingpapers/220-10.pdf>

¹³³ Walker & Gray Brechin, "The Living New Deal: The Unsung Benefits of the New Deal for the United States and California" (2010) IRL Working Paper No. 220-10, p. 16, <http://irle.berkeley.edu/workingpapers/220-10.pdf>.

New Deal programs and legislation.¹³⁴ While northern liberals at the time would not support explicitly racist language in the programs and statutes, the Southern Democrats' racist aim was accomplished in the structure of the programs themselves.¹³⁵ In order to pass numerous New Deal laws, President Roosevelt compromised with the Southern Democrats to ensure their votes by largely excluding jobs mostly held by Black Americans from the New Deal's protections like unemployment insurance, minimum wages, equalized bargaining power, or anti-child labor laws.¹³⁶ Agricultural and domestic-service sectors, and anyone who held a seasonal or part-time job were excluded from these benefits.¹³⁷ Approximately 85 percent of all Black workers in the United States at the time were excluded,¹³⁸ although some historians disagree that federal lawmakers intended to discriminate against Black Americans.¹³⁹

President Roosevelt also compromised to allow New Deal programs to be administered at the local level.¹⁴⁰ By the design of the Southern Democrats in Congress, southern local white government officials argued that if there was laundry to be done or cotton to be picked, the state and federal government should not provide Black Americans with relief of any kind.¹⁴¹ While Black northerners received some governmental jobs and assistance, Black southerners did not.¹⁴²

The following is a non-exhaustive list of labor-related New Deal laws and programs and the ways in which they have discriminated against Black Americans. Many of the New Deal laws created the foundational structures that continue to provide Americans with a social safety net today.

1. National Industrial Recovery Act of 1933

The National Industrial Recovery Act created the National Recovery Agency, which established industry-specific minimum wages and employment protections. The National Recovery Agency eventually enacted over 540 codes providing for minimum wages and maximum hours in different industries.¹⁴³

Many employers advocated for explicitly racist codes before the agency—one argued that Black workers made “a much better workman and a much better citizen, insofar as the South is concerned, when he is not paid the

¹³⁴ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 101.; Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 102.

¹³⁵ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 103-104; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹³⁶ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 102.

¹³⁷ Jacqueline Jones Testimony, Task Force Hearing October.

¹³⁸ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 103-104; Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 342; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹³⁹ <https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html>

¹⁴⁰ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 104.

¹⁴¹ Jacqueline Jones Testimony, October Task Force hearing.

¹⁴² Jacqueline Jones Testimony, October Task Force hearing.

¹⁴³ Social Welfare History Project, “The National Industrial Recovery Act of 1933” (2011) <http://socialwelfare.library.vcu.edu/new-deal/national-industrial-recovery-act-of-1933/>.

highest wage.”¹⁴⁴ While explicit race-based codes were not adopted, the structure of the geographic and occupational breakdowns of the codes often accomplished the same goal. An industry code would classify a state as either “Northern” or “Southern” for the purpose of setting a minimum wage, with “Southern” states often having a lower minimum.¹⁴⁵ And different occupations, governed by different codes, had different minimum wages. One example demonstrates how the government used both geographic and occupational classifications and exclusions to pay Black workers less and provide them fewer protections. Delaware was classified as being “Northern”—and thus subject to a higher minimum wage—for 449 industry codes, but was classified as being “Southern”—and thus subject to a lower minimum wage—for the fertilizer industry, where Black workers made up 90 percent of the industry.¹⁴⁶ John P. Davis, in a speech to the 25th Annual Conference of the National Association for the Advancement of Colored People in 1934 stated: “[T]he one common denominator in all these variations is the presence or absence of Negro labor. Where most workers in a given industry are Negro, that section is called South and inflicted with low wage rates. Where Negroes are negligible, the procedure is reversed.”¹⁴⁷

The purpose of the occupational and geographic differentials in the wage codes was clear to those involved in implementing the National Industrial Recovery Act at the time. The Executive Director of the National Recovery Agency’s Labor Advisory Board wrote in 1934: “[T]o the degree the Southern rate is a rate for Negroes, it is a relic of slavery and should be eliminated.”¹⁴⁸ That same year, Ira De A. Reid, of the National Urban League, wrote in the newspaper the *Chicago Defender*: “the Negro’s initial attitude towards the national recovery act is best reflected in the interpretation of initials given by one observer who called it ‘Negro Riddance Act.’”¹⁴⁹

2. National Labor Relations Act of 1935 (Wagner Act)

The National Labor Relations Act of 1935 (NLRA or Wagner Act), proposed by Senator Robert Wagner, dramatically increased the power of organized labor by allowing officially certified unions in certain sectors the right to negotiate on behalf of *all* employees, if supported by a majority of workers.¹⁵⁰ The National Labor Relations Board, the agency designated to administer the NLRA, was able to hold hearings and resolve disputes involving union representation.

The NLRA harmed Black Americans by purposefully allowing unions to discriminate based on race and by failing to cover sectors of the economy that mostly employed Black Americans.¹⁵¹ This undermined the

¹⁴⁴ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, p. 104.

¹⁴⁵ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, p. 106.

¹⁴⁶ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, p. 106.

¹⁴⁷ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, p. 106.

¹⁴⁸ Dubal, *The New Racial Wage Code* (May 27, 2021) *Harvard Law and Policy Rev.* (forthcoming), SSRN pp. 15-16 <https://ssrn.com/abstract+3855094>.

¹⁴⁹ Caldwell, *What the NRA is Doing to the Race!* (May 26, 1934) *Chi. Defender*, p. 10 (quoted in Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 107.

¹⁵⁰ Rothstein, *The Color of Law: A Forgotten History of How our Government Segregated America* (2017) p. 158.

¹⁵¹ [citation]

bargaining power of Black workers and their ability to participate in the newly-recovering economy for decades.¹⁵²

Labor unions have played a critical role in the development of American society and the day to day experience of the American worker. During and after the New Deal, conditions set up an unprecedented balance of power between workers and employers, and allowed an unprecedented improvement in the condition of the working class in America, the benefits of which continue to be seen today.¹⁵³ For example, workers with strong unions have been able to set industry standards for wages and benefits that help all workers, both union and nonunion.¹⁵⁴ Union workers are more likely to be covered by employer-provided health insurance. More than nine in 10 workers covered by a union contract (94 percent) have access to employer-sponsored health benefits, compared with just 68 percent of nonunion workers.¹⁵⁵ As another example, union workers also have greater access to paid sick days. Nine in 10 workers covered by a union contract (91 percent) have access to paid sick days, compared with 73 percent of nonunion workers¹⁵⁶

While the original bill prohibited government certification of a union that did not allow Black workers to join and have all rights, the American Federation of Labor, the principal white-dominated federation of craft unions, opposed this protection due to its desire to eliminate competition from Black workers.¹⁵⁷ The American Federation of Labor and Southern Democrats won, and the final law protected the bargaining rights of unions with racist membership policies. This gave white labor organizers the power to exclude Black workers from contract negotiations and implement their racist views in the union contracts protected by the federal government.¹⁵⁸

The final law also excluded agricultural and domestic workers, another compromise to the Southern Democrats.¹⁵⁹

Federal law essentially allowed unions to ignore Black workers by maintaining segregated unions, segregating Black workers into less-skilled jobs, locking them out of contract negotiations, and using collective bargaining rights to force employers to replace Black workers with white workers.¹⁶⁰ For example, the NLRB-certified Building Service Employees Union in New York forced Manhattan hotels, restaurants, and offices to replace

¹⁵² [citation]

¹⁵³ Walker & Brechin, “The Living New Deal: The Unsung Benefits of the New Deal for the United States and California” (2010) IRLE Working Paper No. 220-10, p. 33, <http://irle.berkeley.edu/workingpapers/220-10.pdf>.

¹⁵⁴ McNicholas, et al. “Why unions are good for workers—especially in a crisis like COVID-19” (Aug. 25, 2020) *Economic Policy Institute*, <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>.

¹⁵⁵ McNicholas, et al. “Why unions are good for workers—especially in a crisis like COVID-19” (Aug. 25, 2020) *Economic Policy Institute*, <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>.

¹⁵⁶ McNicholas, et al. “Why unions are good for workers—especially in a crisis like COVID-19” (Aug. 25, 2020) *Economic Policy Institute*, <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>.

¹⁵⁷ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, pp. 124-125.

¹⁵⁸ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 343.

¹⁵⁹ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, p. 122.

¹⁶⁰ Rothstein, *The Color of Law: A Forgotten History of How our Government Segregated America* (2017) p. 158.

Black elevator operators and restaurant workers with white employees.¹⁶¹ The federal agency took no action in response.

In 1944, the U.S. Supreme Court held that unions were obligated to represent their members without discriminating on the basis of race, but did not require them to eliminate racial segregation in their membership or provide Black union members with a mechanism for enforcing their civil rights.¹⁶²

Only in 1964 did the federal agency finally decide that it could revoke a union's government certificate due to its racial segregation.¹⁶³ Even then, individual Black workers still had limited recourse against racist union leadership. Employees subject to a racist union could not deal directly with their employer instead.¹⁶⁴

3. Social Security Act of 1935

The Social Security Act of 1935 created old-age and unemployment benefits to help seniors and those out of work. This landmark law followed the same pattern as the rest of the New Deal legislation in limiting how its benefits applied to Black Americans through occupational carve outs for agricultural and domestic labor, and allowing local rather than federal administration,¹⁶⁵ although some historians dispute the allegation that Congress acted with racist intent in make these carve outs.¹⁶⁶ The Social Security Act created several programs that, even today, form the basis for the government's role in providing income security, specifically retirement insurance, unemployment insurance, and Aid to Families with Dependent Children programs.¹⁶⁷

During the debate over the Social Security Act, Congress acknowledged the preponderance of Black workers in the agricultural and domestic labor sectors, but excluded these occupations despite accusations of racism.¹⁶⁸ Charles Hamilton Houston testified on behalf of the NAACP: "In these States where your Negro population is heaviest, you will find the majority of Negroes engaged either in farming or else in domestic service, so that, unless we have some provisions which will expressly extend the provisions of this bill to include domestic servants and agricultural workers, I submit that the bill is inadequate..."¹⁶⁹

Black Americans advocated for a nondiscrimination provision in the statute as protection from the racist local administration of previous New Deal relief statutes. For example, one activist pointed out that in the local

¹⁶¹ Rothstein, *The Color of Law: A Forgotten History of How our Government Segregated America* (2017) p. 158.

¹⁶² *Steele v. Louisville and Nashville R.R. Co.* (1944) 323 U.S. 192; Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?* (Fall 1974) 42 *Univ. Chi. L. Rev.* 1, p. 5; Jones, *Race, Economic Class, and Employment Opportunity* (Fall 2009) 72 *Law and Contemporary Problems* 57, p. 78.

¹⁶³ *Independent Metal Workers Local 1 (Hughes Tool Co.)* (1964) 147 N.L.R.B. 1573; Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?* (Fall 1974) 42 *Univ. Chi. L. Rev.* 1, p. 5.

¹⁶⁴ *Emporium Capwell Co. v. Western Addition Comm. Org.* (1975) 420 U.S. 50; Jones, *Race, Economic Class, and Employment Opportunity* (Fall 2009) 72 *Law and Contemporary Problems* 57, p. 78.

¹⁶⁵ Section 210(b) of the Social Security Act excludes agricultural service and domestic labor in a private home from old-age benefits; and Section 907(c) defines "employment" to exclude agricultural labor and domestic service in a private home for purposes of unemployment benefits. See Social Security Act, ch. 531, tit. 11, § 210(b)(1)-(2), 49 Stat. 620, 625 (1935); ch. 531, tit. IX, § 907(c)(1)-(2), 49 Stat. 620, 643 (1935).

¹⁶⁶ <https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html>

¹⁶⁷ Martin & Weaver, "Social Security: A Program and Policy History" (2005) *Social Security Bulletin* 66:1 <<https://www.ssa.gov/policy/docs/ssb/v66n1/v66n1p1.html>>.

¹⁶⁸ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 *Ohio St. L.J.* 95, 111-12.

¹⁶⁹ *Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means, 74th Cong.* 108 (1935) pp. 797-98 (statement of Charles Hamilton Houston, NAACP).

administration of past emergency measures “there ha[d] been repeated, widespread, and continued discrimination on account of race or color as a result of which Negro men, women, and children did not share equitably and fairly in the distribution of benefits accruing from the expenditure of such Federal Funds.”¹⁷⁰ Congress did not include any such provision in order to secure the support of Southern Democrats.

Charles Hamilton Houston expressed the view of many Black Americans: “If we follow the history of the workmen’s compensation acts, we know that two great classes of workers who will be excluded from the benefit of unemployment insurance; they are agricultural workers and domestic workers. Again, 3 out of every 5 Negro workers drop through the holes of the sieve.”¹⁷¹

4. Fair Labor Standards Act of 1938

The Fair Labor Standards Act of 1938 (FLSA), which is still in force today, provides the federal minimum wage, the maximum number of working hours before overtime pay is required, and the limits on child labor. Like other New Deal laws, in order to appease Southern Democrats, the law purposefully excluded certain occupational categories, like agriculture and domestic services, that prevented the majority of Black Americans from benefiting from the law’s protections.¹⁷² Because of these exclusions, the FLSA essentially outlawed child labor in industrial settings, where most white children worked at the time, and allowed child labor in agricultural and domestic work, where most Black children worked.¹⁷³

Members of Congress were clear about the racist intent. For example, Florida Representative J. Mark Wilcox explicitly stated: “You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.”¹⁷⁴ Congressman Cox of Georgia specifically objected to the possibility of equal wages because of the impact it would have on relieving the economic subjugation of Black Americans central to the social organization of the South, stating the FLSA “will, in destroying State sovereignty and local self-determination, render easier the elimination and disappearance of racial and social distinctions.”¹⁷⁵ As with other New Deal legislation, President Roosevelt and Congress included the agricultural and domestic service exemptions in order to secure the support from Southern Democrats needed to pass the legislation at all.¹⁷⁶

Thus, when the FLSA passed without applying to agricultural or domestic workers, or to employers engaged in intrastate commerce such as service workers, it achieved the explicit aims of the drafting Congress. Like the other New Deal legislation, it accomplished the withholding of protections from many Black Americans through these “race-neutral” occupational exclusions. These carve outs remained until the 1970s, and

¹⁷⁰ Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means, 74th Cong. 108 (1935) p. 598 (statement of George Haynes, Federal Council of Churches of Christ in America).

¹⁷¹ Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means, 74th Cong. 108 (1935) p. 646 (statement of Charles Hamilton Houston, NAACP).

¹⁷² Dubal, *The New Racial Wage Code* (May 27, 2021) Harvard Law and Policy Rev. (forthcoming), SSRN p. 18 <https://ssrn.com/abstract+3855094>.

¹⁷³ Ibid.

¹⁷⁴ 82 Cong. Rec. 1404 (1937).

¹⁷⁵ 82 Cong. Rec. App. 442 (1937).

¹⁷⁶ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 117.

agricultural workers are still excluded from overtime protections.¹⁷⁷

5. Federal Emergency Relief Administration (1933 to 1935) and Works Progress Administration (1935 to 1941)

The Federal Emergency Relief Administration (FERA) provided funding for state and local government programs in public works and the arts, and provided more than 20 million jobs.¹⁷⁸ But the program delegated the actual hiring to the state and local level without oversight, and those administrators used their discretion to channel the bulk of funds to white workers, refusing to hire Black workers for anything except unskilled work, and paying less than the officially stipulated wage.¹⁷⁹ One local FERA administrator stated that “he had to tailor relief . . . to accommodate the demands of southern plantation owners for cheap farm labor by curtailing [the level of] relief payments to agricultural laborers and sharecroppers.”¹⁸⁰

The Works Progress Administration (WPA) replaced FERA in 1935, but continued the racist and often sexist practices of FERA. For example, a majority of projects were focused on heavy construction work, which favored hiring men over women.¹⁸¹ From 1935 to 1941 fewer than 20 percent of all WPA workers were women and only about three percent were Black women.¹⁸² Projects to train women in domestic skills were often explicitly limited to only white women.¹⁸³ Government officials specifically pushed Black workers out of WPA jobs when local conditions required cheap agricultural labor. In Oklahoma, a WPA official closed a Black women’s work project when there was a large cotton crop, writing to Washington, D.C.: “these women are perfectly able to do this kind of work and there is plenty of work to do.”¹⁸⁴

6. Civilian Conservation Corps (1933 to 1942)

The Civilian Conservation Corps (CCC), a public works program focused on conservation projects, employed over 2.5 million men during its tenure—Black and white women were completely excluded—fewer than 10 percent of whom were Black men.¹⁸⁵ While this was somewhat similar to the percentage of Black Americans in the population at large, the conditions of the CCC replicated the racist government intervention seen in other programs, with explicitly limited participation numbers, official segregation at work camps, and limits to the least-desirable unskilled jobs.¹⁸⁶ For example, in Georgia, local selection agents refused to enroll a single black applicant for almost a year, and only relented and enrolled a token number of Black Americans after federal

¹⁷⁷ Dubal, *The New Racial Wage Code* (May 27, 2021) Harvard Law and Policy Rev. (forthcoming), SSRN p. 18

<https://ssrn.com/abstract+3855094>.

¹⁷⁸ CITE.

¹⁷⁹ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2018) pp. 155-56.

¹⁸⁰ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 102.

¹⁸¹ Jones, Jones, *Labor of Love, Labor of Sorrow: Black Women, work, and the Family from Slavery to the Present*, 1st Ed. (1985) p. 217.

¹⁸² *Ibid.*

¹⁸³ *Id.* at p. 218.

¹⁸⁴ *Id.* at pp. 219-220.

¹⁸⁵ Hoak, *The Men in Green: African Americans and the Civilian Conservation Corps, 1933-1942* (2002) p. 2, <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=5470&context=etd>.

¹⁸⁶ Hoak, *The Men in Green: African Americans and the Civilian Conservation Corps, 1933-1942* (2002) p. 2, <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=5470&context=etd>; see also Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 157.

agents threatened to withhold the state's entire allotment of funds.¹⁸⁷

7. Tennessee Valley Authority

The Tennessee Valley Authority was a public utility created by the federal government to bring jobs and development to an area hit especially hard in the Depression. The project included construction, conservation, and social service jobs, and it remains one of the largest utilities in the country today.¹⁸⁸ It too continued the pattern of the other government works programs. Black workers were assigned to work separately on construction projects, and only allowed to work at all if there were enough Black workers to make up a full segregated crew. Black workers were denied foreman or supervisory roles and were relegated to low-level unskilled—and lower-paying—positions without opportunities for advancement.¹⁸⁹

8. Agricultural Adjustment Administration

The federal government created the Agricultural Adjustment Administration (AAA) in 1933 to increase agricultural prices by paying farmers to grow fewer crops.¹⁹⁰ The administration of the AAA harmed Black workers in three specific ways.

First, the program reduced crop planting. For example, the agency limited the amount of land dedicated to cotton farming, but allowed each white landowner to decide *which* acres to stop cultivating, and most often they chose those worked by Black tenant farmers and sharecroppers.¹⁹¹

Second, landowners received federal payments, but the federal administration allowed white landowners to act as “trustees” for their Black tenants without oversight from the AAA.¹⁹² Often, landowners never paid their Black tenants, or they argued that the payment should be used to pay down the tenant families “debts.”¹⁹³

Third, the AAA allowed disputes over payments to be brought to local elected county committees, and not a single Black farmer served on a county committee throughout the South.¹⁹⁴ The county committees, composed of white landlords and white tenants, ruled against Black tenants and directed the vast majority of benefits for the program to white farm owners.¹⁹⁵ In 1934, Ira De A. Reid of the National Urban League said that “[s]o far as the Negroes in the South are concerned the AAA [and other New Deal Agencies] might just as well be

¹⁸⁷ Hoak, *The Men in Green: African Americans and the Civilian Conservation Corps, 1933-1942* (2002) pp. 14-15, <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=5470&context=etd>

¹⁸⁸ Reuters, Factbox: Largest U.S. electric companies by megawatts, customers (April 29, 2014), <https://www.reuters.com/article/amp/idUSBREA3SOP420140429>.

¹⁸⁹ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2018) pp. 156.

¹⁹⁰ Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present*, 1st ed. (1985) p. 201.

¹⁹¹ *Ibid.*, citing Linder, *Farm workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal* (1987) 65 *Tex. L. Rev.* 1335, 1361.

¹⁹² Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 *Ohio St. L.J.* 95, 108.

¹⁹³ Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present*, 1st ed. (1985) p. 201.

¹⁹⁴ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 *Ohio St. L.J.* 95, 108-109.

¹⁹⁵ *Id.* at 109.

administered by the Ku Klux Klan.”¹⁹⁶

I. Fair Employment Practices Committee

Faced with enormous activist pressure, President Roosevelt during World War II attempted to protect Black workers, but these actions were temporary and did not have serious enforcement powers. In the lead up to World War II, civil rights activists demanded desegregation of the defense industry. Following a 1941 meeting of civil rights groups from across the country, activists formed the March on Washington Movement with the aim of using mass protest to desegregate the military and industrial workplaces that were central to the war effort.¹⁹⁷ Soon the movement had spread across the country, with local chapters from San Francisco to Washington, D.C.¹⁹⁸

By June 1941, 100,000 or more Black workers from across the country were expected to march on the nation’s capital, alarming President Roosevelt at the prospect of a mass protest in Washington, D.C. on the eve of the country’s entry into war.¹⁹⁹ In response, he issued Executive Order 8802, which both banned discrimination on the basis of race in government employment, defense industries, and training programs and created the Fair Employment Practices Committee (FEPC) to investigate and address complaints of race discrimination.²⁰⁰ While a step forward, FEPC had power over only public-financed wartime industries, and it did not have any real enforcement power. It was only able to issue recommendations, including the cancellation of defense contracts in cases of persistent discrimination.²⁰¹

FEPC’s impact varied around the country. From March 1942 to 1944, Black employment in war-production jobs rose from under three percent to over eight percent, and some Black workers found jobs as skilled labor in manufacturing and minor managerial roles.²⁰² The most progress was made in places where Black activists, progressive unions, and local civil rights organizations worked together with FEPC investigations to pressure for change. In St. Louis, a large March on Washington Movement chapter agitated to reinstate Black workers at a local arms plant, raise wages, and increase hiring of Black women. The organization used its resources to file and pursue FEPC complaints, justifying the establishment of a regional office to address the concerns of Black workers, but pursued this official action hand-in-hand with mass rallies to general grassroots support.²⁰³

Under the weak enforcement system, other geographic areas were less successful. Both public officials and private employers in several southern cities refused to provide integrated defense employment, and the federal government did not force action.²⁰⁴ FEPC had no mechanism to act against Alabama Governor Frank Dixon, who supported employment of Black war workers only within the bounds of the segregationist system already

¹⁹⁶ Caldwell, What the NRA is Doing to the Race! (May 26, 1934) Chi. Defender, p. 10 (quoted in Perea, The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act (2011) 72 Ohio St. L.J. 95, 107.

¹⁹⁷ Trotter, Workers on Arrival: Black Labor and the Making of America (2019) p. 134.

¹⁹⁸ *Id.* at 135.

¹⁹⁹ Jones, American Work: Four Centuries of Black and White Labor (1998) p. 351.

²⁰⁰ Trotter, Workers on Arrival: Black Labor and the Making of America (2019) p. 135.

²⁰¹ Engstrom, The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972 (May 2011) 63 Stanford Law Rev. 1071, p. 1073; Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017) p. 162.

²⁰² Trotter, Workers on Arrival: Black Labor and the Making of America (2019) p. 136.

²⁰³ Trotter, Workers on Arrival: Black Labor and the Making of America (2019) p. 136.

²⁰⁴ *Ibid.*

in place in the southern states.²⁰⁵ FEPC disbanded in 1946 as the war ended, thus ending a temporary attempt of limited effectiveness to address labor discrimination.²⁰⁶

J. Gains and Limitations of the Civil Rights Acts

Congress passed a series of civil rights laws in the 1960s prohibiting discrimination in employment, voting, and housing. Title VII of the Civil Rights Act of 1964 outlawed employment discrimination on the basis of race, color, religion, sex, or national origin.²⁰⁷

Title VII created strong protection for Black workers throughout the country, making it illegal for an employer to (1) fail to hire or discriminate against a worker, or (2) limit job opportunities because of that worker's "race, color, religion, sex, or national origin."²⁰⁸

The law protects workers against current racial discrimination and segregation practices, but does not provide a way to right past wrongs.²⁰⁹ It exempts "bona fide" seniority systems and professionally developed ability tests.²¹⁰ The former are also known as "last hired, first fired" systems, and the latter include tests developed as part of an application process, such as for firefighters, even though these can be employed in a discriminatory manner.²¹¹ Strict adherence to a seniority system means that "last hired" Black workers, who more recently moved into positions now that racist discrimination is outlawed, will be "first fired," under the systems allowed by the law.²¹² In 1977, the Supreme Court held that Title VII did not outlaw these seniority systems even when they discriminate against Black workers, stating that a seniority policy "does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."²¹³

Title VII is limited in other ways as well. The Supreme Court also drew a line between intentional and unintentional discrimination.²¹⁴ Currently, Title VII protects an employee if they can show that their employer intended to discriminate against them,²¹⁵ which can be difficult to prove. If the employee cannot prove their employer's racist intentions, Title VII protects them only if the challenged employment practice is not "job related" or not "consistent with business necessity."²¹⁶ [include hypothetical based on case law of what is legal in order to further explain.]

In 1965, Congress formed a federal agency called the Equal Opportunity Employment Commission to enforce Title VII and other employment statutes and regulations. The commission, which continues today, covers all

²⁰⁵ Chamberlain, *Victory at Home: Manpower and Race in the American South during World War II* (2003) p. 123.

²⁰⁶ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 354.

²⁰⁷ 42 U.S.C. § 2000e, et. seq.

²⁰⁸ 42 U.S.C. § 2000e-2(a). The statute also prohibits discrimination by employment agencies, labor organizations, and training programs. 42 U.S.C. § 2000e-2(b)-(d).

²⁰⁹ 110 Cong. Rec. 7213 (1964), quoted in Henson, *Purposes of Title VII* (2019) 33 *Notre Dame Journal of Law, Ethic, and Public Policy* 221, p. 233.

²¹⁰ Henson, *Purposes of Title VII* (2019) 33 *Notre Dame Journal of Law, Ethic, and Public Policy* 221, pp. 233-34.

²¹¹ Henson, *Purposes of Title VII* (2019) 33 *Notre Dame Journal of Law, Ethic, and Public Policy* 221, pp. 233-34.

²¹² Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB* (Nov. 1974) 123 *Univ. Penn. L. Rev.* 158, p. 159.

²¹³ *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 353-54.

²¹⁴ *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335 n. 15.

²¹⁵ *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335 n. 15.

²¹⁶ 42 U.S.C. § 2000e-2(k).

industries, and not just wartime industries, like its predecessor, the Fair Employment Practices Committee.²¹⁷ It also has enforcement powers to assess penalties and issue orders, instead of only making recommendations.²¹⁸ However, the agency has been chronically underfunded, which has limited its ability to widely enforce federal protections against racial discrimination in a large number of cases.²¹⁹

K. Limits of Affirmative Action

As the Civil Rights Acts were only forward-looking, between 1964 and the late 1970s, the federal government enacted affirmative action programs intended to address the effects of past racist discrimination and segregation.²²⁰ These programs increased the number of underrepresented groups in government contracting work until the Supreme Court and the Reagan Administration in the 1980s effectively brought many federal affirmative action programs to an end.

In 1965, President Lyndon B. Johnson issued Executive Order 11246, which required government contractors to employ affirmative action to expand opportunities for underrepresented groups and established the Office of Federal Contract Compliance to enforce the order.²²¹ In 1972, the Nixon Administration approved the “Philadelphia Plan,” which instituted numerical goals and timetables for the integration of Black and other racial minority workers into federal contracts.²²² In the late 1970s, President Jimmy Carter extended affirmative action requirements to state and local governments, educational institutions, and contractors—nearly every entity that did business with the federal government.²²³ [Statistic needed specific to Black workers.] Between 1974 and 1980, the rate of minority employment in businesses that contracted with the federal government rose by 20 percent.²²⁴

By the late 1970s, an organized backlash had developed and a number of lawsuits challenged the constitutionality of affirmative action.²²⁵ In response, the U.S. Supreme Court began narrowing the scope of affirmative action programs. The Court has not held that affirmative action is permissible as redress for past harms. The Court, however, did reject explicit race-based quota systems in *Bakke v. Regents of the University of California* in 1978. There, the Court held that it was permissible for government affirmative action programs—in this case, a state school—to consider an applicant’s race in order to advance the interest of diversity, but that it was unconstitutional for an affirmative action program to employ race-based quotas.²²⁶

By the early 1980s, under President Ronald Reagan, the federal government began to restrict its enforcement of

²¹⁷ [citation]

²¹⁸ [citation]

²¹⁹ Barnes, “Is the EEOC Protecting Workers or Discriminatory Employers?” (Sept. 4, 2019) *Forbes* <https://www.forbes.com/sites/patriciagbarnes/2019/09/04/is-the-eec-protecting-workers-or-discriminatory-employers>; Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 362.

²²⁰ Jones, *American Work: Four Centuries of Black and White Labor* (1998) pp. 361-62.

²²¹ More History of Affirmative Action Policies from the 1960s (Am. Assoc. for Access, Equity and Diversity) https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp.

²²² Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 362.

²²³ Menand, “The Changing Meaning of Affirmative Action” (Jan. 20, 2020) *The New Yorker* <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action>.

²²⁴ Menand, “The Changing Meaning of Affirmative Action” (Jan. 20, 2020) *The New Yorker* <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action>.

²²⁵ Iheukwumer & Aka, *Title II, Affirmative Action, and the march Toward Color-Blind Jurisprudence* (Fall 2001) 11 Temp. Pol. & Civ. Rts. L. Rev. 1, pp. 7-9.

²²⁶ 438 U.S. 265.

affirmative action requirements, halting the progress made during the preceding administrations.²²⁷

L. Housing Segregation Limits Black Job Opportunities

Despite the unquestionable progress made in civil and workers' rights since the Civil Rights Acts, numerous systemic issues continue to harm Black workers.

The government and private actions described in Chapter [xx] created a segregated American landscape across the country. This residential segregation created an entrenched type of employment discrimination in the second half of the 20th century.

Following World War II, white workers followed the government incentives described in Chapter [xx] and moved to the suburbs.²²⁸ Large industrial employers closed facilities in urban centers and followed the white workers.²²⁹ Black workers, who could not move to the suburbs due to the barriers erected by federal and local governments, were left behind in urban centers.²³⁰

For example, the Ford Motor Company moved all engine production sited at its River Rouge plant—at the time, the largest employer of Black workers in the Detroit region—to facilities in suburban Brook Park, near Cleveland and Dearborn, outside of Detroit.²³¹ Michigan's *Labor Market Letter* observed the “creation of a very large and alarmingly consistent list of long-term unemployed” Black workers in the region.²³² In another example, meatpacking firms closed plants in central midwestern cities, moving to new facilities in white suburbs and the countryside.²³³

This exodus of major employers to the suburbs also prevented Black Americans from fully taking advantage of benefits provided by unions. For example, the Communication Workers of America lost thousands of Black members when customer service call centers moved out of New York City and reopened in suburban or rural areas not easily accessible to Black Americans living in the city.²³⁴

[paragraph describing globalization and off shore phenomenon.]

By the early 1990s, the Black urban industrial working class had nearly disappeared nationwide. [describe how meaningful the ability for Black workers to access industrial jobs.] Cities that had offered Black workers industrial jobs saw precipitous declines in the manufacturing sector between 1967 and 1987: in Philadelphia, a 64 percent decline (160,000 jobs); in Chicago, 60 percent (326,000 jobs); in New York, 58 percent (over half a

²²⁷ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 166.

²²⁸ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 141; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²²⁹ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 141; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²³⁰ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 141; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²³¹ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 141.

²³² Sugrue, *The Origins of the Urban Crises: Race and Inequality in Postwar Detroit* (1996) pp. 100, 103.

²³³ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 141.

²³⁴ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 164.

million jobs); and, in Detroit, 51 percent (108,000 jobs).²³⁵

M. Ongoing Discrimination

The existence of government-supported discrimination and segregation also allowed further harm to Black workers in the job market due to the secondary effects of social separation. Common hiring patterns often relied on social networks, ethnic loyalties, apprenticeships, and union relationships. As Black workers were shut out of these more informal networks due to government-sanctioned social segregation, these patterns often worked in conjunction with official segregation to bar Black workers from entry into new workplaces or industries.²³⁶

Black Americans continue to experience labor discrimination today. Over the last 25 years, discrimination has not decreased against Black Americans in the labor force.²³⁷

Black Americans receive interview callbacks for jobs at lower rates than white people. In a study where resumes with “very white-sounding” or “very African-American sounding” names were sent out, and experience and education controlled for, there were large differences in the callback rates. Researchers found that white applicants received 36 percent more callbacks than equally qualified African Americans.²³⁸

[Describe ongoing labor market discrimination to the present.

<https://www.pnas.org/content/pnas/114/41/10870.full.pdf>

<https://www.uh.edu/~adkugler/Bertrand&Mullainathan.pdf>

From Here to Equality p. 44-47.]

N. California

1. Lack of Government Protection Supports Private Discrimination

Since the beginning of statehood, California enacted a series of laws limiting the ability of Black Americans to participate as full citizens of the state. This included laws limiting voting rights, property rights, interracial marriage, and competence to testify in court or serve on a jury.²³⁹

Such limitations also undermined Black Americans’ ability to advocate for themselves in the workplace.²⁴⁰ Though most racially discriminatory employment laws in California were targeted at Chinese immigrants, who had a much larger numerical representation in the state, the laws limited the ability of Black Americans to participate fully in the labor force as well.²⁴¹

As in the rest of the country, Black workers in California faced the same issues: lack of government protections

²³⁵ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 162.

²³⁶ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 314; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²³⁷ citation

²³⁸ citation

²³⁹ De Graaf & Taylor, *Introduction: African Americans in California History, California in African American History* in Seeking El Dorado: African Americans in California (De Graaf, Mulroy & Taylor, edits. 2001) p. 10.

²⁴⁰ [CITE NEEDED.]

²⁴¹ [CITE NEEDED.]

for labor rights, and confinement to lower-paying and less-skilled work. Actions by the federal and state government allowed private discrimination to flourish. Before World War II, the number of Black people living in California was small. Nonetheless, Black workers were integral to the development of three key California industries: mining, lumber, and agriculture.²⁴²

[Short summary of Black miners. Source: Seeking El Dorado] Black Americans operated several successful mines, including Horncut Mine, a prosperous quartz mine in Yuba County, and the Washington Mine, a gold mine established in 1869.²⁴³ Black miners faced a hostile environment. Because Black Americans lacked the right to testify in court during this period, Black miners were vulnerable to legal challenges and encroachments on their mining claims.²⁴⁴ [additional details to come.]

To this day, derogatory names like Negro Bar and Negro Flat are still used for locales in the mining region of California.²⁴⁵ The California Department of Parks and Recreation currently operates the Negro Bar, Folsom Lake State Recreation Area.²⁴⁶ However, the department is working with local community and stakeholders to change the name.²⁴⁷

Black mill workers played a significant role in the lumber industry from 1920 to 1960.²⁴⁸ Experienced Black workers were actively recruited from the South to staff California mills.²⁴⁹ Although vital to their employers, Black workers were paid less than their white counterparts and prohibited from undertaking supervisory duties.²⁵⁰

During the late 1800s and early 1900s, Black workers were recruited from the South to work farms in the San Joaquin and Imperial Valleys.²⁵¹ Many Black farmworkers resisted the racist treatment they faced in California, and used contracted field work as a way to establish themselves as entrepreneurs, skilled workers, or yeoman farmers.²⁵² As a result, Californian farmers preferred to hire Mexican nationals and other nonwhite immigrants instead of Black workers.²⁵³ Additionally, growing towns and settlements during the time often explicitly discriminated against and worked to exclude Black Americans from living or working there. For example, fliers

²⁴² National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

²⁴³ National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

²⁴⁴ National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

²⁴⁵ National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm

²⁴⁶ https://www.parks.ca.gov/?page_id=27866

²⁴⁷ https://www.parks.ca.gov/?page_id=27866

²⁴⁸ National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

²⁴⁹ National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

²⁵⁰ National Park Service, "A History of Black Americans in California: Industry" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

²⁵¹ National Park Service, "A History of Black Americans in California: Farming" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm

²⁵² National Park Service, "A History of Black Americans in California: Farming" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm

²⁵³ National Park Service, "A History of Black Americans in California: Farming" *Five Views: An Ethnic History Site Survey for California* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm

for the Maywood Colony, a huge development entirely surrounding the town of Corning, California, trumpeted: “GOOD PEOPLE - In most communities in California you’ll find Chinese, Japs, Dagoes, Mexicans, and Negroes mixing up and working in competition with the white folks. Not so at Maywood Colony. Employment is not given to this element.”²⁵⁴

In the early 1900s, Black workers were less likely to work in higher paying industrial jobs in the West than in the North.²⁵⁵ By 1930, over 50 percent of Black men were working in the industrial sectors of the Northeast and Midwest, but no more than 30 percent in the West.²⁵⁶ While industrial jobs often had significant downsides for Black workers, they offered better pay than unskilled positions.²⁵⁷ Still, many California companies refused to hire Black workers.²⁵⁸ For example, in 1940, aviation official W. Gerald Tuttle of the Vultee Aircraft Company in southern California announced, “I regret to say that it is not the policy of this company to employ people other than the Caucasian race.”²⁵⁹

The interwar period saw a significant influx of Black workers and residents to California. As the number of Black residents increased in cities like San Francisco and Los Angeles, Black workers not only increased in number, but also began to move into professions from which they had previously been completely excluded.

2. The New Deal in California

As it did across the country, the Great Depression brought significant unemployment to the state. For example, manufacturing employment fell by 30 percent from 1929 to its lowest level in 1932, while payrolls fell by 50 percent, and unemployment among unionized workers rose to 33 percent.²⁶⁰ The New Deal provided an influx of funding to the state.²⁶¹ For example, the Works Progress Administration employed over 100,000 workers in California.²⁶² Between 1933 and 1939, the federal government sent \$2.2 billion to California in the form of grants and loans.²⁶³

California governments engaged in discriminatory practices as the rest of the country did in disbursing this federal money. Burbank and Glendale invoked city ordinances to exclude a company of Black workers

²⁵⁴ Quoted in Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2005) p. 49.

²⁵⁵ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) pp. 80-81.

²⁵⁶ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) pp. 80-81.

²⁵⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Weaver, *Negro Labor: A National Problem* (1946), p, 109.

²⁵⁸ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Weaver, *Negro Labor: A National Problem* (1946), p, 109.

²⁵⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Weaver, *Negro Labor: A National Problem* (1946), p, 109.

²⁶⁰ Walker & Brechin, “The Living New Deal: The Unsung Benefits of the New Deal for the United States and California” (2010) IRLE Working Paper No. 220-10, p. 53, <http://irle.berkeley.edu/workingpapers/220-10.pdf>.

²⁶¹ Walker & Brechin, “The Living New Deal: The Unsung Benefits of the New Deal for the United States and California” (2010) IRLE Working Paper No. 220-10, p. 47, <http://irle.berkeley.edu/workingpapers/220-10.pdf>.

²⁶² Walker & Brechin, “The Living New Deal: The Unsung Benefits of the New Deal for the United States and California” (2010) IRLE Working Paper No. 220-10, p. 48, <http://irle.berkeley.edu/workingpapers/220-10.pdf>.

²⁶³ Walker & Brechin, “The Living New Deal: The Unsung Benefits of the New Deal for the United States and California” (2010) IRLE Working Paper No. 220-10, p. 48, <http://irle.berkeley.edu/workingpapers/220-10.pdf>.

organized under the Civilian Conservation Corps.²⁶⁴ White residents of Richmond objected to an interracial Civilian Conservation Corps camp in 1935 and, as a result, it was eventually replaced with an all-white company.²⁶⁵

[Additional research to come: African-American Experience in the Civilian Conservation Corp, by Olen Cole Jr.]

The New Deal in Orange County, California, By Charles Epting 2014

Berkeley and the New Deal By Harvey L. Smith 2014]

3. Wartime Integration and Exclusion from Unions

Black workers made large advancements in the Bay Area during World War II, moving into manufacturing and industrial work in large numbers. By 1944, Black workers were employed widely in wartime industries, especially in the shipyards.²⁶⁶ For example, the City of Richmond saw a massive influx of war workers from 1940-45, when its population grew from 24,000 to 100,000, with the Black population increasing from 270 to 14,000 in those years.²⁶⁷

The Federal Employment Practices Committee, the federal anti-discrimination agency active during World War II, had some success in California. For example, in 1945, FEPC reported: “More than twenty-six percent of the Negro working force was engaged in shipbuilding or ship repair. Another twenty-five percent were employed in servicing water transportation, which was largely government work. These two industries alone, the report concluded, accounted for approximately 12,000 Negro workers.”²⁶⁸ Even so, the boilermakers union, representing shipbuilders, only allowed white workers to join the main branch of the union, and relegated Black workers to an “auxiliary union” where they were not permitted to vote or file grievances, and received limited benefits compared to white members.²⁶⁹ In Los Angeles, the International Longshoremen’s and Warehousemen’s Union, Local 13, for example, excluded Black workers,²⁷⁰ even though Black workers and organizations sued the boilermakers’ union for discrimination.²⁷¹

FEPC helped reveal racist hiring practices at Los Angeles airline manufacturing plants. Hearings in 1941 demonstrated that “there were only ten black employees in Douglas Aircraft’s workforce of 33,000, only two among Bethlehem Shipbuilding’s nearly 3,000 Los Angeles employees, and only 54 among Lockheed Aircraft and Vega Airplane’s 48,000 workers.”²⁷² Black workers’ organizations helped push against this racist hiring to

²⁶⁴ Sundown Towns: A Hidden Dimension of American Racism by James Loewen (pp. 100, 239-40)

²⁶⁵ Loewen p. 239

²⁶⁶ Broussard, “In Search of the Promised Land: African American Migration to San Francisco, 1900-1945” in *Seeking El Dorado: African Americans in California* (De Graaf, Mulroy & Taylor, eds., 2001) p. 198.

²⁶⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²⁶⁸ Quoted in Broussard, “In Search of the Promised Land: African American Migration to San Francisco, 1900-1945” in *Seeking El Dorado: African Americans in California* (De Graaf, Mulroy & Taylor, eds., 2001) p. 199.

²⁶⁹ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 160

²⁷⁰ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 113.

²⁷¹ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 160

²⁷² Leonard, “In the Interest of All Races: African Americans and Interracial Cooperation in Los Angeles During and After World War II” in *Seeking El Dorado: African Americans in California* (De Graaf, Mulroy & Taylor, eds., 2001) p. 311.

open more of these jobs for Black Americans.²⁷³

Ultimately, FEPC never recommended the cancellation of any defense contracts in California.²⁷⁴ During and after the war, areas of California continued to experience job segregation.²⁷⁵ For example, Oakland's employment patterns continued to have Black men and women in separate, lower-skilled, and lower-paid work.²⁷⁶

Many Black Americans also migrated to California during this period to pursue farming, though they encountered setbacks similar to those in other labor sectors. Approximately 30,000 to 40,000 Black Americans travelled to the San Joaquin Valley after World War II. The majority settled in cities such as Fresno and Bakersfield, and about 7,000 settled in the Tulare Lake Basin, farmland owned by J.G. Boswell.²⁷⁷ Still, Black field workers faced discrimination. Unlike their white counterparts, they were rarely promoted to operate machinery for higher pay, and were instead relegated to more demanding physical work for lower pay.²⁷⁸ Moreover, like in factories, Black workers also experienced greater injury and danger from farm work.²⁷⁹

4. Fair Employment and Housing and Short Lived Affirmative Action

Several years before the federal government enacted its version of the law, California passed the Fair Employment and Housing Act in 1959, and prohibited employment discrimination on the basis of race for public and private employers.²⁸⁰ The law, which also prohibits harassment based on a protected category,²⁸¹ is enforced by the Department of Fair Employment and Housing. The state agency is able to investigate and bring complaints of individual and systemic discrimination, to facilitate mediation and resolution of disputes involving civil rights, and enforce the laws by prosecuting violations in civil court.²⁸²

[Research to come: analysis of DFEH is limited by staffing and funding, and cannot prosecute every California violation in court.]

Like the federal government, government agencies in California also implemented affirmative action programs in employment. These programs produced mixed results. For example, between 1977 and 1995, the representation of Black tenured faculty members at the University of California system—which implemented

²⁷³ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Self, *American Babylon: Race and the Struggle for Postwar Oakland* (2005), pp. 54-7, 83.

²⁷⁴ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 162.

²⁷⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Self, *American Babylon: Race and the Struggle for Postwar Oakland* (2005), pp. 54-7, 83.

²⁷⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021), citing Self, *American Babylon: Race and the Struggle for Postwar Oakland* (2005), pp. 54-7, 83.

²⁷⁷ Arax & Warzmann, *The King of California: J.G. Boswell and the Making of a Secret American Empire* (2003) p. 264.

²⁷⁸ Arax & Warzmann, *The King of California: J.G. Boswell and the Making of a Secret American Empire* (2003) pp. 117, 161, 257, 283-84.

²⁷⁹ Arax & Warzmann, *The King of California: J.G. Boswell and the Making of a Secret American Empire* (2003) pp. 117, 161, 257, 283-84.

²⁸⁰ Cal. Gov. Code, § 12940.

²⁸¹ Cal. Gov. Code, § 12940; "Employment Discrimination" (2021) Dept. of Fair Employment and Housing <<https://www.dfeh.ca.gov/employment/>>.

²⁸² "About DFEH" (2021) Dept. of Fair Employment and Housing <<https://www.dfeh.ca.gov/aboutdfeh/>>.

affirmative action in its hiring—grew from 1.8 percent to only 2.5 percent. For community colleges’ faculty between 1984 and 1991, the proportion of Black faculty only grew from 4.9 percent to 5.7 percent.²⁸³

California’s affirmative action programs were banned in 1996, after voters passed Proposition 209.²⁸⁴ Proposition 209 amended the California Constitution to prohibit state institutions from considering race in hiring, contracting, and education.²⁸⁵ According to polling data, Proposition 209 was supported by a majority of white and male voters, but opposed by a majority of African American, Latino, Asian American, and female voters.²⁸⁶

Proposition 209 had a measurable effect on employment opportunities for minority workers. [incorporate research on effects as it relates to Black Californians: <https://www.law.berkeley.edu/wp-content/uploads/2016/07/Proposition-209-and-Public-Employment-Workforce-Diversity.pdf>]

Activists in California have worked to overturn Proposition 209, but have not been successful. In 2020, voters rejected Proposition 16, which would have repealed Proposition 209.²⁸⁷

V. Discrimination in Government Employment

In addition to supporting legal segregation and enabling private discrimination, the federal and California governments discriminated against Black workers as employers. The federal government in civil and military service has refused to employ Black workers, segregated an integrated workforce, and relegated Black workers to lower paid, less-skilled occupations. The state and local governments in California have had similar patterns of discrimination.

A. Segregation in the Federal Civilian Service

The federal civilian service reflected and shaped the racist labor environment of private employers. For much of the federal government’s history, it was almost totally white or segregated. During the 19th century there was no blanket ban on Black workers, but different officials were allowed to create a patchwork of regulations forbidding employment of Black Americans.²⁸⁸ The United States Postal Service was a striking example—in

²⁸³ Tierney, *Affirmative Action in California*

²⁸⁴ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) pp. 165-66. In order to avoid loss of federal funding to state or to run afoul of the courts, Proposition 209 included four exceptions: to keep the state or local governments eligible to receive money from the federal government; to comply with a court order in force as of the effective date of this measure (the day after the election); to comply with federal law or the United States Constitution; and to meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting. Legislative Analyst’s Office, *Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities* (Nov. 1996) https://law.ca.gov/ballot/1996/prop209_11_1996.html.

²⁸⁵ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) pp. 165-66. In order to avoid loss of federal funding to state or to run afoul of the courts, Proposition 209 included four exceptions: to keep the state or local governments eligible to receive money from the federal government; to comply with a court order in force as of the effective date of this measure (the day after the election); to comply with federal law or the United States Constitution; and to meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting. Legislative Analyst’s Office, *Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities* (Nov. 1996) https://law.ca.gov/ballot/1996/prop209_11_1996.html.

²⁸⁶ Oppenheimer, *Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson’s Proposition 209 Decision* (2011) 13 *Berkeley J. Afr.-Am. L. & Pol’y* 229, 234-39.

²⁸⁷ California Statement of Vote (Nov. 5, 2020) <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf>.

²⁸⁸ *Ibid.*

1802 Black workers were banned from carrying mail.²⁸⁹ Black workers were almost completely excluded from federal employment until 1861—the year a Black clerk was appointed to the United States Postal Service in Boston.²⁹⁰

At the turn of the century, Black Americans made up about 10 percent of the federal workforce.²⁹¹ Many Black workers found steady, valuable jobs in urban post offices, but there was little possibility for advancement.²⁹² President Roosevelt provided some support for threatened Black workers. In 1903, he refused to allow the town of Indianola, Mississippi, to drive out its Black postmaster, instead suspending service at the Indianola Post Office rather than accept the resignation of Postmaster Minnie Cox.²⁹³ But this lasted only until the next year, when a white Postmaster was appointed.²⁹⁴ And the tide turned with the election of President William Howard Taft in 1908, who stated in his inaugural address: “[I]t is not the disposition or within the province of the Federal Government to interfere with the regulation by Southern States of their domestic affairs,” and that appointing African Americans to federal offices in prejudiced southern communities would do more harm than good.²⁹⁵

In 1913, President Wilson officially segregated much of the federal workforce, including the Treasury, the Post Office, the Bureau of Engraving and Prints, the Navy, the Interior, the Marine Hospital, the War Department, and the Government Printing Office.²⁹⁶ The federal government created separate offices, lunchrooms, and bathrooms for white and Black workers.²⁹⁷ William McAdoo, Secretary of the Treasury, argued that segregation was necessary “to remove the causes of complaint and irritation where white women have been forced unnecessarily to sit at desks with colored men.”²⁹⁸ The federal government fired Black supervisors, and cut off Black employees’ access to promotions and better-paying jobs, and it reserved those jobs for white employees.²⁹⁹

Postmaster General Albert S. Burleson segregated, demoted, or fired Black workers—all but one of the

²⁸⁹ Historian, United States Postal Service, “African American Postal Workers in the 20th Century” (2012) <https://about.usps.com/who-we-are/postal-history/african-american-workers-20thc.htm>.

²⁹⁰ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 259.

²⁹¹ Little, How Woodrow Wilson Tried to Reverse Black American Progress (Jul. 14, 2020) <https://www.history.com/news/woodrow-wilson-racial-segregation-jim-crow-ku-klux-klan>.

²⁹² Historian, United States Postal Service, “African American Postal Workers in the 20th Century” (2012) <https://about.usps.com/who-we-are/postal-history/african-american-workers-20thc.htm>.

²⁹³ Historian, United States Postal Service, “African-American Postal Workers in the 19th Century” (2017) <https://about.usps.com/who-we-are/postal-history/african-american-workers-19thc.pdf>.

²⁹⁴ Historian, United States Postal Service, “African American Postal Workers in the 20th Century” n. 3 (2012) <https://about.usps.com/who-we-are/postal-history/african-american-workers-20thc.htm>.

²⁹⁵ William Howard Taft, Inaugural Address (March 4, 1909) University of California, American Presidency Project <https://www.presidency.ucsb.edu/documents/inaugural-address-46>.

²⁹⁶ Little, How Woodrow Wilson Tried to Reverse Black American Progress (Jul. 14, 2020) <https://www.history.com/news/woodrow-wilson-racial-segregation-jim-crow-ku-klux-klan>; see also Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 66.

²⁹⁷ Little, How Woodrow Wilson Tried to Reverse Black American Progress (Jul. 14, 2020) <https://www.history.com/news/woodrow-wilson-racial-segregation-jim-crow-ku-klux-klan>; see also Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 66.

²⁹⁸ Equal Justice Institute, “President Wilson Authorizes Segregation Within Federal Government” < <https://calendar.eji.org/racial-injustice/apr/11>>.

²⁹⁹ Little, How Woodrow Wilson Tried to Reverse Black American Progress (Jul. 14, 2020) <https://www.history.com/news/woodrow-wilson-racial-segregation-jim-crow-ku-klux-klan>; see also Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 66.

remaining workers was transferred to the dead letter office, and the remaining worker was surrounded by screens so that white workers would not be able to see him.³⁰⁰ Though no official government records have been found that indicate how many black postal workers were driven from their jobs, there was a clear pattern to segregate, reclassify, and discharge Black workers.³⁰¹

President Wilson's decision to segregate an integrated federal workforce resulted in lower pay for Black workers cut off from better-paying jobs,³⁰² and demoralized workers by creating separate toilets in the Treasury and Interior Departments.³⁰³ This damaged the ability of Black Americans to build economic security. For example, in Washington, D.C., home of many federal jobs, Black homeownership fell after President Wilson's actions, in part because Black federal employees no longer had access to those better jobs and salaries.³⁰⁴

Despite the federal government's history of racism against Black workers, Black workers currently make up more of the federal civil service at over 18 percent than in the general population at 14 percent.³⁰⁵ However, for the Senior Executive Service, the elite corps of experienced civil servants responsible for leading the federal workforce, only 10 percent are Black.³⁰⁶

B. Segregation in Military Service

The military reflected the rest of the federal government and American society in enacting racist and segregationist policies for much of its history. While Black Americans have consistently served in the military since the very beginning of the country, the military has historically paid Black soldiers less than white soldiers and often deemed Black Americans unfit for service until the military needed them to fight.³⁰⁷ The military officially remained segregated until 1950. Black soldiers consistently failed to be recognized for their contributions, and the government failed to follow through on promises of greater opportunities in exchange for service. While military service has provided an avenue for Black Americans to achieve a measure of economic stability, it has consistently been a place of racial discrimination and segregation, particularly in the highest ranks. Today, there continues to be a limited number of Black Americans in leadership roles.

1. The Revolution and the War of 1812

Black Americans' military service predates the republic itself, as do the government's actions discriminating against Black soldiers and failing to honor promises in exchange for their service. Both free and enslaved Black soldiers, from all 13 colonies, fought with the Continental Army and state militias in the American

³⁰⁰ MacLaury, *The Federal Government and Negro Workers Under President Woodrow Wilson* (2000) <https://www.dol.gov/general/aboutdol/history/shfgpr00>.

³⁰¹ American Postal Workers Union, "The Post Office Department and Jim Crow" (Dec. 31, 2005) *The American Postal Worker Magazine* < <https://apwu.org/news/post-office-department-and-jim-crow>>.

³⁰² Foy, *How Woodrow Wilson's racist policies eroded the Black civil service* (Oct. 27, 2020)

<https://newsroom.haas.berkeley.edu/research/how-woodrow-wilsons-racist-segregation-order-eroded-the-black-civil-service>.

³⁰³ Lehr, *The Racist Legacy of Woodrow Wilson* (Nov. 27, 2015) <https://www.theatlantic.com/politics/archive/2015/11/wilson-legacy-racism/417549>.

³⁰⁴ Little, *How Woodrow Wilson Tried to Reverse Black American Progress* (Jul. 14, 2020) <https://www.history.com/news/woodrow-wilson-racial-segregation-jim-crow-ku-klux-klan>.

³⁰⁵ <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/executive-branch-employment-by-gender-and-racenational-origin/>

³⁰⁶ <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2014-2018.pdf> at p.7

³⁰⁷ <https://history.army.mil/html/faq/diversity.html>

Revolution.³⁰⁸ During the American siege of Yorktown in 1781, British troops expelled all Black volunteer soldiers they had recruited with promises of freedom, with one British officer stating: “We had used them to good advantage, and set them free, and now, with fear and trembling, they had to face the reward of their cruel masters.”³⁰⁹ While Joseph Ranger, a free Black man from Virginia served in the Navy of Virginia and received wages, a land grant, and later a life pension from the U.S. Government, David Baker, an enslaved man on the Isle of Wight, was forced to join the American navy as a substitute for his enslaver, and was re-enslaved after the war.³¹⁰

After the republic was established, the Second U.S. Congress passed the Militia Law of 1792 allowing only “free able-bodied white male citizen[s]” to serve in the national militia, which became the National Guard.³¹¹ In 1796, James McHenry, the Secretary of War, declared, “No Negro, Mulatto, or Indian is to be recruited [in the Marine Corps].”³¹² The U.S. Marine Corps continued this ban on Black Americans for the next 167 years.

During the War of 1812, regardless of the fact that Black soldiers were legally not allowed to serve, Black soldiers made up a significant portion of U.S. Navy forces, and approximately one-quarter of U.S. soldiers at the Battle of Lake Erie were Black.³¹³ While many volunteer Black soldiers were explicitly promised freedom or equal opportunities in the future in exchange for their service by the state or federal government, these promises never fully materialized.³¹⁴

Like they had done during the Revolutionary War, British troops recruited Black soldiers by promising freedom and land in exchange for service, but they largely failed to deliver. In fact, Francis Scott Key’s “The Star-Spangled Banner”—the national anthem—contains a little-known but controversial verse understood by some scholars to have been intended as a threat or admonition to Black soldiers who might have escaped slavery and joined the British cause in a bid for freedom and the means for self-support:

No refuge could save the hireling and slave
From the terror of flight or the gloom of the grave,
And the star-spangled banner in triumph doth wave
O’er the land of the free and the home of the brave.³¹⁵

2. The Civil War

³⁰⁸ African Americans in the U.S. Army: Timeline <https://www.army.mil/africanamericans/timeline.html>; Jones, *American Work: Four Centuries of Black and White Labor* (1998) pp. 103-04.

³⁰⁹ Johann Ewald quoted in Frey, *Water from the Rock: Black Resistance in a Revolutionary Age* (1991) p. 170.

³¹⁰ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 104.

³¹¹ The Militia Act of 1792, Second Congress, Session I. Chapter XXVIII ;

³¹² The National Museum of the Marine Corps,

<https://www.usmcmuseum.com/uploads/6/0/3/6/60364049/africanamericanmarinesresources.pdf>

³¹³ American Battlefield Trust, War of 1812 Facts: What roles did African Americans Play in the War of 1812? <
<https://www.battlefields.org/learn/articles/war-of-1812-facts#What%20roles%20did%20African-Americans%20play%20in%20the%20War%20of%201812?>>.

³¹⁴ Smith, *Wedged Between Slavery and Freedom: African American Equality Deferred* (Aug. 14, 2017) <

<https://www.nps.gov/articles/wedged-between-slavery-and-freedom.htm>>.

³¹⁵ Rockwell, *The Ugly Reason ‘The Star-Spangled Banner’ Didn’t Become our National Anthem for a Century* (Oct. 18, 2020)
<https://www.washingtonpost.com/history/2020/10/18/star-spangled-banner-racist-national-anthem>.

In the time of the Civil War, Black Americans again attempted to join the war effort, notwithstanding the army's racist treatment and failures to follow through on promises. Congress amended the Militia Law of 1792 to permit Black Americans to enlist in the Union Army in 1862, but initially, only in menial construction and camp services roles.³¹⁶ Black women labored in refugee camps as servants for Union officers and as laundresses for Union troops.³¹⁷ Black Americans were finally admitted to military service in the Union following the Emancipation Proclamation in 1863.³¹⁸ Eventually, nearly 200,000 Black soldiers, roughly half of whom were formerly enslaved southerners, served in the Union Army.³¹⁹

Once again, Black soldiers failed to receive equal treatment, pay, or medical care in their military service. Black soldiers had few opportunities for advancement to officer rank, received lower pay, and faced far more severe disciplinary measures.³²⁰ Second Lieutenant R. H. Isabelle, the target during a purge of Black officers, resigned in disillusionment in 1863, stating that he "joined the United States army . . . with the sole object of laboring for the good of the union supposing that all past prejudice would be suspended for the good of the Country and that all native born Americans would unite together to sacrifice their blood for the cause as our fathers did in 1812 & 1815," but he found that "the same prejudice still exist[s]."³²¹

During the Civil War, Black soldiers took home net pay of \$7 per month, compared to \$13 per month for white soldiers.³²² And Black soldiers faced a higher mortality rate than their white counterparts, largely due to racist differences in medical care on the battlefield.³²³ One soldier lamented: "Wee [sic] are said to be U.S. Soldiers and behold wee [sic] are U.S. Slaves."³²⁴

In fact, a small number of Black soldiers did not serve willingly in the Civil War.³²⁵ Starting in 1863, some Union officials used tactics similar to enslavers, press gangs, and man-stealers to grow the ranks of the Union Army.³²⁶ One army engineer in 1863 stated that of men forced into service: "My men, Colonel, have not been drafted. They have been kidnapped in the night."³²⁷ Despite President Lincoln declaring in 1865 that "without the military help of the black freedmen, the war against the south could not have been won,"³²⁸ Black soldiers were not treated on equal footing, and suffered economic and social hardship as a direct result of the government's actions during the war.

3. World Wars I and II

³¹⁶ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 48.

³¹⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

³¹⁸ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 49.

³¹⁹ African Americans in the U.S. Army: Timeline <https://www.army.mil/africanamericans/timeline.html>.

³²⁰ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 288.

³²¹ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 286-87.

³²² Freeman, Schamel & West, *The Fight for Equal Rights: A Recruiting Poster for Black Soldiers in the Civil War* (Feb. 1992; revised 1999 by Weidman) 56 *Social Education* 2, pp. 118-120, reprinted at <https://www.archives.gov/education/lessons/blacks-civil-war>.

³²³ The Civil War by the Numbers <https://www.pbs.org/wgbh/americanexperience/features/death-numbers/>.

³²⁴ Anonymous Virginia Black Soldier to an Unidentified Washington Official, December 1865, cited in Berlin, Reidy & Rowlands, eds., *Freedom: A documentary History of Emancipation, 1861-1867, Series II: The Black Military Experience* (1982) p. 725.

³²⁵ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 51.

³²⁶ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 288-89.

³²⁷ Army Engineer to the Headquarters of the Department of the South (Apr. 3, 1863), cited in Berlin, Reidy & Rowlands, eds., *Freedom: A documentary History of Emancipation, 1861-1867, Series II: The Black Military Experience* (1982) p. 56.

³²⁸ Lincoln's Proclamation to Establish a "Bureau of Colored Troops," <https://www.nps.gov/afam/learn/historyculture/index.htm>.

[Short summary of the "Buffalo Soldiers" in the American West, Black soldiers during the Spanish-American War]

While opportunity expanded in the military during the period after the Civil War and more Black Americans joined the service, Black soldiers continued to serve in the armed forces under segregated and unequal conditions. But increased military needs prevailed and, by World War I, there were 380,000 Black soldiers out of the four million total soldiers, a proportion similar to that of Black men in the general population.³²⁹

During World War I, Black men volunteered to serve in eight all-Black army regiments but remained strictly segregated from white soldiers.³³⁰ Black soldiers were subject to humiliations including wearing discarded Civil War uniforms, or performing for the amusement of white soldiers.³³¹ One Black soldier at the time lamented that “The spirit of Saint-Nazaire [Army station in France] is the spirit of the South.”³³² This played out in the numbers: only 11 percent of Black soldiers saw combat in World War I, while the vast majority were relegated to menial labor.³³³ This segregation reflected the larger condition of the American economy in that Black soldiers were prevented from moving up in ranks to supervisory positions, and high paying positions were blocked altogether.³³⁴

This pattern continued in the interwar years and in World War II, when Black Americans continued to serve in the military service despite segregation and other racist policies.³³⁵ For example, in 1941, the U.S. Army established the 78th Tank Battalion, the first black armor unit. It was made up of Black enlisted men and white officers, but without opportunity for the Black soldiers to advance.³³⁶

Author James Baldwin remarked that the “treatment accorded the Negro during the Second World War [marked] a turning point in the Negro’s relation to America.... A certain hope died.”³³⁷

This pattern extended to the Congressional actions aimed at helping soldiers returning from fighting in World War II. In 1944, the Congress passed the Serviceman’s Readjustment Act of 1944, commonly known as the “GI Bill.” The GI Bill included provisions to provide financial assistance for homeownership, opening small businesses, and education, but, like the New Deal legislation before it, it left implementation largely to racist state and local governments and contributed to housing discrimination.³³⁸ As a result, its benefits were not fully realized for returning Black soldiers. For discussion of the role of the Veterans Administration in implementing and maintaining housing segregation, see Chapter [XX]. For a discussion of the VA’s role in education discrimination, see the Chapter [XX].

4. Post-World War II to the Present

³²⁹ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 320.

³³⁰ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 320.

³³¹ *Ibid.*

³³² Black officer quoted in Jack D. Foner, *Blacks and the Military in American History: A New Perspective* (1974) p. 121.

³³³ Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 321.

³³⁴ *Ibid.*

³³⁵ African Americans in the U.S. Army: Timeline <https://www.army.mil/africanamericans/timeline.html>.

³³⁶ African Americans in the U.S. Army: Timeline <https://www.army.mil/africanamericans/timeline.html>.

³³⁷ Quoted in Dalfiume, “The ‘Forgotten Years’ of the Negro Revolution,” *Journal of American History* (June 1968) 55(1) p. 90.

³³⁸ Brown, *The Whiteness of Wealth: how the Tax System Impoverishes Black Americans—And How We Can Fix It* (2021) p. 15; Callahan, *How the GI Bill Left Out African Americans* (Nov. 11, 2013) <https://www.demos.org/blog/how-gi-bill-left-out-african-americans>.

In 1941, President Roosevelt issued Executive Order 8802 stating, “I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin....” The Marine Corps received its first Black recruits, but continued to segregate. “Even though we were all Marines we were kept separate. We didn't have barracks, we lived in huts, built from cardboard, painted green. Camp Lejeune had barracks but we had huts. It was located in the back woods, amid water snakes and bears,” said Marine Sergeant Carrel Reavis.³³⁹

In 1948, President Harry S. Truman issued Executive Order 9981 to desegregate the military.³⁴⁰ But, while the military formally integrated, serious racial discrimination persisted. For example, the army did not begin in earnest to integrate its forces until the Korean War, when demand for additional troops meant that the army had no choice but to send Black troops to replace white troops killed or injured in battle. Segregated all-Black army units persisted until 1954. In the Marines, full integration did not occur until 1960.³⁴¹

Despite discrimination by the federal government, Black soldiers served and died for their country and have historically used it as a mode of upward mobility out of the South.³⁴² As the United States moved to an all-volunteer military following the Vietnam War, Black soldiers enlisted at a much higher rate than white individuals, leading Black representation in the military to be roughly twice their representation in the U.S. population at large.³⁴³

Today, racial disparities in the military continue. Even as lower-level troops were integrated, leadership remained almost exclusively white. As late as 2020, of the 41 officials holding four-star rank, only two were Black Americans.³⁴⁴ Based on government data received through the Freedom of information Act, researchers have found evidence that Black service members have been substantially more likely than white service members to face military justice or disciplinary action.³⁴⁵ Anecdotal news reports have presented a deep-rooted culture of racism and discrimination in all branches of the armed services.³⁴⁶ On January 6, 2021, insurgents stormed the U.S. Capitol, carried a confederate flag inside the Capitol building,³⁴⁷ and displayed a noose and gallows in front of it.³⁴⁸ Of the more than 700 individuals charged in the January 6 insurrection, 81 people have ties to the military.³⁴⁹

C. California

Although Black Americans were present in California going back to the Spanish conquest era, they made up only around one percent or less of the population of California until 1920, and under two percent until the

³³⁹ The National Museum of the Marine Corps, <https://www.usmcmuseum.com/uploads/6/0/3/6/60364049/africanamericanmarinesresources.pdf>

³⁴⁰ Executive Order 9981

³⁴¹ Korb, History of Integration in the U.S. Armed Services (Jul. 13, 2021)

<https://www.militarytimes.com/opinion/commentary/2021/07/13/history-of-integration-in-the-us-armed-services>.

³⁴² [Citation]

³⁴³ African-Americans in Combat <https://www.pbs.org/opb/historydetectives/feature/african-americans-in-combat>.

³⁴⁴ Cooper, African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top (May 25, 2020; updated June 9, 2020) <https://www.nytimes.com/2020/05/25/us/politics/military-minorities-leadership.html>.

³⁴⁵ http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf

³⁴⁶ <https://apnews.com/article/us-military-racism-discrimination-4e840e0acc7ef07fd635a312d9375413>

³⁴⁷ <https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html>

³⁴⁸ <https://www.nationalgeographic.com/history/article/decoding-hate-symbols-seen-at-capitol-insurrection>

³⁴⁹ <https://www.cbsnews.com/news/capitol-riot-january-6-military-ties/>

1940s.³⁵⁰ Still, the pattern seen in the federal civilian service and military service persisted in California at both the state and local levels. Black workers faced segregation and racial discrimination in state and local employment. Even when progress was made, governments failed to meaningfully address past discrimination, and Black workers remained largely shut out of the higher-paid leadership roles—a trend that still exists in the present.

Up until World War II, Black workers were absent from many public and private sector jobs in San Francisco. For example, no Black worker was employed as a public school teacher, police officer, firefighter, or streetcar conductor nor as a bank teller or bus or cab driver in the city before 1940.³⁵¹ There were no Black streetcar workers until 1942—with poet Maya Angelou being one of the first—though this was not due to a lack of available skilled workforce in the area, as evidenced by the fact that within two years there were over 700 Black platform operators.³⁵²

When Bay Area Rapid Transit was built in 1967, no skilled Black workers were hired. The National Labor Relations Board-certified unions did not admit Black members, and BART, though a government agency, refused to use its power to insist on non-discrimination policies by the unions.³⁵³ And it was a similar story when Oakland built a new central post office during the same period—not a single black plumber, operating engineer, sheet metal worker, or other skilled laborer was hired for construction of the government building.³⁵⁴

The City of Pasadena in Southern California similarly employed almost no Black Americans in government jobs prior to World War II. For example, Ruby McKnight Williams, the first Black woman to be employed by the city in a professional capacity in the 1940s, stated: “In Pasadena they told me they don’t hire black teachers.... I found out ... that no [black] men were employed by the city except garbage men and two or three men who swept City Hall. As for [black] women, even the attendants in the restrooms at the Rose Bowl had never been colored.”³⁵⁵

Other types of government actions enforced racist and segregationist policies on Black Californians in different parts of the state. For example, in 1970 Pasadena became the first city outside of the South under a federal court order to desegregate its schools. In its ruling on the matter, the district court concluded that the Pasadena school

³⁵⁰ Gibson & Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* (Sept. 2002) U.S. Census Bureau, Population Division: Working Paper No. 56, Table 19 <https://www.census.gov/content/dam/Census/library/working-papers-2002/demo/POP-twps0056.pdf>; National Park Service, *Five Views: An Ethnic History Site Survey for California: A History of Black Americans in California: Introduction* (2004) https://www.nps.gov/parkhistory/online_books/5views/5views2c.htm.

³⁵¹ Broussard, “In Search of the Promised Land: African American Migration to San Francisco, 1900-1945” in *Seeking El Dorado: African Americans in California* (De Graaf, Mulroy & Taylor, eds. 2001) p. 198.

³⁵² Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 164.

³⁵³ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 168-69.

³⁵⁴ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) p. 168.

³⁵⁵ Quoted in Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020) p. 234; see also Rampersad, *Jackie Robinson: A Biography* (1997) p. 22 [“By 1940, a year before Jack Robinson’s departure from Pasadena, the city had not yet hired, as one editorial indignantly put it, ‘a single [black] policeman, fireman, regular day-time school teacher, meter-reader, or any other type of employee for the utilities; no, not even a janitor or an elevator boy in the City Hall.’ Pasadena employed some blacks in the part, street, and refuse departments, and then only as laborers, never as clerks. At some point, the post office began to hire blacks, and a county office gingerly broke the Jim Crow rule; but most businesses did not, and all trade unions scorned blacks as members. The result was chronic unemployment and a growing despair. In 1924, after the city rebuffed a petition to appoint a black policeman (by then Los Angeles had a black detective and several black patrolmen and firemen), the *Eagle* summed up its concern: ‘The condition of affairs surrounding the racial issues in Pasadena is nothing less than nauseating.’”].

district had discriminated both in its placement of students and in its allocation of teachers. As the court observed, the district's failures to comply with its own integration policies had occurred "in connection with the teacher assignment, hiring, and promotion policies and practices of the District, its construction policies and practices, and its assignment of students."³⁵⁶

Public-sector employers have provided significant opportunities to Black workers, as compared to their private-sector counterparts—including in California. Even still, Black workers continue to encounter barriers to career advancement and higher pay.³⁵⁷ As of 2018, Black workers account for 9.8 percent of California's state civil service, compared to 5.3 percent of the state's labor force and 5.5 percent of the population. However, that 9.8 percent share has been disproportionately concentrated in lower salary ranges; Black civil servants represented 12.6 percent of employees earning \$40,000 or less but only 5.7 percent of workers earning more than \$130,000.³⁵⁸

VI. Effects Today

The cumulative impacts of the federal, state, and local governments' racial discrimination and segregation continue to harm Black Americans today. In 2019, the median Black household earned 61 cents for every dollar earned by the median white household.³⁵⁹ This is a slight increase from 2016, when Black households earned 56 cents to the dollar, a figure *lower* than it had been in 1968, after the passage of the Civil Rights Act in 1964.³⁶⁰

Black Americans experience higher levels of poverty. [national poverty stats] Due to a combination of racism and sexism, women have always had a higher rate of poverty than men.³⁶¹ Twelve percent of white women are impoverished, compared to 23 percent of Black women.³⁶² Black families are more likely than white families to have family members who are impoverished.³⁶³ This has a destabilizing effect during periods of emergency. A 2020 study found that 36 percent of white families had enough savings to cover six months of expenses, versus 14 percent of Black families.³⁶⁴ Another recent survey also found that 36 percent of Black respondents said that they had no money at all set aside for emergencies, compared to 24 percent of white respondents.³⁶⁵ Without a safety net of savings, Black Americans can be more vulnerable to upheavals in the labor market and are more

³⁵⁶ Spangler v. Pasadena City Board of Education, 311 F. Supp. 501 (C.D. Cal. 1970).

³⁵⁷ Madowitz, Price & Meller, "Public Work Provides Economic Security for Black Families and Communities" (Oct. 23, 2020) <https://www.americanprogress.org/issues/economy/reports/2020/10/23/492209/public-work-provides-economic-security-black-families-communities>.

³⁵⁸ California Department of Human Resources and California Government Operations Agency, 2018 Annual Census of Employees in State Civil Service: Report to the Governor and Legislature (Mar. 2020) pp. 10, 19.

³⁵⁹ <https://www.census.gov/data/tables/2020/demo/income-poverty/p60-270.html>

³⁶⁰ Manduca, Income Inequality and the Persistence of Racial Economic Disparities (2018) 5 Sociological Science p. 182.

³⁶¹ Patrick L. Mason, "Moments of Disparate Peaks: Race-Gender Wage Gaps Among Mature Persons, 1965-2007," Review of Black Political Economy 38, 2010, p. 1-25.

³⁶² California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

³⁶³ Whitehead, Center for Poverty Research, Univ. Cal. Davis, Support from Family Does Not Replace the Social Safety Net (Apr. 2016) p. 2.

³⁶⁴ Bhutta, et al., "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances," (2020) *FEDS* <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

³⁶⁵ Akabas et al., *New BPC Survey Shows Americans Need Better Ways to Save for Emergencies* (Feb. 25, 2021) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/new-bpc-survey-shows-americans-need-better-ways-to-save-for-emergencies/>> (as of Aug. 18, 2021).

likely to experience homelessness, as discussed in Chapter [XX].

While Black Americans have made significant advances into occupations and job categories that used to be subject to explicit segregation, or kept Black workers at the margins, there has been a limit to this progress. In 2021, an analysis of the 50 most valuable public companies demonstrated that only eight percent of “C-suite” executives—the highest corporate leaders, usually those that report to the Chief Executive Officer—are Black.³⁶⁶ At least eight companies list no Black executives among their leadership team, as of December 2021.³⁶⁷ Moreover, much of the gains that Black Americans have made in employment and wages have been offset by the intensifying income inequality in the country as a whole.³⁶⁸

A. California

The numbers are similar for California. In 2019, the Public Policy Institute of California reported that about 17.4 percent of Black Californians were poor or near poor, compared to 12.1 percent of white people.³⁶⁹

Black Americans are also under-represented in California’s two major industries: Hollywood and Silicon Valley. In Hollywood, for example, in films released between 2015 and 2019, 11 percent of the lead roles in those movies were played by Black American actors.³⁷⁰ Black American directors directed six percent of those years’ films, Black American producers produced six percent of those films, and Black American screenwriters wrote four percent of those films.³⁷¹ In 2020, the *Los Angeles Times* conducted a study of diversity in Hollywood studios and reported that of 230 senior corporate executives, division heads, and other senior leaders in entertainment companies analyzed by the *Times*, 10 percent were Black Americans.³⁷² A 2018 report of diversity in Silicon Valley revealed that in large tech firms in Silicon Valley, Black Americans made up only 4.4 percent of all employees—1.4 percent were executives, 2.5 percent were managers, and 2.9 percent were professionals.³⁷³

VII. Conclusion

[Summary tying labor discrimination to enslavement]

³⁶⁶ Jan, “The Striking Race Gap in Corporate America” (Dec. 15, 2021) *Wash. Post* <https://washingtonpost.com/business/interactive/2021/black-executives-american-companies/>.

³⁶⁷ Jan, “The Striking Race Gap in Corporate America” (Dec. 15, 2021) *Wash. Post*

<https://washingtonpost.com/business/interactive/2021/black-executives-american-companies/>. These companies are Walmart, Nvidia, Cisco, Pfizer, T-Mobile, Costco, Honeywell and Qualcomm.

³⁶⁸ Reed, *The Surprising Cross-Racial Saga of Modern Wealth Inequality* (Jun. 29, 2020) *The New Republic* <https://newrepublic.com/article/158059/racial-wealth-gap-vs-racial-income-gap-modern-economic-inequality>.

³⁶⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

³⁷⁰ Dunn et al, *Black Representation in Film and TV: The Challenges and Impact of Increasing Diversity*, McKinsey (March 11, 2021), <<https://tinyurl.com/2p89t6k9>> (as of Jan 24, 2022).

³⁷¹ Dunn et al, *Black Representation in Film and TV: The Challenges and Impact of Increasing Diversity*, McKinsey (March 11, 2021), <<https://tinyurl.com/2p89t6k9>> (as of Jan 24, 2022).

³⁷² Faughnder & James, *Hollywood’s C-suites are overwhelmingly white. What are studios doing about it?*, *LA Times* (July 1, 2020), <<https://tinyurl.com/ynxmzp26>> (as of Jan 24, 2022).

³⁷³ Tomaskovic-Devey & Han, *Is Silicon Valley Tech Diversity Possible Now?*, Center for Employment Equity (Jan. 2018), <<https://tinyurl.com/bddbnu37>> (as of Jan 24, 2022).

Chapter 11. An Unjust Legal System

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

As discussed in the previous chapters, throughout history, the governments of this country, at all levels, have treated Black Americans as criminals for the purposes of social control, and to maintain an economy based on exploited Black labor. This legacy and the continuous actions of government actors today have resulted in the over-policing of Black neighborhoods, the mass incarceration of Black Americans, and other inequities in nearly every corner of the American legal system.

This long history of criminalization began with enslavement and has created what some describe as a caste-like system in America where Black Americans are in the lowest caste of America's racial hierarchy.¹ This criminalization of Black Americans has resulted in a criminal justice system that, overall, physically harms,² imprisons,³ and murders⁴ Black Americans more than other racial group relative to their percentage of the population. While constitutional amendments⁵ and federal civil rights laws⁶ have tried to ameliorate this mistreatment of Black Americans, the inequities that remain are so significant that some scholars have argued that, as it relates to Black Americans, U.S. society has replaced enslavement with the criminal justice system.⁷ Black Americans are more likely than white Americans to be arrested, convicted, and to serve lengthy prison sentences.⁸ Black American adults are 5.9 times as likely to be incarcerated than white people.⁹ The experiences of Black Americans with the criminal justice system also result in a general mistrust of the civil justice system¹⁰ where Black Americans also face barriers to accessing justice such as obtaining a lawyer.¹¹

In California, the history of the inequities Black Americans experience is similar to the rest of the country's history. Although enslavement did not exist on the same scale in California that it did in southern states,

¹ See, e.g., Alexander, *The New Jim Crow* (2020); see also Wilkerson, *Caste: The Origins of Our Discontents* (2020).

² [Note: Citation to 2021-2022 statistics to be inserted here closer to publication.]

³ [Note: Citation to 2021-2022 statistics to be inserted here closer to publication.]

⁴ [Note: Citation to 2021-2022 statistics to be inserted here closer to publication.]

⁵ See, e.g., U.S. Const., 13th Amend, U.S. Const., 14th Amend., and U.S. Const., 15th Amend.

⁶ See, e.g., The Civil Rights Act of 1866, The Reconstruction Acts of 1867-1868, The Ku Klux Klan Act, The Civil Rights Act of 1875, The Civil Rights Act of 1964, The Voting Rights Act, and The Fair Housing Act

⁷ See, e.g., Alexander, *The New Jim Crow* (2020).

⁸ The Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance March 2018 < <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> > [as of November 5, 2021].

⁹ Ibid.

¹⁰ Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67; DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts* (2021) 13 Geo. J. L. & Mod. Critical Race Persp. 1.

¹¹ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2020) 24 Lewis & Clark L. Rev. 53.

California has contributed to the inequities Black Americans have experienced and continue to experience. For example, California law once prohibited Blacks Americans from testifying in court cases involving white people.¹² More recently, California's punitive criminal justice policies, such as the state's three-strikes law, have resulted in large numbers of Black Americans in prisons and jails.¹³ Although there is very little scholarship on Black Americans' experience in the civil legal system compared to scholarship on their experience in the criminal justice system, there is evidence that Black Americans have historically experienced and continue to experience discrimination such as lack of access to legal counsel¹⁴ and racial bias among jurors.¹⁵

Section III will discuss the historical criminalization of Black Americans. Section IV will discuss implicit bias. Section V will discuss discrimination in policing. Section VI will discuss discrimination in trial and sentencing. Section VII will discuss discrimination in incarceration. Section VIII will discuss the effects of contact with the criminal justice system. Last, section IX will discuss the experience of Black Americans in the civil legal system.

III. Criminalization of Black Americans

It is well-established in the historical scholarship that American society has criminalized Black Americans starting with enslavement.¹⁶ Federal, state, and local governments, in order to subjugate Black Americans and maintain their enslaved status, criminalized Black Americans as a way to control Black Americans. This system survived the abolition of slavery and the Civil War, and, as some scholars argue, intensified during legal segregation. Once enslavement ended, white Americans created a new legal and social system to continue to socially control and exploit approximately four million Black Americans.¹⁷

Southern states passed the "Black Codes" and segregation laws, which, together, criminalized Black Americans by prohibiting every day, harmless behavior and punishing violations with harsh penalties. State and local governments then leased out unjustly accused, prosecuted, and convicted Black Americans to private companies to work to pay off their fines. Between the 1870s and 1940s this system of leasing essentially created a new form of slavery. In the segregated South, laws that segregated Black Americans treated Black Americans as peripheral in American society by physically separating them from white people. Segregation continued to criminalize Black Americans by imposing criminal punishments, such as fines and jail time, for violations of

¹² The Civil Practice Act, Stats.1851, ch. 1, § 394, p. 113; The Criminal Act of 1850, Stats.1850, ch. 99, § 14, p. 230.

¹³ See, e.g., Sutton, *Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing* (2013) *Law & Society Review* (2013) vol. 47, no. 1, pp. 37–71 <<https://www.jstor.org/stable/23357930>> [as of July 29, 2021].

¹⁴ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2020) 24 *Lewis & Clark L. Rev.* 53.

¹⁵ Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020) <<https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>> [as of Apr. 9, 2021].

¹⁶ See generally Hinton and Cook, *The Mass Criminalization of Black Americans: A Historical Overview* (2021) 4 *Annu. Rev. Criminal* 261-286 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-060520-033306>> [as of Dec. 27, 2021].

¹⁷ U.S. Census, Map Showing the Distribution of the Slave Population of the Southern States of the United States Compiled from the Census of the 1860 <https://www.census.gov/history/pdf/1860_slave_distribution.pdf> [as of Dec. 7, 2021]; see generally National Oceanic and Atmospheric Administration, Office of Coast Survey, Mapping Slavery in the Nineteenth Century <<https://www.census.gov/history/pdf/slavedensitymap.pdf>> [as of Dec. 7, 2021].

laws discriminating against Black Americans. From approximately 1950s to the 1990s, “law and order” or “tough on crime” political campaigns and the war on drugs resulted in laws that punished Black Americans and resulted in their mass incarceration.

A. The Slave Codes and the Fugitive Slave Act

The American legal system’s early criminalization of Black Americans through legalized social control and punitive laws stretches back to the colonial era and became more punitive over time as discussed in Chapter 2. Oppression of Black Americans began with cases in the first American colony of Virginia.¹⁸ In the 1640 case of John Punch, which was one of the first documented court cases involving the rights of Black Americans, the courts punished three servants running away from their employer.¹⁹ Two of the servants were white and the third was Black, but they all committed the same crime.²⁰ The court ordered whippings for all three, but ordered that white servants serve their employer for three more years²¹ while it ordered the Black servant, John Punch, to serve his enslaver for the rest of his life.²²

The first laws also treated Black Americans more harshly than whites. For example, Virginia passed the Casual Killing Act of 1669, which declared that if an enslaved person died while resisting their enslaver, the enslaver would not be considered to have acted with malice, which effectively made it legal for enslavers to kill the people they enslaved.²³ According to one scholar, the most major slave codes were from 1680 to 1682 as they marshalled previous piecemeal legislation into one code. In 1705, Virginia passed “An act concerning Servants and Slaves,” which combined older laws regarding forced labor in Virginia. This law prohibited Black Americans from engaging in activity that white people were free to do such as resisting a white person,²⁴ holding weapons,²⁵ and leaving their plantation without permission.²⁶ The laws in Virginia became a model for other southern states throughout the slavery era.²⁷

¹⁸ See generally Higginbotham, *Virginia Led The Way in Legal Oppression*, The Washington Post (May 21, 1978) <<https://www.washingtonpost.com/archive/opinions/1978/05/21/virginia-led-the-way-in-legal-oppression/664bcdf4-8aaf-475f-8ea7-eb597aee7ecd/>> [as of Dec. 21, 2021]; see also Newby-Alexander, *The “Twenty and Odd”*: *The Silences of Africans in Early Virginia Revealed* Phylon (1960-) 57, no. 1 (2020): 25–36 <<https://www.jstor.org/stable/26924985>> [as of Dec. 21, 2021].

¹⁹ The court’s sentence suggests that he was not already a slave as it would be nonsensical to sentence an already enslaved person to a sentence in which they must serve as a slave for the rest of their life.

²⁰ Minutes of the Council and General Court of Colonial Virginia, July 22, 1640 p. 466 <<https://encyclopediavirginia.org/entries/general-court-responds-to-runaway-servants-and-slaves-1640/>> [as of Dec. 21, 2021].

²¹ *Ibid.*

²² *Ibid.*

²³ An act about the casual [sic] killing of slaves, Act I.

<<https://babel.hathitrust.org/cgi/pt?id=hvd.hxh5u4&view=1up&seq=326&skin=2021>> [as of Dec. 21, 2021].

²⁴ An act concerning Servants and Slaves XXXIV p. 448

<<https://babel.hathitrust.org/cgi/pt?id=hvd.hw2scr&view=1up&seq=443&skin=2021>> [as of Dec. 21, 2021].

²⁵ An act concerning Servants and Slaves XXXV p. 448

<<https://babel.hathitrust.org/cgi/pt?id=hvd.hw2scr&view=1up&seq=443&skin=2021>> [as of Dec. 21, 2021].

²⁶ *Ibid.*

²⁷ Higginbotham Jr., *Virginia Led The Way in Legal Oppression*, The Washington Post (May 21, 1978)

<<https://www.washingtonpost.com/archive/opinions/1978/05/21/virginia-led-the-way-in-legal-oppression/664bcdf4-8aaf-475f-8ea7-eb597aee7ecd/>> [as of Dec. 21, 2021]

Much like Virginia, other colonies adopted their own slave codes and ensured that the law subjected Black Americans to criminal penalties more harshly than white people. Eventually, every enslaving state had its own slave code. Slave codes, in territories like the District of Columbia,²⁸ and states like Alabama²⁹ and North Carolina,³⁰ all fundamentally treated Black Americans as inferior to white people.

Although Americans frequently believe that the North was not segregated, this was not the case in reality. In 1849 the Massachusetts Supreme Court held that segregated schools were permissible under the state's constitution.³¹ Similarly, the Michigan Supreme Court held in 1855 that a steamboat company could refuse to sell an overnight cabin to Black abolitionist William Howard Day.³² Courts in southern states even cited to this case—which was in a northern state—when ruling against Black Americans in other cases involving segregation in schools, streetcars, and public accommodations. Some also required judges to punish Black Americans more harshly than white Americans when found guilty of the same crimes.³³

Federal laws and court decisions criminalized Black Americans for asserting their human right to be free. The Fugitive Slave Acts of 1793³⁴ and 1850³⁵ mandated that all enslaved people seeking freedom by crossing state lines to free states be returned to their enslavers. In 1857, the U.S. Supreme Court held in *Dred Scott v. Sandford* that Black Americans—whether enslaved or free—were not citizens of the United States and therefore were not entitled to the rights and privileges of the U.S. Constitution.³⁶ There are many documented examples of court laws, court decisions, and associated documents³⁷ during this time that demonstrated that the American legal system treated Black Americans as inferior, with fewer rights, who were therefore subject to more punitive treatment under the law.

After the Emancipation Proclamation and the end of the Civil War, Congress made several efforts to safeguard the rights of Black Americans. For example, Congress passed the Thirteenth Amendment, which outlawed slavery.³⁸ Congress also passed the Civil Rights Act of 1866, which defined Black Americans as citizens in

²⁸ The Slavery Code of The District of Columbia Together with Notes and Judicial Decisions Explanatory of the Same, <<https://www.loc.gov/resource/lsc.002/?r=-0.337,0.043,1.797,1.356,0>> [as of Dec. 21, 2021].

²⁹ Slaves, [sic] and Free Persons of Color <<https://archives.alabama.gov/teacher/slavery/lesson1/doc1-3.html>> [as of Dec. 22, 2021].

³⁰ An Act Concerning Slaves and Free Persons of Color <<https://docsouth.unc.edu/nc/slavesfree/slavesfree.html>> [as of Dec. 22, 2021]; Philadelphia Female Anti-Slavery Society, Extracts from the American Slave Code, <<https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t8rb75634&view=lup&seq=7&skin=2021>> [as of Dec. 22, 2021] (compiling extracts from slave codes in Louisiana, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Tennessee, Arkansas, Missouri, Kentucky, Virginia, Maryland, Delaware, and the District of Columbia).

³¹ *Roberts v. City of Boston* (1849) 59 Mass. 198.

³² *Day v. Owen* (1858) 5 Mich. 520.

³³ *Forever Free, supra*, at pp. 95 – 96.

³⁴ An Act respecting fugitives from justice, and persons escaping the service of their masters <<https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c2/l1sl-c2.pdf>> [as of Dec. 29, 2021].

³⁵ An Act to amend, and supplementary to, the Act entitled “An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters,” <<https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c31/l1sl-c31.pdf>> [as of Dec. 29, 2021].

³⁶ *Dred Scott v. Sandford* (1856) 60 U.S. 393.

³⁷ U.S. Library of Congress, *Collection: Slaves and the Courts, 1740 to 1860* <<https://www.loc.gov/collections/slaves-and-the-courts-from-1740-to-1860/about-this-collection/>> [as of Dec. 21, 2021].

³⁸ U.S. Const., 13th Amend.

order to protect the civil rights of newly freed people.³⁹ To primarily protect their physical safety, Congress passed the Ku Klux Klan Act to eliminate extralegal violence against formerly enslaved people.⁴⁰ Congress also created the Freedmen’s Bureau in order to provide food, clothing, fuel, and other forms of assistance to destitute formerly enslaved people.⁴¹ However, as discussed in previous chapters, white supremacist southern politicians rose to power after the contested U.S. presidential election of 1876. U.S. troops withdrew from key cities in the southern states, and the Freedmen’s Bureau had already been dismantled in 1872 because of southern political pressure. As a result, these amendments and statutes were largely ignored or circumvented for a century.

B. The Black Codes and Legal Segregation

Southern states passed the Black Codes and vagrancy laws to criminalize, socially control, and maintain formerly enslaved Black Americans in a lower social caste and as a source of exploited, free labor.⁴² Though often confused with Jim Crow laws, the Black Codes existed to criminalize the everyday activities of Black Americans in southern states during the years immediately after the end of slavery until the Reconstruction Act of 1867.⁴³ If arrested and convicted of violations, Black Americans again had little to no control over their own lives. This provided an opportunity for white Americans in economic and political power to continue using cheap Black labor to support the southern economy.

Enforcing the Black Codes, local authorities arrested Black Americans for actions that were legal for white Americans. During slavery, white Americans generally believed that free Black Americans were suspicious, as white Americans saw free Black Americans as “masterless” and therefore unhoused or vagrant, and most likely fleeing from the law.⁴⁴ In some states, police arrested Black Americans if they could not prove that they worked for a white employer.⁴⁵ They could not change employers without permission.⁴⁶ Black Americans could not sign labor contracts without a discharge paper from their previous employer.⁴⁷ This placed all the power in employers, much like slavery placed all the power in enslavers, and left Black Americans with little control over their ability to find other work.

Other Black Codes supported the forced labor of Black children, as discussed in Chapter 8. As part of the Black Codes, states passed vagrancy laws that declared Black Americans who were unemployed and without a

³⁹ Berwanger, *Negrophobia in Northern Proslavery and Antislavery Thought* *Phylon* (1960-) 33, no. 3 (1972): 266–75.

<<https://doi.org/10.2307/273527>> [as of Dec. 12, 2021].

⁴⁰ An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes, 17 Stat. 13 <<https://tile.loc.gov/storage-services/service/l1/lsl/lsl-c42/lsl-c42.pdf>> [as of Dec. 29, 2021].

⁴¹ Everly, *Freedmen’s Bureau Records: An Overview* (Summer 1997) National Archives and Records Administration’s Prologue Magazine <<https://www.archives.gov/publications/prologue/1997/summer/freedmens-bureau-records.html>> [as of Apr. 8, 2021].

⁴² Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 Va. J. Soc. Pol’y & L. 65, 66; Whitehouse, *Modern Prison Labor: A Reemergence of Convict Leasing Under the Guise of Rehabilitation and Private Enterprises* (2017) 18 Loy. J. Pub. Int. L 89, 90.

⁴³ See generally Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 Va. J. Soc. Pol’y & L. 65, 66.

⁴⁴ Johnson, *African Americans and Homelessness: Moving Through History*, *Journal of Black Studies* (2010) vol. 40, no. 4 pp. 583–605 <www.jstor.org/stable/40648529> [as of July 23, 2021].

⁴⁵ See generally Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008)

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

permanent residence as vagrants and therefore subject to fines or imprisonment, which criminalized and controlled Black Americans.

While the Black Codes ended in the 1860s, ex-Confederate states revived vagrancy laws after the end of Reconstruction. All former states in the confederacy except Tennessee passed vagrancy laws between 1890 and 1909. After the police arrested Black Americans for minor infractions, they leased them to a private company or a white private citizen who would pay the fine in exchange for the person's forced labor.⁴⁸ Under this system, incarcerated people could often never earn enough to repay the plantation owner to their satisfaction, and allowed the plantation owner to continue exploiting his Black workers for many years.⁴⁹

C. Forced Labor under the “Convict Leasing” System

In a system known as “convict leasing,” laws and the U.S. Constitution allowed private entities to force formerly enslaved people and descendants of enslaved people into doing the same work, on the same land, and even for the same people as Black Americans would have when they were enslaved. The convict leasing system was legally permissible because the Thirteenth Amendment allowed forced labor for people who had been convicted of a crime.⁵⁰ Therefore, the legal system considered incarcerated people to have few rights because, in the words of the Supreme Court of Virginia, they were “slaves of the state.”⁵¹ In some instances, the private citizens who benefitted from this system were former enslavers or even former Confederate soldiers, such as the owner of the Angola State Penitentiary land, which was formerly a plantation, as discussed below in the incarceration section of this chapter.

The conditions under which incarcerated people worked in the convict leasing system were oppressive. Unlike in the slavery era, lessees had no incentives to keep incarcerated people healthy or alive so the convict leasing system was “worse than slavery.”⁵² Working and living conditions for incarcerated people were dangerous, unhealthy, and violent.⁵³

For example, archaeologists recently discovered a mass grave of incarcerated people's remains in Sugar Land, Texas at the Bullhead Camp Cemetery that was once part of the Central State Prison Farm owned by the State of Texas.⁵⁴ In this mass grave on land that was once owned by enslavers and their descendants, archaeologists

⁴⁸ Ibid.

⁴⁹ Alexander, *The New Jim Crow* (2011) 9 Ohio St. J. Crim. L. 7, 11.

⁵⁰ U.S. Const., 13th Amend; see generally Pope, Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account (2019) 94 N.Y.U. L. Rev. 1465, 1467.

⁵¹ See, e.g., *Ruffin v. Commonwealth* (1871) 62 Va. 790, 796.

⁵² Oshinsk, *Worse Than Slavery* (1996)

⁵³ *Ibid.* see also Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008); Cardon, ‘*Less Than Mayhem*’: *Louisiana's Convict Lease, 1865-1901* (2017) *Louisiana History: The Journal of the Louisiana Historical Association* vol. 58, no. 4 pp. 417–441 <www.jstor.org/stable/26290931> [as of July 23, 2021].

⁵⁴ Clark, *Back to Bondage Forced Labor in Post Reconstruction Era Texas: Forced Labor in post Reconstruction Era Texas*, August 2020

<https://www.fortbendisd.com/cms/lib/TX01917858/Centricity/ModuleInstance/261315/Sugar_Land_95_Final_Report_Public.pdf> [as of Dec. 27, 2021].

found 95 bodies of men and boys and possibly one woman almost all of whom were Black Americans and were participants in the state-sanctioned convict leasing system, which existed in Texas between 1871 and 1911.⁵⁵

Historical documents showed that incarcerated individuals at this plantation frequently died from heat stroke, malnourishment, extreme physical activity for extended periods of time, and disease.⁵⁶ Further, the incarcerated individuals had occupational injuries and wounds from gunshots and corporal punishment.⁵⁷ Convict leasing such as what occurred in Sugar Land, Texas existed throughout the American South.⁵⁸ Further, a variety of individuals and businesses used convict leasing,⁵⁹ such as Tennessee Coal, Iron & Railroad Co., which U.S. Steel owned, during this era.⁶⁰ Scholars indicate that convict leasing gradually ended by around the beginning of World War II,⁶¹ as each state stopped leasing convict labor to private individuals and business.

D. Legal Segregation and Racial Terror

During era of legal segregation, southern state and local governments implemented a system of legalized social control to separate Black and white Americans. For instance, the United States Supreme Court case *Plessy v. Ferguson*, which upheld the rule of “separate but equal,” legalized laws that required the separation of Black Americans and white people in nearly all public places such as parks, businesses, and public transportation. Jim Crow laws provided for criminal penalties such as fines and imprisonment through the legal justice system—only for Black Americans—who violated segregation laws.

In addition, as Chapter 3 on racial terror discusses, government actors and private citizens routinely punished Black Americans who violated these laws—or even appeared to be breaking racial norms prescribed by white people—through extrajudicial means such as lynching, racial massacre, and social fear mongering. As discussed in Chapter 3, lynching also contributed to the popular belief among Americans that Black people were assumed to be guilty.⁶² White lynch mobs murdered Black suspects who were later found to be innocent.⁶³ Sometimes these murders occurred for no reason at all, and even targeted Black children.⁶⁴ White mobs often framed the lynching as a method of self-defense against Black Americans who were portrayed as dangerous criminals who posed a threat to white society.⁶⁵

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

⁵⁹ Crouch, *One Dies Get Another: Convict Leasing in the American South, 1866-1928* (1996); see generally Mancini, *Race, Economics, and the Abandonment of Convict Leasing* *The Journal of Negro History* (1978) vol. 63, no. 4, pp. 339–352 <www.jstor.org/stable/2716851> [as of July 27, 2021]; Ledbetter, *The Long Struggle to End Convict Leasing in Arkansas* (1993) *The Arkansas Historical Quarterly* vol. 52, no. 1 pp. 1–27 <www.jstor.org/stable/40030832> [as of Dec. 28, 2021].

⁶⁰ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

⁶¹ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008), p. 247.

⁶² *Coffin v. United States*, 156 U.S. 432, 453 (1895); see also EJI 2015, *supra*, at p. 20.

⁶³ Jordan, *supra*, at p. 588-589.

⁶⁴ Jordan, *supra*, at p. 588-589.

⁶⁵ EJI 2015, *supra*, at p. 21.

Segregation laws were legally permissible until the 1950s and 1960s when landmark cases such as *Brown v. Board of Education* and laws like the Civil Rights Act of 1964 found them unconstitutional or made them illegal.⁶⁶

Although Americans often associate segregation laws as a southern phenomenon, the northern legal system also discriminated against Black Americans and treated them as inferior after the Civil War through court cases and laws. This discrimination is particularly apparent in a line of cases involving the rights of Black Americans on railroad cars. For example, in 1867, the Pennsylvania Supreme Court ruled against Mary Miles who refused to sit in the colored-only section of a streetcar.⁶⁷ Courts in southern states, such as the Florida Supreme Court⁶⁸ and the Tennessee Supreme Court,⁶⁹ later cited the *Miles* case in other cases in which the courts decided against Black Americans who sought to sit in the whites-only sections of streetcars.⁷⁰ It is also well-established that, from the 1880s to 1960s, northern states had laws that allowed segregation in schools and public accommodations.⁷¹

E. Tough on Crime Era and the War on Drugs

The civil rights movement ended legal segregation and made explicit discrimination against Black Americans in the text of court cases and statutes illegal. Scholars argue that legalized social control continued in the now purportedly race neutral legal system of mass incarceration of Black Americans.⁷² Mass incarceration of Black Americans, particularly Black men, occurs in this race neutral system in two stages.⁷³

First, police, prosecutors, and judges have significant discretion as to who they may stop, search, arrest, and prosecute even in a supposedly racially neutral system.⁷⁴ During this first stage, the implicit bias—which the previously described history of America’s criminalization of Black Americans created—affects decision makers and results in high numbers of Black Americans in prison during this stage. Second, as discussed below, several court cases prevent legal challenges to racial discrimination.⁷⁵

Several laws in the decades during and after the Nixon administration provided for increasingly harsh penalties on criminal defendants that resulted in the incarceration of an excessive number of Black Americans in prison in comparison to their numbers outside of prison. In other words, the percentage of Black Americans of people in prisons is larger than the percentage of Black Americans of people outside of prisons.

⁶⁶ Alexander, *The New Jim Crow* (2020) pp. 40-44.

⁶⁷ *West Chester & P. R. Co. v. Miles* (1867) 55 Pa. 209.

⁶⁸ See e.g., *Patterson v. Taylor* (1906) 51 Fla. 275.

⁶⁹ *Morrison v. State* (1906) 116 Tenn. 534.

⁷⁰ *Plessy v. Ferguson* (1896) 163 U.S. 537, 548.

⁷¹ See generally, Jim Crow Museum, Examples of Jim Crow Laws - Oct. 1960 – Civil Rights <<https://www.ferris.edu/htmls/news/jimcrow/links/misclink/examples.htm>> [as of Dec. 22, 2021].

⁷² Alexander, *The New Jim Crow* (2020), Small, *The War on Drugs Is a War on Racial Justice* Social Research 68, no. 3 (2001): 896–903 <<http://www.jstor.org/stable/40971924>> [as of Dec. 29, 2021].

⁷³ *Id.* at 130.

⁷⁴ *Id.* at 130.

⁷⁵ *Id.* at 130.

Some scholars argue that during this post-civil rights era, both Republican and Democratic politicians ran on “tough on crime” or “law and order” political platforms that espoused especially punitive criminal laws—particularly laws prohibiting drug sale, distribution, possession, and use—to gain support from voters. John Ehrlichman, who had been Nixon’s domestic policy advisor, explained:

“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”⁷⁶

Much like what Ehrlichman describes, and many scholars have noted, Republican politicians essentially sought to appeal to conservative white people who were unhappy with the results of the civil rights movement through the support of punitive criminal laws.⁷⁷ Democratic politicians such as President Bill Clinton also ran on tough on crime platforms during his campaigns and supported punitive laws once in office.

These political campaigns often relied on the negative stereotypes of Black American as criminals built by the previous three centuries of American law and order. For example, the Willie Horton advertisement, which supporters of Republican nominee George H.W. Bush produced for his 1988 presidential campaign against Democratic nominee Michael Dukakis, shows how advertisements can perpetuate the stereotype of Black American men as predators and rapists of white women. William Horton, a Black American, was convicted of murdering a white woman and stabbing her partner while on furlough through a weekend pass from prison through a Massachusetts program while serving a life sentence for murder and robbery when Dukakis was governor of Massachusetts. The advertisement primarily consisted of a voice over summarizing Horton’s crimes and a mug shot where he looks particularly threatening. The advertisement also nicknamed Mr. Horton “Willie.”⁷⁸ The “Willie Horton” hysteria inaccurately portrayed furlough programs, which had bi-partisan support, were used in all 50 states, and afforded incarcerated individuals the opportunity to leave prison for a certain amount of time to, for example, visit family, to search for employment, and prepare for life out of prison.⁷⁹ Indeed, thousands of incarcerated individuals safely took advantage of furlough programs in the nation, and William Horton was the rare tale of a furlough-gone-bad.⁸⁰

⁷⁶ Baum, *Legalize It All* Harper’s Magazine April 2016 p. 22 <<https://archive.harpers.org/2016/04/pdf/HarpersMagazine-2016-04-0085915.pdf>> [as of Dec. 28, 2021].

⁷⁷ Primuth, *Ronald Reagan’s Use of Race in the 1976 and 1980 Presidential Elections* The Georgia Historical Quarterly 100, no. 1 (2016): 36–66 <<http://www.jstor.org/stable/43855884>> [as of Dec. 29, 2021] [summarizing scholarship].

⁷⁸ Schwartzapfel and Keller, *Willie Horton Revisited* (May 13, 2015) The Marshall Project <<https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>> [as of February 9, 2022].

⁷⁹ Schwartzapfel and Keller, *Willie Horton Revisited* (May 13, 2015) The Marshall Project <<https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>> [as of February 9, 2022].

⁸⁰ Schwartzapfel and Keller, *Willie Horton Revisited* (May 13, 2015) The Marshall Project <<https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>> [as of February 9, 2022];

Nixon declared a “War on Drugs” in 1971.⁸¹ In the speech on it, he described drug abuse as “Public Enemy Number One.”⁸² This marked the beginning of the federal government’s effort to fight illegal drugs by significantly increasing penalties, enforcement, and incarceration of people who possessed, distributed, and sold illegal drugs.⁸³ Rather than treat drug use as a public health issue, the American government chose to treat illegal drug use as a criminal justice issue.⁸⁴ In other words, federal and state governments chose to punish drug users and those involved in the sale and distribution of drugs. As a result, the war on drugs continues today and is what some refer to as the longest American war.⁸⁵ As described below, it was likely a primary cause for the high numbers of Black Americans in prison—even though there is some evidence that they are statistically not more likely to use drugs⁸⁶ or engage in violent crime.⁸⁷

In the decades that followed Nixon’s announcement initiating the war on drugs, Congress passed laws that provided for especially punitive penalties for criminal defendants. For example, during the presidency of Ronald Reagan, Congress passed the Anti-Drug Abuse Act of 1986, which allocated \$1.7 billion to the war on drugs and provided for mandatory minimum sentences for various drug offenses.⁸⁸

Specifically, and most notably, the law included far more severe punishment for the distribution of crack cocaine (cocaine in a solid pellet form) than the punishment for powdered cocaine (cocaine in a fine powdered form).⁸⁹ This occurred even though there is no pharmacological difference between these forms of the drug.⁹⁰ The law established a 100 to 1 disparity in the punishment created for the distribution of crack and powdered

⁸¹ Richard M. Nixon, Remarks About an Intensified Program for Drug Abuse Prevention (June 17, 1971)

<<https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control>> [as of Dec. 29, 2021].

⁸² Ibid.

⁸³ Gorman, “War On Drugs” Continues In United States Under New Leadership (1993) *BMJ: British Medical Journal* vol. 307, no. 6900, 1993, pp. 369–371 <www.jstor.org/stable/29720648> [as of July 30, 2021]; Reuter, *Why Has US [sic] Drug Policy Changed So Little over 30 Years?* (2013) *Crime and Justice*, vol. 42, no. 1, pp. 75–140 <<https://www.jstor.org/stable/10.1086/670818>> [as of July 30, 2021].

⁸⁴ See generally Feldman, *Public Health and the Policing of Black Lives* *Harvard Public Health Review* 7 (2015): 1–3.

<<https://www.jstor.org/stable/48503132>> [as of Dec. 29, 2021]; American Public Health Association, Policy Statement: Defining and Implementing a Public Health Response to Drug Use and Misuse, November 5, 2013 <<https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/08/08/04/defining-and-implementing-a-public-health-response-to-drug-use-and-misuse>> [as of Jan. 3, 2022].

⁸⁵ See, e.g., Hudak, Biden should end America’s longest war: The War on Drugs <<https://www.brookings.edu/blog/how-we-rise/2021/09/24/biden-should-end-americas-longest-war-the-war-on-drugs/>> [as of Dec. 29, 2021]; see also *The War on Drugs turns 50 today. It’s time to make peace* *Washington Post* June 17, 2021 <<https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/>> [as of Dec. 29, 2021].

⁸⁶ See McCabe, *Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students* *J. Ethn Subst. Abuse* 2007 6(2): 75-95 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2377408/>> [as of Dec. 29, 2021]; U.S. Department of Health and Human Services, Institutes of Health, National Institute of Drug Abuse, *Drug Use Among Racial/Ethnic Minorities (Revised)*, <https://archives.drugabuse.gov/sites/default/files/minorities03_1.pdf> [as of Dec. 29, 2021].

⁸⁷ D’Alessio & Stolzenberg, *Race and the Probability of Arrest* *Social Forces* 81, no. 4 (2003): 1381–97. <<http://www.jstor.org/stable/3598118>> [as of Dec. 29, 2021].

⁸⁸ Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 et seq).

⁸⁹ Ibid.

⁹⁰ Vagins and McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (Oct. 2006) *ACLU* at pp. ii <https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf> [as of Feb. 9, 2022].

cocaine.⁹¹ For example, distribution of only five grams of crack results in a minimum five-year federal prison sentence.⁹² Meanwhile, distribution of 500 grams of powder cocaine results in the same sentence.⁹³ In 1988, Congress added even more punitive penalties to the law.⁹⁴

The new law authorized public housing authorities to evict any tenant who allows any form of drug-related criminal activity to occur in or near public housing premises and eliminated many federal benefits, such as student loans, for anyone convicted of a drug offense.⁹⁵ The law also expanded the use of the death penalty for serious drug-related offenses and imposed new mandatory minimums for drug offenses.⁹⁶ This Anti-Drug Abuse Act has had a disproportionate effect on Black Americans because Black Americans have more commonly used crack cocaine rather than powdered cocaine.⁹⁷

Some scholars argue that other laws passed during this time intensified drug law enforcement by incentivizing local law enforcement to stop, search, prosecute, and/or incarcerate large numbers of people. For example, during the presidency of President Bill Clinton, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 or “The 1994 Crime Bill,” which made several changes to the law, such as increased federal penalties for many crimes; made a variety of offenses federal crimes; and provided federal funding under certain conditions that encouraged the growth of a more punitive criminal justice system.⁹⁸

Many scholars have argued that this bill contributed to the exponential growth of the prison population in the United States in large part by promising \$8 billion to states if they adopted “truth-in-sentencing” laws, which mandated that incarcerated people serve at least 85 percent of their sentences.⁹⁹ To name another example, Congress passed the Comprehensive Forfeiture Act of 1984, which as some scholars argue, incentivizes police to engage in over-policing because it allows them to keep assets of people engaging in criminal activity.¹⁰⁰

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ 21 U.S.C. § 801

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Sklansky, *Cocaine, Race, and Equal Protection* (1995) *Stanford Law Review*, vol. 47, no. 6, pp. 1283–1322.

⁹⁸ 42 U.S.C. 12631 et seq; see generally Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System* (Sept. 9, 2019) Brennan Center < <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice>> [as of Feb. 9, 2022].

⁹⁹ Eisen et al., *Undoing the 1994 Crime Bill* (2019) *Democracy & Justice: Collected Writings*, pp. 71–72 <<https://www.jstor.org/stable/resrep28415.27>> [as of July 30, 2021].

¹⁰⁰ Blumenson & Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda* (1998) 65 *U. Chi. L. Rev.* 35, 82; Rainbolt, *Crime, Property, and Justice Revisited (The Civil Asset Forfeiture Reform Act of 2000)* (2003) *Public Affairs Quarterly*, vol. 17, no. 3, pp. 219–239 <www.jstor.org/stable/40441355> as of July 30, 2021]; *U.S. v. Reese*, 2 F.3d 870 (9th Cir. 1993) [involving police officers who used excessive force and were at least partly incentivized by keeping seized drug money]; Rainbolt, *Crime, Property, and Justice Revisited (The Civil Asset Forfeiture Reform Act of 2000)* (2003) *Public Affairs Quarterly*, vol. 17, no. 3, pp. 219–239 <www.jstor.org/stable/40441355> as of July 30, 2021].

F. California

Much like courts in southern states and northern states, California courts also discriminated against Black Americans throughout history. During early statehood, California passed discriminatory laws and California courts cited discriminatory cases from other parts of the country.

For example, the California Supreme Court approvingly cited *Roberts v. Boston*, which is the case where the Massachusetts Supreme Court approved of segregated schools, when it upheld school segregation in San Francisco in 1874.¹⁰¹ In that same case, the California Supreme Court also pointed to *West Chester and Philadelphia Railroad Company v. Miles* where the Pennsylvania Supreme Court ruled against Mary Miles, a Black woman, who refused to sit in the “colored-only” section of a streetcar.¹⁰²

In 1919, the California Supreme Court cited *Miles* when it held against a Black couple, the Garys, who sought to keep their Los Angeles property despite a racially restrictive covenant that prohibited them from possessing the property.¹⁰³ These cases not only show that California courts treated Black Americans as inferior, they also show that California courts were actively involved in the nationwide legalization of discrimination against Black Americans.

In addition to court cases, California also passed discriminatory laws. As discussed in other chapters, in 1850, the state prohibited marriage between Black and white Americans¹⁰⁴ and prohibited Black Americans from testifying in civil and¹⁰⁵ criminal court cases that involved white people.¹⁰⁶ The California Supreme Court upheld this law prohibiting testimony from Black Americans.¹⁰⁷ Like other states and the federal government, California also passed its own Fugitive Slave Law in 1852.¹⁰⁸

[May be expanded with additional research based on criminalization of Black Americans by Californian politicians and additional laws.]

IV. Implicit Bias

After federal, state, and local governments intentionally and methodically criminalized Black Americans through legal social control, Americans, regardless of race, began to associate Black Americans with crime. Psychologists, for instance, have found that Americans of all races visually associate Black Americans with

¹⁰¹ *Ward v. Flood* (1874) 48 Cal. 36, 52

¹⁰² *Ibid.*

¹⁰³ *Los Angeles Inv. Co. v. Gary* (1919) 181 Cal. 680.

¹⁰⁴ Stats. 1850, ch. 140, p. 424

¹⁰⁵ The Civil Practice Act, Stats. 1851, ch. 1, § 394, p. 113.

¹⁰⁶ The Criminal Act of 1850, Stats. 1850, ch. 99, § 14, p. 230.

¹⁰⁷ *People v. Howard* (1860) 17 Cal. 63

¹⁰⁸ An Act Respecting Fugitives from Labor, and Slaves Brought to This State Prior to Her Admission into the Union, Chap. XXXIII, April 15, 1852; see generally Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California*, Pacific Historical Review vol. 80, no. 1 (2011) pp. 28-63 <<https://www.jstor.org/stable/10.1525/phr.2011.80.1.28>> [as of Nov. 18, 2021].

crime and the stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.¹⁰⁹

There is significant research showing that the association between Black Americans and crime is strong and automatic rather than subject to intentional control.¹¹⁰ There are also studies, which indicate that, just as Black Americans can trigger thoughts of crime, thinking of crime can trigger thoughts of Black Americans.¹¹¹ In fact, some scholars have shown that in cases involving a white victim, the more stereotypically Black American a defendant is perceived to be, the more likely that person is perceived to be dangerous.¹¹²

After four centuries of white vigilante violence, laws punishing Black Americans for normal, everyday behavior created a stereotype that that Black Americans are threats to society. This belief seeped into many facets of society, none more so than the criminal justice system.

A new but growing body of scholarship shows that police officers are frequently biased against Black Americans.¹¹³ There is also some preliminary evidence that new policing technologies may perpetuate how police treat Black Americans because new technologies use algorithms that are based on human biases that will therefore replicate, mask, transfer, and exacerbate these issues.¹¹⁴ [May be expanded with incorporation of witness testimony from January hearing.]

V. Policing

A. Slave Patrols

Police have harassed, brutalized, and murdered, Black Americans for decades since the slavery era. Slavery era “slave patrols” were an early form of policing and first began in the Carolina colony in the early 1700s.¹¹⁵ Slave patrols were made up of ordinary citizens—e.g., farmers, hotelkeepers, and brick makers¹¹⁶—who banded together to catch, return, and discipline freedom seekers and prevent revolts.¹¹⁷ Some of the slave patrol

¹⁰⁹ Eberhardt et al, *Seeing Black: Race, Crime, and Visual Processing* (2004) *The Journal of Identity and Social Psychology* <<https://web.stanford.edu/~eberhard/downloads/2004-SeeingBlackRaceCrimeandVisualProcessing.pdf>> [as of May 16, 2021].

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Eberhardt, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* (2006) *Psychological Science* <https://www.scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1040&context=lsrp_papers> [as of May 17, 2021].

¹¹³ See generally Weir, Policing in black & white, *American Psychological Association, Monitor on Psychology*, December 2016 Vol. 47, No. 11 at p. 36 <<https://www.apa.org/monitor/2016/12/cover-policing>> [as of Jan. 2, 2021].

¹¹⁴ Moy, A Taxonomy of Police Technology's Racial Inequity Problems (2021) *U. Ill. L. Rev.* 139; see generally Okidegbe, When They Hear Us: Race, Algorithms and the Practice of Criminal Law (Summer 2020) *Kan. J.L. & Pub. Pol'y*, at 329, 338; Selbst, Disparate Impact in Big Data Policing (2017) *52 Ga. L. Rev.* 109; Richardson et al., Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice (2019) *94 N.Y.U. L. Rev.* 192.

¹¹⁵ Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (2001).

¹¹⁶ Russ, *Slave Patrol Ordinances of St. Tammany Parish, Louisiana, 1835-1838* (1972) *Louisiana History: The Journal of the Louisiana Historical Association* vol. 13, no. 4, pp. 399–412 <<https://www.jstor.org/stable/4231289>> [as of July 22, 2021]; Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (2001).

¹¹⁷ Ibid.

members were community leaders and the enslavers who enslaved large numbers of people in the region.¹¹⁸ Some slave patrols had written patrol enforcement instructions, member rosters, and correspondence.¹¹⁹ Others were more informal and simply consisted of all able-bodied white men in a community.¹²⁰ Every enslaving state had slave patrols by the end of the 18th century.

Slave patrols had many similarities with modern police departments. Much like current police departments, some slave patrols had hierarchical organization structures that mimicked military units with ranks such as captain. Slave patrols also used dogs to attack enslaved people by biting them but also to instill fear, and used bloodhounds to track down enslaved people.¹²¹ The following quote from Walter Rimm, who was born into enslavement in Texas, exemplifies both the fear slave patrols caused but also the ingenuity and resilience of Black Americans. According to Rimm's narrative in the Library of Congress' *Born in Slavery: Slave Narratives from the Federal Writers' Project, 1936-1938*, freedom seekers learned to run without shoes and put black pepper in their socks to make the slave patrols' bloodhounds sneeze and throw them off their scent.¹²²

Much like slave patrols, police continued to use dogs against Black Americans in the 20th century through the present. For example, police used dogs against protestors during the civil rights movement, such as in Birmingham, Alabama when police used dogs against demonstrators.¹²³ The United States Department of Justice has also noted in its 2015 report that the Ferguson Police Department "exclusively set their dogs against black individuals, often in cases where doing so was not justified by the danger presented." To name another example, in Baton Rouge, Louisiana, police dogs bit at least 146 people from 2017 to 2019 and almost all of whom were Black.¹²⁴

B. Targeting and Harassment of Black Political Leaders

Law enforcement agencies have not only targeted Black Americans and physically hurt them, but the federal government conducted targeted investigations against Black American leaders to neutralize their effectiveness. As discussed in Chapter 3 and 4, the Federal Bureau of Investigation and state intelligence agencies, like the Mississippi Sovereignty Commission, targeted and terrorized civil rights leaders and activists for the purposes of discrediting and deterring them.¹²⁵ The Mississippi Sovereignty Commission openly discussed murdering

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Spruill, *Slave Patrols, "Packs of Negro Dogs" and Policing Black Communities* (2016) *Phylon* (1960-) vol. 53, no. 1, 2016, pp. 42–66 <<https://www.jstor.org/stable/phyllon1960.53.1.42>> [as of July 22, 2021].

¹²² Narrative of Walter Rimm, Image 254 of Federal Writers' Project: Slave Narrative Project, Vol. 16, Texas, part 3, Lewis-Ryles, 1936 <<https://www.loc.gov/resource/mesn.163/?sp=253>> [as of Jan. 2, 2022]; see also U.S. Library of Congress, Collection: Born in Slavery: Slave Narratives from the Federal Writers' Project, 1936 to 1938 <<https://www.loc.gov/collections/slave-narratives-from-the-federal-writers-project-1936-to-1938/articles-and-essays/voices-and-faces-from-the-collection/>>

¹²³ See generally Parry, *Police Dogs and Anti-Black Violence* Black Perspectives <<https://www.aaihs.org/police-dogs-and-anti-black-violence/>> [as of Dec. 16, 2021]; Stephens, Police Wanted "A Dog That Would Bite A Black Person" The Marshall Project <<https://www.themarshallproject.org/2020/10/29/police-wanted-a-dog-that-would-bite-a-black-person>> [as of Jan. 2, 2022].

¹²⁴ Stole & Toohey, The City Where Police Unleash Dogs on Black Teens, October 12, 2021 The Marshall Project <<https://www.themarshallproject.org/2021/02/12/the-city-where-police-unleash-dogs-on-black-teens>> [as of Jan. 2, 2022].

¹²⁵ *Id.* at p. v.

civil rights activists and were implicated in false convictions of activists.¹²⁶ The FBI has continued surveillance action today against Black Lives Matter organizers.¹²⁷

C. Over-Policing

Due to implicit bias in policing, Black Americans' communities, paradoxically, simultaneously experience under-policing and over-policing. Black Americans are the victims of police brutality throughout the United States and in California. Further, police kill Black Americans at rates much higher than white people.¹²⁸ Although the murder of George Floyd by a Minnesota police officer and national protests attracted significant national media coverage of police brutality, this coverage simply showed what Black Americans have known since the slavery era: harassment, brutality, and murder of Black Americans has always been a part of this nation's history. The following discussion will show that police physically harm Black Americans more than other groups both nationwide and in California.

So far in 2022, police have killed approximately [redacted] Black Americans nationwide.¹²⁹ Although there is not currently a comprehensive nationwide database on use of force that contains information from all law enforcement agencies and types of deaths,¹³⁰ many scholars, commentators, and advocacy groups have shown that police kill Black Americans at similar rates across the nation.¹³¹ In fact, a study of thousands of use of force incidents has concluded that Black Americans are far more likely than other groups to be the victims of police uses of force.¹³²

There is a growing body of research that indicates racial biases significantly affect how police interact with Black Americans. In fact, a recent study shows that Black American and Latino suspects receive more force in the beginning stages of an interaction with police.¹³³ A 2021 study of traffic stop data in Florida shows that approximately 42 percent of police officers discriminate during traffic stops and that minority drivers are less likely to be able to leave with a warning when compared to white drivers.¹³⁴

A 2017 study of officer-worn body camera footage also indicate that police officers speak significantly less respectfully to Black Americans than to white Americans in everyday traffic stops, even after controlling for

¹²⁶ [citation]

¹²⁷ German, *The FBI has a history of targeting black activists. That's still true today.* *The Guardian*, June 26, 2020 <<https://www.theguardian.com/commentisfree/2020/jun/26/fbi-black-activism-protests-history>> [as of Jan. 3, 2022].

¹²⁸ The Washington Post, Police shootings database 2015-2021, <<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>> [as of Nov. 29, 2021].

¹²⁹ [Note: Citation to 2022 statistics to be inserted here closer to publication.]

¹³⁰ U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services, Uniform Crime Reporting Program, National Use of Force Data <<https://www.fbi.gov/services/cjis/ucr/use-of-force>> [as of July 28, 2021]; see also Federal Bureau of Investigation Crime Data Explorer, <<https://www.crime-data-explorer.fr.cloud.gov/pages/home>> [stating that there is only 57% participation from police agencies nationwide][as of July 28, 2021].

¹³¹ The Washington Post, Police shootings database 2015-2021, <<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>> [as of Nov. 29, 2021].

¹³²

¹³³ Kahn et al., *How Suspect Race Affects Police Use of Force in an Interaction Over Time* (2017) *Law and Human Behavior* 41(2):117-126 <<https://pubmed.ncbi.nlm.nih.gov/27762571/>> [as of July 30, 2021].

¹³⁴ Goncalves & Mello, *A Few Bad Apples? Racial Bias in Policing* (2021) *American Economic Review*, 111 (5): 1406-41 <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20181607>> [as of July 20, 2021].

officer race, infraction severity, stop location, and stop outcome.¹³⁵ In 2016, researchers found that there was pervasive racial discrimination in stops, searches, handcuffing, and arrests in Oakland, California.¹³⁶ There is also a significant amount of scholarship indicating that policing in Black American communities, such as through “stop and frisk” techniques, “communicates to Black American men that they are objects of disdain by the state and that their citizenship is degraded.”¹³⁷

There are federal programs and nationwide policing practices, particularly in the area of drug interdiction, that likely have contributed to the racial profiling we see throughout the nation. For example, Operation Pipeline is a federal program in which over 300 state and local law enforcement agencies train officers to use pretextual stops and consent searches on a large scale for drug interdiction. As another example, “Broken Windows” is an aggressive crime prevention strategy first implemented in New York City in the 1990s.¹³⁸ It resulted in arrests of large numbers of Latino and Black American youth.¹³⁹

A majority of Black Americans live in communities where there are higher rates of violent crime. Due to the effects of segregation, Black Americans comprised a large share of those living in poverty-stricken neighborhoods and communities where socioeconomic vulnerabilities contribute to higher rates of violent crime.¹⁴⁰ Sixty-two percent of Black Americans live in highly segregated, inner-city neighborhoods that experience a high degree of violent crime, while the majority of white Americans live in “highly advantaged” neighborhoods where there is little violent crime.¹⁴¹

There is empirical support for the observation that Black American communities are also simultaneously-under policed and over-policed depending on the type of crime.¹⁴² Specifically, some scholars believe that police arrest large numbers of Black Americans for relatively minor crimes, such as loitering, drug possession, and driving infractions. In 2019, Black Americans comprised 26 percent of all arrests yet they only made up 13.4 percent of the population.¹⁴³ According to a recent large-scale analysis of racial disparities in over 60 million

¹³⁵ Voigt et al., *Language from police body camera footage shows racial disparities in officer respect* (2017) Proceedings of the National Academy of Sciences <<https://web.stanford.edu/~eberhard/downloads/2017-LanguageFromPoliceBodyCameraFootage.pdf>> [as of May 16, 2021].

¹³⁶ Eberhardt et al, *Strategies for Change: Research Initiatives and Recommendation to Improve Police-Community Relations in Oakland, California* <<https://stanford.app.box.com/v/Strategies-for-Change>> [as of September 27, 2021]; Eberhardt et al, *Data for Change: A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, California, 2013-2014* <<https://stanford.app.box.com/v/Data-for-Change>> [as of September 27, 2021].

¹³⁷ Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities* (2014) 12 Ohio St J Crim L 57.

¹³⁸ Kamalu & Onyeozili, *A Critical Analysis of the ‘Broken Windows’ Policing in New York City and Its Impact: Implications for the Criminal Justice System and the African American Community* (2018) *African Journal of Criminology and Justice Studies: AJCJS*, Vol.11, No. 1 <<https://www.umes.edu/uploadedFiles/WEBSITES/AJCJS/Content/VOL%2011%20KAMALU%20FINAL.pdf>> [as of July 30, 2021].

¹³⁹ Ibid.

¹⁴⁰ Krivo & Peterson, *Extremely disadvantaged neighborhoods and urban crime* (1996) *Social Forces* 75(2): pp. 619-647 <<https://www.faculty.washington.edu/matsueda/courses/587/readings/Krivo%20Peterson%201996.pdf>> [as of July 29, 2021].

¹⁴¹ Krivo et al., *Segregation, racial structure, and neighborhood violent crime* (2009) *American Journal of Sociology* vol. 114, no. 6 pp. 1765–1802 <www.jstor.org/stable/10.1086/597285> [as of July 29, 2021].

¹⁴² Chalfin et al., *Police Force Size and Civilian Race Working Paper 28202*, National Bureau of Economic Research <https://www.nber.org/system/files/working_papers/w28202/w28202.pdf> [as of Nov. 29, 2021].

¹⁴³ U.S. Census Bureau, *Quick Facts: U.S.* <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> [as of July 22, 2021].

state patrol police stops in 20 states, including California, researchers found that police officers stop Black Americans more often than white drivers relative to their share of the driving-age population.¹⁴⁴

Further, these researchers found that stopped drivers—after controlling for age, gender, time, and location—are more likely to be ticketed, searched, and arrested when they are Black than when they are white.¹⁴⁵ The bar for searching Black American drivers is lower than for searching white Americans.¹⁴⁶ In fact, as Dr. Bruce Appleyard testified during the December 7, 2021 Task Force Meeting, there may even be a connection with formerly redlined communities and higher rates of police stopping and searching of Black Americans.¹⁴⁷ Further, some early data also indicates that police may have arrested a large number of Black Americans, relative to their portion of the population, for violating social distancing rules during the COVID-19 pandemic.¹⁴⁸

D. Rejection of Black Victimhood and Under-Policing

In addition to being perceived as more dangerous, Americans and police officers are also less likely to view Black Americans as victims of crimes. Particularly in areas of violence against women and girls, and mass shootings. Evidence of under-policing is also apparent in the significant news coverage of many cases in which law enforcement authorities appear to have ignored the disappearance of Black American women, girls, and children.

Although Black American women are more likely to suffer from sexual assault, these crimes are often ignored. These biases are rooted in history. In 1855, in the case of a 19-year-old enslaved woman, Celia, the judge instructed the jury that Missouri's laws protecting women who resist sexual assault did not apply to her—even though she killed her enslaver when he was attempting to rape her and she had endured five years of rape and the birth of two of his children.¹⁴⁹

According to a 2013 U.S. Department of Justice report, Black American women suffered from sexual assault at a rate of 2.8 per 1,000, whereas white women were attacked at a rate of 2.2 per 1,000. Although Black women experience more sexual violence, Black American women have historically not received the same level of attention as white women following sexual assaults.¹⁵⁰ Crimes against Black American women are poorly

¹⁴⁴ Pierson et al., *A large scale analysis of racial disparities in police stops across the United States* (2017) *Nature Human Behavior* 4, 736–745 (2020) <<https://www.nature.com/articles/s41562-020-0858-1>> [as of July 27, 2021].

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Bruce Appleyard, <<https://oag.ca.gov/ab3121/meetings>> [as of Jan. 27, 2022].

¹⁴⁸ Engel et al., *Racial Disparities and COVID-19*, National Commission on COVID-19 and Criminal Justice <<https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Racial-Disparities-and-COVID-19-Report.pdf>> [as of Nov. 20, 2021].

¹⁴⁹ See generally University of Michigan College of Literature, Science, and the Arts, *The Celia Project*, <<https://sites.lsa.umich.edu/celiaproject/research/>> [as of Jan. 27, 2022].

¹⁵⁰ Sood, *Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of the Rape of Black Women* (2018) 18(2) *U. Md. L.J. Race, Religion, Gender & Class* 405, 413, <<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1324&context=rrgc>> (as of Dec. 13, 2021) (Sood).

investigated and sometimes ignored entirely.¹⁵¹ Black American women and girls are more likely to be victims of sex trafficking in the United States than women and girls of other races, but they are also more likely to be prosecuted on prostitution charges.¹⁵² When police investigate alleged crimes against Black American women, they often believe the victims are not credible.¹⁵³ The few sexual assault crimes that actually lead to police charges are frequently not pursued by prosecutors, denying Black women access to justice.¹⁵⁴

Black American children on average remain missing longer and are more likely to be missing than non-Black American children.¹⁵⁵ Black American women and girls, in particular, go missing in numbers larger than their proportion of the population,¹⁵⁶ and not only the police but also the media¹⁵⁷ typically pay them less attention compared to missing white women and girls.¹⁵⁸ Similarly, there has also been news coverage on many cases that police and prosecutors likely properly handled improperly.¹⁵⁹ For example, a serial killer murdered approximately two dozen children, many of whom were Black boys, in Atlanta, Georgia during the late 1970s and early 1980s.¹⁶⁰ Police arrested and prosecutors convicted Wayne Williams of killing two adults and prosecutors never tried or convicted him of killing any children, even though many believe he murdered the missing children.¹⁶¹ In fact, prosecutors have never obtained a conviction for the murders of all the missing children.¹⁶²

Some very new and limited scholarship shows that “mass shootings” occur more in Black communities than in other communities and is more prevalent than the media makes it appear because what constitutes “mass shootings” vary between government agencies.¹⁶³ Often, the media ignores or does not fully cover shootings because they view them as common in Black communities. [May be expanded with additional research.]

¹⁵¹ Sood, *supra*, at pp. 406-407.

¹⁵² See generally Davey, Snapshot on the State of Black Women and Girls: Sex Trafficking in the U.S. (2020), Congressional Black Caucus Foundation <<https://www.cbcfinc.org/wp-content/uploads/2020/05/SexTraffickingReport3.pdf>> (as of Dec. 13, 2021).

¹⁵³ Sood, *supra*, at p. 407.

¹⁵⁴ Sood, *supra*, at pp. 405-407.

¹⁵⁵ See, e.g., van de Rijt, et al., Racial and gender differences in missing children’s recover chances, PLoS One 2018 13(12) December 31, 2018 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6312271/>> [as of Jan. 3, 2022].

¹⁵⁶ U.S. Department of Justice, Federal Bureau of Investigation, 2020 NCIC Missing Person and Unidentified Person Statistics <<https://www.fbi.gov/file-repository/2020-ncic-missing-person-and-unidentified-person-statistics.pdf/view>> [as of Jan. 3, 2022].

¹⁵⁷ Sommers, *Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons*, The Journal of Criminal Law and Criminology (1973-) 106, no. 2 (2016): 275–314 <<http://www.jstor.org/stable/45163263>> [as of Jan. 3, 2022].

¹⁵⁸ See generally, Rivers, Our Black Girls <<https://ourblackgirls.com/>> [as of Jan. 3, 2022]; see also Black Coalition Fighting Back Serial Murders, <<https://www.facebook.com/blackcoalitionfightback/>> [as of Jan. 27, 2022].

¹⁵⁹ Burch, *Who Killed Atlanta’s Children?*, New York Times, Apr. 30 2019 <<https://www.nytimes.com/2019/04/30/us/atlanta-child-murders.html>> [As of Jan. 27, 2022].

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Barton et al, *Mass Shootings Are Soaring, with Black Neighborhoods Hit Hardest* (September 3, 2020) <<https://www.thetrace.org/2020/09/mass-shootings-2020-gun-violence-black-neighborhoods/>> [as of Apr. 9, 2021].

E. Racial Profiling and Police Line Ups

The daily ongoing fear of racial profiling has an enduring effect on Black Americans and extends to family members. For example, former First Lady Michelle Obama recently revealed in an interview her fears about her daughters becoming the victims of racial profiling.¹⁶⁴ “The fact that they are good students and polite girls, but maybe they’re playing their music a little loud, maybe somebody sees the back of their head and makes an assumption[.]” Obama said. “Many of us still live in fear as we go to the grocery store, walking our dogs[.]” she said.¹⁶⁵

The experience of discrimination in policing likely also effects how Black Americans dress in order to possibly avoid racial profiling. Some research indicates that American society views Black Americans so differently than the rest of the population, that marketing professionals have identified and potentially even relied on this trend.¹⁶⁶ As a result, marketing professionals may incorporate beliefs in their work that Black Americans purchase consumer products to defy racism and share collective identities that American society values, such as middle-class membership.¹⁶⁷

A growing body of research suggests that discrimination against Black Americans also occurs in police lineups. For example, one recent study showed that when perpetrators were Black Americans, explicitly egalitarian witnesses, who were more egalitarian in their views on race, more often made incorrect identification decisions than witnesses who stated they were racially prejudiced.¹⁶⁸

Employment discrimination in police departments against Black American applicants may exacerbate discrimination and police brutality against Black Americans. In fact, the Obama administration’s Task Force on 21st Century Policing noted in its recommendations that the diversity of the nation’s law enforcement agencies was an important aspect in developing community trust in the police.¹⁶⁹ The United States Equal Employment Opportunity Commission (EEOC) has specifically identified problems with hiring, retention, harassment, and promotion of Black American police officers.¹⁷⁰ Further, police officers have publicly complained in news outlets throughout the country about issues around discrimination and harassment against Black American police officers and correctional officers.¹⁷¹ These conditions have resulted in many departments that have very

¹⁶⁴ Columbia Broadcasting System (CBS) This Morning, Interview of Michelle Obama (CBS 2021) <https://www.cbs.com/shows/cbs_this_morning/video/FCuZB76_NQQQyQZowu5qoTqx3H3Izbq1/former-first-lady-michelle-obama-reacts-to-chauvin-verdict/?cbsclick=VAg2SuS5qxyLUfc0v2xGjxRzUkBW0dwFMzMhQw0&vndid=2229206&clickid=2229206&sharedid=&ftag=PPM-09-10aag1f&dclid=COPb5YiWtfICFfMzwQodRYgM4g> [as of Aug. 16, 2021].

¹⁶⁵ Ibid.

¹⁶⁶ Lamont et al., *How Blacks Use Consumption to Shape Their Collective Identity* (2001) *Journal of Consumer Culture* <https://scholar.harvard.edu/files/lamont/files/how_blacks_use_consumption.pdf> [May 16, 2021].

¹⁶⁷ Ibid.

¹⁶⁸ Edlund et al., *Eyewitness Racial Attitudes and Perpetrator Identification: The Lineup Method Matters* <<https://www.niu.edu/jskowronski/publications/EdlundSkowronski2008.pdf>> [as of September 27, 2021].

¹⁶⁹ U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission, *Advancing Diversity in Law Enforcement* (Oct. 2016) <<https://www.eeoc.gov/advancing-diversity-law-enforcement>> [as of Aug. 16, 2021].

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

few Black American police officers. Some scholars have argued that this lack of diversity in police departments contributes to discrimination and police brutality against Black Americans.

F. Extrajudicial Police Killings

There is a very long history of not only extrajudicial violence—but also killings of Black Americans throughout the United States by police since the slavery era to present day. This history has not been limited to the southern states—but also California’s history as discussed in Chapter 3. Nationwide, there are many recent and well-publicized examples of police killing Black Americans such as: George Floyd (Minneapolis, Minnesota) and Breonna Taylor (Louisville, Kentucky).¹⁷² Other examples of Black Americans who have died while in police custody are common such as Sandra Bland in Waller County, Texas. Others have likely died because of police neglect such as Mitrice Richardson who disappeared in Malibu, California in 2009. Regardless of whether a Black American died because of negligence by the police or a deliberate murder, prosecutors rarely prosecute and convict police officers despite significant public awareness.

Although there is not currently a comprehensive governmental nationwide database, which collects information from all law enforcement agencies and on all types of deaths, many scholars, commentators, and advocacy groups have shown that police kill Black Americans at similar rates across the nation. According to a well-regarded nongovernmental database, Black Americans comprised 28 percent of the people who police killed in 2020—despite the fact that they only make up 13 percent of the population.¹⁷³ Police killed Black Americans at higher rates than white people in 47 of the 50 largest states.¹⁷⁴ Black Americans are three times more likely to be killed by police.¹⁷⁵ They are also 1.3 times more likely to be unarmed than white people when they are killed by the police.¹⁷⁶ In fact, the statistics may be worse than this because, according to one recent study of data from 1980 to 2019, more than half of all killings by police in the U.S. may go unreported and the majority of those killed are black.¹⁷⁷

G. California

Currently, there is significant evidence indicating that the statistics on violence by police against Black Americans is similar in California.¹⁷⁸ For example, statistics from California’s Racial and Identity Profiling Advisory Board’s recent report present a concerning picture. In the board’s 2022 report, which is located [here](#),

¹⁷² Say Their Names Memorial, <<https://www.saytheirnamesmemorials.com/names>> [as of Dec. 15, 2021]; Stanford Green Library Exhibit, <<https://exhibits.stanford.edu/saytheirnames/feature/green-library-exhibit>> [as of Dec. 15, 2021]; #Say Their Names <<https://sayevery.name/>> [as of Dec. 15, 2021].

¹⁷³ The Washington Post, Police shootings database 2015-2021, <<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>> [as of Nov. 29, 2021].

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Mapping Police Violence Database <<https://www.mappingpoliceviolence.org/>> [as of May 17, 2021].

¹⁷⁷ Sharara, et al., *Fatal police violence by race and state in the USA, 1980-2019*, The Lancet <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01609-3/fulltext#articleInformation](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01609-3/fulltext#articleInformation)> [as of Jan. 6, 2022].

¹⁷⁸ See Rosenhall, California’s attempt to reduce police shootings, explained (May 2021) <<https://www.calmatters.org/explainers/california-police-shootings-deadly-force-new-law-explained/>> [as of Apr. 8, 2021] [summarizing data from government and scholarly sources].

data from 18 law enforcement agencies, including California's 15 largest agencies, shows that police stopped a higher percentage of people perceived to be Black for reasonable suspicion than any other racial group.¹⁷⁹

Further, Black Americans comprise only seven percent of the population, but those perceived to be Black made up 17 percent of people police stopped.¹⁸⁰ The report also states that officers searched, detained, handcuffed, and removed from vehicles more people who the officers perceived as Black than individuals they perceived as white.¹⁸¹ Search discovery rate analysis showed that individuals who police perceived as Black had the highest search rates.¹⁸² People who police perceived to be Black and have a disability had higher search rates than white people perceived to have a disability.¹⁸³ People perceived to be Black were also more likely to have police use force against them compared to people perceived as white.¹⁸⁴ Police officers also reported ultimately taking no action during a stop most frequently when stopping a person they perceived to be Black, suggesting there may have been no legitimate basis for the stop.¹⁸⁵

In the 1980s, the Los Angeles Police Department, which is the largest police department in California and one of the largest in the country, referred to Black Americans suspects as “dog biscuits.”¹⁸⁶ Victims of police dogs sued and alleged that LAPD disproportionately used dogs in minority neighborhoods, which resulted in police dogs inflicting 90 percent of their reported bites on Black Americans and Latinos.¹⁸⁷ Similarly, but more recently in 2013, the Special Counsel to the Los Angeles County Sheriff's Department, which is the largest sheriff's department in California and the country, found that Black Americans and Latinos comprised 89 percent of the total individuals who were bitten by the department's dogs from 2004 to 2012. During the same time, the Special Counsel found that the number of Black Americans that police dogs bit increased 33 percent.¹⁸⁸

Historically, there is some evidence that bias against Black Americans informs police enforcement of laws prohibiting drugs, such as marijuana before legalization in California. For example, the Operation Pipeline Program in California led to racial profiling in the state. In a 1999 report by the California State Legislature, the California Highway Patrol described Operation Pipeline enforcement efforts as a way to find illegal drugs by generating “a very high volume of legal traffic enforcement stops to screen for criminal activity, which may include drug trafficking.”¹⁸⁹ As a California Highway Patrol Office said, “It's sheer numbers. . . Our guys make

¹⁷⁹ Cal. Department of Justice, Racial and Identity Profiling Advisory Board Annual Report 2022 <<https://oag.ca.gov/system/files/media/ripa-board-report-2022.pdf>> [as of Jan. 6, 2022].

¹⁸⁰ *Id.* at p. 8.

¹⁸¹ *Id.* at p. 8.

¹⁸² *Id.* at p. 8.

¹⁸³ *Id.* at p. 12.

¹⁸⁴ *Id.* at p. 9.

¹⁸⁵ *Id.* at p. 8.

¹⁸⁶ Newton, L.A. *Finds Mixed Results in Curbing Police Dog Bites*, March 1, 1996 Los Angeles Times <<https://www.latimes.com/archives/la-xpm-1996-03-01-mn-41895-story.html>> [as of Jan. 2, 2022].

¹⁸⁷ *Lawson v. Gates* (Super. Ct. L.A. County, 1995, No. BC 031232).

¹⁸⁸ U.S. Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department, March 4, 2015 <https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf> [as of January 2, 2022].

¹⁸⁹ Gross & Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway (2002) 101 Mich. L. Rev. 651.

a lot of stops. You've got to kiss a lot of frogs before you find a prince." California Highway Patrol canine units were involved in nearly 34,000 such stops in 1997 and only two percent of those stopped were carrying drugs. In other states, up to 95 percent of all Operation Pipeline searches were unsuccessful.¹⁹⁰

Relatedly, an analysis of data from 2000 to 2008 in California showed that racism behind the enforcement of laws prohibiting marijuana use influenced arrests before its legalization.¹⁹¹ As a result, Black Americans were significantly more likely than white people to be arrested for a marijuana offense.¹⁹² Now that marijuana has become legal in California, recent news reports indicate that Black American entrepreneurs who seek to become a part of the new industry are unable to do so because of delays with implementation of social equity programs and slow licensing processes.¹⁹³

There is also a long history of violence against people of color and Black Americans throughout California. So far, in 2022, police killed [] Black Americans in California. For example, throughout Los Angeles' history, police have brutalized Black Americans and members of historically marginalized groups such as Native Americans, Latinos, and Asian Americans. This long history of violence was particularly acute between the 1920s and 1960s, which was a period characterized by police brutality against Black Americans and protests, such as the Watts Rebellion in 1965. [May be expanded with research on Watts Rebellion.]

Police brutality became such a concern in the Bay Area that the Black Panther Party for Self-Defense, which later became the Black Panther Party, formed in the Bay Area to provide protection to Black Americans from the police during the 1960s.¹⁹⁴ Two young activists, Huey Newton and Bobby Seale, saw brutality against civil rights protestors as part of a long history of police violence.¹⁹⁵ Eventually, the Black Panther Party for Self-Defense evolved into an organization that provided several other services to the community such as medical clinics and free breakfasts for children.¹⁹⁶ In fact, the Black Panthers even engaged in forms of "counter-mapping," which is a form of activism in which marginalized groups use maps to challenge inequality, to propose the creation of new police districts in Berkeley, California.¹⁹⁷

¹⁹⁰ Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism* (January 9, 2007) Esquire <<https://www.esquire.com/news-politics/a1223/driving-while-black-0499/>> [as of Apr. 9, 2021].

¹⁹¹ White & Holman, *Marijuana Prohibition in California: Racial Prejudice and Selective Arrests* Race, Gender, & Class Vol. 19, No. 3-4 2012 p. 75-82 <<https://www.jstor.org/stable/43497489>> [as of Nov. 18, 2021].

¹⁹² Ibid.

¹⁹³ Krupnick, "A farce of social equity": California is failing its Black cannabis businesses, *The Guardian* November 4, 2021 <<https://www.theguardian.com/us-news/2021/nov/04/cannabis-california-black-businesses>> [as of Jan. 3, 2022]; see also Major, Five Years After Recreational Legalization, California is Failing its Black Cannabis Owners, *Black Enterprise* November 9, 2021 <<https://www.blackenterprise.com/five-years-after-recreational-legalization-california-is-failing-its-black-cannabis-businesses/>>

¹⁹⁴ See generally Murch, *Living for the City: Migration, Education, and the Rise of the Black Panther Party in Oakland, California* (2010); Street, *The Historiography of the Black Panther Party* (2010) *Journal of American Studies* vol. 44, no. 2, pp. 351-375 <www.jstor.org/stable/40648818> [as of July 28, 2021].

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Alderman & Inwood, *How Black Cartographers Put Racism on the Map*, *Next City* February 24, 2021 <<https://nextcity.org/urbanist-news/how-black-cartographers-put-racism-on-the-map>> [as of January 26, 2022].

Several police departments in California have a particularly troubling and well-documented history of brutalizing Black Americans. The beating of Rodney King by the LAPD is one such example.¹⁹⁸ Often, such incidents of police brutality led to community protests that, in turn, sometimes continued brutality by police.¹⁹⁹ There is also at least some anecdotal evidence that police gangs, such as those alleged in the Los Angeles County Sheriff’s Department, have exacerbated the brutalization of Black Americans by law enforcement in California.²⁰⁰ For example, in 1990, at least 75 Lynwood resident filed a class action lawsuit alleging that the sheriff’s department allowed the “Vikings,” a sheriff’s department deputy gang, to carry out racially motivated violence in the community.²⁰¹

Discrimination by Californian police against Black Americans is not limited to large police departments like LAPD and the Los Angeles County Sheriff’s Department. For example, according to a recent analysis of traffic stops by the San Diego Police Department from 2014 to 2015, officers are more likely to search and question Black American drivers than white drivers even though officers were less likely to find them with contraband.²⁰² An evaluation of 2016 to 2018 data showed that both the San Diego Police Department and Sheriff’s Department were more likely to stop, search, and use force against Black Americans and people with disabilities than other groups.²⁰³ Further, Black Americans were 4.3 times more likely than white people to be arrested by the police department for drug possession even though research shows that Black and white people use and sell drugs at similar rates.²⁰⁴ The police department also stopped Black Americans at a rate three times higher than white people.²⁰⁵ Both agencies used higher levels of force against Black Americans compared to other groups.²⁰⁶ Most troubling, both agencies used more severe levels of force against Black Americans than white people at every level of alleged resistance.²⁰⁷

Discrimination against Black Americans by police departments is also not limited to populous cities like San Diego, but extends to California’s rural and suburban regions. For example, the California Attorney General has

¹⁹⁸ See generally Meyer, *Police Shootings at Minorities: The Case of Los Angeles* (1980) *The Annals of the American Academy of Political and Social Science*, vol. 452, 1980, pp. 98–110 [as of July 29, 2021]; Knight, *Justifiable Homicide, Police Brutality, or Governmental Repression? The 1962 Los Angeles Police Shooting of Seven Members of the Nation of Islam* (1994) *The Journal of Negro History* vol. 79, no. 2, pp. 182–196 <www.jstor.org/stable/271762> [as of July 29, 2021]; Herbert, *Morality in Law Enforcement: Chasing ‘Bad Guys’ with the Los Angeles Police Department* (1996) *Law & Society Review* vol. 30, no. 4, pp. 799–818 <www.jstor.org/stable/3054118> [as of July 29, 2021]; Stuart, *Constructing Police Abuse after Rodney King: How Skid Row Residents and the Los Angeles Police Department Contest Video Evidence* (2011) *Law & Social Inquiry* vol. 36, no. 2, pp. 327–353 <www.jstor.org/stable/23011895> [as of July 28, 2021].

¹⁹⁹ See generally Roussell and Gascón, *Defining ‘Policeability’: Cooperation, Control, and Resistance in South Los Angeles Community-Police Meetings*, *Social Problems* (2014) vol. 61, no. 2 pp. 237–258 <www.jstor.org/stable/10.1525/sp.2014.12059> [as of July 29, 2021].

²⁰⁰ <https://oig.lacounty.gov/Portals/OIG/Reports/CJLP_Report_LASD_Deputy_Gangs_012021.pdf?ver=Q0LQd4UW_mdwOgvwRj9DeQ%3D%3D> [as of Jan. 3, 2022].

²⁰¹ *Id.* at 24.

²⁰² Chanin, et al., *Traffic enforcement in San Diego, California: An analysis of SDPD vehicle stops in 2014 and 2015*, November 2016 at p. 71 <<https://www.sandiego.gov/sites/default/files/sdpdvehiclestopsfinal.pdf>> [as of Jan. 6, 2022].

²⁰³ Campaign Zero, <https://campaignzero.org/sandiego> [Jan. 6, 2022].

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

investigated²⁰⁸ and secured a judgment²⁰⁹ involving the Kern County Sheriff's Department regarding unlawful practices such as unreasonable use of force, stops, searches, and seizures, and failure to exercise appropriate management and supervision of deputies. Similarly, the Attorney General has investigated²¹⁰ the Bakersfield Police Department, and secured a judgment involving the police department to strengthen policing and community engagement.²¹¹ After the fatal shooting of Stephon Alonzo Clark by members of the Sacramento Police Department, the Attorney General conducted a review of the Sacramento Police Department's policies, procedures, and training regarding the use of force, and issued two reports to help guide the police department's reform efforts.²¹² The Attorney General is also reviewing the practices of the Torrance Police Department amidst serious allegations of racist text messages, some of which contained disparaging comments about Black Americans, and other discriminatory conduct.²¹³

As a result of discrimination against Black Americans by police throughout the state, Black Americans are overrepresented among people who the police physically harm. Black Americans made up 18 percent of the people police have shot or seriously injured, even though they made up just six percent of California's population, from 2016 to 2019 according to the California Department of Justice.²¹⁴ In Los Angeles County, which is the state and country's most populous county,²¹⁵ the statistics are particularly troubling. As of November 2021, Police have killed 945 people since 2001, 25 percent of whom were Black American even though Black Americans comprised only eight percent of the population during that time.²¹⁶ In the San Francisco Bay Area, according to a recent study, 27 percent of the people police killed were Black even though they only comprised seven percent of the population.

The daily fear of racial profiling against Black Californians by police because is well known. One example of racial profiling in California involves the stop of former Los Angeles Assistant District Attorney Johnnie

²⁰⁸ Cal. Department of Justice, Complaint for Injunctive Relief <<https://oag.ca.gov/sites/default/files/Complaint%20Filed.pdf>> [as of Nov. 29, 2021].

²⁰⁹ Cal. Department of Justice, Stipulated Judgment <<https://oag.ca.gov/sites/default/files/Judgment.pdf>> [as of Nov. 29, 2021].

²¹⁰ Cal. Department of Justice, Complaint for Injunctive Relief <<https://oag.ca.gov/system/files/attachments/press-docs/Complaint%20for%20Injunctive%20Relief%20Filed.pdf>> [as of Nov. 29, 2021].

²¹¹ Cal. Department of Justice, Stipulated Judgment <https://oag.ca.gov/system/files/attachments/press-docs/Stipulation%20and%20Order.pdf> [as of Nov. 29, 2021].

²¹² Cal. Department of Justice, Sacramento Police Department Report & Recommendations 2019 <<https://oag.ca.gov/system/files/attachments/press-docs/spd-report.pdf>> [as of Nov. 29, 2021]; Cal. Department of Justice, Review of Sacramento Police Department Report & Recommendations Phase II 2020 <https://oag.ca.gov/system/files/attachments/press-docs/SPD%20Report%20Phase%20II_0.pdf> [as of Nov. 29, 2021].

²¹³ Cal. Department of Justice, Attorney General Bonta Launches Independent Review of Torrance Police Department, Dec. 8, 2021 <<https://oag.ca.gov/news/press-releases/attorney-general-bonta-launches-independent-review-torrance-police-department>> [as of Dec. 15, 2021].

²¹⁴ Mendelson, Police Use Force on Black Angelenos at Dramatically Higher Rates, Data Shows Rates LAist (July 7, 2020) <<https://www.laist.com/2020/07/07/police-use-of-force-on-blacks-in-la-very-high.php>> [as of Apr. 9, 2021] [summarizing data from the California Department of Justice and American Community Survey].

²¹⁵ U.S. Census Bureau, 2020 Population and Housing State Data (August 12, 2021) <<https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html>> [as of Dec. 30, 2021].

²¹⁶ Los Angeles Times Staff, *Police Have Killed 923 People in L.A. County Since 2000*, Los Angeles Times (Apr. 1, 2021) <<https://www.latimes.com/projects/los-angeles-police-killings-database/#nt=00000172-6be6-d818-a7fb-6bfe448e0001-liE0promoSmall-7030colI-main>> [as of Nov. 8, 2021].

Cochran in Los Angeles in 1979.²¹⁷ Cochran was driving down Sunset Boulevard with his two youngest children in the back seat when a police car stopped him. During that stop the police officers searched his car with no legal basis and pulled their guns out. Cochran later described the incident and stated “[The officers] had their guns out and my kids were in the car crying. My daughter said, ‘Daddy I thought you were with the police.’ I had to explain to her why this happened.”²¹⁸

Further, Black Americans are also increasingly victims of hate crimes both nationwide and in California. According to the Federal Bureau of Investigation, 48.5 percent of single-bias hate crime incidents were motivated by anti-Black bias.²¹⁹ According to the California Attorney General’s report on hate crimes in the state in 2020, 34.3 percent of single-bias hate crimes were motivated by anti-Black bias.²²⁰ Further, anti-Black bias events were the most prevalent of all types of hate crimes and increased 87 percent from 2019 to 2020.²²¹ Specifically, there were 243 anti-Black bias events in 2019 and there were 875 in 2020.

Generally, in California, Black people make up about 20 percent of those killed by police²²² even though they made up approximately just 6.5 percent of the statewide population in 2021.²²³ Further, much like across the nation, there are also many high-profile incidents of police killing Black Americans in California such as Ezell Ford (Los Angeles); Kendrec McDade (Pasadena); Wakeisha Wilson (Los Angeles); Oscar Grant (Oakland); Dijon Kizzee (Los Angeles); Richard Risher (Los Angeles); Stephon Clark (Sacramento); and Alfred Olango (San Diego). These deaths and many others nationwide have sparked increased activism and public awareness on the issue of police brutality. For example, organizers founded Black Lives Matter (BLM) in 2013 in response to the acquittal of George Zimmerman, who killed an unarmed Black high school student, Trayvon Martin.²²⁴ The first chapter was established in Los Angeles and BLM is now a global network of activists.²²⁵ BLM and other activist groups helped raise awareness about extrajudicial killings and have helped inspire police reform.

As a result of community activism and increased nationwide public awareness of police brutality against Black Americans in 2020 in particular, California has recently taken steps to attempt to address the numerous concerns with policing in the state. For example, Assembly Bill 89 raises the minimum qualifying age to be a police officer from 18 to 21 years of age and sets other minimum qualification requirements for peace officers in an effort to reduce uses of deadly force. Assembly Bill 750 makes it a crime for a police officer to make a false statement to another peace officer if that statement is included in a peace officer report.

²¹⁷ Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters* (1999) 84 Minn. L. Rev. 265; Jones, *The Silent Persuader* (Oct. 3 1994) *The Washington Post* <<https://www.washingtonpost.com/archive/lifestyle/1994/10/03/the-silent-persuader/4a67dbb9-6f3c-473c-ac5f-66414c672876/>> [as of Feb. 9, 2022].

²¹⁸ *Ibid.*

²¹⁹ U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *Hate Crime Statistics* (2019) <<https://ucr.fbi.gov/hate-crime/2019/topic-pages/victims>> [as of Nov. 29, 2021].

²²⁰ Cal. Department of Justice, *Hate Crime in California* (2020) p. 8 <<https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Hate%20Crime%20In%20CA%202020.pdf>> [as of Nov. 30, 2021].

²²¹ *Id.* at p. 31

²²² Cal. Department of Justice, *Use of Force Incident Reporting 2016-2020* <<https://www.openjustice.doj.ca.gov/data-stories/use-of-force>> [as of July 22, 2021].

²²³ U.S. Census Bureau, *Quick Facts: California* <<https://www.census.gov/quickfacts/fact/table/CA/RHI225219>> [as of July 22, 2021].

²²⁴ Black Lives Matter, *About Black Lives Matter* <<https://blacklivesmatter.com/about/>> [as of Apr. 8, 2021].

²²⁵ Black Lives Matter Los Angeles, *Herstory* <<https://www.blmla.org/herstory>> [as of July 28, 2021].

Assembly Bill 1506 requires the California Department of Justice to investigate and review for potential criminal liability all officer-involved shootings that result in the death of unarmed civilians in the state. Senate Bill 2 creates a process to decertify police officers for misconduct, preventing such officers from being able to join any another agency in California. California was one of only four states without that power. Assembly Bill 118 creates pilot programs to allow community organizations to respond to 911 calls rather than police. Assembly Bill 26 requires officers to intervene if they witness another officer using excessive force, and requires officers to report the use of force and prohibits retaliation against reporting officers. However, these reforms do not alone address the many years of discrimination Black Americans have experienced at the hands of the criminal justice system.

[May be expanded with research on violence against women and girls in CA.] For example, police have historically appeared to ignore the disappearance of Black women such as those Lonnie David Franklin Jr. killed in the Los Angeles area.²²⁶ Franklin is believed to have murdered several Black American women and girls from the 1980s until he was arrested and convicted in 2016.²²⁷

VI. Trial and Sentencing

A. History

The previously described history of the criminal justice system from slavery through present day has created a system that sentences Black Americans in higher numbers than their percentage of the total population. Currently, Black Americans face several systemic problems in the criminal justice system. For instance, jurors are often biased against Black Americans. Harsh policies such as three-strikes law have negatively affected Black Americans and, despite recent reforms, many inequities still remain. Historically and currently, California prosecutors' use of peremptory challenges to exclude Black Americans from juries is believed to be pervasive.

B. Systemic Problems in Criminal Courts

It is well-documented that American criminal courts have systemic problems that work against criminal defendants. For example, there is research and scholarship indicating that prosecutorial bias, which is when prosecutors unknowingly make decisions on who to prosecute based on biases such as racial stereotypes and assumptions, is a persistent feature of the criminal justice system.²²⁸ Further, courts throughout the country have and continue to be underfunded, which can result in barriers in accessing justice, such as case delays.²²⁹ Although the cash bail system is now required to take into account an individual's ability to pay in California,²³⁰

²²⁶ Branson-Potts, *Grim Sleeper's victims were vulnerable, young, and at times ignored*, Los Angeles Times, May 5, 2016 <<https://www.latimes.com/local/lanow/la-me-ln-grim-sleeper-victims-snap-htmlstory.html>> [as of January 27, 2022].

²²⁷ Ibid.

²²⁸ See generally Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice* (2013) 99 Va. L. Rev. 271, 271–342 <www.jstor.org/stable/23528857> [as of July 29, 2021].

²²⁹ Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis* (2014) Daedalus vol. 143, no. 3, pp. 96–104 <www.jstor.org/stable/43298046> [as of July 29, 2021]; Archer, *Tackling Tough Issues: Scrutiny of State Court Funding, Sentencing Guidelines Aims to Improve the System* (2004) ABA Journal vol. 90, no. 2, pp. 8–8 <www.jstor.org/stable/27842545> [as of July 29, 2021]; Podgers, *In Defense of the Courts: A Symposium Finds Consensus on the Need, but No Easy Path to Restoring Court Funding* (2011) ABA Journal vol. 97, no. 11, pp. 56–57 <www.jstor.org/stable/23034160> [as of July 29, 2021].

²³⁰ *In re Humphrey* (2021) 11 Cal.5th 135, 142; see also Senate Bill 262 Penal Code sections 1269b, 1269d, and 1302.5.

in other parts of the country wealthy defendants can essentially purchase their pre-trial freedom through the cash bail system, whereas low-income defendants might suffer additional harsh consequences solely because of their inability to pay. This occurs despite three waves of attempts to reform the cash bail system nationwide.²³¹ As discussed in the civil legal system discussion of this chapter, lack of diversity in the legal profession may also exacerbate the discrimination Black Americans face in the criminal justice system.²³²

C. Juror Bias

There is a great deal of research and scholarship showing that race, ethnicity, and culture can affect the judgement of jurors.²³³ While there are many mechanisms to mitigate the effects of jurors' racial biases,²³⁴ there is significant evidence that lack of diversity on juries is an "endemic" and a nationwide problem.²³⁵ A study in North Carolina showing that qualified Black jurors were struck from juries at more than twice the rate of qualified white jurors.²³⁶ For example, scholars have identified the following as factors contributing to underrepresentation on juries: racial discrimination in jury selection, socioeconomic barriers preventing participation by Black Americans, institutional racism, and bureaucratic discrimination in perpetuating judicial inequality.²³⁷

One scholar has shown that study participants remembered and misremembered legally relevant facts in racially biased ways.²³⁸ The author of the study argues that implicit racial biases affect the way judges and jurors encode, store, and recall, relevant case facts, which leads to the conclusion that implicit memory biases operate in legal decision-making.²³⁹ There are also studies, such as those on racial diversity in juries, which show that lack of diversity in juries can result in poor trial and sentencing outcomes for Black Americans.²⁴⁰ The effects

²³¹ See generally Brunt et al., *Toward a Just Model of Pretrial Release: A History of Bail Reform and Prescription for What's Next*, (2018) *The Journal of Criminal Law and Criminology* (1973-) (2018) vol. 108, no. 4, pp. 709–738 <www.jstor.org/stable/48572970> [as of July 29, 2021].

²³² Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race* (2016) *Political Research Quarterly* vol. 69, no. 4, pp. 788–799 <www.jstor.org/stable/44018057> [as of July 29, 2021].

²³³ See generally Hunt, *Race, Ethnicity, and Culture in Jury Decision Making* (2015) 11 *Ann. Rev. L. & Soc. Sci.* 269 [summarizing research on juror bias].

²³⁴ See generally Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom* (2018) 2018 *Mich. St. L. Rev.* 1243, 1246.

²³⁵ American Bar Association, *Lack of Jury Diversity: A National Problem with Individual Consequences* (September 1, 2015) <<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>> [as of Apr. 9, 2021].

²³⁶ Coleman, *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond* (2018) 42 *Champion* 28, 32 [citing Kotch & Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina* (2010) 88 *N.C. L. Rev.* 2031, 2110–2111 n. 356].

²³⁷ Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, *Journal of Black Studies*, vol. 22, no. 2, Sage Publications, Inc., 1991, pp. 196–215, <<http://www.jstor.org/stable/2784594>> [as of Nov. 28, 2021].

²³⁸ Levinson, *Forgotten Racial Equality: Implicit Bias, Decision and Misremembering* (2007) 57 *Duke L.J.* 345, 407 <<https://www.ojp.gov/ncjrs/virtual-library/abstracts/californias-three-strikes-law-first-six-years-making>> [as of Nov. 17, 2021].

²³⁹ *Ibid.*

²⁴⁰ Sommers, *On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations* *Journal of Personality and Social Psychology*, 90(4), p. 597 <<https://www.stanford.app.box.com/s/4srbkxjhfkxqhm2g6ln5pv2q6wxwhcf0>> [as of Apr. 9, 2021].

of lack of jury diversity can also affect Black Americans in family courts and the child welfare system, which the Chapter 8 on the family discusses in more detail.

Black Americans are also more likely to be convicted and experience lengthy prison sentences. Data compiled over a three-year period in a Chicago suburb showed that more than 70 percent of those arrested on marijuana charges were black.²⁴¹

Over the last few decades there has been a dramatic shift to the right at the United States Supreme Court, which has included an erosion of rights of criminal defendants.²⁴² For example, the Comprehensive Crime Control Act and Sentencing Reform Act law limited mandatory minimums for low-level drug offenses, provide retroactive sentence reductions to people imprisoned under the 100 to 1 crack cocaine disparity, and expand rehabilitation in federal prisons.²⁴³ The outcomes are “mixed” and there is still much left to be done.²⁴⁴

There is also some evidence showing that racism may inform how strongly the public supports punitive criminal justice policies. For example, one study showed that when researchers exposed study participants to a penal institution that was represented as “more Black” people were more concerned about crime and expressed greater acceptance of punitive policies than when the penal institution was represented as “less Black.”²⁴⁵

D. California

Black Americans have not had the opportunity to have their case heard by a jury of their peers throughout California’s history. Historically, California barred Black Americans from serving on juries after statehood.²⁴⁶ Lack of diversity on juries continues to be a widespread problem throughout California as, a 2020 study showed that racial discrimination is an “ever-present” feature of jury selection in California.²⁴⁷ Specifically, the report found that California prosecutors’ use of peremptory challenges to exclude Black Americans from juries is still pervasive.²⁴⁸ More recently, in the last 30 years, the California Supreme Court has reviewed 142 cases involving *Batson* claims, which is the process by which a party can object to a peremptory challenge because of a juror’s race, and found a violation only three times. In fact, from 2006 to 2018, California courts held that there was a *Batson* error in just 18 out of 683 cases.²⁴⁹ Even more troubling, it has been over 30 years since the California Supreme Court held that there was a *Batson* violation involving a Black American juror.²⁵⁰

²⁴¹ Jackson, Truth and Reparations Talk of Reparations Is Being Revived Around the Country, ABA J., Apr./May 2020, at pp. 9, 9–10.

²⁴² See generally Chemerinsky, *The Conservative Assault on the Constitution* (2010).

²⁴³ The Sentencing Project, *One Year after the First Act: Mixed Outcomes* <<https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>> [as of Apr. 2, 2021].

²⁴⁴ *Ibid.*

²⁴⁵ Hetey et al., *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies* (2014) *Psychological Science* vol. 25, no. 10, pp. 1949–1954 <<https://www.jstor.org/stable/24543935>> [as of July 22, 2021].

²⁴⁶ The Civil Practice Act, Stats.1851, ch. 1, § 394, p. 113; The Criminal Act of 1850, Stats.1850, ch. 99, § 14, p. 230.

²⁴⁷ Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020) <<https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>> [as of Apr. 9, 2021].

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

Prosecutorial misconduct also continues to be an issue in California's criminal courts as one study of 4,000 state and federal appellate rulings in California from 1997 through 2009 discovered that courts found prosecutorial misconduct in 707 cases, which on average, amounts to about one case a week during that time.²⁵¹

E. Three Strikes

California is one of several states that have a three-strikes law. Although amended by Proposition 36 in 2012 to apply to only serious or violent felonies,²⁵² California's initial three-strikes law, imposed life sentence for almost any crime—no matter how minor—if the defendant has two prior convictions for crimes that were serious under the California Penal Code. The general goal of the three-strikes law was to deter offenders, particularly violent ones, from committing crimes again. The cases of Leandro Andrade and Gary Ewing are examples of how California's three strikes law was especially punitive and led to excessive sentencing.²⁵³

In 1983, Andrade committed three residential burglaries during the same day while unarmed and when nobody was in the homes he burglarized.²⁵⁴ Then, in 1995, he stole five children's videotapes, which were worth \$84.70 and was arrested for shoplifting.²⁵⁵ Later that same year, he stole four children's videotapes, which were worth \$68.84 and was arrested for shoplifting.²⁵⁶ Under California's three strikes law at that time, the third strike could be for any crime and did not necessarily need to be a serious or violent felony.²⁵⁷ As a result, he received a 50 year to life sentence with no possibility of parole.²⁵⁸

Similarly, Gary Ewing stole three golf clubs worth \$1,200 and received a sentence of 25 years to life in prison because he had prior convictions.²⁵⁹ There evidence that there are many other Black Americans, like Leandro Andrade and Gary Ewing, serving life sentences because of relatively minor offenses. As a result, these policies have increased the number of Black Americans in California correctional facilities.²⁶⁰ Recent reforms in California, which this chapter discusses below, have offered alternatives to incarceration for some individuals, but many Black Americans still served excessive prison sentences for years. The effects of punitive laws, such as California's three strikes law, continue to endure despite recent reforms, in part, because of their effects on the families of incarcerated Black Americans.²⁶¹

²⁵¹ Ridolfi & Possley, Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009, Northern California Innocence Project, Santa Clara University School of Law <<https://digitalcommons.law.scu.edu/ncippubs/2/>> [as of July 29, 2021].

²⁵² California's Three Strikes Sentencing Law, California Courts <<https://www.courts.ca.gov/20142.html>> [as of Feb. 9, 2022.]; Three Strikes Project, Stanford Law School <<https://law.stanford.edu/three-strikes-project/three-strikes-basics/>> [as of Feb. 9, 2022.].

²⁵³ *Lockyer v. Andrade* (2003) 538 U.S. 63.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ewing v. California* (2003) 538 U.S. 11.

²⁶⁰ Sutton, *Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing* (2013) *Law & Society Review* (2013) vol. 47, no. 1, pp. 37–71 <<https://www.jstor.org/stable/23357930>> [as of July 29, 2021].

²⁶¹ Gius, *The Unintended Consequences of the Three Strikes Laws: The Impact of Long Term Imprisonments on Family Structures* (2017) *International Journal of Sociology of the Family*, vol. 43, no. 1/2, pp. 17–24 <www.jstor.org/stable/45206614> [as of July 30, 2021].

VII. Incarceration

A. History

The history of criminalization of Black Americans since slavery and the inequities in policing, trials, and sentencing have resulted in an overrepresentation of Black Americans in jails and prisons. As this chapter has described, American society began to criminalize Black Americans starting from the era of slavery through Black Codes, vagrancy laws, and Jim Crow laws. Further, “law and order” or “tough on crime” political campaigns in the 20th century resulted in particularly punitive sentencing and parole systems, which have led to the imprisonment of large numbers of Black Americans. Although correctional authorities did not always uniformly collect data on the race of prisoners, there is evidence from the U.S. Department of Justice showing that Black Americans have comprised a percentage of prisoners exceeding their percentage of the population outside of correctional facilities, from at least 1926 to 1986.²⁶² Further, there is data showing that the percentage of prisoners admitted to state and federal institutions who are Black has consistently grown, and which general population trends cannot explain.²⁶³ Although the imprisonment rate of Black Americans has generally decreased since 2006,²⁶⁴ Black Americans continue to be overrepresented both nationwide and in California in adult incarceration, solitary confinement, capital punishment, and juvenile incarceration.

B. Adult Incarceration

In recent years, there has been a nationwide effort to identify alternatives to incarceration because of increased public awareness around the effects of mass imprisonment. The United States has the highest imprisonment rate—the number of people in prison or jail as a percentage of its total population—in the world.²⁶⁵ This incarceration rate has led many academics, activists, and politicians to call for an end to mass incarceration. And there have been reforms in several states such as Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio.²⁶⁶

In general, these reforms largely focus on establishing laws that seek to avoid excessive prison sentences. And, although the U.S. incarceration rate fell to its lowest level since 1995 in 2019, the United States still incarcerates a larger share of its population than any other country that provides this data.²⁶⁷ Further, at least one leading nonprofit advocacy organization has argued that this decrease is not sufficient to undo decades of prison expansion and has estimated that it will take 72 years to cut the U.S. prison population in half.²⁶⁸

²⁶² U.S. Department of Justice, *Race of Prisoners Admitted to State and Federal Institutions, 1926-86* <<https://www.ojp.gov/pdffiles1/nij/125618.pdf>> [as of May 1991].

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ <<https://www.prisonpolicy.org/global/2021.html>> [as of Jan. 6, 2022].

²⁶⁶ American Civil Liberties Union, *Smart Reform is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities* <https://www.aclu.org/sites/default/files/field_document/smartreformispossible_web.pdf> [as of Dec. 13, 2021].

²⁶⁷ Widra & Herring, *States of Incarceration: The Global Context 2021 Prison Policy Initiative September 2021* <<https://www.prisonpolicy.org/global/2021.html>> [as of Jan. 6, 2022].

²⁶⁸ Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, The Sentencing Project <<https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/>> [as of Jan. 6, 2022].

Despite reforms, Black Americans are also still overrepresented in correctional facilities nationwide. Specifically, 20 percent of prisoners in federal and state correctional facilities were Black Americans even though they made up just 13.4 percent of the population in 2019.²⁶⁹ In 2021, Black Americans comprise 38.5 percent of inmates in federal prisons across the country.²⁷⁰

In addition to overrepresentation of Black Americans in correctional facilities, federal and state officials continue to use the labor of incarcerated people.²⁷¹ In fact, some present-day prisons where incarcerated people still perform labor are on land that was once a plantation where enslaved people worked before the Civil War and where southern states similarly enslaved Black Americans after the Civil War through convict leasing. For example, Angola Louisiana State Penitentiary shows how, in some ways, the American correctional system continues as an extension of slavery.²⁷²

Angola, which is currently outside of present day Baton Rouge, was originally a plantation named for the African country from which most of its enslaved people originated.²⁷³ After the Civil War and abolition of slavery, former Confederate Major Samuel Lawrence James received a lease for Louisiana State Penitentiary and all of its incarcerated individuals.²⁷⁴ James moved the prisoners under his control to Angola where they worked the fields, maintained the house, and worked on construction projects such as those at the levee and railroad.²⁷⁵ During this time, there were also attempts to industrialize prison labor by forcing incarcerated people to make shoes and clothing.²⁷⁶ In 1898, the State of Louisiana banned convict leasing and, in 1901, the State of Louisiana purchased the prison camp and resumed control of its prisoners.²⁷⁷ More recently,

²⁶⁹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2019* <<https://bjs.ojp.gov/content/pub/pdf/p19.pdf>> [as of Dec. 16, 2021].

²⁷⁰ Federal Bureau of Prisons, Inmate Race <https://www.bop.gov/about/statistics/statistics_inmate_race.jsp> [as of Dec. 16, 2021].

²⁷¹ Federal Bureau of Prisons, Federal Prison Industries Program Details, <https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp#:~:text=UNICOR%20contributes%20significantly%20to%20the,o%20staff%20and%20other%20inmates> [as of July 27, 2021].

²⁷² See generally Selby, How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended, The Innocence Project (June 17, 2021) <<https://innocenceproject.org/13th-amendment-slavery-prison-labor-angola-louisiana/>> [as of Dec., 15, 2021].

²⁷³ Angola History Museum at the Louisiana State Penitentiary, History of Angola, <<https://www.angolamuseum.org/history-of-angola>> [as of Dec., 15, 2021]; see also Cardon, 'Less Than Mayhem': Louisiana's Convict Lease, 1865-1901 (2017) Louisiana History: The Journal of the Louisiana Historical Association vol. 58, no. 4 pp. 417-441 <www.jstor.org/stable/26290931> [as of July 23, 2021].

²⁷⁴ Angola History Museum at the Louisiana State Penitentiary, History of Angola, <<https://www.angolamuseum.org/history-of-angola>> [as of Dec., 15, 2021]; see also Cardon, 'Less Than Mayhem': Louisiana's Convict Lease, 1865-1901 (2017) Louisiana History: The Journal of the Louisiana Historical Association vol. 58, no. 4 pp. 417-441 <www.jstor.org/stable/26290931> [as of July 23, 2021].

²⁷⁵ Angola History Museum at the Louisiana State Penitentiary, History of Angola, <<https://www.angolamuseum.org/history-of-angola>> [as of Dec., 15, 2021]; see also Cardon, 'Less Than Mayhem': Louisiana's Convict Lease, 1865-1901 (2017) Louisiana History: The Journal of the Louisiana Historical Association vol. 58, no. 4 pp. 417-441 <www.jstor.org/stable/26290931> [as of July 23, 2021].

²⁷⁶ Angola History Museum at the Louisiana State Penitentiary, History of Angola, <<https://www.angolamuseum.org/history-of-angola>> [as of Dec., 15, 2021]; see also Cardon, 'Less Than Mayhem': Louisiana's Convict Lease, 1865-1901 (2017) Louisiana History: The Journal of the Louisiana Historical Association vol. 58, no. 4 pp. 417-441 <www.jstor.org/stable/26290931> [as of July 23, 2021].

²⁷⁷ Ibid.

incarcerated people in Angola continue to grow various crops such as wheat, corn, soybeans, cotton, milo,²⁷⁸ sugar cane,²⁷⁹ and they even produce art.²⁸⁰ To this day, approximately 75 percent of incarcerated people in Angola are Black Americans.²⁸¹

Correctional facilities, such as the Federal Prisons Industries of the Federal Bureau of Prisons, tout these programs as providing incarcerated people with marketable job skills.²⁸² However, some academics, argue that these work programs are not beneficial to incarcerated people when they seek work after their incarceration.²⁸³

Black Americans also experience discrimination in the correctional disciplinary system. At least one study has found that while Black and white incarcerated people were equally likely to break rules, correctional authorities were more likely to report infractions by Black people.²⁸⁴ While there is not a significant amount of public information and research on prison disciplinary decisions and race,²⁸⁵ at least one scholar has argued that there may be potential implications of the findings of implicit bias research in the population at large outside of prison, such as in policing, in the prison disciplinary context.²⁸⁶

C. Solitary Confinement

Within correctional facilities, there is an overrepresentation of Black Americans in solitary confinement. A 2018 study showed that both federal and state correctional facilities placed large numbers of Black males in solitary confinement. Specifically, Black males in prison made up approximately 42.5 percent of the prison population but comprised 46.1 percent of the people in restrictive housing (or “solitary confinement”), where, for instance, prisoners are separated from the general population and held in their cells for an average of 22 hours or more per day for 15 continuous days or more.²⁸⁷

²⁷⁸ Prison Enterprises, Agriculture, <http://www.prisonenterprises.org/agriculture/#:~:text=Agriculture&text=Our%20crops%2C%20which%20include%20wheat,our%20livestock%20and%20flight%20birds> [as of Dec. 15, 2021].

²⁷⁹ Hardy, Angola inmates make sugar cane syrup the old-fashioned way (Dec. 23, 2014) <https://www.theadvocate.com/baton_rouge/news/communities/west_feliciana/article_dbc913cb-9fc8-52ad-9de8-8ac99fc9def5.html> [as of Dec. 15, 2021].

²⁸⁰ Schrift, *Angola Prison Art: Captivity, Creativity, and Consumerism*, *The Journal of American Folklore* 119, no. 473 (2006): 257–74 <<http://www.jstor.org/stable/4137637>> [as of Dec. 17, 2021].

²⁸¹ Louisiana Department of Corrections, June 30, 2021 Population County <<https://doc.louisiana.gov/demographic-dashboard/>> [as of Dec., 15, 2021].

²⁸² Federal Bureau of Prisons, Federal Prison Industries Program Details, <https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp#:~:text=UNICOR%20contributes%20significantly%20to%20the,of%20staff%20and%20other%20inmates> [as of July 27, 2021].

²⁸³ See generally Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 *Va. J. Soc. Pol'y & L.* 65, 66.

²⁸⁴ Poole & Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, *Law & Society Review* (1980) vol. 14, no. 4 pp. 931–946. <www.jstor.org/stable/3053215> [as of August 15, 2021].

²⁸⁵ Armstrong, *Race, Prison Discipline, and the Law* (2015) 5 *UC Irvine L. Rev.* 759, 762.

²⁸⁶ *Ibid.*

²⁸⁷ Association of State Correctional Administrators and the Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* (2018) <https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf> [as of September 25, 2021].

D. Capital Punishment

[Note: Section on death penalty in Racial Terror chapter regarding Capital Punishment to be moved here.]

The U.S. Supreme Court both banned and reinstated the death penalty in the 1970s and recognized the disparate impact of the death penalty on Black Americans. During this time, the U.S. Supreme Court also noted that the death penalty has a discriminatory effect on Black Americans. In *Furman v. Georgia*, the Supreme Court banned the death penalty.²⁸⁸

In the *Furman* case, Justice Douglas noted that the President's Commission of Law Enforcement and Administration of Justice had concluded that, "Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns."²⁸⁹ Justice Douglas also noted, a Black American would be more likely to get the death penalty when convicted for rape when compared to white people.²⁹⁰ The Supreme Court subsequently decided five capital cases, which are often collectively referred to by the leading case *Gregg v. Georgia*.²⁹¹ Although each of these cases involved a different crime, statute, and outcome, these cases together affirmed that the death penalty is constitutional in some circumstances.²⁹² As a result, 27 states currently have the death penalty and 23 states and the District of Columbia do not have the death penalty. Three states, such as California, currently have a gubernatorial moratorium on executions.

In the states where executions still occur, Black men are overrepresented among people federal and state governments execute.²⁹³ A 2015 meta-analysis of 30 studies showing that those responsible for the murders of white people were more likely than those responsible for the murders of Black people to face a capital prosecution.²⁹⁴

E. Juvenile Incarceration

Much like Black Americans are overrepresented in the adult criminal justice system, they are also overrepresented in the juvenile justice system. Black youth comprise 41 percent of youth in juvenile facilities even though they make up 15 percent of all youth in America.²⁹⁵ Additionally, Black youth are more than four

²⁸⁸ *Furman v. Georgia* (1972) 408 U.S. 238.

²⁸⁹ *Id.* at p. 251

²⁹⁰ *Id.* at p.

²⁹¹ *Gregg v. Georgia* (1976) 428 U.S. 153.

²⁹² *Ibid.*

²⁹³ The Death Penalty Information Center (DPIC), *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty* (September 15, 2020) <<https://www.deathpenaltyinfo.org/policy-issues/race>> [as of May 16, 2021] [collecting and summarizing scholarly research].

²⁹⁴ Baumgartner et al., *#BlackLivesDon'tMatter: race-of-victim effects in US executions 1976-2013*, <**Error! Hyperlink reference not valid.**> [as of July 27, 2021].

²⁹⁵ Puzanchara et al., *Easy Access to Juvenile Populations: 1990-2019*. National Center for Juvenile Justice (2020) <<https://www.ojjdp.gov/ojstatbb/ezapop>> [as of Nov. 27, 2021].

times likely to be detained or committed in juvenile facilities as their white peers.²⁹⁶ In fact, Black youth are more likely to be in custody than white youth in every state except Hawaii.²⁹⁷

Similarly, Black students are subject to discipline at a higher rate than other groups in schools nationwide. In 43 states and the District of Columbia, Black students are arrested at high levels relative to their percentage of the population.²⁹⁸ There is also evidence that these racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias.²⁹⁹ This sort of disciplinary actions and bias contribute to how Black Americans are eventually pushed to incarceration through the school-to-prison pipeline, as described in Chapter 6 on education.

As a result of their experiences with the juvenile justice system, many Black Americans distrust the system.³⁰⁰ This report further discusses the enduring impact of the juvenile justice system on Black American families in Chapter 8 on Black American families.

F. California

The previously described history of the criminal justice system in America, such as California three-strikes laws and similar policies that have affected large numbers of Black Americans, has led to several conditions that have caused California to lead the way in expansion of prisons in the United States until recent reforms. That history, particularly from the 1980s to present, has contributed to what has been described as “the biggest prison building project in the history of the world” here in California.³⁰¹ The City of Los Angeles, in particular, has been a leader in incarceration because it imprisons more people than any other American city.³⁰² According to one scholar, Black disappearance was one of many driving causes in the historical rise of incarceration in Los Angeles.³⁰³

Since the U.S. Supreme Court’s decision in *Plata v. Brown* in 2011, California has been required to decrease the number of people in state correctional facilities.³⁰⁴ In the 2011 decision in *Plata*, the Court ordered the State of California to reduce its prison population because the Court reasoned that the medical and mental health care in California prisons was so deficient that it violated the U.S. Constitution’s prohibition of cruel and unusual punishment. Later that year, the state began a “realignment plan.” Specifically, California passed Assembly Bill 109, which reduced overcrowding in state facilities by shifting incarceration responsibilities from state to local authorities for certain people convicted of low-level offenses.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Black Students More Likely to Be Arrested at School, <<https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01>> [as of Nov. 27, 2021].

²⁹⁹ Riddle & Sinclair, Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias <<https://www.pnas.org/content/116/17/8255>> [as of Nov. 27, 2021].

³⁰⁰ Pennington, Engaging Parents As A Legitimacy-Building Approach in Juvenile Delinquency Court (2012) 16 U.C. Davis J. Juv. L. & Pol’y 481, 486.

³⁰¹ Gilore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (2007).

³⁰² Hernandez, City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles 1771-1965 (2017).

³⁰³ Ibid.

³⁰⁴ See generally Bachrach et al., *The End of Mass Incarceration in California: What Comes Next?* Boom: A Journal of California (2016) vol. 6, no. 2 pp. 4–7 <www.jstor.org/stable/26413167> [as of July 23, 2021].

California also passed several other laws to reduce its prison population. For example, Proposition 36 substantially changed California's three strikes law by essentially limiting its application to serious or violent felonies for third strike offenders and establishing a process for third strike offenders to ask a court to reduce their term under certain circumstances. Assembly Bill 2942 allows courts to recall and resentence a defendant on the recommendation of district attorneys. Senate Bill 567 requires criminal courts to only impose a maximum term if a jury considers aggravating facts regarding the offense and permits a criminal defendant and other parties to dispute facts in the record or present additional facts for the purposes of sentencing.

Similarly, Senate Bill 73 ended the prohibition against probation and suspended sentencing for certain types of crime, i.e., certain drug offenses. Assembly Bill 484 changes the requirement that a person who is granted probation after being convicted of furnishing or transporting certain controlled substances serve 180 days in a county jail as a condition of probation. Similarly, Senate Bill 136 ended a sentence enhancement that added an extra year for anyone convicted of recommitting a felony for each prior prison or felony jail time they already served. Other laws attempt to end private financial incentives to incarcerate large numbers of people in correctional facilities. Specifically, Assembly Bill 32 includes provisions to prohibit California, as a state, from entering into or renewing a contract with a private, for-profit prison to incarcerate people. However, given the newness of many of these laws, it is difficult to say whether they have had a significant impact on Black Americans. Nevertheless, many Black Americans who have already served time in prison and jail before the passage of these laws remain unable to access relief.

Despite these reforms, Black Americans continue to be overrepresented in correctional facilities. Like the federal government, California still houses and invests in the incarceration of people in large numbers. Specifically, it houses approximately 100,000 people in its facilities, has forecasted a budget of approximately \$227.2 billion for 2021-22, and operates 35 adult facilities. Approximately 28.3 percent of California's prisoners were Black—even though they make up just approximately 6.5 percent of the population in the state in 2021.³⁰⁵ Further, Black people who are incarcerated in California correctional facilities also experience forms of segregation from the moment they enter a facility.³⁰⁶

Further, much like during the convict leasing era, the State of California uses the labor of incarcerated people in a wide variety of contexts. For example, the California Prison Industrial Authority produces myriad of products such as clothing, textiles, furniture, cleaning products, office supplies, signs, and food.³⁰⁷ People who are incarcerated also perform a wide range of duties in areas such as laundry, kitchen, and general maintenance.

Further, as of October 2020, the California Department of Forestry and Fire Protection typically employs around 1,800 incarcerated individuals every year to fight forest fires. As previously discussed, some have

³⁰⁵ U.S. Census Bureau, Quick Facts: California <<https://www.census.gov/quickfacts/fact/table/CA/RHI225219>> [as of July 22, 2021].

³⁰⁶ See generally Goodman, "It's Just Black, White, or Hispanic": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers *Law & Society Review* 42, no. 4 (2008): 735–70 <<http://www.jstor.org/stable/29734153>> [as of Nov. 29, 2021]; see also Goodman, Race in California's Prison Fire Camps for Men: Prison Politics, Space, and the Racialization of Everyday Life, *American Journal of Sociology* 120, no. 2 (2014): 352–94 <<https://doi.org/10.1086/678303>> [as of Jan. 5, 2022].

³⁰⁷ Cal. Prison Industrial Authority, Catalogue <<https://catalog.calpia.ca.gov/>> [as of Nov. 24, 2021].

challenged the value of these programs because they do not necessarily provide incarcerated people with marketable job skills because they are often tasked with low skill work and obtaining a job as a firefighter can be particularly difficult, even for people without criminal records.³⁰⁸

Although California has attempted to reform its juvenile justice system in recent years, it has a well-documented and troubled history of juvenile incarceration.³⁰⁹ The number of incarcerated youth reached unprecedented heights in the 1990s.³¹⁰ California housed over 10,000 youth in 11 facilities throughout the state in 1996.³¹¹ Since that time, however, the state has attempted to make several systemic reforms to not only reduce the population of incarcerated youth but also to improve the treatment of youth who are in such facilities.³¹²

There have also been recent attempts to decentralize the juvenile justice system and provide localized services for juveniles who are accused of crimes.³¹³ To that end, most recently, Senate Bill 823 provided for the closure of the California Department of Corrections and Rehabilitation's Division of Juvenile Justice, formerly the California Youth Authority, and established the Office of Youth and Community Restoration in the California Health and Human Services Agency.³¹⁴

However, many racial inequities for young Black Americans remain. Currently, in California, Black youth are 31.3 times more likely to be committed to imprisonment in the state's juvenile justice system. As of June 2020, of the total 782 youth in California juvenile detention facilities, 227 were Black. In that same time, Black youth made up 36 percent of those committed to a juvenile detention facility even though they comprised only 14 percent of the population in California.

The treatment of Black youth as criminals in California begins at an early age when they are in school. School administrators, teachers, and school police, often treat young Black students as criminals. For example, as Jacob Jackson testified at the October 12, 2021 Task Force hearing, he was targeted by his teacher and school police when he was a student at Crenshaw High School in Los Angeles. More information on the juvenile justice system in California is available in Chapter 8.

VIII. The Effects of Contact with the Criminal Justice System

For those Black Americans who have had contact with the criminal justice system, such as through an arrest and/or conviction, there is evidence that the additional negative effects of this contact are far reaching in a wide

³⁰⁸See, e.g. Stygar, *Thinking Outside the Box: A Point-Based System of Reintegration for California's Inmate Firefighters* (2020) 56 Cal. Western L.Rev. 455, 456.

³⁰⁹ Macallair, *After the Doors Were Locked: A History of Youth Corrections in California and the Origins of the Twenty-First-Century Reform* (2013).

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ [Senate Bill No. 823 \(2019-2020 Reg. Sess.\)](#).

variety of areas despite limited data. Devon Simmons, who served 15 years in prison for crimes he committed as a teenager in Harlem, described the far-reaching effects of incarceration in a recent *New York Times* article.³¹⁵ When asked how the “world” responded to him after incarceration, Simmons replied:

“You’ve got to find a way to reinvent yourself and promote yourself to the world. But there’s a stigma. For a long time, for example any application for school, housing, a job, you needed to check the box saying you’re formerly incarcerated. The disenfranchisement pushes a lot of people into the informal market—selling drugs, for example.”³¹⁶

There is limited quantitative data because of a lack of national databases, research, and scholarship in several key areas. For example, homelessness is especially difficult to track because of the transient nature of the unhoused population. Similarly, it is difficult to know with certainty that a private employer did not hire someone solely because of their criminal record. But, as the following discussion will show, there is evidence that participation in the criminal justice system has enduring effects on the lives of Black Americans.

Historically, Black Americans who have had contact with the criminal justice system experience significant discrimination, such as when looking for a home or a job, across the country. Although states differ as to whether and how they deny formerly incarcerated people’s right to vote, formerly incarcerated people remain unable to vote in many parts of the country, which has an effect on the Black political participation.³¹⁷

Similarly, many states prohibit formerly incarcerated people from serving on a jury, which may exacerbate what some organizations have labeled as a significant national problem with lack of jury diversity.³¹⁸ In addition, even just observing the effects of the criminal justice system can negatively affect the mental health of Black people across the country.³¹⁹ Contact with the criminal justice system and observing its effects can impact how Black people perceive police nationwide, leading to mistrust.³²⁰ California has recently passed laws to mitigate the effects of the criminal justice system in the areas of housing, employment, jury participation, and voting, but these changes will not fully address the many years of effects of contact with the criminal justice system that many Black Americans have experienced.

³¹⁵ Colin, *It’s Never Too Late to Go to College and Rewrite Your Story*, N.Y. Times December 7, 2021 <<https://www.nytimes.com/2021/12/07/us/prison-college-graduate-devon-simmons.html>> [as of Jan. 6, 2022].

³¹⁶ Ibid.

³¹⁷ The Sentencing Project, *Locked out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* (October 3, 2020) <<https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>> [as of Apr. 9, 2021].

³¹⁸ See generally American Bar Association, *Lack of Jury Diversity: A National Problem with Individual Consequences* (September 1, 2015) <<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>> [as of Apr. 9, 2021]; Jackson-Gleich, *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records* (2021) Prison Policy Initiative <<https://www.prisonpolicy.org/reports/juryexclusion.html>> [as of July 29, 2021].

³¹⁹ Bor et al., *Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study* *The Lancet*, June 11, 2018 <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31130-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31130-9/fulltext)> [as of May 16, 2021].

³²⁰ See e.g., Burks, *African American Men’s Negative Personal Experiences with and Trust in Police* <<https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11369&context=dissertations>> [as of Nov. 24, 2021].

A. Discrimination in Housing, Employment, and Political Participation

Black Americans who have been incarcerated experience problems finding a permanent place to live. As discussed in the Chapter 5 on housing, Black Americans have experienced homelessness dating back to slavery,³²¹ regardless of whether they have participated in the criminal justice system. Returning citizens experience high rates of housing insecurity and at least one study found relatively low rates of outright homelessness among returning citizens but very high rates of housing insecurity.³²² Black Americans who have been incarcerated experience significant levels of housing instability soon after they leave prison.³²³

The Prison Policy Initiative estimates that returning citizens are almost 10 times more likely to be unhoused than the general public.³²⁴ They estimate that homelessness of returning citizens who are Black is worse than all other groups.³²⁵ Further, one study suggests that recent paternal incarceration substantially increases the risk of child homelessness and that those effects are concentrated among Black children.³²⁶

Returning citizens who are Black also experience significant difficulties when seeking employment.³²⁷ Lack of employment opportunities for returning citizens can have a broader, negative impact on their families. At least one study argues that Black families with an incarcerated family member are a significant contributing factor to the Black-white wealth gap.³²⁸ Consideration of a job applicant's criminal history can have a disparate impact against men of color, which may be a violation of Title VII of the Civil Rights Act of 1964. However, these cases are often difficult for plaintiffs to prove. Further, the Equal Employment Opportunity Commission has recognized in its enforcement guidance that employers' consideration of a conviction or arrest are factors that are particularly problematic for Black men because they are more likely to have criminal histories.³²⁹

To address the discrimination returning citizens experience, there is a nationwide movement to prohibit employers from considering a job applicant's criminal history before employers consider their qualifications for

³²¹ Johnson, *African Americans and Homelessness: Moving Through History*, *Journal of Black Studies* (2010) vol. 40, no. 4 pp. 583–605 <www.jstor.org/stable/40648529> [as of July 23, 2021].

³²² Herbert et al., *Homelessness and Housing Insecurity Among Former Prisoners*, *RSF: The Russell Sage Foundation Journal of the Social Sciences* (2015) vol. 1, no. 2, pp. 44–79 <www.jstor.org/stable/10.7758/rsf.2015.1.2.04> [as of July 23, 2021].

³²³ Western et al., *Stress and Hardship after Prison*, *American Journal of Sociology* (2015) vol. 120, no. 5 pp. 1525–1528 <www.jstor.org/stable/10.1086/681301> [as of July 23, 2021].

³²⁴ Couloute, *Nowhere to Go: Homelessness among Formerly Incarcerated People*, Prison Policy Initiative, 2018, <www.jstor.org/stable/resrep27306> [as of July, 23 2021].

³²⁵ Ibid.

³²⁶ Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, *The Annals of the American Academy of Political and Social Science*, vol. 651 <<https://www.jstor.org/stable/24541694>> [as of Dec. 10, 2021].

³²⁷ Couloute et al., *Out of Prison & Out of Work: Unemployment among Formerly Incarcerated People* (2018) Prison Policy Initiative <<https://www.jstor.org/stable/resrep27307>> [as of July 1, 2018] [summarizing and analyzing data from the Bureau of Justice Statistics and scholarly sources]; Gurusami, *Working for Redemption: Formerly Incarcerated Black Women and Punishment in the Labor Market*, *Gender and Society* 31, no. 4 (2017): 433–56 <<http://www.jstor.org/stable/44630954>>

³²⁸ Sykes & Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1996 to 2011* (2016) *The Russell Sage Foundation Journal of the Social Sciences* vol. 2, pp. 129–152 <www.jstor.org/stable/10.7758/rsf.2016.2.6.07> [as of July 2021].

³²⁹ U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, <<https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>> [as of September 27, 2021].

a job. This movement is also referred to as the “ban the box” movement. Currently, 36 states and over 150 cities and counties have “banned the box” or prohibited employers from asking about conviction or arrest history, and delay background checks until later in the hiring process. However, much like other criminal justice reforms discussed in this chapter, these new laws do little to address the many decades of discrimination Black returning citizens experienced when looking for work throughout American history.

Laws that deprive people with convictions of the right to serve on a jury may also affect Black Americans. But reliable nationwide statistics on the number of Black people who cannot serve on juries is unavailable because there is not a national database on the number of people who are prohibited from serving on a jury. To complicate matters further, state laws vary as to what triggers exclusion from serving on a jury. For example, some states exclude people from serving on juries when they commit misdemeanors. But it stands to reason that if Black Americans are incarcerated more than other groups, they are also more likely to be excluded from jury participation as well. As discussed in more detail in Chapter 4 on political disenfranchisement, there appears to be substantial scholarship indicating that the lack of jury diversity is a serious and nationwide problem.³³⁰

There is significant variation across the nation as to whether states deprive people who have criminal convictions of the right to vote. A 2003 study found that large nonwhite prison populations increase the odds of a region passing restrictive laws regarding the right of people with convictions to vote, and that the racial composition of populations inside and outside of prisons may be linked to the adoption of reforms.³³¹ There is also evidence that depriving people who have convictions adversely affect the Black vote and racial minorities in general.³³² The Sentencing Project estimates that approximately 1.3 million Black Americans of voting age cannot vote because of past convictions, which is a rate 3.7 times greater than that of non-Black Americans.³³³ In fact, over 6.2 percent of the Black American population cannot vote because of past convictions compared to 1.7 percent of the non-Black American population.³³⁴

Contact with the criminal justice system through incarceration affects the mental health of Black Americans. For example, one study using a nationally representative sample of Black men shows that incarceration history

³³⁰ See generally American Bar Association, *Lack of Jury Diversity: A National Problem with Individual Consequences* (September 1, 2015) <<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>> [as of Apr. 9, 2021]; Jackson-Gleich, Rigging the jury: How each state reduces jury diversity by excluding people with criminal records (2021) Prison Policy Initiative <<https://www.prisonpolicy.org/reports/juryexclusion.html>> [as of July 29, 2021].

³³¹ Behrens et al., Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002 <http://users.cla.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf> [as of Nov. 15, 2021].

³³² Uggen, Christopher, and Jeff Manza, “Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States” *American Sociological Review* 67, no. 6 (2002): 777–803. <https://doi.org/10.2307/3088970>; Harvey, Alice E. “Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look.” *University of Pennsylvania Law Review* 142, no. 3 (1994): 1145–89 <<https://doi.org/10.2307/3312504>> [as of Nov. 15, 2021].

³³³ The Sentencing Project, *Locked out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* (October 3, 2020) <<https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>> [as of Apr. 9, 2021].

³³⁴ *Ibid.*

was associated with perceived discrimination, depressive symptoms, and psychological distress.³³⁵ Similarly, studies show that the impact of incarceration, which Black Americans experience more than their share of the total population, has a lasting impact on the mental health of people who have served time in prison.³³⁶

Incarceration negatively affects the overall physical health of Black people after they leave prisons and jails as discussed in Chapter 12 on health. Similarly, as discussed in Chapter 8, there is also evidence that mass incarceration negatively impacts family members of Black Americans who have been incarcerated both during and after their incarceration.

Even for Black Americans who have not had direct contact with the criminal justice system—even just observing the effects of the criminal justice system—take a toll on Black American’s mental health. For example, a 2018 study found that a police murder of an unarmed Black American triggered days of poor mental health for Black Americans living in the state where that murder occurred.³³⁷ This effects of these extrajudicial murders have wide reaching effects because, as discussed in the Part II of this chapter, police frequently kill Black Americans in many states throughout the country. This accumulation of painful days over the course of a year was comparable to the rate diabetics experienced.³³⁸

Contact with the criminal justice system also has a negative and enduring effect on Black American’s trust in law enforcement. Negative experiences with the criminal justice system have caused many Black Americans to distrust police.³³⁹ Qualitative data shows that Black men in particular, distrust the police because of past negative experiences with police.³⁴⁰ Quantitative data has shown that Black people are less likely to call the police than Latinos and white people.³⁴¹ This distrust likely leads to an underutilization of police and government services in general, such as the civil legal system, as discussed above. As the Kerner Commission noted, “The police are not merely a ‘spark’ factor. To some Negroes police have come to symbolize white power, white racism, and white repression. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among Negroes in the

³³⁵ Assari et al., Discrimination Fully Mediates the Effects of Incarceration History on Depressive Symptoms and Psychological Distress Among African American Men, *Journal of Racial and Ethnic Health Disparities* (2018) pp. 243-252 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6556396/>> [as of Nov. 15, 2021].

³³⁶ Haney, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities* (2001) Report on the Psychological Impact of Incarceration: Implications for Post-Prison Adjustment, The U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation <<https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0>> [as of September 25, 2021].

³³⁷ Bor et al., Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study *The Lancet*, June 11, 2018 <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31130-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31130-9/fulltext)> [as of May 16, 2021].

³³⁸ Ibid.

³³⁹ Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities* (2004) 56 *Stan. L. Rev.* 1271, 1287.

³⁴⁰ See, e.g., Burks, African American Men’s Negative Personal Experiences with and Trust in Police <<https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11369&context=dissertations>> [as of Nov. 24, 2021].

³⁴¹ U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics, Durose and Langton, *Requests for Police Assistance*, 2011 p. 4 <<https://bjs.ojp.gov/content/pub/pdf/rpa11.pdf>> [as of Nov. 24, 2021].

existence of police brutality and in a ‘double standard’ of justice and protection—one for Negroes and one for whites.’³⁴²

B. California

California has made some recent progress towards implementing reforms to mitigate the effects of contact with the criminal justice system in the state.³⁴³ These reforms are in fact mitigating the negative effects of mass incarceration, but returning citizens still experience discrimination in the areas of housing, employment, jury participation, and voting. For example, much like under federal law, housing providers may lawfully consider the criminal history of returning citizens under California law.³⁴⁴ As a result, Black returning citizens still face many barriers when obtaining housing. Further, Chapter 5 on housing discusses, Black Americans continue to experience discrimination in the housing context regardless of whether they have experienced incarceration.

California has made some progress, particularly in the last 10 years, in mitigating the discrimination people experience because of arrests and convictions. Specifically, the state has passed the following laws:

- Proposition 47 (“The Safe Neighborhoods and School Act”): This 2015 law essentially allowed people convicted of non-serious felonies to mitigate the effect of their convictions;³⁴⁵
- Proposition 57 (“The Public Safety and Rehabilitation Act of 2016”): This 2016 law sought to give people who committed nonviolent crimes an opportunity for early parole;³⁴⁶
- Assembly Bill 1076 (“The Clean Slate Act”): This 2018 law allows automatic criminal record relief in certain circumstances and makes several other changes to make it more difficult for employers to discriminate against certain people who have had contact with the criminal justice system;³⁴⁷
- Assembly Bill 1008 (“The Fair Chance Act”): This 2018 law made it illegal for most employers in California to ask about the criminal record of job applicants before making a job offer;³⁴⁸
- Senate Bill 393 (“Consumer Arrest Record Equity Act”/“C.A.R.E Act”): This 2019 law allows for any person who is arrested but not convicted of a crime to ask a court to seal their record;³⁴⁹
- Senate Bill 310 (The Right to a Jury of Your Peers): This 2017 law allows people who were convicted of a felony to serve on juries if they have finished their prison time and are not on parole, probation, or other post-prison supervision; and

³⁴² National Advisory Commission on Civil Disorders, Report of The National Advisory Commission on Civil Disorders <https://belonging.berkeley.edu/sites/default/files/kerneer_commission_full_report.pdf?file=1&force=1> [as of Dec. 7, 2021].)

³⁴³ See generally Judicial Council of Cal., Clean Your Record, <<https://www.courts.ca.gov/1070.htm?rdeLocaleAttr=en>> [as of Nov. 26, 2021].

³⁴⁴ Gov. Code § 12264-12271; see also proposed Assembly Bill 1241 (“Ban the Box Housing Act”), which may change the law <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1241> [as of Nov. 26, 2021].

³⁴⁵ Pen. Code § 1170.18.

³⁴⁶ Cal. Const., art. 1, § 32.

³⁴⁷ Pen. Code § 851.93, § 1203.045.

³⁴⁸ Gov. Code § 12952.

³⁴⁹ Pen. Code § 851.91.

- Proposition 17: This 2020 voter initiative restored voting rights to people on parole.

While these new laws certainly help mitigate the negative effect an arrest and conviction can have for someone who has had contact with the criminal justice system—they do very little to remedy the many decades of discrimination Black Americans suffered before California passed these laws. Further, as the other chapters of this report show, Black Americans who have not had contact with the criminal justice system still experience discrimination in the areas of housing, employment, and political participation such as jury service and voting.

IX. Discrimination in the Civil Justice System

During the 1991-92 Public Hearings on Racial and Ethnic Bias in State Courts, Garry Howard of the Latasha Harlins Justice Committee commented that “the American justice system has completely failed Black Americans. To African Americans, there is no justice.”³⁵⁰ While 30 years have passed since Garry Howard made this statement, it continues to ring true for the civil justice system both nationwide and in California throughout history.

Historically, Black Americans have experienced discrimination in the civil legal system nationwide and in California. In fact, the national civil legal system was a mechanism American society used to further subjugate Black Americans during and after slavery. For example, the U.S. Supreme Court famously held in *Dred Scott v. Sandford* that Black Americans—whether enslaved or free—were not citizens of the United States and therefore were not entitled to the rights and privileges of the U.S. Constitution.³⁵¹ After slavery ended, there were many federal civil cases in which court decisions adversely affected the rights of Black Americans, such as those that legalized segregation,³⁵² decided that the federal government cannot outlaw private acts of discrimination,³⁵³ and interpreted the Fourteenth Amendment as protecting economic liberties rather than the civil rights of Black Americans.³⁵⁴ Further, in many states throughout the country Black Americans could not testify in a case in which a white person was a party.³⁵⁵

The situation was very similar in California. As discussed earlier, California courts also contributed to the growing body of law that discriminated against Black Americans, and that was developed in courts throughout the country. Dr. Stacey Smith identified in her written statement and testimony at the Task Force hearing on September 23, 2021, the California fugitive slave law strictly prohibited accused fugitives from testifying in their own defense.³⁵⁶

³⁵⁰ Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, Final Report on the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts January (1997) p. 38-39 <<https://www.courts.ca.gov/documents/rebias.pdf>> [as of November 9, 2021];

³⁵¹ *Dred Scott v. Sandford* (1856) 60 U.S. 393.

³⁵² *Plessy v. Ferguson* (1896) 163 U.S. 537.

³⁵³ *The Civil Rights Cases* (1883) 109 U.S. 3.

³⁵⁴ *The Slaughter-House Cases* (1873) 83 U.S. 36.

³⁵⁵ See, e.g.,

³⁵⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (September 23, 2021), Testimony of Stacey Smith, <<https://oag.ca.gov/ab3121/meetings>> [as of Nov. 22, 2021] [citing former An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, Cal. Stat., at 67–69].

Further, free Black activists, who were enslaved people's greatest allies, could not be witness in any court proceedings.³⁵⁷ California's Fair Practice Act specifically and explicitly banned testimony by "negroes, or persons having one-half or more of negro blood" in any civil court case to which a white person was a party, which exacerbated discrimination against Black Americans in California courts.³⁵⁸

Currently, there is some evidence that Black Americans experience discrimination in the civil legal system. The civil legal system is the system through which Black Americans can obtain remedies, such as money, for the discrimination they experience in nearly every area of their life as identified in the chapters on labor, education, housing, racial terror, and wealth. But Black Americans with low incomes face several systemic problems in the underfunded court systems both nationwide and in California when attempting to access justice such as obtaining legal counsel.

There appears to be very little scholarship on Black Americans' distrust of the legal system as a whole and how that affects their underutilization of the civil law system,³⁵⁹ but some evidence does indicate that their contact with the criminal justice system negatively affects trust in the civil legal system. For example, the California Judicial Council Advisory Committee on Racial and Ethnic Bias provided some helpful insight when it studied the treatment of minorities in state courts and public perceptions of fairness in 1997.³⁶⁰

The Committee noted in 1997 that members of the Council had developed the impression from opinion surveys of over 2,000 Californians and public hearings that "many minority-group members do not believe that they will receive equal justice in the California courts. Several speakers pointed to the large percentage of minority-group members, particularly African American males, who inhabit state's jails and prisons."³⁶¹ Further, and more recently, at one scholar has pointed out from interviews that negative past experiences with the criminal justice system contribute to resistance to seeking help from the civil legal system.³⁶²

One study has shown that Black claimants are underrepresented in federal court cases under diversity jurisdiction and that white claimants are overrepresented, which is consistent with studies showing that systematic racism engenders distrust in the system and has alienated Black Americans from participating in the

³⁵⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (September 23, 2021), Testimony of Stacey Smith, <<https://oag.ca.gov/ab3121/meetings>> [as of Nov. 22, 2021] [citing Smith, *Freedom's Frontier* (2014) p. 71-72.

³⁵⁸ The Civil Practice Act, Stats.1851, ch. 1, § 394, p. 113;

³⁵⁹ Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67; DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts* (2021) 13 Geo. J. L. & Mod. Critical Race Persp. 1.

³⁶⁰ Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, Final Report on the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts January (1997) <<https://www.courts.ca.gov/documents/rebias.pdf>> [as of November 9, 2021].

³⁶¹ Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, Final Report on the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts January (1997) p. 38-39 <<https://www.courts.ca.gov/documents/rebias.pdf>> [as of November 9, 2021]; see also Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, *Fairness in the California State Courts: A Survey of the Public, Attorneys, and Court Personnel* (1993) <<https://www.courts.ca.gov/documents/12-93.pdf>> [as of November 9, 2021].

³⁶² Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67.

civil legal system.³⁶³ As previously discussed in Part III of this chapter, there is empirical evidence showing that jury selection and juror bias often result in unfavorable results for Black American criminal defendants in the criminal justice system.

A. Barriers to Accessing Justice

The civil legal system is an especially important part of the legal system in the United States because it is the system through which Americans can solve common and ordinary problems. Specifically, Americans must use the civil legal system to solve everyday problems in nearly every area of life such as family law, housing, health, finances, employment, government services, wills and estates, and education. Nationwide, approximately 47 percent of Americans experience at least one civil legal problem in their household each year.³⁶⁴

But members of historically marginalized communities, such as racial minorities, people with low incomes, and people with disabilities, have long faced difficulties accessing justice in state courts throughout the country because of systemic problems. For example, state courts have historically experienced problems with underfunding, which causes barriers to accessing justice.³⁶⁵ Underfunded courts cause many problems such as court closures and staff reductions, which result in significant delays in cases and a decreased ability to provide services, such as self-help resources for litigants without lawyers.

These civil legal problems particularly affect people with low incomes, many of whom are Black. According to the Legal Services Corporation, which Congress created to expand access to the civil legal system for low-income Americans, approximately 21 percent of people who have family incomes at or below 125 percent of the federal poverty line identified as Black in 2016.³⁶⁶ In that same year, approximately 71 percent of low-income households experienced at least one civil legal problem, which included issues with domestic violence, veterans' benefits, disability access, housing conditions, and healthcare.³⁶⁷ Further, Americans with low incomes received inadequate or no legal help for 86 percent of their civil legal problems in 2016.³⁶⁸

Historically, law schools and bar associations have discriminated against Black Americans by

³⁶³ DeVito, Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts (2021) 13 *Geo. J. L. & Mod. Critical Race Persp.* 1, 3.

³⁶⁴ Pew Charitable Trusts, Many U.S. Families Faced Civil Legal Issues in 2018 (2019) <<https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/many-us-families-faced-civil-legal-issues-in-2018>> [as of September 26, 2021].

³⁶⁵ See generally Podgers, in *Defense of the Courts: A Symposium Finds Consensus on the Need, but No Easy Path to Restoring Court Funding*, *ABA Journal* 97, no. 11 (2011): 56–57 <<http://www.jstor.org/stable/23034160>> [as of Nov. 22, 2021]; Greenberg & McGovern. “State Court Funding.” In *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?*, 5–12. RAND Corporation, 2012 <<http://www.jstor.org/stable/10.7249/j.ctt3fh0gv.9>> [as of Nov. 22, 2021]; Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*. *Daedalus*, 143(3), 96–104 <<http://www.jstor.org/stable/43298046>> [as of Nov. 22, 2021].

³⁶⁶ Legal Services Corporation, *The Justice Gap: Measuring the Unmet Legal Needs of Low-income Americans* p. 60 <<https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74>> [as of Nov. 25, 2021].

³⁶⁷ *Id.* at 21.

³⁶⁸ *Id.* at 30.

preventing their entry into law schools and the profession.³⁶⁹ It is well documented in court cases that many law schools excluded Black Americans.³⁷⁰ Similarly, the American Bar Association (ABA) initially rescinded the membership of William H. Lewis in 1912, the first black assistant U.S. attorney general and two other Black men because leaders determined that they had elected him “in ignorance of material facts” and that “the settled practice of the Association has been to elect only white men as members.”³⁷¹

The ABA later reinstated his membership as “grandfathered” but resolved to essentially prohibit members of color and would not formally address the issue again until 1943.³⁷² Today, aspiring Black law students experience marginalization starting from the Law School Admissions Test and to the law school classroom.³⁷³ These structural barriers may even exist in the American Bar Association’s (ABA) law school accreditation process.³⁷⁴ One scholar has argued that the ABA’s accreditation system discriminates against Black Americans because the ABA’s standards are expensive for law schools to maintain and cause tuitions to rise to levels that make attendance too expensive for many Black Americans.³⁷⁵

Black Americans are underrepresented in legal education and have lower bar examination passage rates. There is a significant amount of scholarship indicating that the bar exam is culturally biased against historically marginalized groups, designed to exclude historically marginalized groups, and fails to predict a test takers ability to competently practice law. Nationwide, in 2020, Black Americans comprised eight percent of students in law schools even though they were 13.4 percent of the country’s population.³⁷⁶ Historically and nationwide, Black Americans have had low bar exam passage rates as first-time test takers.³⁷⁷ More recently, only 66 percent of Black Americans passed the 2020 bar examination on their first attempt nationwide, which is the lowest passage rate when compared to other racial groups.³⁷⁸

³⁶⁹ See generally Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools* (2008) 18 Temp. Pol. & Civ. Rts. L. Rev. 177; Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers* (2010) 80 Miss. L.J. 259, 264.

³⁷⁰ See, e.g., *Pearson v. Murray* (1936) 169 Md. 478; *State of Missouri ex rel. Gaines v. Canada* (1938) 305 U.S. 337; *Sweatt v. Painter* (1950) 339 U.S. 629.

³⁷¹ ABA, 1912- ABA Restricts Membership to White Lawyers <https://www.americanbar.org/about_the_aba/timeline/1912/> [as of Nov. 19, 2021]; see also Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools Journal* 53 J. Legal Educ. 103 <<http://www.jstor.org/stable/42893789>> [as of Nov. 19, 2021].

³⁷² ABA, 1912- ABA Restricts Membership to White Lawyers <https://www.americanbar.org/about_the_aba/timeline/1912/> [as of Nov. 19, 2021].

³⁷³ Taylor, *The Marginalization of Black Aspiring Lawyers* Vol. 13 No. 3 <<https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1350&context=lawreview#page=1&zoom=auto,-20,802>> [as of Nov. 22, 2021].

³⁷⁴ Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools Journal* 53 J. Legal Educ. 103 <<http://www.jstor.org/stable/42893789>> [as of Nov. 19, 2021].

³⁷⁵ *Ibid.*

³⁷⁶ ABA, *ABA Profile of the Legal Profession 2020* <<https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>> [as of Nov. 22, 2021].

³⁷⁷ See generally Wightman & Ramsey, *LSAC Longitudinal Bar Passage Study 1998* <<https://files.eric.ed.gov/fulltext/ED469370.pdf>> [as of Nov. 23, 2021].

³⁷⁸ ABA, *Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 and 2021 Bar Passage Questionnaire* <https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf> [as of Nov. 22, 2021].

A likely result of the underrepresentation of Black Americans in legal education is that they are also underrepresented in the national legal profession and federal judiciary. In 2021, 4.7 percent of lawyers are Black³⁷⁹ even though Black Americans make up 13.4 percent of the population.³⁸⁰ These statistics have remained almost unchanged since 2011.³⁸¹ Nationwide, in 2020, Black Americans comprised 9.8 percent of federal judges even though Black Americans make up 13.4 percent of the population.³⁸²

Diversity in the legal profession, which would include a number of Black American attorneys that is similar to the number of Black Americans in the general population, is important because of the demographic and democratic need for diversity as the ABA has identified. In general, lawyers in the legal system are particularly important as they “play a vital role in the preservation of society”³⁸³ and “an officer of the legal system and a public citizen have special responsibilities for the quality of justice.”³⁸⁴

B. California

Currently, many of the previously described problems in the criminal justice system also exist in the civil legal system, which all create a system that can lead to unfair results for historically marginalized groups like Black Americans. For example, much like California criminal courts, the state’s civil courts have been historically underfunded,³⁸⁵ which leads to many conditions that resulted in inadequate resources for the public such as limited services for self-represented litigants, decrepit facilities, and limited court staff.

As a result of underfunded courts, civil cases move particularly slowly and cases are often not resolved for years. The COVID-19 pandemic, which caused statewide court closures and resulted in continuances of hearings and trials, has also further lengthened the time it takes for civil cases to resolve.³⁸⁶ Approximately 55 percent of Californians experience at least one civil legal problem in their household each year.³⁸⁷ But

³⁷⁹ American Bar Association, *Profile of the Legal Profession 2021*

<<https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>> [as of September 25, 2021].

³⁸⁰ U.S. Census Bureau, Quick Facts: U.S. <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> [as of July 22, 2021].

³⁸¹ Ibid.

³⁸² U.S. Census Bureau, Quick Facts: U.S. <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> [as of July 22, 2021].

³⁸³ ABA Model Rules Prof. Conduct: Preamble: A Lawyer’s Responsibilities

<https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/> [as of Nov. 19, 2021].

³⁸⁴ Rules Prof. Conduct, rule 1.0, comment 5 <https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.0-Exec_Summary-Redline.pdf> [as of Nov. 19, 2021].

³⁸⁵ See generally Judicial Council of Cal., “The Road to Independence” A History of Trial Court Funding California Courts Review Winter 2009 <https://www.courts.ca.gov/documents/CCR_09Winter.pdf> [as of Nov. 11, 2021]; Judicial Council of Cal., Special Rep.: Trial Court Funding <<https://www.courts.ca.gov/documents/tcfnews.pdf>> [as of Nov. 12, 2021]; Trial Court Presiding Judges Advisory Committee, Memorandum on Impacts of Trial Court Presiding Judges’ Advisory Committee’s “Instant Survey” March 11, 2013 <<https://www.courts.ca.gov/partners/documents/20130312-PJ-Instant-Survey-Impacts.pdf>> [as of Nov. 12, 2021].

³⁸⁶ Judicial Council of Cal., Judicial Branch Budget Com. Rep.: COVID-19 Backlog Funding Data, Materials for January 5, 2021 Meeting, Judicial Branch Budget Committee <<https://www.courts.ca.gov/documents/jbbc-20210105-materials.pdf>> [as of Nov. 12, 2021].

³⁸⁷ The State Bar of Cal., 2019 California Justice Study Gap p. 6

<<https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf>> [as of Nov. 8, 2021].

according to the State Bar of California, Californians received no or inadequate legal help for 85 percent of their problems.³⁸⁸ People with low incomes struggle with problems related to housing, health, finances, employment, family law issues, disability benefits, and many other civil law issues³⁸⁹—many of which they can resolve in the civil legal system.

Unlike in the criminal justice system, there is no constitutional right to counsel in all types of cases in the civil legal system. However, a lawyer is crucial to prevailing in any civil case. Some states, such as California, have passed laws that provide for counsel in certain civil cases. For example, in California, litigants have a right to counsel in a few situations like in cases involving family law issues.³⁹⁰ Overall, however, in the vast majority of civil cases, there is no right to counsel both nationwide and in California. Some studies show that Black Americans, in particular, face unique impediments in obtaining access to legal counsel.³⁹¹ Specifically, one study showed that those with Black-sounding names receive one-half the callbacks of those with white-sounding names in response to calls for legal representation.³⁹²

Although Black Americans are not underrepresented in the California judiciary they are underrepresented in the statewide legal profession. In 2020, eight percent of judges were Black and comprised 6.5 percent of the state’s population³⁹³ In California, during 2019, Black Americans comprised four percent of lawyers even though they comprise 6 percent of the population in the state.³⁹⁴ These numbers have “remained stagnant” in the last 30 years.³⁹⁵

While this lack of diversity presents a problem for creating trust in both the criminal and civil legal system, it is especially problematic for Black Americans because it is the system through which they can address the discrimination they continue to experience as this report discusses in the across all of its chapters.

X. Conclusion

[Summary to tie it to enslavement]

³⁸⁸ State Bar of California, 2019 California Justice Gap Study Executive Report
<<https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf>> [as of Nov. 22, 2021].

³⁸⁹ Ibid.

³⁹⁰ See generally American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, Directory of Law Governing Appointment of Counsel in State Civil Proceedings: California
<https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaidjudgesmanualca.pdf> [as of Nov. 17, 2021].

³⁹¹ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2020) 24 Lewis & Clark L. Rev. 53.

³⁹² Ibid.

³⁹³ Judicial Council of Cal., *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identify/Sexual Orientation (Gov. Code, § 12011.5 (n))* [sic] *As of December 31, 2020* [sic]
<<https://www.courts.ca.gov/documents/2021-JO-Demographic-Data.pdf>> [as of Dec. 31, 2020].

³⁹⁴ State Bar of California, First Annual Report Card on the Diversity of California’s Legal Profession (2020)
<<https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf>> [as of Sept. 25, 2021].

³⁹⁵ Ibid.

Black Americans have experienced marginalization, physical harm, and death, at the hands of the American criminal justice system at both the federal and state level in three phases that begin during slavery and continued to today. First, during the slavery era, federal and state governments criminalized Black Americans for existing as a method of establishing, maintaining, and socially controlling Black Americans. Second, from 1865 to the 1950s, including what is commonly known as the Jim Crow era, federal and state officials enacted Black Codes and similar laws to continue controlling Black Americans—much like private enslavers did during slavery.

Throughout these two phases, California court cases and statutes contributed to the growing body of law that explicitly discriminated against Black Americans. As a result of legalized discrimination against Black Americans, Americans overall developed and perpetuated biases and stereotypes against Black Americans.

Third, from the 1950s to present, American politicians ran on “law and order” or “tough on crime” platforms leading to laws and policies that have resulted in the overrepresentation of Black Americans in the criminal justice system. The enduring legacy of these three historical phases of subjugation is that Black Americans are overrepresented in nearly every area of the criminal justice system nationwide and in California.

Black Americans also experience significant inequities in the civil legal system. The civil legal system is the system through which Black Americans should—in theory—be able to obtain remedies for the discrimination they experience in nearly every area of their life. But the reality is that Black Americans, particularly those with low incomes, experience several systemic problems in the underfunded court systems both nationwide and in California that prevent them from accessing justice in civil courts. Much like their experience with the criminal justice system, the effect of slavery in the civil legal system is enduring.

Chapter 12. Harm and Neglect: Mental, Physical, and Public Health

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

From January Testimony of Dr. Theopia Jackson

- Re-establishment of Comprehensive Centers across the Developmental lifespan
- Updating the 1977 California Children’s Services Standards
- Actively elevate grassroots advocacy programs and community-based organizations
- Address insurance reimbursement and parity
- Require education for health care providers; inclusion of advocates and champions

II. Introduction

The United States has treated Black Americans as subhuman, destroying the health of Black Americans through oppression, torture, sexual violence, abusive experimentation, forced labor, and harmful neglect. For over 200 years, the United States federal, state, and local governments subjected enslaved people to brutal, dehumanizing conditions. Pseudoscientists developed racist scientific theories, which founded the ideas of discriminatory healthcare systems in the United States.¹ These false theories claimed to provide “scientific” reasoning for Black “inferiority and insanity” to justify slavery.²

During enslavement, enslaved people were treated like farm animals, and physicians provided healthcare only to the extent that was necessary to profit from enslaved peoples’ bodies.³ Physicians’ diagnoses and treatments were based on an array of mistaken and stereotypical beliefs about Black people.⁴ In the name of “medical science,” white physicians experimented upon, tortured, and abused enslaved people.⁵ In addition to this poor system of healthcare, enslavers sexually abused and tortured Black women, freely and without consequence.⁶ Enslavers trafficked, starved, and abused Black children. Enslavement dramatically damaged the overall health of enslaved people.⁷

After the end of slavery in 1865, federal, state, and local government officials worked with private citizens to segregate Black American communities—damaging Black health, creating unequal healthcare services for Black people; depriving Black American communities of safe sanitation and adequate sewage systems; and sacrificing Black health for medical experiments.⁸ While Black American women had been forced to procreate

¹ [citation needed]

² [citation needed]

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2593958/>.

⁴ [citation needed]

⁵ [citation needed]

⁶ [citation needed]

⁷ [citation needed]

⁸ [citation needed]

during slavery—after slavery they were forcibly sterilized by state governments, like the State of California.⁹ Federal and state attempts to address racist harm in the medical system only intensified healthcare inequality for Black Americans.¹⁰ Federal and state sponsored corporatization of healthcare resulted in rising healthcare costs, the separation of Black doctors from Black patients, and further inequality between white and Black Americans.¹¹

As a result, Black Americans have suffered and continue to suffer from the worst mental and physical health outcomes among all Americans. Centuries of exposure to racism, violence, and social and economic oppression has led to a serious decline in Black American physical and mental health.¹² Black Americans die at disproportionately higher rates from preventable health problems.¹³ The white supremacist narrative of Black American inferiority has resulted in trauma and poor psychological health.¹⁴ White doctors are more likely to misdiagnose Black Americans, leading to disparate outcomes in mental health.¹⁵ Black American women face high rates of maternal death and adverse birth outcomes—even Black women with the highest education attainment have the worst birth outcomes across *all* women in America.¹⁶ Black American children face poverty, malnutrition, and worse health than that of white American children.¹⁷ The mismanagement of public health crises by state and federal governments has resulted in more disease and death in Black American communities than among other Americans—particularly during the COVID-19 pandemic.¹⁸ Despite all this, in the face of overwhelming oppression, Black American healthcare providers, patients, and community members, nonetheless, have worked to build healthy communities and fight for a more equitable healthcare system.¹⁹

[To come throughout this chapter: potential additional research disaggregating American descendants of slavery and non-American descendants of slavery.]

Section III of the chapter discusses the racist theories developed and perpetuated by doctors and scientists about Black Americans. Chapter IV describes the health conditions of Black Americans during enslavement. Chapter V, VI, and VII discusses how systemic discrimination and segregation was established and how it continues in the American health care system. Section VIII and IX describes the history of medical experimentation on Black bodies throughout American history, and how medical research and technologies harms Black Americans. Section IX describes the history of racism in mental health and the effects of 400 years of racial oppression on the mental health of Black Americans. Section XI and XII discusses reproductive, gender identity responsive and child health. Section XIII discusses public health crises. Chapter XIV describes the effects of

⁹ [citation needed]

¹⁰ [citation needed]

¹¹ [citation needed]

¹² [citation needed]

¹³ [citation needed]

¹⁴ [citation needed]

¹⁵ [citation needed]

¹⁶ <https://socialequity.duke.edu/wp-content/uploads/2019/12/Eradicating-Black-Infant-Mortality-March-2018.pdf>.

¹⁷ [citation needed]

¹⁸ [citation needed]

¹⁹ [citation needed]

racial oppression on the physical health of Black Americans.

III. Pseudoscientific Racism as Foundation of Healthcare

Federal and state-sanctioned scientific racism set an anti-Black foundation for American medicine, which has had lasting harmful consequences for Black American health. Physicians developed racist theories about Black Americans, which were used to create problematic public health policies.²⁰ Federal and state funded hospitals and public health institutions relied on racist pseudoscientific research to provide inadequate, harmful care to Black Americans.²¹ Federally funded medical research promoted racist practices in medicine and healthcare.²² Scholars have argued that racist theories were developed by the beneficiaries of racism for social, political, and economic self-interests.²³ For example, American capitalists used racist theories about Black Americans to justify and profit from slavery, a system of free and forced labor that enriched the enslavers.²⁴ For centuries, beneficiaries of enslavement, segregation, and mass incarceration have created and spread racist theories about Black Americans, that so many have consumed and believed, to further their own interests.²⁵

During the enslavement era, scientific racism defined race as an innate biological and genetic trait.²⁶ Pseudoscientific definitions of Blackness were based on differences in skin color, facial features, hair texture, lip size, and false beliefs about “brain size” and immunity to diseases.²⁷ Pseudoscientists invented “phrenology”—the baseless “science” of measuring the size of the skull as evidence of intelligence in different races. This pseudoscience was influential across the United States throughout the 1800s.²⁸ Physicians also used their racist reactions to Black people’s appearances and traits, and biblical interpretation to justify racist theories about Black Americans.²⁹ During the slavery era, medical researchers tried to prove that something specific to Black people was the reason to continue slavery.³⁰

Federal and state governments used racist theories to justify slavery and racism in public health policy.³¹ In the 1880s and 1890s, the decades following Reconstruction, false medical theories explained the poverty that Black Americans experienced as the inevitable decline of a “naturally inferior” race, instead of the results of almost three centuries of enslavement.³² These theories discouraged efforts to improve public health systems that

²⁰ [citation needed]

²¹ [citation needed]

²² [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)60052-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)60052-X/fulltext).

²³ Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (2016), pp. 8 – 10.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Zinzi D. Bailey, et. al., *How Structural Racism Works — Racist Policies as a Root Cause of U.S. Racial Health Inequities* (Feb. 25, 2021), <https://www.nejm.org/doi/10.1056/NEJMms2025396>.

²⁷ Harriet Washington, *Medical Apartheid*

²⁸ *Id.* Chapter 5, 265.

²⁹ Harriet Washington, 60, Chapter 1.

³⁰ *Id.*

³¹ Dorothy Roberts, “The Most Shocking and Inhumane Inequality: Thinking Structurally About Persistent Poverty and Racial Health Inequities,” *MLK 50 Symposium*, 49 *University of Memphis Law Review* 167-183, 178 (2018).

³² McBride, *Caring for Equality*

treated Black Americans as inherently inferior and subhuman.³³ Doctors published influential studies stating that Black Americans were responsible for spreading syphilis and tuberculosis to white Americans.³⁴ In contrast, the Kentucky and New Orleans public health agencies claimed that Black Americans' naturally weaker immune system and "irregular habits," were the reason that so many Black Americans died, rather than racist public health systems and damaged health as a result of physical violence and exploitation during enslavement.³⁵

Psychologists published articles arguing that Black Americans were emotionally unstable, and less capable of abstract thought.³⁶ Government actors used these racist theories throughout American history as an excuse to implement policies that ignored or harmed Black Americans.³⁷ During Congressional debates over the establishment of the Freedmen's Bureau, a program which included government-funded healthcare for newly freed Americans, white legislators argued that healthcare assistance to free Black people would result in dependence.³⁸ White legislators stated that for Black Americans, hard labor was better than medicine.³⁹

In the 20th century, the federal and state government supported the eugenics movement, which focused on eliminating "undesirable" traits that were concentrated in poor, uneducated, and nonwhite populations.⁴⁰ Eugenics is based upon the white supremacist ideology that white Anglo-Saxon people are an inherently superior race.⁴¹ Eugenicists enacted laws resulting in the forced sterilization of undesirable "races," including Black people, to create and maintain a white supremacist nation.⁴² By 1931, 30 states had eugenics laws that targeted vulnerable groups across the nation for involuntary sterilization in federally-funded programs.⁴³ It was not until 1979 that federal sterilization regulations required voluntary consent of the person being sterilized.⁴⁴

Racist scientific theories continue to shape ideas and practices in biomedical research and medicine today.⁴⁵ Studies have found that a significant number of white medical students and residents hold false beliefs about biological differences between Black Americans and white Americans, such as the belief that Black Americans have a higher pain threshold than white Americans.⁴⁶ Black patients are especially vulnerable to harmful biases and stereotypes, including the undertreatment of their pain.⁴⁷

Physicians widely hold racist beliefs that Black Americans feel less pain, exaggerate their pain, or are

³³ McBride, Chapter 2.

³⁴ McBride, Chapter 2.

³⁵ Id.

³⁶ The Psychology of the Negro An Experimental Study By George Oscar Ferguson · 1916

³⁷ [citation needed]

³⁸ <https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html>.

³⁹ <https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html>.

⁴⁰ Harriet Washington

⁴¹ <https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444/>;

McBride, Chapter 3.

⁴² McBride Chapter 3.

⁴³ <https://journalofethics.ama-assn.org/article/federal-sterilization-policy-unintended-consequences/2012-02>.

⁴⁴ Id.

⁴⁵ <https://www.pnas.org/content/113/16/4296>.

⁴⁶ <https://www.aamc.org/news-insights/how-we-fail-black-patients-pain>.

⁴⁷ Id.

predisposed to drug addiction.⁴⁸ These beliefs result in racial bias in pain perception and treatment.⁴⁹ Consequently, anti-Black racism that has been the underlying foundation of American medicine continues to adversely affect Black health today. Despite centuries of pseudoscientific racism and anti-Blackness in the healthcare system, Black doctors, nurses, and healthcare workers have worked tirelessly to provide anti-racist culturally responsive healthcare to Black communities.⁵⁰

A. California

California civic leaders were some of the most influential proponents of eugenics in the nation and around the world—including in Nazi Germany.⁵¹ They played a key role in popularizing the eugenics movement.⁵² The Human Betterment Foundation was a private think tank based in Pasadena, California that promoted sterilization from 1926 to 1942.⁵³ The Human Betterment Foundation shaped public policy in California by working with state officials, representing the eugenics movement to the public, and collecting data on sterilizations nationwide.⁵⁴ The foundation hoped that public support would result in state legislation that would increase the number of sterilizations performed each year.⁵⁵ The foundation's members included many prominent leaders of Californian institutions such as David Starr Jordan, Stanford University's first president; *Los Angeles Times* publisher Harry Chandler; Nobel Prize-winning physicist and head of the California Institute of Technology, Robert A. Millikan; and University of Southern California President Rufus B. von KleinSmid.⁵⁶

Thousands of mental health patients were forcibly sterilized across California due to the eugenicist efforts of the Human Betterment Foundation. Black patients were more likely to be sterilized than white patients.⁵⁷ Paul Popenoe, a self-trained biologist, hired by the Human Betterment Foundation stated that this was not surprising because, “studies show that the rate of mental disease among Negroes is high.”⁵⁸ Hundreds of thousands of studies, pamphlets, and books written by the Human Betterment foundation were distributed to policymakers, schools, and libraries.⁵⁹ In 1937, one of Nazi Germany's leading eugenicists wrote to Ezra S. Gosney, the financier who started the Human Betterment Foundation, saying, “You were so kind to send ... new information about the sterilization particulars in California. These practical experiences are also very valuable for us in Germany. For this I thank you.”⁶⁰

IV. Health and Healthcare during Enslavement

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ McBride, Chapter 2.

⁵¹ <https://www.latimes.com/archives/la-xpm-2003-jul-16-me-sterilize16-story.html>.

⁵² <https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1092&context=vocesnovae>.

⁵³

⁵⁴ <https://www.latimes.com/archives/la-xpm-2003-jul-16-me-sterilize16-story.html>.

⁵⁵ <https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1092&context=vocesnovae>.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

The institution of slavery set the foundation for the discriminatory healthcare system that would later emerge in the United States. During the slavery era, enslavers kept enslaved people in overcrowded, dilapidated living areas, which contributed to the spread of infectious and parasitic diseases. Federal and state governments did not allow for the treatment of enslaved people in hospitals and denied enslaved people access to mental healthcare. Enslavers freely and openly tortured enslaved people, raped and abused women, and trafficked children with no legal consequence. Physicians used enslaved people for dangerous experimental surgeries and procedures without repercussion. Federal, state, and local governments used the law to further damage the health of enslaved people and dehumanize them, while neglecting to provide public health and healthcare services. Dr. Carolyn Roberts stated during a hearing before the California Task Force to Study and Develop Reparation Proposals for African Americans that, “This was a form of healthcare where medical violence against African and African descended people became an acceptable, normative, and institutionalized practice.”⁶¹

A. Proliferation of Disease

Slavery had disastrous health consequences for enslaved people due to lack of public health regulations and harsh working conditions that led to widespread infectious and nutritional diseases. Infectious and parasitic diseases thrive in poor living conditions and overcrowding.⁶² So, they were among the major causes of illness and death for enslaved people.⁶³ Worm infections were common among enslaved people due to contact with polluted food and soil.⁶⁴ Hookworm infestation resulted in low birth weights and high infant mortality.⁶⁵ Contagious respiratory diseases were prevalent in the winter months due to the overcrowded quarters and uninhabitable living conditions.⁶⁶ Malaria led to low birth weights and high infant mortality.⁶⁷

The lack of federal or state public health regulations resulted in contaminated food and water, nonexistent sanitary facilities or sewage disposal, wastewater leakage, and poor garbage disposal, which contributed to diseases and infections that were more likely to affect enslaved people.⁶⁸ There was no government-funded healthcare, or regulations regarding water treatment, sewage disposal, or vaccination and the prevention of disease. Sexually transmitted infections were major public health problems affecting the lives of enslaved

⁶¹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Carolyn Roberts, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁶² Todd L. Savitt, *Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia*, p. 49, <https://www.press.uillinois.edu/books/catalog/85scf7fe9780252008740.html>.

⁶³ Id.

⁶⁴ Todd L. Savitt, *Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia*, p. 64-71, <https://www.press.uillinois.edu/books/catalog/85scf7fe9780252008740.html>.

⁶⁵ *Slavery and Diseases in the Antebellum American South*. (2020). In *Parasites, Pathogens, and Progress*. Retrieved from <https://covid-19.mitpress.mit.edu/pub/8flb6457>.

⁶⁶ Todd L. Savitt, *Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia*, p. 51-57, <https://www.press.uillinois.edu/books/catalog/85scf7fe9780252008740.html>.

⁶⁷ *Slavery and Diseases in the Antebellum American South*. (2020). In *Parasites, Pathogens, and Progress*. Retrieved from <https://covid-19.mitpress.mit.edu/pub/8flb6457>.

⁶⁸ Todd L. Savitt, *Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia*, p. 73, <https://www.press.uillinois.edu/books/catalog/85scf7fe9780252008740.html>.

people disproportionately due to forced breeding, overcrowded quarters, and lack of access to treatment.⁶⁹ Diseases, like pellagra, caused by a lack of nutrition in the diet, weakened the immune systems of enslaved people.⁷⁰

The health of enslaved people was worse than that of white people, because there were no hospitals where they could be treated for disease.⁷¹ With few exceptions, enslaved people and free Black people were not allowed to access hospitals, almshouses, and facilities for the deaf and blind.⁷² The welfare of enslaved people was left to enslavers, while free Black people were forced to fend for themselves.⁷³ In 1798, Congress established a loose network of marine hospitals to care for sick and disabled seamen,⁷⁴ but explicitly banned enslaved people from them.⁷⁵

White enslavers tortured enslaved people openly, inflicting cruel punishment upon them without any legal consequences and often permanently damaged their health.⁷⁶ Enslavers deprived enslaved people of food and water, whipped them to inflict serious pain, and abused them.⁷⁷ The brutal violence of enslavers and the harsh labor conditions they imposed resulted in branding, dog bites, assaults with fists and rods, burns, lacerations, mutilated body parts, and bone fractures for enslaved people.⁷⁸ Gashes from chains and iron restraints resulted in injuries, infections, and permanent disability for enslaved people.⁷⁹ Enslaved people were routinely murdered by white enslavers and white people who stabbed, shot, and whipped them to death with impunity.⁸⁰ The lack of protections from extreme climates, in addition to harsh laboring conditions, resulted in illness, injury, and disease.⁸¹

B. Mental Health

Enslaved people and free Black Americans were deprived of adequate mental healthcare by federal and state governments during the slavery era. The first public mental hospital in the United States was founded in 1773, in Williamsburg, Virginia.⁸² Eventually, a few public mental asylums opened in Maryland, Kentucky, and

⁶⁹ Todd L. Savitt, *Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia*, p. 77, <https://www.press.uillinois.edu/books/catalog/85scf7fe9780252008740.html>.

⁷⁰ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, Chapter 1.

⁷¹ *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890*, Howard N. Rabinowitz, p. 327, <https://www.jstor.org/stable/30015123>.

⁷² *Id.*

⁷³ *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890*, Howard N. Rabinowitz, p. 327, <https://www.jstor.org/stable/30015123>.

⁷⁴ Rao, *Administering Entitlement: Governance, Public Health Care, and the Early American State* (2012) 37 *Law & Social Inquiry* 627, 627.

⁷⁵ *Id.* at page 648.

⁷⁶ McBride, Chapter 1.

⁷⁷ David McBride, *Caring for Equality: A History of African American Health and Healthcare*, Chapter 1.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ David McBride, *Caring for Equality: A History of African American Health and Healthcare*, Chapter 1.

⁸² Wendy Gonaver, *The Peculiar Institution and the Making of Modern Psychiatry 1840-1880*, p. 7, Introduction.

South Carolina during the antebellum period.⁸³ Initially, Black patients were only admitted to the asylum in Williamsburg, Virginia—the other public mental health institutions did not allow Black patients to be admitted.⁸⁴ There, free Black patients were funded by the state at much lower rates than whites, so patients received less care and services.⁸⁵ Some enslaved people were diagnosed with fictitious mental illnesses.⁸⁶ Numerous “diseases” that allegedly affected enslaved people were invented by southern doctors, including “drapetomania,” the “irrational” desire to run away, and “dysesthesia,” a supposed laziness that caused enslaved people to mishandle enslaver property.⁸⁷ Doctors recommended torturing enslaved people as “treatment” for these false diseases.⁸⁸

Generally, antebellum mental asylums were segregated or closed to Black patients. If admitted, Black patients were housed in poorer accommodations and forced to work at the asylums under harsher conditions than white patients.⁸⁹ They were assigned the dirtiest and most difficult jobs, including meal preparation, and handling the personal hygiene of ill patients.⁹⁰ In “Central Lunatic Asylum” in Virginia, enslaved people were forced to labor on frequently a plantation, while being mechanically restrained.⁹¹ In the North, state and local governments typically denied Black Americans access to mental healthcare in asylums. For mentally ill free Black Americans in the North, the poorhouse and the jail were the only social “welfare” institutions open to them in the antebellum era.⁹² Free Black Americans did work as janitors in northern mental hospitals and medical schools, but were not allowed to work as direct caregivers.⁹³

C. Enslaved Women and Children

Enslavers held unrestrained reproductive control over enslaved women using rape and livestock breeding techniques sanctioned by law.⁹⁴ The enslaver, President Thomas Jefferson, wrote in his journal of plantation management, “I consider a slave woman who breeds once every two years as profitable as the best worker on the farm.”⁹⁵ Jefferson was commenting on the enslaver’s practice of using enslaved women to reproduce, like livestock. Every year, one out of five enslaved women gave birth and girls were often forced or enticed into sexual relationships at early ages.⁹⁶ State laws stated that children born to enslaved mothers and white men were legally considered to be enslaved, leading enslaved women to be vulnerable to sexual violence inflicted by

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id. at 14.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Dorothy Roberts, *Killing the Black Body*, p. 27-28

⁹⁵ Harriet Washington, Chapter 1, 81.

⁹⁶ Id.

white men.⁹⁷ Furthermore, the law did not recognize the rape of enslaved women as a crime.⁹⁸

White enslavers were legally allowed to economically profit from raping enslaved women because rape generated a larger workforce of enslaved people—and enslavers could rape freely, without consequence.⁹⁹ White women married to enslavers often whipped and tortured enslaved women after they were sexually assaulted by white men.¹⁰⁰ Enslavers inflicted physical and psychological punishment on enslaved women if they were not able to bear children.¹⁰¹ Enslavers forced enslaved women to submit to being raped by men and castrated enslaved men who were not fit for “breeding.”¹⁰²

The health of enslaved mothers and their babies was greatly damaged due to the treatment of enslaved women as objects to be raped, bred, or abused.¹⁰³ On average, enslaved women became mothers earlier than white women due to pressure to reproduce.¹⁰⁴ If enslaved women did not reproduce, they were often tortured or sold. Enslavers treated enslaved women who did not bear children as “damaged goods”—pawning them off on other enslavers. Southern courts even established rules for sellers of enslaved women who misrepresented their fertility, which were akin to rules governing the sale of commodities—i.e., imposing some sort of fine or consequence for misrepresenting their “merchandise.”¹⁰⁵ Mother-child bonding was shattered as white enslavers trafficked children for labor to other plantations or sold them.¹⁰⁶ Records show that expectant mothers only received work relief after the fifth month of pregnancy and often returned to heavy labor within the first month of the infant’s life.¹⁰⁷ Enslaved mothers were forced to labor in fields and to breastfeed white children, while neglecting their own.¹⁰⁸

Pregnant enslaved women were whipped routinely by white enslavers.¹⁰⁹ Enslavers dug holes in the ground, forced women to lie face down so that their stomachs would fit inside the holes, and whipped their backs.¹¹⁰ This was done to punish enslaved women without damaging the fetus, which was legally considered to be the enslaver’s future property.¹¹¹ Women became pregnant during winter months when labor was reduced, consequently giving birth during the summer—the time of highest labor demand and greatest sickness—leading to high infant mortality rates.¹¹² Enslaved women had rich cultural knowledge of natural birth control from their

⁹⁷ Id.

⁹⁸ Dorothy Roberts, *Killing the Black Body*, p. 27-28

⁹⁹ Harriet Washington, Chapter 1, 81.

¹⁰⁰ Dorothy Roberts, *Killing the Black Body*, p. 27-28

¹⁰¹ Harriet Washington, Chapter 1, 81.

¹⁰² Id.

¹⁰³ Dorothy Roberts, *Killing the Black Body*, p. 27-28

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id. Introduction, Chapter 1, Chapter 6.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id.

indigenous cultures, which they were forced to conceal from enslavers.¹¹³ Black midwives assisted pregnant enslaved women with inducing and hiding abortions.¹¹⁴

Children born into slavery experienced disproportionately high mortality rates, consumed contaminated and less nutritious food, and experienced stunted growth and health problems throughout childhood.¹¹⁵ Two-thirds of infants died within their first month of life—due in part to the hard labor enslaved mothers were forced to do.¹¹⁶ Children were forced to work before they turned seven years old.¹¹⁷ They experienced trauma from witnessing brutal beatings of their parents and died at double the rate of the general white population.¹¹⁸

D. Medical Experimentation

Courts completely neglected the health and safety rights of enslaved people, who were rendered powerless in the face of brutal medical experimentation under the institution of slavery.¹¹⁹ Enslaved people were both medically neglected and abused, and had no legal recourse to advocate for their rights. Enslavers often only called physicians as a last resort, when the enslaved person was near-death, because of medical expenses, which they did not wish to pay. Physicians actively exploited enslaved people—practicing dangerous experimental procedures on them without anesthesia and using their cadavers for dissection without consent. Despite this abuse of human rights, enslaved people were not allowed to advocate for their own right to health in courts.

White southern doctors were hired by enslavers and insurance companies to accurately determine the market value of Black bodies.¹²⁰ Physicians used slavery for economic security and experimented on Black people for dangerous procedures that addicted, sickened, poisoned, or killed enslaved people,¹²¹ but furthered the physician's professional advancement.¹²² Black cadavers filled surgical suites, operating theaters, and autopsy tables.¹²³ Black organs were placed on display in state-funded medical schools legally and without consent.¹²⁴ An enslaved person named Sam was experimented on by multiple doctors, who had his lower jaw bone removed without anesthesia for medical research.¹²⁵

James Marion Sims, the “father of modern gynecology,” bought enslaved women and forcibly injected them

¹¹³ David McBride, *Caring for Equality: A History of African American Health and Healthcare*, Chapter 1.

¹¹⁴ *Killing the Black Body*.

¹¹⁵ Patricia M. Lambert, *Infectious disease among enslaved African Americans at Eaton's Estate, Warren County, North Carolina, ca. 1830-1850*, https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0074-02762006001000017&lng=en&nrm=iso&tlng=en.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *A Peculiar Population: The Nutrition, Health, and Mortality of American Slaves from Childhood to Maturity*, 733.

¹¹⁹ Harriet Washington, Chapter 1.

¹²⁰ Deirdre Cooper Owens and Sharla Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery*, *American Journal of Public Health* (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6727302/>.

¹²¹ McBride, Chapter 2.

¹²² Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, Chapter 1.

¹²³ *Id.*

¹²⁴ *Id.* Chapter 4, 191.

¹²⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Carolyn Roberts, < <https://oag.ca.gov/ab3121/meetings/012022> > (as of February 8, 2022).

with morphine to practice excruciatingly painful vaginal surgeries upon them.¹²⁶ Sims' usage of morphine would lead to addiction.¹²⁷ The dangerous surgeries he conducted would later be perfected and used to treat white women.¹²⁸ Sims' surgeries resulted in vaginal tears that he attempted to suture but became continuously re-infected.¹²⁹ All the while, Sims refused to administer anesthesia to enslaved women, but later did administer it for white women upon whom he performed the same surgeries.¹³⁰ Sims also experimented on enslaved children, making scalp incisions and moving skull bones for dangerous experimental procedures.¹³¹ Sims used only Black children as experimental subjects.¹³²

Enslaved people were used to test genital and urinary surgeries, experimental caesarean sections, and eye surgeries.¹³³ Thomas Jefferson injected 200 enslaved people with a cowpox vaccine that may not have been potent, to determine whether he should inject his own family members with it.¹³⁴ Bloodletting and trephination, the drilling of holes in the skull, were risky for wealthy white classes—but often fatal for the malnourished enslaved people upon whom they were tested.¹³⁵ Surgeons often used enslaved people for spontaneous surgical experiments and ad hoc experimentation in medication and dosages.¹³⁶ Enslaved people's bodies were dissected after death to advance medical knowledge and their remains were found at Virginia Commonwealth University in 1994—findings such as these have occurred in numerous medical schools across the country.¹³⁷

E. California

Enslaved people within California likely suffered the same health consequences as enslaved people had suffered in the South.¹³⁸ White southerners flocked to the state with hundreds of enslaved Black people when the Gold Rush began in 1848, forcing them to toil in gold mines and hiring them to cook, serve, and perform manual labor.¹³⁹ Black newspapers described brawls between enslaved people and white enslavers across California.¹⁴⁰

At least initially, Black Americans were denied entry into certain hospitals in California as well as California's medical schools. In 1851, the U.S. Congress created a U.S. Marine Hospital in San Francisco, which was completed in 1853. Marine hospitals were set up to care for sick and disabled seamen by the U.S. Treasury

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, pg. 3-4.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Id. Chapter 2

¹³³ *Medical Apartheid*, Chapter 2, 9

¹³⁴ Id. Chapter 2, 11.

¹³⁵ Washington, Chapter 1, 53.

¹³⁶ Washington, Chapter 1.

¹³⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Carolyn Roberts, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

¹³⁸ <https://californiahistoricalsociety.org/blog/california-a-free-state-sanctioned-slavery/>.

¹³⁹ Id.

¹⁴⁰ Id.

Department.¹⁴¹ The Treasury Department distributed strict guidelines specifying that the “Negro slaves” could not receive treatment at these hospitals.¹⁴²

The population of Black Californians during this early period of California history was small.¹⁴³ However, some Black Californians at this time worked in healthcare as midwives and nurses.¹⁴⁴ In the 1850s, Biddy Mason, a formerly enslaved woman, worked as a nurse and midwife in Los Angeles for Dr. John Strother Griffin.¹⁴⁵ Dr. Griffin was a white native southerner who was impressed with Mason’s nursing skills.¹⁴⁶ Mason delivered hundreds of babies in Los Angeles, and was beloved there.¹⁴⁷ At the time, Los Angeles numbered only 2,000 or so residents—less than 20 of them were Black.¹⁴⁸ Mason eventually went on to run her own midwifery practice.¹⁴⁹

V. Discriminatory Healthcare Systems (1865 to 1870)

At the end of the Civil War, the federal government refused to care for formerly enslaved people living in squalid, post-war conditions, leading to the mass death of Black Americans from preventable diseases.¹⁵⁰ The Civil War resulted in disproportionately large-scale death, destruction, and casualties for formerly enslaved people¹⁵¹—30,000 formerly enslaved people died from infectious diseases.¹⁵²

After the war, Black Americans were forced to live in large, segregated refugee camps.¹⁵³ Hospitals, dispensaries, and military camps were unprepared for the flood of enslaved people, Black soldiers, and other refugees who entered the North due to the Civil War.¹⁵⁴ Escaped and abandoned formerly enslaved people settled near or inside the Union Army’s military camps and battle lines.¹⁵⁵ These enslaved people organized themselves into camps, without adequate sanitation, nutrition, or medical care because the federal government did not assist them.¹⁵⁶ One out of every four Black Americans who lived in the camps died.¹⁵⁷

Following the Civil War, Black Americans were forced to live in overcrowded, unventilated tenements and

¹⁴¹ Rao, *Administering Entitlement: Governance, Public Health Care, and the Early American State* (2012) 37 *Law & Social Inquiry* 627, 627.

¹⁴² *Id.* at page 648.

¹⁴³ [citation needed]

¹⁴⁴ <https://la.curbed.com/2017/3/1/14756308/biddy-mason-california-black-history>; <https://petalumahistorian.com/tag/the-elevator-newspaper/>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ McBride.

¹⁵¹ David McBride, *Caring for Equality: A History of African American Health and Healthcare*, Chapter 2.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

shacks with unsanitary conditions.¹⁵⁸ Excessive mortality rates in Black communities were caused by poor living conditions, lack of access to nutritious food, and lack of access to healthcare, medical aid, and vaccinations.¹⁵⁹ Local governments paid doctors to treat white veterans, but refused to pay for and treat Black veterans.¹⁶⁰ Epidemics broke out constantly where Black Americans lived.¹⁶¹

From 1865 to 1868, the federal government funded the Bureau of Refugees, Freedmen, and Abandoned Lands to provide services and resources to formerly enslaved people after the Civil War, a short-lived, meager attempt to provide medical aid to formerly enslaved people in need.¹⁶² Cities and counties focused on the health of white people and refused to cooperate with the Freedmen's Bureau to provide healthcare for formerly enslaved people.¹⁶³ The Freedmen's Bureau did not provide mental health services to formerly enslaved people.¹⁶⁴

Despite these challenges, the Freedmen's Bureau dispensaries did provide thousands with annual treatment and prescriptions.¹⁶⁵ The Bureau helped to decrease Black American mortality rates—but there were less than 150 physicians to care for over one million formerly enslaved people.¹⁶⁶ Many of these primarily white physicians were racist to their Black patients, and sometimes refused to treat them.¹⁶⁷ After two years of operation, with southern legislators claiming the costs were too high, Congress ended the Freedmen's Bureau medical services—just as demand for services was increasing.¹⁶⁸ When the Bureau's paltry medical services ended, formerly enslaved people continued to suffer from illness, destitution, and racial discrimination from physicians and were left with little to no access to medical care.¹⁶⁹

VI. Segregation and Discrimination in Medical Care (1870 to 1964)

Following the Freedmen's Bureau's failed attempts to provide healthcare to Black Americans, the Jim Crow era of racial segregation and discrimination greatly degraded the health of Black communities.¹⁷⁰ White hospitals discriminated against Black doctors and nurses, and refused to treat Black patients altogether or treated them only in “colored wings.”¹⁷¹ Black hospitals suffered from underfunding and resource constraints, such as struggles with licensing accreditation, and developing links with municipal hospitals—much of which was due

¹⁵⁸ Id.

¹⁵⁹ McBride, Chapter 2.

¹⁶⁰ Reggie L. Pearson, “There Are Many Sick, Feeble, and Suffering Freedmen”: The Freedmen's Bureau Healthcare Activities during Reconstruction in North Carolina, 1865-1868”, 141 https://www.jstor.org/stable/23522765?read-now=1&refreqid=excelsior%3A832895b477aac480ab3bd178df367ea&seq=1#page_scan_tab_contents.

¹⁶¹ McBride.

¹⁶² Reggie L. Pearson, “There Are Many Sick, Feeble, and Suffering Freedmen”: The Freedmen's Bureau Healthcare Activities during Reconstruction in North Carolina, 1865-1868”, 141 https://www.jstor.org/stable/23522765?read-now=1&refreqid=excelsior%3A832895b477aac480ab3bd178df367ea&seq=1#page_scan_tab_contents.

¹⁶³ Pearson, 142.

¹⁶⁴ Pearson, 173-174

¹⁶⁵ David McBride, *Caring for Equality: A History of African American Health and Healthcare*, Chapter 2.

¹⁶⁶ Id.

¹⁶⁷ Pearson, 158; Washington, Chapter 6, 263.

¹⁶⁸ Pearson, 177.

¹⁶⁹ Pearson, 177-178.

¹⁷⁰ [citation needed]

¹⁷¹ [citation needed]

to government action.¹⁷²

In 1946, Congress passed the Hill-Burton Act, which provided federal funding to segregated healthcare facilities—further entrenching discrimination and segregation in the healthcare system.¹⁷³ The racial segregation of the Jim Crow era resulted in dire health consequences for Black Americans and significant racial health disparities.¹⁷⁴

A. Black Patients and Medical Professionals

During the Jim Crow era, Black hospitals and segregated units within predominantly white hospitals were the only viable sources for medical services for Black Americans, due to pervasive racial discrimination, poverty, and lack of geographic accessibility.¹⁷⁵ Some white hospitals operated small wards for Black patients, but they were in the least desirable areas of hospital facilities—in basements or crowded “colored wings.”¹⁷⁶ These white hospitals did not hire Black doctors, and white doctors often treated Black patients with disdain.¹⁷⁷

During World War I and after, millions of Black Americans living in southern states migrated to the urban Northeast and Midwest in the Great Migration.¹⁷⁸ During this time, underfunded and under-resourced Black hospitals were not able to provide care for local Black Americans and newly arriving migrants.¹⁷⁹ In northern cities, Black patients who sought treatment in large city hospitals were forced to compete for healthcare resources with poor European immigrants.¹⁸⁰ Private doctors were unaffordable for most Black Americans.¹⁸¹

From 1870 to 1964, southern states segregated Black people from white Americans in every aspect of life, including healthcare.¹⁸² The Hill-Burton Act allocated separate funds for Black and white hospitals, resulting in a staggering disparity in hospital beds available for Black patients.¹⁸³ Black women could not deliver babies in hospitals,¹⁸⁴ and were instead treated by Black midwives in the rural regions of the South.¹⁸⁵ White patients refused to be treated next to Black patients and by Black doctors or nurses.¹⁸⁶ Black workers often could not afford hospital care.¹⁸⁷ Some Black doctors could have their Black patients admitted to white hospitals—however, the Black doctors themselves were barred from working as physicians at those white hospitals.¹⁸⁸ If a

¹⁷² McBride, Chapter 3.

¹⁷³ [citation needed]

¹⁷⁴ [citation needed]

¹⁷⁵ McBride, Chapter 3

¹⁷⁶ Id.

¹⁷⁷ McBride Chapter 3.

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² Id.

¹⁸³ p.94 of Cheryl Lynn Greenberg’s *To Ask for an Equal Chance*

¹⁸⁴ McBride Chapter 2.

¹⁸⁵ McBride, Chapter 3

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id.

Black patient was admitted to a white hospital, they would face harsh treatment from white hospital staff and physicians.¹⁸⁹ White public health leaders and professionals ignored the needs of the Black community while Black physicians and health leaders traveled to churches, schools, and community meetings to give healthcare education presentations.¹⁹⁰

Black medical schools shut down, in part, due to the racial discrimination and government neglect.¹⁹¹ In 1910, the American Medical Association (AMA), an influential professional association of physicians, was commissioned to evaluate every medical school in the U.S. and Canada.¹⁹² Their report concluded that every Black medical school was substandard and recommended they all be closed.¹⁹³ The first Black medical school, Howard University Medical Department, was founded in 1868. It was the first of 14 Black medical schools founded between 1868 and 1900. By 1915, five of the eight Black medical schools in the nation were closed.¹⁹⁴ The three that remained were in southern states.¹⁹⁵ By 1923, only two training sites were left for black doctors and other medical professionals—Howard University in Washington, D.C. and Meharry Medical College in Tennessee.¹⁹⁶

At the time, there was intense pressure in the medical field to modernize and redesign medical facilities with higher clinical and operational standards.¹⁹⁷ Black hospitals contended with a double bind—adhering to these new modernized standards without the funds or institutional support of major industrialists, premier academic institutions, and political leaders, while also caring for growing healthcare needs of Black Americans in the Jim Crow era.¹⁹⁸ The AMA's report made it difficult for them to raise funds and send their students to white hospitals for training.¹⁹⁹ Without a means of training students, and a lack of teaching and funding resources, Black medical schools were no longer viable institutions for a medical education.²⁰⁰ From 1900 to 1980, only about two percent of medical professionals were Black.²⁰¹ Today, just five percent of physicians are Black.²⁰²

Black professionals experienced constant racial discrimination and were excluded from medical institutions and professional associations during legal segregation.²⁰³ Black doctors were not allowed to treat Black patients in white hospitals.²⁰⁴ Black interns, residents, and registered nursing personnel were excluded from white

¹⁸⁹ Id.
¹⁹⁰ Id.
¹⁹¹ McBride, Chapter 3.
¹⁹² Id.
¹⁹³ Id.
¹⁹⁴ Id.
¹⁹⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2569729/?page=1>.
¹⁹⁶ Id.; McBride.
¹⁹⁷ Id.
¹⁹⁸ Id.
¹⁹⁹ Id.
²⁰⁰ Id.
²⁰¹ W.M. Byrd and L.A. Clayton, Race, Medicine, and Health Care in the United States: A Historical Survey, p. 205, --.
²⁰² <https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018>.
²⁰³ [citation needed]
²⁰⁴ [citation needed]

hospitals.²⁰⁵ Black pharmacists were limited to employment in “colored drugstores.” Many Black women who entered the nursing profession were discriminated against and not allowed to enter the nation’s major government and charitable health agencies.²⁰⁶

Black hospitals were the only viable sources for healthcare for Black Americans because many white hospitals did not admit Black patients, or provided discriminatory care—relegating Black patients to basements.²⁰⁷ As late as 1945, Chicago only had one hospital operated by Black healthcare providers that served roughly 270,000 Black residents.²⁰⁸ Philadelphia had two Black hospitals.²⁰⁹ Southern Black women relied on private physicians and hospitals for maternity care.²¹⁰ Even in 1949, when an increasing number of white women were assisted by physicians during birth, most Black women had no physician present for birth.²¹¹

Until 1954, when the Veterans Administration announced the end of segregation in agency hospitals, Black veterans received worse treatment than white veterans due to separate and unequal facilities.²¹² White hospitals received public and private funds to establish models of care based on the newest scientific developments, while Black hospitals had to rely on their own small community of patients for funding.²¹³ Black hospitals were forced to open in older, outdated hospital structures that were abandoned by prior white founders.²¹⁴

The AMA is the most powerful umbrella organization for physician advocacy and lobbying in the United States.²¹⁵ In addition to being instrumental in the closing of Black medical schools, the AMA actively discriminated against Black medical professionals and supported state-sanctioned discrimination, which has had long-lasting discriminatory effects even until today.²¹⁶ From about 1846 to 1888, the AMA did not allow Black doctors to join. This policy of tolerating racial exclusion was pivotal in creating a two-tier system of medicine in the United States.²¹⁷ In response to the AMA’s racial discrimination, in 1895, Black physicians formed their own professional association, the National Medical Association.²¹⁸

From the 1870s through the late 1960s, the AMA excluded and discriminated against Black physicians, hindering their professional advancement, and creating discriminatory barriers to adequate healthcare for Black patients.²¹⁹ During this period, the AMA was made up of local physician societies.²²⁰ Societies that were in

²⁰⁵ Id.

²⁰⁶ McBride, Chapter 2.

²⁰⁷ Id.

²⁰⁸ Id.

²⁰⁹ Id.

²¹⁰ Id.

²¹¹ Id.

²¹² Id.

²¹³ Id.

²¹⁴ Id.

²¹⁵ <https://www.thenation.com/article/politics/ama-medicare-insurance/>.

²¹⁶ [citation needed]

²¹⁷ <https://journalofethics.ama-assn.org/article/american-medical-association-and-race/2014-06>; <https://www.ama-assn.org/about/ama-history/history-african-americans-and-organized-medicine>.

²¹⁸ [citation needed]

²¹⁹ Id.

²²⁰ Id.

segregationist states freely denied Black physicians entry, yet remained part of the national AMA.²²¹ Consequently, Black physicians were denied membership in state, county, and municipal medical societies throughout the South and in many border states.²²² Exclusion from these medical societies restricted access to training and limited professional contacts.²²³ Since membership in a state medical society was required by most southern hospitals, this policy resulted in the denial of admitting privileges, which meant that Black physicians could not admit Black patients to southern hospitals.²²⁴ This, in turn, created barriers to healthcare for Black Americans and barriers to professional advancement for Black physicians.²²⁵ Furthermore, the AMA was silent in debates over the Civil Rights Act of 1964 and did not support efforts to amend the “separate but equal” provision of the Hill-Burton Act.²²⁶

B. The Hill-Burton Act (1946)

In 1946, Congress passed the Hill-Burton Act, which provided federal construction grants and loans to communities that needed and could sustain health care facilities, based on population and per-capita income.²²⁷ The purpose of the act was to build hospitals where they were needed and would be sustainable.²²⁸ However, the Hill-Burton Act allowed “separate but equal” healthcare facilities.²²⁹ In congressional debates, northern Senators William Langer and Harold Burton called for nondiscrimination in the use of federal funds.²³⁰ Southern Senators, such as Lister Hill from Alabama, claimed that state legislatures and local hospital authorities had the right to set policy without federal interference.²³¹ Ultimately, Congress included the “separate but equal” provision in the Hill-Burton Act to appease the southern states.²³²

Southern states received a significant portion of the federal funds allotted through the Hill-Burton Act.²³³ Because Hill-Burton Act funds were disbursed through regional, state, and local offices, states that were highly segregated continued to engage in racial exclusion.²³⁴ By 1962, 98 hospitals in the South banned Black patients outright, while others only allowed Black patients in segregated areas.²³⁵ Federal regulations interpreting the Hill-Burton Act allowed patients to be denied admittance into hospitals on account of race.²³⁶ As a result, Black

²²¹ Id.

²²² Id.

²²³ Id.

²²⁴ Id.

²²⁵ Id.

²²⁶ Id.

²²⁷ <https://www.npr.org/sections/health-shots/2016/10/02/495775518/a-bygone-era-when-bipartisanship-led-to-health-care-transformation>.

²²⁸ Id.

²²⁹ U.S. Com. on Civil Rights, Equal Opportunity in Hospitals and Health Facilities (Mar. 1965) page 5 (hereafter USCCR).

²³⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225869/>.

²³¹ Id.

²³² Id.

²³³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225869/>.

²³⁴ Reynolds (1997), *supra*, at page 899; Quadagno, *supra*, at page 74.

²³⁵ Id.

²³⁶ USCCR, *supra*, at page 6.

doctors were prevented from treating their patients even when allowed to practice in mixed-race hospitals.²³⁷ Black doctors were denied jobs and squeezed out of the medical market.²³⁸ Black patients were similarly denied the opportunity to continue treatment with a trusted provider.²³⁹

C. Healthcare in the Jim Crow Era

Due to discrimination and segregation instituted and allowed by federal and state governments during the Jim Crow era, Black Americans suffered dire healthcare consequences. Studies conducted on the Black community in the mid-20th century, revealed high rates of syphilis, tuberculosis, maternal and infant mortality, and disparities in life expectancy—healthcare concerns that continue.²⁴⁰

Communicable childhood diseases such as whooping cough, measles, meningitis, diphtheria, and scarlet fever were three times as frequent among Black children than white children—reflecting inadequate access to modern medical treatment.²⁴¹ The infant death rate for Black children was twice that of white children in the late 1950s.²⁴² The Black maternal mortality rate was four times greater than the white maternal mortality rate.²⁴³ Compared to white Americans, Black Americans died at earlier ages of chronic diseases, such as heart disease and cancer of the respiratory system.²⁴⁴

A contributing factor to premature death for Black Americans was that the federal government prohibited Black Americans from accessing antipoverty programs.²⁴⁵ As a result, they could not afford or access quality healthcare.²⁴⁶ Without preventative treatment and care for chronic disease, Black Americans died earlier than white people.²⁴⁷ Heart disease deaths linked to hypertension were occurring among Black people at triple the rate of white people—indicating racial disparities in diet, family background, blood cholesterol levels, stress, age, and access to healthcare.²⁴⁸ Government-sanctioned racial segregation and discrimination extended the legacy of slavery, impacting the healthcare system far into the 20th century and until today.

D. California

California has a history of healthcare discrimination against Black Californians, due to the segregation of hospitals in California and the inadequacy of white physicians in providing healthcare to Black Californians. In the late 1940s, Fresno lost its only Black doctor, Dr. Henry C. Wallace.²⁴⁹ At the time, young Earl Meyers, a

²³⁷ Barton Smith, *The Power to Heal: Civil Rights, Medicare, and the Struggle to Transform America's Health Care System* (2016) page 71; Reynolds (1997), *supra*, at page 900; Quadagno, *supra*, at page 69; Outtersen, *supra*, at page 770.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ McBride.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ <https://www.mercedsunstar.com/news/local/central-valley/article3302659.html>

Black teenager in Fresno, was impressed by Dr. Wallace.²⁵⁰ “Dr. Wallace inspired him ... He was Earl’s mother’s doctor and he healed her,” Mattie Meyers, Earl Meyers’ former wife, said. “At that time, there weren’t any black doctors here. Dr. Wallace was Earl’s mentor,” she said. Earl Meyers then left Fresno to receive his medical degree at Tennessee’s Meharry Medical College—one of the only Black medical schools left in the United States.²⁵¹

Many of the Black residents of Fresno described the difficulty they had in getting medical care from white doctors and asked Dr. Meyers to return to his hometown.²⁵² Dr. Meyers did return home to Fresno, where he established a medical clinic.²⁵³ He also established a dispensary and made prescriptions available at wholesale cost—often refusing to charge impoverished patients for his services.²⁵⁴

Hospitals in California that received Hill-Burton Act funds discriminated against Black patients and physicians.²⁵⁵ From 1947 to 1971, Hill-Burton Act funds contributed to 427 projects at 284 facilities in 165 communities in California.²⁵⁶ A 1950 survey of Los Angeles hospitals found that 11 of the 17 hospitals that received Hill-Burton Act funds racially segregated patients.²⁵⁷ A separate, 1956 study found that only 28.2 percent of Black physicians in Los Angeles served at predominately white hospitals.²⁵⁸ The legacy of this discrimination carries through today. This year, a nonpartisan health organization found that Los Angeles tied Atlanta for the highest number of “least inclusive hospitals.”²⁵⁹

VII. Systemic Anti-Black Discrimination in Healthcare (1964 to Present)

The Civil Rights Act brought marked improvements in addressing healthcare discrimination.²⁶⁰ However, the United States healthcare system was built upon a foundation of enslavement and segregation, which has never been dismantled.²⁶¹ The legacy of enslavement and segregation is present in the legal barriers to medical education for Black Americans, the anti-Black discrimination in the healthcare profession, and the transformation of hospitals and healthcare into a high profit industry that has neglected to provide care for Black Americans.²⁶² The dearth of Black hospitals and the separation of Black providers from Black patients has resulted in inadequate, discriminatory medical care.²⁶³ This continues to harm Black Americans today,

²⁵⁰ Id.

²⁵¹ <https://www.mercedsunstar.com/news/local/central-valley/article3302659.html>

²⁵² Id.

²⁵³ Id.

²⁵⁴ Id.

²⁵⁵ U.S. Dept. of Health, Education and Welfare, Hill-Burton Progress Report (1972) page 72.

²⁵⁶ U.S. Dept. of Health, Education and Welfare, Hill-Burton Progress Report (1972) page 72.

²⁵⁷ Byrd, *supra*, at page 253.

²⁵⁸ *Id.* at 254.

²⁵⁹ Toleos, *Racial Segregation is Common in Urban Hospital Markets, Analysis Reveals* (May 25, 2021) Lown Institute <<https://lowninstitute.org/press-release-racial-segregation-is-common-in-urban-hospital-markets-analysis-reveals/>> (as of Jul. 19, 2021).

²⁶⁰ [citation needed]

²⁶¹ [citation needed]

²⁶² [citation needed]

²⁶³ [citation needed]

resulting in continued inequities in medical treatment and health outcomes.

A. Medical Education

The federal government's ban on race-based quotas in affirmative-action programs that were in place in medical schools has led to a dearth of Black doctors.²⁶⁴ In the 1960s, white medical and dental schools began efforts to increase Black enrollment through affirmative action programs to recruit and graduate higher numbers of Black medical students.²⁶⁵ Affirmative action programs increased Black medical school enrollment from 2.2 percent to 7.5 percent by 1975.²⁶⁶ Surveys have revealed that, of all those who treat Black communities and patient populations, Black physicians provided physician care the most.²⁶⁷

The University of California, Davis opened a medical school with an affirmative action program in 1966.²⁶⁸ However, in 1978, the U.S. Supreme Court ruled that the racial quotas used in this program were unconstitutional in *Regents of the University of California v. Bakke*.²⁶⁹ This ruling reduced the number of Black students admitted in the nation's medical schools—particularly middle- and lower-ranked schools, where the percentage of Black students admitted dropped to miniscule levels.²⁷⁰ There were fewer Black men in U.S. medical schools in 2014 than in 1978.²⁷¹ Medical education began to use a “colorblind” model of selecting, training, and placing black professionals, instead of attempting structural anti-racist changes to medical education and professionalization.²⁷²

Major growth of the medical sector eventually led the bulk of the nation's hospitals to be operated by the government, large corporations, and not-for-profit healthcare businesses.²⁷³ Due to the transformation of healthcare from a largely government provided service to a for-profit industry, Black physicians were separated from Black patient populations.²⁷⁴ Black hospitals were closed and taken over by large corporate entities.²⁷⁵ Black hospitals were not funded by government, corporate, and non-profit economic circles and consequently could not afford to remain open.²⁷⁶ They closed, merged into larger hospital systems, or were renovated into nursing homes by the mid-1980s.²⁷⁷

Health Maintenance Organizations (HMOs) began siphoning patient populations from solo practitioners, which included Black physicians who treated a large population of Black patients.²⁷⁸ In the 1990s, HMOs did not

²⁶⁴ Id.

²⁶⁵ McBride, Chapter 5.

²⁶⁶ Id.

²⁶⁷ McBride, Chapter 6.

²⁶⁸ [citation needed]

²⁶⁹ McBride, Chapter 6.

²⁷⁰ Id.

²⁷¹ <https://www.aamc.org/news-insights/aamc-report-shows-decline-black-males-medicine>.

²⁷² [citation needed]

²⁷³ McBride.

²⁷⁴ [citation needed]

²⁷⁵ Id.

²⁷⁶ Id.

²⁷⁷ Id.

²⁷⁸ Id.

include Black physicians in their networks due to a preference for established networks of largely white physicians.²⁷⁹ The mainstream medical establishment became scattered geographically due to the growth of the medical sector.²⁸⁰ Black doctors who used to serve Black patients concentrated in Black geographic areas were consequently also scattered and unable to continue serving Black patient populations in clinics and hospitals.²⁸¹

Research has shown that diversity among physicians leads to better outcomes for Black patients.²⁸² Non-Black medical students' explicit racist attitudes are associated with decreased intent to practice with underserved or minority populations.²⁸³ One study found that Black patients assigned to a Black doctor increased their demand for preventive care, brought up more medical issues, and were more likely to seek medical advice.²⁸⁴

Racism by white doctors has led to unconscious bias that has resulted in Black Americans receiving inferior medical care as compared to white Americans.²⁸⁵ Higher implicit bias scores among physicians are associated with biased treatment recommendations for the care of Black patients.²⁸⁶ Providers' implicit bias affects their nonverbal behavior, which is associated with poorer quality of patient-provider communication.²⁸⁷ Across virtually every type of diagnostic and treatment intervention, Black Americans receive fewer procedures and poorer-quality medical care than do white Americans.²⁸⁸

B. Discrimination in Healthcare

Federally funded hospitals continued to refuse to care for Black patients after the Civil Rights Act of 1964.²⁸⁹ Black physicians were not admitted for training or staff privileges at the predominantly white federally funded hospitals throughout the South.²⁹⁰ Due to insufficient government-funded healthcare services, as well as the disempowerment and neglect of Black patients by healthcare institutions, Black communities suffered major gaps in healthcare delivery in the impoverished neighborhoods where they lived.²⁹¹ Black residents who lived in urban poverty received medical care from crowded emergency rooms and outpatient services at overburdened public hospitals, or at small practices of private Black physicians.²⁹²

In 1960, there was only one Black doctor for every 5,000 Black patients, compared to the national average of

²⁷⁹ Id.

²⁸⁰ Id.

²⁸¹ Id.

²⁸² [citation needed]

²⁸³ The Effects of Racism in Medical Education on Students' Decisions to Practice in Underserved or Minority Communities

²⁸⁴ https://www.nber.org/system/files/working_papers/w24787/w24787.pdf.

²⁸⁵ David R. Williams, et. al, Racism and Health: Evidence and Needed Research, Annual Review of Public Health (April 2019), https://www.annualreviews.org/doi/full/10.1146/annurev-publhealth-040218-043750#_i2.; Nelson, Body and Soul: The Black Panther Party and the Fight against Medical Discrimination (2011) page 78.

²⁸⁶ Id.

²⁸⁷ Id.

²⁸⁸ Id.

²⁸⁹ McBride Chapter 5.

²⁹⁰ Id.

²⁹¹ McBride, Chapter 5.

²⁹² Id.

one doctor for every 670 Americans.²⁹³ In the Watts neighborhood of Los Angeles, an area with a large Black population, only 106 doctors were serving over 250,000 residents—a doctor to patient ratio of one to 2,377.²⁹⁴ Poor Black women could not afford safe abortions through private doctors and could not receive adequate care at the hospitals and clinics in their communities.²⁹⁵ Hospitals in Black neighborhoods were older than public general hospitals.²⁹⁶ They were administered by nonprofit bodies and funded by voluntary contributions and paying patients.²⁹⁷ They were insufficiently staffed and were in too poor of a physical condition to provide the medical services needed by the Black communities around them.²⁹⁸

As a result, between 1950 to 1970, life expectancy for Black Americans remained almost a decade shorter than that of white Americans.²⁹⁹ Death rates from pneumonia, influenza, and tuberculosis were two to three times higher for Black Americans than white Americans due to lack of access to hospital care.³⁰⁰ Similarly, maternal mortality rates for Black mothers remained four times higher than that of white mothers.³⁰¹ Black mortality from sexually transmitted infections and tuberculosis, remained much higher than that of white Americans.³⁰² Black Americans also continued to suffer from chronic illness at higher rates than white people.³⁰³

In the 1950s and 1960s, the National Association for the Advancement of Colored People brought several lawsuits to force government funded hospitals to hire Black doctors, treat Black patients, and desegregate facilities.³⁰⁴ The federal government filed a brief in support of Black patients in *Simkins v. Moses H. Cone Memorial Hospital*, however the government did not enforce the Civil Rights Act against medical segregation, the way it attempted to do in education.³⁰⁵

To address the government's discriminatory neglect of healthcare services for Black communities, the Black Panther Party provided free healthcare clinics to administer basic preventative care and services.³⁰⁶ In early 1970, the Black Panther Party published in its newspaper an account of "the disrespectful, unprofessional, and even authoritarian encounters between physicians and their patients at San Francisco General."³⁰⁷ Shortly after, the Black Panther Party established free, community-based clinics, known as People's Free Medical Clinics.³⁰⁸ Party members worked with lay people and trusted medical professional volunteers to administer basic

²⁹³ Id.

²⁹⁴ Id.

²⁹⁵ McBride, Chapter 5.

²⁹⁶ Id.

²⁹⁷ Id.

²⁹⁸ *Alondra Nelson* at pages 59-60.

²⁹⁹ McBride, Chapter 5.

³⁰⁰ Id.

³⁰¹ Id.

³⁰² Id.

³⁰³ Id.

³⁰⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225869/>.

³⁰⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225869/>.

³⁰⁶ Id.

³⁰⁷ *Id.* at pages 75-76.

³⁰⁸ *Id.* at page 17.

preventative care and services for patients.³⁰⁹

However, federal and state governments retaliated against the Black Panther Party for these practices through bureaucratic and law enforcement harassment.³¹⁰ The Oakland Police Department, on Federal Bureau of Investigation orders, hounded the Black Panther Party for soliciting clinic funds without proper permits.³¹¹ In 1969, police in Los Angeles raided the Black Panther Party chapter's headquarters and severely damaged the clinic building enough that its forthcoming opening was postponed.³¹²

C. Health Insurance

Insurance status predicts the quality of care a patient receives.³¹³ Health insurance is necessary to pay for healthcare procedures, such as preventive care, screenings, disease management, and prescription drugs.³¹⁴ In the United States, health insurance is dependent upon employment.³¹⁵ In 1942, during World War II, rising prices and competing wages led the federal government to put a cap on wages.³¹⁶ Health insurance was an exception to that wage cap and employer contributions to health insurance premiums were tax-free.³¹⁷ Employers began paying for health insurance to lure employees.³¹⁸ Eventually, this led employees with higher-paying jobs to receive more benefits from their health coverage than those with lower incomes.³¹⁹ Healthcare became a privilege for those with good jobs, rather than a right for all.³²⁰ As discussed in Chapter [XX], Black Americans have historically not been able to access jobs that provide medical insurance through employers due to barriers to education, employment, and discrimination.³²¹ Due to employment discrimination, private, job-based, health care systems excluded Black Americans.³²² Consequently, as of 2018, only 46 percent of Black Americans are covered by employer-sponsored health insurance.³²³

In the 1960s, President Lyndon B. Johnson's Great Society legislation and the Civil Rights Act and Voting Rights Act contained the seeds for creating a nationwide health care system for all citizens.³²⁴ However, the Medicaid and Medicare programs fell short of addressing the healthcare needs of Black communities.³²⁵

³⁰⁹ *Id.* at page 106.

³¹⁰ *Id.* at 112.

³¹¹ *Id.*

³¹² *Id.*

³¹³ https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ <https://www.ncbi.nlm.nih.gov/books/NBK24693/>.

³²² https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/.

³²³ *Id.*

³²⁴ [citation needed]

³²⁵ [citation needed]

Medicare and Medicaid are health insurance programs paid for by the federal government.³²⁶ Medicare serves people with disabilities and people who are 65 years or older.³²⁷ Medicaid serves people who are low-income.³²⁸

Before Medicaid and Medicare, southern states were resistant to a nationwide health insurance system for all, due to desegregation brought about by the civil rights legislation.³²⁹ They wanted limited federal involvement while continuing to run their own health programs for low-income residents.³³⁰ Before Medicaid's enactment, states had control over federal health insurance programs for low-income residents, which disproportionately included Black Americans.³³¹ These programs were underfunded and states with large populations of Black Americans—Texas, Arkansas, Louisiana, Tennessee, Mississippi, Alabama, Florida, Georgia, South Carolina, and North Carolina, referred to as the “Black Belt” states—refused to participate in federal health insurance programs.³³² A state-run Medicaid program would limit federal involvement while allowing states to determine eligibility for health insurance programs on their own.³³³

The enactment of Medicaid allowed states to disproportionately exclude Black, low-income populations who previously qualified for state-funded healthcare programs.³³⁴ Medicaid provided insurance to low-income and unemployed people—about one-fifth of the Black population was considered poor enough to qualify for Medicaid.³³⁵ However, the Black Belt states changed their income criteria, lowering the threshold income for Medicaid so much that many poor Black families were not considered poor enough to qualify for Medicaid.³³⁶ Yet, these same families were not wealthy enough to actually pay for health insurance.³³⁷ Consequently, in the 1970s, 25 percent of the Black American population was uninsured, while only 12 percent of the general population was uninsured.³³⁸ States also limited amounts they awarded for certain medical care categories and benefits.³³⁹

During the 1990s, Medicaid and Medicare programs became increasingly privatized.³⁴⁰ Reimbursement policies established by government and health insurance regulators limited hospitals and physicians in the type and number of patients they could treat.³⁴¹ Consequently, private physicians and hospitals preferred not to treat

³²⁶ <https://www.cms.gov/About-CMS/Agency-Information/History>: <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html>.

³²⁷ <https://www.cms.gov/About-CMS/Agency-Information/History>: <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html>.

³²⁸ <https://www.cms.gov/About-CMS/Agency-Information/History>: <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html>.

³²⁹ <https://www.healthaffairs.org/doi/10.1377/hblog20200828.661111/full/>.

³³⁰ <https://www.healthaffairs.org/doi/10.1377/hblog20200828.661111/full/>.

³³¹ Id.

³³² Id.

³³³ Id.

³³⁴ Id.

³³⁵ Id.

³³⁶ Id.

³³⁷ Id.

³³⁸ Id.; <https://www.cdc.gov/nchs/data/nhsr/nhsr017.pdf>.

³³⁹ Id.

³⁴⁰ McBride, Chapter 6.

³⁴¹ McBride, Chapter 6.

Medicaid recipients, who lacked the funds to access care in a wide range of hospitals.³⁴² Due to this, throughout the 1990s, about 20 percent of the nation's Black population lacked health insurance, while 17 percent of all Americans lacked health insurance.³⁴³

Funding for urban public hospitals was cut by federal and state governments in the 1980s and 1990s.³⁴⁴ Southern state legislatures worked to limit the flow of federal Medicaid funds to poor Black populations.³⁴⁵ In the South, income criteria for public welfare were set so low that thousands of poor people who were below the federal poverty line were still ineligible for Medicaid.³⁴⁶ Medicare and Medicaid funds paid for private hospital beds and nursing homes, as well as the expense of primary care resources needed by underserved Black populations.³⁴⁷

The Affordable Care Act, passed in 2010, greatly reduced the number of uninsured people in the United States.³⁴⁸ Three million Black people previously uninsured obtained insurance.³⁴⁹ However, the U.S. Supreme Court made expansion of Medicaid eligibility under the Affordable Care Act optional to states rather than mandatory.³⁵⁰ The expansion of Medicaid eligibility would have increased access to screening and preventive care, resulted in earlier diagnosis of chronic conditions, and improved mental health.³⁵¹ However, the states that chose not to expand Medicaid were primarily the Black Belt states—Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming.³⁵² Black Americans are among the most likely to be uninsured compared to other populations, further inhibiting Black Americans from accessing quality healthcare.³⁵³

The discriminatory health insurance system has resulted in worse health for older Black Americans who rely on Medicare. Medicare does not cover all healthcare services that an individual may need, and often supplemental coverage is needed.³⁵⁴ This coverage is sold by private insurance companies, or may be provided by employer-sponsored retiree benefits.³⁵⁵ However, due to the low levels of employer-sponsored health coverage for Black Americans and the expense of private insurance, older Black Americans are far more likely than white Americans to rely solely on the Medicare program, or may supplement it with Medicaid.³⁵⁶ About a quarter of Black Americans lack supplemental coverage, while only 10 percent of white Americans lack supplemental

³⁴² Id.

³⁴³ McBride, Chapter 6.

³⁴⁴ Id.

³⁴⁵ McBride, Chapter 6.

³⁴⁶ Id.

³⁴⁷ Id.

³⁴⁸ Id.

³⁴⁹ Id.

³⁵⁰ <https://www.healthaffairs.org/doi/10.1377/hblog20200828.661111/full/>.

³⁵¹ Id.

³⁵² Id.

³⁵³ Id.

³⁵⁴ <https://www.medicare.gov/supplements-other-insurance/whats-medicare-supplement-insurance-medigap>

³⁵⁵ Id.

³⁵⁶ <https://www.kff.org/wp-content/uploads/2013/01/medicare-and-minority-americans-fact-sheet.pdf>.

coverage.³⁵⁷ The lack of supplemental insurance exposes Black Americans to higher out of pocket costs and delayed medical care.³⁵⁸ Discrimination in Medicare extends to the quality of medical services. Ten percent of Black Americans receiving Medicare report unwanted delays in getting an appointment and problems finding a new specialist, while only six percent of white Americans report similar problems.³⁵⁹

D. California

Black physicians have been historically underrepresented in California's medical field, and this severe inequality persists today. The passage of Proposition 209 in 1996 in California, prohibited the consideration of race, ethnicity, or national origin in public education, employment, and contracting.³⁶⁰ As a result, in California's private medical schools, the proportion of Black students matriculating fell from six percent in 1990 to five percent in 2019.³⁶¹ There are not enough Black physicians in California to meet the needs of California's diverse population. In California, Black physicians are less than three percent of the entire medical profession despite being six percent of the population.³⁶²

Black physicians in California have alleged that the Medical Board of California disciplines Black doctors more than white doctors.³⁶³ Research shows that Black physicians in California were more likely to receive complaints and have their complaints escalated to investigations than white physicians, but these investigations were not more likely to result in disciplinary action.³⁶⁴ Anti-Black racism may thus contribute to unfounded harassment of Black physicians in California.

Although only five percent of Black Americans are uninsured in California, they continue to face discrimination in healthcare and disparities in health outcomes.³⁶⁵ Black Californians have experienced racism in their interactions with the healthcare system and many have wanted more access to Black physicians.³⁶⁶ In a study conducted in 2021 where 100 Black Californians were interviewed, some recounted experiences of delayed or missed diagnoses due to inattentive healthcare providers. One Black man from the Central Valley said, "I couldn't hold down any food. I couldn't walk. I couldn't eat, do anything. So I went to a clinic and I told them what was wrong. And they prescribed naproxen, which is generic for Midol and Advil. [So] I went to the hospital and had dual kidney infections... I just don't think they take me seriously... I don't think they take me as seriously as they would a white man or a white woman."³⁶⁷

³⁵⁷ Id.

³⁵⁸ Id.

³⁵⁹ <https://files.kff.org/attachment/Report-Racial-and-Ethnic-Health-Inequities-and-Medicare.pdf>.

³⁶⁰ <https://healthforce.ucsf.edu/publications/recovery-limited-progress-impact-california-proposition-209-raciaethnic-diversity>.

³⁶¹ Id.

³⁶² African American CRDP Report, p. 87.; <https://www.ppic.org/publication/californias-population/>.

³⁶³ <https://www.library.ca.gov/wp-content/uploads/2021/08/MedicalBoardDemographicsJan17.pdf>.

³⁶⁴ Id.

³⁶⁵ California Health Care Foundation, California Health Care Almanac, Health Disparities by Race and Ethnicity in California: Pattern of Inequity (Oc. 2021), available at <https://www.chcf.org/wp-content/uploads/2021/10/DisparitiesAlmanacRaceEthnicity2021.pdf>.

³⁶⁶ <https://www.chcf.org/wp-content/uploads/2022/01/InTheirOwnWordsBlackCaliforniansRacismHealthCare.pdf>, 4.

³⁶⁷ Id. at 15.

VIII. Medical Experimentation

For centuries, federal and state governments allowed doctors and scientists to experiment on the bodies of Black Americans.³⁶⁸ Federal and state governments themselves conducted dangerous medical experiments on Black Americans without consent, often permanently damaging their health and the health of their children.³⁶⁹ The State of California engaged in sterilization, experimentation, and abuse against Black Californians.³⁷⁰

National eugenics policies, which consisted of federally-funded forced sterilizations, began as early as 1910.³⁷¹ Eugenics was a theory developed in the early 20th Century based on the idea of using selective procreation to eliminate “undesirable” and “unfit” individuals from the population.³⁷² Eugenacists used the term “racial hygiene” to justify racist theories of Black inferiority and the elimination of Black people.³⁷³

The targeted use of forced surgical sterilization by the government has been one of the most damaging threats to Black women’s reproductive freedom.³⁷⁴ In 1934, at least 17 states were performing routine sterilizations.³⁷⁵ By 1983, Black women constituted 43 percent of women sterilized in federally-funded family planning programs, though they were only 12 percent of the population.³⁷⁶ Federally-funded contraceptive shots resulted in forced sterilization for poor Black families without their informed consent. Over 100,000 women have been sterilized using federal funds in the South, and at least half of them were Black.³⁷⁷

The U.S. Food and Drug Administration approved contraceptives, such as Norplant, which were disproportionately distributed to poor Black women and young girls in clinics and through public schools without being tested on such young girls.³⁷⁸ These contraceptives caused health complications and were often difficult to remove.³⁷⁹ The coercive use of contraception and sterilization by the legal system and welfare system has forced Black women to choose between financial freedom or prison time.³⁸⁰

Experimental family planning centers, which promoted anti-Black eugenics principles, were strategically located in Black neighborhoods throughout the 1940s and 1950s.³⁸¹ These facilities eventually became government-funded family planning clinics, which marketed experimental contraceptives to poor Black women,

³⁶⁸ [citation needed]

³⁶⁹ [citation needed]

³⁷⁰ [citation needed]

³⁷¹ Id.

³⁷² Id.

³⁷³ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, Chapter 8, 329.

³⁷⁴ Id. at 348.

³⁷⁵ [citation needed]

³⁷⁶ [citation needed]

³⁷⁷ [citation needed]

³⁷⁸ [citation needed]

³⁷⁹ [citation needed]

³⁸⁰ [citation needed]

³⁸¹ Washington.

often resulting in sterilization.³⁸²

After the distribution of the birth control pill to Black women, researchers learned that it was especially dangerous for women who smoked, and it inflated hypertension and stroke risks—which are especially prevalent among Black people.³⁸³ Clinics fitted more Black women than white women with intrauterine devices, or IUDs.³⁸⁴ Researchers learned after several years that IUDs were associated with deadly infections that hampered users' fertility and disproportionately affected Black women who were vulnerable to uterine conditions such as fibroids, endometriosis, and cancer.³⁸⁵

In 1932, the U.S. Public Health Service began its study of syphilis, known as the Tuskegee Syphilis Study, which promised free medical care to hundreds of poor Black sharecroppers in Alabama.³⁸⁶ However, the government lied to the Black sharecroppers, convincing them they were being treated when they were just being monitored and studied.³⁸⁷ Over the course of 40 years, the government did not treat the subjects, though treatment was available.³⁸⁸ Forty of the wives of the Black sharecroppers and at least 19 children contracted syphilis during the study.³⁸⁹ In 1972, the federal government appointed a panel to investigate the study. Decades later, in 1994, the panel released its report on the study.³⁹⁰ Due to internal disagreements, the report's final version deleted references to intentional racism and removed complaints about the investigative panel's insufficient resources.³⁹¹

The U.S. Atomic Energy Commission conducted more than 2,000 experimental projects using radiation and human subjects and Black Americans were at a higher risk of being subjected to these harmful experiments.³⁹² In the 1950s, the commission conducted radiation experiments on 235 Black newborn babies in various hospitals around the nation.³⁹³

In the 1960s, Harry Bailey, a neurosurgeon, delivered a speech at Tulane Medical School where he said, "It was cheaper to use Niggers than cats because they were everywhere and cheap experimental animals."³⁹⁴ From 1940 to 1959, scientists conducted radiation experiments on hundreds of Black children in New York to allegedly treat ringworm. However, researchers knew that the level of radiation used was extremely dangerous and that there were other treatments available for ringworm.³⁹⁵ During this period, five Black people were illegally

³⁸² Id. at 340.

³⁸³ [citation needed]

³⁸⁴ [citation needed]

³⁸⁵ [citation needed]

³⁸⁶ [citation needed]

³⁸⁷ Washington, Chapter 7.

³⁸⁸ [citation needed]

³⁸⁹ [citation needed]

³⁹⁰ [citation needed]

³⁹¹ [citation needed]

³⁹² Washington, Chapter 9.

³⁹³ Washington, Chapter 9.

³⁹⁴ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, pg. 17.

³⁹⁵ [citation needed]

injected with plutonium by the U.S. Atomic Energy Commission, without informed consent, leading them to become sick with cancer.³⁹⁶

Federal and state governments allowed abusive experimentation to be conducted on incarcerated Black people throughout the nation.³⁹⁷ In Pennsylvania's Holmesburg Prison, Dr. Albert M. Kligman induced foot fungus, tested experimental drugs, and administered experimental cosmetics, powders, and shampoos on dozens of Black incarcerated Americans from 1951-1974.³⁹⁸ Kligman conducted these experiments without free, informed consent, for major pharmaceutical and cosmetic companies, such as Johnson & Johnson, as well as for the United States Army.³⁹⁹ The Food and Drug Administration was aware of this abuse.⁴⁰⁰ However, they never canceled Kligman's privileges to perform drug testing. Incarcerated individuals who have filed suit for their injuries due to abusive experimentation have been unsuccessful due to statutes of limitations.⁴⁰¹

Federal and state governments continue to conduct experiments on vulnerable incarcerated Black Americans.⁴⁰² The Central Intelligence Agency (CIA) tested LSD and a drug called bulbocapnine exclusively on incarcerated Black Americans who were routinely referred to by doctors as "niggers."⁴⁰³ The U.S. Department of Health and Human Services continues to conduct clinical trials of experimental HIV vaccines and cancer treatments on incarcerated people.⁴⁰⁴ These experiments disproportionately affect Black Americans due to their disparate presence in carceral facilities and their disparate contraction of diseases such as HIV.⁴⁰⁵ (See Chapter 11 on the legal system chapter and section XII below.) To this day, the federal government has not banned prison medical research.⁴⁰⁶

Black American bodies have been used for major medical advancements and experimentation, without any compensation given to those who were involved, or to their families.⁴⁰⁷ For instance, scientists at Johns Hopkins University were treating Henrietta Lacks, a Black woman and tobacco farmer, for cervical cancer in the 1950s.⁴⁰⁸ They extracted cells from the biopsy of her tumor sample for use in research without her knowledge or consent.⁴⁰⁹ Without compensation to her family or permission from them, her cells were used extensively in scientific research to develop modern vaccines, cancer treatments, in vitro fertilization techniques, among other medical advancements.⁴¹⁰ Doctors and scientists repeatedly failed to ask her family for consent as they revealed

³⁹⁶ Washington, Chapter 9.

³⁹⁷ Washington, Chapter 10

³⁹⁸ [citation needed]

³⁹⁹ [citation needed]

⁴⁰⁰ [citation needed]

⁴⁰¹ [citation needed]

⁴⁰² [citation needed]

⁴⁰³ Washington, Chapter 10.

⁴⁰⁴ [citation needed]

⁴⁰⁵ [citation needed]

⁴⁰⁶ [citation needed]

⁴⁰⁷ [citation needed]

⁴⁰⁸ [citation needed]

⁴⁰⁹ <https://www.nih.gov/news-events/news-releases/nih-lacks-family-reach-understanding-share-genomic-data-hela-cells>.

⁴¹⁰ [citation needed]

her name publicly and gave her medical records to the media.⁴¹¹ Like so many enslaved people, Lacks' body was used for medical experimentation and sold as property without her consent and without compensation.

Black children have been disproportionately represented as subjects for abusive experimental studies.⁴¹² In the 1990s, the New York State Psychiatric Institute and Columbia University conducted experiments on Black boys by giving them doses of the now-banned drug fenfluramine to test a theory that violent or criminal behavior may be predicted by levels of certain brain chemicals.⁴¹³ Experimental brain surgeries, such as lobotomies, were performed on Black children from 1936 to 1960, and by the University of Mississippi in the decade after on Black children deemed “aggressive” and “hyperactive.”⁴¹⁴

From 1987 to 1991, government researchers administered 500 times the approved dosage of the measles vaccine to Black babies in Los Angeles—without informing parents of the experimental dosages of the vaccine being administered.⁴¹⁵ In many cases, this medically risky research violated federal guidelines and was racially discriminatory.⁴¹⁶ However, the Office for Protection from Research Risks, a federal government office, often cleared the institutions that engaged in this abusive research.⁴¹⁷

A. California

California was a leader in implementing eugenics policies due to the Human Betterment Foundation, a leading eugenics think tank organization, as discussed earlier in this chapter. Home to an extensive eugenics movement, California had the highest number of sterilizations in the United States—one third of all sterilizations nationwide.⁴¹⁸ Eugenicists in California saw sterilization as a tool for preventing the procreation of undesirable traits, the overcrowding of state institutions, and the alleviation of fiscal constraints on the state.⁴¹⁹

California became the third state to pass a sterilization law in 1909.⁴²⁰ The first state sterilization law in California was enacted on April 26, 1909, and remained in effect for the next 70 years, until 1979—targeting patients in state hospitals and institutions for the mentally ill, as well as incarcerated individuals.⁴²¹ Black Americans have been disproportionately sterilized in California. In the 1920s Black people constituted just over one percent of California's population, but they accounted for four percent of total sterilizations by the State of California.⁴²² From 1909 to 1963, the State of California sterilized 20,000 people—one-third of all sterilizations

⁴¹¹ <https://www.nature.com/articles/d41586-020-02494-z>.

⁴¹² [citation needed]

⁴¹³ Washington, Chapter 11; <https://www.nytimes.com/1998/04/15/nyregion/experiments-on-children-are-reviewed.html>.

⁴¹⁴ Washington, Chapter 11, 490.

⁴¹⁵ *Id.*, 509.

⁴¹⁶ [citation needed]

⁴¹⁷ Washington, Chapter 11.

⁴¹⁸ <https://www.uvm.edu/~lkaelber/eugenics/CA/CA.html>.

⁴¹⁹ [citation needed]

⁴²⁰ <https://www.theatlantic.com/health/archive/2017/01/california-sterilization-records/511718/>.

⁴²¹ [citation needed]

⁴²² “Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California” by Alexandra Minna Stern. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449330/#r28>.

in the U.S. and more than any other state.⁴²³ The sterilizations were mandated by law and performed in state institutions, hospitals, and prisons.⁴²⁴ The education programs and propaganda of the numerous eugenic organizations in the state influenced public support of sterilization.⁴²⁵ Among Californians who had a basic understanding of sterilization, 90 percent were in favor of the practice, which is why sterilization was so widespread.⁴²⁶

While California laws did not target specific racial or ethnic groups, in practice, labels of “mental deficiency” and “feeble-mindedness” were applied disproportionately to racial and ethnic minorities, including Black people.⁴²⁷ Between 2006 and 2010, almost 150 people imprisoned in California’s women’s prisons were sterilized without proper authorization while giving birth.⁴²⁸ California used state funds to pay doctors almost \$150,000 to sterilize women.⁴²⁹ One of the doctors who coerced women into being sterilized stated, “Over a 10-year period, that isn’t a huge amount of money, compared to what you save in welfare paying for these unwanted children – as they procreated more.”⁴³⁰ A disproportionate number of the women subjected to forced sterilization were Black and Latina.⁴³¹ Kelli Dillon was forcibly sterilized while incarcerated at the Central California women’s facility in Chowchilla when she was told she needed a surgery to treat an ovarian cyst.⁴³² She unknowingly underwent a hysterectomy in 2001, at the age of 24.⁴³³ She was not aware of the sterilization until she requested her medical records with the help of a lawyer.⁴³⁴ Dillon said, “It was like my life wasn’t worth anything,” she said. “Somebody felt I had nothing to contribute to the point where they had to find this sneaky and diabolical way to take my ability to have children.”⁴³⁵ After her release from prison, Dillon founded Back to Basics, an organization fighting for justice for survivors of forced sterilizations in California.⁴³⁶

In 2021, California became the third state to offer reparations payments to victims of forced sterilization.⁴³⁷ California has set aside \$7.5 million for reparations payments to these individuals.⁴³⁸ The state’s proposal would also compensate women who were coerced into sterilization in California prisons.⁴³⁹

In the State of California, Elmer Allen, was illegally injected with plutonium at the University of California,

⁴²³ Id.
⁴²⁴ <https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1092&context=vocesnovae>, 125.
⁴²⁵ Id.
⁴²⁶ Id.
⁴²⁷ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3052.
⁴²⁸ [citation needed]; <https://revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/>.
⁴²⁹ [citation needed]
⁴³⁰ Id.
⁴³¹ [citation needed]
⁴³² [citation needed]
⁴³³ <https://www.theguardian.com/us-news/2020/jun/30/california-prisons-forced-sterilizations-belly-beast>.
⁴³⁴ Id.
⁴³⁵ <https://www.theguardian.com/us-news/2021/jul/19/california-forced-sterilization-prison-survivors-reparations>
⁴³⁶ Id.
⁴³⁷ <https://www.usnews.com/news/health-news/articles/2021-07-08/california-to-pay-reparations-to-victims-of-forced-sterilization>.
⁴³⁸ Id.
⁴³⁹ Id.

San Francisco medical hospital in San Francisco—he was likely never informed of the consequences of this.⁴⁴⁰ The university later acknowledged that the injection was not of therapeutic benefit to him, which was a requirement for experiments.⁴⁴¹ As of 1966, a California survey revealed that 72 percent of the state’s X-ray technicians administered experimental higher X-ray exposures to Black patients because of racist beliefs that Black people had “darker” and “tougher” skin.⁴⁴² The federal government created a committee to investigate radiation experiments, after which President Clinton issued an apology, but the government never prosecuted any physicians who conducted the experiments.⁴⁴³

The State of California has engaged in abusive medical experimentation on incarcerated Black Californians.⁴⁴⁴ In California, from 1966 to 1968, incarcerated people were paralyzed with succinylcholine.⁴⁴⁵ When five of the selected 64 people refused to participate, all were injected against their will.⁴⁴⁶ Dr. Leo Stanley, a eugenicist, performed forced sterilizations and testicular surgeries with animal parts at San Quentin State Prison in California.⁴⁴⁷ He was responsible for further segregation of the prison medical facilities.⁴⁴⁸ He also used the testicular glands of an executed Black man for his experiments, without obtaining the consent of the man’s family because his body was not “claimed.”⁴⁴⁹ In 2018, the California Department of Corrections and Rehabilitation glowingly described Dr. Stanley as a doctor who “push[ed] prison medicine into the 20th century.”⁴⁵⁰

IX. Emerging Science, Medical Therapies, and Technology

The history of medical experimentation, abuse, and neglect has resulted in the damaged health of Black American communities.⁴⁵¹ Government-funded research institutions and government agencies engaged in abusive experimental research and used racist medical technologies, such as spirometers, for diagnosis and treatment of Black Americans.⁴⁵² Conversely, Black Americans have been excluded from clinical trials and research—particularly when that research is supposed to be for treatments for diseases that are more likely to harm them.⁴⁵³ The nation continues to profit from Black American bodies, using them for experimentation and research without compensation.⁴⁵⁴ The pattern of abusive experimentation, exploitation, and medical neglect of

⁴⁴⁰ https://ehss.energy.gov/ohre/roadmap/achre/chap5_4.html.

⁴⁴¹ [citation needed]

⁴⁴² Washington, Chapter 9.

⁴⁴³ [citation needed]

⁴⁴⁴ [citation needed]

⁴⁴⁵ [citation needed]

⁴⁴⁶ [citation needed]

⁴⁴⁷ [citation needed]

⁴⁴⁸ https://www.researchgate.net/publication/236335739_The_Strange_Career_of_Leo_Stanley_Remaking_Manhood_and_Medicine_at_San_Quentin_State_Penitentiary_1913-1951, pg. 216, 220-221, 232, 235.

⁴⁴⁹ Id. at 232.

⁴⁵⁰ <https://www.cdcr.ca.gov/insidecdcr/2018/11/08/early-san-quentin-doctor-pushes-prison-medicine-into-20th-century/>.

⁴⁵¹ [citation needed]

⁴⁵² [citation needed]

⁴⁵³ [citation needed]

⁴⁵⁴ [citation needed]

Black Americans began during the period of enslavement and continues until today.

A. Medical Research

Government-funded researchers and state entities have engaged in the discriminatory nonconsensual use of Black bodies and organs for research and organ donation, while federal and state governments have refused to fund medical research to develop treatments for diseases that specifically affect Black Americans.⁴⁵⁵ Most cadavers used in government-funded research or dissection laboratories are Black.⁴⁵⁶ However, prior to modern research, there has been a long history of Black bodies being stolen for dissection and anatomical investigation without informed consent.⁴⁵⁷ In the early 20th century, Black bodies were disproportionately used as cadavers for medical instruction.⁴⁵⁸ The Freedman's Cemetery in Dallas, excavated in the 1990s, contained the remains of Black Americans, which were illegally used for dissection or stolen.⁴⁵⁹

The overrepresentation of Black bodies in organ transplantation is driven by legal policies, such as the 1987 amendment of the Uniform Anatomical Gift Act, which licensed nonconsensual retrieval of body parts.⁴⁶⁰ Presumed consent statutes increased the number of organs donated for transplantation without the explicit consent of the decedent.⁴⁶¹ In 1997, the Los Angeles coroner's office sold more than 500 pairs of corneas—80 percent of which belonged to Black people and Latinx people.⁴⁶²

Black Americans are significantly less likely to be included in clinical trials for the development of medication, vaccines, or other treatment, which can result in medical developments that are not beneficial for Black Americans.⁴⁶³ At least two million Black infants had the sickle cell trait in the 1970s.⁴⁶⁴ However, there was a great disparity in funding and attention paid to this genetic condition.⁴⁶⁵ Genetic diseases primarily affecting white Americans received more funding and medical attention—an aspect of systemic anti-Black racism, which continues today.⁴⁶⁶ Black Americans are less likely to be treated for skin diseases. This is due to the lack of medical research and training for diagnosing skin conditions for those with darker skin.⁴⁶⁷

Most medical textbooks and journals that assist dermatologists in diagnosing skin disorders do not include images of skin conditions as they appear on Black Americans.⁴⁶⁸ Images of darker skin with skin conditions caused by COVID-19, skin cancer, psoriasis, rosacea, and melanoma often do not appear in medical textbooks

⁴⁵⁵ [citation needed]

⁴⁵⁶ [citation needed].

⁴⁵⁷ Medical Apartheid, Chapter 5.

⁴⁵⁸ <https://www.forbes.com/sites/kristinakillgrove/2015/07/13/dissected-bodies-and-grave-robbing-evidence-of-unequal-treatment-of-19th-century-blacks-and-poor/?sh=34bc90dd6d12>.

⁴⁵⁹ Id.

⁴⁶⁰ [citation needed]

⁴⁶¹ [citation needed]

⁴⁶² [citation needed]

⁴⁶³ Medical Apartheid, Epilogue.

⁴⁶⁴ [citation needed]

⁴⁶⁵ [citation needed]

⁴⁶⁶ Alondra Nelson, *Id.* at page 119.

⁴⁶⁷ <https://www.nytimes.com/2020/08/30/health/skin-diseases-black-hispanic.html>.

⁴⁶⁸ [citation needed]

and journals.⁴⁶⁹ Doctors routinely miss these diagnoses for Black patients because they are not trained to identify or treat skin conditions for Black patients.⁴⁷⁰

Black Americans are often used as research subjects for the development of new medical technologies, yet once these same technologies are perfected, they are too expensive for many Black Americans.⁴⁷¹ Additionally, Black Americans are underrepresented in medical trials.⁴⁷² In medical trials for 24 of the 31 cancer drugs approved by the Food and Drug Administration in the past three years, less than five percent of the subjects were Black.⁴⁷³

Yet, Black Americans have the highest death rate and shortest survival rate of any group in the United States for most cancers.⁴⁷⁴ The Food and Drug Administration has not required specific levels of Black representation in clinical trials, resulting in the production and distribution of medications that have unknown effects on the Black Americans who are prescribed them.⁴⁷⁵

B. Medical Technology

The United States government has historically developed or sanctioned the use of discriminatory technologies against Black Americans. In the 1950s and 1960s, the Central Intelligence Agency attempted to develop chemical and biological weapons by breeding millions of mosquitos to determine if they could be released during war to spread infectious diseases.⁴⁷⁶ The CIA conducted this military technological experiment in the predominantly Black area of Carver Village in Florida.⁴⁷⁷ The CIA released these mosquitos in 1955, resulting in illness and death for many of the Black residents.⁴⁷⁸

Algorithms are widely used in U.S. hospitals to allocate healthcare—however, they systematically reflect human biases and discriminate against Black patients.⁴⁷⁹ A scientific study found that one algorithm assigned Black patients lower risk scores than white patients.⁴⁸⁰ This led to Black patients receiving less referrals for programs that provided personalized care—despite being just as sick as white patients.⁴⁸¹ The algorithm used healthcare cost as a proxy for greater health need.⁴⁸² However, this is deeply discriminatory, because care

⁴⁶⁹ [citation needed]

⁴⁷⁰ [citation needed]

⁴⁷¹ Medical Apartheid, Chapter 14.

⁴⁷² <https://www.aafp.org/news/blogs/leadervoices/entry/20181204lv-clinicaltrials.html>.

⁴⁷³ [citation needed]

⁴⁷⁴ [citation needed]

⁴⁷⁵ [citation needed]

⁴⁷⁶ [citation needed]

⁴⁷⁷ [citation needed]

⁴⁷⁸ Id.

⁴⁷⁹ Heidi Ledford, Millions of Black People Affected by Racial Bias in Health-Care Algorithms, <https://www.nature.com/articles/d41586-019-03228-6#ref-CR1>.

⁴⁸⁰ [citation needed]

⁴⁸¹ Ziad Obermeyer, et. al, Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations, https://science.sciencemag.org/content/366/6464/447.abstract?casa_token=GDa-UkTDh7sAAAAA:qeEntM8P4sEq5AHf-yGGpzb5Ix3hGD11jq5Zoeq9V_hcwCLs9Sk7hmkIPJNfmTMJ98FrZfJD8A0RX8.

⁴⁸² [citation needed]

provided to Black patients costs less on average than care provided to white patients with the same health conditions, due to structural racism.⁴⁸³

Today, the federal government endorses the use of spirometers to diagnose and monitor respiratory illness. Using spirometers leads to the discriminatory measurement of Black lung capacity.⁴⁸⁴ Spirometers are devices that assumes smaller lung capacity for Black patients.⁴⁸⁵ Spirometers were developed by racist physicians in the South to show that Black lung capacity was inferior to white lung capacity.⁴⁸⁶ Later, spirometers were used to enforce anti-Black workers' compensation policies that required Black people to demonstrate even lower lung functioning than similarly positioned white workers to receive compensation.⁴⁸⁷

C. California

Since state and federal governments were negligent in addressing sickle cell disease, Black civil rights organizations, political leaders, and activists began to conduct grassroots sickle cell programs in Black communities.⁴⁸⁸ The Black Panther Party provided free genetic screening for the sickle cell trait.⁴⁸⁹ Finally, the National Sickle Cell Anemia Control Act was passed in 1972.⁴⁹⁰ The act established a national program for the diagnosis and treatment of sickle cell anemia, and for the funding of scientific research.⁴⁹¹

Following the passage of the act, the Federal Bureau of Investigation urged local police in Oakland and surrounding communities to arrest Black Panther Party members for "unlawful solicitations" for sickle cell anemia programming.⁴⁹² The FBI advocated for this even after the local solicitation ordinance was found unconstitutional.⁴⁹³ There is also evidence that the FBI orchestrated a crackdown on Black Panther Party members in Southern California on similar charges, encouraging press and media outlets to question and even attack the legitimacy of the party's campaign.⁴⁹⁴

In 1973, the State of California planned to fund discriminatory research that pathologized Black men as inherently violent.⁴⁹⁵ The University of California, Los Angeles joined with Governor Ronald Reagan to create a center to study the biological causes of violence, a plan that Governor Reagan believed would help "overhaul the criminal justice system."⁴⁹⁶ Possible research programs for the center included targeting minority populations for invasive brain surgery and studying violence in a manner that made it a pathology of Black

⁴⁸³ [citation needed]

⁴⁸⁴ <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-differences-doctors.html>;
<https://www.cdc.gov/niosh/topics/spirometry/refcalculator.html>.

⁴⁸⁵ [citation needed]

⁴⁸⁶ <https://www.upress.umn.edu/book-division/books/breathing-race-into-the-machine>.

⁴⁸⁷ <https://muse.jhu.edu/article/576944>.

⁴⁸⁸ McBride, Chapter 5.

⁴⁸⁹ *Id.* at page 116.

⁴⁹⁰ [citation needed]

⁴⁹¹ Alondra Nelson, 120.

⁴⁹² [citation needed]

⁴⁹³ *Id.* at page 148.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ [citation needed]

⁴⁹⁶ Alondra Nelson, at page 160.

men.⁴⁹⁷ However, the Black Panther Party and other civil rights organizations engaged in months of advocacy to the California State Legislature to deny funding to the center.⁴⁹⁸ The Black Panther Party was concerned that medicine was being used by the state as an instrument of social control and surveillance.⁴⁹⁹

Genetic testing can also be used by employers to discriminate against Black people who are susceptible to diseases that employers do not want to pay for in health coverage.⁵⁰⁰ In 1998, the University of California and the federal government illegally used genetic testing to test Black employees for syphilis, pregnancy, and sickle-cell trait without their knowledge.⁵⁰¹

X. Mental Health

Steve Biko, the South African anti-apartheid activist observed that “the most potent weapon of the oppressor is the mind of the oppressed.”⁵⁰² Historically, dehumanization, oppression, and violence against Black Americans has evolved into present day racism—structural, institutional, and individual. Present-day suicide rates, incarceration rates, and substance abuse among Black youth and adults must be understood in the context of patterns of assault and oppression established in prior generations.⁵⁰³ The harsh impact of multigenerational racism on Black mental health and inherent racism within the discipline of psychology has contributed to disastrous mental health consequences for Black Americans.

A. History of Racism in Mental Health

The federal government and state governments, including the State of California, have historically discriminated against Black Americans in the provision of mental healthcare.⁵⁰⁴ During slavery and the Jim Crow era, Black Americans received low quality healthcare due to segregation and systemic racism in the field of mental health.⁵⁰⁵ Established in 1773, the Public Hospital for Persons of Insane and Disordered Minds in Williamsburg, Virginia, was the first public psychiatric hospital in the United States.⁵⁰⁶ However, the asylum prioritized white people over enslaved people for admission.⁵⁰⁷ The asylum used enslaved labor to operate and accepted enslaved people as payment for care and treatment of white people.⁵⁰⁸

Psychiatric hospitals in the first half of the 19th century were some of the United States’ first officially segregated institutions.⁵⁰⁹ One of the American Psychiatric Association’s founding members refused to admit

⁴⁹⁷ Id. 154-155.

⁴⁹⁸ [citation needed]

⁴⁹⁹ Id. 173-175.

⁵⁰⁰ [citation needed]

⁵⁰¹ [citation needed]

⁵⁰² [citation needed]

⁵⁰³ [citation needed]

⁵⁰⁴ [citation needed]

⁵⁰⁵ [citation needed]

⁵⁰⁶ <https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2020.7a18>; Gonaver, Introduction

⁵⁰⁷ [citation needed]

⁵⁰⁸ [citation needed]

⁵⁰⁹ [citation needed]

Black patients to his mental hospital.⁵¹⁰ He influenced the design of the Government Hospital for the Insane in Washington, D.C., which housed Black patients in a separate building—far away from the better facilities for the white patients.⁵¹¹ Before 1861, Black patients were rarely admitted into southern asylums because they supposedly did not suffer from severe mental illness.⁵¹² The racist notion that only white people suffered from mental illness was written into the law in Virginia.⁵¹³ Yet, white pseudoscientists made up false diseases that plagued enslaved people, such as “drapetomania,” the desire to escape enslavement, and “hebetude,” defined as a laziness that caused enslaved people to mishandle enslaver’s property.⁵¹⁴ Segregation improved conditions for white patients, who moved to new facilities.⁵¹⁵ Black patients experienced outright denial of services.⁵¹⁶ Any services that Black patients did receive were worse than those white patients received.⁵¹⁷

Government-sponsored discrimination in healthcare resulted in disproportionately harmful mental health impacts for Black Americans.⁵¹⁸ The Community Mental Health Centers Construction Act of 1963 resulted in the deinstitutionalization of the mentally ill.⁵¹⁹ Deinstitutionalization was when patients received more individualized treatment in federally-funded community treatment centers.⁵²⁰ Consequently, large numbers of Black mental health patients received outpatient treatment in regional medical centers.⁵²¹ Black patients received the lowest level of treatment, rendered by nonprofessional staff, who were mostly white and continued to misdiagnose and mistreat Black patients.⁵²² Although this system is associated with some positive consequences, when community mental health centers declined, mentally ill people were jailed rather than treated.⁵²³

In the 1960s and 1970s, federally-funded community health centers provided little treatment for Black patients.⁵²⁴ Black Americans were more frequently diagnosed with mental illness and more frequently admitted to community mental health centers.⁵²⁵ These facilities rarely employed Black mental health professionals—who likely would have better served Black communities.⁵²⁶ Non-Black professionals are more likely to

⁵¹⁰ [citation needed]

⁵¹¹ [citation needed]

⁵¹² [citation needed]

⁵¹³

https://books.google.com/books?id=OIJ4eSdsLAAC&pg=PA66&lpg=PA66&dq=1765+virginia+mental+health+policy&source=bl&ots=dCemP8TYtF&sig=ACfU3U3jdU_A5b_jS2d96PNJocJhlgSjPw&hl=en&sa=X&ved=2ahUKEwid7dCIIffxAhVLqp4KHYheBhEQ6AEwD3oECBMQAw#v=onepage&q=1765%20virginia%20mental%20health%20policy&f=false, pg. 66.

⁵¹⁴ Medical Apartheid, Harriet Washington.

⁵¹⁵ [citation needed]

⁵¹⁶ [citation needed]

⁵¹⁷ Id. at 39-40.

⁵¹⁸ McBride.

⁵¹⁹ Id.

⁵²⁰ Id.

⁵²¹ Id.

⁵²² Id.

⁵²³ [citation needed]

⁵²⁴ [citation needed]

⁵²⁵ Rogler (1983).

⁵²⁶ McBride.

misdiagnose Black patients.⁵²⁷ They lack cultural and historical knowledge of Black communities.⁵²⁸ Black patients are forced to explain feelings tied to race to their non-Black mental health providers.⁵²⁹ This leads to frustration and decreases the likelihood of successful treatment for Black patients.⁵³⁰ Consequently, Black Americans, at the time, were overrepresented in mental health statistics while being inadequately served.⁵³¹

White mental health staff at federally-funded clinics and hospitals often diagnosed Black patients as schizophrenic, when they should have been diagnosed with depression.⁵³² The definition of schizophrenia changed during the 1960s and 1970s.⁵³³ Schizophrenia became a disease of “aggression” due to white clinicians fears about Black-led protests. This led to misdiagnosis that disproportionately affected Black men.⁵³⁴ Mental health providers treated Black men as aggressive and criminal, which led to an increase in imprisonment for Black men.⁵³⁵ Black military personnel under conditions of intense racial discrimination received higher rates of severe mental illness diagnoses, such as paranoid schizophrenia.⁵³⁶ Studies of the diagnoses of Black patients at Veterans Affairs facilities have also shown that misdiagnosis has remained a problem for Black communities due to clinicians’ prejudice and misinterpretation of Black patients’ behaviors.⁵³⁷

B. The American Psychological Association and the Discipline of Psychology

The American Psychological Association (APA), in conjunction with federal and state governments, played a significant role in the ongoing oppression of Black people in all sectors.⁵³⁸ In 2020, the APA issued an apology for its role in promoting, perpetuating, and failing to challenge racism in the U.S.⁵³⁹ The APA helped establish racist scientific theories, opposition to inter-racial marriage, and support of segregation and forced sterilization.⁵⁴⁰ The APA also promoted the idea that racial difference is biologically-based, created discriminatory psychological tests, and failed to take action to end racist testing practices.⁵⁴¹ For centuries, the APA has failed to represent the approaches, practices, voices, and concerns of Black Americans within the field of psychology and within society.⁵⁴²

⁵²⁷ [citation needed]

⁵²⁸ [citation needed]

⁵²⁹ [citation needed]

⁵³⁰ <https://www.npr.org/sections/health-shots/2020/06/25/877549715/bear-our-pain-the-plea-for-more-black-mental-health-workers>; <https://www.psychom.net/race-diagnosis-treatment-and-wellness>.

⁵³¹ Grob, 2005.

⁵³² Id.

⁵³³ [citation needed]

⁵³⁴ The Protest Psychosis: How Schizophrenia Became a Black Disease

https://read.amazon.com/kp/embed?asin=B0038OM3L4&preview=newtab&linkCode=kpe&ref=cm_sw_r_kb_dp_VsFpDb59MTMDE&tag=thewaspos09-20&reshareId=KDEZ9KJEAZPJ7PWRVYT&reshareChannel=system.

⁵³⁵ [citation needed]

⁵³⁶ McBride.

⁵³⁷ <https://ps.psychiatryonline.org/doi/full/10.1176/ps.50.3.362>.

⁵³⁸ [citation needed]

⁵³⁹ <https://www.apa.org/about/policy/racism-apology>.

⁵⁴⁰ Id.

⁵⁴¹ Id.

⁵⁴² Id.

Throughout American history, the field of psychology has also influenced federal and state eugenics policies.⁵⁴³ In 1895, an article published in an APA journal argued that white people had a superior, more evolved intelligence.⁵⁴⁴ In 1913, a study reported the inferiority of school performance among Black children in integrated schools in New York.⁵⁴⁵ Racial difference was used to argue against improved schooling opportunities for Black children.⁵⁴⁶ One psychologist, Raymond Cattell, argued that race-mixing was dangerous and would lead to a society of “lower intelligence” through the early 1990s.⁵⁴⁷ These racist studies influenced racist standardized testing practices used in public school systems and public higher education across the nation.⁵⁴⁸

In 1917, the federal government conducted psychological tests on nearly two million soldiers.⁵⁴⁹ Due to culturally-biased questions, the study labeled 89 percent of Black recruits as “morons.”⁵⁵⁰ The tests were forerunners of the widely used college admissions test, the SAT.⁵⁵¹ There continue to be large racial gaps in SAT scores today, which are linked to the racist origins of the test.⁵⁵²

Throughout the 1930s, Black psychologists conducted studies countering the racist findings of white psychologists.⁵⁵³ Their studies suggested that environment plays a central role in shaping intelligence scores and outlined the impact white examiners have on the test scores of Black test takers.⁵⁵⁴ However, these studies were often dismissed.⁵⁵⁵ The APA continued to support the use of testing to validate theories about innate racial hierarchy.⁵⁵⁶

From the 1950s on, psychologists received funding from white supremacist organizations to support segregation and other racist projects.⁵⁵⁷ In 1952, former APA president, Henry E. Garrett, testified in support of segregation in *Davis v. County School Board*, one of five federal court cases combined into *Brown v. Board of Education*.⁵⁵⁸ He testified that segregation would not harm Black students, and the three-judge panel that ruled in favor of segregation agreed.⁵⁵⁹ Garrett also testified before Congress in opposition to the passage of the Civil Rights Act of 1968.⁵⁶⁰ He argued that Black Americans could not reach the intelligence levels of white Americans.⁵⁶¹

⁵⁴³ <https://www.apa.org/about/apa/addressing-racism/historical-chronology>.

⁵⁴⁴ Id.

⁵⁴⁵ Id.

⁵⁴⁶ Id.

⁵⁴⁷ Id.

⁵⁴⁸ [citation needed]

⁵⁴⁹ Id.

⁵⁵⁰ Id.

⁵⁵¹ Id.

⁵⁵² Brookings 2020

⁵⁵³ Id.

⁵⁵⁴ Id.

⁵⁵⁵ Id.

⁵⁵⁶ Id.

⁵⁵⁷ Id.

⁵⁵⁸ Id.

⁵⁵⁹ Id.

⁵⁶⁰ Id.

⁵⁶¹ Id.

Garrett promoted the idea of an innate racial hierarchy and worked with racial extremist and neo-Nazi groups.⁵⁶²

In 1968, 75 Black psychologists left the APA in protest and formed the Association of Black Psychologists.⁵⁶³ However, published articles in top psychological journals continued to be overtly racist and neglect issues and topics beneficial to Black Americans. Between 1970 and 1989, just 3.6 percent of published articles focused on Black Americans, a number that steadily decreases.⁵⁶⁴ Most of the work is focused on standardized testing and none on healthy personality development and the competent intellectual functioning of Black Americans.⁵⁶⁵ As late as 1985, white psychologists published articles arguing that Black Americans evolved to have lower intelligence, have more children, care for them poorly, and commit more crime.⁵⁶⁶ The legacy of the discriminatory practices of the APA and the discipline of psychology continues through today. It is evident in the underrepresentation of Black Americans in the psychology workforce, and in the low usage of mental health services by Black Americans.

C. Racism in Mental Health Today

Structural racism continues to be embedded in psychological diagnosis, testing, and treatment of Black mental health patients in federal and state mental health facilities. Studies document continued and consistent patterns of misdiagnosis, misinterpretation of depression symptoms as schizophrenia symptoms, and disparities in quality of mental healthcare for Black Americans.⁵⁶⁷ Black patients are more likely to receive higher doses of antipsychotics despite evidence that they have more adverse side effects.⁵⁶⁸

There is a dearth of Black psychologists and culturally appropriate treatment for Black Americans.⁵⁶⁹ Only three percent of the psychology workforce in the United States is Black.⁵⁷⁰ White psychology curriculums dominate higher education—and seven percent of psychology doctoral students are Black, though 12 percent of Americans are Black.⁵⁷¹

Black clients' experiences of microaggressions from white therapists have negatively impacted their satisfaction with both counselors and counseling in general. Many Black Americans feel worse after their counseling experiences.⁵⁷² Stereotyping and miscommunication due to cultural issues has led to over-diagnosing of Black Americans in some cases.⁵⁷³ This leads to further disparities in quality of mental healthcare for Black patients

⁵⁶² Id.

⁵⁶³ Id.

⁵⁶⁴ APA Website.

⁵⁶⁵ Id.

⁵⁶⁶ Id.

⁵⁶⁷ <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3202&context=jssw&httpsredir=1&referer=>

⁵⁶⁸ CRDP Report, 88.

⁵⁶⁹ [citation needed].

⁵⁷⁰ (APA website, CSW Data Tool).

⁵⁷¹ (ABPsi).

⁵⁷² (Constantine, 2007, p. 13; see also Helms & Cook, 1999)

⁵⁷³ (Dana, 2002; Neighbors et al., 2003; Whaley, 1997)

due to the implicit biases of mental health providers.⁵⁷⁴

Black Americans are more likely to face barriers to accessing mental healthcare today, as compared to other racial groups.⁵⁷⁵ These barriers include stigma from mental health professionals, unavailability of treatment, overdiagnosis and misdiagnosis, being unable to afford the cost of healthcare, lacking insurance, being unable to access transportation, the criminalization of mental illness, inaccessible services, and a limited number of Black mental health providers.⁵⁷⁶

As a result of these barriers, Black American men are 32 percent less likely to receive psychiatric treatment than white men.⁵⁷⁷ Black Americans use less of any mental healthcare, including outpatient care and psychotropic medication, than white Americans.⁵⁷⁸ This extends to the education system—psychiatric and behavioral problems among minority youth often result in school punishment or incarceration, but rarely mental healthcare.⁵⁷⁹ Furthermore, some treatment approaches are overemphasized as universal, even though they have not been adequately tested on Black Americans.⁵⁸⁰

Overall, mental health conditions occur in Black Americans at the same frequency as white Americans.⁵⁸¹ However, the historical Black experience in America is characterized by trauma and violence more often than for white Americans.⁵⁸² This impacts the emotional and mental health of Black American youth and adults.⁵⁸³ At the same time, Black Americans are dealing with prolonged suffering and immense unrelenting racial stress that takes a toll on the physical and mental health of Black adults, youth, and children.⁵⁸⁴

D. Impact of Anti-Black Racism on Black Mental Health

Anti-Black racism has been cited as the root cause of many concerns related to Black mental health. The effects of anti-Black racism on Black mental health are significant. A 600-year-old narrative has claimed that everything Black is inferior: Black skin, Black hair, Black culture, Black values, Black religion, Black families, and Black philosophy. Anti-Black racism in America has established and maintained authority through multiple vehicles, including literature, scholarship, television, newspapers, and radio.⁵⁸⁵ For more than six centuries, nearly every institution of the Western world has—explicitly and implicitly—reinforced the message that Black Americans are to be devalued. Within this context, it is inevitable that Black American identity, self-awareness, mental health, and well-being has suffered.

⁵⁷⁴ <https://www.apa.org/monitor/2018/02/datapoint>; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4638275/>.

⁵⁷⁵ [citation needed]

⁵⁷⁶ <https://nursing.usc.edu/blog/discrimination-bad-health-minority-mental-healthcare/>.

⁵⁷⁷ (Baglivio, Wolff, Piquero, & Epps, 2015).

⁵⁷⁸ Cooke, note 697.

⁵⁷⁹ In the Care for Children and Young Adults National Study, Marrast, Himmelstein, & Woolhandler.

⁵⁸⁰ McGuire, Alegria, Cook, Wells, & Zaslavsky (2006).

⁵⁸¹ [citation needed]

⁵⁸² [citation needed]

⁵⁸³ [citation needed]

⁵⁸⁴ [citation needed]

⁵⁸⁵ (Grills, Aird and Frierson, 2020).

The psychic effects of this anti-Black narrative include cultural trauma, cultural imperialism, and internalized racism. Cultural trauma is “a dramatic loss of identity and meaning, a tear in the social fabric affecting a group of people that has achieved some degree of cohesion.”⁵⁸⁶ Cultural imperialism is when the culture of one society is forced onto another society or group of people.⁵⁸⁷ This creates a climate of alienation for Black Americans, where they have little psychic energy to withstand or counter the anti-Black narrative.⁵⁸⁸ Internalized racism is “the heartbreaking and painful practice of turning the negative racial beliefs, attitudes, practices, and oppression inflicted by white supremacist thought in upon one’s self, family, and people.”⁵⁸⁹

Anti-Black racism causes adverse psychological effects.⁵⁹⁰ The racial stress caused by anti-Blackness leads to anger, anxiety, paranoia, helplessness, hopelessness, frustration, resentment, fear, lowered self-esteem, and lower levels of psychological functioning.⁵⁹¹ This can profoundly affect Black children by undermining their emotional and physical well-being and their academic success.⁵⁹² Black American women identify racial discrimination as a persistent stressor occurring throughout their lives.⁵⁹³ These experiences having long-lasting effects on their identities and on how they perceive encounters with others, particularly white Americans.⁵⁹⁴ Many Black women describe ruminating on past experiences, developing defense mechanisms in anticipation of future threats, and feeling the need to overcompensate for negative stereotypes.⁵⁹⁵ They may work harder to prove themselves, suppress emotions, and code switch.⁵⁹⁶ At times, they may try to appease racist or violent oppressors, as a stress response and survival strategy, resulting in potential negative effects on the body.⁵⁹⁷ Black American women may feel an obligation to present an image of strength, suppress emotions, resist being vulnerable or dependent on others, determined to succeed despite limited resources, and feel an obligation to help others.⁵⁹⁸ This may lead to chronic psychological distress, which is associated with physiological processes, such as chronic inflammation, abdominal obesity, and heart disease.⁵⁹⁹

The overwhelming amount of racial stress caused by racism can result in trauma.⁶⁰⁰ Racial trauma, or race-based stress, is defined by psychologists as injury caused by racism. This trauma may leave psychological wounds tied to historical traumatic experiences, like slavery, as well as mental illness.⁶⁰¹ Studies have shown

⁵⁸⁶ (Eyerman 2001).

⁵⁸⁷ Id.

⁵⁸⁸ Id.

⁵⁸⁹ Id.

⁵⁹⁰ (Jones 2000; Sellers, Copeland-Linder, Martin & Lewis 2006)

⁵⁹¹ (Fisher, Wallace & Fenton 2000; Jencks & Phillips 2011; Sellers & Shelton 2003).

⁵⁹² (Chavous, Rivas-Drake, Smalls, Griffin & Cogburn 2008; Neblett, Philip, Cogburn & Sellers 2006; Neblett, Smalls, Ford, Nguyễn, & Sellers 2009; Smalls, White, Chavous & Sellers 2007; Stevenson & Arrington 2009; Wong, Eccles & Sameroff 2003)”. (Grills, Aird and Frierson, 2020, p. 179).

⁵⁹³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6904516/>

⁵⁹⁴ Id.

⁵⁹⁵ Id.

⁵⁹⁶ Id.

⁵⁹⁷ Nkem Ndefo, When Agreement is not Consent

⁵⁹⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6904516/>.

⁵⁹⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6904516/>.

⁶⁰⁰ Id.

⁶⁰¹ <https://psycnet.apa.org/fulltext/2019-01033-001.html>.

that racial and ethnic discrimination may play an important role in the development of Post-Traumatic Stress Disorder (PTSD) for Black people.⁶⁰² Racial trauma can cause symptoms similar to PTSD, including hypervigilance, flashbacks, nightmares, avoidance, suspiciousness, and physical symptoms such as headaches, heart palpitations, and other such symptoms.⁶⁰³ Studies have also shown that public racial discrimination against Black Americans is linked to an increase in depressive symptoms.⁶⁰⁴ Exposure to potentially traumatic events in childhood are particularly harmful to Black youth given impact of racism and racial discrimination.⁶⁰⁵

Historical trauma is the legacy of numerous traumatic events inflicted on a group of people and experienced over generations.⁶⁰⁶ The health consequences of historical racism and discrimination can be passed down psychologically, socially, and emotionally from one generation to the next resulting in intergenerational harm to Black mental health due to racism.⁶⁰⁷ Long-term adverse health impacts linked to Jim Crow laws illustrate the long reach of institutional racism.⁶⁰⁸ Historical trauma studies show that children of Black parents who have been affected by trauma, also exhibit symptoms of PTSD, or “historical trauma response.”⁶⁰⁹

Traumatization can occur at a community level as well. Highly publicized police killings of unarmed Black Americans affect the mental health of Black Americans in the region where the killing occurs.⁶¹⁰ In one study, the impact was felt for months afterwards, whereas no negative effects were found for white Americans in those same localities.⁶¹¹ A 2013-2016 study on the mental impacts of killings of Black Americans in certain states found that Black Americans had more poor mental health days, whereas white people were not affected in the same way.⁶¹² The cultural legacy of state-inflicted oppression leads to poor community health through re-traumatization.⁶¹³

E. California

Psychological institutions have contributed to overincarceration, forced sterilization, and denial of educational opportunities for Black Californians. In 1915, psychologists leading the California Bureau of Juvenile Research at Whittier State School oversaw some of the earliest eugenics projects, examining family trees and conducting psychological testing of boys confined at the institution.⁶¹⁴ The results of this project harmed Black youth in

⁶⁰² <https://psycnet.apa.org/record/2019-01033-009>.

⁶⁰³ <https://psycnet.apa.org/fulltext/2019-01033-001.html>.

⁶⁰⁴ <https://psycnet.apa.org/record/2019-01033-010>

⁶⁰⁵ (Bernard et al, 2020; Making the “C-ACE” for a Culturally-Informed Adverse Childhood Experiences Framework to Understand the Pervasive Mental Health Impact of Racism on Black Youth)

⁶⁰⁶ (Brave Heart & DeBruyn 1998; Evans-Campbell 2008).

⁶⁰⁷ The Transgenerational Consequences of Discrimination on African-American Health Outcomes

⁶⁰⁸ Krieger N, Chen JT, Coull BA, Beckfield J, Kiang MV, Waterman PD. 2014. Jim Crow and premature mortality among the US black and white population, 1960–2009: an age–period–cohort analysis. *Epidemiology* 25: 494–504

⁶⁰⁹ Sotero, Historical Trauma

⁶¹⁰ Bor et al., (2018).

⁶¹¹ Id.

⁶¹² California Task Force to Study and Develop Reparation Proposals for African Americans (January 28, 2022), Testimony of Kristee Haggins, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁶¹³ <https://lmu.app.box.com/file/862442822419> -- Williams et al 2021); Gone et al., (2019) Nagata et al., (2019).

⁶¹⁴ APA website.

California by increasing incarceration rates and promoting sterilization.⁶¹⁵ Psychological tests were used by the state's public education system to block educational and economic opportunities for Black youth in California.⁶¹⁶ In 1979, the Federal District Court of Northern California ruled in favor of five Black students who had been placed in special education classes due to their performance on psychological tests.⁶¹⁷

The mental health system in California has discriminated against Black Californians through inaccurate diagnoses, use of involuntary force, high cost, and a lack of culturally-competent services.⁶¹⁸ In comparison to other racial and ethnic groups, it takes longer for Black Californians to be removed from inpatient mental health care settings to a less restrictive level of care.⁶¹⁹ Despite higher rates of inpatient treatment, over 50 percent of Black Californians must wait more than eight days to step down from an inpatient setting to a lower level of care.⁶²⁰ It takes twice as long for Black Californians than it does for most other racial or ethnic groups, despite no evidence of less need.⁶²¹ These racial disparities also exist in California's small counties, despite fewer numbers of people from nonwhite communities.⁶²²

Many Black Californians suffer from high rates of serious psychological distress, depression, suicidal ideation, dual diagnoses, and other mental health issues.⁶²³ Unmet mental health needs are higher among Black Californians, as compared with white Californians. This includes being unable to access mental healthcare and substance abuse services.⁶²⁴ Across racial groups, the highest percentage of serious psychological distress and attempted suicide was found among Black Californians.⁶²⁵ Black Californians had the highest percentage of missed days of work and daily activities due to mental health concerns.⁶²⁶ Black people are over-represented in vulnerable groups at risk for mental illness, such as unhoused people; current and formerly incarcerated people; children in foster care; and veterans.⁶²⁷ These groups have an increased risk for developing Post-Traumatic Stress Disorder.⁶²⁸

California budget cuts in funding for indigent care have disproportionately affected Black communities, who are more likely to be indigent and in need of mental health services.⁶²⁹ The lack of recruitment and retention of Black psychiatrists in Los Angeles has negatively affected Black Californians, who are more likely to seek services from someone with the same racial background.⁶³⁰ Black mentally ill incarcerated Californians are

⁶¹⁵ (Chávez-García, 2015).

⁶¹⁶ APA Website.

⁶¹⁷ (Larry P. v. Riles, 1979).

⁶¹⁸ African American CRDP Report, pg. 6.

⁶¹⁹ <https://cpehn.org/about-us/blog/existing-disparities-in-californias-system-of-specialty-mental-health-care/>.

⁶²⁰ Id.

⁶²¹ Id.

⁶²² Id.

⁶²³ [citation needed]

⁶²⁴ (https://www.rand.org/pubs/research_reports/RR2060.html)

⁶²⁵ Id.

⁶²⁶ Id.

⁶²⁷ [citation needed]

⁶²⁸ Id. at 18.

⁶²⁹ Id. at 49.

⁶³⁰ Id.

overrepresented in Los Angeles County jails. Records indicate that they receive more mental health services while incarcerated than while they are out in the community, which is illustrative of how poor community mental health services are for Black Californians.⁶³¹

Black Californians represent only 11 percent of Alameda County’s population, but make up 47 percent of the county’s unhoused population, 48 percent of the jail system’s mental health population, and 53 percent of people who cycle in and out of both the criminal and hospital systems.⁶³² In Alameda County, Black Californians represent 11 percent of the population and receive 40 percent of all mental health services. Yet despite this “over-provision” of services, the inconsistent mental health outcomes for Black Californians show that they are being inappropriately served.⁶³³ The State of California has repeatedly awarded state and county contracts to agencies that continually fail to meet a minimum level of culturally relevant care for Black Americans.⁶³⁴

XI. Reproductive, Sexual, and Gender Identity Responsive Health

A. Maternal Health

The federal and state governments have historically policed the childbearing practices of Black American women and denied reproductive rights and healthcare.⁶³⁵ Black women have been used as tools of reproduction for capitalist profit—or forcibly sterilized and denied reproductive freedom.⁶³⁶ The government has historically neglected to provide adequate reproductive healthcare to Black women.⁶³⁷ As a result, Black women face high rates of maternal mortality and pregnancy-related health complications today.⁶³⁸

Black women were denied autonomy over their reproduction during the slavery era and denied their rights as mothers.⁶³⁹ State and federal governments forcibly sterilized Black women in 19th and 20th centuries.⁶⁴⁰ (See section VIII of this chapter.) Later, state policies included plans to distribute experimental birth control, like Norplant, in Black communities.⁶⁴¹ States criminalized and sterilized Black women for giving birth if traces of controlled substances were found in them or their babies.⁶⁴² Coercive welfare policies mandated long-term contraceptive insertion, with harmful health consequences, as a condition for receiving welfare benefits.⁶⁴³ For example, some state welfare policies, like Georgia’s, encouraged the insertion of Norplant, a contraceptive

⁶³¹ Id. at 51.

⁶³² <https://www.sfchronicle.com/local/article/Justice-Department-Alameda-County-violates-16122621.php>.

⁶³³ http://www.acbhcs.org/providers/qi/docs/Alameda_African_American_Utilization_Report.pdf.

⁶³⁴ Id. at 78.

⁶³⁵ [citation needed]

⁶³⁶ [citation needed]

⁶³⁷ [citation needed]

⁶³⁸ [citation needed]

⁶³⁹ Dorothy Roberts, *Killing the Black Body*, Introduction.

⁶⁴⁰ Id.

⁶⁴¹ Id.

⁶⁴² Id.

⁶⁴³ Id. Chapter 4, 5.

implant with harmful side effects, which cannot be removed without medical assistance.⁶⁴⁴ These policies funded the implantation of Norplant for free.⁶⁴⁵ However, they only covered the cost of early removal in cases of documented medical necessity—forcing poor women to either scrape together funds for removal themselves or wait for five years.⁶⁴⁶

Institutional and cultural racism have led to inadequate reproductive health services for Black women, such as prenatal care, abortion services, reproduction-assisting technologies, fetal surgery, contraceptives, and family planning counseling.⁶⁴⁷ Historically, state and federal governments have refused to subsidize reproductive care, such as abortion for poor women.⁶⁴⁸ This especially harms Black women’s access to reproductive care.⁶⁴⁹ Black women rely on publicly funded clinics in higher numbers, due to lack of access to private health insurance or income for a private physician.⁶⁵⁰ Black women are also less likely to have access to information about informed consent, sterilization, and side effects of contraceptives.⁶⁵¹ Forced sterilization, mentioned earlier, was used in conjunction with these policies, to deny Black women autonomy over their own bodies and their reproductive health.

Studies show that Black women suffer from disproportionate infertility in comparison to other groups.⁶⁵² This disparity stems from untreated sexually transmitted infections, nutritional deficiencies, complications from childbirth and abortion, and environmental hazards.⁶⁵³ Black women are treated as infertile by doctors who underdiagnose endometriosis in Black women.⁶⁵⁴ Many reproductive technologies are unaffordable or inaccessible to Black women experiencing fertility issues.⁶⁵⁵

One of the most harmful legacies of slavery is the disproportionate maternal and infant death of Black women and children today due to lack of access to adequate reproductive healthcare.⁶⁵⁶ The federal government has not officially counted deaths related to pregnancy in 10 years, and has neglected to address the severe racial disparities in maternal mortality for Black women.⁶⁵⁷

Black women experience disproportionate racial discrimination in access to and quality of prenatal care.⁶⁵⁸ Expecting and new Black mothers often find that their reports of painful symptoms are overlooked or

⁶⁴⁴ Id.
⁶⁴⁵ Id.
⁶⁴⁶ Id.
⁶⁴⁷ Dorothy Roberts, *Killing the Black Body*, Chapter 5.
⁶⁴⁸ Id.
⁶⁴⁹ Id.
⁶⁵⁰ Id.
⁶⁵¹ Id.
⁶⁵² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2592196/>.
⁶⁵³ Id.
⁶⁵⁴ Id.
⁶⁵⁵ Id.
⁶⁵⁶ Deirdre Cooper Owens and Sharla Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery*, *American Journal of Public Health* (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6727302/>.
⁶⁵⁷ Id.
⁶⁵⁸ Id.

minimized by medical practitioners.⁶⁵⁹ Black women must wait longer for prenatal appointments and are ignored, scolded, demeaned, and bullied into having C-sections.⁶⁶⁰ Black women reveal that they feel disrespected and coerced by their health care providers.⁶⁶¹ Even wealthier Black women suffer the racist disregard of medical providers.⁶⁶² Serena Williams, the renowned tennis champion, was ignored by medical providers who dismissed her concern regarding a post-pregnancy blood clot.⁶⁶³ After insistence by Williams that she undergo a CT scan, doctors found a clot in her lungs.⁶⁶⁴

Black women disproportionately experience adverse birth outcomes and adverse maternal health.⁶⁶⁵ Researchers have found evidence that this may be influenced by the uniquely high level of racism-induced stress experienced by Black women, as discussed above. Structural racism in federally-funded healthcare institutions is a stressor that harms Black women at both physiological and genetic levels.⁶⁶⁶ Structural racism contributes to maternal and infant death disparities. In the United States, pregnancy-related mortality is three to four times higher among Black women than among white women.⁶⁶⁷ One contributing factor is the lack of race-conscious reproductive counseling.⁶⁶⁸ Adequate prenatal care does not reduce racial disparities for Black American women, who are still at elevated risk for preterm birth.⁶⁶⁹

Hypertension, which has been linked to the stress of living in a racist society, contributes to racial disparities in pregnancy-related complications, such as eclampsia.⁶⁷⁰ Studies show that Black women who experience higher levels of preterm birth also report the greatest experiences of racism.⁶⁷¹

Black mothers are less likely to breastfeed their babies than white mothers due to numerous historical factors including discriminatory hospital practices and predatory marketing practices.⁶⁷² Lower breastfeeding rates are associated with higher risk of medical issues before and after childbirth, and maternal mental health issues.⁶⁷³

B. Health of Black LGBTQ Americans

Black Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Americans experience discrimination in

⁶⁵⁹ Deirdre Cooper Owens and Sharla Fett, Black Maternal and Infant Health: Historical Legacies of Slavery, American Journal of Public Health (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6727302/>.

⁶⁶⁰ <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

⁶⁶¹ https://healthlaw.org/wp-content/uploads/2020/04/DoulasRacialDisparity_4.16.2020.pdf.

⁶⁶² <https://www.nytimes.com/2018/01/11/sports/tennis/serena-williams-baby-vogue.html>.

⁶⁶³ Id.

⁶⁶⁴ Id.

⁶⁶⁵ Id.

⁶⁶⁶ Deirdre Cooper Owens and Sharla Fett, Black Maternal and Infant Health: Historical Legacies of Slavery, American Journal of Public Health (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6727302/>.

⁶⁶⁷ Id.

⁶⁶⁸ Dorothy Roberts, Killing the Black Body, Chapter 6.

⁶⁶⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 28, 2022), Testimony of Joan Kaufman, < <https://oag.ca.gov/ab3121/meetings/012022> > (as of February 8, 2022).

⁶⁷⁰ [citation needed]

⁶⁷¹ <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

⁶⁷² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4307211/>.

⁶⁷³ Id.

healthcare and lack access to gender-affirming care.⁶⁷⁴ They are also more likely to be uninsured.⁶⁷⁵ For Black transgender Americans, this results in difficulties in seeing healthcare providers and receiving gender-affirming care due to cost.⁶⁷⁶ Studies have indicated that Black LGBTQ Americans experience assumptions, judgment, stigma, and discrimination in the healthcare system.⁶⁷⁷ It is difficult for them to establish a personal bond, trust, and familiarity with providers, who do not often meet their needs with respect to their sexual and gender identities.⁶⁷⁸

Black LGBTQ Americans experience far worse health outcomes than non-Black LGBTQ Americans. Black Americans who identify as women and LGBTQ have higher diagnoses of hypertension, stroke, and diabetes.⁶⁷⁹ Many Black LGBTQ Americans are at higher risk for HIV when compared with white cisgender, heterosexual Americans.⁶⁸⁰ Black transgender Americans had HIV rates that were five times those of the overall transgender population.⁶⁸¹ Those rates were highest for Black transgender women, 19 percent of whom had HIV when compared with 1.4 percent of the transgender population.⁶⁸² Black transgender Americans have also been found to have higher rates of asthma, heart attacks, and cancer.⁶⁸³

A large proportion of Black LGBTQ Americans have suffered verbal insults or abuse, threats of violence, physical or sexual assault, and robbery or property destruction.⁶⁸⁴ Black LGBTQ Americans are twice as likely to report a diagnosis of depression compared to Black American non-LGBT adults.⁶⁸⁵ Researchers posit that such physical health and mental outcomes are linked to a combination of anti-Black racial discrimination, homophobia, and transphobia.⁶⁸⁶ Stigma and discrimination create a stressful social environment that leads to

⁶⁷⁴ Soon Kyu Choi et al, Black LGBT Adults in the US: LGBT Well-Being at the Intersection of Race (January 2021), UCLA School of Law: Williams Institute, <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>> (as of January 19, 2021).

⁶⁷⁵ Jonathan Matthias Lassiter et al, A Systematic Review of Black American Same Sex Couples Research: Laying the Groundwork for Culturally-Specific Research and Interventions (August 30, 2021), The Journal of Sex Research, <<https://doi.org/10.1080/00224499.2021.1964422>> (as of January 19, 2021).

⁶⁷⁶ <https://transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

⁶⁷⁷ <https://pubmed.ncbi.nlm.nih.gov/31274661/>.

⁶⁷⁸ Id.

⁶⁷⁹ Jonathan Matthias Lassiter et al, A Systematic Review of Black American Same Sex Couples Research: Laying the Groundwork for Culturally-Specific Research and Interventions (August 30, 2021), The Journal of Sex Research, <<https://doi.org/10.1080/00224499.2021.1964422>> (as of January 19, 2021).

⁶⁸⁰ <https://pubmed.ncbi.nlm.nih.gov/31274661/>.

⁶⁸¹ <https://transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

⁶⁸² Id.

⁶⁸³ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>.

⁶⁸⁴ Id.

⁶⁸⁵ Soon Kyu Choi et al, Black LGBT Adults in the US: LGBT Well-Being at the Intersection of Race (January 2021), UCLA School of Law: Williams Institute, <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>> (as of January 19, 2021).

⁶⁸⁶ Jonathan Matthias Lassiter et al, A Systematic Review of Black American Same Sex Couples Research: Laying the Groundwork for Culturally-Specific Research and Interventions (August 30, 2021), The Journal of Sex Research, <<https://doi.org/10.1080/00224499.2021.1964422>> (as of January 19, 2021).

mental and physical health problems for Black Americans in the LGBTQ community.⁶⁸⁷

C. California

In California, as well as nationally, Black women are substantially more likely than white women to suffer severe health complications during pregnancy, give premature birth, die in childbirth, and lose their babies.⁶⁸⁸ From 2014 to 2016, the pregnancy-related mortality ratio for Black women in California was four to six times greater than the mortality ratio for other ethnic groups.⁶⁸⁹ In fact, Black women were overrepresented for pregnancy-related deaths for all causes, but most notably for deaths during pregnancy or during hospitalization post-delivery.⁶⁹⁰ Black babies that are born in the Bay area, similar to other areas in California, are twice as likely to die or be born prematurely than their white counterparts. In a comprehensive study of 1.8 million hospital births, it was found that when a Black doctor is the primary charge on these cases, the infant mortality is cut in half.⁶⁹¹

The high rates of preterm birth and maternal mortality for Black women are due, in part, to complications from underestimated or undiagnosed health conditions.⁶⁹² In 2006, Bettye Jean Ford gave preterm birth to a baby who did not survive in Los Angeles.⁶⁹³ “Giving birth was horrible,” she said. “It was just an awful experience emotionally, physically.”⁶⁹⁴ Even after delivery, Black women experience the highest rates of postpartum depression.⁶⁹⁵ California passed the Dignity in Pregnancy and Childbirth act in 2019, which aims to address implicit bias in healthcare and collect data on maternal health.⁶⁹⁶ However, experts state that the bill is difficult to enforce, since physicians’ contract with hospitals and are not employees.⁶⁹⁷ It is left to healthcare facilities to implement practices to address implicit bias—which is not likely to occur.⁶⁹⁸

A survey in California found that Black women disproportionately reported unfair treatment, harsh language,

⁶⁸⁷ Soon Kyu Choi et al, Black LGBT Adults in the US: LGBT Well-Being at the Intersection of Race (January 2021), UCLA School of Law: Williams Institute, <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>> (as of January 19, 2021).

⁶⁸⁸ <https://calmatters.org/health/2019/07/black-women-health-racism-maternity-care-california/>.

⁶⁸⁹ CA-PMSS Surveillance Report: Pregnancy-Related Deaths in California, 2008-2016, at page 7. Sacramento: California Department of Public Health, Maternal, Child and Adolescent Health Division. 2021, available at <https://www.cdph.ca.gov/Programs/CFH/DMCAH/surveillance/CDPH%20Document%20Library/CA-PMSS/CA-PMSS-Surveillance-Report-2008-2016.pdf>

⁶⁹⁰ <https://www.cmqcc.org/research/maternal-mortality-review-ca-pamr/ca-pamr-background#:~:text=Since%202006%2C%20California%20has%20seen,Health%20International%20on%20CA%20PAMR.>

⁶⁹¹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁶⁹² <https://calmatters.org/health/2019/07/black-women-health-racism-maternity-care-california/>.

⁶⁹³ Id.

⁶⁹⁴ Id.

⁶⁹⁵ California Health Care Foundation, California Health Care Almanac, Health Disparities by Race and Ethnicity in California: Pattern of Inequity (Oct. 2021), available at <https://www.chcf.org/wp-content/uploads/2021/10/DisparitiesAlmanacRaceEthnicity2021.pdf>.

⁶⁹⁶ https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB464.

⁶⁹⁷ <https://calmatters.org/health/2019/07/black-women-health-racism-maternity-care-california/>.

⁶⁹⁸ Id.

and rough handling during their hospital stay, as compared to white women.⁶⁹⁹ Women have been denied financial support for doulas by the State of California—a denial that is more likely to harm Black mothers.⁷⁰⁰ Doulas are trained professionals who provide physical, emotional, and informational support to mothers.⁷⁰¹ Doulas have been shown to ameliorate health disparities in maternal and child health.⁷⁰² Evidence shows that women who had the support of doulas were less likely to have C-sections and have healthier babies.⁷⁰³ Doulas play an important role as advocates for Black women in the medical system when medical providers do not believe Black women or address their needs.⁷⁰⁴ However, during the COVID-19 pandemic, the California state legislature failed to pass an initiative to provide doula care for pregnant and postpartum people in the 14 California counties with the highest birth disparities.⁷⁰⁵

In the American West, Black LGBTQ Americans are more likely to be uninsured, diagnosed with depression, and diagnosed with asthma, diabetes, high blood pressure, high cholesterol, heart disease, and cancer.⁷⁰⁶ A 2021 study of transgender women in the San Francisco Bay Area revealed that Black American transgender women are at a higher risk for becoming the victims of a hate crime because of the intersectional effects of racism and transphobia.⁷⁰⁷ Black transgender women had a higher tendency to be the victim of battery with a weapon, a potentially fatal form of violence, compared to white transgender women who participated in the study.⁷⁰⁸

XII. Child and Youth Health

Due to the institution of slavery, as well as the segregation and racial terror that occurred in the years after, Black children faced disproportionately high rates of infant mortality and damaged health.⁷⁰⁹ Federal and state-sanctioned discriminatory pediatric care has continued through the centuries—resulting in lasting health disparities affecting Black children and youth.⁷¹⁰ The public school, foster care, and carceral systems further damage the health of Black youth due to the discriminatory and violent treatment they receive at the hands of state and local officials.⁷¹¹

A. Pediatric Care

⁶⁹⁹ [citation needed]

⁷⁰⁰ [citation needed]

⁷⁰¹ [citation needed]

⁷⁰² [citation needed]

⁷⁰³ [citation needed]

⁷⁰⁴ <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

⁷⁰⁵ <https://healthlaw.org/news/california-doula-push-shifts-focus-due-to-covid-19-pandemic/>.

⁷⁰⁶ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>, 38.

⁷⁰⁷ Akua O. Gyamerah et al, Experiences and Factors Associated with Transphobic Hate Crimes Among Transgender Women in the San Francisco Bay Area: Comparisons Across Race (June 2, 2021), BMC Public Health, <<https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021-11107-x>> (as of January 19, 2021).

⁷⁰⁸ Akua O. Gyamerah et al, Experiences and Factors Associated with Transphobic Hate Crimes Among Transgender Women in the San Francisco Bay Area: Comparisons Across Race (June 2, 2021), BMC Public Health, <<https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021-11107-x>> (as of January 19, 2021).

⁷⁰⁹ [citation needed]

⁷¹⁰ [citation needed]

⁷¹¹ [citation needed]

Historical and contemporary racial segregation in federal and state government-funded hospitals has resulted in low birth weight and premature birth for Black infants.⁷¹² The infant death rate for Black babies is the highest in the nation.⁷¹³ Black infants are more than twice as likely to die as white infants—11.3 per 1,000 Black babies die, compared with 4.9 per 1,000 white babies.⁷¹⁴ This racial disparity is wider than that of 1850, when Black Americans were enslaved.⁷¹⁵ This racial gap adds up to more than 4,000 lost Black babies.⁷¹⁶ Studies show that education does not mitigate this problem. Black women with advanced degrees are more likely to lose their babies than white women with less than an eighth-grade education.⁷¹⁷ Federal and state governments have not addressed this problem, since only about half of state governments have maternal-mortality review boards that analyze pregnancy-related deaths.⁷¹⁸ Scientists have posited that systemic racism can create toxic physiological stress, resulting in conditions like hypertension and pre-eclampsia—leading to higher rates of Black infant and maternal death.⁷¹⁹

Racial disparities in infant mortality and the complications of low birth weight have been associated with racial discrimination and maternal stress.⁷²⁰ Low-birth weight Black infants are born in hospitals that have higher rates of infection and that have higher rates of discharging babies without ensuring that breast milk is provided.⁷²¹ The patient-to-nurse ratios in these hospitals are much higher than in other hospitals—resulting in overworked nurses who cannot provide adequate care.⁷²² Studies show that Black physician care of Black newborns significantly reduces the Black infant death rate; however, Black physicians are disproportionately underrepresented in the field of medicine.⁷²³

The American Academy of Pediatrics has stated that racism is a social determinant of health which has a profound impact on the health of children.⁷²⁴ Black American children experience worse health outcomes than white American children, due to unequal access to care, in part, because of parental unemployment and lower household net worth.⁷²⁵ (See Chapter 13 on wealth.) The impact of racism has been linked to birth disparities and health problems in Black children and adolescents.⁷²⁶ Chronic stress leads to increased and prolonged levels of exposure to stress hormones, which lead to inflammatory reactions that predispose children to chronic disease.⁷²⁷ Increased stress related to racial discrimination experienced by Black children has been associated

⁷¹² <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2728461>.

⁷¹³ African American CRDP Report, pg. 55.

⁷¹⁴ <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html>.

⁷¹⁵ Id.

⁷¹⁶ Id.

⁷¹⁷ Id.

⁷¹⁸ Id.

⁷¹⁹ Id.

⁷²⁰ <https://pediatrics.aappublications.org/content/144/2/e20191765>.

⁷²¹ [citation needed]

⁷²² <https://www.nature.com/articles/s41390-019-0513-6>.

⁷²³ <https://www.pnas.org/content/117/35/21194>.

⁷²⁴ <https://publications.aap.org/pediatrics/article/144/2/e20191765/38466/The-Impact-of-Racism-on-Child-and-Adolescent>.

⁷²⁵ <https://publications.aap.org/pediatrics/article/144/2/e20191765/38466/The-Impact-of-Racism-on-Child-and-Adolescent>.

⁷²⁶ <https://pediatrics.aappublications.org/content/pediatrics/144/2/e20191765.full.pdf>.

⁷²⁷ Id.

with increased asthma risk and severity.⁷²⁸ Black American children are more likely to die from asthma.⁷²⁹ Children's exposure to discrimination has also been linked with higher rates of attention deficit hyperactivity disorder, anxiety, depression, and decreased general health.⁷³⁰ The rate of suicide is greatest among Black children who are 11 to 12 years old.⁷³¹

Black youth disproportionately suffer from obesity and being overweight due to social and environmental circumstances that produce psychological stress—including less access to education and more exposure to racial discrimination.⁷³² Black children are underdiagnosed for allergies and referred less quickly for kidney transplants than white children.⁷³³ They are also more likely to die following surgery.⁷³⁴ The underdiagnosing of Black children is linked to the lack of Black pediatricians, which has resulted in inadequate access to pediatric care for Black children.⁷³⁵

B. Health in School, Foster Care, and Carceral Systems

Black youth are disproportionately represented in the foster care system and suffer disproportionately worse health outcomes in the system.⁷³⁶ Black youth suffer from greater rates of child abuse and neglect as well as the associated negative impacts on mental health in state-run foster care systems.⁷³⁷ They may be placed on psychotropic drugs which alter behavior patterns and increase the risk for suicide and illness.⁷³⁸

Black students experience disparate health outcomes and discrimination in public school systems.⁷³⁹ Racial disparities in educational access and attainment, along with racism experienced in schools, affect the trajectory of academic achievement for Black youth and ultimately harm their health.⁷⁴⁰ (See Chapter 6 on education.) Black students are 2.9 times more likely to be labeled with a disability than white students, resulting in disproportionate placement of Black students in special education, where they are less likely than white students to return to regular instruction and are prescribed unnecessary psychotropic medications.⁷⁴¹

In public schools, despite health screenings and low academic scores that indicate mental illness, a learning disability, or developmental delay—Black children are still neglected by school health workers.⁷⁴² Black youth

⁷²⁸ Bridgette L. Jones, Chronic stress exposure among young African American children with asthma, [https://www.annallergy.org/article/S1081-1206\(19\)30612-X/fulltext](https://www.annallergy.org/article/S1081-1206(19)30612-X/fulltext).

⁷²⁹ <https://www.nytimes.com/2020/06/15/well/family/the-impact-of-disparities-on-childrens-health.html>; [https://www.academicpedsjnl.net/article/S1876-2859\(20\)30125-X/pdf](https://www.academicpedsjnl.net/article/S1876-2859(20)30125-X/pdf).

⁷³⁰ <https://www.aappublications.org/news/2017/05/04/PASRacism050417>.

⁷³¹ [citation needed]

⁷³² <https://www.hindawi.com/journals/jobee/2019/1316765/>.

⁷³³ Id.

⁷³⁴ <https://pediatrics.aappublications.org/content/146/2/e20194113>.

⁷³⁵ <https://www.today.com/health/why-racism-can-have-long-term-effects-children-s-health-t186480>.

⁷³⁶ [citation needed]

⁷³⁷ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4767020/>.

⁷³⁸ African American CRDP Report, at 88.

⁷³⁹ [citation needed]

⁷⁴⁰ [citation needed]

⁷⁴¹ African American CRDP Report, at 90-91.

⁷⁴² [citation needed]

are over-diagnosed for conduct disorder and under-diagnosed for depression.⁷⁴³ The closure of public schools during the COVID-19 pandemic resulted in missed meals, negatively impacting Black children's health, nutrition, and food security because Black students are more likely to be eligible for free or reduced-price meals.⁷⁴⁴

Black youth are overrepresented at every level of the juvenile justice system, from initial contact with law enforcement to sentencing and incarceration, which has led to worsening health.⁷⁴⁵ Among youth who are arrested, Black youth are three times as likely to be incarcerated in the juvenile justice system and less likely to be diverted to non-carceral settings than white youth.⁷⁴⁶ Black American youth involved in the carceral system are more likely to be without health insurance and have worse mental and physical health, during and after incarceration.⁷⁴⁷ This is due to communicable diseases, which spread in juvenile facilities, physical and sexual trauma, as well as erosion of mental health.⁷⁴⁸ Black youth are overprescribed psychotropic medication, misdiagnosed, and mistreated by the carceral system, when compared with white youth.⁷⁴⁹ Within juvenile justice settings, Black American boys are 40 percent more likely to be diagnosed with conduct disorder than white youth, while Black American girls are 54 percent more likely—even when controlling for trauma, behavioral indicators, and criminal offense charges.⁷⁵⁰

C. California

Malnutrition rates are higher for Black children in California, when compared with other racial groups.⁷⁵¹ In 2020, in California, the rate of food insecurity was almost five percent higher for Black households in California than for all households in California. In addition, 20.2 percent of Black households reported having children who did not have enough to eat, while 15.9 percent of all households reported not having enough food to eat. According to data from 2018, three times as many Black Californian children live in poverty when compared with white children.⁷⁵² Poverty results in worse cognitive, socio-emotional, and physical health.⁷⁵³ Children who face poverty when young are at greater risk for poor adult health, among other adverse outcomes. This is particularly prevalent for Black children in California, due to their overrepresentation among poor children at large.⁷⁵⁴

In California, Black youth, after exposure to toxic stress and trauma, are more likely to be incarcerated than

⁷⁴³ [citation needed]

⁷⁴⁴ <https://ajph.aphapublications.org/doi/10.2105/AJPH.2020.305875>.

⁷⁴⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5616175/>.

⁷⁴⁶ <https://assets.aecf.org/m/resourcedoc/alliance-thecolorofjustice-2019.pdf>.

⁷⁴⁷ [citation needed]

⁷⁴⁸ <https://pediatrics.aappublications.org/content/early/2017/01/19/peds.2016-2624>.

⁷⁴⁹ <https://assets.aecf.org/m/resourcedoc/alliance-thecolorofjustice-2019.pdf>.

⁷⁵⁰ (Steinberg, 2008; The Annie E. Casey Foundation, 2006).

⁷⁵¹ <https://calbudgetcenter.org/resources/snap-cal-fresh-california-black-and-latinx-children-need-policymakers-to-act/>.

⁷⁵² <https://www.kidsdata.org/topic/234/poverty-race/table#fmt=450&loc=2,127,1657,331,1761,171,2168,345,357,324,369,362,360,2076,364,356,217,354,1663,339,2169,365,343,367,344,366,368,265,349,361,4,273,59,370,326,341,338,350,2145,359,363,340&tf=108&ch=7,11,726,10,72,9,73,1298>.

⁷⁵³ Id.

⁷⁵⁴ Id.

their white peers.⁷⁵⁵ The poor living conditions among incarcerated youth intensify health problems.⁷⁵⁶ The carceral system inadequately serves the health needs of Black incarcerated youth.⁷⁵⁷ Tanisha Denard, a Black teenager, was in high school when she violated her probation due to unpaid truancy tickets and was sent to juvenile hall.⁷⁵⁸ Her time in juvenile hall severely harmed her mental health. “Being locked down make you feel that you are worthless to society,” she said. “You start to think about any way to escape, even if it means suicide.”⁷⁵⁹ While incarcerated she was subjected to solitary confinement, not allowed to use the restroom, and forced to sleep on bedsheets stained with urine, blood, and feces.⁷⁶⁰ The juvenile justice system lacks policies, practices, and interventions specific to serving Black youth like Denard.⁷⁶¹

XIII. Public Health Crises

Throughout the history of the United States, federal and state governments have mismanaged public health crises due to entrenched systemic racism.⁷⁶² This systemic racism has disproportionately harmed Black American health.⁷⁶³ The public health crises described in this section are not an exhaustive list of the mismanagement of health crises, rather they are merely selected illustrative examples.⁷⁶⁴ Today, Black Americans continue to be at the highest risk for negative health impacts from public health crises.⁷⁶⁵

A. Infectious Diseases

In 1793, anti-Black racism on the part of state officials in Pennsylvania resulted in the death of hundreds of Black Americans during the yellow fever epidemic.⁷⁶⁶ Government officials fled the state, falsely assuming Black residents were immune to the disease, and left them to manage the epidemic.⁷⁶⁷ Three hundred Black residents who remained in the city participated in the epidemic relief effort, working as nurses, digging graves, and burying the dead.⁷⁶⁸ There were about 20 Black nurses for each white nurse.⁷⁶⁹ When some Black nurses fell ill with yellow fever, doctors were reluctant to say that they died from it, perpetuating the harmful myth that Black Americans were immune to the disease.⁷⁷⁰

In the post-Reconstruction era, tuberculosis was a deadly health problem for Black Americans.⁷⁷¹ In 1900, there

⁷⁵⁵ [citation needed]

⁷⁵⁶ <https://www.cdcr.ca.gov/ccjbh/wp-content/uploads/sites/172/2020/07/Juvenile-Justice-Factsheet-6.30.2020.pdf>.

⁷⁵⁷ <https://assets.aecf.org/m/resourcedoc/alliance-thecolorofjustice-2019.pdf>.

⁷⁵⁸ Id.

⁷⁵⁹ Id.

⁷⁶⁰ Id.

⁷⁶¹ Id.

⁷⁶² [citation needed]

⁷⁶³ [citation needed]

⁷⁶⁴ [citation needed]

⁷⁶⁵ [citation needed]

⁷⁶⁶ [citation needed]

⁷⁶⁷ [citation needed]

⁷⁶⁸ Id.

⁷⁶⁹ [citation needed]

⁷⁷⁰ [citation needed]

⁷⁷¹ [citation needed]

were large disparities in tuberculosis rates between white and Black populations because segregated Black neighborhoods were impoverished, had congested housing, and could not access basic healthcare information.⁷⁷² In the early 1900s, state and local public health agencies, hospitals, and physicians portrayed Black people as a hazardous population to the white public.⁷⁷³ Black medical societies worked to inform their communities about tuberculosis because the government did not provide any such public health services.⁷⁷⁴

Due to lack of federal funding in the 1920s, Black communities did not have access to adequate tuberculosis screening services or healthcare resources.⁷⁷⁵ Disparities between tuberculosis rates for Black and white Americans continued throughout the 20th century.⁷⁷⁶ In 1965, Black tuberculosis rates were two to three times higher than for white Americans.⁷⁷⁷ Substandard and segregated housing, in addition to concentrated poverty, contributed to high HIV and tuberculosis rates in the 1980s and 1990s.⁷⁷⁸ Due to systemic racism, Black Americans are also overrepresented in high-risk physical spaces such as prisons, hospitals, cramped housing, and homeless shelters.⁷⁷⁹ Thus, Black Americans have contracted illnesses that spread through sexual and physical contact at higher rates.

B. Drug Addiction

Internationally, public health officials have recognized that drug addiction should be treated as a health disorder and not as a criminal behavior.⁷⁸⁰ The federal government chose to respond to rising drug addiction as a criminal justice issue, instead of as a public health issue.⁷⁸¹ This resulted in state action against Black people in need of substance abuse services.⁷⁸² According to healthcare providers and experts, the government should have treated drug addiction as a public health issue.⁷⁸³ Drug addiction is a medical condition, not a character flaw or form of social deviance.⁷⁸⁴ Punishment for substance abuse disorders does not ameliorate addiction, rather it leads to higher risk of drug overdose.⁷⁸⁵

In 1972, Nixon announced the creation of the Office for Drug Abuse Law Enforcement, a precursor to the Drug Enforcement Administration.⁷⁸⁶ This office would use the criminal justice system to address drug addiction.⁷⁸⁷ The government embarked upon a rigorous crackdown on the usage of crack, a crystalized type of cocaine

⁷⁷² [citation needed]

⁷⁷³ [citation needed]

⁷⁷⁴ [citation needed]

⁷⁷⁵ [citation needed]

⁷⁷⁶ [citation needed]

⁷⁷⁷ [citation needed]

⁷⁷⁸ [citation needed]

⁷⁷⁹ [citation needed].

⁷⁸⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5428163/>; <https://www.healthaffairs.org/doi/10.1377/hblog20210421.168499/full/>.

⁷⁸¹ [citation needed.]

⁷⁸² [citation needed.]

⁷⁸³ Citation.

⁷⁸⁴ [citation needed.]

⁷⁸⁵ [citation needed.]

⁷⁸⁶ [citation needed.]

⁷⁸⁷ <https://www.vox.com/2016/3/29/11325750/nixon-war-on-drugs>.

which is highly addictive and relatively cheap.⁷⁸⁸ During the 1970s, hospital emergency rooms began testing pregnant women for suspected drug use and reporting them to police authorities.⁷⁸⁹ In many cases, government funded hospitals imprisoned women, shackled them while they gave birth, or took temporary or permanent custody of their children.⁷⁹⁰ Hospitals reported Black pregnant women 10 times more frequently to government health authorities than white women.⁷⁹¹ Black men were, and continue to be, disproportionately arrested for drug possession.⁷⁹²

State policy leaders did not address the need for increasing preventive mental illness and rehabilitation resources.⁷⁹³ Nor did they address the psychosocial origins for the demand for crack. Police crackdowns and incarceration for drug possession did not relieve the social conditions that spawned the crack cocaine epidemic.⁷⁹⁴ State actions exacerbated them by treating drug addiction as a crime, as opposed to a public health issue.⁷⁹⁵ According to federal surveys, most crack users were and still are white.⁷⁹⁶ However, Black Americans were sent to federal prison nearly seven times more often for crack offenses from 1991 to 2016.⁷⁹⁷ From 1991 through 1995, more than 13 Black Americans were imprisoned for every white defendant.⁷⁹⁸ Additionally, there are allegations that the Central Intelligence Agency was involved in the crack cocaine epidemic by selling crack to Black American communities to fund the Nicaraguan Contra's efforts to overthrow the Nicaraguan government.⁷⁹⁹ However, the pervasiveness of these activities and the federal government's knowledge of them is still debated.⁸⁰⁰

C. HIV/AIDS

During the 1980s, AIDS harmed Black communities severely, especially LGBTQ Black populations and intravenous Black drug users.⁸⁰¹ Black Americans were disproportionately represented among the poor. (See Chapter 13 on wealth.) HIV treatments were unaffordable for individuals on Medicaid and state governments would not assist poor people in accessing treatment.⁸⁰² Today, the prevalence of HIV is especially high within the Black American LGBTQ community.⁸⁰³ Black gay and bisexual men are infected by HIV at twice the rate

⁷⁸⁸ [citation needed.]

⁷⁸⁹ [citation needed.]

⁷⁹⁰ [citation needed.]

⁷⁹¹ [citation needed.]

⁷⁹² [citation needed.]

⁷⁹³ [citation needed.]

⁷⁹⁴ [citation needed.]

⁷⁹⁵ [citation needed.]

⁷⁹⁶ <https://www.app.com/in-depth/news/local/public-safety/2019/12/02/crack-heroin-race-arrests-blacks-whites/2524961002/>.

⁷⁹⁷ Id.

⁷⁹⁸ Id.

⁷⁹⁹ <https://oig.justice.gov/sites/default/files/archive/special/9712/ch01p1.htm>.

⁸⁰⁰ Id.

⁸⁰¹ McBride, Chapter 6.

⁸⁰² Medical Apartheid, Chapter 3.

⁸⁰³ Marc A. Pitasi et al, Vital Signs: HIV Infection, Diagnosis, Treatment and Prevention Among Gay, Bisexual, and Other Men Who Have Sex with Men — United States, 2010–2019 (December 3, 2021), Centers for Disease Control and Prevention, <<https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7048e1-H.pdf>> (as of January 19, 2021).

of white Americans, more than any other group in the United States today.⁸⁰⁴ Between 2010 and 2019, the number of HIV infections among white gay men decreased significantly while the number of infections among Black American gay men did not decrease.⁸⁰⁵ Longstanding inequities in access to and delivery of HIV related services to Black American gay men has led to this disparity.⁸⁰⁶ Black women accounted for the largest share of women living with an HIV diagnosis in 2017.⁸⁰⁷

Due to the lack of federal or state-funded healthcare resources for the AIDS epidemic, Black healthcare leaders and organizers worked to connect AIDS victims to medical services, benefits, and health education.⁸⁰⁸ From 1989 to 1993, AIDS cases increased 3.5 times among Black Americans, and 2.5 times among white Americans.⁸⁰⁹ Churches and community organizations formed to educate Black women about sexual health and AIDS prevention.⁸¹⁰ They worked with Black LGBTQ populations to educate them about safe sex practices and to provide outreach and health services to people with AIDS.⁸¹¹ Despite this work by Black American communities, the Centers for Disease Control and Prevention planned to cut funding from dozens of groups operating AIDS services.⁸¹²

D. Nutrition

Black Americans are more likely to live in food deserts—areas with limited access to healthy, affordable food, due to historical segregation and redlining—while also having plenty of access to cheap, unhealthy, dangerous food, liquor, and tobacco products.⁸¹³ (See Chapter 7 on environment.) Tobacco products, such as menthol cigarettes, have been historically marketed to Black communities by tobacco companies at higher rates than white communities.⁸¹⁴ Despite regulating and banning other products, the federal government has not considered banning menthol flavored tobacco products until 2021.⁸¹⁵ Additionally, the overconcentration of liquor stores in Black American neighborhoods has had terrible consequences for Black American health.⁸¹⁶

The makers of sugar sweetened beverages, fast foods, and other products often target Black communities in

⁸⁰⁴ <https://www.cdc.gov/hiv/group/msm/bmsm.html>; <https://www.kff.org/hiv/aids/fact-sheet/black-americans-and-hiv-aids-the-basics/>.

⁸⁰⁵ Vital Signs: HIV Infection, Diagnosis, Treatment and Prevention Among Gay, Bisexual, and Other Men Who Have Sex with Men — United States, 2010–2019 (December 3, 2021), Centers for Disease Control and Prevention, <<https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7048e1-H.pdf>> (as of January 19, 2021).

⁸⁰⁶ Vital Signs: HIV Infection, Diagnosis, Treatment and Prevention Among Gay, Bisexual, and Other Men Who Have Sex with Men — United States, 2010–2019 (December 3, 2021), Centers for Disease Control and Prevention, <<https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7048e1-H.pdf>> (as of January 19, 2021).

⁸⁰⁷ <https://www.kff.org/hiv/aids/fact-sheet/black-americans-and-hiv-aids-the-basics/>.

⁸⁰⁸ McBride, Chapter 7.

⁸⁰⁹ McBride.

⁸¹⁰ Id.

⁸¹¹ Id.

⁸¹² Id.

⁸¹³ https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf; 11.

⁸¹⁴ Pg. 160, https://cancercontrol.cancer.gov/sites/default/files/2020-06/m19_5.pdf.

⁸¹⁵ <https://www.washingtonpost.com/health/2021/04/16/civil-rights-groups-demand-ban-menthol-cigarettes/>;
<https://www.cbsnews.com/news/menthol-cigarettes-biden-fda-ban/>.

⁸¹⁶ [citation needed].

marketing schemes.⁸¹⁷ These food products contribute to overconsumption, leading to diabetes, obesity, and other health problems.⁸¹⁸ Between 2005 and 2008, Black adults consumed nearly nine percent of their daily calories from sugar drinks, compared to about five percent for white adults.⁸¹⁹ Black children and teens see more than twice as many television ads for sugar drinks than their white peers.⁸²⁰ Lower-income Black neighborhoods have disproportionately more outdoor ads on billboards, bus benches, sidewalk signs, murals, and store window posters for sugar drinks.⁸²¹ Sugar has had disproportionately negative consequences for Black people, and is linked to diabetes, obesity, and cancer.⁸²²

E. Natural Disasters

The federal government has engaged in the mismanagement of natural disasters like hurricanes—a prime example is Hurricane Katrina, which destroyed Black American communities.⁸²³ Racial health disparities among Black communities in New Orleans existed prior to Hurricane Katrina.⁸²⁴ This was due to lack of health insurance for low-income residents, high levels of infant mortality, and high levels of chronic disease.⁸²⁵ The State of Louisiana did not address any of the causes of health disparities.⁸²⁶ Charity Hospital, a state hospital in New Orleans, had been the center of hospital care for poor Black Americans prior to Hurricane Katrina.⁸²⁷ Three quarters of its patients were Black, with incomes below \$20,000. The hospital provided care for HIV/AIDS, drug abuse, psychiatric care, and trauma care.⁸²⁸ After the hurricane, the state did not reopen Charity Hospital—leaving Black Americans in New Orleans without medical care.⁸²⁹

Following Hurricane Katrina, Black communities received diminished medical care that amplified health disparities, while white communities were restored to even better conditions than they had lived in before the hurricane hit.⁸³⁰ By 2010, 34 percent of the Black population in New Orleans was living in poverty, compared to 14 percent of white people.⁸³¹ Black Americans in New Orleans were three times as likely as whites to die of diabetes.⁸³² There were increased death rates for Black Americans from kidney disease and HIV.⁸³³ From 2009

⁸¹⁷ [citation needed].

⁸¹⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5707955/>.

⁸¹⁹

<https://cspinet.org/sites/default/files/attachment/CSPI%202017%20Facts%20on%20Health%20Disparities%20and%20Sugar%20Drinks.pdf>.

⁸²⁰ Id.

⁸²¹ Id.

⁸²² <https://www.nytimes.com/interactive/2019/08/14/magazine/sugar-slave-trade-slavery.html>.

⁸²³ McBride.

⁸²⁴ Id.

⁸²⁵ Id.

⁸²⁶ Id.

⁸²⁷ Id.

⁸²⁸ Id.

⁸²⁹ Id.

⁸³⁰ From Here to Equality, Chapter X; <https://talkpoverty.org/2016/08/29/white-new-orleans-recovered-hurricane-katrina-black-new-orleans-not/>.

⁸³¹ Id.

⁸³² Id.

⁸³³ Id.

to 2011, one-third of Black residents lacked health insurance, double that of white Americans.⁸³⁴ The federal government directed funding to repair the buildings, bridges, and streets of New Orleans.⁸³⁵ However, the government did not address the rampant poverty and health disparities among Black people that had been exacerbated by Hurricane Katrina.⁸³⁶

F. COVID-19

Today, Black Americans are disproportionately at risk for COVID-19 infection and death due to structural factors such as healthcare access, density of households, employment, and pervasive discrimination.⁸³⁷ According to the Centers for Disease Control and Prevention, Black Americans are 1.1 times more likely to contract COVID-19, 2.9 times more likely to be hospitalized due to COVID-19, and two times more likely to die from COVID-19.⁸³⁸ The federal government suggests that systemic racism contributes to worse COVID-19 outcomes for Black people.⁸³⁹ Factors that increase COVID-19 risk for Black Americans include: unaffordable housing, lack of healthy food, environmental pollution, poor quality healthcare, poor health insurance, essential worker jobs, lower incomes, greater debt, and poorer access to high quality education.⁸⁴⁰ All of these factors disproportionately affect Black Americans due to state-sanctioned systemic racism.

G. California

The State of California has also engaged in the mismanagement of public crises in ways that have harmed Black Americans. In California, the criminal justice system excessively targeted Black Americans during the crack cocaine epidemic. In Los Angeles, Black Californians would receive up to a 10-year federal sentence, while white Americans prosecuted in state court faced a maximum of five years and often received no more than a year in jail.⁸⁴¹ From 1987 to 1992, a University of California, Los Angeles study found there were no white Americans among the 71 defendants prosecuted federally by the U.S. attorney's office in Los Angeles.⁸⁴² This discriminatory prosecution occurred even though studies showed that white Americans accounted for the majority of people who used crack cocaine in Los Angeles.⁸⁴³

California incarcerates Black Americans at nine times the rates of white Americans, resulting in devastating health impacts for the Black American community. About 30 percent of California's male prisoners are Black, a

⁸³⁴ Id.

⁸³⁵ Id.

⁸³⁶ Id.

⁸³⁷ COVID-19 Racial and Ethnic Disparities in U.S. Counties, <https://ehe.amfar.org/disparities>.

⁸³⁸ *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity* (updated June 17, 2021) Center for Disease Control <<https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>> (as of July 11, 2021).

⁸³⁹ *Introduction to COVID-19 Racial and Ethnic Health Disparities* (updated Dec. 10, 2020) Center for Disease Control <<https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html>> (as of July 11, 2021).

⁸⁴⁰ Ibid.

⁸⁴¹ <https://www.latimes.com/archives/la-xpm-1995-05-21-mn-4468-story.html>.

⁸⁴² Id.

⁸⁴³ Id.

disproportionately high number.⁸⁴⁴ Black women are imprisoned at a rate five times that of white women in California.⁸⁴⁵ Black Californians are also disproportionately represented among California's unhoused.⁸⁴⁶ The overrepresentation of Black Californians among the unhoused and incarcerated populations means that they are consequently at higher risk of contracting COVID-19 and other illnesses.⁸⁴⁷

California is also home to many food deserts that harm Black American health. In South Los Angeles, many Black Californians do not have enough grocery stores, access to organic produce, thriving small businesses, affordable housing, or medical services.⁸⁴⁸ In View Park area, a majority Black South Los Angeles neighborhood, the nearest grocery store is an Albertsons more than a mile away.⁸⁴⁹ Black residents have been forced to engage in urban micro-farming, building community gardens, and mini markets to compensate for the lack of healthy available food.⁸⁵⁰

The trifecta of liquor stores, smoke shops, and marijuana dispensaries in Black neighborhoods in California has resulted in inadequate access to healthy foods.⁸⁵¹ Maria Rutledge, a Black resident of South Los Angeles, said, "We are in desperate need of a real grocery market in the area that is welcoming to families, provides healthy food choices, and supports a safer environment."⁸⁵² In addition to the lack of grocery stores, there is an overabundance of liquor stores.⁸⁵³ During the early 1990s, there were 728 liquor stores in a 54-square-mile radius encompassing South Los Angeles.⁸⁵⁴ While that number has decreased, South Los Angeles communities are still overrun by liquor stores, with approximately 8.5 liquor stores per square mile compared to 1.97 liquor stores per square mile in West Los Angeles, a majority white neighborhood.⁸⁵⁵ The trifecta of liquor stores, smoke shops, and marijuana dispensaries in Black neighborhoods have indirectly resulted in sexual harassment, violence, and a climate of fear—leading to poor mental and physical health for Black Californians.⁸⁵⁶

In California, COVID-19 infections disproportionately affect Black Americans. This is due, in part, to structural racism.⁸⁵⁷ It is challenging to prevent the spread of COVID-19 in essential workplaces and in shared and congregate housing centers, such as prisons, jails, and homeless shelters—places that are poorly suited to social

⁸⁴⁴ Harris et al., *Just the Facts: California's Prison Population* (July 2019) Public Policy Institute of California <<https://www.ppic.org/publication/californias-prison-population/>> (as of July 11, 2021).

⁸⁴⁵ *Ibid.*

⁸⁴⁶ *Id.*

⁸⁴⁷ Cimini, *Black People Disproportionately Homeless in California* (updated February 27, 2021) Cal Matters <<https://calmatters.org/california-divide/2019/10/black-people-disproportionately-homeless-in-california/>> (as of July 12, 2021).

⁸⁴⁸ <https://www.kcet.org/shows/power-health/liquor-stores-dispensaries-and-smoke-shops-our-neighborhood-is-killing-us>.

⁸⁴⁹ <https://www.latimes.com/california/story/2021-05-13/asante-microfarms-jamiah-hargins-south-la-fresh-food-produce>.

⁸⁵⁰ <https://www.latimes.com/california/story/2021-05-13/asante-microfarms-jamiah-hargins-south-la-fresh-food-produce>.

⁸⁵¹ <https://www.kcet.org/shows/power-health/liquor-stores-dispensaries-and-smoke-shops-our-neighborhood-is-killing-us>.

⁸⁵² *Id.*

⁸⁵³ *Id.*

⁸⁵⁴ *Id.*

⁸⁵⁵ *Id.*

⁸⁵⁶ *Id.*

⁸⁵⁷ California's Commitment to Health Equity, *supra*.

distancing.⁸⁵⁸ The death rate for Black Californians due to COVID-19 is 16 percent higher than the COVID-19 death rate for all Californians.⁸⁵⁹ Black Americans are six percent of California's population, yet they account for 6.8 percent of deaths due to COVID-19.⁸⁶⁰ [Dr. Grills to provide additional CA specific COVID data for Black communities, as well its relationship to pre-existing disparities.⁸⁶¹]

XIV. Impact of Anti-Black Racism on Black Health

State-sanctioned racism has culminated over centuries in severely damaged physiological health for Black Americans.⁸⁶² Low life expectancy, poor healthcare, and high rates of disease have resulted in great physiological harm to Black Americans.⁸⁶³ State-sanctioned systemic racism has led to environmental racism, urban poverty, and over-incarceration—all of which have harmed the health of Black Americans.⁸⁶⁴ The cumulative effect of institutional racism by federal and state governments has led to racial trauma that has had intergenerational impacts on the mental health of Black Americans.⁸⁶⁵

Black Americans have higher rates of morbidity and mortality than white Americans for almost all health outcomes in the United States, an inequality that increases with age.⁸⁶⁶ Black Americans suffer disproportionately from cardiovascular disease relative to white people.⁸⁶⁷ In surveys of hospitals across the country, Black patients with heart disease receive older, cheaper, and more conservative treatments than their white counterparts.⁸⁶⁸ They also suffer from higher rates of diabetes, hypertension, hyperlipidemia, and obesity.⁸⁶⁹ These are all risk factors for cardiovascular disease.⁸⁷⁰

This is linked to the fact that Black Americans suffer from weathering—constant stress from chronic exposure

⁸⁵⁸ *Risk of Exposure to COVID-19: Racial and Ethnic Health Disparities* (updated Dec. 10, 2020) Center for Disease Control <<https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-exposure.html#ref17>> (as of July 11, 2021).

⁸⁵⁹ <https://covid19.ca.gov/equity/>.

⁸⁶⁰ <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Race-Ethnicity.aspx>.

⁸⁶¹ https://cal.lmu.edu/event/covid-19s-impact-on-communities-of-color-key-findings-from-a-national-study-for-congressional-caucuses-of-color-2109?utm_campaign=widget&utm_medium=widget&utm_source=Loyola+Marymount+University.

⁸⁶² [citation needed].

⁸⁶³ [citation needed].

⁸⁶⁴ [citation needed].

⁸⁶⁵ [citation needed].

⁸⁶⁶ Forde et. Al., (2019). Forde AT, Crookes DM, Suglia SF, Demmer RT. The weathering hypothesis as an explanation for racial disparities in health: a systematic review. *Ann Epidemiol.* 2019 May;33:1-18.e3. doi: 10.1016/j.annepidem.2019.02.011. Epub 2019 Mar 19. PMID: 30987864.

⁸⁶⁷ Id.

⁸⁶⁸ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones, <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁸⁶⁹ Id.

⁸⁷⁰ Christopher Kuzawa, Epigenetics and the embodiment of race: Developmental origins of US racial disparities in cardiovascular health, <https://onlinelibrary.wiley.com/doi/pdf/10.1002/ajhb.20822>; <https://journalofethics.ama-assn.org/article/race-discrimination-and-cardiovascular-disease/2014-06>.

to social and economic disadvantage, which leads to accelerated decline in physical health.⁸⁷¹ Social environments that pose a persistent threat of hostility, denigration, and disrespect lead to chronically high levels of inflammation.⁸⁷² Studies have shown that Black youth who are exposed to discrimination and segregation have worse cases of adult inflammation due to race-related stressors.⁸⁷³ In fact, race-related stress has a greater impact on health among Black Americans than their diet, exercise, smoking, or being low income.⁸⁷⁴ Cortisol, which is a stress hormone, locates itself in bodies in response to racism—consequently Black American adults have higher rates of cortisol than their white counterparts, and this is linked to cardiovascular disease.⁸⁷⁵ Consequently, exposure to racism as a child or adolescent lays the foundation for inflammation and subsequent health disparities. Even middle- and upper-class Black Americans manifest high rates of chronic illness and disability.⁸⁷⁶ Black American health disparities are a consequence of the cumulative impact of racism.⁸⁷⁷

Discriminatory attitudes and behaviors by healthcare professionals may also contribute to misdiagnosis and mismanagement of cardiovascular disease among Black patients. Black Americans disproportionately lack access to renal transplants due to racial bias exhibited by physicians, as well as institutionalized racism.⁸⁷⁸ Black Americans are less likely to be identified as transplant candidates, referred for evaluation, be put on the kidney transplant waitlist, receive a kidney transplant, and receive a higher-quality kidney from a living donor.⁸⁷⁹ They are more likely to receive lower quality kidneys and have poorer transplant survival.⁸⁸⁰

Cancer is diagnosed later in Black Americans than in white people, causing more Black people to become sick from cancer and to die.⁸⁸¹ Black Americans suffer from the highest rate of cancer and cancer deaths in the

⁸⁷¹ <https://www.npr.org/sections/codeswitch/2018/01/14/577664626/making-the-case-that-discrimination-is-bad-for-your-health>; Forde et. Al., (2019).

⁸⁷² Id.

⁸⁷³ Id.

⁸⁷⁴ Id.

⁸⁷⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁸⁷⁶ Geronimus AT, Andersen HF, Bound J. (1991). Differences in hypertension prevalence among United-States black-and-white women of childbearing age. *Public Health Report*;106(4):393e9. Geronimus AT. (1996). Black/white differences in the relationship of maternal age to birthweight: a population-based test of the weathering hypothesis. *Soc Sci Med*;42(4):589e97. Simons, R. L., Lei, M. K., Beach, S., Barr, A. B., Simons, L. G., Gibbons, F. X., & Philibert, R. A. (2018). Discrimination, segregation, and chronic inflammation: Testing the weathering explanation for the poor health of Black Americans. *Developmental psychology*, 54(10), 1993–2006. <https://doi.org/10.1037/dev0000511>.

⁸⁷⁷ Id.

⁸⁷⁸ Kimberly Jacob Arriola, Race, Racism, and Access to Renal Transplantation among African Americans, https://sph.emory.edu/news/includes/documents/Kim.J.A_ProjectMuseArticle.pdf

⁸⁷⁹ Id.

⁸⁸⁰ <https://bloomworks.digital/organdonationreform/Inequity/>.

⁸⁸¹ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, pg. 6.

United States.⁸⁸² Black women are 2.2 times as likely as white women to die of breast cancer and are diagnosed at a more advanced rate than white women.⁸⁸³ Black men have the highest rates of developing and dying from prostate and lung cancer.⁸⁸⁴

Black patients with sickle cell disease are discriminated against by medical providers who display racist attitudes and accuse people with sickle cell disease of faking their pain.⁸⁸⁵ This results in inadequate treatment.⁸⁸⁶ There are many reports of Black children with sickle cell disease who do not receive screening tests and treatment necessary to prevent strokes that can occur due to the disease.⁸⁸⁷

Racial disparities in Black health outcomes occur today as a culmination of historical racial inequality, discriminatory health policy, and persistent racial discrimination in many sectors of life in the United States.⁸⁸⁸ Discriminatory health systems and healthcare providers contribute to racial and ethnic disparities in healthcare.⁸⁸⁹ The U.S. Office for Civil Rights within the U.S. Department of Health and Human Services is charged with enforcing several relevant federal statutes and regulations that prohibit discrimination in healthcare, such as Title VI of the 1964 Civil Rights Act.⁸⁹⁰ However, the agency is under-resourced and has not been proactive in investigating healthcare related complaints from the public, conducting compliance reviews of healthcare facilities, or initiating enforcement proceedings for civil rights violators.⁸⁹¹ For example, the Office for Civil Rights could bring more Title VI suits against hospital systems that provide more resources for hospitals located in majority-white areas rather than majority-black areas.⁸⁹² Civil rights enforcement in healthcare has been relegated to low-priority status.⁸⁹³

Policing and incarceration have clear adverse consequences for the health of Black Americans. Racial inequality and racial bias occur in all aspects of the criminal legal system, with federal and state governments overincarcerating and disproportionately punishing Black Americans.⁸⁹⁴ (See Chapter 11 on the legal system.) Police use of force kills hundreds of Black Americans each year and nonfatally injures many thousands more.⁸⁹⁵

⁸⁸² Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, pg. 6.

⁸⁸³ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, pg. 6.

⁸⁸⁴ Harriet A. Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present*, pg. 6.

⁸⁸⁵ [citation]

⁸⁸⁶ Power-Hays, *supra* note X.

⁸⁸⁷ Gina Kolata, *These Sisters With Sickle Cell Had Devastating, and Preventable, Strokes*, (May 29, 2021), <https://www.nytimes.com/2021/05/23/health/sickle-cell-black-children.html>.

⁸⁸⁸ <https://www.ncbi.nlm.nih.gov/books/NBK220355/>.

⁸⁸⁹ *Id.*

⁸⁹⁰ Citation needed.

⁸⁹¹ <https://www.healthaffairs.org/doi/10.1377/hlthaff.2016.1091>;
<https://thinkculturalhealth.hhs.gov/assets/pdfs/OCRFacilitatorsGuide.pdf>.

⁸⁹² <https://www.healthaffairs.org/doi/10.1377/hlthaff.2016.1091>.

⁸⁹³ Citation needed.

⁸⁹⁴ Zinzi D. Bailey, et. al., *How Structural Racism Works — Racist Policies as a Root Cause of U.S. Racial Health Inequities* (Feb. 25, 2021), <https://www.nejm.org/doi/10.1056/NEJMms2025396>.

⁸⁹⁵ *Id.*

Incarcerated people—who are disproportionately Black—face a high risk of death after release due to poor health as a result of incarceration.⁸⁹⁶ Prisons and jails have been major sites of disease transmission.⁸⁹⁷ The churn in and out of incarceration can result in community spread of sexually transmitted infections or other infectious diseases.⁸⁹⁸

Black Americans are overrepresented in state carceral facilities, are less likely to receive the latest psychiatric medications, and have greater difficulty in achieving successful community integration once they leave carceral facilities—further harming their mental health.⁸⁹⁹ State and federal prisons disproportionately force incarcerated Black Americans into solitary confinement.⁹⁰⁰ Solitary confinement has serious documented harmful mental health effects.⁹⁰¹ Those who are forced into it are more likely to be involuntarily committed for psychiatric care or forced into psychiatric treatment or medication.⁹⁰²

Anti-Black government action harms the mental health of Black communities. Police violence can harm mental and physical health for Black communities through constant surveillance and threats of violence.⁹⁰³ Studies have shown that Black Americans who view material depicting harassment by police officers experience an increase in blood pressure.⁹⁰⁴ Scientific evidence shows that police killings of unarmed Black Americans have adverse effects on mental health among Black adults in the general population.⁹⁰⁵ Mental health screening tools used in state and federal carceral facilities reproduce racial disparities, resulting in fewer Black Americans screening positive for mental illness.⁹⁰⁶ Thus, Black Americans remain under-referred and undetected in the jail population.⁹⁰⁷

State and federal underfunding of medical resources combined with unhealthy physical environments, unemployment, and poverty in Black communities has led to a public health crisis.⁹⁰⁸ Urban neighborhoods have the highest rates of preventable diseases, and lack health insurance and adequate housing.⁹⁰⁹ Urban neighborhoods are where 60 percent of the nation’s Black population lives due to redlining and historical housing segregation.⁹¹⁰ Black communities continue to experience disproportionately high rates of chronic

⁸⁹⁶ Id.

⁸⁹⁷ Id.

⁸⁹⁸ Id.

⁸⁹⁹ <https://ps.psychiatryonline.org/doi/full/10.1176/ps.2007.58.1.114>.

⁹⁰⁰ Id.

⁹⁰¹ Id.

⁹⁰² <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-032317-092326>;

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4539829/>;

https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17740_E.pdf;

<https://pubmed.ncbi.nlm.nih.gov/19414892/>; <https://www.nyclu.org/en/publications/testimony-extending-kendras-law>.

⁹⁰³ Id.

⁹⁰⁴ Physiological Responses to Racism and Discrimination: An Assessment of the Evidence

⁹⁰⁵ [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(18\)31130-9.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(18)31130-9.pdf).

⁹⁰⁶ Id.

⁹⁰⁷ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4768817/>.

⁹⁰⁸ McBride, Chapter 6.

⁹⁰⁹ Id.

⁹¹⁰ Id.

diseases linked to environmental racism.⁹¹¹ (See Chapter 7 on environment.) Built-up pollution from abandoned industrial and commercial work sites resides in soil, water, structures, and air.⁹¹² This has resulted in high rates of chronic diseases for Black Americans.⁹¹³ Asthma, cancer, and childhood disorders that affect Black communities are linked to polluted environmental conditions such as toxic waste exposure and lead poisoning.⁹¹⁴

Segregation adversely affects the availability and affordability of care—creating a lack of access to high-quality primary and specialty care, as well as pharmacy services.⁹¹⁵ A review of nearly 50 empirical studies generally found that government facilitated segregation was associated with poorer health.⁹¹⁶ The state-perpetrated discriminatory practice of redlining officially ended in 1968, but it created residential segregation, which continues today.⁹¹⁷ Today, preterm birth, cancer, tuberculosis, maternal depression, and other mental health issues occur at higher rates among residents of once-redlined areas.⁹¹⁸ Segregation has been found to be positively associated with later-stage diagnosis, elevated mortality, and lower survival rates for both breast and lung cancers for Black people.⁹¹⁹ Historically redlined census tracts have significantly higher rates of emergency department visits due to asthma.⁹²⁰ This evidence suggests that redlining might be contributing to racial and ethnic asthma health disparities.⁹²¹

Housing segregation disproportionately exposes Black communities to environmental pollutants and isolates Black communities from health resources such as recreational spaces, quality pharmacies, clinics, hospitals, and healthy food options.⁹²² Disparities in life expectancies between Black and white people are rooted in state-sanctioned-policies that extracted wealth from Black communities.⁹²³ Evidence shows that gaps between white and Black life expectancy are dependent on zip codes and housing segregation.⁹²⁴ Today, in Chicago, residents of the 73 percent white neighborhood of Streeterville live to be 90 years old on average, while residents of the 95 percent Black neighborhood of Englewood only have a life expectancy of 60.⁹²⁵

There are cumulative negative effects of institutional and systemic racism and oppression—many of which have yet to be studied by scientists. A public health study conducted in 2021 revealed that repeated use of chemical

⁹¹¹ McBride, Chapter 7.

⁹¹² Id.

⁹¹³ Id.

⁹¹⁴ Id.

⁹¹⁵ David R. Williams, et. al, Racism and Health: Evidence and Needed Research, Annual Review of Public Health (April 2019), https://www.annualreviews.org/doi/full/10.1146/annurev-publhealth-040218-043750#_i2.

⁹¹⁶ Id.

⁹¹⁷ Id.

⁹¹⁸ Id.

⁹¹⁹ Williams, supra note 117.

⁹²⁰ Id.

⁹²¹ Associations between historical residential redlining and current age-adjusted rates of emergency department visits due to asthma across eight cities in California: an ecological study

⁹²² Belonging Berkeley website.

⁹²³ Id.

⁹²⁴ Id.

⁹²⁵ <https://www.npr.org/2021/05/06/994173342/how-systemic-racism-continues-to-determine-black-health-and-wealth-in-chicago>

irritants for crowd-control by local and federal law enforcement during racial justice protests in the U.S. likely resulted in adverse physical and psychological health issues.⁹²⁶

A. California

Black Californians experience the shortest life expectancy than any other race or ethnicity.⁹²⁷ In the San Francisco Bay Area, life expectancy is more than five years greater in white neighborhoods (84 years) than highly segregated Black neighborhoods (79 years).⁹²⁸ Black Californians have the highest mortality rate in nine out of the top ten causes of death in San Francisco.⁹²⁹ A high number of Black Californians live in Southwest Fresno, an area with lower life expectancy than the affluent neighborhoods of Fresno.⁹³⁰ This is due to the fact that Black communities are affected by undetected or untreated chronic diseases like cancer, heart disease, and diabetes.⁹³¹ Black Californians suffer from the highest cancer rates among all races in breast, prostate, and lung cancer.⁹³² Black men are dying of prostate cancer at almost five times the rate of white men in California.⁹³³ In 2015, Black Californians had the highest rate of preventable hospitalizations for diabetes, heart disease, asthma, and angina.⁹³⁴ Black Americans suffer from the highest number of asthma cases in California.⁹³⁵ Black children in California tend to live in areas with higher levels of traffic related pollution, which contributes to higher levels of asthma.⁹³⁶

Black Californians are the most disproportionately affected by the HIV epidemic due to barriers to accessing healthcare, such as discrimination, stigma, cost, and insurance eligibility.⁹³⁷ In 2018, Black Californians made up approximately six percent of California's population, yet they accounted for 18 percent of California's HIV positive population.⁹³⁸ Among women newly diagnosed with HIV, Black Californians accounted for 31 percent, and among transgender people they accounted for 14 percent.⁹³⁹ For Black Californian men, HIV rates are 4.1 times higher than white Californian men.⁹⁴⁰ For Black women, the HIV rate is 8.6 times higher than for white

⁹²⁶ <https://pubmed.ncbi.nlm.nih.gov/33902512/>.

⁹²⁷ Cal. Health Care Foundation, *California Health Care Almanac* (Oct. 2019) p. 7 < <https://www.chcf.org/wp-content/uploads/2019/10/DisparitiesAlmanacRaceEthnicity2019.pdf>> (as of July 12, 2021).

⁹²⁸ <https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-4>.

⁹²⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Brett Andrews, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁹³⁰ <https://chhs.fresnostate.edu/cvvhpi/documents/updated%20demographics.pdf>.

⁹³¹ [citation needed.]

⁹³² Cal. Health Care Foundation, *California Health Care Almanac* (Oct. 2019) p. 24 < <https://www.chcf.org/wp-content/uploads/2019/10/DisparitiesAlmanacRaceEthnicity2019.pdf>> (as of July 12, 2021).

⁹³³ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Tina Sacks, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁹³⁴ Cal. Health Care Foundation, *California Health Care Almanac* (Oct. 2019) p. 18 < <https://www.chcf.org/wp-content/uploads/2019/10/DisparitiesAlmanacRaceEthnicity2019.pdf>> (as of July 12, 2021).

⁹³⁵ Id.

⁹³⁶ <https://ww2.arb.ca.gov/resources/asthma-and-air-pollution>.

⁹³⁷ <https://ochealthinfo.com/sites/hca/files/2021-05/2018HealthDisparitiesReport%202021-05-26.pdf>; add additional citation.

⁹³⁸ Id.

⁹³⁹ Id.

⁹⁴⁰ Id.

women.⁹⁴¹ Health outcomes for those who are HIV-positive is worse than that of all other racial groups in California, regardless of gender or age.⁹⁴²

Police violence and incarceration have greatly damaged the health of Black Californians. Black Californians account for 20 percent of serious injuries and fatalities due to police use of force, even though they are only six percent of the population.⁹⁴³ More than four in 10 Californians shot by police were identified as suffering from a mental health condition, having an alcohol- or drug-related disorder, or both, according to hospital data.⁹⁴⁴ In *Brown v. Plata*, the Ninth Circuit Court of Appeals, determined that California had to reduce overcrowding in its prison population due to inadequate healthcare for incarcerated people.⁹⁴⁵ Black Californians in Los Angeles' jails who have mental health conditions report receiving considerably harsher sentences than their white counterparts.⁹⁴⁶ They also feel they are less likely to be offered alternative treatment programs, instead of incarceration during sentencing.⁹⁴⁷ Due to the overrepresentation of Black Californians in the prison and jail systems, inadequate prison healthcare greatly diminishes the overall health of Black Californians.⁹⁴⁸

XV. Conclusion

[Summary connecting to enslavement]

Historically, the United States has destroyed the health of Black communities through slavery, segregation, racial terror, abusive experimentation, institutional and systemic oppression, and harmful neglect. As a result, Black people have suffered and continue to disproportionately suffer negative health outcomes.

The mismanagement of public health crises by state and federal governments has resulted in more adverse health consequences and deaths in Black communities—most recently during the COVID-19 pandemic. In the face of overwhelming historical and contemporary racial oppression, Black healthcare providers, patients, and community members have demonstrated power and strength as they work to build healthy communities and fight for a more equitable healthcare system.

⁹⁴¹ Id.

⁹⁴² Id.

⁹⁴³ <https://www.ppic.org/publication/police-use-of-force-and-misconduct-in-california/>.

⁹⁴⁴ Id.

⁹⁴⁵ <https://www.ncbi.nlm.nih.gov/books/NBK201966/>.

⁹⁴⁶ https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17740_E.pdf.

⁹⁴⁷ Id.

⁹⁴⁸ <https://calbudgetcenter.org/wp-content/uploads/2021/06/R-FP-Prison-Racial-Disparities.pdf>.

Chapter 13. The Wealth Gap

I. Potential Recommendations

[Potential legislative recommendations based on the content of this chapter to be drafted by Task Force Members and combined.]

II. Introduction

Wealth—what you own minus what you owe—is the key to economic security.¹ It is what enables families to build a better future.² For a family, wealth functions in many ways. It provides economic stability during lean times. It opens doors to improving quality of life. It is a dam against the floodwaters of economic catastrophes. It provides access to political power. And it allows us to live and retire with dignity. Wealth can also be passed down through generations, allowing children to live better lives than their parents and grandparents. It allows parents to pay for their children’s college education. It allows grandparents to help a young family buy their first home. Throughout American history, government policies at all levels have helped white families accumulate these tools while preventing or undermining Black Americans’ ability to do the same.

As a result, the wealth gap between Black and white Americans is enormous, and the same today as it had been two years before the Civil Rights Act was passed in 1964. The 2019, the median Black household had a net of \$24,100, 13 percent of the median net worth of white households at \$188,200.³ This wealth gap persists regardless of education level and family structure.⁴ For example, at the median, single Black women over the age of 60 with a college degree— at \$11,000—have less than three percent of the wealth of single white women over the age of 60 with a college degree— at \$384,000.⁵ In short, for every dollar owned by a college educated older white woman, a similarly situated Black woman has three cents.

Single white parents have more than double the wealth (\$35,000) of married black parents (\$16,000).⁶ The wealth gap also is present across all income levels. In 2016, estimates drawn from the Survey of Consumer Finances indicate the median white household in the bottom quintile of the income distribution, the poorest white household, had a net worth of \$21,700, greater than the median for *all* black households at \$18,601.⁷ Black households in the lowest income quintile had a median net worth of \$2,700, nearly 10 times lower than

¹ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

² https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

³ <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finance-20200928.htm>

⁴ William Darity Jr. and A. Kirsten Mullen *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* Chapel Hill: University of North Carolina Press 2021 pg. 35-38

⁵ Darity and Mullen, p. 37

⁶ Darity and Mullen, p. 36.

⁷ William Darity Jr., Fenaba Addo, Imari Z. Smith “A Subaltern Middle Class: The Case of the Missing Black Bourgeoisie” *Contemporary Economic Problems* 39:3 July 202 pg.499.

the poorest white household.⁸

The trend is the same across social class. White households with working class breadwinners typically have two to three times the wealth of black households with professional-managerial class breadwinners. For example, in 2019, the median white working-class household had a net worth of \$114,270, while the median black professional-managerial household had a net worth of \$38,800. In the same year, white professional-managerial households—at \$276,000—had a median net worth that was eight times the median black professional-managerial household and *19 times* the median black working-class household.⁹

The discrimination Black Americans experience, as described in the previous 12 chapters, has resulted in this racial wealth gap.¹⁰ The American government at the federal, state, and local levels has systematically prevented Black American communities from building, maintaining, and passing on wealth. These harms cascade over a lifetime and compound over generations.

The historical causes of the wealth gap extend back from enslavement, legal segregation, and subordination, through ongoing racial inequality and racism today. They include direct government creation of white wealth and destruction of Black wealth through the support of racial terror, disenfranchisement, land theft, mass incarceration, exclusion of Black Americans from government benefits, and banking discrimination. Unequal homeownership, fewer assets, and lower business ownership continue to drive the wealth gap today. This has resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crises, and homelessness.

Section III discusses estimates of the contemporary racial wealth gap for the nation as whole, for California, by gender, and for descendants of Africans enslaved in the United States. Section IV describes historical causes of the racial wealth gap during enslavement and post-enslavement, including racial terror, land theft, mass incarceration, and discrimination in government benefits, the labor market, and banking. Section V discusses the drivers of the contemporary wealth gap today include unequal homeownership, Black Americans' holding fewer assets, and lower business ownership. Section VI discusses the harmful effects of the wealth gap, which cascades across generations, have resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crisis, and homelessness.

III. The Contemporary Racial Wealth Gap

This section discusses estimates of the contemporary racial wealth gap for the nation as whole, for California, by gender, and for descendants of Africans enslaved in the United States.

⁸ William Darity Jr. and A. Kirsten Mullen *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* Chapel Hill: University of North Carolina Press 2021 pg. 35-38

⁹ Fenaba Addo, William Darity Jr. "Disparate Recoveries: Wealth, Race, and the Working Class After the Great Recession" *Annals of the American Academy of Political and Social Science* 695 May 2021 pg.182.

¹⁰ <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/>

A. National and California Estimates

Significant research on the contemporary wealth gap in recent decades and literature on Black wealth gaps in the immediate decades after emancipation, demonstrate that white Americans have long had a higher net worth than Black Americans. And there is research underway about the much lesser known historical evolution of the racial wealth gap.¹¹ The gap has changed little since 1989, when the median white household wealth was \$143,000, and the median Black household wealth was \$9,000. At that time, Black household wealth was 95 percent less than white household wealth.¹² The wealth gap was roughly the same in 2016 as it was in 1962,¹³ two years before the Civil Rights Act. Preliminary research suggests that, despite rapid accumulation of wealth by Black Americans in the decades after slavery and sharp episodes of income convergence during World War II and the Civil Rights era, racial wealth convergence halted by the mid-20th century with racial wealth gaps slightly worsening over the last several decades.¹⁴ Indeed, due to the impact of the Great Recession, the wealth gap has widened. From 2005 to 2009, an interval that captures much of the impact of the Great Recession, median household wealth—, i.e., all assets minus all debt, the latter including mortgages, credit card balances, and other loans—among Black Americans actually fell 53 percent, compared with a drop of 16 percent among white Americans.¹⁵

An asset is anything you own that adds financial value, as opposed to a liability, which is money you owe.¹⁶ Examples of personal assets include: a home or other property, such as a rental house or commercial property; a checking or savings account; cars; financial and retirement accounts; gold, jewelry, and coins; collectibles and art; and life insurance policies.¹⁷ Wealth estimates can be demonstrated in median and mean figures, both of which are provided in this chapter. A median figure shows the worth of the middle household in each community.¹⁸ A mean figure shows the worth of the average household in the community.¹⁹ Some researchers suggest that the median is a more useful measure for calculating typical differences in wealth between Black and white people because it is not affected by exceptions like small numbers of extremely rich individuals who would skew the average higher than is representative.²⁰ However, researchers also suggest that the mean is the appropriate target measure for calculating the sum required to eliminate the racial wealth gap.²¹ Policymakers have usually focused on the median gap in wealth, which some researchers argue is not representative of what is happening to the average Black or white person in reality.²² Comparing Black and white wealth at the mean—

¹¹ <https://www.russellsage.org/sites/default/files/Derenoncourt.Proposal.pdf>

¹² Kent, Has Wealth Inequality in America Changed over Time? Here are Key Statistics (December 02, 2020) Federal Reserve Bank of St. Louis <https://tinyurl.com/44anuuf3> (as of January 19, 2022)

¹³ Darity, Mullen, From Here to Equality: Reparations for Black Americans in the Twenty-First Century.

¹⁴ <https://www.russellsage.org/sites/default/files/Derenoncourt.Proposal.pdf>

¹⁵ Kocchar and Fry, “Wealth Inequality Has Widened.”

¹⁶ <https://www.businessinsider.com/what-are-assets>

¹⁷ <https://www.businessinsider.com/what-are-assets>

¹⁸ <https://www.nytimes.com/2021/04/30/business/racial-wealth-gap.html>

¹⁹ <https://www.nytimes.com/2021/04/30/business/racial-wealth-gap.html>

²⁰ Darity, William A. et al., *From Here to Equality* (p. 257).

²¹ Darity, William A. et al., *From Here to Equality* (p. 257).

²² <https://www.nytimes.com/2021/04/30/business/racial-wealth-gap.html> vb

for the average household in each community—shows a far larger wealth gap.²³

Today, white American households continue to be far more likely to hold assets, and the types of assets they hold are worth, on average, more than that of Black American households.²⁴ In 2019, the most recent year for which data is available, the total financial assets of white households is nine times higher than Black American households.²⁵ The median Black American household wealth was approximately \$24,100, while median white household wealth was approximately \$188,200—a difference of \$164,100.²⁶ In contrast, the mean for Black American household wealth is \$142,300, while the mean for white household wealth is close to \$1 million at \$983,400—a difference of \$840,000.²⁷

This wealth disparity cannot be explained by lack of personal motivation and effort, lack of financial literacy, family instability, lack of education, lack of homeownership, or lack of entrepreneurship on the part of Black Americans.²⁸ For instance, there is very little, if any, evidence to support the claim that Black saving behavior is the source of the enormous racial wealth gap.²⁹ There is no significant difference in savings between Black and white families with similar income levels, nor a difference in rates of return on their personal investments.³⁰ In fact, in some income categories, Black people display a higher rate of savings.³¹ And though Black Americans have more family obligations on their income than white Americans because their relatives are more likely to have need than white Americans, the savings rate among Black people is comparable to the savings rate at each level of household income among white people.³² Differences in family structure also do not explain the racial wealth gap.³³ Single white women with children have as higher a median net worth as compared to black women with no children.³⁴ At the media, single white parents have more than two times the wealth— at \$35,000—of married black parents—at \$16,000.³⁵ The supposed economic benefits of having the “ideal” family

²³ <https://www.nytimes.com/2021/04/30/business/racial-wealth-gap.html>

²⁴ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

²⁵ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

²⁶ Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

²⁷ Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

²⁸ <https://socialequity.duke.edu/portfolio-item/what-we-get-wrong-about-closing-the-racial-wealth-gap/>; Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

²⁹ Darity, et al., *What We Get Wrong*.

³⁰ Darity, William A. . *From Here to Equality* (p. 36).

³¹ Darity, William A. . *From Here to Equality* (p. 36).

³² For the most recent studies that present documentation about the absence of any significant difference in black and white saving behavior after controlling for household income, see Mariela Dal Borgo, “Ethnic and Racial Disparities in Saving Behavior,” *Journal of Economic Inequality*, no. 17 (2019): 253–83; and Amy Traub, Laura Sullivan, Tatjana Meschede, and Thomas Shapiro, *The Asset Value of Whiteness: Understanding the Racial Wealth Gap* (New York: Demos; Waltham, Mass.: Institute for Assets and Social Policy, 2017), <http://www.demos.org/sites/default/files/publications/Asset%20Value%20of%20Whiteness.pdf>. See also Maury Gittleman and Edward N. Wolff, “Racial Differences in Patterns of Wealth Accumulation,” *Journal of Human Resources* 39, no. 1 (2004): 193–227; and Ngina S. Chiteji and Darrick Hamilton, “Family Connections and the Black-White Wealth Gap among Middle-Class Families,” *Review of Black Political Economy* 30, no. 1 (Summer 2002): 9–28.

³³ Darity, et al., *What We Get Wrong*.

³⁴ Darity, et al., *What We Get Wrong*.

³⁵ Traub et al., *Asset Value of Whiteness*, 7–8.

type do not translate into closure of the racial wealth gap.³⁶ Being a “stable,” married, two-parent Black family far from evens Black and white wealth levels.³⁷ For comparable levels of family socioeconomic status, Black youth obtain more years of schooling and credentials, including college degrees, than white youth.³⁸

The extent of the Black-white wealth gap and its causes in California and the nation is an under-studied area. Available scholarship has concluded that the racial wealth gap in California is comparable or worse than at the national level. While some studies, unsatisfactorily, extrapolate California’s racial wealth gap from national estimates.³⁹ Direct California estimates of the racial wealth gap are only available in a single metropolitan area, Los Angeles.⁴⁰ In 2016, while the median net worth of white Angelino households (assets minus debts) was \$355,000, median net worth of native-born Black Angelino households was \$4,000.⁴¹ The average Black household in Los Angeles had only just had one percent of the median wealth of the average white household, far worse than the national average of 10 to 15 percent.⁴²

B. Gender-Specific Estimates

The wealth gap between Black men and women, which is small,⁴³ functions differently than the wealth gap between white men and women, which is much larger. In terms of numbers, Black men and women have similarly low wealth, although for slightly different reasons.⁴⁴

The wealth gap between white men and women is largely because white men have traditionally had access to jobs that provide retirement accounts and other benefits available to careers not traditionally available to women.⁴⁵ These factors do not exist between Black men and women, as Black Americans of all genders historically have been excluded from these benefits due to the effects of government action and private labor discrimination, as discussed in Chapter [xx].

³⁶ Darity, et al., *What We Get Wrong*.

³⁷ Traub et al., *Asset Value of Whiteness*, 7–8.

³⁸ 21. See Patrick L. Mason, “Race, Culture, and Skill: Interracial Wage Differentials among African Americans, Latinos, and Whites,” *Review of Black Political Economy* 25, no. 3 (Winter 1997): 5–39; William Mangino, “Race to College: The ‘Reverse Gap,’” *Race and Social Problems*, no. 2 (December 2010): 164–78; William Mangino, “Why Do Whites and the Rich Have Less Need for Education?,” *American Journal of Economics and Sociology* 71, no. 3 (July 2012): 562–602; and William Mangino, “The Negative Effects of Privilege on Educational Attainment: Gender, Race, Class, and the Bachelor’s Degree,” *Social Science Quarterly* 95, no. 3 (September 2014): 760–84.

³⁹ *Ibid.*

⁴⁰ Fred Ali, “An Equity Profile of the Los Angeles Region,” *Policy Link*, 2017; Melany De La Cruz-Viesca et al., “The Color of Wealth in Los Angeles,” *Federal Reserve Bank of San Francisco*, 2016; Paul Ong et al., “Race, Ethnicity, And Income Segregation in Los Angeles,” *UCLA Center for Neighborhood Knowledge*, 2016.

⁴⁰ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

⁴¹ *Id.* at p. 5.

⁴² De La Cruz-Viesca et al., “The Color of Wealth in Los Angeles.”

⁴³ See “Racial Wealth Divide Snapshot: Women and the Racial Wealth Divide,” *Prosperity Now*, March 29, 2018, <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide>.

⁴⁴ “Racial Wealth Divide Snapshot: Women and the Racial Wealth Divide,” *Prosperity Now*, March 29, 2018, <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide>.

⁴⁵ [citation needed]

The median wealth for single Black women is a mere \$200, while the median wealth of single Black men is only \$300.⁴⁶ Studies that show a greater wealth gap between Black women and men do not appear to take into account the effects of mass incarceration, as Black men are deprived of their ability to build wealth for themselves and their family during a prison sentence.⁴⁷ As discussed below in section [CROSS REFERENCE], criminal convictions also create numerous barriers to wealth building after the sentence ends.

Still, Black women face barriers to wealth building due to the combination of racism and sexism. As a result, there are vast differences in wealth between Black women and both white men and white women.⁴⁸ One study reports that, in 2019, single Black women's median net wealth was \$7,000, while median net wealth for white women was \$87,000, and \$92,000 for single white men.⁴⁹ While white men's median wealth was \$28,900 in 2015, Black women's median wealth was \$200, less than one cent on every dollar of white men's wealth.⁵⁰

The large wealth gap faced by single Black women is particularly important because Black women are more and increasingly likely to be single and breadwinner mothers.⁵¹ The marriage rate of Americans aged 25 to 54 has declined since the early 1960s across all groups, but especially for Black women for whom it has halved to less than 40 percent.⁵² One-third of Black women aged 25 to 54 are single with children in the household.⁵³ Among Black mothers, more than 80 percent are breadwinners compared to 50 percent of white mothers.⁵⁴ At least half of nonmarried Black American women have zero or negative assets.⁵⁵ On average, Black American women do not accumulate net worth approaching retirement; they have no financial assets at age 50 and do not accumulate any more as they age.⁵⁶

Black men also face a stark wealth gap with white women and men. One study reports that, in 2019, median net wealth for Black men was 15 percent of the median net wealth for white men and 16 percent of the wealth of white women.⁵⁷ While white men's median wealth was \$28,900 in 2015, Black men's median was \$300, about

⁴⁶ <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide>.

⁴⁷ See, e.g., Struyven, Black Womenomics: Investing in the Underinvested (March 9, 2021) Goldman Sachs <https://tinyurl.com/4d9rm59t> (as of January 19, 2022)

⁴⁸ Darity, et al., *What We Get Wrong*.

⁴⁹ Struyven, Black Womenomics: Investing in the Underinvested (March 9, 2021) Goldman Sachs <https://tinyurl.com/4d9rm59t> (as of January 19, 2022)

⁵⁰ <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide>.

⁵¹ Struyven, Black Womenomics: Investing in the Underinvested (March 9, 2021) Goldman Sachs <https://tinyurl.com/4d9rm59t> (as of January 19, 2022); Katherine Richard, "The Wealth Gap for Women of Color," Center for Global Policy Solutions Fact Sheet, 2014, <http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf>.

⁵² Struyven, Black Womenomics: Investing in the Underinvested (March 9, 2021) Goldman Sachs <https://tinyurl.com/4d9rm59t> (as of January 19, 2022)

⁵³ Struyven, Black Womenomics: Investing in the Underinvested (March 9, 2021) Goldman Sachs <https://tinyurl.com/4d9rm59t> (as of January 19, 2022).

⁵⁴ Struyven, Black Womenomics: Investing in the Underinvested (March 9, 2021) Goldman Sachs <https://tinyurl.com/4d9rm59t> (as of January 19, 2022).

⁵⁵ Richard, "The Wealth Gap for Women of Color".

⁵⁶ Brown, "The Intersection and Accumulation of Racial and Gender Inequality: Black Women's Wealth Trajectories," p. 252.

⁵⁷ <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide>.

one cent on every dollar of white men's wealth.⁵⁸ As detailed below, mass incarceration in particular has devastating effects on wealth accumulation for Black men, impacting Black household wealth overall.

There does not appear to be extensive scholarship on wealth gap estimates for Black LGBTQ populations.

C. Descendants of Africans Enslaved in the United States

[To come: discussion and research on immigration trends and statistics from African diaspora]

There appears to be no data at the national and state level and limited scholarship at the city level describing the wealth gap between American descendants of slavery, recent Black immigrants, and white Americans.⁵⁹ Very few of the city level studies present findings on the wealth gap that disaggregates the racial category of Black by national origin.⁶⁰ Some scholars argue that the effects of systemic racism have had unique and exceptional harms to Black American descendants of slavery when compared to Black immigrants who do not have the same experience of systemic racial discrimination in the United States.⁶¹

One study, *The Color of Wealth in Los Angeles*, included separate data for American descendants of slavery and recent African Black immigrants.⁶² National origin and race were both self-reported in this study.⁶³ On average, white Angelinos were far more likely to hold assets in stocks, mutual funds, and investment trusts than both U.S. and African Black Angelinos.⁶⁴ But, African Black Angelinos were likely to hold more assets than U.S. Black Angelinos. For example, 87 percent of African Black Angelinos owned liquid assets versus 62 percent of Black Angelinos born in the United States.⁶⁵ Eighty percent of African Black Angelinos had a checking account versus 68 percent of U.S. Black Americans.⁶⁶ Eighty percent of African Black Americans had a savings account versus 56 percent of U.S. Black Americans.⁶⁷

IV. Historical Causes of the Racial Wealth Gap

⁵⁸ <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide>.

⁵⁹ <https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Los-Angeles.pdf>;
<https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Miami-Metro.pdf>; Table 9
<https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Boston.pdf>;

https://www.researchgate.net/publication/310425115_The_Color_of_Wealth_in_the_Nation%27s_Capital#fullTextFileContent

⁶⁰ <https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Los-Angeles.pdf>;
<https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Miami-Metro.pdf>; Table 9
<https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Boston.pdf>;

https://www.researchgate.net/publication/310425115_The_Color_of_Wealth_in_the_Nation%27s_Capital#fullTextFileContent

⁶¹ Roderick Graham, "Reflections on the ADOS Movement," Medium, March 3, 2019,
<https://medium.com/@roderickshawngraham/reflections-on-the-ados-movement-a8f0355c7275>.

⁶² Melany De La Cruz-Viesca et al., "The Color of Wealth in Los Angeles," Federal Reserve Bank of San Francisco, 2016.

⁶³ Melany De La Cruz-Viesca et al., "The Color of Wealth in Los Angeles," Federal Reserve Bank of San Francisco, 2016.

⁶⁴ Melany De La Cruz-Viesca et al., "The Color of Wealth in Los Angeles," Federal Reserve Bank of San Francisco, 2016.

⁶⁵ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

⁶⁶ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

⁶⁷ https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf

The modern racial wealth gap between Black Americans and other racial groups began with enslavement. But scholars debate whether enslavement should be the basis for reparations given that today's wealth differential captures the cumulative effects of racism on living Black descendants of American enslavement.⁶⁸ This section describes historical causes of the racial wealth gap during and post-enslavement, including racial terror, land theft, mass incarceration, and discrimination in government benefits, the labor market, and banking.

A. Enslavement

Several scholars have estimated the slavery bill for Black reparations.⁶⁹ Most of these estimates require a calculation in today's dollars for unpaid wages, the purchase prices of the human property, or the land promised to the formerly enslaved.⁷⁰ These estimates are generated by multiplying earlier values by a compound interest rate.⁷¹ For example, Thomas Craemer's calculations for unpaid wages owed to enslaved people amounts to \$19.4 trillion in today's dollars.⁷² He arrives at this number by multiplying the prevailing average market wage by the number of hours "worked" for each 24-hour day by those enslaved over the interval of 1776 to 1865 and applies a three percent interest rate.⁷³ Merely doubling the interest rate to the more realistic six percent would exponentially blow up the total estimate to \$6.6 quadrillion in 2019 dollars.⁷⁴

Similar to Craemer's estimates is James Marketti's bill for reparations from enslavement using the idea of income diverted from enslaved persons.⁷⁵ He derived a cumulative figure of \$2.1 trillion as of 1983. Using a six percent interest rate; the 2018 value would amount to \$17.1 trillion.⁷⁶ Another estimate is reached by calculating the value in today's dollars of the wealth held in the property in enslaved persons. For example, Judah P. Benjamin, a critical member of Jefferson Davis's Confederate Cabinet proclaimed the value of enslaved persons in 1860 to be four billion dollars, which compounds to \$42.2 trillion by 2019 at a six percent interest rate.⁷⁷ Other scholars argue that as large as such estimates seem, they are in fact, underestimates because they do not account for the physical and emotional harms of enslavement, the coercive nature of the system, the denial of the ability to acquire property and some degree of autonomy, or the denial of control over one's own family life.⁷⁸

⁶⁸ Darity, William A., *From Here to Equality* (p. 258).

⁶⁹ *Id.* (p. 253-258);

⁷⁰ Darity, William A. . *From Here to Equality* (p. 253).

⁷¹ Darity, William A. . *From Here to Equality* (p. 253).

⁷² California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Thomas Craemer, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁷³ Thomas Craemer, "Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies," *Social Science Quarterly* 96, no. 2 (June 2015): 639–55.

⁷⁴ *Id.*

⁷⁵ James Marketti, "Estimated Present Value of Income Directed during Slavery," in *America, Wealth of Races*, 107–24.

⁷⁶ Darity, William A. . *From Here to Equality* (p. 254).

⁷⁷ Darity, William A. . *From Here to Equality* (p. 255)

⁷⁸ Darity, William A. . *From Here to Equality* (p. 255)

B. Post-Enslavement

The case for reparation extends beyond slavery to Jim Crow, the near-century-long era of legal segregation and terror, and the atrocities that continue today: mass incarceration; police killings of unarmed Black Americans; sustained credit, housing, and employment discrimination; and the immense Black-white wealth disparity.⁷⁹ Post-enslavement American history can be divided into five overlapping phases of federal government policies, which created the modern racial wealth gap. They involve white wealth creation through government land grants, Black wealth destruction through racial terror, white wealth creation through mortgage subsidies, Black wealth destruction through eminent domain, and Black wealth destruction through mass incarceration.

1. White Wealth Creation through Government Land Grants

The first phase lasted from 1862 to 1976. This phase was characterized by the federal government transferring massive amounts of land mostly to white families. Some scholars have named this phase the Wagon Train phase, after the covered-wagon caravans romanticized by 1950s television shows, which carried white families to seek their fortunes in the West.⁸⁰ In 1862, the federal government established the Homestead Act under which land allocations took place until 1980, although more sporadically after the 1920's.⁸¹ The Homestead Act encouraged western migration by providing American citizens—and immigrants soon to be citizens—up to 160 acres of public lands, which was increased to 320 acres in 1909, for \$0 if they continuously resided on the property for five years and paid a small \$10 filing fee.⁸² After six months, homesteaders also had the option of getting around the five-year residency requirement if they paid \$1.25 per acre and lived on the property for six months.⁸³ While the act was not racially exclusive, Black Americans were unable to secure land allocations under the act for four years until the Civil Rights Act of 1866 clarified that they were citizens.⁸⁴ California's homestead laws similarly excluded Black Americans before 1900 because they required a homesteader to be a white citizen.⁸⁵

Though Black homesteaders were able to secure land allocations under the Act after 1866, which enabled Black migration out of the South to areas such as California and the Great Plains after Reconstruction, they were few in comparison to the multitudes of white settlers and had to settle for the least desirable land.⁸⁶ During the 124-year life of the legislation, the federal government gave 270 million acres of land essentially for free to mostly white, native-born and immigrant Americans—the landmass of California and Texas combined.⁸⁷ More than 1.5

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Douglas W. Allen, "Homesteading and Property Rights; or, 'How the West Was Really Won,'" *The Journal of Law and Economics* 34, no. 1, 1991.

⁸² Allen, "Homesteading and Property Rights," p. 8.

⁸³ <https://guides.loc.gov/homestead-act>

⁸⁴ <https://www.unl.edu/plains/homesteading-research>

⁸⁵ https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm

⁸⁶ <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm>;

https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm

⁸⁷ <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm>

million white families received land patents, and today as many as 45 million of their living descendants reap the wealth benefits, approximately one-quarter of the adult population of the United States.⁸⁸ Approximately 3,500 Black claimants succeeded in obtaining their patents from the General Land Office in the Great Plains, granting them ownership of approximately 650,000 acres of prairie land.⁸⁹ In California, Black homesteaders can be traced back to 1900, when agricultural settlements were promoted at various times after the turn of the century in Yolo, San Bernardino, Tulare, and Fresno counties.⁹⁰ At least two different efforts at colonization occurred in San Bernardino County between 1900 and 1910, including solicitation of families to homestead government land in the Sidewinder Valley, desert land near Victorville.⁹¹ Black homesteaders also established an agricultural settlement in 1908 in the town of Allensworth in Tulare County, which ultimately was depleted of a water supply necessary to sustain the settlement.⁹² And despite the homesteading context that Black homesteaders shared with white Americans, they also faced racial challenges.⁹³ The racial climate around Black American colonies ranged from welcoming or neutral to hostile, although none have been reported to experience the kind of everyday violence and intimidation Black Americans regularly experienced in the South.⁹⁴

The federal government undermined other efforts to allocate land to the formerly enslaved. Another estimate of reparations to Black Americans can be made by calculating the value in today's dollars of the unfulfilled land distribution of "forty acres and a mule" promised to the formerly enslaved beginning in 1865.⁹⁵ On January 16, 1865, upon seizing the coastline from Charleston, South Carolina to St. John's River, Florida,⁹⁶ General Sherman issued Special Field Orders No. 15 that established the provision "of not more than (40) forty acres of tillable ground" designated "for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States."⁹⁷ The order carved out 400,000 acres of land confiscated or abandoned by Confederates. Each family of formerly enslaved Black people would get up to 40 acres.⁹⁸ The Army would lend them mules no longer in use.⁹⁹ Further, the Freedmen's Bureau Act of March 3, 1865, had an explicit racial land redistribution provision that specified that "not more than 40 acres" of land was to be provided to refugee or freed male citizens at three years' annual rent not exceeding six percent of the value of the land based on appraisal of the state tax authorities in 1860.¹⁰⁰ At the end of three years of occupying the

⁸⁸ Merrit, "land and the roots of African-American Poverty," AEON, Mar. 11, 2016

⁸⁹ <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm>

⁹⁰ Ibid; https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm.

⁹¹ Ibid; https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm.

⁹² Ibid; https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm.

⁹³ <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm>

⁹⁴ <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm>

⁹⁵ Darity, William A. . From Here to Equality (p. 255); Darity "Forty Acres and a Mule in the 21st Century," Social Science Quarterly 89, No. 3 (Sept. 2008)

⁹⁶ <https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations/>

⁹⁷ Darity "Forty Acres and a Mule in the 21st Century," Social Science Quarterly 89, No. 3 (Sept. 2008)

⁹⁸ <https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations/>

⁹⁹ <https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations/>

¹⁰⁰ Darity "Forty Acres and a Mule in the 21st Century," Social Science Quarterly 89, No. 3 (Sept. 2008)

land, they could purchase it and receive title.¹⁰¹ Similar provisions were included in the postwar Southern Homestead Act of 1866. Freedmen were to receive land in the southern states at a price of \$5 for 80 acres.¹⁰²

Neither of these acts were effectively implemented on behalf of the formerly enslaved, given President Andrew Johnson's intense opposition.¹⁰³ By the end of 1865, Johnson also had ordered the removal of thousands of formerly enslaved persons from the lands they had settled under Sherman's Special Field Orders No. 15,¹⁰⁴ which were ultimately given back to former enslavers.¹⁰⁵ With the exception of a small number who had legal land titles, freed Black people were removed from the land as a result of President Johnson's "restoration" program.¹⁰⁶ Thousands of Black Americans left without land were eventually forced into sharecropping and peonage.¹⁰⁷

If four million enslaved persons had gained emancipation by 1865, and the land allocation rule meant that roughly 40 acres would go to families of four, each formerly enslaved individual would have been allocated about 10 acres. This implies a total distribution of at least 40 million acres of land. Using a conservative estimate of \$10 per acre,¹⁰⁸ the total value of the projected distribution of land to the "freedmen" would have been \$400 million in 1865.¹⁰⁹ The value in today's dollars at a six percent interest rate would be \$3.1 trillion. This number would be much higher if the conditions of the Southern Homestead Act, which provided for 80 acres of land to be sold to freedman at \$5 total were treated as a debt to be paid to the descendants of the formerly enslaved.¹¹⁰ And if as some scholars interpret, *each* freedman was eligible to receive 40 acres of land, it would have led to a much higher total value of the land to be distributed to freedmen after the war—amounting to \$1.6 billion in 1865 and compounding to \$12.6 trillion at a six percent interest rate in 2019.¹¹¹

2. Black Wealth Destruction through Racial Terror

The second phase has lasted from 1865 to the present, and has been characterized by federal and local government dereliction of duty as government actors refused to protect Black Americans during periods of racial terror and land theft. Sometimes, government actors joined, led, or supported the violence.¹¹² As detailed

¹⁰¹ Darity "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, No. 3 (Sept. 2008)

¹⁰² Darity "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, No. 3 (Sept. 2008)

¹⁰³ Darity "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, No. 3 (Sept. 2008)

¹⁰⁴ <https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations/>

¹⁰⁵ Darity "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, No. 3 (Sept. 2008); (see Friedman, 1996; McPherson, 1964; Shabazz, 1994)

¹⁰⁶ Darity "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, No. 3 (Sept. 2008); (see Friedman, 1996; McPherson, 1964; Shabazz, 1994)

¹⁰⁷ Darity "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, No. 3 (Sept. 2008); (see Friedman, 1996; McPherson, 1964; Shabazz, 1994)

¹⁰⁸ Anuradha Mittal and Joan Powell, "The Last Plantation," *Food First* 6, no. 1 (Winter 2000): 1–8.

¹⁰⁹ William Darity Jr., "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, no. 3 (September 2008): 656–64..

¹¹⁰ William Darity Jr., "Forty Acres and a Mule in the 21st Century," *Social Science Quarterly* 89, no. 3 (September 2008): 656–64..

¹¹¹ Darity, William A., *From Here to Equality* (p. 256).

¹¹² <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

in Chapter 3 on racial terror, white federal, state, and local government officials, working jointly with private citizens, terrorized Black Americans to prevent them from accumulating political and economic power.¹¹³ White mobs destroyed thriving Black communities in racial massacres nationwide, whether in Louisiana, North Carolina, Michigan, Delaware, Nebraska, Florida, Illinois, Oklahoma, Texas, or elsewhere.¹¹⁴ The most well-known was the destruction of the Greenwood district in Tulsa, Oklahoma. The Greenwood district was known popularly as “Black Wall Street.”¹¹⁵ Scholars estimate that the present value of destroyed Black property in Tulsa is at least \$611 million.¹¹⁶ The 1919 massacre in Elaine, Arkansas destroyed \$10 million of Black wealth.¹¹⁷ Plus, there is evidence that murders of Black Americans continue to be driven by underlying economic incentives.¹¹⁸ Police killings of unarmed Black Americans frequently occur in neighborhoods undergoing white gentrification.¹¹⁹

3. White Wealth Creation through Mortgage Subsidies

In the 19th century, a third phase of federal programs were designed to promote asset accumulation centered on the acquisition of land. This phase is characterized by federal, state, and local governments passing laws and implementing practices which heavily subsidized the creation of the white middle class while substantively crippling the ability of Black people to do the same.¹²⁰ Federal policies, implemented by private citizens focused on helping mostly white Americans buy single family homes.¹²¹ As discussed in Chapter 5 on housing, the Veterans Administration, the Federal Housing Administration, and the Home Owner’s Loan Corporation subsidized white families’ purchase of single family homes in the suburbs while preventing Black families from doing the same.¹²²

Beginning in the 1930s and 1940s, the federal government created programs that subsidized low-cost loans opening up home ownership to millions of average Americans for the first time.¹²³ At the same time, government underwriters introduced a national appraisal system, tying property value and loan eligibility in part

¹¹³ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹¹⁴ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹¹⁵ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹¹⁶ The Tulsa estimate is provided in a pictorial section of the June 2021 issue of National Geographic with a detailed description of how the estimate was reached.

¹¹⁷ <https://www.bloomberg.com/opinion/articles/2020-09-21/calculating-reparations-look-what-s-been-taken-from-black-americans>

¹¹⁸ <https://www.nbcnews.com/think/opinion/breonna-taylor-s-death-racist-police-violence-highlight-danger-gentrification-ncna1234472>; <https://journals.sagepub.com/doi/pdf/10.1177/1463499617732501>; <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

¹¹⁹ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹²⁰ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹²¹ https://www.pbs.org/race/000_About/002_06_a-godeeper.htm

¹²² Housing Chapter.

¹²³ https://www.pbs.org/race/000_About/002_06_a-godeeper.htm

to racial composition, which designated predominantly nonwhite neighborhoods as hazardous and coloring these areas red—a process known as redlining.¹²⁴ Consequently, all-white communities received the highest ratings and benefited from low-cost, government backed loans. Minority and mixed neighborhoods—and especially Black neighborhoods—received the lowest ratings and were denied these loans.¹²⁵ This functionally concentrated Black Americans into impoverished neighborhoods in America’s urban centers.¹²⁶ Of the \$120 billion worth of new housing subsidized between 1934 and 1962, less than two percent went to nonwhite families—virtually locking them out of homeownership.¹²⁷ Today, approximately three in four neighborhoods—74 percent—that the federal government deemed “hazardous” in the 1930s remain low- to moderate-income, and more than 60 percent are predominantly nonwhite.¹²⁸ In short, while federal intervention and investment helped expand homeownership and affordable housing for countless white families, it has undermined wealth building in Black communities.¹²⁹

4. Black Wealth Destruction through Disenfranchisement and Land Theft

The fourth phase began in 1956, with the passage of the National Highway Act. Like the second phase, this phase is also one of government theft and destruction.¹³⁰ As described in Chapter 5 on housing, during this phase, the federal government passed the National Highway Act and urban renewal legislation.¹³¹ Funded by the federal government, state and local officials used eminent domain to destroy countless thriving Black communities in the name of highway and park construction, and urban renewal, erasing generations of accumulated Black wealth.¹³² Black American business districts were cleaved by the highways, and never recovered.¹³³

For instance, in the mid-20th century, the federal United States Department of Agriculture’s policies displaced Black farmers from their land and discriminated against them at the height of the civil rights era.¹³⁴ During the civil rights era, federal anti-discrimination statutes that applied to the USDA were diluted by the time they reached the local level, and did not provide protection for Black farmers.¹³⁵ White USDA administrators gave

¹²⁴ Rothstein, *The Color of Law*.

¹²⁵ <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/>

¹²⁶ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹²⁷ https://www.pbs.org/race/000_About/002_06_a-godeeper.htm

¹²⁸ <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/>

¹²⁹ <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/>

¹³⁰ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹³¹ Housing Chapter.

¹³² <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹³³ <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹³⁴ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 5

¹³⁵ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 34

millions of dollars in funding to all-white Southern local agricultural committees.¹³⁶ These powerful committees were county arms of the USDA and did not want Black farmers on their boards, so they would prevent their election by splitting the Black vote or through voter intimidation tactics.¹³⁷ These boards made decisions on loan recipients, acreage allotments, appropriate crop yields, hardship adjustments, and preferred farming methods, benefitting white farmers.¹³⁸

The Farmers Home Administration was another agency that discriminated against and displaced Black farmers.¹³⁹ The agency offered loans and credit to poor farmers for home construction and improvement.¹⁴⁰ But instead of going to badly-needed rural housing in the South, FHA loans went to segregated swimming pools, picnic areas, tennis courts, and golf courses in white communities.¹⁴¹ Loan requirements were stringent and often subjective, such as whether an applicant was a good citizen.¹⁴² Loans went to the white and wealthy while Black farmers were turned down.¹⁴³ Even if a Black farmer received a loan, agency administrators would seek to get rid of them by luring them into debt and then foreclosing and auctioning off their machinery.¹⁴⁴ As a result, Black farmers were pushed off their land.¹⁴⁵ Lawrence Lucas, President Emeritus of the United States Department of Agriculture Coalition of Minority Employees says that the USDA's programs continue to discriminate against Black farmers and that "a culture of systemic racism at the USDA that denies black farmers their dignity, that denies black farmers a right to farm, denies black farmers the right to the same programs and services that white farmers get in this country" is still present today."¹⁴⁶ In 1910, Black farmers owned 16 million acres of land. In 2007, they owned 3.2 million acres, an 80% loss.¹⁴⁷ In 1999, Black farmers filed a class action lawsuit against the USDA for unlawful discrimination against them in denying their farm loan applications.¹⁴⁸ The lawsuit, *Pigford v. Glickman*, ultimately settled for money damages, but no policy changes at the USDA.¹⁴⁹ While many claims have been paid, the USDA nonetheless has been slow to pay out all the

¹³⁶ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 28

¹³⁷ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) pp. 23; 124; 130

¹³⁸ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 28

¹³⁹ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 220

¹⁴⁰ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 216

¹⁴¹ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 216

¹⁴² Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 217

¹⁴³ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) pp. 218; 229

¹⁴⁴ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) pp. 219; 229

¹⁴⁵ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015) p. 232

¹⁴⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Lawrence Lucas, < <https://oag.ca.gov/ab3121/meetings/102021> > (as of February 10, 2022).

¹⁴⁷ Tyler, Moore, *Plight of Black Farmers in the Context of USDA Farm Loan Programs: A Research Agenda for the Future*, (December 16, 2013), *Professional Agriculture Workers Journal*, <https://tinyurl.com/yckr3rpa> (as of February 10, 2022)

¹⁴⁸ Tyler, Moore, *Plight of Black Farmers in the Context of USDA Farm Loan Programs: A Research Agenda for the Future*, (December 16, 2013), *Professional Agriculture Workers Journal*, <https://tinyurl.com/yckr3rpa> (as of February 10, 2022)

¹⁴⁹ Tyler, Moore, *Plight of Black Farmers in the Context of USDA Farm Loan Programs: A Research Agenda for the Future*, (December 16, 2013), *Professional Agriculture Workers Journal*, <https://tinyurl.com/yckr3rpa> (as of February 10, 2022)

claims, and has spent extensive resources in fighting claims.¹⁵⁰ In the 2021 coronavirus relief bill, \$4 billion was set aside for debt relief for socially disadvantaged farmers, including Black farmers, but payments have been stopped do to an ongoing lawsuit alleging it is reverse-racism and a “windfall” for some farmers.¹⁵¹

5. Black Wealth Destruction through Mass Incarceration

The fifth phase began in the late 1980s as mass incarceration and the war on drugs continued the American government’s historical criminalization of Black Americans.¹⁵² As discussed in Chapter 11 on the legal system, Black Americans have experienced marginalization, physical harm, and death, at the hands of the American criminal justice system at both the federal and state level beginning during slavery and continuing to today.¹⁵³

During the slavery era, federal and state governments criminalized Black Americans for existing as a method of establishing, maintaining, and socially controlling Black Americans as a lower class of human being than white Americans.¹⁵⁴ From 1865 to the 1950s, state officials enacted “Black Codes” and legal segregation laws to continue controlling Black Americans.¹⁵⁵ California court cases and laws during these times show that the state contributed to the growing body of law that explicitly discriminated against Black Americans.¹⁵⁶

As a result of this legalized discrimination against Black Americans, Americans became biased against Black Americans.¹⁵⁷ And from the 1950s to present, American politicians ran on “law and order” or “tough on crime” platforms leading to laws and policies that punished Black Americans more than white Americans, often for similar crimes, resulting in mass incarceration and overrepresentation of Black Americans in the criminal justice system to present day, nationwide and in California.¹⁵⁸

Mass incarceration creates a vicious cycle in relation to wealth. Studies have shown that lower wealth increases the likelihood of incarceration and incarceration decreases the ability to build or maintain wealth.¹⁵⁹ Black Americans, who have low family wealth compared to white Americans,¹⁶⁰ are especially vulnerable to

¹⁵⁰ Tyler, Moore, Plight of Black Farmers in the Context of USDA Farm Loan Programs: A Research Agenda for the Future, (December 16, 2013), Professional Agriculture Workers Journal, <https://tinyurl.com/yckr3rpa> (as of February 10, 2022)

¹⁵¹ Healy, A Windfall for Minority Farmers Divides Rural America (May 22, 2021) The New York Times <https://tinyurl.com/kt6dtphn> (as of February 10, 2022)

¹⁵² <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap>

¹⁵³ Legal System Chapter.

¹⁵⁴ Legal System Chapter.

¹⁵⁵ Legal System Chapter.

¹⁵⁶ Legal System Chapter.

¹⁵⁷ Legal System Chapter.

¹⁵⁸ Legal System Chapter.

¹⁵⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202/#CR47> (quoting Huebner, 2005; Maroto, 2015; Massoglia & Remster, 2019; Schwartz-Soicher, Geller, & Garfinkel, 2011; Turney & Schneider, 2016; Uggen, Manza, & Thompson, 2006; Western, Braga, Davis, & Sirois, 2015; Zaw, Hamilton, & Darity, 2016)

¹⁶⁰ Kent, Has Wealth Inequality in America Changed over Time? Here are Key Statistics (December 02, 2020) Federal Reserve Bank of St. Louis <https://tinyurl.com/44anuuf3> (as of January 19, 2022)

incarceration.¹⁶¹ Growing up with less family wealth means living in poorer neighborhoods with lower-quality education and a greater exposure to high “street” crime and high imprisonment areas. Sixty-two percent of Black Americans live in highly segregated, inner city neighborhoods where socioeconomic vulnerabilities contribute to higher rates of violent crime,¹⁶² while the majority of white Americans live in “highly advantaged” neighborhoods where there is little violent crime.¹⁶³

In 2019, Black Americans comprised 26 percent of all arrests yet they only made up 13.4 percent of the population.¹⁶⁴ According to a recent large-scale analysis of racial disparities in over 60 million state patrol police stops in 20 states, including California, researchers found that police officers stop Black Americans more often than white drivers relative to their share of the driving-age population.¹⁶⁵ Further, these researchers found that, after controlling for age, gender, time, and location, police are more likely to ticket, search, and arrest Black American drivers than white Americans.¹⁶⁶ And the bar for searching Black American drivers is lower than for searching white Americans.¹⁶⁷ Low family wealth can also mean being unable to afford additional education and delaying entering the labor market, leading to higher risks of incarceration.¹⁶⁸ Once a person is a criminal defendant, low family wealth makes it hard to post bond or to hire high quality lawyers to help navigate the criminal justice system, making incarceration more likely.¹⁶⁹

Mass incarceration has been catastrophic to the ability of Black families to build and maintain wealth by reducing household assets and income, and lowering homeownership rates. In 2009, Black Americans made up less than 13 percent of the U.S. population, but comprised over a third of all the people in prison.¹⁷⁰ And as explained in Chapter 11 on the legal system, Black Americans are also more likely to be convicted and experience lengthy prison sentences.¹⁷¹ Involvement in the criminal justice system increases legal debt.¹⁷²

¹⁶¹ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁶² Krivo & Peterson, *Extremely disadvantaged neighborhoods and urban crime* (1996) *Social Forces* 75(2): pp. 619-647 <<https://www.faculty.washington.edu/matsueda/courses/587/readings/Krivo%20Peterson%201996.pdf>> [as of July 29, 2021].

¹⁶³ Krivo et al., Segregation, racial structure, and neighborhood violent crime (2009) *American Journal of Sociology* vol. 114, no. 6 pp. 1765–1802 <www.jstor.org/stable/10.1086/597285> [as of July 29, 2021].

¹⁶⁴ U.S. Census Bureau, Quick Facts: U.S. <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> [as of July 22, 2021].

¹⁶⁵ Pierson et al., *A large scale analysis of racial disparities in police stops across the United States* (2017) *Nature Human Behavior* 4, 736–745 (2020) <<https://www.nature.com/articles/s41562-020-0858-1>> [as of July 27, 2021].

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁶⁹ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁷⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202/#CR47>

¹⁷¹ Legal System Chapter, pp. 24-25.

¹⁷² Western B, Wildeman C. The Black Family and Mass Incarceration. *The ANNALS of the American Academy of Political and Social Science*. 2009;621(1):221–242. doi: 10.1177/0002716208324850.

Incarceration means loss of income and may lead to missed mortgage payments and other debts.¹⁷³ This increases interest obligations and penalties, which in turn can send an incarcerated individual's credit score plummeting.¹⁷⁴ Incarceration also means household instability, placing an additional burden on the capacity to build assets.¹⁷⁵

Once released from incarceration, criminal convictions make it harder to find and maintain jobs, find leases, and be approved for mortgages.¹⁷⁶ A record of previous incarceration also has wide-ranging immediate and future consequences that affect asset building capability over the lifetime. Such a record acts as a barrier to employment, thereby lowering earnings.¹⁷⁷ Furthermore, the criminal "credential" associated with incarceration impedes wealth accumulation through stigmatization, poor credit access, and lack of access to supportive social institutions.¹⁷⁸

C. Government Benefits Exclude or Discriminate Against Black Americans

Black Americans have consistently been excluded from numerous major categories of government benefits, which have generally benefited white Americans. Government benefits refer to assistance programs that provide either cash assistance or in-kind benefits to individuals and families from any governmental entity. There are two major types of government benefit programs: social welfare programs and social insurance programs.

Benefits received from social welfare programs are usually based on low income means-tested eligibility criteria. Benefits received from social insurance programs are usually based on eligibility criteria, such as age, employment status, or being a veteran. Some of the major federal, state, and local social insurance programs are: Social Security, Department of Veterans' Affairs benefits, unemployment insurance compensation, and workers' compensation.

Social insurance programs can also provide important support in times of crisis. Unemployment insurance, a state level program, helps protect against unexpected drops in income by paying cash benefits to unemployed workers who have lost jobs through no fault of their own.¹⁷⁹ The federal Supplemental Nutrition Assistance Program (SNAP), also known as food stamps, gives money to low income families to buy food, and the program expands to provide important support when people lose their jobs. A one percentage point increase in the unemployment rate is associated with two to three million additional participants.¹⁸⁰ Recipients have

¹⁷³ Western B, Wildeman C. The Black Family and Mass Incarceration. *The ANNALS of the American Academy of Political and Social Science*. 2009;621(1):221–242. doi: 10.1177/0002716208324850.

¹⁷⁴ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁷⁵ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁷⁶ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁷⁷ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁷⁸ <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf>

¹⁷⁹ Bivens et al., *supra* note 9, at p. 25.

¹⁸⁰ *Economic Linkages: Supplemental Nutrition Assistance Program (SNAP) Linkages with the General Economy* (Aug. 20, 2019) Economic Research Service, U.S. Dept. of Agriculture <<https://www.ers.usda.gov/topics/food-nutrition-assistance/supplemental-nutrition-assistance-program-snap/economic-linkages/#SNAPcaseloads>> (as of Aug. 19, 2021).

improved food security, health, and reduced healthcare expenses.¹⁸¹

Particular crises can also generate new government programs to meet urgent needs. During the COVID-19 pandemic, most households received several stimulus checks from the federal government. Studies have found that these payments were “likely crucial” to help households that lost jobs pay their expenses.¹⁸² The federal government also supplemented state payments with up to \$600/week for unemployed workers, extended the duration of benefits, and gave benefits to workers traditionally left out of unemployment insurance programs.¹⁸³ The federal government also instituted the Paycheck Protection Program to provide loans that enable businesses suffering from COVID-19’s economic shocks to pay their employees and other costs.¹⁸⁴

Historically, federal policy decisions dealing with welfare, work, and war in the 1930s and 1940s excluded or discriminated against the vast majority of African Americans.¹⁸⁵ Because of the legislation southern representatives passed with the complicity of other congressional colleagues, Black Americans became even more significantly disadvantaged with the development of the American middle class during and after World War II.¹⁸⁶

Among other things, southern legislators prevented Congress from including anti-discrimination provisions in an expansive range of social welfare programs, such as community health services, school lunches, and hospital construction grants—all the programs that distributed funds to the south.¹⁸⁷ As a result, when an expansive range of federal public policies was providing most white Americans with valuable tools to advance their social welfare—insure their old age, get good jobs, acquire economic security, build assets, and gain middle-class status—most Black Americans were left behind or left out.¹⁸⁸

Social Security, passed and signed by President Roosevelt in 1935, left out most Black Americans and was characterized “by a form of policy apartheid” for the first quarter century of its existence.¹⁸⁹ Southern congressional representatives heavily influenced the Social Security Act with devastating results.¹⁹⁰ As a result,

¹⁸¹ Brantley et al., *supra* note 9, at p. 2. <https://guides.loc.gov/homestead-act>

¹⁸² Chen, Center for Retirement Research, Boston College, Did the Stimulus Checks Help People with Unexpected Expenses? (Aug. 2021) p. 3.

¹⁸³ Bivens et al., *supra* note 9, at p. 20.

¹⁸⁴ *Paycheck Protection Program*, U.S. Dep’t of the Treasury <<https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program>> (as of Aug. 19, 2021).

¹⁸⁵ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*. W. Norton & Company.

¹⁸⁶ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*. W. Norton & Company.

¹⁸⁷ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*. W. Norton & Company, p. 23.

¹⁸⁸ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*. W. Norton & Company, p. 23.

¹⁸⁹ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹⁰ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

the federal government left power to control benefit levels, eligibility, and administration of such programs in the hands of the states and excluded occupations mostly held by Black Americans.¹⁹¹ Sixty-five percent of African Americans fell outside of eligibility for the Social Security program—and between 70 and 80 percent fell outside eligibility requirements in different parts of the South.¹⁹²

For example, in 1940, the year Social Security payments for the elderly began after a sufficient fund had been received, the Social Security Board identified nearly 2.3 million Black workers as eligible for old age insurance.¹⁹³ The majority of Black people still were left out because they were farmworkers or domestic workers, and people in those categories did not qualify.¹⁹⁴ This exclusion also left most Black workers out of unemployment insurance under the act.¹⁹⁵ Even when they worked in covered industrial and commercial jobs, they often were left out because they lacked a history of regular, stable employment.¹⁹⁶ And even when they received benefits, the benefits tended to be meager as compared to those received by white workers.¹⁹⁷

In addition to the federal government's direct transfer of land through the Homestead Act, and the federal government provided mortgage subsidies to mostly white families through various federal agencies, as discussed in Chapter [XX]. The federal government has also supported the creation and maintenance of the white middle class through other statutes of the New Deal. The New Deal was a collection of government programs developed by President Franklin D. Roosevelt to provide aid to the American people with the goal of lifting America out of the economic depression triggered by the stock market crash of October 1929, commonly referred to as the Great depression.¹⁹⁸ Chapter [XX] discusses in detail how the New Deal programs excluded Black Americans.

In 1944, the federal government enacted the Serviceman's Readjustment Act of 1944, also known as the GI Bill, which was reinforced in 1948 with the Integration of the Armed Forces Act. Through these laws, the federal government offered unprecedented benefits to mostly white veterans, including mortgages to buy homes, job placement services, money for vocational and university education, and loans for small

¹⁹¹ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹² Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹³ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 48).

¹⁹⁴ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹⁵ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹⁶ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹⁷ Katznelson, Ira. *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (p. 42).

¹⁹⁸ Joe William Trotter, Jr., "From a Raw Deal to a New Deal?: 1929-1945," *In To Make Our World Anew Volume Two: A History of African Americans since 1880*, edited by Robin D.G. Kelley and Earl Lewis, New York: Oxford University Press, 2005, p. 131.

businesses.¹⁹⁹ But, these laws also included key features of administrative decentralization that sharply disadvantaged southern Black veterans.²⁰⁰

For example, according to a Brookings Institution report, white World War II veterans “were afforded the opportunity to build wealth by sending themselves and their children to college and by obtaining housing and small business grants”—but “Black veterans could not redeem their post-war benefits like their white peers.”²⁰¹ Part of this stemmed from earlier discrimination in the military. Black soldiers were disproportionately issued neutral and dishonorable discharges, which were then used to exclude Black veterans from GI Bill benefits.²⁰² Ira Katznelson explains that: “severe discrimination” affected the home loan, business loan, and higher education programs offered under the GI Bill; the home mortgage, small business, and farm loan programs were especially vulnerable to racist administration, leading to the relative absence of Black veterans in these programs; and Black veterans “were significantly underrepresented” in the GI Bill’s loan programs, including business loans.²⁰³

Some scholars repeatedly refers to the difficulty Black veterans faced when trying to secure loans under the GI Bill, without focusing on a particular type of loan, or includes business loans when enumerating the types of loans provided, showing that business loans were part of the inequitable administration of GI Bill benefits.²⁰⁴ He quotes Harry Wright, a field agent of the Southern Regional Council: “To Negro veterans in Mississippi getting a G.I. loan is similar to seeking ‘The Holy Grail.’”²⁰⁵

Today, Black American families continue to have trouble accessing government benefits. Although ostensibly race-neutral, welfare programs are embedded in a racist labor market and criminal justice system, which exacerbate the various ways of curtailing access to welfare benefits, such as work requirements, family caps, drug testing, and resource limits like exclusions for home ownership.²⁰⁶ Because welfare programs are often administered at the state and local levels, state and especially local governments have been able to introduce

¹⁹⁹ David H. Onkst, “First a Negro . . . Incidentally a Veteran”: Black World War Two Veterans and the G.I. Bill of Rights in the Deep South, 1944-1948 (Spring 1998) 31(3) *Journal of Social History* 517, 518 (Onkst); Jacob Knutson, Legislation to Resolve GI Bill Racial Inequities Introduced by Democrats (Nov. 11, 2021) *Axios*, <<https://www.axios.com/democrats-resolving-gi-bill-racial-inequities-bill-341303e3-fe1e-43a7-9930-b7682100f5cb.html>> (as of Jan. 18, 2022); Katznelson, Ira. *Fear Itself: The New Deal and the Origins of Our Time* (p. 368).

²⁰⁰ Katznelson, Ira. *Fear Itself: The New Deal and the Origins of Our Time* (p. 368); see also Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W. W. Norton, 2005), pp. 113–41; See also Suzanne Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (New York: Oxford University Press, 2007); Kathleen Frydl, *The G.I. Bill* (Cambridge: Cambridge University Press, 2011). Katznelson, Ira. *Fear Itself: The New Deal and the Origins of Our Time* (p. 620). Liveright. Kindle Edition.

²⁰¹ Rashawn Ray & Andre Perry, *Why We Need Reparations for Black Americans* (Apr. 2020) Brookings Institution <<https://www.ptcondo.com/wp-content/uploads/2021/01/Brookings-Institute.pdf>> (as of Jan. 18, 2022), p. 3.

²⁰² Onkst, *supra*, at p. 520; Paula S. Rothenberg, *Race, Class, and Gender in the United States: An Integrated Study* (2007) p. 46.

²⁰³ Katznelson & Mettler, *On Race and Policy History: A Dialogue About the G.I. Bill* (Sept. 2008) 6(3) *American Political Science Association* 519, 521, 522, 530 (available at <http://urban.hunter.cuny.edu/~schram/mettlerkatznelson.pdf> as of Jan. 18, 2022).

²⁰⁴ Onkst, *supra*, at pp. 519, 522, 532.

²⁰⁵ Onkst, *supra*, at p. 523.

²⁰⁶ Madison Allen, *Racism in Public Benefit Programs: Where Do We Go from Here?* (July 23, 2020) Center for Law and Social Policy, <<https://www.clasp.org/blog/racism-public-benefit-programs-where-do-we-go-here>> (as of Jan. 24, 2022) (Allen).

racial bias into welfare administration, contributing to racially disparate outcomes.²⁰⁷ States have been significantly more likely to both adopt and impose welfare sanctions if they have higher proportions of nonwhite welfare recipients.²⁰⁸ States with higher Black populations—generally in the South—tend to provide fewer unemployment payments for a shorter time.²⁰⁹ Additionally, in many places, part-time workers—who are disproportionately Black—are not eligible for unemployment payments.²¹⁰ Despite having higher unemployment rates in general, Black workers receive unemployment benefits at lower rates.²¹¹ A report by the Government Accountability Office found that 73 percent of Black unemployment applicants received unemployment payments during the pandemic versus 80.2 percent of white applicants.²¹² Although governments have waived work requirements for certain SNAP beneficiaries during certain national crises—e.g., the Great Recession and the COVID-19 pandemic—studies have found that work requirements disproportionately cut off Black adults from SNAP benefits, which may be partially due to discrimination in the labor market making the job search more difficult for Black people.²¹³

During the pandemic, white households also received their COVID-19 stimulus checks faster than Black households: 68.6 percent of eligible Black adults received their first stimulus payments by late May 2020 versus 73.7 percent of white households.²¹⁴ This was likely due to the Internal Revenue Service-focused structure of the program, which made receiving the payment more complicated for unbanked families and families who didn't file taxes. Black people are more likely to be among both groups.²¹⁵

Studies of pandemic-era federal loans have found that 29 percent of Black American applicants were successful in obtaining loans for their businesses versus 60 percent of white applicants. And only 1.6 percent of federal loan dollars were disbursed to self-identified Black-owned businesses versus 13.6 percent to white-owned businesses.²¹⁶ Businesses in majority-Black American neighborhoods were also more likely to receive federal loans later than businesses in majority-white neighborhoods. Because federal money was paid out through large banks, Black American business owners may have been less likely to obtain them—despite being more likely

²⁰⁷ Fording et al., *Race and the Local Politics of Punishment in the New World of Welfare* (March 2011) 116(5) *American Journal of Sociology* 1610, 1614, 1650 (Fording et al.). (available on JSTOR: <https://www.jstor.org/stable/10.1086/657525>)

²⁰⁸ Fording et al., *supra*, at p. 1614.

²⁰⁹ Bivens et al., *supra* note 9, at pp. 2, 10.

²¹⁰ *Id.* at p. 22.

²¹¹ *Id.* at p. 10.

²¹² GAO Report, *supra* note 5, at 3.

²¹³ Brantley et al., *supra* note 9, at pp. 7-8.

²¹⁴ Holtzblatt & Karpman, Tax Policy Center, Urban Inst., Who Did Not Get the Economic Impact Payments by Mid-to-Late May, and Why? (July 2020) p. 2.

²¹⁵ Price & Pugh, *The Next Pandemic Stimulus Bill Must be Race-Conscious* (Sept. 4, 2020) *Time* <<https://time.com/5886002/next-stimulus-bill-race-conscious/>> (as of Aug. 19, 2021).

²¹⁶ 78.6% of loan dollars went to businesses who did not report the owner's race. Plerhoples, *Correcting Past Mistakes: PPP Loans and Black-Owned Small Businesses* (Feb. 25, 2021) *Am. Const. Society* <<https://www.acslaw.org/expertforum/correcting-past-mistakes-ppp-loans-and-black-owned-small-businesses/>> (as of Aug. 19, 2021). 78.6% of loan dollars went to businesses who did not report the owner's race.

than white business owners to have at risk or distressed businesses even before the pandemic²¹⁷—due to poor relationships with banks and systematic exclusion from banking services historically.²¹⁸ Inadequate pandemic relief put the brunt of pandemic-related economic hardship disproportionately on Black Americans, who were more likely to hold the types of jobs most severely impacted by the pandemic.²¹⁹

D. Education Segregation and Debt

Higher education for Black Americans can have a positive effect on their income, but does not translate into a reduction in wealth disparities.²²⁰ Differences in parental wealth and the racial disparities in wealth are a big part of why even affluent Black households with incomes above \$75,000 live in more under-resourced neighborhoods with less access to quality school resources than their white counterparts that undermines equal education opportunity and upward mobility starting from childhood.²²¹ College degrees do little to close the racial wealth gap.²²² For example, college-educated Black American households have 30 to 33 percent less wealth at the median than non-college educated white households. Average wealth for white Americans in this category is \$180,500, while the Black American average is \$23,400.²²³

Education increases debt in part because of higher student loan rates for Black students who see “unequal returns” on investment in a college education.²²⁴ Rucker C. Johnson, Ph.D. points out that, historically, school funding mechanisms have been implicitly tied to long-standing assumptions about which communities and students are deserving of adequate educational investment.²²⁵ The median difference between Black and white American student loan interest rates is 0.63 percent.²²⁶ The mean difference is 1.09 percent.²²⁷ This means that Black American students have higher interest rates, and that more than half of Black American students have interest rates 3/5 to 1 and 1/10 times higher than white students.²²⁸

Black American students also incur more educational debt because their families have so little wealth.²²⁹ For example, these higher levels of debt are reflected in the wealth of young women. Twenty- to 29-year-old single

²¹⁷ Mills & Battisto, Federal Reserve Bank of New York, *Double Jeopardy: Covid-19’s Concentrated Health and Wealth Effects in Black Communities* (Aug. 2020) p. 5-6.

²¹⁸ *Id.*; Plerhoples, *supra* note 76.

²¹⁹ Trisi & Saenz, *supra*.

²²⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Rucker C. Johnson, Ph.D., <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²²¹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Rucker C. Johnson, Ph.D., <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²²² Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*, p. 8.

²²³ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap” p. 6; Weller et al., “Stimulating How Large Policy Proposal Affect the Black-White Wealth Gap”.

²²⁴ Herring, Henderson, “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap,” p. 6.

²²⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Rucker C. Johnson, Ph.D., <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²²⁶ Chiteji, “The Racial Wealth Gap and the Borrower’s Dilemma,” p. 356.

²²⁷ Chiteji, “The Racial Wealth Gap and the Borrower’s Dilemma,” p. 356.

²²⁸ Chiteji, “The Racial Wealth Gap and the Borrower’s Dilemma,” p. 356.

²²⁹ Chiteji, “The Racial Wealth Gap and the Borrower’s Dilemma,” p. 356.

white women who have completed college have a median net worth of \$3,400. Single black women of a similar age and level of education have a median net worth of negative \$11,000.²³⁰

The costs of higher education are a larger burden for Black Californians.²³¹ Generally, white people are twice as likely as Black Americans to receive financial assistance from home for higher education.²³² Only 16 percent of Black American students receive a CalGrant award.²³³ The state financial aid Black Americans do receive is often insufficient, especially with respect to housing.²³⁴ Fifteen percent of white households in Los Angeles had student loan debt. In contrast with 20.5 percent of households headed by Black Americans did.²³⁵

E. Labor Market Discrimination

Income is different from wealth. Income represents how much a person earns in a lifetime, both from work and from a yearly return on their investments.²³⁶ Wealth represents a person's total net worth calculated from assets minus debts.²³⁷ While income plays a modest role in the ability to generate wealth, as lower income translates to reduced capacity for savings or investments, income does not explain massive Black-white wealth disparities in the United States. Without savings or wealth of some form, which can be passed from generation to generation, economic stability quickly falls apart when income is cut or disrupted through job loss, reduced work hours or reduced wages, or if families suffer from an unexpected health emergency.²³⁸ In fact, the intergenerational transfer and impact of wealth is one of the reasons why racial wealth inequities have become entrenched.²³⁹

As detailed in Chapter 10 on labor, labor market discrimination significantly contributes to the wealth gap.²⁴⁰ Some scholars including, Bernadette Chachere and Gerald Udinsky, base their estimates for a reparations bill on more recent economic injustices such as labor market discrimination.²⁴¹ For example, Bernadette Chachere and Gerald Udinsky estimated the monetary benefits that white workers gained from employment discrimination between 1929 and 1969.²⁴² They concluded that by the mid-1980s, white workers gained in \$1.6 trillion from

²³⁰ Zaw, et al.

²³¹ Esi Hutchful, "The Racial Wealth Gap: What California Can Do About a Long-Standing Obstacle to Shared Prosperity," California Budget & Policy Center, 2018, p. 8.

²³² Esi Hutchful, "The Racial Wealth Gap: What California Can Do About a Long-Standing Obstacle to Shared Prosperity," California Budget & Policy Center, 2018, p. 8.

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ De La Cruz-Viesca et al., "The Color of Wealth in Los Angeles," p. 9.

²³⁶ <https://www.moneycrashers.com/wealth-and-income-difference/>

²³⁷ <https://www.moneycrashers.com/wealth-and-income-difference/>

²³⁸ Khaing Zaw, Jhumpa Bhattacharya, Anne Price, Darrick Hamilton, and William Darity Jr., *Women, Race and Wealth* (Durham, N.C.: Samuel DuBois Cook Center on Social Equity, Duke University; Oakland, Calif.: Insight Center for Community Economic Development, 2017), https://www.insightccd.org/wp-content/uploads/2017/01/January2017_ResearchBriefSeries_WomenRaceWealth-Volume1-Pages-1.pdf.

²³⁹ *Id.*

²⁴⁰ Labor Chapter.

²⁴¹ Darity, William A. . *From Here to Equality* (p. 256).

²⁴² Bernadette Chachere and Gerald Udinsky, "An Illustrative estimate of the present value of the benefits from Racial discrimination 1929-1969"

employment discrimination at the expense of Black workers, assuming that 40 percent of the Black-white income gap was because of labor market discrimination.²⁴³ Further, David Swinton concludes that even if one subtracted the total cost of government benefits programs including Social Security, Medicare, Medicaid, unemployment insurance, and other welfare programs—which are often argued to be reparations—over the same time span from the Chachere and Udinsky estimate, there would be still be a \$500 billion net benefit to white people from labor market discrimination by the mid-1980s.²⁴⁴

But, income alone cannot alone explain the racial wealth gap. A reduction in racial differences in income would leave as much as three-fourths of the wealth gap unaddressed.²⁴⁵ “Equal achievements” lead to “unequal wealth rewards” for Black Americans.²⁴⁶ For example, between 1984 and 2009, every dollar increase in average income for white households added \$5.19 in wealth. The same increase in average incomes for Black American households added only \$0.69 in wealth.²⁴⁷ In the 1990s, the Black-white ratio of median household income was 0.62, but the ratio of median wealth far less at 0.08.²⁴⁸ In fact, the racial wealth gap increases as income increases. The wealth gap between Black Americans and whites in the bottom fifth of income levels is \$7400, but the wealth gap between comparable African Americans and whites in the top fifth of income levels is \$264,700.²⁴⁹ And, while white households have five to 10 times the net worth of Black American households, they only earn twice as much as Black American households.²⁵⁰ Within the same income brackets, Black American wealth is less than one-half that of white people.²⁵¹ White people in the bottom fifth of the income distribution have more than 10 times the median wealth of Black Americans in the bottom fifth.²⁵² Lower incomes for Black Americans because of labor market discrimination affect wealth only to the extent that it reduces capacity for savings that can be passed across generations. There is no evidence that Black Americans have a lower savings rate than white Americans once household income is taken into account.²⁵³ One study found that once income is taken into account, if anything, Black American families actually have a slightly higher savings rate than their white counterparts.²⁵⁴ In fact, white households spend 1.3 times as much as Black American households with similar incomes.²⁵⁵ At high income levels, Black Americans save more than white people who tend to invest.²⁵⁶ In addition to savings from income or “active savings,” a family’s

²⁴³ Bernadette Chachere and Gerald Udinsky, “An Illustrative estimate of the present value of the benefits from Racial discrimination 1929-1969”

²⁴⁴ David Swinton, “Racial Inequality and Reparations,” in *America, Wealth of Races*, 153–62.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ Melvin L. Oliver, Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, Routledge, 1995.

²⁴⁹ Herring, Henderson, “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap,” p. 14.

²⁵⁰ Barsky et al., “Accounting for the Black-White Wealth Gap: A Nonparametric Approach”.

²⁵¹ Barsky et al., “Accounting for the Black-White Wealth Gap: A Nonparametric Approach”.

²⁵² Barsky et al., “Accounting for the Black-White Wealth Gap: A Nonparametric Approach”.

²⁵³ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap”; Hamilton and Chiteji, 2013).

²⁵⁴ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap”; Hamilton and Chiteji, 2013).

²⁵⁵ Blau, Graham, “Black/White Differences in Wealth and Asset Composition”; Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap”; Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*; Herring, Henderson, “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap”;

²⁵⁶ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap” p. 22.

wealth also can increase because of “passive savings” or when the value of a family’s assets rises or appreciates. Data collected before the predatory subprime mortgage market crisis shows that there is no significant racial advantage in “passive savings” for white families with positive assets after family income is taken into account.²⁵⁷

F. Discrimination in Banking

Black Americans have historically faced systemic discrimination in banking which has impacted their ability to accumulate wealth. Banks established by the federal government discriminated against Black Americans and deprived them of wealth. The Freedmen’s Fund, Free Labor and Union Army Military Banks, and the Freedman’s Bank were three banking institutions established by federal government agents and Congress in the early to mid-1860s, which provided recently emancipated Black Americans with the means to save the money they earned.²⁵⁸ But, paternalistic attitudes towards Black Americans ultimately impacted their ability to accumulate wealth and invest their wealth how they saw fit.²⁵⁹ Improper investing of savings deposited into the Freedman’s Bank led to the loss of approximately \$2.9 million or \$63 million in 2017 dollars, impacting the savings and wealth accumulation of “Freedmen” and their descendants for generations to come.²⁶⁰

One of the earliest experiments to manage wages from freedmen’s labor was the exploitative Freedmen’s Fund created in 1862 by Union army chaplain John Eaton, Jr. who controlled contraband camps in the Mississippi Valley.²⁶¹ The fund served as a central depository for the wages of formerly enslaved Black Americans who self-emancipated by escaping to Union lines or “contrabands” captured by Union troops who worked for and under the direction of the Union army.²⁶² But, freedmen had no access to their individual wages or savings, nor did they have any say in how their own wages or the money that was donated for their benefit would be used.²⁶³ Instead, Eaton pooled the wages in the fund to use them provide food, shelter, and other needs for freedmen collectively, essentially treating freedmen as contract laborers.²⁶⁴ In addition to depositing freedmen’s wages in the fund, he also took all their wealth. Soldiers confiscated horses, wagons, money, and other valuables that self-emancipated Black Americans brought with them to the Union lines.²⁶⁵ Eaton took for the fund anything that the soldiers and quartermasters did not steal for themselves. Near the end of the Civil War, Eaton controlled contraband camps throughout the Mississippi Valley.²⁶⁶ By 1864, he had formalized his contract labor system to

²⁵⁷ Blau, Graham, “Black/White Differences in Wealth and Asset Composition”; Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap”; Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*; Herring, Henderson, “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap”;

²⁵⁸ Mehrsa Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap*, Cambridge, Harvard University Press, 2017, p. 30.

²⁵⁹ Id.

²⁶⁰ Shennette Garrett-Scott, *Banking on Freedom: Black Women in U.S. Finance before the New Deal*, Columbia University Press, New York, 2019, p. 13; p. 31.

²⁶¹ Garrett-Scott, *Banking on Freedom*, p. 16-17.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

negotiate contracts for and hired out Black workers on abandoned plantations the federal government leased to northerners and to some southerners who supported the Union.²⁶⁷ Any profits from the cash crops that Black workers grew and harvested were placed in the Freedmen's Fund.²⁶⁸ All the while, Eaton further commandeered the fund for other expenses along with providing for freedmen.²⁶⁹ In one year alone, Eaton stole \$103,000 or \$1.6 million in 2017 dollars from Black depositors to pay for the Union Army's incidental expenses; \$5,000 in medical expenses; the salaries of all hospital stewards and medical assistants; in addition to food, clothing, housing, and labor supplies for Black Americans.²⁷⁰

The Free Labor and Union Army Military Banks first established in 1864 used an exploitative model of contracting Black people's labor similar to Eaton's freedmen's fund. But, they also allowed Black soldiers and workers more control over their own income, letting them decide how much to save and how much to keep for personal expenses, and build up their individual wealth rather than contribute to collective expenses.²⁷¹ Army quartermasters issued them passbooks that soldiers and civilian workers used to keep records of their deposits.²⁷² Still, the army limited a soldier's single deposit to \$5, which significantly limited individuals who wanted to save more. Soldiers could also not withdraw funds until their enlistment ended, which limited how they could use their own savings, and their accounts did not earn interest.²⁷³ The army also did not provide fiduciary oversight to protect soldiers' deposit from loss, with quartermasters sometimes mismanaging and stealing soldiers' savings.²⁷⁴

In 1865, Congress created the Freedman's Bank and Trust Company, also known as the Freedman's Savings Bank, seeding the bank with unclaimed deposits from the free labor and military banks.²⁷⁵ The initial charter designated an all-white board of trustees with broad discretion to oversee the bank, and intended to hold only the deposits of the survivors of enslavement and their descendants.²⁷⁶ Despite the language in the charter, the bank welcomed customers regardless of race, though formerly enslaved people made up the vast majority of bank customers.²⁷⁷ And though the charter made clear that its purpose was to invest the deposits in low-risk treasury notes and conservative U.S. securities, it vaguely stated that a third of the deposits, called "available funds," could be invested anywhere leaving an opening for abuse.²⁷⁸

The Freedman's Bank used a number of aggressive methods and tactics to solicit deposits and to convince

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.; John Davis, "Bankless in Beaufort: A Reexamination of the 1873 Failure of the Freedman's Savings Branch at Beaufort, South Carolina," *South Carolina Historical Magazine* 104, no. 1 (2003): 25–55, here 29–31.

²⁷⁵ <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html>

²⁷⁶ <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html>

²⁷⁷ Garrett-Scott, *Banking on Freedom*, p. 25

²⁷⁸ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap*, p. 25.

Black patrons that their money was safe and that they could grow wealth.²⁷⁹ Passbooks and other bank literature contained numerous slogans and poems on the ways of thrift and savings.²⁸⁰ Bank advertisements often included the names of prominent government officials, such as Abraham Lincoln and Oliver Otis Howard, misleading customers and the public into believing that the federal government protected and guaranteed their deposits.²⁸¹ Depositors were reminded during public meetings and other bank-sponsored gatherings that the bank was under Congressional charter, and thus under its complete protection.²⁸² With such assurances that their deposits were safe, Black Americans from a wide variety of backgrounds and occupations, many excited to be receiving a wage for their services for the first time in their lives, opened accounts with the Freedman's Bank between 1868 and 1874 at an extraordinary rate. And within 10 years, 75,000 depositors—who were virtually all Black Americans—trusted the bank by depositing more than \$75 million, approximately \$1.5 billion in today's dollars.²⁸³ Most of these deposits were being saved to buy land and other productive goods such as tools or agricultural supplies as depositors were told to do.²⁸⁴

But the bank was a façade turning quickly turned from a savings bank to a highly risky private investment bank with a small minority of trustees remaining in control.²⁸⁵ Against the bank's original Congressional charter and without the knowledge of the Black customers, who were largely unable to secure loans from the bank, the bank deceptively invested the money in risky railroad and real estate holdings to the benefit of white businessmen and corrupt bank managers.²⁸⁶ When the bank headed toward failure because of self-dealing and fraud closed on June 29, 1874, 61,131 mostly Black depositors lost about \$2.9 million or \$63 million in 2017 dollars, and had only \$32,089.35 in assets.²⁸⁷ More than half of accumulated Black wealth disappeared through the mismanagement of the Freedman's Savings Bank.²⁸⁸ Because the bank had represented much more than just a place to store money, its failure cost the Black American population more than just their deposits—it cost them trust in the federal government, which ultimately bore responsibility for the bank's misdeeds and they lost faith in banks in general.²⁸⁹

²⁷⁹ <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html>; Garrett-Scott, *Banking on Freedom*, p. 25; Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap*, p. 25-26.

²⁸⁰ <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html>

²⁸¹ <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html>; Garrett-Scott, *Banking on Freedom*, p. 25

²⁸² <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html>

²⁸³ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap*, p. 25-26.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, p. 30.

²⁸⁷ *Ibid.*, p. 30; Garrett-Scott, *Banking on Freedom*, p. 13; p. 31; Cite U.S. Senate 43rd Congress, 2nd Session (1874); Du Bois, *Black Reconstruction*, p. 600; Gilbert, "The Comptroller of the Currency," p. 131; and the U.S. Treasury at <https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html> state that the number of depositors were 61,144 at the time of its closing.

²⁸⁸ Baradaran, Mehra. *The Color of Money* (p. 30); "[H]alf the depositors [in the Freedmen's Bank] received compensation—an average of \$18.51 per person, or about three-fifths the value of their accounts." Foner, *Reconstruction*, 532.

²⁸⁹ Harmon et al., *Negro as a Business Man*, 54; Baradaran, Mehra. *The Color of Money* (p. 296); Seder and Burrell, *Getting It Together*, 9.

Black depositors protested to get the bank and the federal government to refund their money.²⁹⁰ Congress authorized refunds that, according to their claims, amounted to \$1.7 million of the \$2.9 million that was lost.²⁹¹ Refunds were dispersed in five payments between 1874 and 1914, but the process for obtaining refunds was difficult and placed a burden on account holders and heirs to prove that they had a rightful claim to a refund.²⁹² One study provides a comparative analysis of the average amount owed to depositors across 71 bank failures of federally chartered banks between 1865 to 1933.²⁹³ The Freedman's Savings Bank ranked third for the largest amount owed to depositors at the time of bank failure.²⁹⁴

State and private banks following emancipation refused to serve the credit needs of freedmen during the late 19th century, which meant that they had to rely on more expensive and exploitive credit systems.²⁹⁵ General stores became an important means of accessing short-term credit.²⁹⁶ Prices were at the discretion of the merchant.²⁹⁷ One price for goods purchased with cash and a different, often at least 25 percent higher, price for goods purchased with credit.²⁹⁸ Goods purchased on credit were charged interest of eight to 15 percent, with the rate determined in part by creditworthiness of the borrower.²⁹⁹ The amount of interest to charge was determined by the merchant.³⁰⁰

Black-owned banks, which evolved from mutual aid or fraternal societies post-Reconstruction,³⁰¹ were established to provide banking services to Black American communities.³⁰² Approximately 130 Black-owned banks were established between 1900 and 1934. Fifty savings and loans and credit unions were also established during this period. Only eight banks survived the Great Depression out of 130 Black-owned banks.³⁰³ Today, there are only 21 Black-owned banks nationwide, and 32 Black-owned financial institutions overall, including credit unions.³⁰⁴

²⁹⁰ Ibid., p. 146.

²⁹¹ Garrett-Scott, *Banking on Freedom*, p. 31.

²⁹² Garrett-Scott, *Banking on Freedom*, p. 32-40.

²⁹³ Claire Célérier and Purnoor Tak, "The Impact of Financial Inclusion on Minorities: Evidence from the Freedman's Savings Bank," August 1, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825143, p. 32.

²⁹⁴ Baradaran, *The Color of Money*, p. 30; Garrett-Scott, *Banking on Freedom*, p. 13; p. 31; Cite U.S. Senate 43rd Congress, 2nd Session (1874); W.E.B. Du Bois, *Black Reconstruction in America 1860-1880*, New York: Simon and Schuster, 1998, p. 600; Gilbert, "The Comptroller of the Currency," p. 131; and the U.S. Treasury at <https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html> state that the number of depositors were 61,144 at the time of its closing.

²⁹⁵ Nier II, "The Shadow of Credit," p. 151-152.

²⁹⁶ Ibid., p. 154.

²⁹⁷ Ibid., p. 154.

²⁹⁸ Ibid., p. 154.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Baradaran, *The Color of Money*, p. 40.

³⁰² Lila Ammons, "The Evolution of Black-Owned Banks in the United States between the 1880s and 1990s," *Journal of Black Studies* 26, no. 4, 1996, <https://doi.org/10.1177/002193479602600406>, p. 471; https://www.urban.org/sites/default/files/publication/101849/the20potential20and20limits20of20black-owned20banks_0_0.pdf.

³⁰³ Ibid., p. 87.

³⁰⁴ <https://www.businessinsider.com/personal-finance/black-owned-banks-credit-unions>

The federal government prevented the success of Black-owned banks by excluding them from full participation in the banking market.³⁰⁵ Black bank deposits were smaller and were more frequently withdrawn than white bank deposits, which made them more risky.³⁰⁶ Most Black depositors had no wealth to invest in the bank and were just depositing money from their wages while keeping small amounts to live on.³⁰⁷ They put their money into Black-owned banks not only for safekeeping, but also as rainy-day funds during bad times that came often.³⁰⁸ Because their deposits experienced high risk, Black-owned banks had to keep more cash as reserves or invest in other more liquid assets such as government securities, which were safer than loans.³⁰⁹ They needed to make sure they always had enough cash at the bank to pay out to depositors. Black-owned banks also held very high capital ratios to offset this risk.³¹⁰ For example, in 1920, the mean capital ratio for white banks was 18 percent, while Black banks had an average capital ratio of 32.9 percent.³¹¹ This meant that the Black bank owners invested more of their own money and earnings in the bank to keep it secure, but this severely lessened their ability to make a profit or lend money.³¹²

Another source of vulnerability for Black banks was their assets or loan portfolios.³¹³ The fate of Black banks was tied up with the fate of Black businesses, and the precarious state of the latter meant that Black banks lacked the healthy diversity required for sound banking.³¹⁴ Most thriving banks prefer to hold a mix of commercial and real estate loans, because a diversified portfolio is safer and more profitable.³¹⁵ But Black banks made loans almost exclusively on residential real estate because the vast majority of Black businesses were small service operations with no need of bank financing.³¹⁶

As a result, portfolios at Black-owned banks were largely home loans.³¹⁷ As described in Chapter 5 on housing, the federal government generally labeled Black homeowners and Black neighborhoods as being at higher risk of default, and white-owned banks generally refused to issue mortgages to Black homeowners. Black-owned banks often met the need and provided home loans to Black American homebuyers.³¹⁸ Since homes owned by Black Americans were undervalued due to government redlining, the property held for collateral during the term of the loan immediately diminished in value, upholding the perception that these loans were inherently risky investments.³¹⁹ Therefore, there was no market for mortgages held by Black Americans because of the

³⁰⁵ Ibid.

³⁰⁶ Baradaran, *The Color of Money*, p. 88-89

³⁰⁷ Baradaran, *The Color of Money*, p. 88-89

³⁰⁸ Baradaran, *The Color of Money*, p. 88-89

³⁰⁹ Baradaran, *The Color of Money*, p. 88-89

³¹⁰ Baradaran, *The Color of Money*, p. 88-89

³¹¹ Baradaran, *The Color of Money*, p. 88-89

³¹² Baradaran, *The Color of Money*, p. 88-89

³¹³ Baradaran, *The Color of Money*, p. 88-89

³¹⁴ Baradaran, *The Color of Money*, p. 88-89

³¹⁵ Baradaran, *The Color of Money*, p. 88-89

³¹⁶ Baradaran, *The Color of Money*, p. 88-89

³¹⁷ Housing Chapter.

³¹⁸ Housing Chapter.

³¹⁹ Housing Chapter.

devaluation of property owned by Black Americans and the assumption that loans held by Black Americans were inherently risky.³²⁰ This in turn meant that it was difficult for Black-owned banks to earn a profit from an investment portfolio that was largely composed of home loans to Black American homebuyers.³²¹

G. California

[Additional research to come]

Many of these structural racial disparities regarding access to unemployment insurance, food stamps, and COVID-19 federal loans in a crisis are also visible in California. From March through June 2020, 84.9 percent of California's Black labor force filed for unemployment benefits, compared to 39.4 percent of the state's white labor force.³²² Black Californians who received unemployment insurance during the pandemic received \$293.90, the smallest median weekly benefit of any racial group, versus white claimants who received \$394.90.³²³

California's version of food stamps, CalFresh, generally maintains the same work requirements that disproportionately cut Black adults off from food assistance at the federal level.³²⁴ In 2016, California enrolled only 72 percent of eligible residents in CalFresh, the fifth lowest rate in the nation.³²⁵ It is also one of 10 states that manage food assistance programs at the county level, which tends to be more expensive and variable than administering the program at the state level.³²⁶ Black Californians make up 6.5 percent of the state's population, but 14.7 percent of participating CalFresh households.³²⁷ During the pandemic, one survey found that 20.2 percent of Black households with children sometimes or often did not have enough to eat in a four week period spanning June and July, compared to 8.8 percent of white households with children.³²⁸

In California, an analysis of the distribution of federal loans found disparate distribution by race: Black American neighborhoods received \$445 per resident, while white neighborhoods received \$666 per resident, partially due to lower concentration of small businesses or small business employees in Black American

³²⁰ Lindsay, "The Negro in Banking," p. 195.

³²¹ Lindsay, "The Negro in Banking," p. 195.

³²² Bell et al., Cal. Policy Lab, An Analysis of Unemployment Insurance Claims in California During the COVID-19 Pandemic (Dec. 2020) p. 22.

³²³ *Id.* at p. 22.

³²⁴ CalFresh, The Able-Bodied Adults Without Dependents Time Limit, Cal. Dept. Social Services <<https://www.cdss.ca.gov/inforesources/calfresh/abawd>> (as of Aug. 19, 2021).

³²⁵ Botts & Rodriguez-Delgado, *Getting Food Stamps to Poor Californians is Surprisingly Difficult* (Sept. 2, 2019) CalMatters <<https://calmatters.org/california-divide/2019/09/california-food-stamp-participation-counties-challenges/>> (as of Aug. 19, 2021).

³²⁶ Botts & Rodriguez-Delgado, *Getting Food Stamps to Poor Californians is Surprisingly Difficult* (Sept. 2, 2019) CalMatters <<https://calmatters.org/california-divide/2019/09/california-food-stamp-participation-counties-challenges/>> (as of Aug. 19, 2021).

³²⁷ Tan & Danielson, *The CalFresh Food Assistance Program* (Sept. 2020) Public Policy Inst. Cal. <<https://www.pplic.org/publication/the-cal-fresh-food-assistance-program/>> (as of Aug. 19, 2021).

³²⁸ Ramos-Yamamoto, *Not Enough to Eat: California Black and Latinx Children Need Policymakers to Act* (Sept. 2020) Cal. Budget & Policy Center <<https://calbudgetcenter.org/resources/snap-cal-fresh-california-black-and-latinx-children-need-policymakers-to-act/>> (as of Aug. 19, 2021).

neighborhoods.³²⁹ However, another analysis revealed that in most major metro areas in the country—including Los Angeles, San Francisco, and San Diego—businesses in majority-white areas also received federal loans at a greater rate than businesses in majority-Black American areas.³³⁰

V. Drivers of the Wealth Gap Today

The primary drivers of the contemporary wealth gap today include unequal homeownership, Black Americans' holding fewer assets, and lower business ownership, which has resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crisis, and homelessness.

A. Unequal Homeownership

Because of racial discrimination in housing and mortgage markets over many decades, a reliance on homeownership in the U.S. during most of the 20th century for wealth-building continues to exacerbate the wealth gap between Black and white families.³³¹ Homes are one of the most important wealth assets that households can possess.³³² People who own homes can use them to borrow money to pay for expenses or pay off high-interest debt in times of crisis.³³³ Homeowners are able to generate wealth through home equity, so long as their home increases or appreciates in value. Homeownership is also believed to be more beneficial than renting because owners build equity, and obtain additional tax benefits.³³⁴ Homeowners may also face less housing instability than renters—partially because they tend to be more well-off in general—especially during a crisis, and may therefore be less likely to lose their housing.³³⁵ Housing affordability problems—where an occupant must pay more than 30 percent of gross income for housing costs, including utilities³³⁶—are more than twice as common among renters than homeowners.³³⁷

Historically, governmental and institutional barriers to homeownership have impaired the ability of Black Americans to purchase real estate, gain wealth through real estate, and transfer that wealth to successive generations.³³⁸ Broad-based homeownership in the United States as a means to achieve economic security was

³²⁹ Ong et al., Latino Policy & Politics Initiative, Univ. Cal. Los Angeles, Disparities in the Distribution of Paycheck Protection Program Funds Between Majority-White Neighborhoods and Neighborhoods of Color in California (Dec. 2020) p. 5.

³³⁰ Morel et al., *Rampant Racial Disparities Plagued How Billions of Dollars in PPP Loans Were Distributed in the U.S.* (May 1, 2021) <<https://revealnews.org/article/rampant-racial-disparities-plagued-how-billions-of-dollars-in-ppp-loans-were-distributed-in-the-u-s/>> (as of Aug. 19, 2021).

³³¹ <https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/>

³³² See, e.g., Bowser, *The Black Middle Class: Social Mobility – And Vulnerability* (2006) p. 120.

³³³ Bortz, *How to Unlock the Equity in Your Home* (Aug. 10, 2021), N.Y. Times <<https://www.nytimes.com/2021/08/10/realestate/tapping-home-equity.html>> (as of Aug. 18, 2021).

³³⁴ Alexandra Killewald, and Brielle Bryan, “Does Your Home Make You Wealthy?” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 2, no. 6, 2016, <https://doi.org/10.7758/rsf.2016.2.6.06>, p. 11.

³³⁵ *Ibid.*

³³⁶ <https://archives.hud.gov/local/nv/goodstories/2006-04-06glos.cfm>

³³⁷ *Ibid.*

³³⁸ *Ibid.*

brought about through public policy reforms, starting with New Deal legislation.³³⁹ The New Deal created relatively sound long-term mortgage markets and down payment capital finance. It also reduced down payment requirements for homeownership. This transformed the housing landscape, allowing many working-class households to move from the rental lifestyle to obtaining a piece of the American dream—owning a home.³⁴⁰ Yet, as described above and in Chapter 5 on housing, the path to homeownership has been riddled with entrenched racism, as the Federal Housing Administration systematically refused loan applications to Black families through redlining.³⁴¹

Today, Black Americans are in a worse position than white Americans to have homes as assets to aid them in a crisis. The racial homeownership gap was 19 percent in 1940, and grew to 28 percent in 2009. As of the second quarter of 2020, out of \$30.8 trillion in real estate assets in the U.S.,³⁴² five percent was held by Black American households and 78 percent was held by white households.³⁴³ In 2019, 42.8 percent of Black Americans owned homes versus 73.3 percent of white Americans, and are more likely to face affordability issues in securing capital to purchase and sustain housing at 30 percent of their gross income, including utilities.³⁴⁴

Black Americans who own homes have a greater reliance on the house as a source of wealth than white households.³⁴⁵ For example, in 2014, home equity accounted for 92 percent of Black Americans' net worth.³⁴⁶ This is because Black American homes are typically the largest investment a Black American household has, while white households have a larger variety of investments, i.e., a more diversified portfolio.³⁴⁷ In addition, white people become homeowners and begin accumulating home equity an average of eight years earlier than Black American families—linked to inheritance or intergenerational wealth transfers.³⁴⁸ Home equity for Black American homeowners has not increased at the same rate as it has for white homeowners largely because home values in the neighborhoods to which Black people have been systematically restricted, have been slow to recover since the housing crisis.³⁴⁹ Consequently, they also have generated lower returns on mortgage debt.³⁵⁰

There is a gap between the appreciation of a home owned by a white family and the appreciation of a similar home owned by a Black American family.³⁵¹ When Black Americans do own homes, they tend to be appraised

³³⁹ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

³⁴⁰ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

³⁴¹ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

³⁴² Ibid.

³⁴³ Emily Moss, Kriston McIntosh, Wendy Edelberg, and Kristen Broady, “The Black-White Wealth Gap Left Black Households More Vulnerable,” *Brookings*, 2020, <https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/>.

³⁴⁴ CFPB Report, *supra* note 33, at 5.

³⁴⁵ Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

³⁴⁶ Tippet et al., Center for Global Policy Solutions, *Beyond Broke: Why Closing the Racial Wealth Gap is a Priority for National Economic Security* (May 2014) p. 3.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

³⁵¹ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

for less than comparable white homes, limiting the amount of money that can be taken out of their home equity. Race affects the rate of return on home asset.³⁵² Black American home-owning households have an average of \$140,000 less in net worth than their white counterparts.³⁵³ In 2019, the typical Black American homeowner had a home value of \$150,000.³⁵⁴ The typical white homeowner had a home value of \$230,000. Black American homeowners had a median home equity of \$66,800 in 2019.³⁵⁵ White homeowners had a median home equity of \$130,000 in the same year.³⁵⁶ Residential segregation could also be pushing down the value of houses in Black American neighborhoods.³⁵⁷ The depreciation of home value is due to residential segregation and concentrated neighborhood poverty attributable to “structural conditions.”³⁵⁸ Black American homeowners also tend to own homes appraised for less in neighborhoods deemed less valuable,³⁵⁹ which decreases their available equity relative to white homeowners.³⁶⁰ Even controlling for factors like neighborhood or home quality, a study has found systemic undervaluation of homes in Black American neighborhoods attributable to anti-Black bias.³⁶¹

Black Americans have more difficulty accessing home equity due to factors linked to systemic discrimination in mortgage lending.³⁶² All of this limits Black Americans’ access to the benefits of home equity in a crisis.³⁶³ Black Americans also experience significant housing cost burdens.³⁶⁴ Without sufficient wealth in the first place, Black American households have limited means to invest in homeownership.³⁶⁵ In 2019, 43 percent of Black American households spent more than 30 percent of their income on housing—compared with 25 percent of white households.³⁶⁶ Systemic discrimination in mortgage lending may also make it more difficult for Black American homeowners to access their home equity through cash-out refinancing,³⁶⁷ a means of accessing home equity that has been increasingly popular during the pandemic.³⁶⁸ Between April 2020 and January 2021, less than a quarter of Black American homeowners who could have saved \$200 a month by refinancing did so,

³⁵² Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

³⁵³ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 11.

³⁵⁴ Neil Bhutta, et al., “Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances.”

³⁵⁵ Neil Bhutta, et al., “Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances.”

³⁵⁶ Neil Bhutta, et al., “Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances.”

³⁵⁷ Herring, Henderson, “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap,” p. 15.

³⁵⁸ *Ibid.*, p. 1546.

³⁵⁹ Manhertz, *Home Value Disparities Between Races are Shrinking, but Remain Very Wide* (Dec. 19, 2020) Zillow

<<https://bit.ly/3jbhrxT>> (as of Aug. 18, 2020); Perry et al., Brookings Inst., *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property* (Nov. 2018) pp. 13-15.

³⁶⁰ See Redfin, *Black Homeowners Earned \$59,000 in Home Equity in 2020, Compared with \$50,000 for White Homeowners* (Mar. 9, 2021) PR Newswire <<https://www.prnewswire.com/news-releases/black-homeowners-earned-59-000-in-home-equity-in-2020--compared-with-50-000-for-white-homeowners-301243130.html>> (as of Aug. 18, 2021).

³⁶¹ Perry et al., *supra* note 38, at p. 3.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ Harvard Report, *supra* note 32, at p. 26.

³⁶⁵ Darity Jr. et al., “What We Get Wrong About Closing the Racial Wealth Gap,” p. 14.

³⁶⁶ Harvard Report, *supra* note 32, at p. 26.

³⁶⁷ Murillo, *supra* note 9.

³⁶⁸ Campisi, *Pandemic Remodeling Boom Looming? Cash-Out Refinancing Hits 13-Year High* (Dec. 4, 2020) Forbes <<https://www.forbes.com/advisor/mortgages/cash-out-refinancing-hits-13-year-high/>> (as of Aug 18, 2021).

compared to 40 percent of similarly situated white homeowners.³⁶⁹

Black Californians are much more likely to be renters and much more likely to be housing cost-burdened. For instance, 58.4 percent of Black Californians are renters versus 34.1 percent for white Californians, and much more likely to be housing cost-burdened.³⁷⁰ Black Californians are thus disproportionately less likely to have access to the credit and housing stability that a home can provide in a crisis.³⁷¹ Among those who do own homes, Black American families in many California cities are much more likely to own homes in formerly redlined neighborhoods, where median home equity is much lower.³⁷² Anecdotal evidence from California also suggests outright racial discrimination in the valuation of Black-owned homes.³⁷³ This reduces the amount of money Black Californian homeowners can borrow against the value of their homes in a crisis, or the value of cash-out refinancing, relative to white homeowners.³⁷⁴

In California, Black Americans experience continuing difficulties affording homes and face outsized rent burdens. Two-thirds of the individuals paying more than 30 percent of their income on rent are people of color. Homeownership for Black Californians lags behind the nationwide Black American homeownership rate—36.8 percent versus 44 percent nationally in 2019. The homeownership rate for white families is 28.4 percent higher than Black families. And homeownership rates for Black American households have fallen every decade for the last 30 years, both unconditionally and after controlling for income and demographics. Sixty-three percent of white Californians own their homes, while only 33 percent of Black Californians do. Estimates from 2021 reflect that 35 percent of Black Californians own homes. In addition, home ownership for Black American households has declined by more than 20 percent since 1980. Black Californians are involved in a “very different mortgage market” than white Americans, which leads to them facing challenges such as higher price loans, more predatory lending, and more risk. In October 2008, 6.3 percent of Black American homeowners were in default on their home purchase loans, though Black American homeowners are only 1.3 percent more likely to be in default than white people. Further, during the housing crisis of the 2000s, California had the country’s highest foreclosure rates, with Los Angeles leading the state. Black American household foreclosure rates were 1.9 times that of white Americans, likely due to increased targeting of minority communities for predatory lending as discussed above.

But closing the homeownership gap alone will not close the racial wealth gap; the homeownership gap alone does not explain the racial wealth gap. Among Black and white American households who do not own a home,

³⁶⁹ Murillo, *supra* note 9.

³⁷⁰ Davalos et al., Cal. Budget & Policy Center, California’s 17 Million Renters Face Housing Instability and Inequity Before and After COVID-19 (Jan. 2021) pp. 6-7.

³⁷¹ *Ibid.*

³⁷² Anderson, *Redlining’s Legacy of Inequality: \$212,000 Less Home Equity, Low Homeownership Rates for Black Families* (June 11, 2020) Redfin <<https://www.redfin.com/news/redlining-real-estate-racial-wealth-gap/>> (as of Aug. 20, 2021).

³⁷³ E.g., Glover, *Black California Couple Lowballed by \$500K in Home Appraisal, Believe Race was a Factor* (Feb. 12, 2021) ABC7 <<https://abc7news.com/black-homeowner-problems-sf-bay-area-housing-discrimination-minority-homeownership-anti-black-policy/10331076/>> (as of Aug. 20, 2021).

³⁷⁴ *Ibid.*

white households still have 31 times more wealth than Black American households.³⁷⁵

B. Fewer Assets

Black American households hold less assets than white households overall, but Black Americans have a higher proportion of assets in auto and home,³⁷⁶ and less in net liquid and net business assets. Black American households are also generally less likely to hold financial assets.³⁷⁷ Black Americans have “substantially” fewer assets than white people at every income level, including bank deposits, stocks, bonds, and loans.³⁷⁸

Black Americans tend to have fewer investments. Some studies argue that Black American investment patterns generally show risk aversion and lack of education on stocks and investments.³⁷⁹ They argue that wealthier Black Americans tend to save more and invest less³⁸⁰ compared to wealthier white Americans, and that white Americans are more likely than Black Americans to invest in high-risk, high-reward assets.³⁸¹ For example, in 2004, Black American families were less likely than white families to have investment accounts and retirement accounts. Only 44 percent of Black Americans have retirement savings accounts, with a typical balance of around \$20,000, compared to 65 percent of white Americans, who have an average balance of \$50,000, according to the Federal Reserve.³⁸² And only 34 percent of African Americans own any stocks or mutual funds, compared to more than half of white people. Some studies claim that this can be attributed to familial influence—Black American families are less likely to have investment accounts if their parents didn’t have any.³⁸³ Other studies argue that Black Americans are not significantly more risk averse or less financially literate than white people with similar levels of income and wealth. Further, Black Americans engage in entrepreneurship, which presents inherent risk, at higher rates than white Americans with similar levels of income and wealth. Low wealth, lack of financial inclusion, and financial constraints on choice often forces Black borrowers to use predatory and abusive alternative financial services rather than financial illiteracy.³⁸⁴

Black Americans have less liquid assets. Liquid assets accessible as cash in times of crisis include cash savings, checking accounts, savings accounts, money market funds, certificates of deposit, and government bonds.³⁸⁵ Access to liquid assets is important in a crisis, as it enables people to continue to pay bills in the event of a

³⁷⁵ Ibid., p. 11.

³⁷⁶ Blau, Graham, “Black/White Differences in Wealth and Asset Composition,” p. 18.

³⁷⁷ Oliver, Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*.

³⁷⁸ Conley, *Being Black, Living in the Red: Race, Wealth and Social Policy in America*, p. 41.

³⁷⁹ Andrew F. Brimmer, “Income, Wealth, and Investment Behavior in the Black Community,” *The American Economic Review* 78, 2, 1988, p. 151-155.

³⁸⁰ Herring, Henderson, “Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap,” p. 8.

³⁸¹ Lisa A. Keister, “Race and Wealth Inequality: The Impact of Racial Differences in Asset Ownership on the Distribution of Household Wealth,” *Social Science Research* 29, 2000, p. 499.

³⁸² <https://money.usnews.com/money/retirement/aging/articles/the-retirement-crisis-facing-black-americans>

³⁸³ Sharon A. Devaney, Sophia T. Anong, and Yuan Yang, “Asset Ownership by Black and White Families,” *Financial Counseling and Planning* 18, 1, 2007, p. 33-45.

³⁸⁴ <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-case-for-accelerating-financial-inclusion-in-black-communities>

³⁸⁵ De La Cruz-Viesca et al., *Federal Reserve Bank of San Francisco, The Color of Wealth in Los Angeles* (2016) p. 25.

sudden loss of income, or pay for emergency expenses such as medical costs. Lack of access to liquid assets can heighten the impact of crises by making it harder to afford basic necessities.³⁸⁶ People may also turn to family for economic support in times of hardship.³⁸⁷ In addition, access to government aid such as unemployment insurance, nutrition subsidies, and crisis-specific programs, such as stimulus checks and small business loans, help people and their businesses stay afloat.³⁸⁸ These resources are vital for surviving economic crises. For example, liquid assets such as cash savings help people pay bills in the event of a job loss or weather emergency expenses like a medical emergency.³⁸⁹ Similarly, people who have homes, stocks, or retirement funds may leverage their home value for a loan,³⁹⁰ liquidate stocks, or borrow from or against their retirement accounts to pay for expenses during difficult economic times.³⁹¹

Black American households tend to disproportionately lack access to many of these resources, often due to the persistence of historical disparities.³⁹² In 2019, while 96.8 percent of Black American families had some kind of liquid asset—such as a checking account, savings account, or pre-paid card—typical Black American families with liquid assets had \$1,500 in liquid savings, compared to \$8,100 for white families with liquid assets.³⁹³

³⁸⁶ Akabas et al., *supra* note 2; Hutchful, Cal. Budget & Policy Center, *The Racial Wealth Gap: What California Can Do About a Long-Standing Obstacle to Shared Prosperity* (Dec. 2018) p. 3.

³⁸⁷ Mills & Zhang, Urban Inst., *Social Support Networks and their Effects on Hardship Avoidance Among Low-Income Households* (Dec. 2013).

³⁸⁸ Liu & Parilla, *New Data Shows Small Businesses in Communities of Color Had Unequal Access to Federal COVID-19 Relief* (Sept. 17, 2020) Brookings Inst. <<https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/>> (as of Aug. 18, 2021).

³⁸⁹ Akabas et al., *New BPC Survey Shows Americans Need Better Ways to Save for Emergencies* (Feb. 25, 2021) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/new-bpc-survey-shows-americans-need-better-ways-to-save-for-emergencies/>> (as of Aug. 18, 2021).

³⁹⁰ Lerner, *Accessing Home Equity in a Tight Economy Has Become Problematic* (June 11, 2020) Wash. Post <https://www.washingtonpost.com/realestate/equity-rich-but-cash-poor--what-can-a-homeowner-do/2020/06/10/1856e51e-9a0c-11ea-a282-386f56d579e6_story.html> (as of Aug. 18, 2021).

³⁹¹ Akabas et al., *supra* note 2.

³⁹² E.g., Gladstone et al., *Racial Inequities Have Long Existed in the Economy. A New BPC Survey Shows COVID-19 Made Them Worse*. (June 22, 2020) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/racial-inequities-have-long-existed-in-the-economy-a-new-bpc-survey-shows-covid-19-made-them-worse/>> (as of Aug. 18, 2021); Hardy & Logan, Hamilton Proj., Brookings Inst., *Racial Economic Inequality Amid the Covid-19 Crisis* (Aug. 2020) p. 2; Murillo, *Black Homeowners Are Being Left out of the Mortgage Refinance Boom* (June 9, 2021) Money <<https://money.com/mortgage-refinance-rate-race-gap/>> (as of Aug. 18, 2021); Choe, *Stocks are Soaring, and Most Black People are Missing Out* (Oct. 12, 2020) AP News <<https://apnews.com/article/virus-outbreak-race-and-ethnicity-business-us-news-ap-top-news-69fe836e19a8dfe89d73e8e4be6d480c>> (as of Aug. 18, 2021); Hardy & Logan, Hamilton Proj., Brookings Inst., *Racial Economic Inequality Amid the Covid-19 Crisis* (Aug. 2020) p. 2; Murillo, *Black Homeowners Are Being Left out of the Mortgage Refinance Boom* (June 9, 2021) Money <<https://money.com/mortgage-refinance-rate-race-gap/>> (as of Aug. 18, 2021); Choe, *Stocks are Soaring, and Most Black People are Missing Out* (Oct. 12, 2020) AP News <<https://apnews.com/article/virus-outbreak-race-and-ethnicity-business-us-news-ap-top-news-69fe836e19a8dfe89d73e8e4be6d480c>> (as of Aug. 18, 2021); Bivens et al., Economic Policy Inst., *Reforming Unemployment Insurance: Stabilizing a System in Crisis and Laying the Foundation for Equity* (June 2021); Brantley et al., *Association of Work Requirements with Supplemental Nutrition Assistance Program Participation by Race/Ethnicity and Disability Status, 2013-2017* (June 2020); Bivens et al., Economic Policy Inst., *Reforming Unemployment Insurance: Stabilizing a System in Crisis and Laying the Foundation for Equity* (June 2021); Bhutta et al., *supra* note 1; Akabas et al., *supra* note 2; GAO Report, *supra* note 5; Cronin, *supra* note 6; Liu & Parilla, *supra* note 7.

³⁹³ Bhutta et al., *supra* note 1.

Black Americans have less non-liquid assets. In general, non-liquid assets such as homes, stocks, and retirement funds can support financial security by increasing resources necessary to weather a crisis or invest in wealth-generating assets for the future.³⁹⁴ As discussed above, Black Americans experience myriad barriers to homeownership and the mortgage market. Stocks and mutual funds, which can be sold, and retirement funds, which can be liquidated or borrowed against, also provide potential sources of aid in a crisis.³⁹⁵ Black Americans are also less likely to own stocks than white Americans, and Black Americans who own stocks have less equity than white Americans do.³⁹⁶ While 61 percent of white households own any form of stocks, only 33.5 percent of Black American households do.³⁹⁷ Among families who own stocks, the typical white family has access to \$50,600 they could tap in an emergency, compared to \$14,400 for the typical Black American family.³⁹⁸

While Black Americans are more likely to have access to retirement accounts than homes or other types of stocks, they are still less likely than white Americans to have them.³⁹⁹ Around 55 percent of Black American working-age families have access to an employer-sponsored retirement plan, and 45 percent participate.⁴⁰⁰ Seventy percent of white working-age families have access to an employer-sponsored retirement plan, and 60 percent of them participate.⁴⁰¹ Among working-age white families with balances in such accounts, the typical white family has approximately \$50,000 saved, whereas the comparable Black American family has approximately \$20,000 saved.⁴⁰² Additionally, owners of these retirement accounts may face penalties for withdrawing money from them to handle a crisis.⁴⁰³ During the pandemic, a survey found that Black American households with retirement accounts were much more likely to report that they planned on withdrawing from or borrowing against them (48 percent and 45 percent) than white households (29 percent and 29 percent) due to relative lack of other assets.⁴⁰⁴ However, withdrawing money from retirement accounts can incur tax and other penalties.⁴⁰⁵ One survey found that Black American workers are less likely to have access to an employer-offered emergency savings plan that they can draw from without a penalty than white workers (24 percent versus 26 percent).⁴⁰⁶

Similarly, Black Californians have less non-liquid assets. Only 22 percent of Black Americans in Los Angeles own stocks, mutual funds, and/or investment trusts; only 38 percent of households own an individual retirement

³⁹⁴ Hutchful, *supra* note 12, at p. 2.

³⁹⁵ E.g., Bhutta et al., *supra* note 1.

³⁹⁶ Choe, *supra* note 9; Bhutta et al., *supra* note 1.

³⁹⁷ Choe, *supra* note 9; Bhutta et al., *supra* note 1.

³⁹⁸ Choe, *supra* note 9; Bhutta et al., *supra* note 1.

³⁹⁹ *Ibid.*

⁴⁰⁰ Bhutta et al., *supra* note 1.

⁴⁰¹ Bhutta et al., *supra* note 1.

⁴⁰² Bhutta et al., *supra* note 1.

⁴⁰³ Gladstone et al., *supra*.

⁴⁰⁴ Gladstone et al., *supra*.

⁴⁰⁵ Watkins & Akabas, *supra*

⁴⁰⁶ Akabas et al., *supra*

account or private annuity.⁴⁰⁷ Eighteen percent of Black American households do not have a car.⁴⁰⁸ While Californians, in general, face long commute times, Black Californians in Los Angeles, on average, have a 7.5 percent longer commute; at the same time, only 72 percent of U.S.-born Black households in Los Angeles own a vehicle, the lowest proportion for a racial group.⁴⁰⁹

C. Lower Business Ownership

Business ownership allows Black Americans to participate in local, regional, and global markets from which they have historically been excluded due to systemic racism and discrimination.⁴¹⁰ Equity in a business is among one of the types of assets that are more unequally distributed by race.⁴¹¹ Lower wealth for Black Americans leads to lower business ownership and self-employment.⁴¹² Studies have demonstrated the substantial wealth advantages to self-employment and have shown that those who become self-employed show much stronger gains in wealth compared to individuals who never become self-employed.⁴¹³ This is especially true for Black business owners given that the median net worth for Black business owners is 12 times higher than Black nonbusiness owners.⁴¹⁴ Further, Black business ownership is a viable path to creating wealth not only for Black business owners, but for Black communities at large.⁴¹⁵ Most small businesses tend to hire from the community, which tends to create job opportunities for community residents.⁴¹⁶ Therefore, the success of Black-owned businesses is a critical path for economic empowerment in Black communities.⁴¹⁷

Despite the importance of Black business ownership, the Center for Financial Household Stability and the Federal Reserve Board of St. Louis have documented that, compared to white individuals, Black Americans own fewer of their assets in the form of business assets.⁴¹⁸ In terms of market share, Black-owned businesses

⁴⁰⁷ Ibid, p. 29-30.

⁴⁰⁸ Ali, "An Equity Profile of the Los Angeles Region," p. 6.

⁴⁰⁹ De La Cruz-Viesca et al., "The Color of Wealth in Los Angeles," p. 36.

⁴¹⁰ Perry & Romer, *To Expand the Economy, Invest in Black Businesses* (Dec. 31, 2020) Brookings Inst.

<https://www.brookings.edu/essay/to-expand-the-economy-invest-in-black-businesses/>.

⁴¹¹ Marion Gross Sobol, "Factors Influencing Private Capital Accumulation on the 'Eve of Retirement'," *Review of Economics and Statistics*, LXI, 1979, p. 585-593.

⁴¹² Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

⁴¹³ Association for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* (2017) pg. 8.

⁴¹⁴ Association for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* (2017) pg. 8.

⁴¹⁵ Association for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* (2017) pg. 4, 8.

⁴¹⁶ Association for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* (2017) pg. 4.

⁴¹⁷ Association for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* (2017) pg. 4.

⁴¹⁸ Klein, *Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap* (2017) FIELD at the Aspen Institute, pg. 6.

are significantly underrepresented in comparison to white and other minority-owned businesses.⁴¹⁹ In 2017, only 3.5 percent of all United States businesses were Black-owned compared to 81 percent white-owned, 9.7 percent Asian-owned, and 5.8 percent Hispanic-owned in the country.⁴²⁰ In Los Angeles, 11.7 percent of white households own a business versus 3.1 percent of Black American households.⁴²¹ Although Black business ownership has been steadily increasing in the United States, growth has been tremendously slow.⁴²² Several factors contribute to the racial disparity in American business ownership such as systemic barriers to securing start-up capital and the relatively small size of Black businesses.⁴²³

Black Americans face many systemic barriers when seeking the social and financial capital necessary to start their own businesses that make it increasingly difficult for Black entrepreneurs to secure the financial capital necessary to launch or grow their own businesses.⁴²⁴ As a result, Black business owners typically start their businesses with half the capital of white business owners despite the fact that they demonstrate a greater need for start-up financing.⁴²⁵ According to Pepperdine's Private Capital Access Index report, approximately 80 percent of Black businesses sought financing for planned business growth or expansions compared to only 55 percent.⁴²⁶ Although Black businesses demonstrate a greater desire and need to secure financing, discriminatory lending practices cause Black business owners to receive lower loan amounts at a significantly lower rate than white business owners.⁴²⁷ For example, the median loan amount for Black business owners who are approved for credit is less than half of the loan amounts extended to their white counterparts.⁴²⁸

Another barrier to the growth and development of Black businesses is the fact that, on average, the businesses owned by Black Americans are smaller than those owned by white Americans.⁴²⁹ A key factor for measuring the size of a business is whether the business has employees and statistics show that Black-owned businesses

⁴¹⁹ Howard, Smith, & Nwagwe, Banks & the Black Community, What Can Major Commercial and Retail Banking Institutions Do to Better Support Black Entrepreneurs and Businesses in the U.S.? (2020) pg. 1.

⁴²⁰ Howard, Smith, & Nwagwe, Banks & the Black Community, What Can Major Commercial and Retail Banking Institutions Do to Better Support Black Entrepreneurs and Businesses in the U.S.? (2020) pg. 1.

⁴²¹ De La Cruz-Viesca et al., "The Color of Wealth in Los Angeles," p. 43.

⁴²² Howard, Smith, & Nwagwe, Banks & the Black Community, What Can Major Commercial and Retail Banking Institutions Do to Better Support Black Entrepreneurs and Businesses in the U.S.? (2020) pg. 1-3.

⁴²³ Howard, Smith, & Nwagwe, Banks & the Black Community, What Can Major Commercial and Retail Banking Institutions Do to Better Support Black Entrepreneurs and Businesses in the U.S.? (2020) pg. 3.

⁴²⁴ Association for Enterprise Opportunity, The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success (2017) pg. 24.

⁴²⁵ Association for Enterprise Opportunity, The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success (2017) pg. 24-25.

⁴²⁶ Association for Enterprise Opportunity, The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success (2017) pg. 24.

⁴²⁷ Association for Enterprise Opportunity, The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success (2017) pg. 24.

⁴²⁸ Association for Enterprise Opportunity, The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success (2017) pg. 24.

⁴²⁹ Klein, Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap (2017) FIELD at the Aspen Institute, pg. 7.

are much less likely to have employees than white-owned businesses.⁴³⁰ In 2012, for example, 23.9 percent of businesses owned by white men had employees whereas only six percent of businesses owned by Black men had employees.⁴³¹ Although the size of a business has a significant influence on the profitability of a business, even Black-owned businesses with employees tend to be much less profitable than white-owned businesses with employees.⁴³² In 2014, 63.4 percent of white-owned businesses with employees indicated that they were profitable compared to the reported profitability of only 45.6 percent of Black-owned businesses with employees.⁴³³ In addition, the top 100 Black-owned businesses earned less than \$30 billion in 2014. Walmart earned \$482 billion, or sixteen times that.⁴³⁴

The challenges faced by Black business owners were further exacerbated by the economic hardships caused by the COVID-19 pandemic.⁴³⁵ The Federal Reserve Bank of New York reports that about 58 percent of Black-owned businesses were at risk of financial distress before the pandemic, compared to approximately 27 percent of white-owned businesses.⁴³⁶ The financial instability experienced by Black-owned businesses made these businesses particularly vulnerable at the onset of the pandemic.⁴³⁷ According to a report by the House Committee on Small Business, Black business ownership declined approximately 40 percent, more than any other racial group, during the first few months of the pandemic.⁴³⁸ Black business owners such as Richard Anderson, the owner of Kinfolk Brass Band and Music Group, experienced significant economic distress as a result of the pandemic.⁴³⁹ Before the pandemic, Kinfolk Brass Band was one of the most popular bands in New Orleans and frequently performed at weddings and music festivals around the world.⁴⁴⁰ However, lockdown measures enacted to reduce the spread of COVID-19 forced all large events and gatherings to cease.⁴⁴¹ Without any events to perform at, Kinfolk Brass Band and its band members, including owner Richard Anderson,

⁴³⁰ Klein, *Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap* (2017) FIELD at the Aspen Institute, pg. 8.

⁴³¹ Klein, *Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap* (2017) FIELD at the Aspen Institute, pg. 8.

⁴³² Klein, *Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap* (2017) FIELD at the Aspen Institute, pg. 9.

⁴³³ Klein, *Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap* (2017) FIELD at the Aspen Institute, pg. 9.

⁴³⁴ Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

⁴³⁵ Perry & Romer, *To Expand the Economy, Invest in Black Businesses* (Dec. 31, 2020) Brookings Inst.

<<https://www.brookings.edu/essay/to-expand-the-economy-invest-in-black-businesses/>>.

⁴³⁶ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes

<<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴³⁷ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes

<<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴³⁸ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes

<<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴³⁹ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes

<<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴⁴⁰ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes

<<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴⁴¹ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes

<<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

suffered a significant loss of income in 2020.⁴⁴²

VI. Effects of Wealth Gap

The harmful effects of the wealth gap, which cascade across generations, have resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crisis, and homelessness.

A. Fewer Intergenerational Wealth Transfers

Lower assets of Black Americans means that intergenerational wealth transfers are less likely and tend to be smaller. Inheritance, intergenerational wealth transfers, or parental wealth are primary sources of the capacity for sustained wealth building.⁴⁴³ Wealth, more than income, can be used to invest in appreciating assets for offspring, such as a college education, an unpaid internship in a high rent city, a new business, a property in a better residential neighborhood, or a job in the family firm.⁴⁴⁴ Without wealth transfers, regardless of income, these assets are harder to attain.⁴⁴⁵ The fewer resources the older generation has to transfer to the next, the lower the wealth position attained by the younger generation.⁴⁴⁶ At least 26 percent of an adult's wealth position is directly due to inheritance or gift money—a conservative estimate. The true effect could be as high as 50 percent.⁴⁴⁷ Greater familial assistance contributes to white families' greater ability to buy better housing and get better deals on mortgages earlier in life, further compounding the homeownership and wealth gap and giving white families better security in crisis.⁴⁴⁸ An Urban Institute study estimates that the shortfall in large gifts and inheritances accounts for 12 percent of the Black-white wealth gap.⁴⁴⁹

The devastating impact of fewer intergenerational transfers is reflected in the stark wealth gap between Black and white American millennials. While the typical white millennial family has about \$88,000 in wealth, the typical Black millennial family has only about \$5,000 in wealth. Further, white millennial families made huge

⁴⁴² Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes <<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴⁴³ Blau, Graham, "Black/White Differences in Wealth and Asset Composition"; Conley, *Being Black, Living in the Red: Race, Wealth and Social Policy in America*; Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*; Killewald, "Return to Being Black, Living in the Red: A Race Gap in Wealth That Goes Beyond Social Origins"; Weller et al., "Stimulating How Large Policy Proposal Affect the Black-White Wealth Gap."

⁴⁴⁴ https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3813400_code3127782.pdf?abstractid=3698814&mirid=1&type=2

⁴⁴⁵ https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3813400_code3127782.pdf?abstractid=3698814&mirid=1&type=2

⁴⁴⁶ Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*.

⁴⁴⁷ Conley, "Decomposing the Black-White Wealth Gap: The Role of Parental Resources, Inheritance, and Investment Dynamics"; Herring, Henderson, "Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap"; Weller et al., "Stimulating How Large Policy Proposal Affect the Black-White Wealth Gap".

⁴⁴⁸ Blau, Graham, "Black/White Differences in Wealth and Asset Composition"; Conley, *Being Black, Living in the Red: Race, Wealth and Social Policy in America*; Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*; Killewald, "Return to Being Black, Living in the Red: A Race Gap in Wealth That Goes Beyond Social Origins"; Weller et al., "Stimulating How Large Policy Proposal Affect the Black-White Wealth Gap."

⁴⁴⁹ McKernan, Signe-Mary, Caroline E. Ratcliffe, Margaret Simms, and Sisi Zhang. "Private transfers, race, and wealth." *The Urban Institute, Report 5* (2012).

strides between 2016 and 2019, and they now lag previous generations of white families by only about five percent.⁴⁵⁰ Between 2007 and 2019, however, Black millennials fell further and further behind—not just compared with white millennials, but compared with previous generations of Black Americans.⁴⁵¹ While white millennials trail the wealth of previous generations of white Americans by only five percent, Black millennials trail previous generations of Black Americans by 52 percent.⁴⁵² The typical Black millennial has \$5,700 less in net worth than counterparts in previous generations.⁴⁵³

There are several reasons for these deep disparities between Black and white millennials.⁴⁵⁴ First, white millennials are more likely to benefit from having wealthy parents. Greater familial assistance contributes to white families' greater ability to buy better housing and get better deals on mortgages earlier in life, further compounding the homeownership and wealth gap and giving white families better security in crisis.⁴⁵⁵ Their parents have more resources, for example, to help them with down payments on their first house or to help them pay off their student loans.⁴⁵⁶ About 80 percent of Black millennials with at least a bachelor's degree still have student loan debt, compared with about half of white millennials. White millennials are also more likely to own assets like stocks and homes, which have ballooned in value in recent years.⁴⁵⁷ While about two-thirds of white millennials own homes, less than a third of Black millennials own homes.⁴⁵⁸

B. Lower Financial Resilience during Crisis

Support from family networks can provide a “private safety net” to aid with cash transfers, housing, or childcare in times of material hardship.⁴⁵⁹ Cash transfers can provide additional income, multigenerational housing can provide shelter, and family-provided childcare can permit a parent to work and earn income as well as avoid childcare expenses.⁴⁶⁰ For example, during the COVID-19 pandemic, almost a quarter of renters borrowed money from friends or family.⁴⁶¹

While Black Americans receive assistance from family members at high rates, their overall tendency to lack resources may reduce the available quantity of such assistance, and may result in economic harm to the giver.⁴⁶²

⁴⁵⁰ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵¹ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵² <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵³ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵⁴ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵⁵ Blau, Graham, “Black/White Differences in Wealth and Asset Composition”; Conley, *Being Black, Living in the Red: Race, Wealth and Social Policy in America*; Darity, Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century*; Killewald, “Return to Being Black, Living in the Red: A Race Gap in Wealth That Goes Beyond Social Origins”; Weller et al., “Stimulating How Large Policy Proposal Affect the Black-White Wealth Gap.”

⁴⁵⁶ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵⁷ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵⁸ <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth>

⁴⁵⁹ Whitehead, Center for Poverty Research, Univ. Cal. Davis, *Support from Family Does Not Replace the Social Safety Net* (Apr. 2016) p. 1.

⁴⁶⁰ *Id.* at p. 1.

⁴⁶¹ Harvard Report, *supra* note 32, at 29.

⁴⁶² Whitehead, *supra* note 88, at p. 1.

Black American families are more likely than white families to have high-poverty family networks and more likely to make repeated cash transfers, which hinders their ability to accumulate wealth.⁴⁶³ For example, in 2019, 71.9 percent of white families expected that they could get \$3,000 from friends or family during a crisis, versus less than 40.9 percent of Black American families.⁴⁶⁴ While new Black American mothers are more likely to live in a relative's home, host a family member, and give or receive money than white mothers, helping family members in poverty may have negative consequences for struggling families.⁴⁶⁵

A pre-pandemic study found that while 29.1 percent of white households are liquid-asset poor (meaning that they could not use their savings to live for three months at the federal poverty rate), 58.2 percent of Black American households are.⁴⁶⁶ And a 2020 study found that 36 percent of white families had enough savings to cover six months of expenses, versus 14 percent of Black American families.⁴⁶⁷ In one February 2021 survey of "disadvantaged workers," 42 percent of white households reported that they could not pay for a \$400 emergency expense without taking on additional debt, drawing down retirement accounts, or selling items, compared to 59 percent of Black American households.⁴⁶⁸ The survey also found that 36 percent of Black American respondents said that they had no money at all set aside for emergencies, compared to 24 percent of white respondents. As a result, Black American families may be hit harder by crises because they have considerably lower access to liquid assets than white families.⁴⁶⁹

Black Americans are more likely to suffer from economic crises such as the COVID-19 pandemic. For example, one June 2020 survey found that while only 27 percent of white households had experienced financial hardship as a result of the pandemic, 40 percent of Black American households had.⁴⁷⁰ In addition, lack of access to liquid assets can also force people into financially risky options during a crisis, such as taking out predatory payday loans or high-interest credit card debt.⁴⁷¹ Lack of access to liquid assets can also make it harder to afford food and rent.⁴⁷² June 2020 census data showed that, among households where a job was lost during the COVID-19 pandemic, 31 percent of Black American households lacked sufficient food in the prior week (a 12 point increase), compared to 12 percent of white households (a five point increase).⁴⁷³ The data also showed that, compared to white renters, Black American renters were less likely to have paid their rent in the previous

⁴⁶³ *Id.* at p. 2.

⁴⁶⁴ Hutchful, *supra* note 12, at p. 4; Bhutta et al., *supra* note 1.

⁴⁶⁵ *Id.* at p. 2.

⁴⁶⁶ Gladstone et al., *supra* note 9; Sims & Weisman, *Prosperity Now Scorecard: Main Findings* (Jan. 2020) Prosperity Now <<https://scorecard.prosperitynow.org/main-findings#takeaways>> (as of Aug. 18, 2021).

⁴⁶⁷ Bhutta et al., *supra* note 1.

⁴⁶⁸ Akabas et al., *supra* note 2.

⁴⁶⁹ Akabas et al., *supra* note 2.

⁴⁷⁰ Gladstone et al., *supra* note 9.

⁴⁷¹ Watkins & Akabas, *The Savings Gap for Americans is A Key Component of Economic Stability – Here's what we Can Do About it* (July 1, 2020) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/the-savings-gap-for-americans-is-a-key-component-of-economic-stability-heres-what-we-can-do-about-it/>> (as of Aug. 18, 2021).

⁴⁷² Watkins & Akabas, *The Savings Gap for Americans is A Key Component of Economic Stability – Here's what we Can Do About it* (July 1, 2020) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/the-savings-gap-for-americans-is-a-key-component-of-economic-stability-heres-what-we-can-do-about-it/>> (as of Aug. 18, 2021).

⁴⁷³ Gladstone et al., *supra* note 9.

month and more likely to predict that they would not be able to make their next rent payment.⁴⁷⁴ In a May 2020 survey, Black American respondents were more than twice as likely as white respondents to report missing a credit card, utility, internet, rent, mortgage, or other “important payment” since the beginning of the pandemic.⁴⁷⁵ Black American families with liquid assets also use them up more rapidly than white families during a crisis.⁴⁷⁶ Black American families with emergency savings at the start of the pandemic were twice as likely as white households to have needed to use them by May, and more than twice as likely to have already spent at least a quarter of their savings.⁴⁷⁷

C. California

[To come: additional research regarding unequal homeownership, lower business ownership]

In California, Los Angeles provides a stark version of nationwide racial disparities in liquid assets accessible during a crisis.⁴⁷⁸ A 2014 study of the Los Angeles metro area found that the median value of liquid assets for native born Black American households was \$200, compared to \$11,000 for white households.⁴⁷⁹ While 91.6 percent of white households had any kind of liquid asset, only 62.3 percent of native-born Black American households did. Further, 90.1 percent of white households had a checking account, versus 68.1 percent of native-born Black American households.⁴⁸⁰ In addition, 71 percent of white households had a savings account, versus 55.5 percent of native-born Black American households.⁴⁸¹ While 40.7 percent of white households had stocks, mutual funds, or investment trusts, only 21.5 percent of native-born Black American households did.⁴⁸² Finally, 63.6 percent of white households had an individual retirement account or private annuity, versus 37.9 percent of native-born Black American households.⁴⁸³

VII. Conclusion

[Summary of ties to enslavement]

The American government at the federal, state, and local levels has systematically prevented Black American communities from building, maintaining, and passing on wealth because of the atrocities of slavery, segregation, racial terror, institutional and systemic racist oppression, and harmful racist neglect atrocities in nearly every sector of civil society. These harms cascade over a lifetime and compound over generations. As a result, Black Americans have suffered and continue to disproportionately experience a large and persistent wealth gap as compared to other racial groups. Addressing this persistent racial wealth gap means countering

⁴⁷⁴ Gladstone et al., *supra* note 9.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ De La Cruz-Viesca et al., *supra* note 11.

⁴⁷⁹ *Id.* at p. 38.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at p. 25.

⁴⁸² *Id.* at p. 6.

⁴⁸³ *Id.* at pp. 6-7.

long-standing institutional arrangements that have kept Black American households from building and growing wealth at the same rate as white households to the present day.

DRAFT