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I. Introduction

As discussed in the previous chapters, throughout history, the American government at all levels has treated African Americans as criminals for the purposes of social control, and to maintain an economy based on exploited African American labor. This criminalization of African Americans is an enduring legacy of slavery. These persisting effects of slavery have resulted in the over-policing of African American neighborhoods, the mass incarceration of African 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 African Americans are in the lowest caste of America's racial hierarchy.¹ As the following chapter will show, this criminalization of African Americans has resulted in a criminal justice system that, overall, physically harms, imprisons, and murders African Americans more than other racial group relative to their percentage of the population. While constitutional amendments² and federal civil rights laws³ have tried to ameliorate this mistreatment of African Americans, the inequities that remain are so significant that some scholars have argued that, as it relates to African Americans, U.S. society has replaced legal segregation with the criminal justice system.⁴ African Americans are more likely than white Americans to be arrested, convicted, and to serve lengthy prison sentences.⁵ African American adults are 5.9 times as likely to be incarcerated than white people.⁶ The experiences of African Americans with the criminal justice system also result in a general mistrust of the civil justice system⁷ where African Americans also face barriers to accessing justice such as obtaining a lawyer.⁸

In California, the history of the inequities African 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, California has contributed to the inequities African Americans have experienced and continue to experience. For example, California law once prohibited African Americans from testifying in court cases involving white people.⁹ More recently, California's punitive criminal justice policies, such as the state's three-strikes law, have resulted in large numbers of African



Young Black men enslaved as part of the convict labor system of Florida. (1915)

Americans in prisons and jails.¹⁰ Although there is very little scholarship on African Americans' experience in the civil legal system compared to scholarship on their experience in the criminal justice system, there is evidence that African Americans have historically experienced and continue to experience discrimination, such as lack of access to a lawyer¹¹ and racial bias among jurors.¹²

Section II will discuss the historical criminalization of African Americans and implicit bias. Section III will discuss discrimination in policing. Section IV will discuss discrimination in trial and

sentencing. Section V will discuss discrimination in incarceration. Section VI will discuss the effects of contact

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with the criminal justice system. Lastly, section VII will discuss the experience of African Americans in the civil legal system.

II. Criminalization of African Americans

It is well established in the historical scholarship that American society has criminalized African Americans starting with enslavement.¹³ Federal, state, and local governments, in order to subjugate African Americans and maintain their enslaved status, criminalized African Americans as a way to control them. 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 African Americans.¹⁴

Southern states passed laws which criminalized African Americans by prohibiting every day, harmless behavior and punishing violations with harsh penalties.¹⁵ State and local governments then leased out unjustly accused, prosecuted, and convicted African Americans to private companies to work to pay off their fines.¹⁶ Between approximately the 1870s and 1940s, this system of leasing essentially created a new form of slavery.¹⁷ In the segregated South, laws that segregated African Americans treated African Americans as peripheral in American society by physically separating them from white people.¹⁸ Segregation continued to criminalize African Americans by imposing criminal punishments, such as fines and jail time, for violations of laws discriminating against African Americans.¹⁹

From approximately the 1950s to the 1990s, “law and order” or “tough on crime” political campaigns and the war on drugs resulted in laws that punished African Americans and resulted in their mass incarceration.²⁰

The Slave Codes and the Fugitive Slave Act

The American legal system's early criminalization of African 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, Enslavement. Oppression of African Americans began with cases in the first American colony of Virginia.²¹ In the 1640 case of John Punch, the courts punished three servants running away from their employer.²² This was one of the first documented court cases involving the rights of African Americans.²³ Two of the servants were white and the third was African American, but they all committed the same crime.²⁴ The court ordered whippings for all three, but ordered that the white servants serve their employer for three more years²⁵ while it ordered the African American servant, John Punch, to serve his enslaver for the rest of his life.²⁶

The first laws also treated African Americans more harshly than whites. 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.²⁷ According to one scholar, most of the major slave codes were from 1680 to 1682 as they marshalled previously piecemealed 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 African Americans from engaging in activity that white people were free to do such as resisting a white person,²⁸ holding weapons,²⁹ and leaving their plantation without permission.³⁰ The laws in Virginia became a model for other southern states throughout the slavery era.³¹

Much like Virginia, other colonies adopted their own slave codes and ensured that the law subjected African 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,³² and states like Alabama³³ and North Carolina,³⁴ all fundamentally treated African 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.³⁵ The Michigan Supreme Court held in 1855 that a steamboat company could refuse to sell an overnight cabin to African American abolitionist William Howard Day.³⁶ Courts in southern states even cited to this case—which was in a northern state—when ruling against African Americans in other cases involving segregation in schools, streetcars, and public accommodations.

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Federal laws and court decisions criminalized African Americans for asserting their human right to be free. The Fugitive Slave Acts of 1793³⁷ and 1850³⁸ required 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 African Americans—whether enslaved or free—were not citizens of the United States and therefore did not have the rights and privileges of the U.S. Constitution.³⁹ There are many documented examples of court laws, court decisions, and associated documents⁴⁰ during this time that demonstrated that the American legal system treated African Americans as inferior, with fewer rights, and 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 African Americans. Congress passed the Thirteenth Amendment, which outlawed slavery.⁴¹ Congress also passed the Civil Rights Act of 1866, which defined African Americans as citizens in order to protect the civil rights of newly freed people.⁴² To primarily

protect their physical safety, Congress passed the Ku Klux Klan Act to eliminate extralegal violence against formerly enslaved people.⁴³ Congress also created the Freedmen's Bureau in order to provide food, clothing, fuel, and other forms of assistance to destitute formerly enslaved people.⁴⁴

But, 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.⁴⁵

The Black Codes

Southern states passed the Black Codes and vagrancy laws to criminalize, socially control, and maintain formerly enslaved African Americans in a lower social caste and as a source of exploited, free labor.⁴⁶ Though often confused with segregation laws, the Black Codes existed to criminalize the everyday activities of African Americans in southern states during the years immediately after the end of slavery until the Reconstruction Act of 1867.⁴⁷ If arrested and convicted of violations, African 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 Black labor to support the southern economy.⁴⁸ Moreover, Black Codes and vagrancy laws were a revival of a legal system that existed during the slavery era and further contributed to the social control of African Americans, enabling their economic exploitation.⁴⁹

During slavery, white Americans generally believed that free African Americans were suspicious, as white Americans saw free African Americans as “masterless” and therefore unhoused or vagrant, and most likely fleeing from the law.⁵⁰ In some states, police arrested African Americans if they could not prove that they worked for a white employer.⁵¹ They could not change employers without permission.⁵² African Americans could not sign labor contracts without a discharge paper from their previous employer.⁵³ This placed all the power in employers, much like slavery placed all the power in enslavers, and left African 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, Pathologizing the African American Family. As part of the Black Codes, states passed vagrancy laws that declared African Americans who were unemployed and without a permanent residence as vagrants and therefore subject to fines or imprisonment, which criminalized and controlled African Americans.⁵⁴

While the Black Codes ended in the 1860s, ex-Confederate states passed vagrancy laws after the end of Reconstruction.⁵⁵ All former states in the confederacy, except Arkansas and Tennessee, passed vagrancy laws by

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1865.⁵⁶ After the police arrested African 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.⁵⁷ Under this system, incarcerated people could often never earn enough to repay the plantation enslaver to their satisfaction, and allowed the plantation enslaver to continue exploiting African American workers for many years.⁵⁸

Convict Leasing and Re-enslavement

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 African Americans would have done when they were enslaved.⁵⁹ African American men and boys were arrested on vagrancy charges or minor violations, fined, and forced to pay off their fine through convict leasing. The convict leasing system was legal because the Thirteenth Amendment allowed forced labor for people who had been convicted of a crime.⁶⁰ 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.”⁶¹

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,⁶² which was formerly a plantation, as will be 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.”⁶³ Working and living conditions for incarcerated people were dangerous, unhealthy, and violent.⁶⁴

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.⁶⁵ In this mass grave, on land that was once owned by enslavers and their descendants, archaeologists found 95 bodies of men and boys and possibly one woman—almost all of whom were African Americans—who were participants in the state-sanctioned convict leasing system, which existed in Texas between 1871 and 1911.⁶⁶

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.⁶⁷ Further, the incarcerated individuals had occupational injuries and wounds from gunshots and corporal punishment.⁶⁸ Convict leasing, such as what occurred in Sugar Land, Texas, existed throughout the American South.⁶⁹ Further, a variety of individuals and businesses used convict leasing,⁷⁰ such as Tennessee Coal, Iron & Railroad Co., which U.S. Steel owned.⁷¹ Scholars indicate that convict leasing gradually ended by around the 1940s,⁷² as each state stopped leasing convict labor to private individuals and business.

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Convicted children working in the fields. (1903)

Legal Segregation and Racial Terror

During the era of legal segregation, southern state and local governments implemented a system of legalized social control to separate African American and white Americans. As discussed below, these laws were a legacy of slavery because they criminalized African Americans in a post-slavery era by mandating their separation from white Americans and provided for criminal punishments for any violations. The United States Supreme Court case *Plessy v. Ferguson*, which upheld the rule of “separate but equal,” legalized laws that required the separation of African Americans and white people in nearly all public places such as parks, businesses, and public transportation.⁷³ Laws provided for criminal penalties such as fines and imprisonment through the legal justice system—only for African Americans—who violated segregation laws.⁷⁴

In addition, as Chapter 3, Racial Terror, discusses, government actors and private citizens routinely punished African Americans who violated these laws—or even appeared to be breaking racial norms created by white people—through extrajudicial means such as lynching, racial massacre, and social fear-mongering. Lynching also contributed to the popular belief among Americans that African American people were assumed to be guilty.⁷⁵ White lynch mobs murdered African American suspects who were later found to be innocent.⁷⁶ Sometimes these murders occurred for no reason at all and at least one targeted a pregnant woman and her unborn child.⁷⁷ White mobs often framed the lynching as a method of self-defense against African Americans who were portrayed as dangerous criminals who posed a threat to white society.⁷⁸

Segregation laws were legal 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.⁷⁹

Although Americans often associate segregation laws as a southern phenomenon, the northern legal system also discriminated against African Americans and treated them as inferior after the Civil War through court cases and laws.⁸⁰ This discrimination is particularly apparent in a line of cases involving the rights of African Americans on railroad cars.⁸¹ In 1867, the Pennsylvania Supreme Court ruled against Mary Miles who refused to sit in the colored-only section of a streetcar.⁸² Courts in southern states, such as the Florida Supreme Court⁸³ and the Tennessee Supreme Court,⁸⁴ later cited the *Miles* case in

other cases in which the courts decided against African Americans who sought to sit in the whites-only sections of streetcars.⁸⁵ It is also well-established that, from the 1880s to 1960s, northern states had laws that allowed segregation in schools and public accommodations.⁸⁶

Tough on Crime Era and the War on Drugs

The civil rights movement ended legal segregation and made explicit discrimination against African Americans in the text of court cases and statutes illegal. However, scholars argue that legalized social control continues today in the legal system despite existing civil rights laws and regulations.⁸⁷ These scholars argue that the incarceration of African Americans, particularly African American men, occurs in our legal system in two stages.⁸⁸

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.⁸⁹ During this first stage, the implicit bias—which the previously described history of America’s criminalization of African Americans created—affects decision makers and results in high numbers of African Americans in prison.⁹⁰ Second, as discussed above, several court cases prevented legal challenges to racial discrimination.⁹¹

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Several laws in the decades during and after the Nixon administration provided for increasingly harsh penalties on criminal defendants that resulted in a higher likelihood of African Americans in prison than white Americans.⁹² During the post-civil rights era, both Republican and Democratic politicians ran on “tough on crime” or “law and order” political platforms that popularized especially punitive criminal laws—particularly laws prohibiting drug sales, distribution, possession, and use—to gain support from voters.⁹³ 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."⁹⁴

Much like what Ehrlichman describes, and many scholars have noted, Republican politicians essentially sought to appeal to the backlash against the civil rights movement by supporting punitive criminal laws.⁹⁵ Democratic politicians such as President Bill Clinton also ran on tough on crime platforms during his campaigns and supported punitive laws once in office.⁹⁶

These political campaigns often relied on the negative stereotypes of African Americans as criminals built by the previous three centuries of American law and order. George H.W. Bush produced a series of advertisements for his 1988 presidential campaign against Democratic nominee Michael Dukakis that featured an African American man named William Horton. These advertisements exploited the stereotype of African American men as predators and rapists of white women. William Horton was convicted of murdering a white woman and stabbing her partner while on furlough through a weekend pass from prison. The furlough was granted through a Massachusetts program when Dukakis was governor of Massachusetts. The advertisement primarily consisted of a voice-over summarizing Horton's crimes and a mug shot where he looked particularly threatening. The advertisement also nicknamed Mr. Horton "Willie."⁹⁷ The "Willie Horton" advertisements inaccurately portrayed bi-partisan supported furlough programs. These programs were used in all 50 states, and afforded incarcerated individuals the opportunity to leave prison for a certain amount of time to visit family, search for employment, and prepare for life out of prison.⁹⁸ Thousands of incarcerated individuals safely took advantage of furlough programs in the nation, and William Horton was the rare tale of a disaster.⁹⁹

Once politicians entered office, racist political campaigns morphed into racist policies. In 1971, President Nixon declared a "War on Drugs."¹⁰⁰ In the speech on it, he described drug abuse as "Public Enemy Number

One."¹⁰¹ 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.¹⁰² Rather than treat drug use as a public health issue, the American government chose to treat illegal drug use as a criminal justice issue.¹⁰³ Federal and state governments chose to punish drug users rather than offer medical help. The war on drugs, which continues today,¹⁰⁴ is a cause for the high numbers of imprisoned African Americans, as evidence exists to suggest that African Americans use drugs at approximately the same rate or less than white Americans.¹⁰⁵

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In the decades that followed Nixon's announcement initiating the war on drugs, Congress passed laws that harshly punished criminal defendants. 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.¹⁰⁶

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),¹⁰⁷ even though there is no scientific difference between these forms of the drug.¹⁰⁸ The law established a 100 to 1 disparity in the punishment created for the distribution of crack and powdered cocaine.¹⁰⁹ Distribution of only five grams of crack resulted in a minimum five-year federal prison sentence.¹¹⁰ Meanwhile, distribution of 500 grams of powder cocaine resulted in the same sentence.¹¹¹

In 1988, Congress added even harsher penalties to the law.¹¹² The change allowed public housing authorities to evict any tenant who allows any form of drug-related criminal activity to occur in or near public housing premises¹¹³ and eliminated many federal benefits, such as student loans, for anyone convicted of a drug offense.¹¹⁴ An arrest is not required to evict entire families from public housing, as long as an agency employee determines that a household member or guest has

engaged in drug related activity.¹¹⁵ Scholars have argued that these policies perpetuate residential segregation.¹¹⁶

The law also expanded the use of the death penalty for serious drug-related offenses and imposed new mandatory minimums for drug offenses.¹¹⁷ This Anti-Drug Abuse Act has had a disproportionate effect on African Americans because African Americans have more commonly used crack cocaine rather than powdered cocaine.¹¹⁸ One study found that the probability that a Black man would enroll in college dropped 10 percent after the passage of the Anti-Drug Abuse Act of 1986.¹¹⁹ Another showed that close to one third of individuals arrested for drug possession in the U.S. are African American adults.¹²⁰

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. 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 in ways that encouraged the growth of a more punitive criminal justice system.¹²¹

Some scholars have argued that this bill contributed to the exponential growth of the prison population in the United States in part by promising \$8 billion to states if they adopted “truth-in-sentencing” laws, which required that incarcerated people serve at least 85 percent of their sentences.¹²² To name another example,

In 1984, Congress passed the Comprehensive Forfeiture Act which allows the police to keep assets of people engaging in criminal activity. Numerous studies around the country have found that the police are more likely to seize money and property from Black defendants.

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.¹²³ Numerous studies around the country have found that the police are more likely to seize money and property from African American defendants.¹²⁴

Implicit Bias

As federal, state, and local governments intentionally and methodically criminalized African Americans, Americans, regardless of race, began to associate African Americans with crime. This enduring legacy of slavery has resulted in an American society that is biased against African Americans. Psychologists have documented, for almost 60 years, that the stereotype of African Americans as violent and criminal.¹²⁵ This association is not only strong, it also appears to be automatic (unconscious).¹²⁶ Other studies show that in cases involving a white victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is perceived to be dangerous.¹²⁷

A new but growing body of scholarship shows that police officers are frequently biased against African Americans.¹²⁸ New policing technologies may perpetuate how police treat African Americans because they use algorithms that replicate human biases.¹²⁹

California

Much like courts in southern states and northern states, California courts and the legislature also discriminated against African Americans throughout history.

In 1874, the California Supreme Court upheld school segregation in San Francisco.¹³⁰ In 1919, the California Supreme Court decided a case *against* an African American couple, the Garys, who fought to keep their Los Angeles property against a racially restrictive covenant.¹³¹ These cases show that California courts were actively involved in legitimizing discrimination against African Americans.

In addition to court cases, California also passed discriminatory laws. As discussed in other chapters, in 1850, the state prohibited marriage between African American and white Americans¹³² and prohibited African Americans from testifying in civil and¹³³ criminal court cases that involved white people.¹³⁴ The California Supreme Court upheld this law prohibiting testimony from

African Americans.¹³⁵ Like other states and the federal government, California also passed its own Fugitive Slave Law in 1852.¹³⁶ Much like southern states, California also had vagrancy laws.¹³⁷

More recently, California passed the Mulford Act on July 28, 1967, which made it a misdemeanor to carry

loaded firearms in public.¹³⁸ The bill was in response to the Black Panther Party for Self-Defense, which was formed in Northern California in 1966 and organized legal armed demonstrations in the state to support and protect African Americans.¹³⁹ In February 1967, 20 armed Panthers escorted Malcom X's widow Betty Shabazz to the Malcom X Grassroots Memorial in San Francisco.¹⁴⁰ In April 1967, 12 armed Panthers led a protest against a Contra Costa County Sheriff who killed a young Black man.¹⁴¹ It was against this backdrop that state Assemblyman Donald Mulford introduced legislation to ban the carrying of firearms in public places.¹⁴² In response to the proposed legislation, a group of Panthers walked inside the Assembly chamber at the California Capitol while carrying firearms to protest.¹⁴³ Although Assemblyman Mulford had denied that the legislation was racially motivated, after that demonstration, Assemblyman Mulford added a provision to Assembly Bill 1591 that would also include a ban on carrying loaded weapons in state buildings.¹⁴⁴

California has also imprisoned African American activists. Romaine “Chip” Fitzgerald and Geronimo Pratt, both influential members of the Black Panther Party, were sentenced to life in prison for separate murders in 1969 and 1971, respectively.¹⁴⁵ Even though by 1990 there was substantial evidence indicating that Geronimo Pratt was framed, the California Supreme Court refused to overturn his conviction at the time and a Los Angeles

III. Policing

Police have harassed, brutalized, and killed African Americans since the slavery era. The stereotypes created to support slavery and that have carried through to the modern day have resulted in implicit biases against African

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San Francisco Police raid Black Panthers in the Fillmore District (1969)

County Deputy District Attorney argued against Pratt's parole stating, “he is still a revolutionary man.”¹⁴⁶ While Fitzgerald remained in prison for over 51 years until his death at age 71,¹⁴⁷ Pratt was eventually released in 1996 after documents confirmed that the government's key witness was an undercover police operative who posed as a member of the Black Panther Party.¹⁴⁸ Advocates argue that other African American political activists currently imprisoned in California should be considered political prisoners because they have been denied parole as a result of their political affiliations.¹⁴⁹

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Americans in the American public at large and in our police force. Due to implicit bias in policing, and the effects of residential segregation, African American communities are paradoxically both under and over-policed depending on the type of crime.¹⁵⁰ The police and the American public see African Americans not as victims, but as criminals. The legacy of slavery continues to devalue African American lives today as police are more likely to stop, arrest, and kill African Americans than white Americans.

Slave Patrols

Slavery era “slave patrols” were an early form of policing and one of the first patrols began in the Carolina colony in the early 1700s.¹⁵¹ Slave patrols were made up of ordinary citizens, like farmers, hotelkeepers, and brick makers,¹⁵² who banded together to catch, return, and discipline freedom seekers and prevent revolts.¹⁵³ Some slave patrol members were community leaders and the enslavers who enslaved large numbers of people in the region.¹⁵⁴ Some slave patrols had written patrol enforcement instructions, member rosters, and correspondence.¹⁵⁵ Others were more informal and simply consisted of all adult men in a community.¹⁵⁶

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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

Much like slave patrols, police have continued to use dogs against African Americans in the 20th century through the present. Police used dogs against demonstrators during the civil rights movement.¹⁶⁰ The United States Department of Justice 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.” In Baton Rouge, Louisiana, police dogs bit at least 146 people from 2017 to 2019 and almost all of whom were Black.¹⁶¹

Law Enforcement Targeting of African American Political Leaders

Law enforcement agencies have not only targeted African Americans and physically hurt them, but the

federal government has targeted African American political leaders to neutralize their effectiveness. As discussed in Chapter 3, Racial Terror and Chapter 4, Political Disenfranchisement, the Federal Bureau of Investigation and state intelligence agencies, like the Mississippi Sovereignty Commission, targeted civil rights leaders and activists to deter them. The Mississippi Sovereignty Commission openly discussed murdering civil rights activists¹⁶² and were implicated in false convictions of activists.¹⁶³ The Federal Bureau of Investigation has continued surveillance action today against Black Lives Matter organizers.¹⁶⁴

Over-Policing

A majority of African Americans live in communities where there are higher rates of violent crime. As described in Chapter 5, Housing Segregation, due to government-sanctioned residential segregation, African Americans are far more likely than white Americans to live in impoverished neighborhoods with higher rates of violent crime.¹⁶⁵ Sixty-two percent of African Americans live in highly segregated, metropolitan areas 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.¹⁶⁶ As Dr. Bruce Appleyard testified during the December 7, 2021 Task Force Meeting, there may be a connection with formerly redlined communities and higher rates of police stopping and searching of African Americans.¹⁶⁷

Studies suggest that police treat African Americans differently than white Americans. Some scholars believe that police arrest large numbers of African Americans for relatively minor crimes, such as loitering, drug possession, and driving infractions. In 2019, African Americans comprised 26 percent of all arrests yet they only made up 13.4 percent of the population.¹⁶⁸ According to a recent large-scale analysis of racial disparities in of nearly 100 million state patrol police stops in 33 states, researchers found that police officers stop African Americans more often than white drivers relative to their share of the driving-age population.¹⁶⁹ Drivers—after controlling for age, gender, time, and location—are more likely to be ticketed, searched, and arrested when they are African American than when they are white.¹⁷⁰ There is also evidence that the bar for searching African American drivers is lower than for searching white Americans.¹⁷¹ A 2021 study of traffic stop data in Florida shows that approximately 42 percent of police officers in that state discriminate during traffic stops and that minority drivers are less likely to be able to leave with a warning when compared to white drivers.¹⁷² Another study shows that police use more force against African American and Latino suspects in the beginning stages of interactions.¹⁷³

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Vintage engraving of an African American man running through long grass chased by men on horseback with dogs. (c. 1880)

Some early data also indicates that police may have arrested a large number of African Americans, relative to their proportion of the population, for violating social distancing rules during the COVID-19 pandemic.¹⁷⁴

Some research indicates that American society views African Americans so differently than the rest of the population that marketing professionals have identified and potentially exploited this trend.¹⁷⁵ Marketing has targeted African Americans for consumer products to defy racism and project a middle class identity.¹⁷⁶ Respondents in one study indicated that being well groomed is a way to defy racism by showing worthiness.¹⁷⁷

The daily ongoing fear of racial profiling has an enduring effect on African Americans. Former First Lady Michelle Obama discussed her fears about her daughters becoming the victims of racial profiling.¹⁷⁸ “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.” “Many of us still live in fear as we go to the grocery store, walking our dogs, or allowing our children to get a license.” Obama said.¹⁷⁹

Policing in African American communities, such as through “stop and frisk” techniques, “communicates to Black men that they are objects of disdain by the state and that their citizenship is degraded.”¹⁸⁰

A 2017 study of officer-worn body camera footage showed police officers speaking significantly less respectfully to African Americans than to white Americans in everyday traffic stops after controlling for officer race, infraction severity, stop location, and stop outcome.¹⁸¹

Federal programs and nationwide policing practices have contributed to this over-policing. 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 the interception of the transportation of drugs. “Broken Windows,” an aggressive crime prevention strategy, emphasizing arresting people for committing both major and minor offenses, was first implemented in New York City in the 1990s.¹⁸² It resulted in arrests of disproportionate numbers of Latino and African American youth.¹⁸³

Under-Policing and the Dismissal of African American Victims

In addition to perceiving African Americans as more dangerous, Americans and police officers are also less likely to view African Americans as victims of crimes, particularly in areas of violence against women and girls, and mass shootings. Evidence of such under-policing is apparent in the popular news coverage of many cases in which law enforcement authorities appear to have ignored the disappearance of African American women, girls, and children.

Crimes against Black women are poorly investigated and sometimes ignored altogether. When police actually attempt to investigate alleged crimes against Black women, they often believe the victims are not credible.

Although Black women experience more sexual violence, Black women have historically not received the same level of attention as white women following sexual assaults.¹⁸⁴ As one scholar explains: “Crimes against Black women are poorly investigated and sometimes ignored altogether. When police actually attempt to investigate alleged crimes against Black women, they often believe the victims are not credible. Further, the few sexual assault crimes that actually lead to police charges are frequently not pursued by prosecutors[,] . . . denying [Black women] access to justice.”¹⁸⁵ Black women and girls are disproportionately more likely to be victims of sex trafficking in the United States than women and girls of other races.¹⁸⁶

These biases are rooted in history. In 1855, a judge instructed a jury that Missouri’s laws protecting women who resist sexual assault did not apply to a 19-year-old enslaved woman, Celia, who killed her enslaver when he was attempting to rape her, after she had already endured five years of rape resulting in the birth of two of his children.¹⁸⁷

This trend also extends to crimes against African American children. African American children on average remain missing longer than non-Black children.¹⁸⁸ African American women and girls, in particular, go missing in numbers larger than their proportion of the population.¹⁸⁹ Not only the police but also the media¹⁹⁰ typically pay them less attention compared to missing white women and girls.¹⁹¹ Police and prosecutors sometimes have also improperly handled these cases.¹⁹² In Atlanta, Georgia, during the late 1970s and early 1980s, a serial killer murdered approximately two

dozen children, many of whom were African American boys.¹⁹³ Police arrested and prosecutors convicted Wayne Williams of killing two adults, but prosecutors never tried or convicted him of killing any children, even though many believe he murdered the missing children.¹⁹⁴ In fact, prosecutors have never obtained a conviction for the murders of all the missing children.¹⁹⁵

Similarly, African American transgender and gender non-conforming people receive inadequate police protection, even though they are more likely to suffer violent crime.¹⁹⁶ Advocates have described an increasing “epidemic of violence” against the transgender community,¹⁹⁷ and studies show that Black transgender women are significantly more likely to experience violence or be murdered compared to white transgender women.¹⁹⁸ In 2019, for example, African American transgender women made up 91 percent of all transgender people killed by violent crime.¹⁹⁹ Despite experiencing greater levels of violence, African American transgender people are also less likely to seek and receive help from the police.²⁰⁰ This is because African American transgender people suffer much higher rates of harassment and assault when interacting with the police.²⁰¹

Some very new and limited scholarship shows that “mass shootings” occur more in Black communities than in other communities and more frequently than is covered in media reports.²⁰² Part of the reason is due to the fact that the definition of “mass shootings” is different,

Black children on average remain missing longer than non-Black children. Black women and girls, in particular, go missing in numbers larger than their proportion of the population. Not only the police but also the media typically pay them less attention compared to missing white women and girls.

depending on the government agency, and the media tends only to cover “mass public shooting” rather than mass shootings that grow out of violence between individuals or groups.²⁰³

Employment Discrimination

Employment discrimination in police departments against African American applicants may exacerbate discrimination and police brutality against African Americans. 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.²⁰⁴ The United States Equal Employment Opportunity Commission has identified problems with hiring, retention, harassment, and promotion of African American police officers.²⁰⁵ Police officers have publicly complained in news outlets throughout the country about issues around discrimination and harassment against African American police officers and correctional officers.²⁰⁶ These conditions have resulted in many departments that have very few African American police officers. Some scholars have argued that this lack of diversity in police departments contributes to discrimination and police brutality against African Americans.

Extrajudicial Police Killings

There is a very long history of police officers killings of African Americans throughout the United States, from the slavery era to present day. This history has not been limited to the southern states, but as discussed in Chapter 3, Racial Terror, is also part of California’s history.

A study of thousands of use of force incidents has concluded that African Americans are far more likely than other groups to be the victims of police violence.²⁰⁷ African Americans are 2.9 times more likely to be killed by police than white people.²⁰⁸ In fact, the statistics may be worse than this because, according to one study of data from 1980 to 2019, more than half of all killings by police in the U.S. go unreported in the USA National Vital Statistics System database from which some analysis is drawn.²⁰⁹

There are many well-publicized examples of police killing African Americans such as: George Floyd (Minneapolis, Minnesota) and Breonna Taylor (Louisville, Kentucky).²¹⁰ Some have died while in police custody, like 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.

California

Police violence against African Americans is similar in California.²¹¹ Statistics from California’s Racial and Identity Profiling Advisory Board’s 2022 report, drawing on data from 18 law enforcement agencies, including

African Americans are



to be killed by police

More than half of all killings by police in the U.S. go unreported in the USA National Vital Statistics System database from which some analysis is drawn.

California's 15 largest agencies, shows that police stopped a higher percentage of people perceived to be African American for reasonable suspicion that the person was engaged in criminal activity than any other racial group.²¹²

In 2020, African Americans made up about seven percent of the population, but those perceived to be African American made up 17 percent of people police stopped,²¹³ and 18 percent of the people police have shot or seriously injured.²¹⁴ African American Californians are about three times more likely to be seriously injured, shot, or killed by the police relative to their share of the state's population.²¹⁵

Officers searched, detained on the curb or in a patrol car, handcuffed, and removed from vehicles more people who the officers perceived as African American than individuals they perceived as white.²¹⁶ Search discovery rate analysis showed that individuals who police perceived as African American had the highest search rate.²¹⁷ People perceived to be African American were also more likely to have police use force against them compared to people perceived as white.²¹⁸ Police officers also reported ultimately taking no action during a stop most frequently when stopping a person they perceived to be African American,²¹⁹ suggesting there may have been no legitimate basis for the stop.

As in the rest of the country, 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."²²⁰ As one California Highway Patrol sergeant said in an interview, "It's sheer numbers. . . . Our guys make a lot of stops. You've got to kiss a lot of frogs before you find a prince."²²¹ 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.²²² In 1999, the American Civil Liberties Union sued the California Highway Patrol and alleged that Operation Pipeline taught

officers to stop African American and Latino male drivers for little or no reason.²²³ The California Highway Patrol admitted in court documents that its officers were twice as likely to stop Black drivers than white drivers, and were more likely to ask Black drivers for permission to search their cars than white drivers.²²⁴

Relatedly, an analysis of data from 2000 to 2008 in California showed that African Americans were significantly more likely than white people to be arrested for a marijuana offense.²²⁵ After the legalization of cannabis in California, news reports indicated that Black entrepreneurs who try to start new cannabis related businesses face challenges and delays, including a slow licensing processes.²²⁶ For an in depth discussion of discrimination in licensure, see Chapter 10, Stolen Labor and Hindered Opportunity.

African 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 in 2019.²²⁷ 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.²²⁸ Anti-Black bias events were the most prevalent of all types of hate crimes and increased 88 percent from 2019 to 2020.²²⁹

88% increase
in **anti-Black** hate crimes
from 2019 to 2020



There are numerous high-profile incidents of police killing African Americans in California such as Ezell Ford (Los Angeles); Kendrec McDade (Pasadena); Wakeisha Wilson (Los Angeles); Anthony McClain (Pasadena); 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. Activists established the first chapter of Black Lives Matter in Los Angeles and it is now a global network of activists.²³⁰

Police departments throughout the state have histories of violence against African Americans.

In Los Angeles before the turn of the century, the city's police had a history of violence against other historically marginalized groups such as Native Americans, Latinos, and Asian Americans. As more African Americans moved to the city, the time period between the 1920s to the 1960s was characterized by police brutality against African Americans and protests, such as the Watts Rebellion in 1965. Much like many other historical events that are often considered "riots," what occurred in Watts was a reaction to injustice or a "rebellion." For further discussion of rebellions, please see Chapter 3, Racial Terror.

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 African American suspects as "dog biscuits."²³¹ Victims of police dogs sued and alleged that the department disproportionately used dogs in minority neighborhoods, which resulted in police dogs inflicting 90 percent of their reported bites on African Americans or Latinos.²³² 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 African Americans and Latinos comprised 89 percent of the total individuals who were bitten by the department's dogs from 2004 to 2012.²³³ During the same time, the Special Counsel found that the number of African Americans that police dogs bit increased 33 percent.²³⁴

Often, such incidents of police brutality led to community protests that, in turn, sometimes continue brutality by police.²³⁵ The beating of Rodney King by the LAPD is one such example.²³⁶ On March 3, 1991, Rodney King stopped his car after leading LAPD officers on a pursuit.²³⁷ Officers beat Rodney King and were captured on video.²³⁸ The officers were charged but, despite strong video evidence against the officers, were ultimately acquitted.²³⁹

There is also at least some evidence that law enforcement gangs—which are groups of peace officers within an agency that engage in a pattern of on-duty behavior that intentionally violates the law or fundamental principles of professional policing²⁴⁰—such as those alleged in the Los Angeles County Sheriff's Department, have exacerbated the brutalization of African Americans by law enforcement in California.²⁴¹ 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.²⁴²

In Los Angeles County, which is the state and country's most populous county,²⁴³ as of April 2022, police have killed 964 people since 2000, 24 percent of whom were African American even though African Americans comprised only eight percent of the population during that time.²⁴⁴ Los Angeles police have also historically appeared to ignore the disappearance of African American wom-

The Los Angeles Police Department, the largest police department in California and one of the largest in the country, once referred to African American suspects as "dog biscuits."

en.²⁴⁵ Lonnie David Franklin Jr. was believed to have murdered several African American women and girls in the Los Angeles area.²⁴⁶ He was not arrested and convicted until 2016, due to what activists believe was police neglect.²⁴⁷

In the Bay Area, police brutality became such a concern that the Black Panther Party for Self-Defense, which later became the Black Panther Party, formed to provide protection to African Americans from the police during the 1960s.²⁴⁸ Two young activists, Huey Newton and Bobby Seale, saw brutality against civil rights protestors as part of a long history of police violence.²⁴⁹ 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.²⁵⁰ 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.²⁵¹ In the San Francisco Bay Area, according to a study, 27 percent of the people police killed were Black even though they only comprised seven percent of the population at the time.²⁵²

Discrimination by Californian police against African Americans is not limited to large police departments like the Los Angeles Police Department and the Los Angeles County Sheriff's Department. According to analysis of traffic stops by the San Diego Police Department from 2014 to 2015, officers are more likely to search and question African American drivers than white drivers even though officers were less likely to find them with contraband.²⁵³ 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 African Americans and people with disabilities than other

groups.²⁵⁴ Further, African 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 African American and white people use and sell drugs at similar rates.²⁵⁵ The police department also stopped African Americans at a rate three times higher than white people.²⁵⁶ Both agencies used higher levels of force against African Americans compared to other groups.²⁵⁷ Both agencies used more severe levels of force against African Americans than white people at every level of alleged resistance.²⁵⁸

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.²⁵⁹



COURTESY OF JUSTIN SULLIVAN VIA GETTY IMAGES

Sacramento, California: Hundreds packed a special city council meeting at Sacramento City Hall to address concerns over the shooting death of Stephon Clark by Sacramento police. (2018)

In California's rural and suburban regions, the California Attorney General has investigated²⁶⁰ and secured a stipulated judgment²⁶¹ 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. The Attorney General has also investigated²⁶² the Bakersfield Police Department, and secured a stipulated judgment for the police department to strengthen its engagement with the community.²⁶³ 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 African Americans, and other discriminatory conduct.²⁶⁴

As a result of community activism and increased nationwide public awareness of police brutality against African Americans in 2020 in particular, California has recently taken steps to attempt to address the numerous concerns with policing in the state. 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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ California was one of only four states without that power.²⁶⁹ Assembly Bill 118 creates pilot programs to allow community organizations to respond to 911 calls rather than police.²⁷⁰ 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.²⁷¹ But these reforms do not alone address the many years of discrimination African Americans have experienced at the hands of the criminal justice system.

IV. Trial and Sentencing

History

During the slavery era, most states denied African Americans the right to service on juries, as most states linked the ability to serve on juries to the ability to vote.²⁷² As discussed in Chapter 3, Racial Terror, African Americans were not allowed to vote in most states during this time. Most states also denied African Americans the right and protections of a jury trial, leaving African Americans vulnerable to unjust convictions.²⁷³

After the Civil War, the Civil Rights Act of 1875 outlawed race based discrimination in jury selection.²⁷⁴ As discussed in Chapter 4, Political Disenfranchisement, the 14th and 15th Amendments guaranteed African American men the right to vote and serve on juries.²⁷⁵ In some states, racially integrated juries protected the rights of African American defendants and prosecuted white perpetrators of racial violence.²⁷⁶

In the South, after Reconstruction, and until the 1960s, numerous allegations of crimes involving African American defendants and white victims never made it to trial.²⁷⁷ Instead, the accused African American person was lynched.²⁷⁸ As discussed in Chapter 3, Racial Terror, prosecutors rarely tried or convicted the white Americans who tortured and murdered African Americans through race massacres and lynchings. The same all-white juries who did not indict white perpetrators of violence convicted African American defendants, imposed harsh sentences for minor crimes, often with little evidence.²⁷⁹ According to the Select Committee of the Senate outlined in the Report on Alleged Outrages in the Southern States in 1871, “In nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors.”²⁸⁰

The U.S. Supreme Court did not decide until 1935 that excluding African Americans from juries because of race was unconstitutional.²⁸¹ In *Norris v. Alabama*, eight African American teenagers were convicted by an all-white jury and sentenced to death for the rape of two white women in Scottsboro, Alabama, despite overwhelming evidence of their innocence.²⁸² No African American person has served on a jury in Scottsboro in living memory.²⁸³

After *Norris v. Alabama*, many jurisdictions continued to exclude African Americans from jurors by using preemptory strikes or other pretexts.²⁸⁴

Systemic Bias Today

Today, systemic problems in the criminal justice system continue to discriminate against African Americans. Courts throughout the country have and continue to be underfunded, which can result in barriers in accessing justice, such as case delays.²⁸⁵ Although courts in California are now required to take into account an individual’s ability to pay when setting bail,²⁸⁶ 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.²⁸⁷ As discussed in the civil legal system discussion of this chapter, lack of diversity in the legal profession may also exacerbate the discrimination African Americans face in the criminal justice system.²⁸⁸ Scholars argue that racial bias against African American defendants results in discriminatory choices by

prosecutors, who make important decisions in the criminal justice system,²⁸⁹ although empirical evidence exists of such bias only seems to exist in certain types of crimes.²⁹⁰

One study showed that when witnesses knew that the perpetrators were Black, witnesses who claimed to not be racially biased were more likely to incorrectly identify the perpetrator than witnesses who stated they were racially prejudiced.

Discrimination against African Americans in the criminal justice system not only results from racial biases in police, but also in witnesses and jurors. One study showed that when witnesses knew that the perpetrators were African American, witnesses who claimed to not be racially biased were *more* likely to incorrectly identify the perpetrator than witnesses who stated they were racially prejudiced.²⁹¹ Lack of diversity on juries continues to be a nationwide problem.²⁹² A study in North Carolina showing that qualified African American jurors were struck from juries at more than twice the rate of qualified white jurors.²⁹³ Scholars have identified the following as factors contributing to underrepresentation on juries: “racial discrimination in jury selection,” socioeconomic barriers preventing participation by African Americans, “judicial discrimination that allows racially demarcated jury representation,” and “institutional racism and bureaucratic discrimination in perpetuating judicial inequality.”²⁹⁴

One scholar has shown that study participants remembered and misremembered legally relevant facts in racially biased ways.²⁹⁵ 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.²⁹⁶ A lack of jury diversity can also harm African Americans in family courts and the child welfare system, which the Chapter 8, Pathologizing, the African American Family, discusses in more detail.

The lack of diversity in juries can result in poor trial and sentencing outcomes for African Americans.²⁹⁷ According to a 2017 report from the United States Sentencing Commission, African American men who commit the same crimes as white men are given prison sentences that are about 20% longer, even after controlling for prior criminal history.²⁹⁸ African Americans are more likely than white Americans to be serving sentences of life, life without parole, or sentences of 50 years or more.²⁹⁹

Capital Punishment

As discussed in Chapter 3, Racial Terror, advocates have argued that capital punishment is the modern day, legal equivalent of lynching. The U.S. Supreme Court has acknowledged that the death penalty has a discriminatory effect on African Americans. In *Furman v. Georgia*, U.S. Supreme Court Justice William Douglas noted that there is evidence of racial discrimination in the imposition of the death penalty³⁰⁰ and that an African American would be more likely to get the death penalty when convicted for rape when compared to a white American.³⁰¹ Regardless, the Supreme Court still decided that the death penalty is constitutional in some circumstances.³⁰² Currently, 27 states have the death penalty while 23 states and the District of Columbia do not.³⁰³ Three states, such as California, currently have a gubernatorial moratorium on executions.³⁰⁴

In the states where executions still occur, African American men are overrepresented among people federal and state governments execute.³⁰⁵ 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 African American people to face a capital prosecution.³⁰⁶

California

Historically, California barred African Americans from serving on juries.³⁰⁷ 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.³⁰⁸ The study found that California prosecutors’ use of peremptory challenges to exclude African Americans from juries is still pervasive.³⁰⁹ 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 preemptory challenge because of a juror’s race, and found a violation only three times.³¹⁰ In fact, from 2006 to 2018, California courts held that there was a *Batson* error in just 18 out of 683 cases.³¹¹ It has been over 30 years since the California Supreme Court held that there was a *Batson* violation involving a Black juror.³¹²

Prosecutorial misconduct, which is generally when a prosecutor violates their duty to refrain from improper

methods calculated to produce a wrongful conviction,³¹³ 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.³¹⁴

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,³¹⁵ 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 is an example of how California’s three strikes law was especially punitive and led to excessive sentencing.³¹⁶ In 1982, Andrade committed three residential burglaries during the same day while unarmed and when nobody was in the homes he burglarized.³¹⁷ Then, in 1995, he stole five videotapes, which were worth \$84.70 and was arrested for shoplifting.³¹⁸ Later that same year, he stole four videotapes, which were worth \$68.84 and was arrested for shoplifting.³¹⁹ 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.³²⁰ As a result, he received a sentence of 50 years to life.³²¹

In *Furman v. Georgia*, U.S. Supreme Court Justice William Douglas noted that there is evidence of racial discrimination in the imposition of the death penalty and that an African American would be more likely to get the death penalty when convicted for rape when compared to a white American.

These policies have resulted in longer sentences for African Americans in California correctional facilities.³²² Recent reforms in California, which this chapter discusses below, have offered alternatives to incarceration for some individuals, but many African Americans still served excessive prison sentences for years.³²³

V. Incarceration

History

The history of criminalization of African Americans since slavery and the inequities in policing, trials, and sentencing have resulted in an overrepresentation of African Americans in jails and prisons, a phenomenon known as mass incarceration. As this chapter has described, American society began to criminalize African Americans starting from the era of slavery through Black Codes, vagrancy laws, and segregation 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 African 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 African Americans have comprised a percentage of prisoners exceeding their percentage of the population outside of correctional facilities, from at least 1926 to 1986.³²⁴

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.

The percentage of prisoners admitted to state and federal institutions who are African American has consistently grown, and which general population trends cannot explain.³²⁵ Although the imprisonment rate of African Americans has generally decreased since 2006,³²⁶ African Americans continue to be overrepresented both nationwide and in California in adult incarceration, solitary confinement, capital punishment, and juvenile incarceration.

Adult Incarceration

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.³²⁷ Numerous academics, activists, and politicians have called for an end to mass incarceration, and there have been reforms in several states such as Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio.³²⁸

These reforms largely focus on reducing excessive prison sentences. However, advocates argue that these efforts are not sufficient to undo decades of prison expansion.³²⁹ One study estimates that at current rates, it will take 72 years to cut the U.S. prison population in

half.³³⁰ Despite reforms, African Americans continue to be overrepresented in prisons nationwide: 20 percent of prisoners in federal and state correctional facilities were African Americans even though they made up just 13.4 percent of the population in 2019.³³¹ In 2021, African Americans comprise 38.3 percent of people in federal prisons across the country.³³²

In addition to overrepresentation of African Americans in correctional facilities, federal and state officials continue to use the labor of incarcerated people.³³³ 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 African Americans after the Civil War through convict leasing.³³⁴ Angola Louisiana State Penitentiary shows how, in some ways, the American correctional system continues the legacy of slavery.³³⁵

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 were trafficked.³³⁶ After the Civil War and abolition of slavery, former Confederate Major Samuel

Lawrence James received a lease of Louisiana State Penitentiary and all its incarcerated individuals.³³⁷ Under this lease, James subleased the majority of African American people who were incarcerated to land owners to replace enslaved people while others continued to work on levees, railroads, and road construction while others were given clerical and craftsmanship work.³³⁸ Later, there were also attempts to industrialize prison labor by forcing incarcerated people to make shoes and clothing.³³⁹ 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.³⁴⁰ More recently, incarcerated people in Angola continue to engage in production to sell goods such as growing crops like wheat, corn, soybeans, cotton, milo,³⁴¹ sugar cane,³⁴² and even producing art.³⁴³ To this day, approximately 65 percent of incarcerated people in Angola are African Americans.³⁴⁴

Correctional facilities, such as the Federal Prisons Industries of the Federal Bureau of Prisons, argue that these programs teach marketable job skills.³⁴⁵ But some academics argue that these work programs are not beneficial.³⁴⁶

Correctional Discipline

African Americans also experience discrimination in the correctional disciplinary system. At least one study has found that while African American and white incarcerated people were equally likely to break rules, correctional authorities were more likely to report infractions by African American people.³⁴⁷

There is an overrepresentation of African Americans in solitary confinement. Scholars have defined solitary confinement as when correctional facility officials separate incarcerated people from the general population and hold them in their cells for an average of 22 hours or more per day for 15 continuous days or more.³⁴⁸ A 2018 study showed that both federal and state correctional facilities placed large numbers of African American males in solitary confinement. African American males in prison made up approximately 42.5 percent of the prison population but comprised 46.1 percent of the people in solitary confinement.

Juvenile Incarceration

African Americans are also overrepresented in the juvenile justice system. As discussed in Chapter 8, Pathologizing the African American Family, American culture tends to see African American children not as children, but as adults. African American 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 higher levels relative to their percentage of the population.³⁴⁹ There is also evidence that these racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias.³⁵⁰ This sort of disciplinary actions and bias contribute to how African Americans are eventually pushed to incarceration through the school-to-prison pipeline, as described in Chapter 6, Separate and Unequal Education and Chapter 8, Pathologizing the African American Family.

committed in juvenile facilities as their white peers.³⁵² African American youth are more likely to be in custody than white youth in every state except Hawaii.³⁵³

As a result of their experiences with the juvenile justice system, many African Americans distrust the system.³⁵⁴ This report further discusses the enduring impact of the juvenile justice system on African American families in Chapter 8, Pathologizing the African American Family.

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 African 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.³⁵⁵ The City of Los Angeles imprisons more people than any other American city.³⁵⁶ According to one scholar, law enforcement officials often arrested, incarcerated, and/or instructed African Americans to leave Los Angeles during the 1920s and 1930s.³⁵⁷

African Americans are overrepresented in correctional facilities. Approximately 28.3 percent of California's prisoners were African American, when they make up about 6 percent of the population.³⁵⁸ Further, Black people who are incarcerated in California correctional facilities also experience forms of segregation from the moment they enter a facility.³⁵⁹

California has a history of extremely poor conditions in its numerous prisons, which disproportionately harms African Americans, as they are more likely to be in prison and to serve longer sentences due to systemic racism. Like the federal government, California still houses and invests in the incarceration of people in large numbers. 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.

In a 2011 U.S. Supreme Court case called *Plata v. Brown*, the Court ordered the State of California to reduce its prison population because the medical and mental health care in California prisons was so bad that it violated the U.S. Constitution's prohibition of cruel and unusual



African American youth comprise 41 percent of youth in juvenile facilities even though they make up 15 percent of all youth in America.³⁵¹ African American youth are more than four times as likely to be detained or

punishment.³⁶⁰ Since the decision in 2011, California has been required to decrease the number of people in state correctional facilities.³⁶¹ Later that year, the state 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.

California also passed several other laws to reduce its prison population including:

- Proposition 36 limits California's three-strikes law 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 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.
- Senate Bill 73 ended the prohibition against probation and suspended sentencing for certain types of 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.
- 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.
- Assembly Bill 32 prohibits California, as a state, from entering into or renewing a contract with a private, for-profit prison to incarcerate people.
- Other laws attempt to end private financial incentives to incarcerate large numbers of people in correctional facilities.
- Assembly Bill 2542 or the Racial Justice Act, prohibits the use of race, ethnicity, or national origin to seek

or obtain convictions or impose sentences. The Racial Justice Act is also an attempt to address previous court

In 2011, the medical and mental health care in California prisons was so bad that the U.S. Supreme Court ordered the State to immediately reduce its prison population because the living conditions grossly violated the U.S. Constitution's prohibition of cruel and unusual punishment.

decisions and systemic issues in the state's criminal justice system, which have made it nearly impossible for criminal defendants to challenge racial bias.³⁶²

Many of these laws are new so it is difficult to evaluate their impact on African Americans.

While individuals serve their prison sentences, the State of California uses their labor in many ways. The California Prison Industry Authority produces myriad products such as clothing, furniture, cleaning products, and food.³⁶³ They also perform a wide range of duties in areas such as laundry, kitchen, and general maintenance.³⁶⁴ The California Department of Forestry and Fire Protection employed around 1,600 incarcerated individuals to fight forest fires in May 2021.³⁶⁵

As previously discussed, some scholars have challenged the value of these programs because they do not necessarily provide incarcerated people with marketable job skills. Incarcerated individuals are often tasked with low skill work and obtaining a job as a firefighter can be particularly difficult, even for people without criminal records.³⁶⁶

Although California has attempted to reform its juvenile justice system in recent years, it has a well-documented and troubled history of juvenile incarceration.³⁶⁷ The number of incarcerated youth reached unprecedented heights in the 1990s.³⁶⁸ California housed over 10,000 youth in 11 facilities throughout the state in 1996.³⁶⁹ Since that time, 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.³⁷⁰

There have also been recent attempts to decentralize the juvenile justice system and provide localized services for juveniles who are accused of crimes.³⁷¹ 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.³⁷²

But many racial inequities for young African Americans remain. Currently, in California, African American youth are 31.3 times more likely to be committed to imprisonment in the state's juvenile justice system than white youths. As of June 2020, of the total 782 youth in California juvenile detention facilities, 227 were African American. In that same time, African American 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 African American youth as criminals in California begins at an early age when they are in school. School administrators, teachers, and school police, often treat young African American students as crimi-

The number of incarcerated youth reached unprecedented heights in the 1990s. California housed over 10,000 youth in 11 facilities throughout the state in 1996.

nals. 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.³⁷³ More information on the juvenile justice system in California is available in Chapter 8, Pathologizing the African American Family.

VI. Effects

The lingering negative impact of contact with the criminal justice system are wide-ranging and far-reaching. African Americans who have had contact with the criminal justice system experience significant discrimination when looking for a home or a job, when they are trying to vote,³⁷⁴ or

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.”³⁷⁹

African Americans who have been incarcerated experience significant levels of housing instability soon after they leave prison. The Prison Policy Initiative estimates that returning citizens are almost 10 times more likely to be unhoused than the general public, and the problem among Black returning citizens is worse than other racial groups.

Lingering Discrimination

African Americans who have been incarcerated experience problems finding a permanent place to live. As discussed in the Chapter 5, Housing Segregation, African Americans have experienced homelessness dating back to slavery,³⁸⁰ regardless of whether they have participated in the criminal justice system.

serving on juries.³⁷⁵ Just observing the effects of the criminal justice system can negatively affect the mental health of African Americans,³⁷⁶ and lead to mistrust of the legal system.³⁷⁷ Although California has passed laws to limit the lingering harms of the criminal justice system, these changes will not fully address the many years of effects of contact with the criminal justice system that many African Americans have experienced.

Devon Simmons, who served 15 years in prison for crimes he committed as a teenager in Harlem, explained:³⁷⁸ “You’ve got to find a way to reinvent yourself and promote

African Americans who have been incarcerated experience significant levels of housing instability soon after they leave prison.³⁸¹ The Prison Policy Initiative estimates that returning citizens are almost 10 times more likely to be unhoused than the general public,³⁸² and the problem among African American returning citizens is worse than other racial groups.³⁸³ Another study offers an example of the collateral damage of incarceration. Having a recently incarcerated father greatly increases the risk of child homelessness, a phenomenon that is more likely experienced by African American children than white children.³⁸⁴

Finding jobs is also difficult for African American returning citizens.³⁸⁵ Lack of employment opportunities for returning citizens can have a broader, negative impact on their families. Scholars argue that the high number of incarcerated members of African American families contribute to the Black-white wealth gap.³⁸⁶ Although the Civil Rights Act of 1964 prohibits consideration of a job applicant's criminal history if it negatively impacts African American job applicants, these cases are difficult for plaintiffs to prove. The Equal Employment Opportunity Commission, the federal agency which enforces civil rights laws in employment, recognizes that employers' consideration of a conviction or arrest are factors that are particularly problematic for African American men because they are more likely to have criminal histories.³⁸⁷

To address these issues, there is a nationwide movement to prohibit employers from considering a job applicant's criminal history before employers consider their qualifications for a job. This movement is also referred to as

A 2018 study found that a police murder of an unarmed African American triggered days of poor mental health for African Americans living in the state where that murder occurred.

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. But much like other criminal justice reforms discussed in this chapter, these new laws do little to address the many decades of discrimination African American returning citizens experienced when looking for work throughout American history.

Laws that deprive people with convictions of the right to serve on a jury also disproportionately harm African Americans. Some states exclude people from serving on juries when they commit misdemeanors, although reliable nationwide statistics on the number of African American people who cannot serve on juries is unavailable because no national database exists to track such data. Because African Americans are incarcerated more than other groups, they are also more likely to be excluded from jury participation as well. As discussed above, lack of jury diversity is a legacy of slavery and a serious and nationwide problem.³⁸⁸

Some states also deprive people who have criminal convictions of the right to vote. A 2003 study found that regions with large nonwhite prison populations are

more likely to pass laws restricting the right of people with convictions to vote.³⁸⁹ Depriving people who have convictions diminishes the political power of African Americans.³⁹⁰ The Sentencing Project estimates that approximately 1.3 million African Americans of voting age cannot vote because of past convictions, which is a rate 3.7 times greater than that of non-African Americans.³⁹¹ In fact, over 6.2 percent of the African American population cannot vote because of past convictions compared to 1.7 percent of the non-African American population.³⁹²

Contact with the criminal justice system through incarceration affects the mental health of African Americans. Studies show that incarceration was associated with perceived discrimination, depressive symptoms, and psychological distress,³⁹³ and the impact is long lasting.³⁹⁴ Incarceration negatively affects the overall physical health of African American people after they leave prisons and jails as discussed in Chapter 12, Mental and Physical Harm and Neglect. As discussed in Chapter 8, Pathologizing the African American Family, there is also evidence that mass incarceration negatively impacts family members of African Americans who have been incarcerated, both during and after their incarceration.

Even for African Americans who have not had direct contact with the criminal justice system, just observing the effects of the criminal justice system takes a toll on African American's mental health. A 2018 study found that a police murder of an unarmed African American triggered days of poor mental health for African Americans living in the state where that murder occurred.³⁹⁵ This total number of painful days over a year was comparable to the rate diabetics experienced.³⁹⁶

These negative experiences with the criminal justice system have caused many African Americans, and African American men in particular,³⁹⁷ to distrust police.³⁹⁸ As a result, African Americans are less likely to call the police than Latinos and white people.³⁹⁹ This distrust likely leads to an underutilization of police and government services in general, such as the civil legal system, as will be discussed below. As the Kerner Commission noted in 1968, “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 existence of police brutality and in a ‘double standard’ of justice and protection—one for Negroes and one for whites.”⁴⁰⁰

California

In California, as discussed earlier, courts also contributed to the growing body of law that discriminated against African Americans. 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.⁴⁰¹ Free African American activists, who were enslaved people's greatest allies, could not be witness in any court proceedings.⁴⁰²

Currently, there is some evidence that African Americans experience discrimination in the civil legal system. The civil legal system is the system through which African 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 African 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 a lawyer.

There appears to be very little scholarship on African Americans' distrust of the legal system as a whole and how that affects their underutilization of the civil law system,⁴⁰³ but some evidence does indicate that their contact with the criminal justice system negatively affects trust in the civil legal system. 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 1997.⁴⁰⁴

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."⁴⁰⁵

In California, returning citizens still experience discrimination in the areas of housing, employment, jury participation, and voting. Much like under federal law, housing providers may lawfully consider the criminal history of returning citizens under California law.⁴⁰⁶ As a result,

African American returning citizens still face many barriers when obtaining housing. California has made some recent progress towards implementing reforms to mitigate the effects of contact with the criminal justice system in the state⁴⁰⁷ by passing 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;⁴⁰⁸
- 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;⁴⁰⁹
- 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;⁴¹⁰
- 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;⁴¹¹
- 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;⁴¹²
- 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
- 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 African Americans suffered before California passed these laws.

VII. Discrimination in the Civil Justice System

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. 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.⁴¹³ Unlike in the criminal justice system, there is no constitutional right to counsel in all types of cases in the civil legal system. But a lawyer is crucial to prevailing in any civil case.

Historically, African Americans have experienced discrimination in the civil legal system nationwide and in California. American government and its citizens have used the civil legal system to subjugate African Americans during and after slavery. For an in depth discussion of the impact of the civil legal system on labor and employment rights, see Chapter 10, Stolen Labor and Hindered Opportunity. African Americans today continue to face numerous barriers in access to civil justice, including lack of resources and access to courts, and lack of diversity in the legal profession.

Systemic Barriers

The U.S. Supreme Court notoriously held in *Dred Scott v. Sandford* that African Americans—whether enslaved or free—were not citizens of the United States and therefore did not have the rights and privileges of the U.S. Constitution.⁴¹⁴ After slavery ended, many federal civil decisions harmed African Americans, such as cases that legalized segregation,⁴¹⁵ that prevented the federal government from outlawing racial discrimination by private citizens,⁴¹⁶ and that protected the economic liberties of white Americans over the civil rights of African Americans.⁴¹⁷ Further, in many states throughout the country African Americans could not testify in a case in which a white person was a party.⁴¹⁸ These government actions that occurred after slavery ensured African Americans remained in the lowest caste of the American racial hierarchy.

Evidence exists that African Americans' negative past experiences with the criminal justice system contribute to resistance to seeking help from the civil legal system.⁴¹⁹

One study has shown that Black claimants are underrepresented in federal court cases and white claimants are overrepresented.⁴²⁰

Members of historically marginalized communities, including African Americans, have long faced difficulties accessing justice due to systemic problems like underfunding.⁴²¹ Underfunded courts have reduced hours and staff, resulting in case delays and a decreased ability to provide services, such as resources for litigants without lawyers. These problems particularly affect people with low incomes, who are disproportionately African American.

According to the Legal Services Corporation, which Congress created to provide attorneys to low-income Americans, approximately 21 percent of people who have family incomes at or below 125 percent of the federal poverty line identified as African American in 2016.⁴²² 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.⁴²³ Americans with low incomes received inadequate or no legal help for 86 percent of their civil legal problems in 2016.⁴²⁴

Lack of Diversity in the Legal Profession

Historically, law schools and bar associations have discriminated against African Americans by preventing their entry into law schools and the profession.⁴²⁵ As discussed in Chapter 6, Separate and Unequal Education, predominately-white graduate schools like law schools routinely excluded African Americans until the 1960s.⁴²⁶ The American Bar Association, the main profession association of attorneys in the United States prohibited

Scholars also argue that the bar exam, the licensure exam for lawyers, is culturally biased against and designed to exclude historically marginalized groups, like African Americans. Nationwide, in 2020, African Americans comprised eight percent of students in law schools, but only about 5 percent of lawyers, even though they were 13.4 percent of the country's population.

African Americans from joining until 1943.⁴²⁷ African American lawyers founded the National Bar Association instead.⁴²⁸ Chapter 10, Stolen Labor and Hindered

Opportunity, provides an in depth discussion of racial discrimination against African Americans by professional guilds and licensure process. The American Bar Association initially rescinded the membership of William H. Lewis in 1912, the first African American assistant U.S. attorney general and two other African American 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.”⁴²⁹

Today, scholars argue that the Law School Admissions Test and law school accreditation continues this discrimination.⁴³⁰ Scholars also argue that the bar exam, the licensure exam for lawyers, is culturally biased against and designed to exclude historically marginalized groups, like African Americans. Nationwide, in 2020, African Americans comprised eight percent of students in law schools, but only about 5 percent of lawyers,⁴³¹ even though they were 13.4 percent of the country's population.⁴³² Only 61 percent of African Americans passed the 2021 bar examination on their first attempt nationwide, a rate much lower than that of white, Hispanic and Asian test takers.⁴³³

As a result, African Americans are underrepresented in the national legal profession and federal judiciary. Nationwide, in 2020, African Americans comprised 9.8 percent of federal judges even though African Americans make up 13.4 percent of the population.⁴³⁴

In general, lawyers in the legal system are particularly important as they “play a vital role in the preservation of society”⁴³⁵ and “an officer of the legal system and a public citizen have special responsibilities for the quality of justice.”⁴³⁶ Scholars argue that a law degree is a springboard to lucrative and powerful careers, which are closed off to many African Americans.⁴³⁷ Advocates argue that African American attorneys provide African American litigants and defendants with much needed and effective culturally appropriate legal services.⁴³⁸

California

These same issues exist in California. Much like California criminal courts, the state's civil courts have been historically underfunded,⁴³⁹ which leads to many conditions that result 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 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.⁴⁴⁰ Approximately 55 percent of Californians experience at least one civil legal problem in their household each year.⁴⁴¹ But according to the State Bar of California, 85 percent of Californians received no or inadequate legal help for their civil legal problems.⁴⁴² People with low incomes, many of whom are African American, struggle with problems related to housing, health, finances, employment, family law issues, disability benefits, and many other civil law issues.⁴⁴³

Individuals with Black-sounding names receive half the callbacks of those with white-sounding names in response to calls for legal representation.

California has passed laws that provide for counsel in certain civil cases, like those involving family law issues.⁴⁴⁴ But, overall, in the vast majority of civil cases, there is no right to counsel both nationwide and in California. Some studies show that African Americans, in particular, face unique impediments in obtaining access to a lawyer.⁴⁴⁵ 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.⁴⁴⁶

Although African Americans are not underrepresented in the California judiciary, they are underrepresented in the statewide legal profession. In 2020, eight percent of judges were African American.⁴⁴⁷ In California, during 2019, African Americans comprised four percent of lawyers even though they comprise 6 percent of the population in the state.⁴⁴⁸ These numbers have “remained stagnant” in the last 30 years.⁴⁴⁹

While this lack of diversity presents a problem for creating trust in both the criminal and civil legal system, it is especially problematic for African 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.

VIII. Conclusion

Rooted in the tools to maintain slavery, social control of African Americans continued through American history as the Black Codes and segregation laws. Federal and state governments continue the legacy of slavery by criminalizing African Americans today. California court cases and statutes contributed to a national body of law that explicitly discriminated against African Americans. As a result of legalized discrimination against African Americans, the American general public developed and perpetuated biases and stereotypes against African Americans. American politicians capitalized on these racist stereotypes to win office and implement more laws and policies that have imprisoned more African

Americans than white Americans compared to their shares in the population. This ensured that African Americans remained in the lowest caste of the American racial hierarchy.

Much like in the criminal justice system, the effects of slavery in the civil legal system have caused African Americans to experience significant inequities. African Americans, particularly those with low incomes, experience numerous barriers in the underfunded court systems, both nationwide and in California, that prevent them from accessing justice in civil courts.

Endnotes

¹ See, e.g., Alexander, *The New Jim Crow* (2020) (Alexander); see also Wilkerson, *Caste: The Origins of Our Discontents* (2020).

² See, e.g., U.S. Const., 13th, 14th, and 15th Amends.

³ 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 of 1965, and The Fair Housing Act of 1968.

⁴ Alexander, *supra*.

⁵ 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) (as of Apr. 24, 2022).

⁶ *Ibid.*

⁷ Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67 (Greene); 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 (as of Apr. 24, 2022).

⁸ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2019) 24 Lewis & Clark L. Rev. 53 (Libgober) (as of Apr. 24, 2022).

⁹ The Civil Practice Act, Stats. 1851, ch. 1, § 394, p. 113; The Criminal Act of 1850, Stats. 1850, ch. 99, § 14, p. 230.

¹⁰ See, e.g., Sutton, *Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing* (2013) 47 Law & Soc'y Rev. 1 (2013), 37–71 (as of Apr. 24, 2022).

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¹⁵ See generally Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, (2008) (Blackmon) at pp. 53–54, 99–100.

¹⁶ See generally Blackmon, *supra*.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See generally Alexander, *supra*, at pp. 50–73.

²¹ See generally Higginbotham Jr., *Virginia Led The Way in Legal Oppression*, (May 21, 1978), *The Washington Post* (as of Apr. 24, 2022) (Higginbotham); see also Newby-Alexander, *The “Twenty and Odd”: The Silences of Africans in Early Virginia Revealed* (2020) 57 *Phylon* 25–36 (as of Apr. 24, 2022).

²² General Court, *Minutes of the Council and General Court of Colonial Virginia* (July 9, 1640), p. 466 (as of Apr. 24, 2022); Higginbotham, *supra*; The court's sentence suggests that he was not already enslaved as it would be nonsensical to sentence an already enslaved person to a sentence in which they must be enslaved for the rest of their life.

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²⁵ *Ibid.*; see generally Higginbotham, *supra*.

²⁶ *Ibid.* see generally Higginbotham, *supra*.

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²⁹ *An act concerning Servants and Slaves XXXV* (1705), Records of the American Colonies, p. 459 (as of Apr. 24, 2022).

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³⁶ *Day v. Owen* (Mich. 1858) 5 Mich. 520.

³⁷ The American Slave Code, *An Act respecting fugitives from justice, and persons escaping the service of their masters* Extracts from the American Slave Code (as of Apr. 24, 2022).

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³⁹ *Dred Scott v. Sandford* (1857) 60 U.S. 393.

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⁴¹ U.S. Const., 13th Amend.

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⁴⁵ Alexander, *supra*, at pp. 36-38.

⁴⁶ 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, 66-67 (Hammad); 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 (as of Apr. 24, 2022).

⁴⁷ Hammad, *supra*, at p. 66.

⁴⁸ Blackmon, *supra*, at pp. 52-53

⁴⁹ *Ibid.*

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⁴²⁹ American Bar Association, [1912 - ABA Restricts Membership to White Lawyers](#) ABA (as of Apr. 26, 2022); see also Shepherd, [No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools](#) (Mar. 5, 2001) 53 *J. Legal Educ.* 103 (as of Apr. 26, 2022).

⁴³⁰ Taylor, [The Marginalization of Black Aspiring Lawyers](#) (2019) *Florida International University L. Rev.* Vol. 13 No. 3 (as of Apr. 26, 2022).

⁴³¹American Bar Association, [*ABA National Lawyer Population Survey*](#) (2022), p. 4 (as of May 31, 2023).

⁴³²American Bar Association, [*ABA Profile of the Legal Profession*](#) (2020), p. 33 (as of Apr. 26, 2022).

⁴³³American Bar Association, [*Summary Bar Pass Data*](#), p. 1 (as of May 31, 2023).

⁴³⁴U.S. Census Bureau, [*Quick Facts: U.S.*](#) (as of Apr. 26, 2022).

⁴³⁵American Bar Association, [*Model Rules Prof. Conduct: Preamble: A Lawyer's Responsibilities*](#) (as of Apr. 26, 2022).

⁴³⁶State Bar of California, [*Rule 1.0 Purpose and Function of the Rules of Professional Conduct*](#), Comment 5 (as of Apr. 26, 2022).

⁴³⁷See Shepherd, [*No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools Journal*](#) (Mar. 5, 2001) 53 J. Legal Educ. 103 (as of Apr. 26, 2022).

⁴³⁸King, [*Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*](#) (2008) 18 Cornell L. Rev. 1, at p. 1 (as of Apr. 26, 2022).

⁴³⁹See generally Judicial Council of Cal., [*The Road to Independence: A History of Trial Court Funding California Courts Review*](#) (Winter 2009) (as of Apr. 26, 2022); Judicial Council of Cal., [*Special Rep.: Trial Court Funding*](#), (1997) (as of Apr. 26, 2022); Trial Court Presiding Judges Advisory Committee, [*Memorandum of Trial Court Presiding Judges' Advisory Committee's Summary of Impacts from "Instant Survey"*](#) (March 11, 2013) (as of Apr. 26, 2022).

⁴⁴⁰Judicial Council of Cal., Judicial Branch Budget Com. Rep. [*COVID-19 Backlog Funding Data, Materials for January 5, 2021 Meeting, Judicial Branch Budget Committee*](#) (as of Apr. 26, 2022).

⁴⁴¹The State Bar of Cal., [*2019 California Justice Study Gap, Executive Report*](#) p. 6 (as of Apr. 26, 2022).

⁴⁴²*Id.* at p. 7.

⁴⁴³*Id.* at p. 11.

⁴⁴⁴See generally American Bar Association Standing Committee on Legal Aid and Indigent Defendants, [*Directory of Law Governing Appointment of Counsel in State Civil Proceedings: California*](#) (2016) (as of Apr. 26, 2022).

⁴⁴⁵Libgober, *supra*.

⁴⁴⁶*Id.* at p. 26.

⁴⁴⁷Judicial Council of Cal., [*Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identify/Sexual Orientation*](#) Gov. Code, § 12011.5, subd. (n)) (2020) (as of Apr. 26, 2022).

⁴⁴⁸State Bar of California, [*First Annual Report Card on the Diversity of California's Legal Profession*](#) (2020), Appendix Table 1 (as of Apr. 26, 2022)

⁴⁴⁹*Id.* at p. 7.