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AGENDA ITEM 3

ACTION ITEM:
MARCH MEETING MINUTES

**AB 3121 TASK FORCE TO STUDY AND DEVELOP
REPARATIONS PROPOSALS FOR AFRICAN AMERICANS**

MEETING MINUTES
March 29, 2022, 8:30 A.M.
<https://oag.ca.gov/ab3121>

The meeting of the Task Force was conducted via Blue Jeans video and telephone conference at <https://primetime.bluejeans.com/a2m/live-event/kwbgqkek>.

Members Present: Chairperson Kamilah V. Moore, Senator Steven Bradford, Dr. Cheryl Grills, Lisa Holder, Dr. Jovan Lewis, Don Tamaki, Monica Montgomery-Steppe.

Members Absent: Vice Chair Brown and Member Jones-Sawyer Joined the meeting later.

1. Chairperson Welcome

Chairperson Moore welcomed everyone to the first day of the March 2022, AB 3121 Hearing and opened the meeting at 8:50 a.m.

Chair Moore called for a roll call attendance to establish a quorum. **Parliamentarian Dorothea Johnson** called the roll. Members present during roll call included: Chair Moore, Member Bradford, Member Grills, Member Holder, Member Lewis, Member Montgomery-Steppe, Member Tamaki.

5 members are needed for a quorum, there were **7** members present and a quorum was established.

Vice Chair Brown and Member Jones-Sawyer joined the meeting after the roll call.

Chair Moore reminded everyone of the full agenda and the need for a strict adherence to the meeting timeline.

Chair Moore then turned the meeting over to **Aisha Martin-Walton** for the Public Comment.

2. Public Comment.

Aisha Martin-Walton provided directions for public comment. Pursuant to the vote of the Task Force in the previous meeting, the Public Comment period for this meeting was extended to 90 minutes. There were approximately 30 comments. Public comments reflected individuals, community organizations and businesses in support of reparations. Most of the commenters recommended to the Task Force that they vote for reparations eligibility based on lineage of African Americans who are the descendants of slaves in the United States.

3. Action Item: Approval of February, 2022 Meeting Minutes

Chair Moore indicated that the minutes were provided to the Task Force with the materials and they had an opportunity to review them. She asked if there were any comments, corrections, and hearing none, called for a motion to approve the February Meeting Minutes.

MOTION: Member Grills moved to approve the February Meeting Minutes as presented. It was Seconded by Member Tamaki.

Chair Moore called for the Discussion: No discussion

Chair Moore called for the vote. **Parliamentarian Johnson** called the vote:

AYES: Chair Moore, Member Grills, Member Holder, Member Lewis, Member Tamaki
NAYS: 0

There were 5 members voting. There were 5 **Ayes** and 0 **Nays**.

The motion passed and the February 2022 meeting minutes were approved as presented.

4. Community Engagement Plan Update: Member Grills

Member Grills provided an update on the Community Engagement Plan by informing the Task Force of the calendar schedule for the Listening Sessions. One Listening Session was held in January 2022 and another one is currently scheduled for the week of March 28th. Listening Sessions have also been planned for April, May, June, and July. Some of the Anchor organizations will be holding multiple Listening Sessions as well. The sessions are not intended to provide a particular perspective or position but rather to provide an open forum discussion on the basic information available regarding reparations. The participants within the community will be able to identify and share their personal stories of the harms inflicted on Black Americans (for example, Foster Care, incarceration, youth, and elderly etc.) as well as discussions and recommendations on what form reparations should take and what should be included. The sessions will take place in a variety of areas around the state.

Member Grills encouraged Task Force members to attend the Listening Sessions cautioning adherence to the **Bagley Keene** rules. **Member Grills** also stated that she and Mr. Stoll work to continually seek out additional funding and have been successful in securing a California Foundation award of \$300,000 to be used by the Bunche Center, the Communication Firms, and in support of the Listening Sessions. A second grant proposal was submitted to an organization on the east coast and she hoped to hear from this organization soon.

Chair Moore thanked Member Grills for her update. She then shared her concerns that the

Anchor Organizations should be organizing the Listening Sessions and not the Communication Firms. Chair Moore also had a concern that some of the deliverables outlined in the Bunche Center Contract have been missed.

Member Grills said the Communication Firms have already been approved and confirmed for the April Task Force meeting to discuss their process and path forward of support. Member Grills also stated that she would follow up on Chair Moore's concerns and provide an informed response at the April Task Force meeting.

Chair Moore asked for comments and concerns or questions. Hearing none, Chair Moore indicated that she had questions and concerns relative to two of the communication firms. Chair Moore also identified several concerns regarding the Bunche Center's adherence to certain terms of the contract. Chair Moore indicated that the seriousness of this concern was expressed to the point of possibly opening the process again.

Member Grills responded and indicated that had she known of the concerns ahead of time, she would have sought answers to the concerns raised. She stated that the Bunche Center was faced with concerns above and beyond their control by the University and state regulations but would provide responses at the April meeting when the Bunche Center was already scheduled to be addressing the Task Force.

Chair Moore called for the DOJ Updates, which were provided by Special Assistant Attorney General Damon Brown.

5. Information, Discussion and Potential Action Items: Department of Justice Updates

SAAG Brown advised that during the February meeting a request was made for DOJ to circulate a doodle poll for a May meeting if there was a decision to convene a meeting. The schedule for future meetings that was voted upon did not include a May meeting and the next meeting after the April meeting is scheduled for July 2022. If the Task force would like to convene a May meeting, DOJ would like to provide an opportunity to advise so we can turn our attention to plan a May meeting or continue to plan for a July meeting. There were no questions or comments by the Task Force on this item.

SAAG Brown noted that the next meeting will take place on April 13th and 14th and notice had to be posted by April 1st. SAAG Brown also reminded the Members that if they were not going to be at the noticed location but would like be at a remote location and participate telephonically, they must notify DOJ prior to the posting of the notice of the meeting, and that the location had to be noticed and accessible to the public.

SAAG Brown also noted that the Task Force members needed to clarify how witnesses were to be confirmed.

Member Holder stated her concerns regarding the decision of the Task Force to limit witnesses of one particular panel to one hour, but in reality, the number of witnesses and

the time for witnesses was expanded. It was noted that the Task Force's collective directive in its previous meeting relative to the time allotted and number of witnesses was not followed.

Chair Moore raised the question as to who determined who had the final authority to select the witnesses who would testify, when more than the approved number were confirmed as 'available'. Chair Moore stated that she and Vice Chair Brown believe they were given authority by the Task Force to finalize the agenda including selecting which confirmed witnesses submitted by other task force members would be placed on a panel and selected to present. Chair Moore stated that the DOJ did not agree that the Task force provided this authority to she and the Vice Chair, therefore Chair Moore is asking the task force to that clarify today.

SAAG Brown clarified that not all of the witnesses included on the agenda were timely, but they were added to the agenda after their availability was confirmed, however the original eight witnesses included by Member Grills were provided in a timely manner. Chair Moore subsequently added three additional witnesses, after the time for providing witnesses had elapsed. Chair Moore and Vice Chair Brown then made the decision to expand the amount of time for the panel beyond the one hour previously approved by the Task force.

SAAG Brown requested that the Task Force provide direction to DOJ as to how and by whom decisions were to be made with respect to the selection of witnesses, as it is outside the scope of DOJ's administrative and technical support.

SAAG Brown advised that there may be additional issues DOJ may need to resolve between the March and April meeting when conferring with the economic experts in developing the Executive Summary and to facilitate this DOJ recommends the Task Force consider designating two members to review and incorporate edits that would then come back to the full Task Force for consideration and final approval in April.

Member Holder asked, in the interest of time, to table these important items to 'Unfinished Business' tomorrow.

In the interest of time and consideration for ensuring the Community of Eligibility decisions are made, the Task Force did not continue its discussion of this item and agreed via a consensus (7 members present) to **move agenda item #5 to Potential Action Item #21 Unfinished Business.**

6. Potential Action Item: Hearing Proposal Chair Moore and Member Lewis

In the interest of time Chair Moore recommended that this agenda item be moved to agenda item #21 "Unfinished Business" on March 30.

7. Lunch: (5 min)

8. **Witness Panel #1 - Community of Eligibility**

Before introducing the speakers, Chair Moore asked Parliamentarian Johnson to call the roll. Present: Chair Moore, Member Grills, Member Holder, Member Lewis, Member Tamaki, Member Montgomery- Steppe.

There are six members present and 5 members are necessary to reestablish a quorum and a quorum has been established.

Chair Moore announced that a quorum has been reestablished.

Chair Moore introduced each of the panelist prior their testimony.

a. **Witness Testimony: Dr. Evelyn McDowell**

Dr. McDowell is an Associate Professor and Accounting Department Chair at Rider University in New Jersey.

Dr. McDowell has no official stance on reparations. However, she spoke on the feasibility of lineage based reparations. She is a member of the Sons and Daughters of the United States Middle Passage (SDUSMP) organization that has successfully helped its members trace their lineage through a process of research and analysis of the Census, Birth and Death certificates, Negative Evidence (State Laws that tracked the enslaved), Enslaved were sometimes listed as property on the Wills of the owner and Living relatives. She shared her discovery of family traced lineage as an example of her successful ancestral trace efforts.

b. **Witness Testimony: Dr. Antoinette Harrell**

Dr. Harrell is an American historian, genealogist, and civil rights activist who has spent the last ten years conducting peonage research throughout the Mississippi Delta and Louisiana.

Dr. Harrell's testimony spoke to the difficulty she faced when researching her family history. She warned of the pitfalls, lack of access to historical records, and the issue of many enslaved families were separated and/or split due to being sold, traded, and auctioned. Records were sometimes destroyed or buildings that housed permanent records were burned down leaving no research mechanism. She also wanted to note the costs associated with doing the research, such as the necessity to travel to find reputable proof of lineage could be expensive.

c. **Witness Testimony: Dr. Hollis Gentry**

Dr. Gentry is a genealogy specialist at the Smithsonian's National Museum of African American History & Culture Library

Dr. Gentry shared the personal experience of her successful trace of her ancestral connection to the enslaved using Public Court records, Bank records (land bought by a relative using a Bounty earned as a Civil War Veteran), Freedman's Bureau Records and national Archives, such as the National Museum of African American History and Culture Library, including records of the Daughters of the Revolution (DAR).

d. Witness Testimony: Kellie Farrish

Ms. Farrish is a dedicated Genealogist with over 15 years of experience in DNA analysis and lineage tracing using DNA.

Ms. Farrish provided instructions for how one might want to do genealogy research to locate enslaved ancestors using the Familysearch.com website. Historically speaking, Ms. Farrish's research noted a timetable that specifies little to no free Africans or Caribbeans living in the United States. Only Africans who were enslaved lived in the United States. She testified that the 1790 Naturalization Act that allowed only white men from Western Europe to obtain citizenship after living in the United States for 2 years didn't expand to Africans until 1870 as documented in the census of the same year. It was the Reed-Johnson Immigration ACT of 1924 that allowed a national origin quota of only 2% of the population of a nationality would be granted a U.S. Visa. For Africans, which amounted to approximately 1200 Africans that would be able to migrate to the United States. This limiting approach would only allow 2% of Africans to migrate to the United States by 1925. On the other hand, thousands of Caribbeans migrated to the United States between 1910 – 1930. Ms. Farrish noted three approaches for determining if you have ancestral enslaved lineage:

1. Identify Ancestors born in the South prior to 1865
2. Identify Ancestors living in the United States prior to the 1900s
3. Identify Ancestors living in the South prior to the Great Migration of the 1940s.

Ms. Farrish closed her presentation by doing a tutorial on how to use the website of <http://www.Familysearch.com>

e. Witness Testimony: Tony Burroughs

Burroughs is the founder and CEO of The Center for Black Genealogy. He is an internationally known genealogist who taught genealogy at Chicago State University for fifteen years.

Mr. Burroughs' testimony centered on the challenges of tracing ancestral lineage as far back as 157 years. For authenticity, one must prove identity and relationships with evidentiary documents such as birth and/or death certificates, obituaries, court records, and sometimes documented oral histories etc. many of which are not available online and did not survive the years. The life of the enslaved often times resulted in being

loaned out to pay a debt, or their last names were changed from the original owner because they were taken from their families and sold. Some of their names were changed for protection as a result of the Underground Railroad. as a result, the work required to research heritage requiring authentic proof is time-consuming and could be costly.

f. Witness Testimony: Robin C. Semple

Ms. Semple is a Vice Chancellor at Rutgers University and a Founding Member and Co-President of the Richard B. Dickensen Chapter of the Afro-American Historical and Genealogical Society.

Ms. Semple provided the following resources that can be used to compile proof of being a descendant of the enslaved. She listed Census records, Court House records, Property records, Wills and Probate records, newspapers, as well as Manifests that might exist. Specifically, information could be found in the Freedmen's Bureau records, the Colored troops Military Service records 1863-1865, the United States Census of 1870, Cohabitation Register, and the United States African American Photo Collection 1850-2000 may help to substantiate a descendant of enslavement claim. She stated that proof may require several documents. Ms. Semple also believes this endeavor should require the following proof standards:

1. Reasonably exhaustive research
2. Complete and accurate source citations
3. Thorough analysis and correlation
4. Resolution of conflictive evidence
5. Soundly written conclusions based on the strongest evidence.

g. Witness Testimony: Gregory Carr

Dr. Carr is Associate Professor of Africana Studies and Chair of the Department of Afro-American Studies at Howard University and Adjunct Faculty at the Howard School of Law.

Dr. Carr stated that there were creative ways to approach the issue of eligibility. Immigration is a central theme in human history. However, forced immigration due to colonization provide context for global, regional, and local obligations to address harm for specific groups. Dr. Carr made the four assertions which he thought might be useful to the task Force to define eligibility beyond race and lineage. He also asked the task force to think about the question of how do you decolonize the modern world when the harm predates today? The four assertions Dr. Carr presented are as follows:

1. Remedies will require international efforts of will and must look at harm in the past.

2. It is best to study how race and lineage intersect and interact with legal definitions and beyond. Therefore, race and lineage are inadequate tools for group based harm.
3. The racial category of Black is based on white colonialism that establishes black with racial regimes thereby establishing the eligibility of global harm via local repair efforts.
4. Country, state, and municipal level repair methods should not preclude other remedies. California should not be precluded from other government reparations. In summary how do you assess group harm if the group was never asked, and the group keeps shifting. Dr. Carr agrees that race is not legally sustainable.

h. Witness Testimony: Jessica Ann Mitchel Aiwuyor

Ms. Mitchel Aiwuyor is a cultural communications expert, author, and publisher based in the Washington, DC area.

Ms. Aiwuyor discussed the violations of civil and human rights resulting from the systemic racism endured by African Americans. She also suggested that the need for reparations must be ongoing and inclusive to address both lineage and harms for those who migrated from southern states as well as those who resided in California during the enslavement era.

i. Witness Testimony: Marcus Champion

Mr. Champion is a staunch reparation advocate and is a founding member of The National Assembly of American Slavery Descendants Los Angeles and The Coalition for a Just and Equitable California where he serves on the Advisory Board of both organizations.

Mr. Champion provided some context of how the wording of AB3121 was formed around eligibility. He discussed his opinion along with some experts of the need to adopt a lineage based standard for reparations because a race standard will violate Proposition 209. Mr. Champion and the CJEC organization worked to obtain buy in from Shirley Weber to include lineage based specifics into the AB3121 bill. Because of those conversations and rationale, the Bill now cites that the Task Force should study and develop reparations proposals for African Americans with “Special Consideration” for African Americans who are descendants of persons enslaved in the United States. The Bill also allows for the inclusion of descendants of free African Americans prior to the end of 19th Century as well.

j. Witness Testimony: Mike Davis

Mr. Davis is a former State Assembly Member and currently works for the Board of

Public works. After representing the 48th District (South Los Angeles and Koreatown–Wilshire area) from 2006 to 2012. He served as Vice Chair of the California Legislative Black Caucus and also chaired the Select Committee on Rail Transportation.

Mr. Davis began his testimony by stating his position of supporting a lineage based preference for reparations. He iterated that lineage based reparations corrects the notion of Proposition 209 which envelops discrimination and limits the ability to compete for publicly funded government contracts and jobs. In his opinion, a lineage based solution will right the wrong of Proposition 209. California has a history of shaping policy for the rest of the nation so we should not shy away from our rightful entitlement and go forward with a lineage based standard for reparations.

k. Witness Testimony: Kevin Brown

Mr. Brown is a Director of Policy, Advocacy & Legislative Affairs at Safer Foundation which is one of the nation’s largest nonprofits working tirelessly to disrupt the cycle of recidivism and social injustice in society.

Mr. Brown joined the call when the meeting had progressed to Agenda Item #9, the Discussion on Community of Eligibility, but the Chair permitted his testimony to be offered at that time.

l. Task Force Comments and Questions

The question and answer session followed the witness testimony. The Witness’ oral testimony can be found on <http://oag.ca.gov/ab3121>

9. Potential Action Item: Discussion on Community of Eligibility

Chair Moore opened the Community of Eligibility by initiating a very detailed power point presentation supporting lineage based reparations.

During Chair Moore’s power point presentation, Witness Kevin Brown from Agenda #8 joined the call. Chair Moore then turned the meeting over to Kevin Brown so that he could give his Witness Testimony.

Kevin Brown stated that he is one of the founders of “Evanston Rejects Racist Reparations” This group was organized as a result of the reparations effort in Evanston Illinois which is being lauded as the First Municipal Oriented Reparations Program in the United States. Their group formed as a result of the effort for reparations and to really try and acquire what they deemed as an authentic reparations program. Unfortunately, their community group does not feel that the effort that is ongoing represents a true reparations program but more a social equity program that has essentially been renamed Reparations. Their group came together essentially to monetize reparations and turn it into a housing

project in Evanston. We support the California efforts for reparations as being lineage based.

Once Kevin Brown completed his testimony, he turned the meeting back to Chair Moore so that she could resume her presentation.

MOTION

Member Lewis moved to define that the community of eligibility for reparations be based on lineage, determined by an individual being an African American descendant of a Chattel enslaved person or a descendant of a free Black person living in the United States prior to the end of the 19th Century. **Member Montgomery-Steppe** seconded the motion.

Chair Moore then called for the discussion: Member Jones-Sawyer raised a point of order, stating that the Chair was out of order in making a 45-minute presentation which was not agendaized. Member Jones-Sawyer requested equal time be allowed to each Task Force member to weigh in with their thoughtful analysis and position on whether the Community of Eligibility for reparations should be based on lineage or be race based.

Vice Chair Brown called the question.

Parliamentarian Johnson stated that the call of the question could not be used to preclude 'discussion'.

Vice Chair Brown, stated that as there was a state of unreadiness, those individuals who had questions or comments should have the opportunity to speak.

Member Tamaki, moved to table the scope of work and witness testimony to the next day, allowing the members an opportunity to discuss the issue.

Member Lewis recommended that the witnesses be moved from today's agenda to tomorrow's agenda and with the time that would free up, the vote could be taken today.

Member Bradford agreed with the two members, to allow the members have a discussion before taking a vote.

Chair Moore reminded the Task Force that there was a motion on the floor and discussion should commence.

DOJ SAAG Brown noted for the record that the economists could call in on the following day.

Chair Moore asked Parliamentarian Johnson to poll the Task Force for a consensus

Parliamentarian Johnson called roll to determine if there was a consensus to move the discussion forward and allow for other Task Force to weigh in on their position.

Consensus to allow equal time and discussion on the topic of the Community of Eligibility from Task Force members:

Yes: Member Bradford, Member Grills, Member Holder, Member Tamaki, Member Jones-Sawyer, Member Lewis, Vice -Chair Brown,

No: Member Montgomery-Steppe, Chair Moore

Yes (7) and No (2) The expert panel will be moved to the following day and the motion before the house will move forward with the discussion moves forward, based on a **7-2** vote.

The discussion allowed for the different perspectives to be presented and considered by each Task Force member. Discussion was offered by Vice-Chair Brown, Member Jones-Sawyer, Member Lewis, Member Holder, who provided clarification on the application of Proposition 209. Further discussion was provided by Member Grills, Member Bradford, Member Tamaki and Member Montgomery-Steppe

Vice Chair Brown called for the previous question to end debate.

Parliamentarian Johnson called the roll for the vote:

AYEs: Chair Moore, Vice Chair Brown, Member Lewis, Member Montgomery-Steppe

NAYs: Member Grills, Member Holder, Member Jones-Sawyer

ABSTAIN: Member Bradford, Member Tamaki There were nine (9) members voting; 4 Ayes, 3 Nays and 2 Abstentions. To pass the motion needed 2/3 vote or six (6) Aye votes. There were only four (4) aye votes, therefore

The motion failed and the discussion on the main motion on the floor continued.

Member Holder moved to Amend the Motion by Member Lewis.

MOTION

Member Holder moved to amend the motion to define the Community of Eligibility to be consistent with the 2.6 million African Americans in the State of California with an understanding that there will be special lineage considerations determined by an individual being an African American descendant of a Chattel enslaved person or the descendant of a free Black person living in the United States prior to the end of the 19th Century.

Member Jones-Sawyer seconded the motion

Discussion. A question was asked by Member Bradford as to whether the word 'lineage' could be used in the amended version to determine those who are African American? Member Jones-Sawyer added: "special lineage considerations determined by an individual being an African American descendant".

Member Lewis asked what the amendment language ‘do’ and how are you defining “African American”.

Member Holder emphasized that this did not have to be a ‘final’ vote, rather that it was to create a scope of work so that the economists can have a benchmark to move forward

Member Bradford asked if the ‘2.6 million would capture those in the lineage based community.

Member Lewis said the amended definition was not what was posed by his motion, which is presumably smaller than the 2.6 million.

Member Bradford called for the question: Member Holder seconded the motion to end debate

Parliamentarian Johnson called the roll.

AYEs: Chair Moore, Vice Chair Brown, Member Bradford, Member Grills, Member Holder, Member Jones-Sawyer, Member Lewis, Member Tamaki, Member Montgomery-Steppe

NAYs: 0

There were 9 members present and voting, 9 Ayes and 0 Nays. The motion to end the debate carried.

Chair Moore called on Parliamentarian Johnson to call for the vote on the amendment.

Parliamentarian Johnson called the vote.

AYEs: Member Grills, Member Holder, Member Jones-Sawyer

NAYs: Chair Moore, Vice Chair Brown, Member Lewis, Member Montgomery-Steppe

ABSTAINED: Member Bradford, Member Tamaki

There were 9 members voting: Ayes-3, Nays-4, Abstentions- 2

The Motion to amend failed.

The original motion was again before the body. A Vote was held on the first motion. Parliamentarian Johnson called the vote:

AYEs: Chair Moore, Vice Chair Brown, Member Bradford, Member Lewis, Member Montgomery-Steppe

NAYs: Member Grills, Member Holder, Member Jones-Sawyer, Member Tamaki

There were nine members voting, 5 members voted Ayes, and 4 members voted Nays

The motion carried.

10. **Break:**
11. **Potential Action Item: Discussion on Scope of Work (Task force agreed to table this item, Item #11, to Unfinished Business, Item #15, on the next day, March 30th.)**
12. **Recess Meeting until March 30, 2022, 9:00 a.m.**

DRAFT

March 30, 2022

Criminal Justice System and Anti Black Bias (Hate Crimes)

Members Present: Chairperson Kamilah V. Moore, Vice Chair Dr, Amos Brown, Senator Steven Bradford, Dr. Cheryl Grills, Lisa Holder, Assembly Member Dr. Jovan Lewis, Don Tamaki, Monica Montgomery-Steppe.

Members Absent: None

13. Chairperson Welcome

Chairperson Moore welcomed everyone to the second day of the March 2022, AB 3121 Hearing and opened the meeting at by restating that the Task Force vote to approve lineage-based eligibility for reparations.

Chair Moore called for a roll call attendance to establish a quorum. **Parliamentarian Doreathea Johnson** called the roll.

Members, present during roll call: Chair Moore, Vice Chair Brown, Member Bradford, Member Grills, Member Holder, Member Jones-Sawyer, Member Lewis, Member Montgomery-Steppe, Member Tamaki.

There are nine members on the Task Force. Five (5) members are needed for a quorum and there were 9 members present. A quorum was established.

Chair Moore reminded everyone of the full agenda and the need for a strict adherence to the meeting timeline.

SAAG Brown updated agenda for the March 30th Task Force meeting.

Chair Moore then turned the meeting over to **Aisha Martin-Walton** for the Public Comment.

14. Public Comment

Aisha Martin-Walton provided directions for public comment. There were approximately 30 comments. Public comments reflected individuals, community organizations and businesses in support of reparations. Most of the commenters thanked Task Force members who voted that reparations eligibility be based on lineage of African Americans who are the descendants of slaves in the United States, or free before the 19th Century.

Some commenters made the following suggestions: Data on Black people should be disaggregated, that American Descendants of Slaves should be made a protected class, the Task Force should look into the Fair Housing Rumford Act, the California state government should pay the cost for people to locate their ancestors, the form of reparations should be medical, education and cash, the cash should be tax free and cover back rent owed due to COVID, the length of time for reparations should be long term, the amount should be provided monthly or annually, be above the poverty line and based on today's costs, the economists proposals should be considered and cash payments should be at the top of the list.

15a. Potential Action Item: Discussion on Scope of Work (moved from Agenda Item #11 on March 29th to Agenda Item #15 on March 30)

The Economic Consultant team presented two Models for the consideration of the Task Force that could be used as the framework for determining the calculations for reparations.

Model One – National Reparations Framework

Model Two- State Specific Atrocities Framework (Harms specific to California)

After much discussion, the Task Force decided to vote to use **Model Two (State Specific Atrocities Framework- Harms specific to California)**. Model Two consists of at least the following harms identified by the Expert Team:

- Unjust Property Taking by Imminent Domain
- Intellectual Property Deprivation
- Homelessness
- Unwarranted Police Violence
- Segregated Education
- No Representative Estate Commission
- Housing Discrimination
- Labor Discrimination
- Environmental Harm
- Mass Incarceration and Sentencing
- Health Harms
- Transgenerational Effects
- Other Potential Harms

Chair Moore called for a motion:

MOTION: Member Jones-Sawyer moved that the Task Force adopt Model Two that includes all 13 stated specific harms and atrocities to provide a framework for calculating Reparations. **Member Tamaki** Seconded the motion.

Chair Moore called for the Discussion: Member Lewis added Tertiary University level education to the list of harms associated with the Segregated Education item listed in the Model Member Grills presented a list of parameters which needs to be articulated to the expert team:

1. Who (lineage), and what the threshold is for establishing harm
2. Residency requirements
3. The categories of harm
4. For what time frame for each category of harm
5. What level of evidence is required
6. How to address emotional and physical health consequences
7. Operationalization

Chair Moore asked for further discussion. There was no further discussion and she called for the vote.

Parliamentarian Johnson called the role for the vote:

AYEs: Chair Moore, Member Bradford, Member Grills, Member Holder, Member Jones-Sawyer, Member Lewis, Member Tamaki, Member Montgomery-Steppe

NAYs: 0

There were 8 members present and voting. There were 8 Ayes, 0 Nays.

Chair Moore announced that the Motion carried.

Member Holder moved that the Task Force to discuss and analyze if there are additional harms to be added to the Model 2. The motion died due to a lack of a second. The Task Force listed the following harms to include.

- Crack Cocaine Epidemic
- Slavery that existed in California between 1850-1865
- Black Exclusion Policies
- Family Welfare
- Foster Care
- Mass Incarceration
- Black Juvenile Justice System
- Gangs

15b. **Witness Panel #1 Criminal Justice System**

Chair Moore introduced each of the panelist prior their testimony

a. **Witness Testimony Rachel Barkow**

Professor Barkow is the Charles Seligson Professor of Law and the Faculty Director of the [Zimroth Center on the Administration of Criminal Law](#) at NYU. Her scholarship

focuses on administrative and criminal law, and she is especially interested in applying the lessons and theory of administrative law to the administration of criminal justice.

Dr. Barkow focused her presentation on the Criminal Justice System's Disparate Impact on Black America. She noted there are structural biases that cause people of color to turn towards criminal activity. The United States incarcerates more people than any other country in the world. About two million people are in local jails and millions more are under the control of the probation and parole systems. "State policy drives mass incarceration," stated Barkow. California is second in the total number of persons incarcerated. There are more than 60% of the incarcerated people are people of color, in California, the percentage is higher with 72% of the incarcerated population being people of color. Black people are detained more often, have higher bail fees, and have a greater chance of incarceration and mistreatment while incarcerated. Black Americans are also more likely to receive higher sentencing when discretionary decisions are allowed.

She also focused her presentation on policing. With more than one hundred million traffic stops, Black people are more likely to get pulled over than white people. Black drivers were less likely to get stopped after sunset, when the "veil of darkness" makes one's race less apparent. Therefore, the darker the sky, the less pronounced the disparity. Black people are more likely to get searched after a stop, but White people are more likely to be found with illicit drugs. She noted that police officers are pulling Black people over for alleged mechanical or equipment problems or record checks. Her slides show overall that Black Americans are more likely than Hispanics or Whites to experience incidents of racial discrimination or violence.

b. Witness Testimony: Dr. James Pitts

Dr. Pitts is an assistant professor in the Department of Criminology at Fresno State.

Dr. Pitts gave a presentation that focused on how the Criminal Justice system can be used to justify reparations as it pertains to slavery and contemporary slavery. Black Americans are still facing racial discrimination disparities legally and socially economically. In terms of income, we [Black Americans] tend to earn about half that of our White counterparts. In terms of wealth, we have fewer assets to pass down. And in terms of unemployment, we find ourselves unemployed at rates twice that of our White counterparts. There is an over-policing of Black communities, and this led to more disparities, more arrests, more use of force, more police misconduct, and more Black Americans being killed by the police. Black Americans' have a strained view of the police. "Without acknowledgment, reconciliation becomes less likely," states Pitts. Even though Stop and Frisk were declared unconstitutional, while it was neutral on its face, it was applied to Blacks and other People of Color more than to any other race. The war on drugs was fought in the Black community, five grams of crack cocaine would get a Black person a life sentence, while anyone else convicted of having 500 grams of powder cocaine would get the same sentence. Crack cocaine (which is not

pure and is often cut with baking powder) was often found in the Black communities and powder cocaine (which is pure) is found in the wealthier communities. Pitts notes, "...the police, in many ways, constitute the gatekeepers of the [justice] system that unjustly and systematically subjects a disproportionate number of Black Americans to injustices." It also leads to lower socioeconomic status, which is seen when Black Americans are less favorable in court, when they cannot afford cash bail, or when they cannot afford a private attorney. Research shows that you are less likely to get a favorable outcome if you are forced to use a public defender. Research also shows that having to rely on a public defender leads to a longer prison sentence. Pitts states, "We need to be mindful that mass incarceration is reminiscent of slavery, inmates can be forced to work for free." While the 13th amendment was supposed to abolish slavery, its only exception was as punishment for a crime. Prisoners are often called slaves of the state." In short, the 13th amendment only abolished enslavement by a private owner. 1 in 3 Black people will be in jail or prison at some point in their lives. Black people are 35% of the prison population and 13% of the general population. White people account for 62% of the general population and are 34% of the prison population.

c. Witness Testimony: Thomas Harvey

Thomas Harvey is the Executive Director of the Children's Defense Fund-CA and National Litigation Strategist.

Mr. Harvey stated, "The legacy of enslavement drives child poverty, especially in California, which has among the largest poverty levels in the nation." He also noted Black people are systematically denied housing, quality health care, ample and nutritious food, equitable education, safe neighborhoods, and access to resources and opportunities. His work has shown him the disproportionate treatment of Black people in the legal system. The legal system has provided harm by enforcing Black Codes, convict leasing, Jim Crow laws, the Drug War, and the overall disproportionate treatment of Black people in the criminal legal system.

Professor Harvey stated the legal system has reflected the pernicious strains of American racism. According to the Children's Defense Fund's 2021 report on the state of children in the U.S., a disproportionate number of Black children are incarcerated in the juvenile or adult systems. 530,000 were arrested in the U.S., a child or teen was arrested every 59 seconds. Black 2.4 times more likely to be arrested verses white children. Black youth are nine times more likely to receive an adult sentence the White students. Black youth are less likely to misbehave in school compared to white students and more likely to be homeless.

Data around police killings shows that police shot and killed 1055 nationwide in 2021, Black people about for 13% of the population accounted for 27% of those who were shot in 2021. Over nine hundred people were killed in Los Angeles County since 2001, 233 of those killed were black.

The legacy of slavery is visible every day within the criminal legal system. It is persistent today, in the housing, education, the accumulation of wealth, employment and the child welfare system. The remedies have to be comprehensive: Direct cash payment for those who survive the harm, massive system changes to end that harm in the future, and the creation of systems that will offset those harms.

d. Witness Testimony: Kika Keith

Kika Keith is founder of Life Development Group, co-founder of the Social Equity Owners and Workers Association, and now a Social Equity cannabis retail license owner.

Ms. Keith opened her testimony stating there are distinct parallels between the institution of slavery which was constitutionally and statutorily sanctioned by the United States and the war on drugs which was marred by racism and was enforced with racism motivation. Before 2017, before learned about the legalization of recreational cannabis in California. She was the owner of a beverage company that marketed to Whole Foods, Bristol Farms, and the like. She was raised in impoverished neighborhoods. Black men were eight times more likely to be arrested and convicted for cannabis use than white men. The fabric of the Black family was broken into the prison system, the foster care system, and the graveyard. The whole community was criminalized.

With reparations, we must consider the legacy of the days when we were kidnapped and brought to these shores. Our very beginning speaks of traumatic stress that was passed down to generations but has been visited upon us by civil society and by government policy, as well. The father of the war on drugs did not keep his overtly racist comments behind the closed door. Richard Nixon signed into law the Controlled Substance Act, which remains in force today. The Nixon campaign and White House had two enemies, (1) the anti-war electorate and (2) Black people. Marijuana criminalization is a textbook case of how structural racism and white supremacy is embedded in false laws and policy in the United States. These laws have continued to lead to the incarceration of Black people. The resulting mass incarceration has caused three million children to live in a home where at least one parent is incarcerated. One in 9 Black children is in foster care compared to 1 in 57 white children.

From 1980 to the 2000s, the “this is your brain on drugs” anti-drug campaign pushed the perils of cannabis as a gateway drug all across America. Black people have borne the burden of incarceration even though whites have higher rates of use. Black people are 8% of Los Angeles, but 40% of the arrests. In just a few years, cannabis has transformed from an illicit product to the fifth most valuable crop in the United States and a multi-million-dollar industry. But this economic success does not benefit the Black community targeted by the war on drugs as it was dominated by white-owned businesses. There is also a hypocrisy in granting cannabis equity licenses for

communities harmed by criminalization. But unfortunately, these efforts fall short as they do not name Black communities harmed by the war on drugs. The 14th amendment demands that the government treat similarly-situated people the same but with the cannabis community, this is not happening. Once again, Black people were kept out of an industry, just like with the cotton industry, the tobacco industry, the auto industry, and the alcohol industry. It was the same with the cannabis industry, Black people were set up with predatory investments with sharecropper agreements. This, despite legislation designed to address this. Along with others, she filed a lawsuit against Los Angeles and 1300 days later, she finally opened the first woman-owned cannabis business.

e. Witness Testimony: Cerise Castle

Cerise Castle is a Los Angeles-based journalist specializing in arts and culture, civil rights, crime, and human interest stories

Ms. Castle is the descendant of Isaac Wingfield, who was a slave that was bought and sold on the Wingfield plantation. Her presentation aims to show the culture of the Los Angeles Sheriff's Department of Deputy Gangs is a symptom of a broken system. A deputy gang is identified by Penal code 186.22 which defines a gang as having an organization that has common names or common signs and has as one of its primary activities, the commission of one of a lost list of California criminal offenses, whose members have engaged in a pattern of criminal gang activity either alone or together. These crimes included murder, rape, kidnapping, and money laundering. The deputy gangs are not cliques; they are gangs. There are about eighteen deputy gangs that are not new. They are responsible for about nineteen murders, and most of these victims were experiencing a mental health crisis. Los Angeles County keeps a list of all lawsuits related to deputy gangs and the litigation related to this case has cost the county above \$100 million (funded by taxpayers) over the past 30 years. No action has been taken on the issue of deputy gangs despite their existence being well known. There are at least four gangs inside the jails, the best known is the 3000 boys. From 2010 to 2017, there were three assaults, one non-fatal shooting, and 5 deaths, and all of the deputies are still employed by LASD. Deputies in the Antelope Valley were more likely to stop and question Black teens up to four times as often as their White peers. Deputies engage in a system called "hunting" where they stop people of color that do not know their rights. The deputies are rarely personnel held financially liable because of qualified immunity. LASD continues to avoid accountability. Sheriff Alex Villanueva continues to say that there are no deputy gangs within the LASD. Deputy gangs are a symptom of a broken system.

f. Witness Testimony: Tasha Henneman

Tasha Henneman oversees PRC's public policy and government affairs, as well as all communications functions.

Ms. Henneman does work on “Dismantling the Pre-school to Prison Pipeline.” She shows the effects of expulsion from pre-school. Preschoolers are expelled at rates three times than K-12 students. Henneman refers to the 3 B’s: Black, Boy, and Bigger. Expulsion is the permanent removal (ages 2-5) from an early childhood setting; a pushout is when the school is constantly communicating with the family about the behavior of the child and the family feels that they are being pushed out; in-school suspension where the kids are sent out of the classroom and out of school suspensions is when the parents or caregivers are called to pick up the child early due to behavior issues. 4-year-olds are 50% more likely to be expelled than 3-year-olds. Boys represent 54% of the preschoolers but 78% of the suspensions. Black children are 5 times more likely to be expelled than their Asian peers. An average of 250 black preschoolers are being expelled or suspended each day. The children were expelled for the following reasons: talking back, not talking nicely, being too loud, explosive behavior, not standing, not sitting still in circle time, using bad language, and reasons that were unclear to the parents. Although we have seen progress, the state has a long way to go. In 2014, the passage of AB420 mandated that kids from kindergarten through 3rd grade cannot be expelled and in 2019 extended this suspension through 8th grade.

g. Witness Testimony: Nicole Porter

Nicole Porter manages The Sentencing Project’s state and local advocacy efforts on sentencing reform, voting rights, and eliminating racial disparities in the criminal justice system.

Ms. Porter stated the Sentencing Project has been doing work since the 1980s to call out the racial disparities that are exacerbated by criminal legal practices that lead to the over-representation of black residents in the prison system and amounts arrests and other parts of the criminal justice system and addressing racial disparities and through this conversation, the reparative justice that might be possible is a part of the growing coalition of interest in this country. The Sentencing Project deals in data. Behind each data set is a Black man behind the wall, is a Black child that will visit a parent in jail. The prison population has declined by about 11% in the past 10 years after reaching an all-time high in 2009. But the reduction follows a nearly 700% increase in the prison population between 1972 and 2009. In 2019, 1.4 million persons are incarcerated, it will take 6 decades to cut the U.S prison population in half. California has seen a reduction of about 30% since 2009 with the help of a reduction in sentencing reform.

Black Americans are incarcerated in state prisons across the country at nearly five times the rate of whites. Racial disparities in California’s criminal legal system go beyond differences in criminal offending and stem from implicit bias in police arrests, rates of conviction, and sentencing. In California, the Black/white disparity of 9.3-to-1 is one of the highest in the nation. While racial disparities in arrests have decreased, they persist statewide. Racial disparities in California arrests peaked in 1992 when the

African American arrest rate—the number of arrests per 100,000 African Americans—was 3.6 times greater than the white arrest rate. Although these disparities have narrowed, in 2016 the African American arrest rate was still 3.0 times the white arrest rate.

Officials have worked to address racial injustice in the state’s criminal legal system. California’s 2020 Racial Justice Act prohibits prosecutors from seeking, obtaining, or imposing a criminal conviction or sentence based on race, ethnicity, or national origin. The law allows defendants to challenge a range of discriminatory trial practices, including racial bias in jury selection. Evidence that a judge, attorney, law enforcement officer, expert witness, or juror “used racially discriminatory language “or otherwise “exhibited bias or animus towards the defendant” at trial could establish a violation of the Racial Justice Act. The RJA also allows defendants to prove that their convictions or sentences were racially motivated by presenting evidence that other people of color were more frequently charged with more serious offenses or received more severe sentences than white people.

The Sentencing Project strongly supports efforts to center racial justice and reparations for communities harmed by mass incarceration in all laws, policies, and practices developed to reform California’s criminal legal system. The policy remedies you are considering have implications for other jurisdictions across the country. The features of the recommendation that I have mentioned would go far in aligning California’s public policies to advance racial justice.

h. Witness Testimony: Brendon Woods

Brendon Woods has more than 15 years of experience in criminal defense litigation and has held positions of increasing responsibility within the Alameda County Public Defender's Office and was appointed Public Defender in December 2012.

Mr. Woods is the Public Defender for Alameda County. He is the first Black person to hold this office in his county and he was the only Chief Black Public Defender until October 2021 within the 58 counties in California. He stated that Black Californians have a complete lack of representation. Slavery is the heart of the story but if only look at this history, we sell ourselves short. The 13th amendment did not make slavery legal it gave it a different title. The jail in Alameda County holds almost 4000 people and is 48%, Black. Mr. Woods noted that the have Public Defender is working to make things better. They are in the Community-based organization at the discussions because they’re essential. They passed SB310 which would delete the prohibition relative to the person who has been convicted of a felony from being eligible and qualified to be a prospective juror. They have assisted with the passage of AB37 which would extend the requirement to mail a ballot to every registered voter in all elections and apply them to all local elections. And AB2542 which would prohibit the state from seeking a

criminal conviction or sentence based on race, ethnicity, or national origin. Woods also mentioned that the state needs bail reform, needs to end three strikes, needs to look at getting rid of the death penalty and increasing mental health services within the community. He concluded by reminding the Task Force that the criminal legal system today is racist, and it is built on the legacy of white supremacy, he also notes there is nothing just about it and it is not colorblind, and it does not treat people equally.

i. Witness Testimony: Susan Burton

Ms. Burton is the founder of A New Way of Life, a nonprofit organization that provides housing and other support to formerly incarcerated women.

Ms. Burton shared her story and journey beginning with the loss of her five-year-old son in 1982. He was hit and killed by a police car. Overwhelmed with grief, she took to numbing her pain with alcohol and drugs. Over the next 15 years, she was arrested and released six times, with limited money, no ID, and no social security card. She had been assaulted as a child and when she lost her son when he was a child, society responded to my trauma by locking me away.” In 1996, she learned that society responded to the trauma of others differently. White middle-class women were offered treatment services instead of incarceration. She fought for the same services and was able to obtain treatment at the CLARE Foundation in Santa Monica. When she became sober in 1997, she began to wonder how life would have been had these services (instead of incarceration) been readily available to people like herself. In 1998, she opened A New Way of Life Reentry Project by purchasing a home in South LA. Her vision was that this home would offer formerly incarcerated women in South LA a space for healing, power, and opportunity. She sought out residents for the house by visiting the downtown LA bus station and offering formerly incarcerated women a place to live as they worked to rebuild their lives. Today, A New Way of Life has 10 safe houses and is growing.

In the early 2000s, she realized that the work to rebuild the lives of formerly incarcerated women had to be multifaceted and abolitionist. In 2003, along with Dorsey Nunn, she started All of Us or None (AOUON), a grassroots civil rights organization fighting for the rights of incarcerated and formerly incarcerated people and our families. In 2006, she launched our Women Organization for Justice & Opportunity (WOJO) Leadership Lab for formerly incarcerated women. In 2007, with Saúl Sarabia, Joshua Kim, and she began ANWOL’s Legal Clinic. And in 2021, she put together the Family Reunification Legal Team. They are now operating, 10 safe homes throughout Los Angeles County, from South Los Angeles to Montebello to Long Beach. The houses now can serve 73 women, along with their children, at any given time. In 2020, they provided services for 94 women, along with their children. They offer their residents holistic support from case management to workforce and development training, and more.

They now have 3 staff attorneys dedicated to offering pro bono legal services for formerly incarcerated individuals. These services include Sentencing Expungement; Reclassification & Reduction; Prop. 47 & Prop. 64 petitions; Occupational Licensing. In 2020, they began providing pro bono legal services to 201 clients, with 602 petitions for expungement (with a 92% success rate).

j. The question and answer session followed the witness testimony. The witnesses' oral testimony can be found on <http://oag.ca.gov/ab3121>

16. Lunch- There was no lunch break

17. Witness Panel #2 Anti-Black Bias (Hate Crimes)

Chair Moore introduced each of the panelist prior their testimony

a. Witness Testimony: David Price

Mr. Price serves as Director of Racial Equity for the Civil + Human Rights and Equity Department for the City of Los Angeles.

Mr. Price said Hate Crimes have been on the rise and especially aimed at Black people. Mr. price shared that the mission of his department is to maintain and strengthen the city's diversity, equality, and accountability. His focus is on reducing bias and injustices while leveling the playing field through community engagement and equity initiatives and upward mobility programs.

b. Personal Testimony: Darris Young

Mr. Young is the Impact Manager of African Americans and Pacific Islanders at the Bay Area Regional Health Inequities Initiative

Mr. Young shared his personal story and also provided some pertinent facts about the school to prison pipeline and the Zero Tolerance practices and policies that are disproportionately placed on students of color that ultimately lead to the criminal justice system. Mr. Young also reviewed the 13th Amendment that state one cannot be enslaved unless you have been convicted of a crime. This law was used to convict innocent Blacks of crimes so that they can become free labor for prisons

c. Witness Testimony: Cynthia Roseberry

Ms. Roseberry is the Deputy Director of Policy in the Justice Division of the ACLU. Ms. Roseberry spoke on the California Fugitive Slave Law enacted to provide a legal right to capture and return fugitive slaves who escaped a slave territory to come to

California because it was a free state. Also, that California would allow white people to bring in their slaves from other states to work the Gold mines even though California was a free state. The trauma that is so easily ignited in us when we see a police officer and you wonder if you will be able to go home. She talked about the disparity in health, unemployment, legacy admission to colleges that were not available to Blacks and how incarceration destroys Black families and the constant surveillance of the Black communities.

d. Witness Testimony: Katherine Hubbard

Ms. Hubbard is an attorney whose work focuses on litigation challenging the criminalization of poverty, particularly debtor's prisons and wealth-based pretrial detention and coordinates Civil Rights Corps' bail reform efforts in several states across the country.

Ms. Hubbard shared an example of Anti Black racism in the criminal legal system and how it often results in higher bail cost and pre-trial detention, even if ultimately found innocent. She also spoke of the median money bail in California as exceptionally high and usually unaffordable. Ms. Hubbard stated that the disproportionate financial cost that the criminal legal system has inflicted on Californians should be included in the reparations calculations

e. Witness Testimony: Max Markham

Markham serves as the Vice President of Policy & Community Engagement at the Center for Policing Equity, leading the organization's campaign strategy and government affairs work, while developing grassroots policy advocacy in partnership with communities all over the country. Mr. Markham is the Vice President of Policy and Community Engagement at the Center for Policy Equity which is research and action organization that uses science to identify and reduce the cause of racial disparities and police interaction. He also advocates for large scale and meaningful change in public safety. Mr. Markham discussed the history of anti-Black racism in policy and addressed ways that reimagining public safety and investing in Black communities as a positive step forward.

- f. The question and answer session followed the witness testimony. The witnesses' oral testimony can be found on <http://oag.ca.gov/ab3121>

18. Break – There was no Break

19. Witness Panel #3 -History of Policing & War on Drugs

Chair Moore introduced each of the panelist prior their testimony and advised that panelist Aaron Harvey could not attend and D'Andre Brooks would take his place.

a. Witness Testimony: D'Andre Brooks

D'Andre Brooks spent his young adult years incarcerated but decided to take control of his future and manifesting a new life for himself. He is now pursuing a Master of Public Administration from San Diego where he received his bachelor's degree. He is a member of the San Diego Commission on Gang Prevention and Intervention as well as a Juvenile Justice Program Associate at the Children's Initiative in San Diego.

Mr. Brooks shared his personal story of how he was pulled into the life of gangs and drugs. That life created an opening to ultimately be sent to prison for a crime he did not commit. The war on drugs created a lot of fatherless homes and single parent households. This situation thrust he and his friends to gravitate to the street life and gangs. There was a heavy presence of police always in his community harassing everyone. Mr. Brooks said It felt like they were just hoping to catch them at anything. Street life did put him in a bad situation, and he went to prison for ten years for something he did not do. Mr. Brooks said he thought once he tried to get his life back on track, things would change with the police, but it didn't. He was still a victim of their harassment. He was stopped many times for no reason and then just let go. He said no one in his community appreciated law enforcement. The war on drugs continue to put communities at risk and makes them feel unsupported.

b. Witness Testimony: Geneviève Jones-Wright

Jones-Wright was a San Diego County public defender from 2006 to 2019. She co-founded and serves as the Executive Director of an impact litigation non-profit, Community Advocates for Just and Moral Governance which works to achieve racial and social justice and holds government accountable to all people, especially those who are marginalized.

Ms. Jones-Wright shared some insights from an historical perspective. She addressed some of the historical points focusing on the policies and on racism in the United States, California, and San Diego. Ms. Jones -Wright testified that the effects of slavery and white supremacy still persist and is rooted in the attitudes, decisions, policies, and laws of today, and is reflected in the correlation of mistreatment and dehumanization that occurs with the over policed African American neighborhoods, the courts, and the prison system. This happens simply because our skin is seen as a threat. After the civil war, slave patrols were used to round up newly freed men and women. It was considered a violation to walk around Black and free. Unfortunately, this violation still results at a disproportionate rate for African Americans especially, and especially for the homeless, forcing them to engage with the criminal legal system.

Ms. Jones-Wright cited that the very first Governor of California blocked Black people from coming to California. In 1870 the California Supreme Court upheld a law for mandatory school segregation. Even though California was considered a free state it enacted its own Jim Crow and Black Codes enforcement between 1850- 1947.

Ms. Jones-Wright voiced that African Americans in San Diego are victims of over-policing as well as arbitrary and selective enforcement of the law. The over-policing in San Diego is rooted in white supremacy.

c. Witness Testimony: Dave Menschel

Mr. Menschel is a criminal defense attorney and President of Vital Projects Fund, a charitable foundation that seeks to end mass incarceration, with a focus on curtailing cruel and excessive sentences, holding police and prosecutors accountable, ameliorating barbaric prison conditions, and reaffirming the humanity of incarcerated people.

Mr. Menschel's testimony focused on the laws within California that target African Americans when the law is immoral, unjust, and enforced in a racially disparate manner. Especially when that law caused the individual to be unjustly criminalized and over sentenced resulting in mass incarceration. He believes righting these wrongs could be a model for reparations. Mr. Menschel cited for examples of cases (i.e., expungement of marijuana convictions) that could result in reparations:

1. Proposition 36 - Amended the Three Strikes law
2. SB 1010 - Eliminated the Crack Cocaine Disparity (77% of those convicted were Black).
3. SB 2437 - Amended the Felony Murder Rule
4. SB 394 - Eliminated the Life Without the Possibility of Parole sentence for juveniles.

d. Witness Testimony: Charles Ramsey

Mr. Charles Ramsey is the Former Washington D.C. Chief of Police, Philadelphia Police Commissioner, and Co-Chair of President Obama's Task Force on 21st Century Policing.

Mr. Ramsey highlighted his years of experience with policing. Most of his years were spent in the Narcotics division so he had first- hand experience dealing with the impacts of drugs, specifically crack cocaine versus powdered cocaine and in reality, they were the same drug just a different form of it. Mr. Ramsey voiced his opinion regarding the War on Drugs, finding it have been a failure. He believed it failed on many levels but primarily it failed because nothing was provided for treatment, prevention, and alternatives to incarceration. Everything was geared towards enforcement and getting drugs off the streets. Providing more training to police in areas for crisis interventions

is never going to be as good as using social services professionals. Legislators pass laws to criminalize different behaviors and police enforce these laws. Public Safety needs to be redefined. It is Law enforcement, traditional fire, emergency management and emergency health. What is missing is Community Safety and funding to address homelessness, mental health and poverty. One solution would be for legislators to stop enacting laws that criminalize some of these issues and for cities to properly fund more social service responders. Mr. Ramsey advised that the entire criminal justice system needs to be reformed, yes police too, but not just police, because while they need reform, changes in one area of the criminal justice system affects other areas. Reform has to be thought through. Look at police, look at prosecution, look at defense, look at corrections, look at reentry. Mr. Ramsey stated that he has not talked to one police chief who objects to the police budget for public safety decreasing if public health workers will pick up the financial and operational slack. You need to look at all of these areas together because they are all connected. Mr. Ramsey's experience is that when change does occur it gets stuck in one place. Changes in individual criminal justice system areas have a ripple effect so there needs to be complete criminal justice system reform. The last comprehensive look at the system was when Lyndon Baines Johnson was President. It's time to take another look.

- e. The question and answer session followed the witness testimony. The witnesses' oral testimony can be found on <http://oag.ca.gov/ab3121>

20. Potential Action Item: Next Meeting Agenda and Witnesses

The Task Force reviewed the April agenda based on consensus reached during the February 24 meeting that day one of the April meeting be devoted to panel hearings on educational disparities in California. The specific areas of interest included:

Witness Panel 1- Pre-K to 12th Grade Educational Institutions

Witness Panel 2- College and Professional Institutions

Witness Panel 3- School to Prison Pipeline

Additionally, they agreed that the April Meeting will include a final review and approval of Report 1 and a discussion about how to educate the public about the contents of the report. The Task Force also agreed to assign a presentation by the communications firms about their communications strategy for the Task Force and include time to hear from the Economist expert team. Finally, the Task Force will receive an update from the subpoena advisory committee. Chair Moore asked Task Force members to provide DOJ with suggested witnesses as requested and DOJ may add additional names by task force members if witnesses decline. There was a discussion on the issues surrounding the first Task Force in-person meeting including Public Comment and Virtual Witness Testimony.

SAAG Brown reminded everyone that April 4th was the deadline for submitting witnesses for the April 13 and 14 meetings at the in-person meeting in San Francisco. It would be helpful if Task force members would rank their witnesses by panel.

Chair Moore asked SAAG Brown to confirm that in-person meetings prohibit anyone to give virtual testimony. The meetings will be live streamed. Member Bradford expressed concern, because the Legislature who is also meeting in person allows phone-in testimony and does not want to do a disservice to the public to make them travel to the meetings. SAAG Brown advised that DOJ will look into this possibility and whether it has the capability and resources to do including considering an operator assisted phone line. He agrees that the objective is to be over inclusive and DOJ will do everything it can and advise the Task Force accordingly.

Chair Moore asked whether Public Commenters need to be at the meeting in person. SAAG Brown advised this issue also needs to be explored in the context of the language in Governor's executive order. Member Bradford stated that the Governor's order should not supersede the public's ability to participate remotely.

Prior to voting on the April agenda, Chair Moore stated that before she entertains a motion to adopt the agenda she wanted to revisit the Community Engagement Communications contracts between DOJ and the Bunche Center and the Bunche Center and the two communications firms. Chair Moore suggested that in light of the concerns she indicated earlier in the meeting, that in addition to the two firms presenting at the April meeting, she wanted the Task Force to also publicize between now and the April meeting the opportunity for other communications firms to present their ideas and strategies on how to educate the California public in April should the Task Force decide to not continue with the Bunche Center and communication firms contract.

Several Task Force members stated that effective public relations is important however the Task Force needs to hear from the two communications firms currently under contract about the issues raised and give them clear instructions of what the Task Force wants, rather than revisiting the contracts as suggested by the Chair. Member Montgomery-Steppe agreed with other members and notwithstanding the wonderful reputation of the Bunche Center, advised that on one occasion she reached out to one of the firms and did not get a reply so it would be good to hear from them and review the existing scope of work and share Task Force's expectations. Task Force members agreed that before reaching out to other organizations, representative Task Force members should meet with the Bunche Center and communication firms prior to the April meeting to let them know the concerns raised by Chair Moore so that they can come to the April meeting and address any outstanding issues. It was stated that this process would help members better understand the issues and allow the Task Force to make a more informed decision about the existing contracts prior to inviting other organizations to make proposals.

SAAG Brown suggested that the DOJ could facilitate a meeting with the Bunche Center, the communications firms, and two Task Force members before the next Task Force meeting

Chair Moore then asked for volunteers and mentioned Montgomery Steppe and Vice Chair Brown could meet with the Bunche Center and the Communication firms. The purpose would be to review the contract requirements and deliverables developed between the Bunche Center and DOJ and to inform them of the concerns of the Task Force in preparation of the April Task Force meeting. Member Montgomery-Steppe volunteered. Chair Moore suggested that the contract between the Bunche Center and the two communications firms also be reviewed. Member Montgomery Steppe stated that she would honor Dr. Grills position as the liaison to the Task Force for the Community Engagement Plan as she gathers the information.

Member Tamaki suggested that someone should meet with the Bunche center to clarify the concerns raised by the Task Force members.

SAAG Brown reminded everyone that the contract between the Bunche Center and DOJ is a public document and he agreed to provide the Task Force members a copy of the contract for their review.

Chair Moore asked for a Motion to adopt the Draft April Agenda as presented.

MOTION: Member Montgomery-Steppe moved to adopt the Draft April Task Force Agenda as presented.

Vice Chair Brown Seconded the motion

Chair Moore called for the vote.

Parliamentarian Johnson called the roll for the vote.

AYEs: Chair Moore, Vice Chair Brown, Member Bradford, Member Grills, Member Holder, Member Jones-Sawyer, Member Lewis, Member Tamaki, Member Montgomery-Steppe.

NAYs: 0

There were nine members present and voting. **9 Ayes and 0 Nays**

The motion carried

Chair Moore stated that the motion carried and the April agenda was adopted as presented.

21. Potential Action Item: Unfinished Business

Agenda Item #5 DOJ Updates was tabled by consensus of the task force to item #21, Unfinished Business in the interest of time and in consideration of ensuring that the Community of Eligibility decisions are timely made.

Chair Moore asked Task Force members to review a slide created by DOJ of two comments for Report 1 that Chair Moore submitted it to DOJ. She told task force members that DOJ stated that her comments might change the framing of the Report so, Chair Moore is presenting the two comments to the Task Force who could vote on whether or not to incorporate them into the Report:

Comment 1 Change all references of Black American to African American

Comment 2 Change all references of Race/Racism to Caste/Casteism/Casteist

Chair Moore explained the bases for her two proposed changes.

Chair Moore then called for a motion to adopt the changes reflected in the two slides.

Member Lewis voiced his concern with respect to comment 2. He stated that further time was needed to explain the concerns relative to changing references from ‘race/racism’ to ‘caste’ casteism/casteist

Member Grills expressed that the proposed changes would add unnecessary confusion.

Member Jones-Sawyer and Holder also expressed concerns and discomfort over the proposed changes, indicating that they would lead to confusion and needed greater analysis.

Vice Chair Brown voiced his belief that the language should be left alone.

MOTION

Member Bradford moved to Table the discussion on this topic until the April Meeting.

The motion was seconded by **Vice Chair Brown**.

Chair Moore called for the vote. Parliamentarian Johnson called the roll for the vote:

AYEs: Chair Moore, Vice Chair Brown, Member Bradford, Member Grills, Member Holder, Member Jones-Sawyer, Member Lewis, Member Tamaki, Member Montgomery-Steppe.

NAYs: 0

Nine members voted: **Ayes:** 9 and **Nays:** 0

Chair Moore announced that there were 9 ayes and 0 nays, and that the motion carried. The matter was tabled to the next Task Force meeting.

Chair Moore announced that the meeting was adjourned.

Member Bradford asked for permission to make a statement. He wanted to call attention to the morning Public Comments for the record. He stated there were a lots of accusations made both positive and negative toward task force members. Including alluding to sabotage. He reminded everyone of the importance of having diversity of opinion and to suggest that when someone that has a different opinion is sabotage, is divisive. He added

that there is no need to attack members for having a difference of opinion and every member should be able to freely express their opinions.

SAAG Brown said it would not pose a problem to continue to take public comments and witness testimony, telephonically.

He also stated that the DOJ was looking for direction with respect to witness selection. Some discussion occurred among the Task Force members with suggestions of ways to solve the problem but there was no agreed-upon solution no was there a vote on how to handle excess witnesses.

Potential Action Item #6: Hearing Proposal Schedule Chair Moore and Member Lewis (Agenda Item #6 was moved from March 29 to Agenda item #21 Unfinished Business The Task Force did not address this item.

22. Adjourn:

MOTION:

Vice Chair Brown moved that the meeting be adjourned. **Member Jones-Sawyer seconded** the motion. Chair Moore called for the Discussion: No discussion

Vice Chair Brown called for the Question

Chair Moore called for the vote. Aisha Martin-Walton called the vote.

AYEs: Chair Moore, Vice Chair Brown, Member Grills, Member Holder
Member Jones-Sawyer, Member Lewis, Member Tamaki, Member Montgomery Steppe

NAYs: 0

ABSENT: Member Bradford

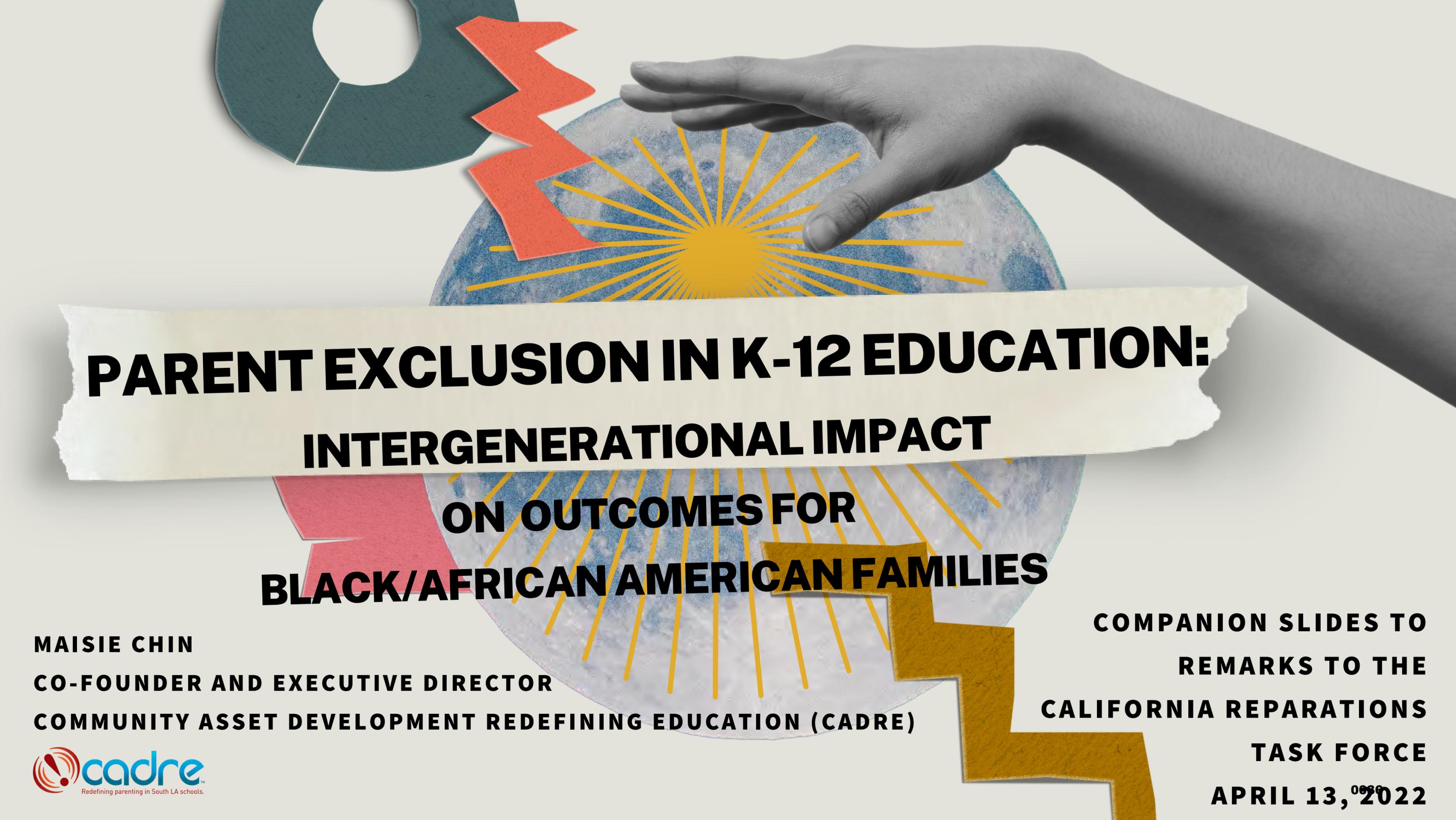
There were eight members present, 8 Ayes, 0 Nay

The motion carried. The meeting was adjourned.

AGENDA ITEMS 4, 7, AND 9

AVAILABLE WITNESS STATEMENTS AND
PRESENTATIONS

(Not all witnesses have submitted written statements
and presentations)



**PARENT EXCLUSION IN K-12 EDUCATION:
INTERGENERATIONAL IMPACT
ON OUTCOMES FOR
BLACK/AFRICAN AMERICAN FAMILIES**

**MAISIE CHIN
CO-FOUNDER AND EXECUTIVE DIRECTOR
COMMUNITY ASSET DEVELOPMENT REDEFINING EDUCATION (CADRE)**

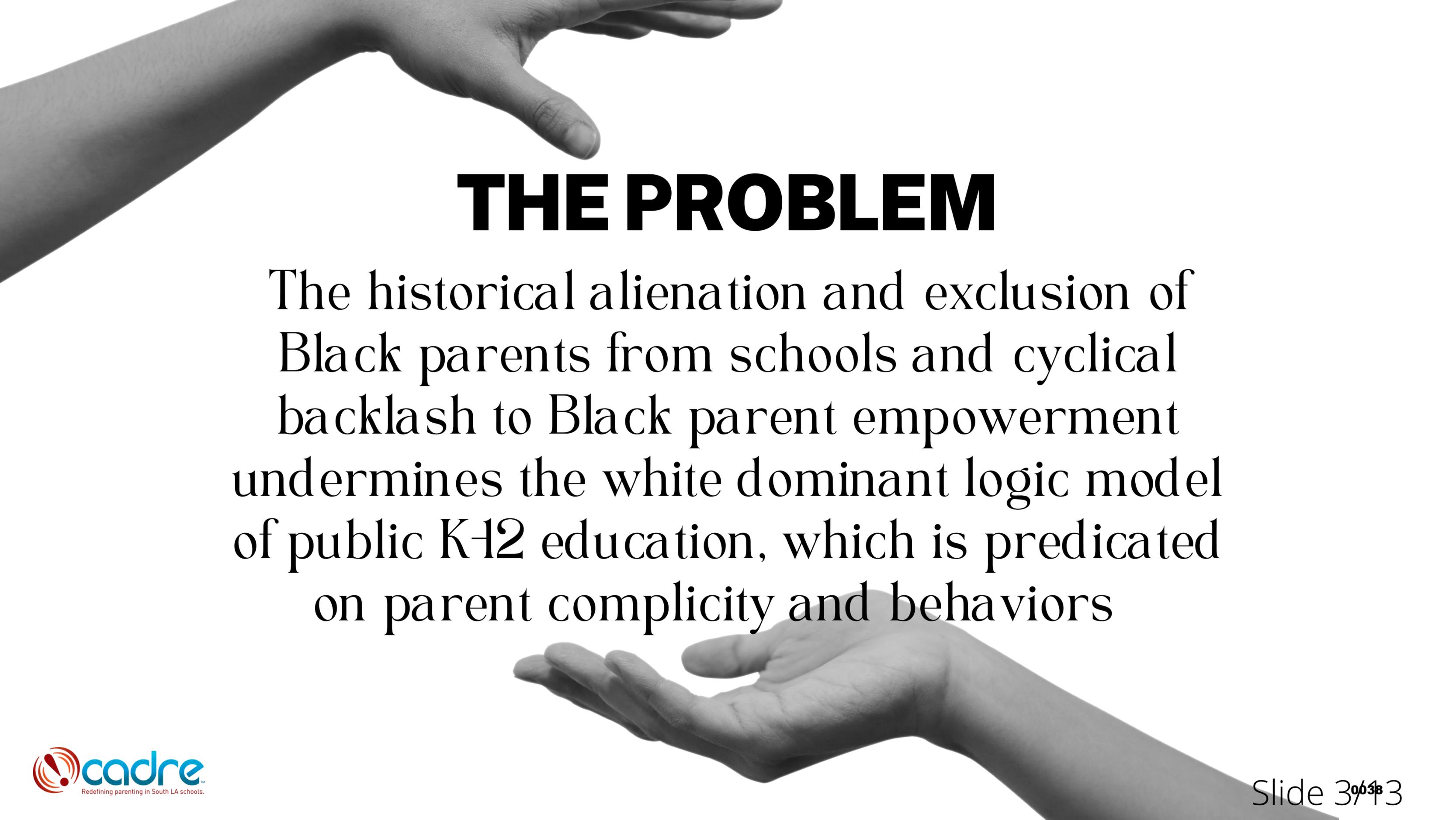


**COMPANION SLIDES TO
REMARKS TO THE
CALIFORNIA REPARATIONS
TASK FORCE
APRIL 13, 2022**



Today's remarks are the result of over 20 years of grassroots parent organizing based in South Los Angeles, through which this insight has been and will continue to be cultivated through deep relationships, conscious leadership and political development with marginalized Black and Brown parents, and building Black and Brown solidarity by centering the stories of Black South LA parents.





THE PROBLEM

The historical alienation and exclusion of Black parents from schools and cyclical backlash to Black parent empowerment undermines the white dominant logic model of public K-12 education, which is predicated on parent complicity and behaviors

THE RESPONSE:

EXAMINING THE INTERPERSONAL ROOTS OF PARENT ALIENATION FROM SCHOOLS WITHIN A COMMUNITY ORGANIZING MODEL



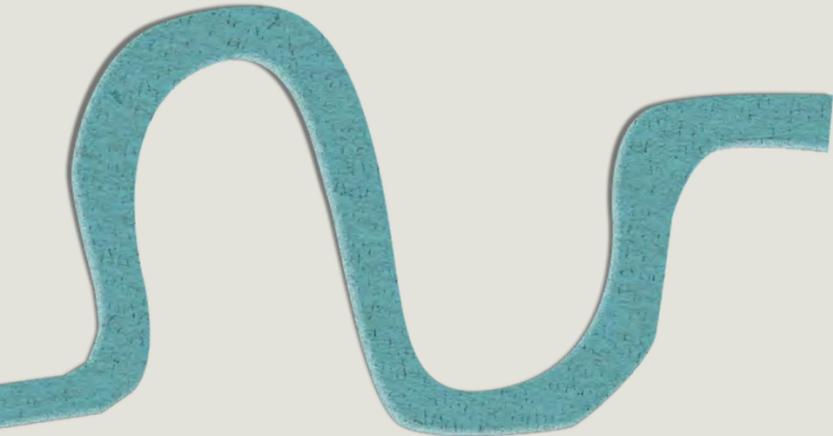
What does “parent power” mean if educational access and equity continue to be elusive for Black families?

CASES IN POINT:

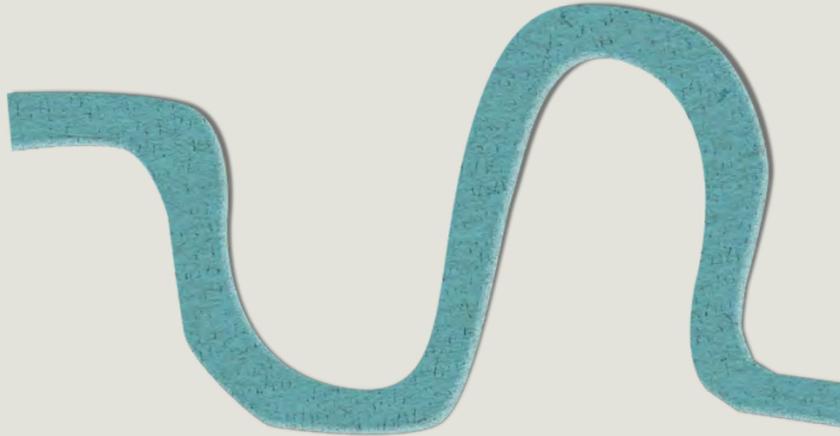
Rosalinda's Story

House meetings from 1999-2001





**DOES
RESEARCH
DOCUMENT THIS
DISSONANCE?**



We found that it is sorely
lacking.

SO, WE DID AND DO OUR OWN RESEARCH



**We interrupt this crisis—
with our side of the story**

Relationships Between South Los Angeles Parents and Schools
OCTOBER 2004





**Interrumpimos esta crisis—
con nuestra parte de la historia**

Relaciones Entre Los Padres del Sur de Los Angeles y las Escuelas
OCTUBRE DEL 2004





Community Asset Development Re-defining Education

More Education. Less Suspension.
A Call to Action to Stop the *Pushout* Crisis in South Los Angeles

Human Rights Documentation
In the Los Angeles Unified School District, Local District 7
June 14, 2006

Background

CADRE is a grassroots campaign to *solidify and advance parent leadership to ensure that all children are rightfully educated regardless of where they live.*

The Los Angeles Unified School District (LAUSD) has one of the highest dropout rates in the country. Nearly half of the students who start high school do not graduate. As the *Los Angeles Times* in its *Vanishing Class Series*, “the act of dropping out [is] generally the last twist in a downward spiral that begins with schools that are overcrowded, underperforming, lack resources to the volunteers who passed hours of their lives providing information about the experiences of the parents and of the parent-educators.”

Parents del Comité de CADRE por la dignidad y respeto

Padres del Comité de CADRE

Clinton Cameron, voluntario de CADRE

Amia Garcia y Maria Luisa Diano, separadoras de CADRE




Community Asset Development Re-defining Education

Más Educación. Menos Suspensión.
Un Llamado a la Acción para Terminar con la Crisis de la *Pushout* en el Sur de Los Angeles

Una Documentación de los Derechos Humanos
En el Distrito Escolar Unificado de Los Angeles, Distrito Local 7
14 de junio, 2006

Los Antecedentes

CADRE es un organismo comunitario de base que busca solidificar y avanzar el liderazgo de los padres para asegurar que todos los niños sean legítimamente educados sin importar el área donde ellos viven.

El Distrito Escolar Unificado de Los Angeles (LAUSD) tiene una de las mayores tasas de abandono de los estudios. Casi la mitad de los estudiantes que inician el primer grado no terminan. Como dice el *Los Angeles Times* en su serie *Class Series*, “el acto de abandonar los estudios [es] generalmente el último giro en un descenso descendente.” En el Sur de Los Angeles (El Sur de Los Angeles), el descenso comienza con escuelas que están sobrepobladas de estudiantes, que realizan un desempeño bajo un compromiso de parte de los maestros y el personal que funciona bajo una mala distribución de recursos. Las escuelas tienen tasas extremadamente altas de suspensiones de estudiantes llamado transferencias de ‘oportunidad.’ Sumada a estos obstáculos



EXECUTIVE SUMMARY

**Reshaping Dignity
in Our Schools**

A Shadow Report on School-Wide Positive Behavior Support Implementation in South Los Angeles, 2007-2010

JUNE 2010
Community Asset Development Re-defining Education (CADRE)
Mental Health Advocacy Services, Inc.
Public Counsel Law Center





RESUMEN EJECUTIVO

La Redefinición de la Dignidad en Nuestras Escuelas

Informe Sombra de la Implementación de la Política Apoyo Positivo del Comportamiento en Todas las Escuelas en el Sur de Los Angeles, 2007-2010

Junio del 2010
Community Asset Development Re-defining Education (CADRE)
Mental Health Advocacy Services, Inc.
Public Counsel Law Center





**Demanding Dignity in Our Schools:
Calling for Full Implementation of School-Wide Positive Behavior Interventions and Supports in LAUSD South LA Schools**

Review of LAUSD Discipline Data 2009-2010 through 2011-2012 school years and South LA Schools SWPBS Implementation in the 2011-2012 school year.

November 2012




HOW CAN YOU LOVE THE KIDS BUT HATE THE PARENTS?

A SHADOW REPORT ON THE UNFULFILLED PROMISES OF LAUSD SCHOOL DISCIPLINE REFORM IN SOUTH LA

OCTOBER 2017



¿CÓMO PUEDEN QUERER A LOS NIÑOS PERO ODIAR A LOS PADRES?

UN REPORTE SOMBRAS SOBRE LAS PROMESAS INCUMPLIDAS EN LA REFORMA DE DISCIPLINA ESCOLAR POR PARTE DE EL DISTRITO ESCOLAR UNIFICADO DE LOS ANGELES (LAUSD) EN EL SUR DE LA

OCTUBRE 2017



**NO
STANDARDS
FOR PARENT
TREATMENT**

**DENIED
STANDING TO
DEFEND THEIR
CHILDREN**

**NOT BELIEVED,
NOT
DOCUMENTED**

PUSHOUT/STPP

**PARENT +
CHILD
PROFILED OR
TARGETED**

**THREATENING
RETALIATION
(MANDATORY
REPORTING, PUBLIC
BENEFITS, ARREST)**

STILL... DEFERRED PROMISES

Numerous policies, data reports, and convenings have legitimized the STPP

and yet the full freedom and range of Black parent advocacy has yet to be legitimized



IN OTHER WORDS

TOO OFTEN - FAILURE TO LAUNCH

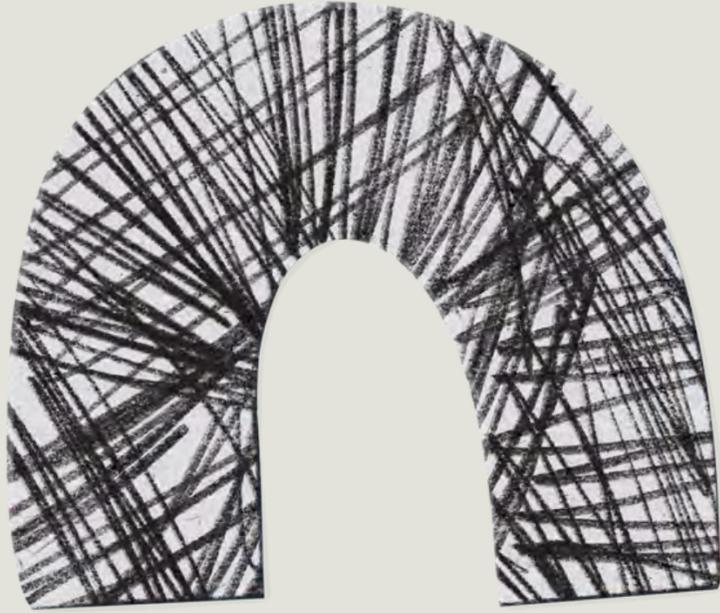
The most advanced, rigorous, and transformative strategies towards school climates are not equitably implemented for Black students - EVEN WITH POLICY ADOPTION AND RESOURCE ALLOCATION

PARENT MONITORING OF IMPLEMENTATION UNWELCOME

Little infrastructure or political will exist to include parents - especially parents of children targeted for exclusion and removal - in power over decisions and holding school staff accountable for implementing policy and no practical right to counsel

DISPARITIES FOR BLACK STUDENTS PERSIST

Striving for fidelity in implementation without confronting the resistance to implementing well-known remedies specifically for Black students, or willingness to be faithful to Black parents -- creates dead ends.



ANECDOTAL

EVIDENCE:

INTERGENERATIONAL

IMPACT



THANK YOU FOR LISTENING



Dr. Joyce E. King

President & CEO, The Academy for Diaspora Literacy, Inc.

Benjamin E. Mays Endowed Chair for

Urban Teaching, Learning & Leadership & Professor

Georgia State University *

Testimony Before the California AB3121 Task Force
to Study and Develop Reparations Proposals for African Americans
College to Professional Education Institutions Panel

April 13, 2022 via Telephone

* Testimony not intended to represent Georgia State University

BLACK EDUCATION

*A Transformative Research and Action Agenda
for the New Century*



Edited by
Joyce E. King



Published in partnership with the American Psychological Association



THE
BLACK LEADERSHIP KITCHEN CABINET
OF SILICON VALLEY www.blkc.org

OUR 
EDUCATION

**EDUCATION
ASSESSMENT &
RESEARCH PROJECT**

**Santa Clara County
African/African Ancestry
Research Project & Demographic Study**

What is *wrong* with our education?

From a Black Studies Theoretical perspective
this is a ***Knowledge Problem***: Bias, distortion, and omission in
the Academic Disciplines, influence College and Professional
Education Institutions, and mis-education in K-12
Curriculum, Pedagogy, Textbooks & Policy

California high school under fire after a unique “slavery lesson” outraged parents

Alex Thomas, September 20, 2017 2:10 pm



Photo by Hulton Archive/Getty Images

“She’s the only Black student in her fifth-grade class. When slavery wasn’t in a lesson plan, she spoke up.”



Her class was online in Pearland, TX (2020).

Iris was crushed by her teacher’s response, and she turned her camera off to cry.

Later she wrote an essay about the experience that went viral.

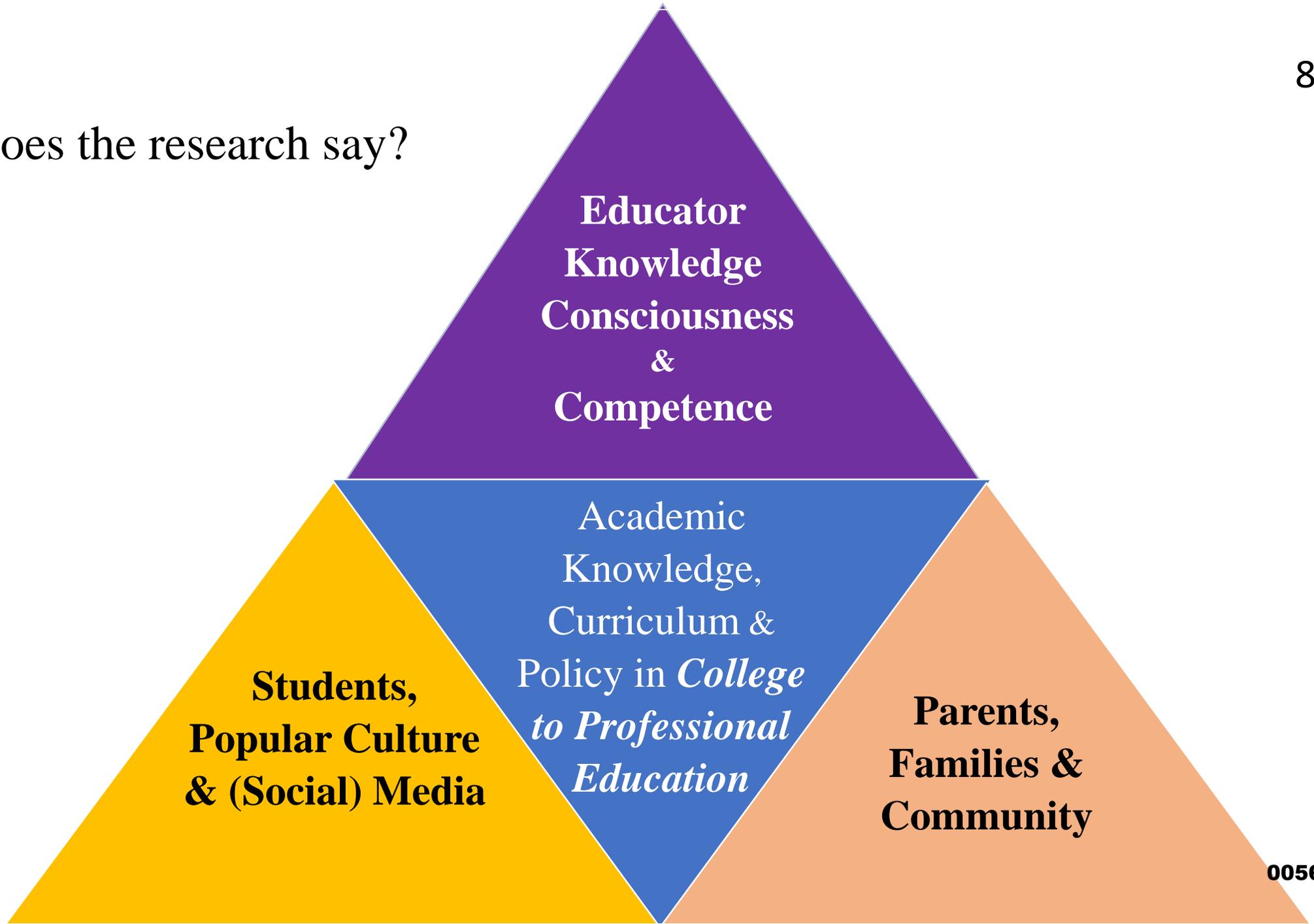
Iris Haq Lukolyo, Age 10

WHAT THE RESEARCH SAYS ABOUT ETHNIC STUDIES

Chapter 3 from *Transformative Ethnic Studies in Schools: Curriculum, Pedagogy, and Research*

Christine E. Sleeter
Miguel Zavala

What does the research say?



Subject: Resolution No. 208-25A2

In Support of Creating a K-12 Black Studies Curriculum that Honors Black Lives, Fully Represents the Contributions of Black People in Global Society, and Advances the Ideology of Black Liberation for Black Scholars in the San Francisco Unified School District

- Commissioners Stevon Cook, Alison M. Collins, Jenny Lam, Gabriela Lopez, Faauga Moliga, Rachel Norton, Mark Sanchez, and Student Delegates Shavonne Hines-Foster and Kathya Correa Almanza

WHEREAS: The San Francisco Unified School District has for the past 40 years introduced various initiatives aimed at closing the opportunity gap between African American students and their White and Asian counterparts; and

WHEREAS: The Euro-centric focus of the American education system and other American institutions has perpetually framed the history of Black people in America as either enslaved, discriminated against, or suffering under the social-ills of poor health, poverty and over-incarceration; and

WHEREAS: The broader impact of African innovations such as math, science, engineering, sea exploration and astrology that informed much of western civilization has never been sufficiently taught to students in traditional public schools; and

WHEREAS: The contributions of Black Americans to American history have been limited to stories of Dr. Martin Luther King Jr., Rosa Parks and individual accomplishments from various black people in history often shared in a one time celebration during Black History month; and

WHEREAS: The history of Black people in San Francisco is never taught in school from the role of a Black man in founding the San Francisco Unified School District, to SFUSD paying teachers less to work in “colored schools”, to the Great Migration of southern Blacks to the Bay Area to support the World War II effort, to the racist lending and hiring policies of the federal, state, and local government, to how urban renewal policies removed Black residents from their homes; and

WHEREAS: Given the long and varied history of the Black community and the wider impact of African innovation, a historical narrative needs to be detailed specific to the Black community in school that stands alone from the more multicultural history that is taught in Ethnic Studies; and

WHEREAS: There is a harmful myth and misconception that elevating individual achievements of Black Americans alone can translate into a broader inspiration and motivation to achieve for Black students; and

WHEREAS: Students in the San Francisco Unified School District have directly reported the value of knowing a fuller history of Black people for in order to achieve a stronger sense of self, a deeper understanding of American history and its contradictions, and increased engagement in their education; and

THEREFORE BE IT RESOLVED: The San Francisco Board of Education approves and supports the development of a K-12 Black Studies framework and curriculum, that provides the opportunity for every student to enroll in a Black Studies class by school year 2022 - 2023; and

BE IT FURTHER RESOLVED: The Black Studies curriculum will include a-g approved courses for SFUSD high schools and required unit plans for grades PK-8 that introduce students to the concept of race, racial identity, African and African American history, equity, and systemic racism; and

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PAGE 4

BE IT FURTHER RESOLVED: That the San Francisco Board of Education recommends the Superintendent to secure funding for this expansion, including the funding of 1 FTE devoted to overseeing the sequenced development of curriculum, stipends to pay educators and consultants to assist in writing curriculum, 3 FTEs to oversee implementation and conduct observations of curriculum on SFUSD campuses, 1 FTE data analyst to monitor implementation trends and outcomes from the courses, and a budget for professional development for ongoing learning for teachers; and

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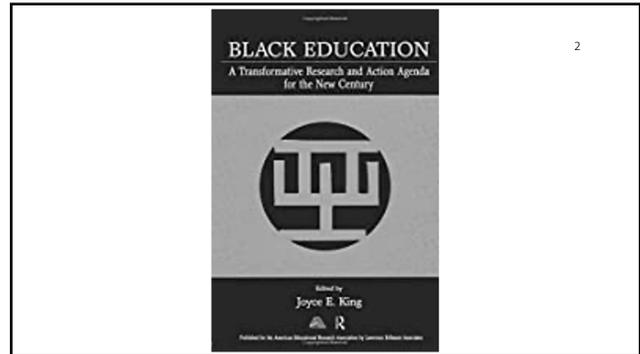
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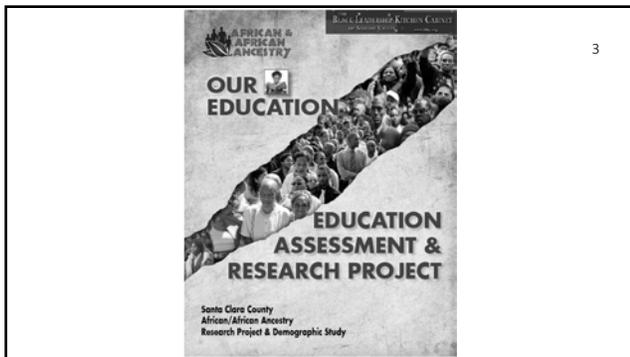
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* Testimony not intended to represent Georgia State University

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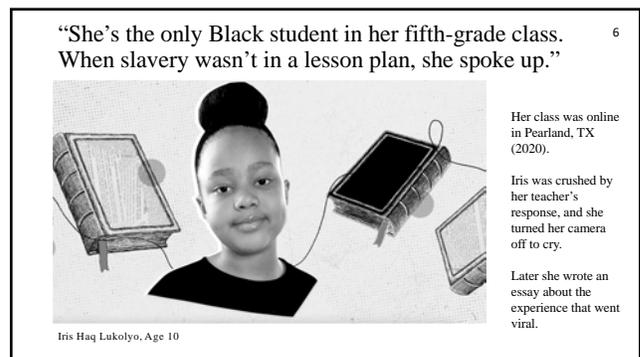
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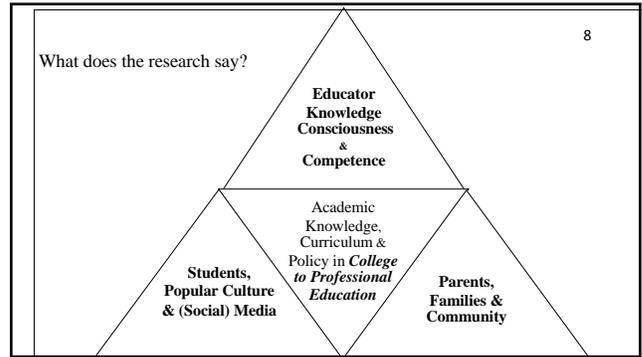
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Adopted by the Board of Education at its Regular Meeting of October 20, 2020

**Subject: Resolution No. 208-25A2
In Support of Creating a K-12 Black Studies Curriculum that Honors Black Lives, Fully Represents the Contributions of Black People in Global Society, and Advances the Ideology of Black Liberation for Black Scholars in the San Francisco Unified School District**
- Commissioners Stevon Cook, Alison M. Collins, Jenny Lam, Gabriela Lopez, Faauuga Moliga, Rachel Norton, Mark Sanchez, and Student Delegates
Shavonne Hines-Foster and Kathya Correa Almanza

WHEREAS: The San Francisco Unified School District has for the past 40 years introduced various initiatives aimed at closing the opportunity gap between African American students and their White and Asian counterparts; and

9

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14

Resolution No. 288-25A2 - In Support of Creating a K-12 Black Studies Curriculum that Honors Black Lives, Fully Represents the Contributions of Black People in Global Society, and Advances the Ideology of Black Liberation for Black Scholars in the San Francisco Unified School District - Commissioners Stevon Cook, Alison M. Collins, Jenny Lam, Gabriela Lopez, Faauuga Moliga, Rachel Norton, Mark Sanchez, and Student Delegates Shavonne Hines-Foster and Kathya Correa Almanza **PAGE 4**

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15

Attachment #3

Black Teaching Tradition (BTT) Teacher Development Framework for Black Pedagogical Genius

Black Teaching Tradition (BTT)

Definition: characteristics, roles, and embodiments transformative Black teachers have been collectively innovating for over a century; governs teaching practices

Nearly six generations of scholars have documented the distinctive attributes of excellent Black teachers in the United States and their transformative impact on Black children. Dr. Akosua Lesesne conducted a review of this rich body of literature through a teacher development lens¹. She found nine common elements representing the characteristics, roles, and embodiments governing these teachers' practices. Lesesne (2020) characterizes these elements as the Black Teaching Tradition (BTT). Even though Black teachers only comprise 6.8 percent of the U.S. teaching force (USDOE, 2016), several recent, large quantitative studies have found Black teachers to have a distinctively positive impact on the well-being and academic success of Black children (Egalite & Kisida, 2018; Gershenson et al., 2018; Gershenson et al., 2016; Grissom & Redding, 2015; Lindsay & Hart, 2017; Nicholson-Crotty et al., 2016). These data also comport with the scholarship on excellent Black teachers, as well as practice wisdom, and oral accounts. Despite the persistence of this evidence, teacher preparation programs and education reforms still look beyond the BTT to address the opportunity gap, disproportionately disadvantaging Black students in the United States, which has persisted for over sixty years. Lesesne asserts this effectiveness stems from the BTT. She contends the BTT is a culturally mediated tradition of pedagogical genius collectively innovated by Black teachers past and present with implications for the future.

Dr. Akosua Lesesne (Patricia Lesesne) is an educational design leader with eighteen years of teaching, teacher development, school-based leadership, and district level leadership experience in predominantly Black and Latinx urban school districts along the East Coast. She specializes in developing and coaching teachers and educational leaders in the implementation of curricula, programs, and pedagogy that employs an education for liberation approach to inspire Black children. Her work is also rooted in the transformative elements of the Black Teaching Tradition (BTT). Akosua is the founder of Sisters in Education Circle (SIEC) and Lesesne Learning.

¹ Considerations from a **teacher development lens include teachers' dispositions, knowledge, and skills represented in the BTT** by characteristics (priorities), roles (relationships), and embodiments (daily enactments).

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For more information:

Cell: (215) 983-8937

Email: lesesnelearning@gmail.com

Text messages are welcomed and receive most rapid response.

References

- Egalite, A. J., & Kisida, B. (2018).** The effects of teacher match on students' academic perceptions and attitudes. *Educational Evaluation and Policy Analysis*, 40(1), 59-81.
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Table of Black Teaching Tradition (BTT) Elements

CHARACTERISTICS

<i>High Expectations</i>	Black teachers hold high expectations for Black students' academic success, well-being, social thriving, sense of self-regard, and role in the community. Within the context of a <i>caring</i> relationship and made possible through <i>professional expertise</i> , Black teachers leverage personal authority and utilize appropriate effective instructional strategies to support Black students in meeting these expectations.
<i>Professional Expertise</i>	Black teachers are influenced by their sense that teaching is <i>answering</i> a serious calling and commit to acquiring quality formal training and pursuing continuous professional learning. <i>Believing</i> in the value of Black culture, Black teachers identify, implement, adapt, or invent instructional strategies that incorporate Black culture(s) as a tool for learning to meet educational needs of Black children.

ROLES

<i>Advocate</i>	Black teachers are defenders of the educational interests of Black students and are nurturers of political consciousness for Black students. In alignment with the role of <i>community member/extended family</i> , Black teachers are partners with Black students in the fight against oppression. Through <i>professional expertise</i> , Black teachers design instruction to these ends OR to develop the criticality of students.
<i>Bridge</i>	Black teachers are connectors who identify Black students' potential beyond current experiences, serve as <i>advocates</i> to connect them to additional options, and encourage and support them to take advantage of opportunities. <i>Believing</i> in the capacity of Black students, Black teachers are mentors and role models for <i>overcoming</i> systemic barriers for Black students' success in wider arenas.
<i>Community Member/Extended Family</i>	Black teachers often serve as other-parents, who often foster kinship relationships with Black students that reflect <i>caring</i> connections within family or tight knit communities. Black teachers view themselves as members of the same community or family with Black students. They advocate for Black students as their own and ensure their wellbeing, success, and fight against oppression as their own.

EMBODIMENTS

<i>Answering</i>	Black teachers often approach teaching Black students as a calling beyond the performance of an everyday job. In alignment with their role as <i>advocates</i> and out of a sense of <i>caring</i> , Black teachers' professional disposition is dictated by this calling. They go beyond industry standards, especially if said standards are oppressive or dehumanizing for Black students.
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Black Teaching Tradition (BTT)
Teacher Development Framework for Black Pedagogical Genius

<i>Believing</i>	Black teachers approach instruction from the unwavering standpoint that Black culture(s) are rich and positive, and with the conviction that Black students have limitless intellectual capacity and potential for success. In alignment with the <i>community member/extended family</i> role, Black teachers hold a collectively positive view of Black culture(s), themselves, and their students as community members.
<i>Caring</i>	Black teachers genuinely love Black students and approach teaching with full recognition of Black students' humanity . In alignment with the <i>advocate</i> and <i>community member/extended family</i> BTT elements, respectively, Black teachers' are shaped by the view that their political destinies are intertwined with that of Black students' , and by their sense of connection to Black students.
<i>Overcoming</i>	Black teachers often approach teaching with knowledge of the everyday injustice Black students' face and with the knowledge of how to overcome these injustices. Black teachers demonstrate <i>professional expertise</i> and act as an <i>advocate</i> by using this knowledge to create learning environments where Black students acquire knowledge and develop skills to overcome obstacles caused by injustice.

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Text messages are welcomed and receive most rapid response.

Suggested Reading and Resource List on Black Teaching Excellence

- Acosta, M. M., Foster, M., & Houchen, D. F. (2018). [“Why seek the living among the dead?” African American pedagogical excellence: Exemplar practice for teacher education](#). *Journal of Teacher Education*, 69(4), 341-353.
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- Baker-Bell, A. (2020). [Linguistic Justice: Black Language, Literacy, Identity, and Pedagogy](#). Routledge.
- Collins, M. (1992). [“Ordinary” children, extraordinary teachers](#). Hampton Roads Publishing.
- Delpit, L. (2006). [Other people's children: Cultural conflict in the classroom](#). The New Press.
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- Hale, J. E., & Hale, J. E. (1982). [Black children: Their roots, culture, and learning styles](#). JHU Press.
- Hilliard, A. G. (1998). [SBA: The reawakening of the African mind](#). Makare Pub Co.
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- Irvine, J. J. (1989). Beyond role models: [An examination of cultural influences on the pedagogical perspectives of Black teachers](#). *Peabody Journal of Education*, 66(4), 51-63.
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- Ladson-Billings, G. (2009). [The dreamkeepers: Successful teachers of African American children](#). John Wiley & Sons.
- Love, B. L. (2019). [We want to do more than survive: Abolitionist teaching and the pursuit of educational freedom](#). Beacon Press.

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Black Teaching Tradition (BTT)
Teacher Development Framework for Black Pedagogical Genius

- Muhammad, G. (2020). [Cultivating genius: An equity framework for culturally and historically responsive literacy](#). Scholastic Incorporated.
- Monroe, L. (1997). [Nothing's impossible: Leadership lessons from inside and outside the classroom](#). Times Books, a Division of Random House, Inc., New York, NY 10022.
- Nobles, W. W., & Nobles, Z. C. A. (2011). [NSaka Sunsum \(touching the spirit\): A pedagogy and process of black educational excellence](#). Multicultural Learning and Teaching, 6(2).
- Payne, C. M., & Strickland, C. S. (2008). [Teach freedom: Education for liberation in the African-American tradition](#). Teachers College Pr.
- Perry, T., Steele, C., & Hilliard, A. G. (2003). [Young, gifted, and Black: Promoting high achievement among African-American students](#). Beacon Press.
- Sizemore, B. (2008). [Walking in Circles: The Black Struggle for School Reform](#). Third World Press.
- Smitherman, G. (1999). [Talkin that talk: Language, culture and education in African America](#). Routledge.
- Walker, V. S. (2018). [The lost education of Horace Tate: Uncovering the hidden heroes who fought for justice in schools](#). The New Press.
- Wilson, A. N. (1992). [Awakening the natural genius of Black children](#). Afrikan World InfoSystems.
- Woodson, C. G. (2006). [The mis-education of the Negro](#). Book Tree.

About this list:

- This list is NOT exhaustive.
- Links for books are from Black-owned bookstores where available.
- Links for articles provide access to full texts.

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Adopted by the Board of Education at its Regular Meeting of October 20, 2020

Subject: Resolution No. 208-25A2

In Support of Creating a K-12 Black Studies Curriculum that Honors Black Lives, Fully Represents the Contributions of Black People in Global Society, and Advances the Ideology of Black Liberation for Black Scholars in the San Francisco Unified School District

- Commissioners Stevon Cook, Alison M. Collins, Jenny Lam, Gabriela Lopez, Faauuga Moliga, Rachel Norton, Mark Sanchez, and Student Delegates
Shavonne Hines-Foster and Kathya Correa Almanza

WHEREAS: The San Francisco Unified School District has for the past 40 years introduced various initiatives aimed at closing the opportunity gap between African American students and their White and Asian counterparts; and

WHEREAS: Despite these various attempts, ranging from developing Community Schools, Dream Schools, and Star Schools, the gap in English Language Arts and Mathematics standardized testing outcomes between racial groups has not narrowed whatsoever; and

WHEREAS: The Euro-centric focus of the American education system and other American institutions has perpetually framed the history of Black people in America as either enslaved, discriminated against, or suffering under the social-ills of poor health, poverty and over-incarceration; and

WHEREAS: The broader impact of African innovations such as math, science, engineering, sea exploration and astrology that informed much of western civilization has never been sufficiently taught to students in traditional public schools; and

WHEREAS: The contributions of Black Americans to American history have been limited to stories of Dr. Martin Luther King Jr., Rosa Parks and individual accomplishments from various black people in history often shared in a one time celebration during Black History month; and

WHEREAS: The history of Black people in San Francisco is never taught in school from the role of a Black man in founding the San Francisco Unified School District, to SFUSD paying teachers less to work in “colored schools”, to the Great Migration of southern Blacks to the Bay Area to support the World War II effort, to the racist lending and hiring policies of the federal, state, and local government, to how urban renewal policies removed Black residents from their homes; and

WHEREAS: Given the long and varied history of the Black community and the wider impact of African innovation, a historical narrative needs to be detailed specific to the Black community in school that stands alone from the more multicultural history that is taught in Ethnic Studies; and

WHEREAS: There is a harmful myth and misconception that elevating individual achievements of Black Americans alone can translate into a broader inspiration and motivation to achieve for Black students; and

WHEREAS: Students in the San Francisco Unified School District have directly reported the value of knowing a fuller history of Black people for in order to achieve a stronger sense of self, a deeper understanding of American history and its contradictions, and increased engagement in their education; and

WHEREAS: The San Francisco Board of Education has passed previous resolutions to support culturally responsive instruction and curriculum for African American students including a 2014 resolution to institutionalize Ethnic Studies, a 2015 resolution in support of expanded and targeted programming for African American students, and a 2019 Equity Studies resolution centering on decolonizing and anti-oppressive pedagogy and a humanizing framework for teaching students; and

WHEREAS: A 2016 Stanford Graduate School of Education study demonstrated SFUSD's implementation of Ethnic Studies boosted attendance and academic performance for students at risk of dropping out in high school and a series of working papers published by the National Bureau of Economic Research show that having just one Black teacher not only lowers Black students' high school dropout rates and increases their desire to go to college, but also can make them more likely to enroll in college; and

WHEREAS: There are a number of practitioners, programs, and school districts that have implemented elements of a Black Studies framework and can be consulted for guidance including (but not limited to): San Francisco State University's Africana Studies Department, Black to the Future, the African American Achievement & Leadership Initiative, San Francisco Human Rights Commission, Mega Black, San Francisco NAACP, OMEGA Boys & Girls Club, San Francisco Alliance of Black School Educators, San Francisco Black Led Organizations Coalition, Meadows Livingstone School, Kingmakers of Oakland, Ile Omode, Los Angeles Unified School District, El Rancho Unified School District, Philadelphia Schools, Tyson Amir, Jeff Duncan-Andrade, Shawn Ginwright, Urban Ed Academy, San Francisco Achievers, and John Templeton.

THEREFORE BE IT RESOLVED: The San Francisco Board of Education approves and supports the development of a K-12 Black Studies framework and curriculum, that provides the opportunity for every student to enroll in a Black Studies class by school year 2022 - 2023; and

BE IT FURTHER RESOLVED: The Black Studies curriculum will include a-g approved courses for SFUSD high schools and required unit plans for grades PK-8 that introduce students to the concept of race, racial identity, African and African American history, equity, and systemic racism; and

FURTHER BE IT RESOLVED: The commitment to expand Black Studies is grounded in the following principles:

- Deeper understanding of the principles of humanization to extend to Black knowledge and love of self, Black solidarity, and Black self-determination
- A collectivist process that elevates local Black voices in order to create a framework and curriculum that highlights the Black San Franciscan experience
- Exploration of racist ideas and policies balanced with the presentation of antiracist ideas and policies, including biological antiracism, ethnic antiracism, bodily antiracism, cultural antiracism, behavioral antiracism, color antiracism, class antiracism, space antiracism, gender antiracism, and queer antiracism

- Increasing Black employment and Black contracts through the development and implementation of this curriculum, including Black administrators, Black teachers, Black consultants, and Black paraprofessionals among other professions
- All students benefit from access to Black Studies courses because Black history provides a counternarrative to the dominant, often deceptive, Eurocentric telling of history

BE IT FURTHER RESOLVED: SFUSD adopts the following goals:

- in grades PK-5:
 - Students form a sense of pride for the accomplishments of Black people in global society and their local communities
 - Students identify examples of Black civilizations that have contributed to the major academic disciplines, building and stewarding wealth, and governing ancient and contemporary societies
 - Students reason that their culture, values, appearance, and other characteristics are not superior to another person's based on their race
- in grades 6-8:
 - Students complete an in-depth studies of Sub-Saharan African countries and their legacy
 - Students analyze the role Black leaders have played in challenging racist policies and ideas throughout history
- in grades 9-12:
 - Students evaluate how racist policies and ideas led to the rise of the transatlantic slave trade
 - Students assess enslaved Africans' economic contributions to the United States during slavery and the causes of the Civil War
 - Students hypothesize how Reconstruction, if uninterrupted, could have impacted and reduced racial disparities in the contemporary United States
 - Students analyze every major resistance effort led by Black people in the United States and the diaspora and how it contributed to progress in society

FURTHER BE IT RESOLVED: The Black Studies curriculum will include at least three "A" courses, one on African history, culture, and geographies, one on African diasporic studies, and another on African American history and phases of African American resistance; and

BE IT FURTHER RESOLVED: The Black Studies framework will include at least one "B" course focused on classic and modern African, African American, and diasporic literature; and

FURTHER BE IT RESOLVED: The Black Studies framework will include at least one "G" course that is youth-driven in curriculum development and implementation; and

BE IT FURTHER RESOLVED: That the San Francisco Board of Education recommends the Superintendent to secure funding for this expansion, including the funding of 1 FTE devoted to overseeing the sequenced development of curriculum, stipends to pay educators and consultants to assist in writing curriculum, 3 FTEs to oversee implementation and conduct observations of curriculum on SFUSD campuses, 1 FTE data analyst to monitor implementation trends and outcomes from the courses, and a budget for professional development for ongoing learning for teachers; and

FURTHER BE IT RESOLVED: The Board of Education recommends the Superintendent to secure participation from the San Francisco State University Africana Studies Department, AAPAC, and the Stanford-SFUSD partnership to sit on a Black Studies Advisory Committee that can inform curriculum design and course evaluation; and

BE IT FURTHER RESOLVED: The Board of Education recommends the Superintendent to secure participation from longstanding organizations focused on advancing the Black Community such as the Human Rights Commission, San Francisco NAACP, Alliance of Black School Educators, Mega Black, The San Francisco Coalition; and

FURTHER BE IT RESOLVED: The Board of Education recommends the Superintendent collaborate with the Human Rights Commission to convene Community Based Organizations and practitioners interested in contributing to the framework as a way to ensure local expertise is sought in curriculum development and delivery; and

BE IT FURTHER RESOLVED: The Board of Education recommends the Superintendent to raise a Black Studies Fund to fully fund this effort – including but not limited to curriculum development, FTEs to administer the program, and teacher FTEs to reach the curriculum – such that school sites do not need to draw resources from their site-allocated budgets to implement the Black Studies curriculum; and

FURTHER BE IT RESOLVED: The Black Studies Fund will allocate no less than \$15M annually to the development and implementation of the Black Studies curriculum and at least 80% of the fund will go directly to site-based costs of implementation including teachers, professional development, and supplies and 20% of the fund will go to administrative support for the Black Studies curriculum from Central Office; and

BE IT FURTHER RESOLVED: The Superintendent explores PEEF, philanthropic resources, and specialized city and state funding sources (e.g. ballot measures) to generate a Black Studies Fund; and

FURTHER BE IT RESOLVED: That the Superintendent provide an annual update to the Board of Education on the progress of this resolution.

8/25/20
10/20/20

2001

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Illinois	Cowlshaw ES	Several	Not Specified	Hartman, K. (2000, December 12). Moving history Fou Fourth grade students reenacted Underground Railroad and attempted to escape slavery	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61
Illinois	Fox Ridge ES	Audrey Tillmans	Not Specified	Meltzer, E. (2000, March 25). Re-enactment examines Fifth grade students reenact Underground Railroad	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61
Michigan	Cook Elementary	Three teachers	Not Specified	Bach, M. (2000, March 9). Parents, teachers meet, air Third and fourth graders shown the first 10 minutes of Amistad - with scenes of violence and nudity	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61

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2001

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Illinois	Cowlshaw ES	Corey Swift and	Not specified	Hartman, K. (2001, December 11). A look into the Under	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3AAsid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A15FF
				Fourth grade students reenacted Underground Railroad and attempted to escape slavery	
Colorado	Hadley MS	Rosalin Smoot	Not specified	Hughes, N. (2001, February 21). Middle-schoolers work	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3AAsid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A15FF
				8th grade student was mock kidnapped by uniformed men to simulate the slavery of children in Sudan.	

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[:3EC0&rfv_val_format=info%3Aofi/fmt%3Akev%3Amtx%3Actx&rfv_dat=document_id%3Anews%252F0EADB272C1F5ABA8](mailto:3EC0&rfv_val_format=info%3Aofi/fmt%3Akev%3Amtx%3Actx&rfv_dat=document_id%3Anews%252F0EADB272C1F5ABA8)

2002

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
California	Lincoln MS	Not specified	Not specified	Sorokin, E. (2002, July 21). Parents want apology for 8th grade students were tied up during a lesson on slavery	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61
Michigan	Paragon Charter acad	Several	Not specified	Roberts, K. (2002, February 22). Interactive history 8th graders participated in underground railroad reenactment	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61

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2003

Location	Name of School	Teacher	Ethnicity of Teac	Description	Link
Illinois	Cowlshaw ES**	Multiple	Not specified	Hartman, K. (2003, December 13). Runaway student Fourth grade students were set up to run through a simulated Underground Railroad	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0C
Missouri	Francis Howell MS	Bev Lofton	Not specified	Anthony, S. (2003, April 29). Barnwell students explc Eighth grade students were given the option to participate in having ankles and wrists taped together and lay on the floor to simulate slave ship	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0C

**This activity at this school is repeated in 2001 and 2000

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2004

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Virginia	Swift Creek ES	Andrea Tavenner	Not specified	Carroll, H. (2005, January 4). Mother contests 'Slave Auct 4th grade class re-enacted slave auction	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rfc_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&re

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2005

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Minnesota	St. Paul's Higher Ground Academ	Not specified	Not specified	Yuen, L. (2005, October 17). RELIVING ROAD Sixth grade students re-enacted underground railroad at night , complete with dogs	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CE
Alabama	Clay Elementary School	Not specified	Not specified	Jafari, S. (2005 May 22). THE PAST COMES TO 5th grade students participated in Underground railroad escape experience at YMCA's Camp Cosby	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CE
Texas	Cedar Park MS	Betsy Gonzales		Taboada, M.B. (2005, April 14). Living history Teacher had 8th grade students lie on the floor in the dark to simulate transport on slave ship	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CE

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2006

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
California	Ramona ES	Adriana Soltero	Not specified	Peterson, A. (2006, November 17). Ramona kid: 3rd grade role play: half class played as slaves, the other half as masters	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A15FF
Michigan	Waterford School dist	Tim VanRaemdonck (reenactor)	Not specified	Journal Editorial Board (2006, June 16). Race ca Civil War reenactor referred to Black 2nd grade students as slaves while they were on a field trip.	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A15FF
New Jersey	Readington MS	Not specified	Not specified	Reilly, M. (2006, January 22). Slavery essay upse African American student assigned to write a persuasive essay from the point of view of Spanish slave traders	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A15FF

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[3EC0&rt_val_format=info%3Aofi/fmt%3Akev%3Amtx%3Actx&rt_dat=document_id%3Anews%252F1124C3782D37D9F8](#)

[3EC0&rt_val_format=info%3Aofi/fmt%3Akev%3Amtx%3Actx&rt_dat=document_id%3Anews%252F10F4FD58A4BA7358](#)

2007

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Texas	Ridglea Hills ES	Larue Washington	Not specified	Associated Press, (2007, February 2). Teacher Punished Elementary students were shown a clip from Amistad - including a scene in which a character was stabbed	https://login.pallas2.tcl.sc.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=n5h&AN=519dd7f3b05d9dcb7b4f5b9dde9a8
Texas	Richland HS	Not specified	Not specified	AP. (2007, November 1). Texas school official to apologize Teacher repeatedly used "n-word" and wrote it on the board even after students asked her not to in preparation for Huck Finn lesson	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=
New Jersey	Grover Cleveland MS	Not specified	Not specified	Heyboer, K. (2007, October 11). Did slavery assignment Students were to imagine they inherited land in SC pre-Civil war and to create an advertisement convincing that slavery was the way to go.	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=
Florida	Sarasota MS	Not specified	Not specified	Nagat, K. (2007, April 25). Students re-enact life during 8th grade students reenacted life during Civil War	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Asid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=

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2008

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
New York	Havenstraw MS	Not specified	Not specified	Associated Press. (2008, December 6). Teacher's slavery lesson Two 7th grade Black girls had their hands and feet bound as part of slavery demonstration	https://www-proquest-com.pallas2.tcl.sc.edu/news/docview/1977460445/9993E519223840BEPQ/19?accountid=13965
Illinois	Freedom ES	Christine Wolinski	Not specified	Ferrell, P. (2008, December 5). Plainfield students pretend to es 5th graders reenacted Underground Railroad, some captured	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A1
Texas	Brownsboro Jr High	Rickey Pittman	Not specified	(2008, May 15). Junior high students step back in history. <i>The Cl</i> Teacher identified misinformation regarding civil war: claimed slavery was not a reason for Civil War	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A1
Minnesota	Highland Park Jr High	Jeanette Stohlmann	Not specified	Belden, D. (2008, March 31). HIGHLAND PARK JUNIOR HIGH - LE Seventh grade students participated in a simulated slave hunt to freedom through the school.	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A1
Connecticut	Cider Mill School	Tim Gallo	Not specified	Shea, B. (2008, March 13). Cider Mill students find freedom in U Fifth grade students took part in an exercise at Ambler Farm where they took on the role of slaves trying to escape	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3Aid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A1

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2010

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Michigan	Margaret Black ES	Not specified	Not specified	AP. (2010, November 11). Father sues district over reading Fifth grade teacher read excerpts from Julius Lester's "From Slave Ship to Freedom Road" that contain racial epithets and racist characterizations	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3AAsid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A1
Connecticut	Central MS	Anthony Mangano	Not specified	Vigdor, N. (2010, November 11). Parent: Homework assign 7th graders were given an assignment with passages that included N-word and other expletives to prepare for a literature unit	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3AAsid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_d
Indiana	East Elementary School	Not specified	Not specified	Stafford, D. (2010, April 23). Slavery lesson stops after conc Role play activity of underground railroad with rewards to students who returned "slaves" back to plantation	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3AAsid/infoweb.newsbank.com&svc_dat=WORLDNEWS&req_dat=0D0CB61A1

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2011

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Ohio	Chapelfield Elementary	Not specified	Not specified	10tv.com (2011, March 3). School Apologizes For Elementary students reenacted a slave auction	https://www.10tv.com/article/news/school-apologizes-elementary-slave-auction/530-49d52cc3-74ed-4fe9-8686-a26b911ecf41
Virginia	Sewells Point ES	Jessica Boyle		Sieff, K. (2011, April 12). Norfolk teacher holds m Fourth grade teacher had Black and mixed-race students act as slaves and White students bid on them.	https://www-proquest-com.pallas2.tcl.sc.edu/news/docview/1938733386/pagelevelImagePDF/9993E519223840BEPQ/34?accountid=

2012

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Georgia	Beaver Ridge ES	Luis Rivera	Latinx	Dodd, D.A. (2012, August 10). Gwinnett teacher who resigned apologizes for writing slavery-themed questions. The Third grade students at Beaver Ridge Elementary School in Gwinnett County were assigned math homework that used slave beatings and cotton picking in the calculation prompts.	https://www.ajc.com/news/local/gwinnett-teacher-who-resigned-apologizes-for-writing-slavery-t

2018

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Alabama	MacMillan International Academy	Not specified	Not specified	Roberts, C. (2013, February 21). School kids 'act out' slavery in Alabama classro Kindergarten students asked to act out slave auction and sent home with a color sheet of a slave auction	https://www.nydailynews.com/news/national/kids-act-slavery-alabama-school-article-1.1269775
Kansas	Liberty Memorial Central MS	Mike Wormsley	Not specified	Associated Press. (2013, February 19). Changes made in Lawrence 8th grade sla 8th grade teachers had students wear mock shackles as part of slavery lesson	https://www.butlercountytimesgazette.com/article/20130219/NEWS/130219055?template=ampart

2018

Location	Name of School	Teacher	Ethnicity of Teac	Description	Link
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2015

Location	Name of School	Teacher	Ethnicity of Teac	Description	Link
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2016

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Georgia	Cheatham Hill ES	Hope Largent	Not specified	Zubrzycki, J. (2016, September 6). Georgia Teacher Defends Controversial Lesson on Slavery. https://www.edweek.org/teaching-learning/georgia-teacher-defends-controversial-lesson-on-slavery/2016/09/06 Students played a game of dice to simulate the Underground Railroad with chances for freedom. https://www.ajc.com/blog/get-schooled/slavery-game-presents-opportunity-become-smarter-will-teacher-argue/2016/09/06	https://www.edweek.org/teaching-learning/georgia-teacher-defends-controversial-lesson-on-slavery/2016/09/06 https://www.ajc.com/blog/get-schooled/slavery-game-presents-opportunity-become-smarter-will-teacher-argue/2016/09/06

2017

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
California	Whitney HS	Not specified	Not specified	Thomas, A. (2017, September 21). High school under fire after 's 8th grade students role played as slaves while teachers were playing as ship captains. Students' hands were bound with tape, laid on floor while watching Roots	https://www.fox13memphis.com/news/trending-now/high-school-under-fire-after-slavery-lesson-outrages-parents/612420648/?out

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2018

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
New York	MS 118	Patricia Cummings	White	Burke, K., Ray, E. and Chapman, B. (2018, February) Black middle school students at Middle School 118 in NYC were told to lie on the floor to model slavery and teacher stepped on their backs in an attempt to m	https://www.nydailynews.com/new-york/education/bronx-teacher-sparks-outrage-cruel-slavery-lesson-art
Texas	Great Hearts Monte Vista	Not specified	Not specified	The Associated Press. (2018, April 21). Texas teach Eighth grade students in a San Antonio, Texas middle school social studies class were asked to list both positives and negatives to slavery.	https://www.reviewjournal.com/news/nation-and-world/texas-teacher-asks-students-to-list-positives-of-slavery/
Michigan	Meadow Brooke ES	Not specified	White	Berger, T. (2018, March 23). Michigan Parent Furiou 5th grade students were asked to lay on the floor to simulate how uncomfortable slaves were on the ships. Students and the teacher (white) made jokes during the lesson as well.	https://atlantablackstar.com/2018/03/23/michigan-parent-furious-yet-another-slavery-lesson-goes-left/
Georgia	Coleman MS	Not specified	Not specified	Thomas, T. (2018, February 1). Mother, student upset about sl 7th grade assignment: The students were asked to respond to the following: "Slavery wasn't such a bad thing because slaves were an important investment and people take care of import	https://www.wsbtv.com/news/local/gwinnett-county/mother-student-upset-about-slavery-question-in-middle-school-7th-grade-assignment
Illinois	Nature's Classroom Institute McKinley Junior HS	Not specified	Not specified	Lourgos, A. (2018, April 27). Slavery-era portrayal upsets some 6th grade field trip had student recreate the Underground Railroad	https://www-proquest-com.pallas2.tcl.sc.edu/news/pagelevelimagepdf/2070179056/pagelevelImagePDF/9993E51!

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model the Middle Passage.

[-class/692739525](#)
:ant investments. Explain why you agree or disagree.”

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2019					
Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Tennessee	Sunset MS	Not specified	Not specified	Associated Press. (2019, March 1). Tennessee school apologizes for asking students to pretend https://www.cbsnews.com/news/slavery-homework-assignment-tennessee-school-apologizes-for-asking-students-to-pretend-to-own-slaves/ Students at Sunset Middle School asked to pretend they owned slaves and create a list of expectations.	
Virginia	Madison's Trust ES	Not specified	Not specified	Collazo, V. (2019, February 21). For Black History Month, this Loudoun County elementary scho https://www.loudountimes.com/news/for-black-history-month-this-loudoun-county-elementary-school-played-a-runaway-slave-game-in/article_9cec Third, fourth, and fifth grade students participated in an obstacle course to represent Underground Railroad and simulated runaway slaves	
New York	J.W. Dodd MS	Not specified	Not specified	Eyewitness News ABC7NY. (2019, September 26). Long Island teacher apologizes after telling s https://www.youtube.com/watch?v=sEq9QF-9RyI Eighth grade students asked to caption photos of Enslaved Africans to "make it funny"	
North Carolina	Codington ES	Not specified	Not specified	Bellamy, C. (2019, March 12). School apologizes after teaching students black history with 'Esca https://www.fayobserver.com/news/20190312/school-apologizes-after-teaching-students-black-history-with-escaping-slavery-game Fourth grade students were assigned a game called "Escaping Slavery" where they role played escaping slavery and risked being penalized and being sent back to a plantation as a slave	
New York	Village Lutheran Church Chapel School	Rebecca Antinozzi	White	Griffith, J. (2019, May 29). Black students were cast as slaves in New York teacher's mock 'aucti https://www.nbcnews.com/news/nbcblk/black-students-were-cast-slaves-new-york-teacher-s-mock-n1011361 Black fifth grade students at Village Lutheran Church Chapel School in Bronxville, NY were put ir https://connecticut.news12.com/i-teach-with-my-heart-teacher-pushes-back-amid-slavery-lesson-firestorm-40155154	
Missouri	Blades Elementary School	Not specified	Not specified	KCOMV (2019, December 11). Mehlville teacher on administrative leave for slave trade classroom activity. <i>KMOV4</i> https://www.kmov.com/news/set-your-price-for-a-slave-mehlville-teacher-on-administrative/article_28ad01f8-1aca-11ea-8171-4ff6599da67e.html 5th grade math: "You own a plantation or farm and therefore need more workers. You begin to get involved in the slave trade industry and have slaves work on your farm. Your product to trade is slaves. Set your price for a slave. _____ These could be worth a lot.	
Arizona	Charter school - name not given	Not specified	Not specified	Lockhart, P.R. (2019, April 19). Schools keep teaching slavery and civil rights history in ways that traumatize black s https://www.vox.com/identities/2019/4/19/18507873/arizona-school-segregation-lesson-slavery-civil-rights-history 9 year old 3rd grade Black boy was asked to walk through the classroom while classmates jeered at him simulating "Little Rock Nine" experiences	
New York	North Elementary School	Patricia Bailey		Chapman, K. (2020, August 10). State completes probe into 'slave auction' at North Elementary School, teacher sp https://www.wny.com/2020/08/10/state-ag-completes-investigation-into-alleged-slave-auction-incident/ Fourth grade Black students stood at the front of the room while others bid on them. Lesson reported to be unrelated to slavery	
Alaska	North Pole HS	Not specified	Not specified	Associated Press. (2019, November 8). Investigation clears North Pole teacher in slavery lesson. <i>Alaska's News Sou</i> https://www.alaskanewssource.com/content/news/Investigation-clears-North-Pole-teacher-in-slavery-lesson-564678411.html Social Studies lesson taught that South's economy was tied to slavery.	
Washington DC	Lafayette ES	Not specified	Not specified	Fedschun, T. (2020, January 2). Black students at DC school were asked to portray slaves during assignment, princi https://www.foxnews.com/us/black-classmates-washington-dc-school-slavery-assignment Fifth grade students were tasked with portraying slavery and asked Black classmates to play role of enslaved peop https://www.proquest-com.pallas2.tcl.sc.edu/news/docview/2360121322/pagelevel/ImagePDF/9993E519223840BEPQ/46?accountid=13965	
North Carolina	Kannapolis MS	Not specified	Not specified	Associated Press (2019, December 11). District apologizes for assignment comparing value of slaves. <i>Associated Pr</i> https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&ft_id=info%3Asid/infoweb.newsbank.com&svc_dat=V The assignment asked questions such as "How many slaves would be needed to equal at least four white people?"	
Indiana	Western Middle School	Kevin Pax		Associated Press (2019, September 14). Indiana school cancels slave ship lesson after public outcry. <i>Associated Pre</i> https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&ft_id=info%3Asid/infoweb.newsbank.com&svc_dat=V Eighth grade social studies teacher had planned a slave ship reenactment	

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2020

Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Tennessee	Waverly Belmont ES	Andrew Herman	White	Mangrum, M. (2020, November 5). Nashville family of child with autism sues MNPS, teach Fourth grade students at Waverly Belmont Elementary School in Nashville participated in a lesson called "Let's make a slave" that was created by a student teacher.	https://www.tennessean.com/story/news/education/2020/11/05/nashville-lawsuit-schools-class-assignment-slavery/
Colorado	West Woods ES	Not specified	Not specified	Dignan, C. (2020, January 29). Parents defend teacher on leave over racial casting in slav Teacher assigns African American and biracial students to play Enslaved Africans in read-aloud play in class	https://www.nhregister.com/metro/article/Parents-defend-teacher-on-leave-over-racial-15013541.ph
South Carolina	Richland One	Not specified	Not specified	Dapri, Lucas (2020 May 26). District apologizes for 'inappropriate' question about slavery Fourth grade students in Richland One were assigned to write a journal entry from the perspective of either slave or slave owner before the Civil War.	https://www.thestate.com/news/local/education/article242999937.html
New Jersey	Toms Rivers Intermediate	Lawrence Cuneo	White	Strupp, J. (2020, February 13). Toms River schools clear teacher who taught controversial slavery lesson. ap Eighth grade students laid on floor pretending to pick cotton with whip cracking noises surrounding them **teacher is the mayor of Pine Beach**	https://www.app.com/story/news/education/in-our-schools/2020/02/13/toms-river-schools-clear-teacher-controversi
Texas	Glenn York ES	Not specified	Not specified	McShane, J. (2021, February 23). She's the only Black kid in her fifth-grade class. She spoke up when slavery Lesson on Founding Fathers building country neglected to include contributions of African Americans Student writes an essay in response	https://www.thelily.com/shes-the-only-black-kid-in-her-fifth-grade-class-she-spoke-up-when-slavery-wasnt-included
Michigan	Frost MS	Not specified	Not specified	(2020, December 7). Livonia mother speaks out about racially offensive history lesson in her daughter's 7th Seventh grade social studies assignment: "A slave stands before you. This slave has disrespected his master by telling him you are not my master. How will you punish this slave?"	https://www.wxyz.com/news/america-in-crisis/livonia-mother-speaks-out-about-racially-offensive-history-lesson-in-h

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[ier-daughters-7th-grade-class](#)

2021					
Location	Name of School	Teacher	Ethnicity of Teacher	Description	Link
Pennsylvania	South Fayette HS	Not specified	Not specified	Salo, J. (2021, March 11). Pennsylvania teacher suspended over 'unacceptable' assignment on slaves. New York Post. Pennsylvania 10+ grade students at South Fayette High School asked to imagine they were retired British	https://nypost.com/2021/03/11/pa-teacher-suspended-over-unacceptable-assignment-on-slaves/
Pennsylvania	Moon Area Middle School	Not specified	Not specified	Houston, R. (2021, April 21). Parents angered after Pennsylvania teacher asks students unsettling slavery Pennsylvania 8th grade students at Moon Area Middle School asked, "Would you rather have been a well taken	https://www.wpxi.com/news/top-stories/parents-angered-after-pennsylvania-teacher-asks-unsettling-slavery-question-students/K6TH
Wisconsin	Patrick Marsh Middle School	three teachers	not specified	Associated Press (2021, April 14). Wisconsin teachers resign in wake of slavery question. Abcne Wisconsin 6th grade students asked how they would punish slaves as part of a unit on ancient Mesopotami	https://abcnews.go.com/US/wireStory/wisconsin-teachers-resign-wake-slavery-question-7706860/
Louisiana	**State house debate***	Rep. Ray Garofalo	white	Wilkinson, J. (2021, April 27). Louisiana state rep suggests teaching 'good' of slavery during edu "If you're having a discussion on, whatever the case may be, on slavery, then you can talk about everything dealing with slavery, the good the bad the ugly," Rep. Ray Garofalo sa	https://www.nydailynews.com/news/national/ny-louisiana-state-rep-slavery-good-20210427-alcrcq2bjhkpcsq2p7p63q-story.htm
Michigan	MacDonald MS	Matt Christians	not specified	Nurse, K. (2021, May 10). East Lansing teacher reinstated after probe of slavery assignments. L: 8th grade social studies teacher assigned a worksheet that asked students to imagine themselves as enslaved people Assignment from 2012 from same teacher surfaced that asked students to argue the pros of slavery	https://www.lansingstatejournal.com/story/news/local/2021/05/10/east-lansing-teacher-reinstated-after-investigation-slavery-assignm
New York	Jefferson Road ES	several implied, none specified	not specified	Murphy, J. (2021, April 20). Pittsford sorry after some fourth-graders falsely were taught Africans 4th graders given a worksheet that claimed "Africans voluntarily came to America as part of a multi-year employment contract.	https://www.democratandchronicle.com/story/news/2021/04/20/pittsford-school-district-apologizes-over-worksheet-on-slavery/73027
Washington	Sacajawea MS	Not specified	Not specified	Associated Press. (2021, June 3). Black students upset by school project directing them to clean Twin 8th grade girls were asked to clean cotton as part of a lesson on slavery. When parents complained admin offered to remove the twins from the class (two of the only three Black student)	https://www.nbcnews.com/news/nbcblk/black-students-upset-school-project-directing-clean-cotton-rcna1101
Texas	Purvis MS	Not specified	Not specified	Beveridge, L. (2021, March 4). 'Pretend like you are a slave': Purvis Middle School teacher's assi Middle school students in Mississippi assigned to assume role of a slave and write a letter to your family back in Africa describing your lif	https://www.hattiesburgamerican.com/story/news/local/2021/03/04/teacher-slavery-assignment-purvis-mississippi-sparks-outrage/45
Pennsylvania	Lincoln HS	Not specified	Not specified	Graham, K.A. and Vella, V. (2021, March 26). Philly teacher under scrutiny after giving an assign African American history class at Lincoln High School, Mayfair, PA, 10th grade students were to write an essay explaining how it would feel to be sold and make an argument or plea to reconsider the arrangeme Assignment stood and was graded	https://www.inquirer.com/news/philadelphia-school-district-lincoln-high-assignment-slavery-20210326.htm
Florida	Island Coast HS	Not specified	Not specified	Mathews, D. (2021, February 18). Florida teacher suspended after telling class n-word 'just mea AP History students at Island Coast High School in Cape Coral, FL were told by their teacher that the n-word only meant ignorant and that slave owners would not abuse their slave	https://www.nydailynews.com/news/national/ny-florida-teacher-n-word-tiktok-20210218-mqmniiib6zf4nltk37mf5ly2y-story.htm
North Carolina	Waxhaw ES	Not specified	Not specified	Changa, A. (2021, March 16). 'Slavery For Life': School District Forced To Apologize After Anoth Fourth grade students at Waxhaw Elementary School in NC were assigned to create hashtags that may have been tweeted during the Civil War, resulting in #slaveryforever and #slaveryforli	https://newsone.com/4106505/north-carolina-slavery-civil-war-school-assignment
Delaware	McIlvaine Early Childhood Cent	Not specified	White	Linly, Z. (2021 February 28). Slavery Yoga Was Taught to Kindergarteners in Delaware for Black Kindergarten teacher at McIlvaine Early Childhood Center recorded a distance learning yoga lesson using slavery situations to teach yoga: boat pose, plow pos	https://www.theroot.com/slavery-yoga-was-taught-to-kindergarteners-in-delaware-184637630/
New York	Jefferson Road ES Plank Road ES	Not specified	Not specified	Murphy, J. (2021, April 20). Pittsford sorry after some fourth-graders falsely were taught Africans came to U.S. by Worksheet used included: "As an exchange for the trip to America, African Americans agreed to work for colonists for ____ years, but then were kept as slaves.	https://www.democratandchronicle.com/story/news/2021/04/20/pittsford-school-district-apologizes-over-worksheet-on-slavery/73027
Michigan	John Page MS	Not specified	Not specified	Wimbley, R. (2021, March 22). 'A crash course in slavery' assignment shocks Madison Heights parents. Fox2 Detroit Math problems based on slavery: One of the questions read, "If a slave could clean and process five pounds of cotton a day, how much could one clean and process with a cotton gin?" Another said, "If an enslaver could produce 200 pounds of cotton a day wil	https://www.fox2detroit.com/news/a-crash-course-in-slavery-assignment-shocks-madison-heights-parents
Pennsylvania	Pennridge School District	Not specified	Not specified	Ullery, C. (2021, March 10). Did Pennridge 'Planter Aristocrat' lesson sanitize slavery? Courier Times Writing assignment asked students to imagine themselves as part of the Southern Planter class rather than the slaveholding class	https://www.buckscountycouriertimes.com/story/news/2021/03/11/pennridge-school-district-slave-owner-assignment-stokes-ire/6875
Colorado	Creighton MS	Not specified	Not specified	Hernandez, L. (2021, February 11). Jeffco Schools says Creighton MS working with family that took issue with slave 8th grade teacher allowed inappropriate jokes to be made during a lesson about slavery	https://www.thedenverchannel.com/news/local-news/jeffco-schools-says-creighton-ms-working-with-family-that-took-issue-with-slave
Utah	Centennial MS	Not specified	Not specified	Williams, R. (2021, April 20). Provo middle school Civil War project raises some concern. Daily Herald Reenactment of Civil War era for 8th grade students with roles as enslaved and slave owner:	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3A%2Finfoweb.newsbank.co
Colorado	James Irwin Charter Schools	Not specified	Not specified	Snouwaert, J. (2021, April 16). Colorado Springs charter school apologizes to students, staff for assignment on raci Assignment related to "Their Eyes were Watching God" - assignment titled "N-Word Journal" "Is it hard to talk about the N-word in an academic setting? Why or why not?"	https://infoweb-newsbank-com.pallas2.tcl.sc.edu/apps/news/openurl?ctx_ver=z39.88-2004&rft_id=info%3A%2Finfoweb.newsbank.co

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th eight slaves and a cotton gin, how many more slaves would he have to buy to produce 500 pounds of cotton a day?

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State	Total	2021	2020	2019	2018	2017	2016	2013	2012	2011	2010	2008	2007	2006	2005	2004	2003	2002	2001	2000
1 Alabama	2							1							1					
2 Alaska	1			1																
3 Arizona	1			1																
4 Arkansas	0																			
5 California	3					1								1				1	1	
6 Colorado	4	2	1																1	
7 Connecticut	2										1	1								
8 Delaware	1	1																		
9 Florida	2	1											1							
10 Georgia	3				1		1		1											
11 Hawaii	0																			
12 Idaho	0																			
13 Illinois	6				1							1					1		1	2
14 Indiana	2			1							1									
15 Iowa	0																			
16 Kansas	1							1												
17 Kentucky	0																			
18 Louisiana	1	1																		
19 Maine	0																			
20 Maryland	0																			
21 Massachusetts	0																			
22 Michigan	8	2	1		1						1			1				1		1
23 Minnesota	3											1		1	1					
24 Mississippi	1	1																		
25 Missouri	2			1													1			
26 Montana	0																			
27 Nebraska	0																			
28 Nevada	0																			
29 New Hampshire	0																			
30 New Jersey	3		1										1	1						
31 New Mexico	0																			
32 New York	7	2		3	1							1								
33 North Carolina	2			2																
34 North Dakota	0																			
35 Ohio	1									1										
36 Oklahoma	0																			
37 Oregon	0																			
38 Pennsylvania	4	4																		
39 Rhode Island	0																			
40 South Carolina	1		1																	
41 South Dakota	0																			
42 Tennessee	2		1	1																
43 Texas	7	1	1		1							1	2		1					
44 Utah	1	1																		
45 Vermont	0																			
46 Virginia	3			1						1									1	
47 Washington	1	1																		
48 West Virginia	0																			
49 Wisconsin	1	1																		
50 Wyoming	0																			
51 Washington DC	1			1																
TOTAL	77	18	6	12	5	1	1	2	1	2	3	5	4	4	3	1	2	2	2	3

#StudentsDeserve Reparations: The School-to-Prison Pipeline and the fight for Police-Free Schools!



#STUDENTSDESERVE

MAKING BLACK LIVES MATTER
IN SCHOOLS



Overview



01

Who is Students Deserve?

A short description of the work of Students Deserve and our personal connection to it.

02

The Impact of the School to Prison Pipeline

Data & experiences about youth criminalization in LA's schools

03

Pushback from the People!

Community responses to student criminalization

04

Where are we now?

The current state of student criminalization and the case for reparations.

Who is Students Deserve?



- A youth-led grassroots organization of students + parents + teachers fighting for justice in education and beyond.
- We center and uplift Black youth voices & experiences and work closely with Black Lives Matter-LA, fighting to Make Black Lives Matter in and beyond schools.
- We want schools to divest from criminalization and policing.
- We want schools to invest in us as Black, Muslim, undocumented, indigenous, and queer youth in poor and working class communities of color.

Personal Experiences With Youth Criminalization

Marshé Doss - Youth Organizer, Students Deserve

Mau Trejo - School and Community Organizer, Students Deserve

Joseph Williams - Director, Students Deserve



Race, Class, and Criminalization in LA Schools

- After Columbine, there was a national movement to place police in schools. That largely happened in schools with low-income BIPOC youth
- CA is one of the highest spenders on prisons and mass incarceration, and one of the lowest per pupil spenders on education
- In 2011, the Department of Education found that Black students in LAUSD were being denied equal access to education due to disciplinary and other reasons
- From 2014-17, Black students made up 8% of LAUSD but 30% of LASPD arrests
- Immigrant students contacted by school police have higher rates of incarceration and/or deportation
- LASPD is the largest independent school police department in the country and had a budget of nearly \$80 million (UNTIL WE HELPED CUT IT!) **0121**

POLICING OUR STUDENTS

MD
MILLION
DOLLAR
HOODS



AN ANALYSIS OF L.A. SCHOOL POLICE DEPARTMENT DATA (2014-2017)

Terry Allen MA, Isaac Bryan MPP, Andrew Guerrero, Alvin Teng MPP, Kelly Lytle-Hernández PhD, and the Million Dollar Hood Team

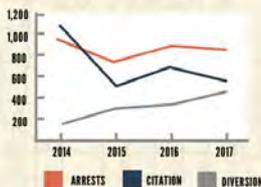
Los Angeles County is home to the largest school police force in the nation and the fifth largest police department in the county.¹ Using Los Angeles School Police Department (LASPD) data, this report provides insight into three processes by which youth come into contact with the LASPD. These processes include arrest, citation, and diversion.

Our analysis shows that LASPD made 3,389 arrests while issuing 2,724 citations and 1,282 diversions between 2014 and 2017. Black youth comprised 25% of the total arrests, citations, and diversions, despite representing less than 9% of the student population.² Boys of color made up 76% of all LASPD involvement. Elementary and middle-school age youth accounted for 1 in 4 of the total arrests.

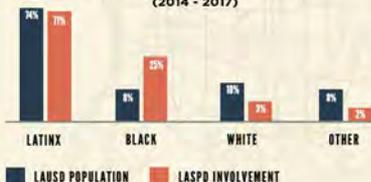
7,395 TOTAL YOUTH ARRESTS, CITATIONS AND DIVERSIONS REPORTED BETWEEN 2014 AND 2017



THE TOTAL NUMBER OF ARRESTS AND CITATIONS HAS SLIGHTLY DECREASED SINCE 2014. DIVERSIONS ARE STEADILY RISING



LAUSD POPULATION VS. LASPD INVOLVEMENT (2014 - 2017)



TOP 5 CHARGES FOR LASPD INVOLVEMENT (2014 - 2017)

CHARGE CATEGORY	% OF CHARGES
PUBLIC DISTURBANCE	19%
BATTERY	19%
TRESPASSING	10%
CANNABIS CHARGES	9%
VANDALIZE/PROPERTY DAMAGE	9%

ONE IN FOUR

1 IN 4 ARRESTS MADE BY THE LASPD WERE ELEMENTARY AND MIDDLE SCHOOL AGED YOUTH



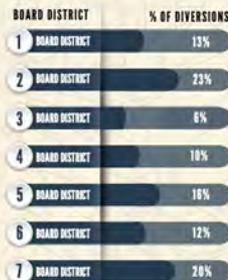
PERCENT OF TOTAL ARRESTS BY SCHOOL BOARD MEMBER (2014 - 2017)



PERCENT OF TOTAL CITATIONS BY SCHOOL BOARD MEMBER (2014 - 2017)



PERCENT OF TOTAL DIVERSIONS BY SCHOOL BOARD MEMBER (2014 - 2017)



TOP 5 ZIP CODES FOR LASPD INVOLVEMENT (2014 - 2017)

ZIP CODE	SOUTH CENTRAL		SOUTH GATE		SOUTH CENTRAL
	90011	90044	90001	90280	90003
TOTAL INVOLVEMENT	350	331	303	277	275

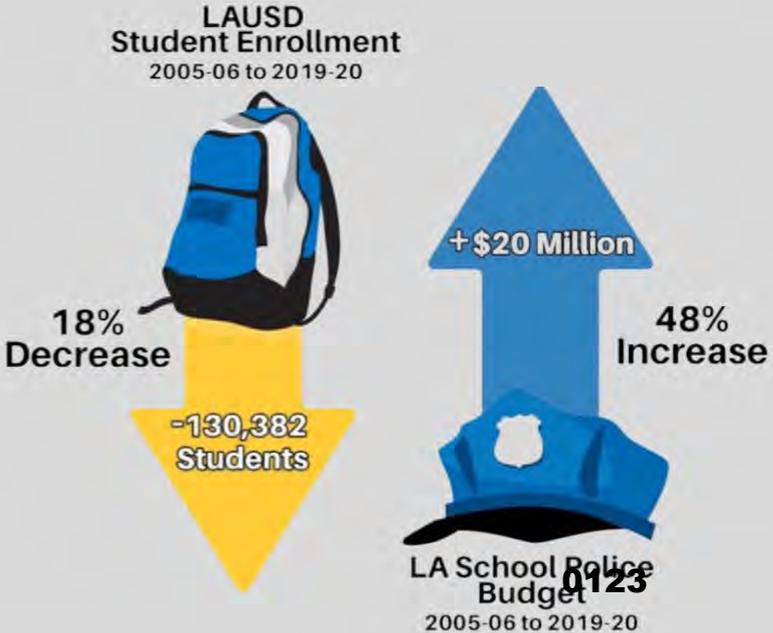
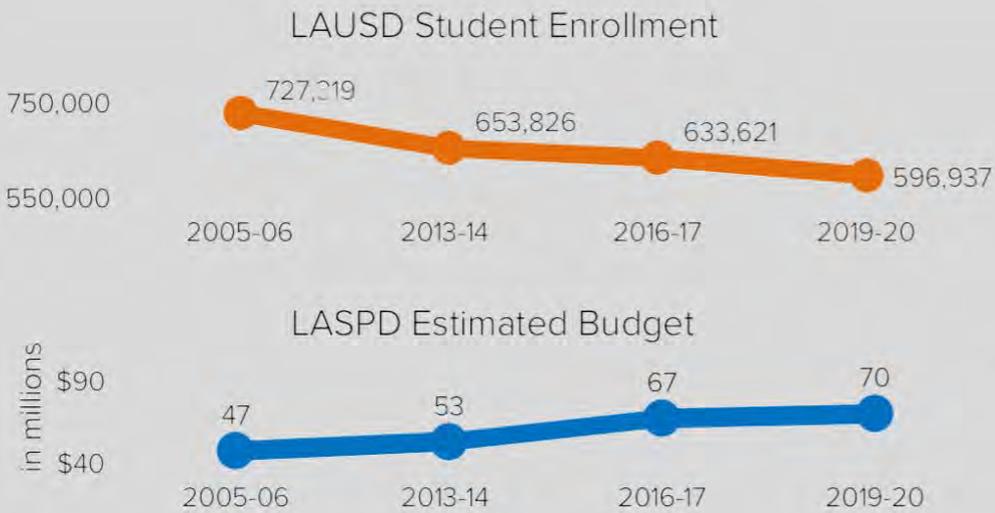
Methodology: On March 25, 2018, the LASPD fulfilled a Public Records Act request submitted by Professor Kelly Lytle Hernandez on January 4, 2018. The data provided included more than 15 categories of information for all contact with youth made by the LASPD between January 1, 2014 and March 31, 2018. For this report, we dropped all observations for the partial 2018 year and utilized the following categories of information: Race, Sex (gender), Involvement Type, Location of Contact, Age, and Charge. To determine the leading charges of LASPD contact we aggregated variations of the same charge such as: Public Disturbance (415, 314, 1, 372, 409); Battery (243(A), 243(B), 243.1, 243.2, 243.3, 243, 242); Trespassing (602, 647(H), 555, 626, 419); Cannabis (11357-11362); and Vandalism/Property Damage (594, 591.5, 603, 4600(A), 23110, 231108).

1 See Los Angeles School District <https://achieve.lausd.net/Page/8851>
2 California Department of Education, LAUSD Enrollment Data (2016-2017)

Recommended Citation: Allen, Terry, Bryan, Isaac, Guerrero, Andrew, Teng, Alvin, and Lytle-Hernandez, Kelly (2018). "Policing Our Students: An Analysis of L.A. School Police Department Data (2014 - 2017)." Los Angeles, CA: The Million Dollar Hood Project.

Template Designed by Alex Haro

Overreliance on Policing in Schools



Edwards et al (2020) UCLA Black Male Institute

School to Prison/Deportation Pipeline

Mau Trejo (they/them)

School and Community Organizer - **Students Deserve**

Steering Committee Member - **Orange County Rapid Response Network**

1. Criminalization and policing of students can lead to deportation for immigrant students and/or families
2. Black immigrants are often invisibilized in the public discourse, but are targeted for criminalization and deportation at the highest rates
3. The contrast between the treatment of Haitian and other Black migrants at the Southern border and the treatment of European migrants also fleeing conflict is emblematic of this disparity



#StudentsDeserve and BLM LA release survey results on Defunding LA School Police!

@LA_STUDENTSDESERVE

HERE ARE THE FIRST SURVEY RESULTS !!!

5433 people took survey in 5 days across all 7 LAUSD Board Members' Districts

86% of students and alumni called for the Defunding of LA School Police

Notably, 88% of current Black students want School Police defunded !!!



#STUDENTSDESERVE
MAKING BLACK LIVES MATTER
IN SCHOOLS

@LA_STUDENTSDESERVE

85% of current & former students

who had interactions with School Police reported them as negative, including experiences like

being followed, questioned, "randomly" searched, harassed, use of force, racially profiled



#STUDENTSDESERVE
MAKING BLACK LIVES MATTER
IN SCHOOLS

Black Students are targeted by School Police!

**Our Survey Results reveal the
SYSTEMIC RACISM of LA School Police**

**Black students are 3x as likely as
white students to report being
followed by school police** 

**Black students are 4x as likely as
white students to report being
racially profiled by school police**



**Black students are 3x as likely as
white students to report experiencing
use of force by school police**

 **Black students are 2x as likely as
white students to report being
removed from class by school police**

School Police Cause Harm!

@LA_STUDENTSDESERVE

SURVEY FINDINGS:

What girls and gender non-conforming students said about LA School Police:

- “Made sexually inappropriate comments towards me”
- “Made Sexually charged compliments to students”
- “Stop sexualizing Black girls.”

There is nothing to reform, NO training to be done.

#AbolishSchoolPolice #FundBlackFutures



School Police DO NOT support students who get sexually harassed:



- “I was sexually harassed...and they [school police] blamed me entirely”
- “ After reporting another student for sexual harassment and rape threats, school police did nothing to help.”
- “The police officer at my school made me feel so bad VICTIM BLAMING me.”
- The school police officer “belittled... made me feel so small... as if reporting my incident was dumb.”

LAUSD must act. Shift the \$70 million toward PSWs, Counselors, Community Schools for Black youth

Community Victories Against Anti-Black School Discipline Policies in LA

1. Ended Willful Defiance Suspensions
2. Won School-wide Positive Behavioral Interventions and Supports (SWPBIS) and Restorative Justice
3. Stopped the 1033 Program from arming LASPD with a tank and grenade launchers
 4. Ended mandatory Daily "Random" Weapons Searches
 5. Banned the use of Pepper Spray against students by School Police
 6. Won the removal of all LA School Police on-campus posts
 7. Won a \$25 million cut to the LA School Police Department
8. Won the creation and then expansion to over \$100 million of funding for a Black Student Achievement Plan (BSAP)

WE FOUGHT FOR BSAP. SO WHAT DO OUR SCHOOLS GET?!?

STAFFING

1. PSW (1:250 Black students)
2. School Climate Advocate (1:200 Black students)
3. Restorative Justice Teacher (1:school)
4. PSA Counselor (ES 1:250 Black students)
5. Academic Counselor (1:250 Black students)
6. Administrative Coordinator of Instruction (2-4 schools)

PARTNERSHIPS & PROGRAMMING

1. Community Partnership Grants (per Black students in COS)
2. Community Schools Funding (up to 10 schools)

CURRICULUM

1. Culturally responsive curriculum audit
2. Culturally responsive curriculum grant (per Black student)
3. Secondary AA Studies Auxiliary period

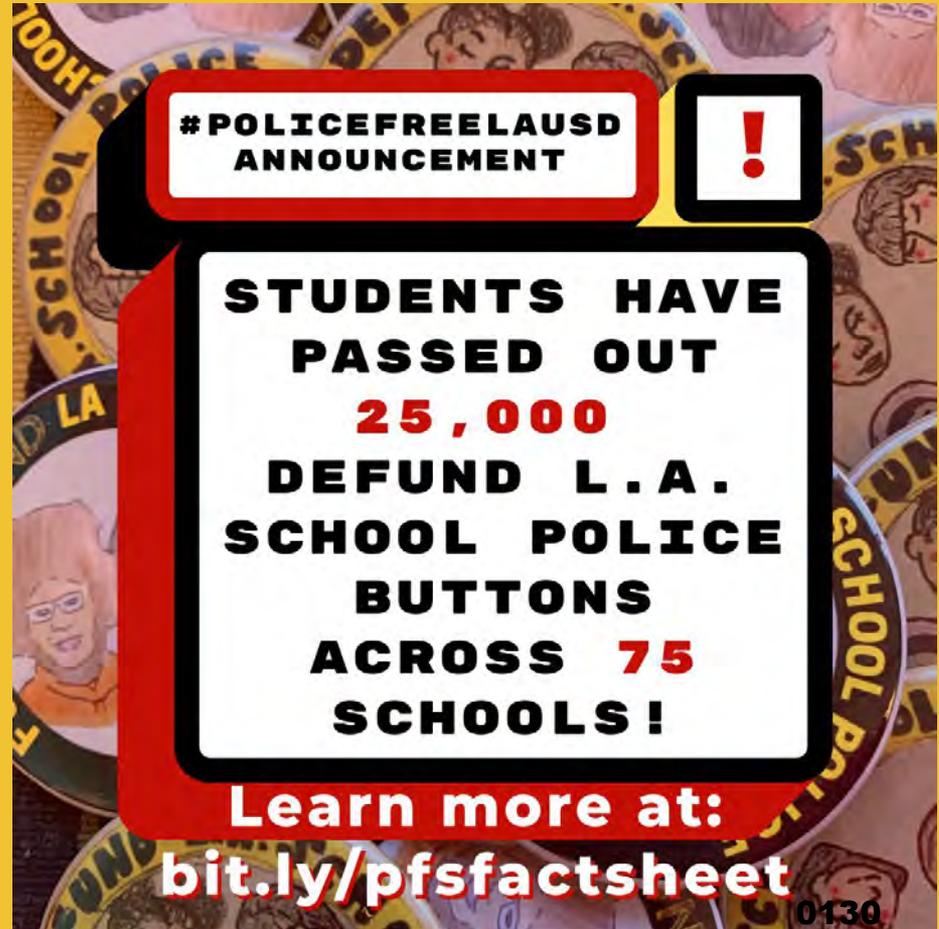
PD & TRAINING

1. 24 hours of teacher PD & training
2. 3 sub release days/teacher
3. Leadership & Equity Academy for Principals (LEAP)

Button Organizing!

We are continuing to build the movement for fully Police-Free Schools in LA. Student leaders are using student-designed buttons and half-sheets with information about school police to have organizing conversations throughout LA Unified School District.

Students Deserve and the Police-Free LAUSD Coalition are fighting for the resources, the supports, the funding, the opportunities, and the schools that Black students and all students truly need and deserve.



**#POLICEFREELAUSD
ANNOUNCEMENT**

**STUDENTS HAVE
PASSED OUT
25,000
DEFUND L.A.
SCHOOL POLICE
BUTTONS
ACROSS 75
SCHOOLS!**

**Learn more at:
bit.ly/pfsfactsheet**

0130

The Ongoing Fight to Fully Defund LASPD and the Case for Reparations

- Making Black Lives Matter in schools means the \$25mil cut to school police was not enough. We are fighting for fully **police free-schools and real investment in our futures**
- School police have caused irreparable damage, disproportionately to Black students and families
- We are saying **DEFUND** the remaining \$52+ million dollars within LASPD, and **INVEST** in more resources for Black students, like LAUSD's Black Student Achievement Plan!
- **BUT** we also know that most of the youth who have been criminalized and pushed out of schools by school policing will not benefit from current or future changes
- **Reparations are necessary** to address the very real harm caused to Black students and families for decades due to policing, criminalization, school pushout and the school-to-prison pipeline





As we look toward a future where we can all safely be back on campus, that vision doesn't include police. Black students need counselors, mental health support, and school programming and resources with our futures in mind.

- MALEEYAH FRAZIER, 10TH GRADE LAUSD STUDENT AND LEADER WITH STUDENTS DESERVE

Connect with us on social media!



@la_studentsdeserve



@LA_StudentsDsrv



LAStudentsDeserve



Email us: info@studentsdeserve.org

AGENDA ITEM 15

ACTION ITEM:
FINAL DISCUSSION AND VOTE ON REPORT

Executive Summary

In 1863, Abraham Lincoln signed the Emancipation Proclamation, and, in 1865, the 13th Amendment to the U.S. Constitution ended chattel slavery and commanded that “[n]either slavery nor involuntary servitude ... shall exist within the United States.”¹ In supporting the passage of the 13th Amendment, its co-author Senator Lyman Trumbull of Illinois said “it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins...”² In 1883, the Supreme Court interpreted the 13th Amendment as empowering Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”³

However, throughout the rest of American history, instead of abolishing “badges and incidents of slavery,” the United States federal government and state and local governments, including California, perpetuated and created new iterations of harms. Contrary to the demands of the 13th Amendment as interpreted by the U.S. Supreme Court, American government at all levels has continued the “badges and incidents of slavery” throughout its history and the resulting harms are innumerable.

This report is a general survey of these harms, as part of the broader efforts of California’s Task Force to Study and Develop Reparations Proposals for African Americans (Reparations Task Force). So thoroughly have the effects of slavery infected every aspect of American society over a period of 400 years, that it is nearly impossible to identify every “badge and incident of slavery,” include every piece of evidence, and describe every harm done to Black Americans by governments operating on American soil. Therefore, to address this practical reality, this first report devotes 13 chapters to specific areas of systemic discrimination with the understanding that this report presents only a sampling of the harm.

Throughout this report, the Reparations Task Force presents evidence of government actions perpetuating these “badges and incidents of slavery” and the compounding harms that they continue to inflict on Black Americans today. During enslavement, government actors adopted white supremacist beliefs and passed laws to maintain a racial hierarchy in order to control enslaved and free Black Americans, and violently quash rebellions that threatened to overturn slavery.⁴ After the end of slavery, although the federal constitution recognized Black Americans as citizens on paper, the American government failed to give them the full rights of citizenship.⁵ Further, the American government did not protect Black Americans from racial terror and violence, and white supremacy continues to impact America and its people.⁶ America’s racial

¹ Pres. Proc. No. 95, (Jan. 1, 1863); U.S. Const. amend. XIII, § 1.

² Cong. Globe, 39th Cong., 1st Sess. 475 (1866), Reprinted In *The Reconstruction Amendments' Debates: The Legislative History And Contemporary Debates In Congress On The 13th, 14th, And 15th Amendments* 122 (Alfred Avins Ed., 1967)

³ *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

⁴ Kolchin, *supra*, at pp. 17 – 18, Kendi, *supra*, p. 39.

⁵ See Chapter 3 Political Disenfranchisement

⁶ See generally Chapter 3 Racial Terror

hierarchy resulted in and was reinforced by segregation.⁷ The racist lies created to justify enslavement have since formed the foundation of innumerable modern laws, policies, and practices across the nation.⁸

Today, 160 years later, the “badges and incidents of slavery” remain embedded in the political, legal, health, financial, educational, cultural, environmental, social, and economic systems of the United States of America.⁹ American laws, racist lies used to perpetuate harmful and unsupported racial stereotypes, and various systems and institutions have harmed and continue to physically and mentally harm Black Americans today.¹⁰ Without a remedy specifically targeted to heal the injuries that colonial and American governments have inflicted on 16 generations of Black Americans and dismantle the foundations of these systems, the “badges and incidents of slavery” will continue to harm Black Americans in almost all aspects of American life.

This report is the first of two currently set to be issued by the Reparations Task Force, which was established under Assembly Bill 3121 in 2020. The law charges the Reparations Task Force with studying the institution of slavery and its lingering negative effects on society and living Black Americans, including descendants of persons enslaved in the United States. The law also ultimately requires the Reparations Task Force to recommend appropriate remedies of compensation, rehabilitation, and restitution for Black Americans, with a special consideration for descendants of persons enslaved in the United States. This executive summary provides a brief outline of many of the initial key findings and preliminary recommendations of the Reparations Task Force. As evidenced throughout this report, America’s legacy of slavery and racial discrimination has resulted in unique harms that have compounded over generations of Black Americans.

I. Enslavement

A. Nationally

America’s wealth was built by the forced labor of trafficked African peoples and their descendants who were bought and sold as commodities.¹¹ American government at all levels allowed or participated in exploiting, abusing, terrorizing, and murdering people of African descent so that mostly white Americans could profit from their enslavement.¹²

⁷ See generally Chapters 2. Enslavement; 3. Racial Terror; 5. The Root of Many Evils Residential Segregation; 6. Separate and Unequal Education

⁸ See generally Chapters 2. Enslavement; 3. Racial Terror; Chapters 4. Political Disenfranchisement; 5. The Root of Many Evils Residential Segregation; 6. Separate and Unequal Education, 8. Pathologizing the Black Family; 9. Control Over Spiritual Creative and Cultural Life; 10. Stolen Labor and Hindered Opportunity; 11. An Unjust Legal System; 12. Harm and Neglect Mental Physical and Public Health

⁹ See generally Chapters 6. Separate and Unequal Education; 7. Racism in Environment and Infrastructure; 8. Pathologizing the Black Family; 10. Stolen Labor and Hindered Opportunity; 11. An Unjust Legal System; 12. Harm and Neglect Mental Physical and Public Health; 13. The Wealth Gap.

¹⁰ See generally Chapter 12. Harm and Neglect Mental Physical and Public Health;

¹¹ Chapter 2, section V.B.

¹² Chapter 2, section V.B.

After the War of Independence, the United States built one of the largest and most profitable enslaved labor economies in the world.¹³ Between the end of the American Revolution in 1783 and the start of the Civil War in 1861, the enslaved population of the United States increased almost five times¹⁴ from just under 650,000 enslaved individuals to almost four million enslaved people.¹⁵ Among the 11 southern states of the Confederacy, between 20 and 49 percent of white families enslaved people.¹⁶

The federal government politically and financially supported enslavement.¹⁷ Wealthier white Americans adopted a national constitution that protected enslavement and gave proslavery white people outsized political power in the federal government.¹⁸ Half of the nation's pre-Civil War presidents enslaved Black Americans while in office.¹⁹ Ultimately, throughout American history, more than 1,700 Congressmen, representing 37 states, once enslaved Black people.²⁰ They did not only represent the South, but also every state in New England, much of the Midwest, and many Western states.²¹ By 1861, just under two percent of the entire budget of the United States went to pay for expenses related to enslavement,²² like enforcing fugitive slave laws²³ and renting enslaved people to build federal military sites in the South.²⁴

Between 1790 and 1859, enslavers trafficked approximately 845,720 people within the U.S.,²⁵ and made more than \$159 million between 1820 and 1860.²⁶ Charles Ball, an enslaved man trafficked south from Maryland, later reflected on enslavement and the anguish that many Black Americans expressed: "I had at times serious thoughts of suicide so great was my anguish. If I could have got a rope I should have hanged myself at Lancaster. The thought of my wife and

¹³ Baptist, *supra*, at p. xxiii.

¹⁴ Baptist, *supra*, at p. xxiii.

¹⁵ Bourne, "Slavery in the United States," EH.Net, Economic History Association, <https://eh.net/encyclopedia/slavery-in-the-united-states/>

¹⁶ Darity and Mullen, *From Here to Equality*, p. 67.

¹⁷ see Chapter 2, Section V. C.

¹⁸ Baptist, *supra*, at pp. 9 – 11. For an in depth discussion, see Chapter 2, Section V. C.

¹⁹ See Rosenwald, *Slave-owning presidents become targets of protesters* (June 3, 2020) Washington Post < <https://www.washingtonpost.com/history/2020/06/23/slave-owning-presidents-become-targets-protesters/> > (as of Jan. 24, 2022).

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

²¹ Weil and Blanco, *supra*.

²² Ericson, *The Federal Government and Slavery: Following the Money Trail* (Spring 2005) 19 Stud. in Amer. Pol. Dev. 107 (Ericson).

²³ Ericson, *supra*, at pp. 112 – 115.

²⁴ Ericson, *supra*, at p. 115 .

²⁵ Baptist, *supra*, at pp. 2 – 3.

²⁶ Pritchett, Quantitative Estimates of the United States Interregional Slave Trade, 1820 – 1860 (June 2001) 61 J. of Econ. Hist. 474.

children I had been torn from in Maryland, and the dreadful undefined future which was before me, came near driving me mad.”²⁷

In order to continually increase the production of cotton and profits and to extract increasingly higher product quotas, enslavers regularly staged public beatings and other violent acts.²⁸ Historians have argued that many of today’s financial accounting and management practices began among enslavers in the U.S. South and the Caribbean.²⁹ White enslavers used profit maximization as a justification for providing deplorable living conditions for enslaved people.³⁰ Historians have also found evidence that enslavers raped and impregnated enslaved women and girls, and profited from this sexual violence by owning and selling their own children.³¹ President Thomas Jefferson, who enslaved four of his own adult children, believed that the “labor of a breeding [enslaved] woman” who births a child every two years to be as profitable as the best enslaved worker on the farm.³²

In 1860, the last census taken before the Civil War, there were about 12 million people living in the 15 slaveholding states, about four million were enslaved.³³ In order to terrorize and force one-third of this population to work without pay, the colonial and American governments created a type of slavery that was different from how people had been enslaved during what historians refer to as the pre-modern period.

Unlike in what historians call the pre-modern era, slavery in America was based on the ideas that African ancestry was the sole basis for life-long enslavement, that the children of enslaved African-descent women were enslaved from birth,³⁴ and that people of African descent were naturally destined to be enslaved.³⁵ European colonists in North America claimed a false racial hierarchy where white people were naturally superior to people of African descent.³⁶ Colonial governments passed laws which effectively made it legal for enslavers to kill the people they enslaved.³⁷

After the War of Independence, in order to exert the maximum amount of control, federal, state, and local governments continued to pass laws and take actions which controlled both enslaved and free Black people.³⁸ These American laws built a system of slavery based in a racial

²⁸ Baptist, *supra*, at pp. 116 – 117, 121

²⁹ Rosenthal, *Reckoning with Slavery: How Revisiting Management’s Uncomfortable Past Can Help Us Confront Challenges Today* (2021) 20 *Academy of Management Learning & Ed.* 467-472.

³⁰ For an in depth discussion of the horrors suffered by enslaved people, see Chapter 2, section VI

³¹ Berry, *supra*, at pp. 78 – 83, Douglass, *supra*, at pp. 3 – 4.

³² <https://tjrs.monticello.org/letter/2117>

³³ U.S. Census of page vii

³⁴ Kolchin, *supra*, at p. 17.

³⁵ Kolchin, *supra*, at p. 18.

³⁶ Morgan, *supra*, at pp. 369, 385 – 386.

³⁷ An act about the casual [sic] killing of slaves, Act I.

<https://babel.hathitrust.org/cgi/pt?id=hvd.hxh5u4&view=lup&seq=326&skin=2021> > [as of Dec. 21, 2021].

³⁸ See Chapter 2, secs.III, V., and IX

hierarchy and treated all Black people as less than human.³⁹

During enslavement, laws prohibited the political participation of enslaved and free Black people and controlled Black labor absolutely. In some states, free and enslaved Black Americans could not vote or hold political office.⁴⁰ Enslaved people were not allowed to gather in large groups away from plantations.⁴¹ During enslavement in the South, it was illegal for Black Americans to resist a white person,⁴² and leave a plantation without permission.⁴³ In the North, some laws required judges to punish Black Americans more harshly than white Americans when found guilty of the same crimes.⁴⁴

After the Civil War, the federal government failed to meaningfully protect the rights and lives of Black Americans.⁴⁵ When Andrew Johnson became president after the assassination of Abraham Lincoln, he proclaimed in 1866, “[t]his is a country for white men, and by God, as long as I am President, it shall be a government for white men[.]”⁴⁶ The laws passed to control enslaved Black Americans during slavery were reborn as the Black Codes, and then as the Jim Crow laws segregating Black and white Americans in every aspect of life.⁴⁷ Although many of these laws were most prominent in the South, they reflected a national desire to reinforce a racial hierarchy based in white supremacy.

B. California

Although California technically entered the Union in 1850 as a free state,⁴⁸ California’s early state government supported enslavement.⁴⁹ An estimated 1,500 enslaved African Americans lived in California in 1852.⁵⁰ Enslaved people trafficked to California often worked under

³⁹ See e.g., US Constitution, Article I, Section 2; Kolchin, *supra*, at pp. 17 – 18, *Dred Scott v. Sandford*, 60 U.S. 393; Darlene Goring, *The History of Slave Marriage in the United States*, 39 J. Marshall L. Rev. 299, 299, 302-304 (2006). (Abolitionist William Goodell described the way that American law treated the families of enslaved people in 1853 as: “The slave has no rights. Of course, he or she cannot have the rights of a husband, a wife. The slave is a chattel, and chattels do not marry. ‘The slave is not ranked among sentient beings, but among things;’ and things are not married.”); Campbell, *Making Black Los Angeles: Class, Gender, and Community, 1850-1917* (2016). (The 1850 and 1860 federal censuses did not list most enslaved people by name, as they did for white Americans, but en masse in “slave schedules.”)

⁴⁰ Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (1998), pp. 123 – 124 (Berlin).

⁴¹ [citations]

⁴² An act concerning Servants and Slaves XXXIV p. 448

<<https://babel.hathitrust.org/cgi/pt?id=hvd.hw2scr&view=1up&seq=443&skin=2021>> [as of Dec. 21, 2021].

⁴³ *Ibid.*

⁴⁴ *Forever Free, supra*, at pp. 95 – 96.

⁴⁵ See Chapter 3 and 4.

⁴⁶ Petrella and Loggins, “*This is a Country for White Men*”: *White Supremacy and U.S. Politics* (Jan. 5. 2017) Black Perspectives, African American Intellectual History Society <<https://www.aaihs.org/this-is-a-country-for-white-men-white-supremacy-and-u-s-politics/>> (as of March 15, 2022).

⁴⁷ See Chapters 2, 4, 6, 10, 11

⁴⁸ *Forever Free, supra*, at pp. 29 – 30.

⁴⁹ Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California* (Feb. 2011) 80 *Pacific Hist. Rev.* 33 (Remaking Slavery).

⁵⁰ *Freedom’s Frontier, supra*, at pp. 40, 257.

dangerous conditions,⁵¹ and lived in unclean environments.⁵² Much like enslaved people in the South, those in California also faced brutal violence.

Proslavery white southerners held a great deal of power in the state legislature, the state court system, and among California's representatives in the U.S. Congress.⁵³ In 1852, California passed and enforced a fugitive slave law that made California a more proslavery state than most other free states.⁵⁴ California also outlawed non-white people from testifying in any court case involving white people.⁵⁵

After the Civil War, California did not ratify the Fourteenth Amendment, which protected the equal rights of all citizens, until 1959 and the Fifteenth Amendment, which prohibited states from denying a person's right to vote on the basis of race, until 1962.⁵⁶

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Implement a comprehensive reparations scheme, as will be detailed in the Task Force's Report 2.
- Establish Office of African American/Freedmen Affairs to address past harms and potential future harms, and include an administrative arm to assist claimants in filing for eligibility
- Establish Office of Freedmen Genealogy in order to support potential claimants with genealogical research and to confirm eligibility
- Establish a Reparations Tribunal/Redress Administration in order to adjudicate substantive claims for past harms
- Establish Office of Immediate Relief to expedite claims (case-by-case)
- Transmit the Task Force's Report and findings to the United States Congress and President with a recommendation that the Federal Government create a Reparations Commission for African Americans/American Freedmen through statute or executive action.

⁵¹ Rohrbough, *supra*, at pp. 136 – 138.

⁵² Baur, *The Health Factor in the Gold Rush Era* (Feb. 1949) 18 *Pacific Hist. Rev.* 97 – 105.

⁵³ Freedom's Frontier, *supra*, at p. 8.

⁵⁴ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, California Statutes, at 67–69.

⁵⁵ Freedom's Frontier, *supra*, at pp. 71 – 72.

⁵⁶ Waite, *Early California lawmakers also preached #resistance—but against immigration* (Aug. 3, 2018) Los Angeles Times < <https://www.latimes.com/opinion/op-ed/la-oe-waite-california-14-amendment-20180803-story.html> > (as of Jan. 26, 2022); Cottrell, It took 92 years for California to ratify the 15th Amendment (June 26, 2020) The Union < <https://www.theunion.com/news/steve-cottrell-it-took-92-years-for-california-to-ratify-the-15th-amendment/> > (as of March 15, 2022)

- Request that the federal Government, potentially through the United States Office of Management and Budget, facilitate data disaggregation for Black/African racial groups on federal level.
- Enact legislation such as ACA3 and AB1604 that would advance the recommendations and findings of the Task Force.

II. Racial Terror

A. Nationally

Chattel slavery was followed by decades of violence and intimidation intended to maintain America's racial hierarchy, a badge of slavery.⁵⁷ Racial terror, and lynchings in particular, pervaded every aspect of post-enslavement Black life.⁵⁸ Led and joined by prominent members of society, and supported sometimes by government officials, ordinary citizens terrorized Black Americans to prevent Black Americans from building the same wealth and political influence as white Americans.⁵⁹

Black Americans faced threats of violence when they tried to vote, when they tried to buy homes in white neighborhoods, when they tried to swim in public pools, and when they attempted to make progress through the courts or in legislation.⁶⁰ White mobs bombed, murdered, and destroyed entire towns.⁶¹ Federal, state, and local governments ignored the violence, failed to prosecute offenders, or participated in the violence themselves.⁶²

Racial terror often takes direct forms, such as physical assault, threats of injury, and destruction of property. It also inflicts psychological trauma on those who witness the harm and injury.⁶³ The

⁵⁷ Equal Justice Initiative (EJI), *Lynching in America: Confronting the Legacy of Racial Terror* (2015), p. 3 <https://time.com/wp-content/uploads/2015/02/eji_lynching_in_america_summary.pdf> (as of Oct. 20, 2021) (EJI 2015).

⁵⁸ See, e.g., Foner, *Reconstruction*, *supra*, pp. 569-76, EJI 2015, *supra*, at p. 3.

⁵⁹ EJI 2015, *supra*, at pp. 3, 7; EJI, *Lynching in America: Confronting the Legacy of Racial Terror: Third Edition* (2017), pp. 48-50, 65, 73 <<https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-052421.pdf>> (as of Oct. 20, 2021) (EJI 3d ed.); Wilkerson, *Caste: The Origins of Our Discontents* (2020), p. 151 (Caste); Lee, *How America's Vast Racial Wealth Gap Grew: By Plunder* (Aug. 18, 2019), *New York Times*, <<https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>> (as of Oct. 22, 2021) (Lee); *Case for Reparations*, *supra*; Lawfare, *supra*.

⁶⁰ Coates, *The Case for Reparations* (June 2014) *The Atlantic* <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>> (as of Oct. 20, 2021) (*Case for Reparations*); Byman, *The Failure of Counterterrorism After the Civil War* (Aug. 22, 2021) *Lawfare* <<https://www.lawfareblog.com/failure-counterterrorism-after-civil-war>> (as of Oct. 20, 2021) (Lawfare); Niraj Chokshi, *Racism at American Pools Isn't New: A Look at a Long History* (August 1, 2018) *New York Times* <<https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html>> (as of Dec. 11, 2021).

⁶¹ See, e.g., Brockell, *Tulsa isn't the only race massacre you were never taught in school. Here are others.*, *The Washington Post*, <https://www.washingtonpost.com/history/2021/06/01/tulsa-race-massacres-silence-schools/>

⁶² See Chapter 3.

⁶³ *Impact of Racial Trauma*, *supra*, at p. 4; Erlanger A. Turner & Jasmine Richardson, *Racial Trauma Is Real: The Impact of Police Shootings on African Americans* (July 14, 2016), *American Psychological Association, Psychology*

traumatic experience of surviving mass violence creates insecurity, mistrust, and alienation—psychological harms that were amplified by the dangers inherent in navigating Southern racial boundaries.⁶⁴ Lynchings in the American South were not isolated hate crimes committed by rogue vigilantes. Lynchings were targeted racial violence that formed part of a systematic campaign of terror perpetrated in furtherance of an unjust social order. Selective public memory compounds the harm of officials' complicity in lynching and maintains the otherness of Black people.⁶⁵

While lynching, mob violence, and other forms of racial terror are no longer socially acceptable, the threat and legacy of terror continue to haunt Black communities.⁶⁶ Such violence has found a modern form in extrajudicial killings of Black Americans by police and vigilantes.⁶⁷ Racial terror targeted at successful Black Americans has contributed to the present wealth gap between Black and white Americans.⁶⁸

The tactics of white supremacy at any time in history are simultaneously overtly violent and subversively traumatic for Black Americans. Racial terror remains the constant backdrop and tool for other forms of discrimination intended to exert control of Black Americans—from redlining and segregated schools to disparate healthcare and denial of bank loans—that has prevented many Black Americans throughout history from living a dignified life of equal opportunity.

B. California

Supported by their government, Californian citizens also terrorized and murdered Black Californians.⁶⁹ The Ku Klux Klan (KKK) established chapters all over the state in the 1920s.⁷⁰ During that time, California sometimes even held more KKK events than Mississippi or Louisiana.⁷¹ Many of California's KKK members were prominent individuals who held positions in civil leadership and police departments.⁷²

For example, in the 1920s, in Los Angeles, prominent and numerous city government officials were KKK members or had KKK ties, including the mayor, district attorneys, and police

Benefits Society, <<https://psychologybenefits.org/2016/07/14/racial-trauma-police-shootings-on-african-americans/>> (as of Mar. 15, 2022).

⁶⁴ EJI 2015, *supra*, at p. 23.

⁶⁵ EJI 2015, *supra*, at p. 23.

⁶⁶ EJI 2015, *supra*, at pp. 19-20, 22-23; EJI 3d ed., *supra*, at p. 65.

⁶⁷ Niedermeier, *The Color of the Third Degree* (2019), pp. 17-19 (Third Degree); United Nations General Assembly, Report of the Working Group of Experts on People of African Descent on its mission to the United States of America (Aug. 18, 2016), p. 16 (U.N. Working Group Report); Love, *The Trayvon Martin case reveals a vigilante spirit in the US justice system* (Apr. 7, 2012) *Guardian*, King, <<https://www.theguardian.com/commentisfree/cifamerica/2012/apr/07/trayvon-martin-vigilante-spirit-us-justice>> (as of Sept. 8, 2021).

⁶⁸ Lee, *supra*.

⁶⁹ See Chapter 3 Section V.J.3.

⁷⁰ Hudson, *supra*, at pp. 171-72.

⁷¹ Hudson, *supra*, at p. 172.

⁷² Hudson, *supra*, at p. 172.

officers.⁷³ Violence against Black homeowners in California peaked in the 1940s, as more Black Californians bought homes in white neighborhoods.⁷⁴

Today, police violence against and extrajudicial killings of Black Americans occur in California in the same manner as they do in the rest of the country.

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Create forms of expression, acknowledgment, and remembrance of the trauma of state-sanctioned white supremacist terror, possibly including memorials, and funding a long-term truth and reconciliation commission.
- Estimate the value of Black-owned businesses and property in California stolen or destroyed through acts of racial terror, distribute this amount back to Black Californians, and make housing grants, zero-interest business and housing loans and grants available to Black Californians.
- Make it easier to hold police officers accountable for unlawful harassment and violence, including 1) a provision overruling the extratextual “specific intent” requirement that California courts have read into the Bane Act; 2) a provision eliminating state law immunities that shield officer misconduct, and explicitly rejecting protections analogous to qualified immunity under federal law; and 3) a provision for additional special damages when the unlawful conduct is shown to be racially motivated.

III. Political Disenfranchisement

A. Nationally

Black Americans have pursued equal political participation since before the Civil War,⁷⁵ but the federal, state, and local governments of the United States have suppressed and continue to suppress Black votes and Black political power.⁷⁶ After the Civil War, the United States protected the voting rights of Black Americans on paper, but not in reality.⁷⁷ During a 12-year period after the Civil War called Reconstruction, the federal government tried to give newly freed Black Americans access to basic civil rights⁷⁸ and, by 1868, more than 700,000 Black men

⁷³ Brenda Elaine Stevenson, *The Contested Murder of Latasha Harlins: Justice, Gender, and the Origins of the LA Riots* (2013), p. 186; Hudson, *supra*, at p. 179.

⁷⁴ Hudson, *supra*, at p. 168.

⁷⁵ Nat. Park Service, U.S. Dept. of the Interior, *Civil Rights in America: Racial Voting Rights* (2009), p. 4 <<https://tinyurl.com/3rupm86e>> (as of Nov. 8, 2021)

⁷⁶ See Chapter 4

⁷⁷ See Chapter 4.

⁷⁸ Foner, *Forever Free: The Story of Emancipation and Reconstruction* (First Vintage Books 2006), pp. 113-115, 117-118 (“Foner, Forever Free”).⁷⁸ Foner, *Reconstruction*, *supra*, pp. 444-44, U.S. Const., amend. XV, § 1, U.S. Const., amend. XIV, § 2.

were registered to vote in the South.⁷⁹ During Reconstruction, over 1,400 Black Americans held federal, state, or local office, and more than 600 served in state assemblies.⁸⁰ During that period, 16 Black men were elected to Congress, 14 to the U.S. House of Representatives and two to the U.S. Senate.⁸¹ However, progress was short lived.

Over time, white northern support for Reconstruction collapsed. During the contested presidential election of 1876, Republicans and Democrats agreed to withdraw federal troops from key locations in the South, effectively ending Reconstruction.⁸²

States willfully ignored the voting protections in the U.S. Constitution, and passed literacy tests, poll taxes, challenger laws, grandfather clauses, and created other devices to prevent Black Americans from voting in both general and primary elections.⁸³ States also barred Black Americans from serving on juries, denying Black Americans other opportunities to serve in civic and public life.⁸⁴

These methods had the same effect as enslavement-era laws, which directly outlawed Black political participation, maintaining a racial hierarchy. In 1867, Black turnout was 90 percent in Virginia.⁸⁵ After Virginia's voter suppression laws took effect, the number of Black voters dropped from 147,000 to 21,000.⁸⁶ During Reconstruction, 16 Black men held seats in Congress.⁸⁷ From 1887 to 1901, just five members of Congress—in either the House of Representatives and Senate—were Black.⁸⁸ From 1901 to 1929, not a single Black American served in Congress.⁸⁹ No Black congressman would be elected again from the South until the 1970s.⁹⁰

These restrictions secured the power of white supremacists in local, state, and federal government,⁹¹ allowing them to block hundreds of civil rights laws⁹² and rewrite many of the country's most important pieces of legislation to exclude or discriminate against Black

⁷⁹ Cobb and Jenkins, *supra*, p. 184.

⁸⁰ Nat. Park Service, *supra*, p. 6; Black Officeholders in the South, <<https://tinyurl.com/5x7mhm6d>> (as of Nov. 19, 2021).

⁸¹ Nat. Park Service, *supra*, p. 6; Black Officeholders in the South, <<https://tinyurl.com/5x7mhm6d>> (as of Nov. 19, 2021).

⁸² *Id.* at pp. 581-82.

⁸³ See generally Chapter 4, Section IV.

⁸⁴ See generally Chapter 4, Section IV.

⁸⁵ Foner, *Forever Free*, *supra*, p. 143.

⁸⁶ Nat. Park Service, U.S. Dept. of the Interior, *Civil Rights in America: Racial Voting Rights* (2009), p. 14 <<https://tinyurl.com/3rupm86e>> (as of Nov. 8, 2021).

⁸⁷ Nat. Park Service, *supra*, p. 6; Black Officeholders in the South, <<https://tinyurl.com/5x7mhm6d>> (as of Nov. 19, 2021).

⁸⁸ U.S. House of Representatives, Office of History and Preservation, *Black Americans in Congress: 1870-2007* (2008), pp. 3-4 <<https://tinyurl.com/5v53mmfx>> (as of Nov. 18, 2021).

⁸⁹ *Id.* at pp. 2, 4.

⁹⁰ *Ibid.*

⁹¹ Caro, *Master of the Senate* (2009), pp. xiii-xiv; Grantham, *The Life and Death of the Solid South: A Political History* (1992).

⁹² Caro, *supra*, pp. xiii-xiv.

Americans.⁹³ The New Deal, a series of federal laws and policies designed to pull America out of the Great Depression, created the modern white middle class and many of the programs that Americans depend upon today, such as Social Security.⁹⁴ But the New Deal excluded Black Americans from many of its benefits.⁹⁵ Historians have argued that southern lawmakers ensured that the GI Bill was administered by states instead of the federal government to guarantee that states could direct its funds mostly to white veterans.⁹⁶ Similarly, in order to secure the support of white southern lawmakers, Congress included segregation clauses or rejected anti-discrimination clauses in the Hill Burton Act of 1946, which paid for our modern healthcare infrastructure, and the Housing Act of 1949, which intensified residential segregation.⁹⁷ These federal legislative decisions solidified the racial hierarchy that is a badge of slavery which continues today.

B. California

California also passed laws and enforced them to prevent Black Californians from accumulating political power.⁹⁸

California's law prohibiting non-white witnesses from testifying against white Californians protected white defendants from justice.⁹⁹ The California Supreme Court warned that allowing any non-white person to testify "would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls," a prospect that the court viewed as an "actual and present danger."¹⁰⁰

California did not allow Black men to vote until 1879.¹⁰¹ The state also passed many of the voter suppression laws that were used in the South. California prohibited individuals convicted of felonies from voting,¹⁰² added a poll tax,¹⁰³ and put in place a literacy test.¹⁰⁴

C. Preliminary Recommendations

⁹³ See Chapter 4, 10, 12

⁹⁴ See, e.g., Katznelson, *When Affirmative Action was White* (2005), p. 113; Krugman, Paul Krugman - New Deal Created the Middle Class (Apr. 1, 2011) <<https://tinyurl.com/yvxj9djin>> (as of Jan. 18, 2022); Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (2005), p. 9.

⁹⁵ Katznelson, *supra*, p. 113; California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Jones, 7:20-8:55 <<https://tinyurl.com/4smp9aek>> (as of Jan. 26, 2022).

⁹⁶ Katznelson, *supra*, p. 121.

⁹⁷ Thomas, *supra*, p. 823; Von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949* (2000) 11 *Housing Policy Debate* 299, 309; Thomas, *supra*, p. 836.

⁹⁸ See Chapter 4.IV.L., and Chapter 3.

⁹⁹ *People v. Hall* (1854) 4 Cal. 399, at p. 404.

¹⁰⁰ *Id.* at p. 404.

¹⁰¹ Katz, et al., *Reckoning with our Rights: The Evolution of Voter Access in California*, UCLA Luskin Center for History and Policy (Sept. 2020) pp. 3, 7 <<https://tinyurl.com/5xzhj32p>> (as of Nov. 17, 2021).

¹⁰² Cal. Const. of 1849, art. II, § 5; *Ramirez v. Brown* (1974) 12 C.3d 912, 117 C.R. 562, 528 P.2d 378; Uggen, et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement* The Sentencing Project (Oct. 6, 2016), p. 4 <<https://tinyurl.com/vsv8y9ds>> (as of Nov. 16, 2021).

¹⁰³ *Ibid.*

¹⁰⁴ *Id.* at pp. 11-12.

The Task Force recommends that the legislature consider legislation to:

- Establish Office of Freedmen Political Affairs to support ongoing political education on African American history; to support political activity for African American youth (i.e. model government programs); and to support forums that amplify African American governmental candidates.
- Create forms of acknowledgment and apology for acts of political disenfranchisement.
- Fund greater voter registration efforts amongst Black voters.

IV. The Root of Many Evils: Residential Segregation

A. Nationally

America's racial hierarchy, a badge of slavery, transformed into a system of segregation in the United States after the Civil War.¹⁰⁵ The aim of segregation was not only to separate Black and white Americans, but to force Black Americans to live in worse conditions in nearly every aspect of life than those of white Americans.¹⁰⁶

As the American government supported violence and passed discriminatory laws, which prevented Black Americans from making political and economic gains, government actors, working with private individuals, actively segregated America into Black and white neighborhoods.¹⁰⁷ Although this system of segregation was called Jim Crow in the South, it existed by less obvious, but just as effective means throughout the entire the country, including in California.

During enslavement, about 90 percent of Black Americans were forced to live in the South.¹⁰⁸ Immediately after the Civil War, the country was racially and geographically configured in ways that were different from the way it is segregated today.¹⁰⁹ Throughout the 20th century, American federal, state, and local municipal governments lead segregation efforts through zoning ordinances, slum clearance policies, construction of parks and freeways through the middle of Black neighborhoods, and public housing siting decisions.¹¹⁰ Courts approved racially restrictive covenants placed by private citizens in housing deeds to prevent homes from being sold to Black Americans until the late 1940s.

The federal government used redlining to deny Black Americans equal access to the capital needed to buy a single-family home at the same time that it subsidized white Americans' efforts

¹⁰⁵ See Chapter 5, 6, and 10

¹⁰⁶ Wilkerson, *The Warmth of Other Suns* (2010)

¹⁰⁷ See Chapter 5

¹⁰⁸ 1860 census

¹⁰⁹ See e.g., Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

¹¹⁰ See Chapter 5

to own a single-family home in the suburbs.¹¹¹ President Herbert Hoover invoked the white supremacist point of view that certain rights and privileges were the sole purview of white people when he stated in 1931 that single-family homes were “expressions of racial longing” and “[t]hat our people should live in their own homes is a sentiment deep in the heart of our race.”¹¹²

Even after the passage of the Federal Housing Act, which outlawed housing discrimination, urban renewal, funded by the federal and state governments, maintained residential segregation.¹¹³

Segregation continues today. The average urban Black person in 1890 lived in a neighborhood that was only 27 percent Black.¹¹⁴ In 2019, America is as segregated as it was in the 1940s, with the average urban Black person living in a neighborhood that is 44 percent Black.¹¹⁵ Better jobs, tax dollars, municipal services, healthy environments, good schools, access to health care, and grocery stores have followed white residents to the suburbs, leaving concentrated poverty, underfunded schools, collapsing infrastructure, polluted water and air, crime, and food deserts in segregated inner city neighborhoods.¹¹⁶

B. California

In California, the federal, state, and local government created segregation through discriminatory federal housing policies, zoning ordinances, decisions on where to build schools, and discriminatory federal mortgage policy, i.e., redlining.¹¹⁷ California “sundown towns” prohibited Black Americans from living in towns throughout the state — and most of the suburbs of Los Angeles and San Francisco, and most of Orange County were designated “sundown towns.”¹¹⁸

The federal Home Owners’ Loan Corporation maps used in redlining described many Californian neighborhoods in racially discriminatory terms. For example, in San Diego: There were “servant’s areas” of La Jolla and several areas “restricted to the Caucasian race.”¹¹⁹

The federal government financed many whites only neighborhoods throughout the state.¹²⁰ During World War II, the federal government paid to build segregated housing for defense workers in Northern California.¹²¹ Housing for white workers was more likely to be better

¹¹¹ See Chapter 5

¹¹² *Id.* at page 103.

¹¹³ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Stephen Menendian, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹¹⁴ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) 107 No. 3 J. of Political Economy 455, 456

¹¹⁵ Frey, Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans (Apr. 6, 2021) Brookings Institution <<https://www.brookings.edu/research/neighborhood-segregation-persists-for-black-latino-or-hispanic-and-asian-americans/>> (as of June 30, 2021).

¹¹⁶ <https://belonging.berkeley.edu/roots-structural-racism>

¹¹⁷ Rothstein, *supra*, at p. 11.

¹¹⁸ Loewen, *supra*, at p. 76.

¹²⁰ Nelson, *supra*, at pp. 118-19.

¹²¹ *Ibid.*

constructed and permanent.¹²² The federal government did not pay to build enough housing for Black workers and what was built was badly constructed.¹²³ While white workers lived in rooms paid for by the federal government, Black war workers lived in cardboard shacks, barns, tents, or open fields.¹²⁴

Racially-restrictive covenants, which were clauses in property deeds that usually allowed only white residents to live on the property described in the deed, were common place by the 1910s in California and California courts enforced them until 1947.¹²⁵

Numerous neighborhoods around the state rezoned Black neighborhoods for industrial use to keep out white residents¹²⁶ or adopted zoning ordinances to ban apartment buildings to try and keep out Black residents.¹²⁷

State agencies demolished thriving Black neighborhoods in the name of urban renewal and park construction. Operating under a state law for urban redevelopment, the City of San Francisco declared that the Western Addition was blighted, and destroyed the Fillmore, San Francisco's most prominent Black neighborhood and business district.¹²⁸ In doing so, the City of San Francisco closed 883 businesses, displaced 4,729 households, destroyed 2,500 Victorian homes,¹²⁹ and damaged the lives of nearly 20,000 people.¹³⁰ And then left the land empty for 40 years.¹³¹

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Reverse the effects of anti-Black housing discrimination policies;
- Compensate individuals forcibly removed from their homes due to state action, including but not limited to park construction, highway construction, and urban renewal; and
- Prevent current banking and mortgage related discrimination, including but not limited to

¹²² *Ibid.*

¹²³ *Id.* at page 33.

¹²⁴ *Id.* at page 33.

¹²⁵ Hudson, West of Jim Crow, *supra*, at fn. **Error! Bookmark not defined.**, p. 61, fn. 11 & 12.

¹²⁶ (Abrams 1966). Taylor (2014), *supra*, at p. 186.

¹²⁷ Rothstein at p. 36.

¹²⁸ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008) <<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

¹²⁹ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008) <<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

¹³⁰ Taylor, *How 'Urban Renewal' Decimated the Fillmore District, and Took Jazz With It*, KQED (Jun. 25, 2020) <<https://www.kqed.org/news/11825401/how-urban-renewal-decimated-the-fillmore-district-and-took-jazz-with-it>>

¹³¹ Fulbright, *Sad chapter in Western Addition history ending*, San Francisco Chronicle (Jul. 21, 2008) <<https://www.sfgate.com/bayarea/article/Sad-chapter-in-Western-Addition-history-ending-3203302.php>> (as of Jul. 7, 2021)

discriminatory actions as a result of artificial intelligence and automated data analytics.

V. Separate and Unequal Education

A. Nationally

Through much of American history, enslavers and the white political ruling class in America falsely believed it was in their best interest to deny education to Black Americans in order to dominate and control them.¹³² Enslaving states denied education to nearly all enslaved people, while the North and Midwest segregated their schools and limited or denied access to freed Black people.

After slavery, southern states maintained the racial hierarchy, a badge of slavery, by legally segregating Black and white children, and white-controlled legislatures funded Black public schools far less than white public schools.¹³³ An Alabama state legislator stated in 1889, “[e]ducation would spoil a good plow hand.”¹³⁴ Black teachers received lower wages, and Black children received fewer months of schooling per year and fewer years of schooling per lifetime than do white children.¹³⁵

Contrary to what most Americans are taught, the U.S. Supreme Court’s landmark 1954 case, *Brown v. Board of Education*, which established that racial segregation in public schools is unconstitutional, did not mark the end of segregation.¹³⁶

After *Brown v. Board*, many white people and white-dominated school boards throughout the country actively resisted integration. In the South, segregation was still in place through the early 1970s due to massive resistance by white communities. In the rest of the country, including California, education segregation occurred when government supported residential segregation coupled with school assignment and siting policies forced Black children to attend different schools from white children.¹³⁷ Because children attended the schools in their neighborhood and school financing was tied to property taxes, most Black children attended segregated schools with less funding and resources than schools attended by white children.¹³⁸

In 1974, the U.S. Supreme Court allowed *de facto* school segregation to continue in schools if it reflected residential segregation patterns between the city and the suburbs. In part, as result of this decision and other U.S. Supreme Court decisions that followed that further undermined

¹³² Du Bois, *The Souls of Black Folk: Essays and Sketches* (2d ed. 1903); Tyack & Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South* (1986), 94 Am. J. Ed. 236, 238-239, 250-252; Anderson, *The Education of Blacks in the South, 1860-1935* (1988) pp. 95-96 (“From the vantage point of the southern white majority, any system of universal education for blacks, even industrial education, would potentially lead to universal suffrage.”).

¹³³ [citation needed from education]

¹³⁴ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) pp. 121-122, fn. 40 (hereafter *Slavery by Another Name*).

¹³⁵ [citation needed from education]

¹³⁶ See Chapter 6

¹³⁷ [citation needed from education]

¹³⁸ [citation needed from education]

desegregation efforts, many public schools in the United States never integrated in the first place or were integrated and then re-segregated.

B. California

California led the nation in segregation by some measures. In 1874, the California Supreme Court ruled segregation in the state's public schools was legal,¹³⁹ a decision that predated the U.S. Supreme Court's infamous "separate but equal" 1896 case of *Plessy v. Ferguson* by 22 years.¹⁴⁰

In 1966, as the South was in the process of desegregating, 85 percent of Black Californians attended predominantly minority schools, and only 12 percent of Black students and 39 percent of white students attended racially balanced schools.¹⁴¹ Like in the South, white Californians fought desegregation and, in a number of school districts, courts had to order districts to desegregate. Any progress attained through court-enforced desegregation was short-lived. Throughout the mid- to late-1970s, courts overturned, limited, or ignored desegregation orders in many California districts, as the Supreme Court and Congress further restricted the use of remedies like busing and school reassignment to integrate schools.¹⁴² In 1979, a white majority in California passed Proposition 1, which further limited desegregation efforts tied to busing.¹⁴³

In the vast majority of California school districts, schools either re-segregated or were never integrated, so segregated schooling persists today. California is the sixth most segregated state in the country for Black students.¹⁴⁴ In California's highly segregated schools, schools mostly attended by white and Asian children receive more funding and resources than schools mostly attended by Black and Latino children.¹⁴⁵

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Establish Office of Freedmen Education and Social Services to offer free educational and social services; to facilitate free tuition initiative between claimants and California school of choice
- Add Black students as a group to the existing three student groups listed in the Supplemental Grants provisions of the Local Control Funding Formula (LCFF). This funding must be used to provide instructional supports, enrichment, and counseling to Black students.

¹³⁹ *Ward v. Flood*, 48 Cal. 36 (1874).

¹⁴⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁴¹ Wollenberg, All Deliberate Speed, *supra*, at fn. **Error! Bookmark not defined.**, p. 144.

¹⁴² *Butt v. California* (1992) 4 Cal. 4th 668, 684; Orfield & Ee, Segregating California's Future: Inequality and Its Alternative 60 Years after *Brown v. Board of Education*, The Civil Rights Project, University of California Los Angeles (May 14, 2014) p. 3.

¹⁴³ See Cal. Const., art. I, § 7; School Assignment and Transportation of Pupils, California Proposition 1 (1979).

¹⁴⁴ Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 30-31, Tables 13 and 14.

¹⁴⁵ See Ch.6 Section IV.M.2

- Provide funding for free tuition initiative; African American/American Freedmen owned and controlled schools (PreK-12th); colleges and universities; trade schools; professional school.
- Adopt a school curriculum that includes a much more expansive discussion of the experiences of Black Americans in a way that is accurate and honest. Moreover, this curriculum should highlight the humanity of Black Americans before, during, and after slavery and emphasize how this sense of humanity empowered generations of Black Americans to fight for social justice and liberation.
- Adopt mandatory curriculum for teacher credentialing in all teaching colleges and universities in California that includes culturally responsive pedagogy, anti-bias training, and restorative practices and develop strategies to proactively recruit Black American teachers to teach in K-12 public schools.
- Reduce school segregation either by creating porous school district boundaries (i.e., that allow certain numbers of students from neighboring districts to attend) or increasing the availability of inter-district transfers (e.g., with transportation when certain criteria are met) to increase the critical mass of diverse students at each school so that students are assigned to and/or able to attend public schools based on factors independent of their parents' income levels and ability to afford housing in a particular neighborhood or city. The goal of the legislative amendment would be to reduce harmful and arbitrary segregation within California public schools and resulting harms experienced by Black students at majority-nonwhite underfunded and under-resourced schools.
- Provide scholarships for all Black high school graduates to cover four years of undergraduate education at their school of choice for perpetuity to address specific and ongoing discrimination faced in California schools.

VI. Racism in Environment and Infrastructure

A. Nationally

Due to residential segregation, Black Americans have lived in poor-quality housing throughout American history, exposing them to disproportionate amounts of lead poisoning¹⁴⁶ and increasing their risks of infectious disease.¹⁴⁷ Segregated Black neighborhoods have more exposure to hazardous waste, oil and gas production, and automobile and diesel fumes,¹⁴⁸ and are

¹⁴⁶ See, e.g., Haslam, Robert, Lead poisoning, *Paediatrics & Child Health* Vol. 8,8 (2003): 509-10; Tong Shilu, von Schirnding, Yasmin & Prapamontol, Tippawan, *Environmental Lead Exposure: A Public Health Problem of Global Dimensions*, *Bulletin of the World Health Organization*, 2000, 78 (9).

¹⁴⁷ WHO Housing and Health Guidelines. Geneva: World Health Organization (2018), Household crowding; Krieger, J., & Higgins, D. L. (2002), *Housing and health: time again for public health action*. *American journal of public health*.

¹⁴⁸ *Pollution and Prejudice*, CalEPA, January 25, 2021, p. 6., *see also*, Haley M. Lane, *et. al*, *Environmental Science & Technology Letters* Article ASAP
DOI: 10.1021/acs.estlett.1c01012

more likely to have inadequate public services like sewage lines and water pipes.¹⁴⁹ Black Americans are more vulnerable than white Americans to the dangerous effects of extreme weather patterns like heat waves and hurricanes, made worse by the effects of climate change.¹⁵⁰

B. California

National patterns are replicated in California. Black Californians are more likely than white Californians to live in overcrowded housing,¹⁵¹ and near hazardous waste.¹⁵² Black neighborhoods are more likely to lack tree canopy¹⁵³ and suffer from the consequences of water¹⁵⁴ and air pollution.¹⁵⁵ For instance, Black neighborhoods in the San Joaquin Valley were historically denied access to clean water.¹⁵⁶

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Require and fund statewide investments in environmental infrastructure to create shade equity, minimize heat islands, and create equal access to parks, parklands, and natural resources in Black neighborhoods.
- Ensure that state and local allocation of resources to public transit systems is equitable on a per-rider basis for methods of transit that are disproportionately utilized by low-income, urban, and Black residents.

VII. Pathologizing the Black Family

A. Nationally

Government policies and practices have destroyed Black families throughout American history. After the Civil War, southern state governments re-enslaved children by making them

¹⁴⁹ Jeremy S. Hoffman, Vivek Shandas, Nicholas Pendleton, The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas Climate 2020, 8(1), 12; Published: 13 January 2020; Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 270.

¹⁵⁰ Hoffman et al, *supra*.

¹⁵¹ California Department of Public Health, Office of Health Equity, Housing Overcrowding, <https://www.cdph.ca.gov/Programs/OHE/Pages/HCI-Housing-Overcrowding.aspx>.

¹⁵² Robert D. Bullard et al, Toxic Wastes and Race at Twenty, 1987—2007, A Report Prepared for the United Church of Christ Justice & Witness Ministries (2007) at 80 (showing that while people of color broadly are overrepresented in neighborhoods adjacent to toxic waste facilities by approximately 38 percent, Black residents are overrepresented by approximately 45 percent).

¹⁵³ Off. of Health Equity, Cal. Dept. of Public Health, Climate Change & Health Equity: Issue Brief (2019) page 2 <https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CCHEP-General/CDPH_CC-and-Health-Equity-Issue-Brief.pdf> (as of June 17, 2021).

¹⁵⁴ Jose A. Del Real, *The Crisis Lurking in Californians' Taps: How 1,000 Water Systems May Be at Risk*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/the-crisis-lurking-in-californians-taps-how-1000-water-systems-may-be-at-risk.html>.

¹⁵⁵ Pollution and Prejudice, CalEPA, January 25, 2021, p. 10.

¹⁵⁶ London et al, UC Davis Center for Climate Change, The Struggle for Water Justice in California's San Joaquin Valley (2018) at 10.

“apprentices” and forcing them to labor for white Americans, who were sometimes their former enslavers.¹⁵⁷ In the past century, both financial assistance and child welfare systems have based decisions on racist beliefs about Black Americans, which continue to operate as badges of slavery.¹⁵⁸

Government issued financial assistance has excluded Black Americans from receiving benefits. In the early 1900s, state governments made support payments every month to low income single mothers to assist them with the expenses incurred while raising children.¹⁵⁹ Black families were generally excluded, despite their greater need.¹⁶⁰

Child welfare agencies today have disproportionately targeted Black families for investigations of child mistreatment and neglect.¹⁶¹ Scholars have found that racial discrimination exists at every stage of the child welfare process.¹⁶² Studies have found that when equally poor Black and white families are compared, even where the families are considered to be at equal risk for future abuse, state agencies are more likely to remove Black children from their families than white children from their families.¹⁶³ As of 2019, Black children make up 14 percent of American children, but 23 percent of children in foster care.¹⁶⁴ Studies have shown that this is likely not because Black parents mistreat their children more often, but rather due to systemic racism and poverty.¹⁶⁵

¹⁵⁷ Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland* (1988) 62 *Ag. Hist.* 57, p. 63.

¹⁵⁸ Robinson, “*The Black Family*” and *US Social Policy: Moynihan's Unintended Legacy?*, *Revue Française d'études Américaines* (Sept 2003) p. 118-128; Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, and “Worthiness” in Poverty Discourse and Policy* (Spring 2010) *The Modern American*, Vol. 6.1; Minoff, Center for the Study of Social Policy, *The Racist Roots of Work Requirements* (Feb. 2020), <<https://cssp.org/wp-content/uploads/2020/02/Racist-Roots-of-Work-Requirements-CSSP-1.pdf>> (as of March 6, 2022); Cooper, *Racial Bias in American Foster Care: The National Debate* (2013) 97 *Marq. L.Rev.* 215, p. 230; sections VI & VII, *infra*.

¹⁵⁹ Ctr. on Budget & Pol’y Priorities, *TANF Policies Reflect Racist Legacy of Cash Assistance* 10 (2021).

¹⁶⁰ Moehling, *supra*, at 7, 10, 12-18, table 9 (analyzing data from Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia).

¹⁶¹ *Ibid.*

¹⁶² See, e.g., Dettlaff, *supra*; Children’s Bureau, *Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3* (Apr. 2021).

¹⁶³ Dettlaff, et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare* (2011) *Children and Youth Services Review*, 33, pp. 1630–1637; Miller, *Racial Disproportionality in Washington State’s Child Welfare System* (2008) Olympia: Washington State Institute for Public Policy; Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children* (2008) *Child Welfare*, 87, pp. 151–168.

¹⁶⁴ Children’s Bureau, *Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3* (Apr. 2021).

¹⁶⁵ Cooper, *Racial Bias in American Foster Care: The National Debate* (2013) 97 *Marq. L.Rev.* 215, 230; Sedlak, A. J., & Broadhurst, D. (1996). Third national incidence study of child abuse and neglect: Final report. Washington, DC: U.S. Department of Health and Human Services; Dettlaff, Alan J., Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt, and Leonard Burton, *It Is Not a Broken System, It Is a System That Needs to Be Broken: The UpEND Movement to Abolish the Child Welfare System*, *Journal of Public Child Welfare* 14, no. 5 (October 19, 2020): 500–517; Sedlak, A. J., McPherson, K., & Das, B. (2010). Supplementary analyses of race differences in child maltreatment rates in the NIS-4. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families; Sedlak, A. J., Mettenburg, J., Basena, M., Petta, I., McPherson, K., Greene, A., & Li, S. (2010). Fourth national incidence study of child abuse and neglect (NIS-4): Report to congress.

Meanwhile, the criminal and juvenile justice systems have intensified these harms to Black families by imprisoning large numbers of Black youth, and separating Black families.¹⁶⁶

B. California

Trends in California match those in the rest of the country. Recent California Attorney General investigations have found several school districts punished Black students at higher rates than students of other races.¹⁶⁷ A 2015 study ranked California among the five worst states in foster care racial disparities.¹⁶⁸ Black children in California make up 23 percent of the foster population, while only *six percent* of the general child population,¹⁶⁹ far higher than the national percentages.¹⁷⁰ Some counties in California—both urban and rural—have much higher disparities compared to the statewide average. In San Francisco County, which is largely urban and has nearly 900,000 residents, the percentage of Black children in foster care in 2018 was over *20 times* the rate of white children.¹⁷¹

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Establish Office of Freedmen Family Affairs to assist with family planning and reunification efforts; and to assist with home-buying and related activities
- Compensate families who were denied familial inheritances by the operation of racist anti-miscegenation statutes or other laws or precedent that denied Black heirs resources they would have received had they been white.
- Increase the percentage of federal Temporary Assistance to Needy Families funding devoted to direct assistance to impoverished families within California to realign with historic practices, which would provide greater funding to poor Black families that have historical been denied equal welfare benefits pursuant to a variety of overtly and/or practically racist policies and practices.

Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families; Bartholet, E. (2011). *Race & child welfare: Disproportionality, disparity, discrimination: Re-assessing the facts, re-thinking the policy options.*

¹⁶⁶ Puzzanhera et al., *Easy Access to Juvenile Populations: 1990-2019*. National Center for Juvenile Justice (2020) <<https://www.ojjdp.gov/ojstatbb/ezapop>> (as of Jan. 28, 2021).

¹⁶⁷ *Ibid.*

¹⁶⁸ Tiano, *Los Angeles' Plan to Address the Overrepresentation of Black and LGBTQ Youth in Foster Care* (May 22, 2019) The Imprint <<https://imprintnews.org/news-2/l-a-s-plan-to-address-the-overrepresentation-of-black-and-lgbtq-youth-in-foster-care/35125>> (as of Aug. 25, 2021).

¹⁶⁹ Children in Foster Care, by Race/Ethnicity (2018) KidsData <<https://www.kidsdata.org/topic/22/foster-in-care-race/table>> (as of Aug. 27, 2021).

¹⁷⁰ *Compare Ibid with Children's Bureau, Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3* (Apr. 2021).

¹⁷¹ Children in Foster Care, by Race/Ethnicity (2018) KidsData <<https://www.kidsdata.org/topic/22/foster-in-care-race/table>> (as of Aug. 27, 2021).

- Address the severely disparate involvement of Black families within the child welfare and foster care systems.

VIII. Control Over Creative Cultural and Intellectual Life

A. Nationally

During slavery, state governments controlled and dictated the forms and content of Black American artistic and cultural production.¹⁷² After the Civil War, governments and politicians embraced minstrelsy, which was the popular racist and stereotypical depiction of Black Americans through song, dance, and film.¹⁷³ Federal and state governments failed to protect Black artists, culture-makers, and media-makers from discrimination and simultaneously promoted discriminatory narratives.

Federal and state governments allowed white Americans to steal Black American art and culture with impunity—depriving Black creators of valuable copyright and patent protections.¹⁷⁴ State governments denied Black American entrepreneurs and culture-makers access to leisure sites, business licenses, and funding for leisure activities.¹⁷⁵ State governments memorialized the Confederacy as just and heroic through monument building, while suppressing the nation's history of racism and slavery.¹⁷⁶ States censored cinematic depictions of discrimination against and integration of Black people into white society.¹⁷⁷

B. California

In California, city governments decimated thriving Black neighborhoods with vibrant artistic communities, like the Fillmore in San Francisco.¹⁷⁸ Local governments in California have discriminated against, punished, and penalized Black students for their fashion, hairstyle, and appearance.¹⁷⁹ State-funded California museums have excluded Black art from their

¹⁷² Ibid.

¹⁷³ Rhae Lynn Barnes, *Yes, Politicians Wore Blackface. It Used to be All-American 'Fun'* (Feb. 8, 2019), Washington Post <https://www.washingtonpost.com/outlook/yes-politicians-wore-blackface-it-used-to-be-all-american-fun/2019/02/08/821b268c-2b0d-11e9-b011-d8500644dc98_story.html> (as of March 21, 2022).

¹⁷⁴ Jonathan Rothwell, *The Black Innovators Who Elevated the United States:: Reassessing the Golden Age of Invention* (Nov. 23, 2020), Brookings Institution <<https://www.brookings.edu/research/the-black-innovators-who-elevated-the-united-states-reassessing-the-golden-age-of-invention/>> (as of March 21, 2022).

¹⁷⁵ Alison Rose Jefferson, *Living the California Dream: African American Leisure Sites During Jim Crow Era* (2020).

¹⁷⁶ Karen L. Cox, *Dixies Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture* (2003).

¹⁷⁷ Ellen C. Scott, *Cinema Civil Rights: Regulation, Repression, and Race in the Classical Hollywood Era* (2015).

¹⁷⁸ Elizabeth Pepin, *Music of the Fillmore* (2000), KQED <<https://www.pbs.org/kqed/fillmore/learning/music/swing.html>> (as of March 20, 2022).

¹⁷⁹ See, e.g., Erika Paggett, *Cultural Incompetence: My Son was Kicked out of Class Because of His Hair* (March 8, 2018), ACLU of Northern California <<https://www.aclunc.org/blog/cultural-incompetence-my-son-was-kicked-out-class-because-his-hair>> (as of March 21, 2022).

institutions.¹⁸⁰ California has criminalized Black rap artists, as California courts have allowed rap lyrics to be used as evidence related to street gang activity.¹⁸¹ California has been home to numerous racist monument and memorial construction for centuries.¹⁸²

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Establish Office of Freedmen Cultural Affairs to restore African American cultural/historical sites; establish monuments; advocate for removal of racist relics; support knowledge production and archival research; and to provide support for African Americans in the entertainment industry
- Reverse the effects of anti-Black discrimination policies in the areas of artistic, cultural, creative, athletic, and intellectual life.
- Compensate individuals who have been deprived of rightful profits for their artistic, creative, athletic, and intellectual talent.
- Prevent discrimination in the industries of art, culture, invention, sports, leisure, and business, including but not limited to: ensuring access to patents and royalties for cultural, intellectual, and artistic production; prohibiting discrimination and glass ceilings that harm Black artists and entrepreneurs; removing anti-Black memorials and monuments; placing clear restrictions on the use of artistic works in disciplinary or law enforcement actions; and providing a pathway to compensation for student-athletes.

IX. Stolen Labor and Hindered Opportunity

A. Nationally

During slavery, American government at all levels enabled and benefitted from the theft of Black Americans' labor.¹⁸³ Since then, federal, state, and local government actions directly segregated and discriminated against Black Americans.¹⁸⁴ In 1913, President Wilson officially segregated much of the federal workforce.¹⁸⁵ In 1979, the U.S. General Accounting Office found that exams administered by the Office of Personnel Management to screen applicants for federal jobs

¹⁸⁰ See, e.g., LA Times article. Carolina A. Miranda, *How One Art Museum Has Reckoned with Race and Its Past* (Oct. 22, 2020), L.A. Times <<https://www.latimes.com/entertainment-arts/story/2020-10-22/how-one-art-museum-has-reckoned-with-race-and-its-past>> (as of March 20, 2022).

¹⁸¹ (People v. Olguin (1994) 31 Cal.App.,4th 1355)..

¹⁸² Charles Desmarais, *Historic Wrongs on a Pedestal: Ugly Past Doesn't Vanish When the Artwork Does* (Feb. 27, 2018) <<https://www.sfchronicle.com/news/article/Historic-wrongs-on-a-pedestal-Ugly-past-12713662.php>> (as of March 21, 2022).

¹⁸³ See Chapter 2

¹⁸⁴ See Chapter 10, section V

¹⁸⁵ Little, How Woodrow Wilson Tried to Reverse Black American Progress (Jul. 14, 2020)

<https://www.history.com/news/woodrow-wilson-racial-segregation-jim-crow-ku-klux-klan>; see also Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 66.

disqualified Black candidates at higher rates than white candidates.¹⁸⁶ While Black Americans have consistently served in the military since the very beginning of the country, the military has historically paid Black soldiers less than white soldiers and often deemed Black Americans unfit for service until the military needed them to fight.¹⁸⁷

Federal laws have also protected white workers while denying the same protections to Black workers, setting up and allowing private discrimination.¹⁸⁸ Approximately 85 percent of all Black workers in the United States at the time were excluded from labor protections passed in 1938 like federal minimum wage, the maximum number of working hours before overtime pay is required, and limits on child labor.¹⁸⁹ Because of these exclusions, the U.S. Fair Labor Standards Act essentially outlawed child labor in industrial settings, where most white children worked at the time, and allowed child labor in agricultural and domestic work, where most Black children worked.¹⁹⁰

Although federal and state laws like the Federal Civil Rights Act of 1964 and the California Fair Employment and Housing Act of 1959 prohibit discrimination in the present, they do not remedy the harms committed in the past,¹⁹¹ and enforcement is slow and spotty.¹⁹² Federal and state policies like affirmative action produced mixed results and were short lived.¹⁹³ Black Americans continue to face employment discrimination today.¹⁹⁴

B. California

Several California cities did not hire Black workers until the 1940s¹⁹⁵ and certain public sectors continued to avoid hiring Black workers even in 1970. The San Francisco Fire Department, for example, had no Black firefighters before 1955 and, by 1970 when Black residents made up 14 percent of the city's population, only four of the Department's 1,800 uniformed firefighters were

¹⁸⁶ U.S. General Accounting Office, Race in America, <https://www.gao.gov/race-america> (last checked Mar. 7, 2022).

¹⁸⁷ <https://history.army.mil/html/faq/diversity.html>

¹⁸⁸ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 103-104; Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 342; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹⁸⁹ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio St. L.J. 95, 103-104; Jones, *American Work: Four Centuries of Black and White Labor* (1998) p. 342; California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹⁹⁰ *Ibid.*

¹⁹¹ See Chapter 10

¹⁹² See, e.g., *Color of Law*, *supra*, at pp. 257-58.

¹⁹³ See chapters 6 and 10

¹⁹⁴ See Chapter 10 section IV.N.

¹⁹⁵ See, e.g., Broussard, "In Search of the Promised Land: African American Migration to San Francisco, 1900-1945" in *Seeking El Dorado: African Americans in California* (De Graaf, Mulroy & Taylor, eds. 2001) p. 198; *West of Jim Crow: The Fight Against California's Color Line* (2020) p. 234;

Black.¹⁹⁶ During the New Deal, several California cities invoked city ordinances to prevent Black federal workers from working within their cities.¹⁹⁷ Labor unions excluded Black workers in California.¹⁹⁸ Today, by some measures, California's two major industries, Hollywood and Silicon Valley, employ disproportionately fewer Black Americans.¹⁹⁹

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Ensure that barriers to employment and advancement are closely examined and addressed for Black Californians seeking public employment and promotion to higher-paying positions in government. The California Legislature should also consider legislation to bring about pay equity.
- Raise the minimum wage and require scaling up of the minimum wage for more experienced workers, require provision of health benefits and paid time off, and provide other missing protections for workers in food and hospitality services, agricultural, food processing, and domestic worker industries.
- Require or incentivize private and public employers to undergo training regarding bias in employment practices and measures to address bias in hiring, promotion, pay, and workplace practices.
- Create a fund to support the development and sustainment of Black-owned businesses and eliminate barriers to licensure that are not strictly necessary and that harm Black workers.
- Create and fund intensive training programs that enable Black Californians to access employment opportunities from which they have been excluded.
- Ban employment practices that lock in and perpetuate historic and continuing discrimination and should make eligibility for public contracts contingent on elimination of employment practices that disproportionately harm Black workers.
- Address disparities in transportation that limit access to jobs.

X. An Unjust Legal System

A. Nationally

American government at all levels criminalized Black Americans for the purposes of social

¹⁹⁶ United States v. City and County of San Francisco, 696 F. Supp. 1287 (N.D. Cal. 1988)

¹⁹⁷ See, e.g., *Sundown Towns: A Hidden Dimension of American Racism* by James Loewen (pp. 100, 239-40)

¹⁹⁸ See, e.g., Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. 113.

¹⁹⁹ See, e.g., Dunn et al, *Black Representation in Film and TV: The Challenges and Impact of Increasing Diversity*, McKinsey (March 11, 2021), <<https://tinyurl.com/2p89t6k9>> (as of Jan 24, 2022); Tomaskovic-Devey & Han, *Is Silicon Valley Tech Diversity Possible Now?*, Center for Employment Equity (Jan. 2018), <<https://tinyurl.com/bddbnu37>> (as of Jan 24, 2022).

control, and to maintain an economy based on exploited Black labor. This criminalization of Black Americans, an enduring badge of slavery, has contributed to the over-policing of Black neighborhoods, the school to prison pipeline, the mass incarceration of Black Americans, and other inequities in nearly every corner of the American legal system.²⁰⁰

As a result, the American criminal justice system overall physically harms,²⁰¹ imprisons,²⁰² and kills²⁰³ Black Americans more than other racial groups relative to their percentage of the population. While constitutional amendments²⁰⁴ and federal civil rights laws²⁰⁵ have tried to prevent this mistreatment of Black Americans, the inequities that remain are so significant that some scholars have argued that, as it relates to Black Americans, the U.S. criminal justice system is a new iteration of legal segregation.²⁰⁶

After the Civil War, and throughout legal segregation, states maintained the badge of slavery by passing numerous laws that criminalized Black Americans when they performed everyday tasks, like stepping into the same waiting rooms as white Americans at bus stations, cutting the hair of white women and girls in a barbershop, or walking into a park for white people.²⁰⁷ In the South, until the 1940s, Black men and boys were arrested on vagrancy charges or minor violations, fined, and forced to pay off their fine in a new system of enslavement called convict leasing.²⁰⁸ In the words of the Supreme Court of Virginia, they were “slaves of the state.”²⁰⁹

During the tough on crime and War on Drugs era, politicians continued to criminalize Black Americans to win elections. President Richard Nixon’s domestic policy advisor explained that by “getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, [the Nixon White House] could disrupt those communities... Did we know we were lying about the drugs? Of course we did.”²¹⁰

The criminalization of Black Americans has not only resulted in the arrest, conviction, and imprisonment of Black Americans, it has also led to a rejection by police and mainstream media of accepting Black Americans as victims. Crimes against Black American women are poorly investigated and sometimes ignored entirely.²¹¹ Black children on average remain missing longer

²⁰⁰ See Chapter 11

²⁰¹ [Note: Citation to 2021-2022 statistics to be inserted here closer to publication.]

²⁰² [Note: Citation to 2021-2022 statistics to be inserted here closer to publication.]

²⁰³ [Note: Citation to 2021-2022 statistics to be inserted here closer to publication.]

²⁰⁴ See, e.g., U.S. Const., 13th Amend, U.S. Const., 14th Amend., and U.S. Const., 15th Amend.

²⁰⁵ See, e.g., The Civil Rights Act of 1866, The Reconstruction Acts of 1867-1868, The Ku Klux Klan Act, The Civil Rights Act of 1875, The Civil Rights Act of 1964, The Voting Rights Act, and The Fair Housing Act

²⁰⁶ See, e.g., Alexander, *The New Jim Crow* (2020).

²⁰⁷ https://www.nps.gov/malu/learn/education/jim_crow_laws.htm

²⁰⁸ See generally Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008)), p. 247.

²⁰⁹ See, e.g., *Ruffin v. Commonwealth* (1871) 62 Va. 790, 796.

²¹⁰ Baum, *Legalize It All* Harper’s Magazine April 2016 p. 22

<<https://archive.harpers.org/2016/04/pdf/HarpersMagazine-2016-04-0085915.pdf>> [as of Dec. 28, 2021].

²¹¹ Sood, *supra*, at pp. 406-407.

and are more likely to be missing than non-Black children.²¹²

B. California

Like the rest of the country, California police stop,²¹³ shoot,²¹⁴ kill,²¹⁵ and imprison²¹⁶ more Black Americans than their share of the population. Police officers reported ultimately taking no action during a stop most frequently when stopping a person they perceived to be Black, suggesting there may have been no legitimate basis for the stop.²¹⁷ A 2020 study showed that racial discrimination is an “ever-present” feature of jury selection in California.²¹⁸ The ongoing effects of California’s punitive criminal justice policies, such as the state’s three-strikes law, have resulted in large numbers of Black Americans in prisons and jails.²¹⁹

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Establish Office of Freedmen Legal Affairs in order to offer a range of free legal services; free arbitration and mediation services; and to advocate for civil/criminal justice reforms.
- Reverse the effects of discriminatory policing and particularly killings, use of force, and racial profiling of Black Americans.
- Reverse the effects of discrimination within the criminal justice system.
- Prevent discrimination by algorithms in new policing technologies.

XI. Harm and Neglect: Mental Physical and Public Health

A. Nationally

The government’s actions and derelictions of duty, as further described in this report, have had a devastating effect on the health of Black Americans. Compared to white Americans, Black

²¹² See, e.g., van de Rijt, et al., Racial and gender differences in missing children’s recover chances, PLoS One 2018 13(12) December 31, 2018 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6312271/>> [as of Jan. 3, 2022]

²¹³ *Id.* at p. 8.

²¹⁴ Mendelson, Police Use Force on Black Angelenos at Dramatically Higher Rates, Data Shows Rates LAist (July 7, 2020) <<https://www.laist.com/2020/07/07/police-use-of-force-on-blacks-in-la-very-high.php>> [as of Apr. 9, 2021] [summarizing data from the California Department of Justice and American Community Survey].

²¹⁵ Cal. Department of Justice, Use of Force Incident Reporting 2016-2020 <<https://www.openjustice.doj.ca.gov/data-stories/use-of-force>> [as of July 22, 2021].

²¹⁶ U.S. Census Bureau, Quick Facts: California <<https://www.census.gov/quickfacts/fact/table/CA/RHI225219>> [as of July 22, 2021].

²¹⁷ *Id.* at p. 8.

²¹⁸ Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020) <<https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>> [as of Apr. 9, 2021].

²¹⁹ See, e.g., Sutton, *Symbol and Substance: Effects of California’s Three Strikes Law on Felony Sentencing* (2013) *Law & Society Review* (2013) vol. 47, no. 1, pp. 37–71 <<https://www.jstor.org/stable/23357930>> [as of July 29, 2021].

Americans have lower life expectancy. Black Americans are more likely to suffer and die from almost all diseases and medical conditions than white Americans.²²⁰ When they are hospitalized, in surveys of hospitals across the country, Black patients with heart disease receive older, cheaper, and more conservative treatments than their white counterparts.²²¹

Researchers have found that by some measures, this health gap has grown and cannot be explained by poverty alone,²²² as middle- and upper-class Black Americans also manifest high rates of chronic illness and disability.²²³ Researchers have linked these health outcomes in part to Black Americans' unrelenting experience of racism in our society.²²⁴ When stressed by experiences of hostility and disrespect, the human body produces cortisol, a hormone linked to heart disease.²²⁵ Researchers have found that Black American adults have higher levels of cortisol than their white counterparts.²²⁶

Stress also results in chronically high levels of inflammation in the body.²²⁷ Studies have shown that Black youth who are exposed to discrimination and segregation have worse cases of adult inflammation due to race-related stressors.²²⁸ Research suggests that race-related stress may have a greater impact on health among Black Americans than diet, exercise, smoking, or being low income.²²⁹

In addition to physical harm, Black Americans experience anger, anxiety, paranoia, helplessness, hopelessness, frustration, resentment, fear, lowered self-esteem, and lower levels of

²²⁰ Forde et. Al., 2019). Forde AT, Crookes DM, Suglia SF, Demmer RT. The weathering hypothesis as an explanation for racial disparities in health: a systematic review. *Ann Epidemiol.* 2019 May;33:1-18.e3. doi: 10.1016/j.annepidem.2019.02.011. Epub 2019 Mar 19. PMID: 30987864.

²²¹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

²²² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4181672/>; Arline T. Geronimus, Margaret Hicken, Danya Keene, and John Bound, "Weathering" and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States," *American Journal of Public Health*, May 2006, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470581/>.

²²³ Geronimus AT, Andersen HF, Bound J. (1991). Differences in hypertension prevalence among United-States black-and-white women of childbearing age. *Public Health Report*;106(4):393e9. Geronimus AT. (1996). Black/white differences in the relationship of maternal age to birthweight: a population-based test of the weathering hypothesis. *Soc Sci Med*;42(4):589e97. Simons, R. L., Lei, M. K., Beach, S., Barr, A. B., Simons, L. G., Gibbons, F. X., & Philibert, R. A. (2018). Discrimination, segregation, and chronic inflammation: Testing the weathering explanation for the poor health of Black Americans. *Developmental psychology*, 54(10), 1993–2006. <https://doi.org/10.1037/dev0000511>.

²²⁴ <https://www.npr.org/sections/codeswitch/2018/01/14/577664626/making-the-case-that-discrimination-is-bad-for-your-health>; Forde et. Al., 2019).

²²⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

²²⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones, < <https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

²²⁷ April D. Thames, Michael R. Irwin, Elizabeth C. Breen, and S.W. Cole, "Experienced Discrimination and Racial Differences in Leukocyte Gene Expression," *Psychoneuroendocrinology*, August 2019, <https://www.sciencedirect.com/science/article/abs/pii/S0306453018310436?via%3Dihub>.

²²⁸ Id.

²²⁹ Id.

psychological functioning as a result of racism.²³⁰ These feelings can profoundly undermine Black children’s emotional and physical well-being and their academic success.²³¹

B. California

These measures are similar in California. The life expectancy of an average Black Californian was 75.1 years, six years shorter than the state average.²³² Black babies are more likely to die in infancy²³³ and Black mothers giving birth die at a rate of almost four times higher than the average Californian mother.²³⁴ Compared with white Californians, Black Californians are more likely to have diabetes,²³⁵ die from cancer,²³⁶ or be hospitalized for heart disease.²³⁷

Black Californians suffer from high rates of serious psychological distress, depression, suicidal ideation, and other mental health issues.²³⁸ Unmet mental health needs are higher among Black Californians, as compared with white Californians, including lack of access to mental healthcare and substance abuse services.²³⁹ Black Californians have the highest rates of attempted suicide among all racial groups.²⁴⁰

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Reverse the effects of anti-Black healthcare laws and policies and anti-Black discrimination in healthcare.
- Compensate individuals whose mental and physical health has been permanently damaged by the anti-Black healthcare system, including, but not limited to, those subjected to forced sterilization, medical experimentation, racist sentencing disparities, police violence, environmental racism, and psychological harm from race-related stress.
- Address current and future discrimination and systemic racism, including but not limited to,

²³⁰ (Fisher, Wallace & Fenton 2000; Jencks & Phillips 2011; Sellers & Shelton 2003).

²³¹ (Chavous, Rivas-Drake, Smalls, Griffin & Cogburn 2008; Neblett, Philip, Cogburn & Sellers 2006; Neblett, Smalls, Ford, Nguyễn, & Sellers 2009; Smalls, White, Chavous & Sellers 2007; Stevenson & Arrington 2009; Wong, Eccles & Sameroff 2003)”. (Grills, Aird and Frierson, 2020, p. 179).

²³² Aurrera Health Group, *Health Disparities by Race and Ethnicity in California: Pattern of Inequity* (Oct. 22, 2021), p. 7 <<https://tinyurl.com/2kser7js>> (as of Nov. 3, 2021)

²³³ *Id.* at p. 42.

²³⁴ Cal. Maternal Quality Care Collaborative, *The California Pregnancy-Associated Mortality Review* (2018), p. 21 <<https://tinyurl.com/yc5uc8dx>> (as of Jan. 21, 2022).

²³⁵ Cal. Health Care Foundation, *Health Disparities by Race and Ethnicity in California: Pattern of Inequity* (Oct. 22, 2021), p. 25 <<https://tinyurl.com/2kser7js>> (as of Nov. 3, 2021).

²³⁶ *Id.* at p. 28.

²³⁷ *Id.* at p. 19.

²³⁸ See generally V. Diane Woods et. al, “WE AIN’T CRAZY! Just Coping With a Crazy System”: Pathways into the Black Population for Eliminating Mental Health Disparities (2012), California Reducing Disparities Project <<https://cultureishealth.org/wp-content/uploads/2021/02/African-American-Population-Report-1.pdf>> (as of March 16, 2022)

²³⁹ (https://www.rand.org/pubs/research_reports/RR2060.html)

²⁴⁰ *Id.*

discrimination by healthcare providers; inequity in access to healthcare; inaccessibility of health insurance; funding needs of health-focused community organizations; the dearth of clinical research on health conditions that affect Black Americans; the overrepresentation of Black Americans among the unhoused, among the incarcerated, in the foster care system, in insecure housing, and in food deserts; the underrepresentation of Black Americans among medical and mental health providers; and the lack of race-conscious public health policy.

- Establish Office of Freedmen Medical Services
- Create free healthcare program;
- provide ongoing medical education, particularly on illnesses and other issues that historically impact health of African Americans; provide medical clinics.

XII. The Wealth Gap

A. Nationally

As described in further detail throughout this report, government policies perpetuating badges of slavery have helped white Americans accumulate wealth, while erecting barriers which prevented Black Americans from doing the same.²⁴¹

Federal and California Homesteading Acts essentially gave away hundreds of millions of acres of land almost for free mostly to white families.²⁴² Today, as many as 45 million of their living descendants reap the wealth benefits, approximately one-quarter of the adult population of the United States.²⁴³ In the 1930s and 1940s, the federal government created programs that subsidized low-cost loans, which allowed millions of average white Americans to own their homes for the first time.²⁴⁴ Of the \$120 billion worth of new housing subsidized between 1934 and 1962, less than two percent went to nonwhite families.²⁴⁵ Other bedrocks of the American middle class, like Social Security and the GI Bill, also mostly excluded Black Americans.²⁴⁶ The federal tax structure also discriminates against Black Americans.²⁴⁷ These harms compounded over generations, resulting in an enormous gap in wealth between white and Black Americans today.

As a result, the wealth gap between Black and white Americans is enormous, and the same today as it had been two years before the Civil Rights Act was passed in 1964.²⁴⁸ In 2019, the median

²⁴¹ See Chapter 5

²⁴² <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm>

²⁴³ Merrit, “land and the roots of African-American Poverty,” AEON, Mar. 11, 2016

²⁴⁴ https://www.pbs.org/race/000_About/002_06_a-godeeper.htm

²⁴⁵ https://www.pbs.org/race/000_About/002_06_a-godeeper.htm

²⁴⁶ See Chapters 5, 6, 10, 13

²⁴⁷ See Brown, Dorothy A.. *The Whiteness of Wealth*, p. 16,

²⁴⁸ Fed. Reserve Bank of Cleveland, *What is Behind the Persistence of the Racial Wealth Gap?* (Feb. 28, 2019), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx>>(as of Mar. 18, 2022).

Black household had a net of \$24,100, 13 percent of the median net worth of white households at \$188,200.²⁴⁹ This wealth gap persists regardless of education level and family structure,²⁵⁰ and across all income levels.²⁵¹

B. California

California's homestead laws similarly excluded Black Americans before 1900 because they required a homesteader to be a white citizen.²⁵² Californians passed Proposition 209 in 1996, which prohibited the consideration of race in state contracting.²⁵³ One study has estimated that, as a result of Proposition 209, minority- and women-owned business enterprises lost about \$1 billion.²⁵⁴

The wealth gap exists in similar ways in California. A 2014 study of the Los Angeles metro area found that the median value of liquid assets for native born Black American households was \$200, compared to \$11,000 for white households.²⁵⁵

C. Preliminary Recommendations

The Task Force recommends that the legislature consider legislation to:

- Establish Office of Freedmen Business Affairs to provide ongoing education related to entrepreneurialism and financial literacy; to provide business grants; and to establish public-private reparative justice-oriented partnerships.
- Implement a detailed program of reparations for Black Americans, including the form of compensation that should be awarded, how it should be awarded, and who should be eligible for compensation.
- Develop and implement other policies, programs, and measures to close the racial wealth gap in California.

²⁴⁹ U.S. Federal Reserve, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>

²⁵⁰ From Here to Equality, *supra* note 5, pp. 35-38,

²⁵¹ Darity Jr., et al, *A Subaltern Middle Class: The Case of the Missing Black Bourgeoisie* in *Contemporary Economic Problems* (Jul. 2020) p. 499.

²⁵² https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm

²⁵³ <https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf>.

²⁵⁴ <https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf>.

²⁵⁵ *Id.* at p. 38.

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Chapter 1. Introduction

I. Introduction

Why Reparations in California?

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

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

Consider Basil Campbell. Campbell was born enslaved in Missouri, where he married a woman named Mary Stephens and had two sons.³ In 1854, four years after California joined the Union as a free state, a man named J.D. Stephens bought Campbell for \$1,200 and forcibly moved him 1,500 miles away to a farm in Yolo County, California.⁴ Campbell never saw his wife or two sons again. J.D. Stephens enslaved Basil Campbell in California, ignoring California’s status as a free state, for another seven years, until Stephens decided that Campbell had sufficiently paid off his purchase price.⁵ Over the rest of his life, Campbell married again, adopted his wife’s children, and amassed a small fortune in land and livestock.⁶ After his death in 1906, his two sons from his first marriage in Missouri filed a petition for a portion of Campbell’s estate.⁷ A California appellate judge concluded that a marriage between enslaved people “is not a marriage relation, and it is mockery to speak of it as such.”⁸ The land once owned by Campbell is now a nature preserve.⁹

Consider the Burgess family. According to testimony given before the Task Force to Study and Develop Reparation Proposals for African Americans (Task Force), Rufus Burgess’s enslaver trafficked him to Coloma, California in the late 1840s.¹⁰ After his enslavement, like Basil Campbell, Rufus Burgess was able to build a family, a home, and a small fortune in Coloma, including farmland and orchards.¹¹ Before his death in 1869, Burgess handwrote in his autobiography that “man has deeply wronged me, but the glory of God lives forever.”¹² According to testimony by his descendant Jonathan Burgess, the California government ignored the Burgess family’s land deeds in the 1950s and razed the family home to establish the Marshall Gold Discovery

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

² Cal. Const. of 1849, art. I, § 18.

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

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

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

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

⁹ Restore/Restory: A People’s History of the Cache creek Nature Preserve, *History: Basil Campbell* <<https://tinyurl.com/2s3a5e4r>> (as of Jan. 21, 2022).

¹⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (Sep. 23, 2021), Testimony of Jonathan Burgess <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

¹¹ *Ibid.*

¹² *Ibid.*

State Historic Park.¹³ The Burgess family has never been compensated.¹⁴ “My uncle . . . [would] just point and cry” every time they drove past the park, Burgess told the Task Force, because the land had been theirs.¹⁵

Consider the Short family. In December 1945, O’Day Short, his wife Helen, their seven-year-old daughter Carol Ann, and their nine-year-old son Barry moved into the house that they had built in Fontana, California.¹⁶ In 1945, Fontana was a white neighborhood.¹⁷ Deputy sheriffs warned Short that he was “out of bounds,” and that to avoid “disagreeableness,” Short should move his family back to the segregated Black neighborhood on “the other side of the Baseline.”¹⁸ The real estate agent who sold the property to the Shorts warned them on December 3, 1945 that a “vigilante committee had a meeting on your case last night. They are a tough bunch to deal with. If I were you, I’d get my family off this property at once.”¹⁹ On December 6, two weeks after they moved in, an explosion and a fire engulfed the house.²⁰ Neighbors reported seeing Helen try to beat down the flames consuming her children.²¹ Helen, Carol Ann, and Barry died in the hospital.²² The San Bernardino County Coroner and District Attorney concluded that the explosion was an accident.²³ The District Attorney based this conclusion partly on a statement given by O’Day while he was in the hospital. During the same conversation, O’Day also said, “I am here on my sick bed, my hair burned off my head, my legs twisted under me. You have no respect for my position. All you want to do is get the information you are looking for.”²⁴ The District Attorney told O’Day that his wife and two young children had died when doctors had been keeping the information from him for fear that his condition would worsen.²⁵ O’Day Short died a few days later.²⁶ A subsequent California Attorney General report investigating the murders concluded that no evidence of vigilante activity in Fontana could be found.²⁷

Consider Alfred Simmons, a Black school teacher who rented a house from his white colleague in the Elmwood district of Berkeley in 1958.²⁸ The Berkeley chief of police asked the Federal Bureau of Investigation (FBI) to investigate how Simmons managed to live in the all-white community.²⁹ The FBI referred the case to the U.S. Attorney, who did not prosecute because no laws had been broken.³⁰ The Federal Housing Administration, the agency created by the federal government to help Americans buy homes, then wrote to Simmons’s white

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020), p. 190.

¹⁷ *Id.* at p. 192.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Id.* at p. 193

²¹ *Ibid.*

²² *Ibid.*

²³ *Id.* at p. 194.

²⁴ *Ibid.*

²⁵ *Id.* at p. 204.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Rothstein, *The Color of Law* (2017), pp. 66-67.

²⁹ *Ibid.*

³⁰ *Ibid.*

landlord to tell him that his future mortgage insurance applications would be rejected because renting to a Black American was an “Unsatisfactory Risk Determination.”³¹

Consider Paul Austin and Tenisha Tate-Austin, who bought a home in Marin City in 2016. Three years later, a white appraiser valued their home for \$500,000 less than it was worth, calling it a “distinct, marketable area.”³² “I took that as code word as: it’s a Black area,” said Paul Austin, who testified before the Task Force that he felt physically sick when he read the appraisal report.³³ Paul Austin testified that his grandparents had moved to California in the 1940s to work in the shipyards in Sausalito.³⁴ When they had saved up enough money to buy a house, his grandparents realized that they could not buy homes outside of Marin City due to redlining.³⁵ Redlining is a set of government policies that helped white families buy homes in the suburbs while forcing Black families to remain in urban centers.³⁶ These policies have devalued Black neighborhoods³⁷ and led to continued education segregation.³⁸ In 2019, a California Attorney General investigation found that the Sausalito-Marin City School District intentionally established a racially and ethnically segregated elementary and middle school, by offering inferior education programming and directly harming a mostly Black and Latino student body.³⁹ In the 1950s, Paul Austin’s paternal grandfather was one of the first Black families to move to Mill Valley, a white neighborhood.⁴⁰ Paul’s grandfather built a home where the driveway dropped 90 degrees so that the house could not be seen from the road. “Grandson,” Paul’s grandfather told him, “I had to build this home at nights and on weekends, so we wouldn’t be detected, because they didn’t want any Black families living in their city.”⁴¹ A white man picked up the lumber for them.⁴² Like Alfred Simmons’s white landlord, the white woman who sold her land to Paul’s grandfather was, in Paul’s words, “blackballed,” because the neighbors found out that she had sold her property to a Black family.⁴³ In 2021, Paul testified that the smaller houses in a white neighborhood that are a mile away from Paul and Tenisha’s house are valued at \$200,000 to \$300,000 more.⁴⁴

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

³¹ *Ibid.*

³² California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Perry, et al., *The Devaluation of Assets in Black Neighborhoods*, Brookings Institute (Nov. 2018), pp. 10-19 <<https://tinyurl.com/3uj9bdn5>> (as of Jan. 20, 2022).

³⁸ *Ibid.*; Oliver and Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995) pp. 8-9, 20; Guastafarro, *Why Racial Inequities in America's Schools are Rooted in Housing Policies of the Past*, USA Today (Nov. 2, 2020) <<https://tinyurl.com/yfm53e6e>> (as of June 23, 2021).

³⁹ California Attorney General, *Sausalito Marin City School District Agrees to End Segregation in its Schools* (Aug. 9, 2019) <<https://tinyurl.com/bdcyjap6>> (as of Mar. 21, 2022).

⁴⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Paul Austin, <<https://tinyurl.com/m97znmh6>> (as of Oct. 25, 2021).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

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

As W.E.B. Du Bois asked in 1935: “Nations reel and stagger on their way; they make hideous mistakes; they commit frightful wrongs; they do great and beautiful things. And shall we not best guide humanity by telling the truth about all this, so far as the truth is ascertainable?”⁴⁵

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

In order to maintain a system of enslavement and subjugation in the United States, white government leaders used the belief system of white supremacy to restrict the freedom of Black Americans and the flourishing of Black culture and prosperity.⁴⁶ These belief systems have served to normalize and perpetuate crimes against humanity and systemic racism in our governmental institutions. These beliefs created dehumanizing stereotypes of Black Americans, which mainstream arts and culture disseminated and amplified, fueling racial terror and violence long after enslavement ended. These beliefs were enshrined into the United States’ laws, court decisions, and government policies and practices, and into California’s laws, court decisions, and government policies and practices.⁴⁷ Government actors used these laws and practices to suppress and criminalize Black political participation and rip apart Black families. Federal, California, and local government, acting in tandem and in parallel with private actors, created and intensified housing segregation. Government actions intertwined with private action and segregated America, leading to environmental harms, unequal educational and health outcomes, and over-policing of Black neighborhoods in California and across the nation. Government actions and failures over 400 years have created a wealth gap that persists between Black and white Americans at all levels of income, regardless of education or family status. In fact, the wealth gap today is the same size it was two years before the passage of the Civil Rights Act of 1964.

II. The Task Force’s Charge

What does California owe its Black residents?

Assembly Bill 3121 (AB 3121) established this Task Force to Study and Develop Reparation Proposals for African Americans.⁴⁸ The Task Force consists of nine members.⁴⁹ AB 3121 charges the Task Force with studying the institution of slavery and its lingering negative effects on society and on living Black Americans, including descendants of persons enslaved in the United States.⁵⁰ The Task Force must synthesize documentary evidence of the capture, procurement, and transportation of Africans for the purpose of enslavement; the domestic trade of trafficked Black Americans; the treatment of enslaved people; the denial of humanity and the

⁴⁵ Du Bois, *Black Reconstruction in America, 1860–1880* (Free Press 1999), p. 714.

⁴⁶ See generally Kendi, *Stamped from the Beginning* (2016).

⁴⁷ See, e.g., U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3; Cal. Const. of 1849, art. II, § 1; An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, California Statutes, at 67–69; *Dred Scott v. Sanford* (1857) 60 U.S. 393; *People v. Hall* (1854) 4 Cal. 399, 403.

⁴⁸ California Assembly Bill No. 3121 (2019-2020 Reg. Sess.).

⁴⁹ Gov. Code, § 8301.2, subd. (a).

⁵⁰ *Id.*, § 8301.1, subd. (b)(1).

abuse of Black Americans; and the discrimination and lingering negative effects that followed in the colonies that eventually became the United States, and the United States of today.⁵¹

The Task Force must recommend appropriate remedies of compensation, rehabilitation, and restitution for African-Americans, with a special consideration for African-Americans who are descendants of persons enslaved in the United States, with a special consideration for descendants of persons enslaved in the United States.⁵² The Task Force recommendations must address how they comport with international standards and how the State of California will apologize for its role in perpetuating gross human rights violations and crimes against humanity on enslaved Africans and their descendants.⁵³ The Task Force must address the role of California laws and policies in continuing the negative lingering effects on Black Americans as a group and how these injuries can be reversed.⁵⁴ The recommendations must include how to calculate compensation, what form it will take, and who should be eligible.⁵⁵

The Task Force must issue a public report to the Legislature by June 1, 2022.⁵⁶ On June 1, 2021, the Task Force voted to issue a report in two parts.⁵⁷ Part one, to be published by June 1, 2022, will describe the institution of slavery, the ensuing discriminatory systems created by slavery, and its reverberations throughout American history and into the present.⁵⁸ It will make preliminary recommendations. Part two, to be published before the law sunsets on July 1, 2023, will include the Task Force's final recommendations, following further hearings, community engagement, and consultations with experts, regarding potential forms that an apology and reparations should take.⁵⁹

III. Overview of Activities

AB 3121 authorizes the Task Force to hold public hearings to pursue its mission.⁶⁰ In order to inform the contents of part one of its report, the Task Force held [XX] public meetings, during which it considered public comments, expert, and personal witness testimony, in addition to considering the voluminous materials submitted to the Task Force via email from those unable to attend the meetings.

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

⁵¹ *Ibid.*

⁵² *Id.*, subd. (b)(3).

⁵³ *Id.*, subd. (b)(3)(A)-(B).

⁵⁴ *Id.*, subd. (b)(3)(C)-(D).

⁵⁵ *Id.*, subd. (b)(3)(E)-(G).

⁵⁶ *Id.*, § 8301 subds. (a), (b).

⁵⁷ California Task Force to Study and Develop Reparation Proposals for African Americans, June Meeting Minutes (Jun. 1, 2021), <<https://tinyurl.com/2p8k8x6f>> (as of Jan. 21, 2022).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Gov. Code, § 8301.3, subd. (a)(1). The meetings are conducted pursuant to the Bagley Keene Act. Gov. Code § 11120. Due to the COVID-19 pandemic, from June 2021 to [March] 2022, according to California Governor Executive Orders N-29-20, N-08-21, and N-1-22, all meetings were conducted virtually.

IV. Structure of the Report

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

Under international law, a government is responsible where its wrongful actions or negligence caused injury to a specific group of people.⁶¹ Once proven, governments have a duty to remedy wrongful actions.⁶² Reparations offer such a remedy, and the United Nations recognizes five formal categories of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁶³ American courts of law have long recognized a similar concept—that parties must redress the harms caused by their actions or omissions where there was a duty to act.⁶⁴ Advocates frame reparations as a program that seeks acknowledgment, redress, and closure for injustice.⁶⁵

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

In addition to California's potential legal obligations, repairing a wrong is a political and moral obligation. America and California's democratic forms of government exist to embody the will of the people.⁶⁶ In accepting this system, we, as Americans and as Californians, are more than a random group of people who live in the same geographic area; we bind ourselves into a community that lives beyond the lifespans of its individual members.⁶⁷ Through government, a community channels its visions for the society it wants to create through the laws that govern it.⁶⁸

Following the charge of AB 3121 to describe the trade of trafficked African people across the oceans and within the lands of the United States, in this Report, the Task Force will recount the moral and legal wrongs the American and Californian governments have inflicted upon their own Black citizens and residents. The first chapter describes the institution of slavery as it existed in the geographic territory of the United States, and the legal, political, economic, and cultural systems maintaining and enriched by enslavement. The subsequent eleven chapters describe how these racist systems metastasized throughout America and California, reaching into all corners of American life. Each chapter traces an issue from its historic foundations in slavery, through successive discriminatory government actions, and government failures to correct and remedy the harms of anti-Black racism. Each chapter describes the uncorrected, compounding, and continuous harms all levels of the American government inflicted upon Black Americans, as well as the modern-day effects of those harms.

⁶¹ See Intl. Law Com., Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/83, at Arts. 31, 39 (2001).

⁶² *Ibid.*

⁶³ G.A. Res. 60/147, ¶¶ 19-23 (Mar. 21, 2006).

⁶⁴ See, e.g., *Merrill v. Los Angeles Gas & Elec. Co.* (1910) 158 Cal. 499, 503–04; Rest.2d, Torts §§ 4, 430, 431.

⁶⁵ Darity and Mullen, *From Here to Equality* (2020), p. 2.

⁶⁶ *Reynolds v. Sims* (1964) 377 U.S. 533, 562; see also U.S. Const., preamble; California Const., preamble.

⁶⁷ See Hamilton, *Federalist No. 1* <<https://tinyurl.com/y2tdk6xe>> (as of Oct. 27, 2021); U.S. Const., preamble; California Const., preamble; Hamilton, *Federalist No. 1* <<https://tinyurl.com/y2tdk6xe>> (as of Oct. 27, 2021); Hearings before House Com. on Jud., Subcom. on the Constitution, Civil Rights & Civil Liberties, on H.R. 40, 116th Cong., 1st Sess., testimony of Ta-Nahesi Coates.

⁶⁸ See *ibid.*

By focusing on the role of government actors at all levels of local, State and national authority in enslavement and racial discrimination, this report does not and cannot ignore the countless racist actions of private citizens throughout American history. The government's role does not absolve private actors of their own responsibility or prevent private individuals and entities who benefited from this state of affairs for generations from offering their own apologies and engaging in their own acts of reparations.⁶⁹ As the report makes clear in the following pages, federal, state, and local governments often worked in tandem with private individuals⁷⁰ to build and maintain a system placing Black Americans in the lowest social strata of this country.⁷¹

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

Often, government discrimination or racist mob violence targeted many communities at once. During the Zoot Suit Riots of 1943, white mobs of U.S. servicemen, off-duty police officers, and civilians indiscriminately attacked Latino, Black, and Filipino men in Los Angeles.⁷² Sometimes, one racial group enacted violence against another. As AB 3121 charges this Task Force solely with investigating the history of systemic racism as it relates to Black Californians, it does not focus on the innumerable acts of racist violence and discrimination by government officials and private citizens against other people of color.

V. Immigration and Migration Patterns

The first ship carrying enslaved people landed in what would become the United States in 1619 on the shores of Virginia.⁷³ Although Congress outlawed the trans-Atlantic slave trade in 1807, between 1619 and 1866, approximately 388,000 enslaved people were trafficked to the United States.⁷⁴ These African men, women, and children were mostly captured on the west coast of the African continent between modern day Senegal and Angola.⁷⁵ Once in the United States, the majority of enslaved people remained in the South,⁷⁶ although southern enslavers often brought enslaved people into free states.⁷⁷

⁶⁹ See, e.g., Desai, *The First Reparations Attempt at an American College Comes from its Students*, *The Atlantic* (Apr. 2019) <<https://tinyurl.com/45yde8y9>> (as of Oct. 27, 2021); Lockhart, *A Virginia Seminary Is the First School to Create a Reparations Fund*, *Vox* (Sept. 10, 2019) <<https://tinyurl.com/6sspaw5j>> (as of Oct. 28, 2021).

⁷⁰ See, e.g., *Brentwood Acad. v. Tennessee Secondary School Athletic Assn.* (2001) 531 U.S. 288, 295-303; *Shelley v. Kraemer* (1948) 334 U.S. 1, 13-23; *Burton v. Wilmington Parking Auth.* (1961) 365 U.S. 715, 716-26.

⁷¹ See generally, Wilkerson, *Caste* (2020).

⁷² Gerber, *Zoot Suit Riots: After 75 Years, L.A. Looks Back on a Violent Summer* (June 4, 2018) <<https://tinyurl.com/e45vbt4h>> (as of Nov. 5, 2021).

⁷³ Selections: Massachusetts and Virginia. The May-Flower at Plymouth, and the First Slave Ship at Jamestown (Sep. 28, 1860). *Liberator (1831-1865)* (page 1) <https://www.proquest.com/historical-newspapers/selections/docview/91117667/se-2?accountid=10352>

⁷⁴ Gates, Jr., *How Many Slaves Landed in the U.S.?* PBS (Sep. 19, 2013) <<https://tinyurl.com/2p9f9njy>> (as of Mar. 21, 2022).

⁷⁵ Pruitt, *What Part of Africa Did Most Enslaved People Come From?* *History* (Jun. 19, 2019) <<https://tinyurl.com/mysn6ena>> (as of Mar. 21, 2022); Trans-Atlantic Slave Trade - Database, *Slave Voyages* <<https://tinyurl.com/4dwefcb6>> (as of Mar. 21, 2022).

⁷⁶ Mullen, *These Maps Reveal How Slavery Expanded Across the United States*, *Smithsonian Magazine* (May 15, 2014) <<https://tinyurl.com/4essy9nw>> (as of Mar. 21, 2022).

⁷⁷ Darity and Mullen, *supra*, at p. 81.

In the 1800s and early 1900s, very few African people voluntarily immigrated to the United States due to immigration laws that limited the number of African immigrants.⁷⁸ Between 1870 and 1920, 17,376 African immigrants arrived in the United States representing 0.06 percent of the total immigrant population at the time.⁷⁹ The Johnson-Reed Act of 1924 established an immigration system that limited the number of immigrants from the African continent.⁸⁰ Between 1920 and 1970, 58,449 African individuals entered the United States, or about 0.51 percent of the total immigrant population.⁸¹ Beginning in the 1960s, Congress passed immigration reforms which significantly increased Caribbean and African immigration to the United States.⁸² As a result, the Black population of the United States became increasingly diverse. In 1990, 363,819 African immigrants entered the United States.⁸³

Today, approximately 47 million Black people live in the United States, according to the 2020 census.⁸⁴ Of those 47 million Black individuals, academics and other experts differ on the number who are the descendants of people enslaved in the United States. Name changes, destruction of culture, inaccurate records, forced family separation, and other consequences of 400 years of racial oppression make it extremely difficult to trace which Black individuals living today are American descendants of slaves. On the other hand, about 12 percent of Black people in American were born in a foreign country.⁸⁵ Nine percent of Black Americans have at least one foreign-born parent.⁸⁶ By 2060, the Black foreign-born population is projected to make up about one-third of the U.S. Black population.⁸⁷ 58 percent of Black immigrants arrived in the United States after 2000.⁸⁸ Every U.S. census conducted since 1970 has found that Black immigrants from the English speaking Caribbean earn more, are more likely to be employed than U.S.-born Black Americans, are more likely to hold more financial assets,⁸⁹ are more likely to own their home,⁹⁰ and most are more likely to be healthy than U.S.-born Black Americans.⁹¹

In California, the Black population remained small until World War II. Unlike the English speaking colonies on the east coast, racial boundaries were not strict, and a multiracial population lived in California as a Spanish colony in the 1500s.⁹² By 1850, when California entered the union, the Black population of California was a mix of Black Americans from the North and South, foreign-born Black Afro-Latinos from Mexico, Peru and

⁷⁸ U.S. Department of State Office of the Historian, *The Immigration Act of 1924 (The Johnson-Reed Act)* <<https://tinyurl.com/mtufd8nf>> (as of Mar. 21, 2022).

⁷⁹ U.S. Department of State Office of the Historian, *supra*.

⁸⁰ *Ibid.*; The Immigration Act of 1924 (Johnson-Reed Act), Pub. L. 68-139, 43 Stat. 153.

⁸¹ Newton, Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on its Impact on African Immigration to the United States (2005) 38 Cornell International Law Journal 1049, 1061.

⁸² Rumbaut *Origins and Destinies: Immigration to the United States Since World War II* (1994) 9 Sociological Forum 583,595.

⁸³ *Ibid.*

⁸⁴ U.S. Census Bureau, Race: Total Population (2020) <<https://tinyurl.com/2p8skfu6>> (as of Mar. 21, 2022).

⁸⁵ Tamir, *Key Findings about Black Immigrants in the U.S.*, Pew Research (Jan. 27, 2022) <<https://tinyurl.com/mus3wkx>> (as of Mar. 21, 2022).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Hamilton, *Immigration and the Remaking of Black America* (2009) [pincite].

⁹⁰ *Id.* at pp. [pincite].

⁹¹ *Id.* at pp. [pincite].

⁹² Taylor, *In Search of the Racial Frontier: African Americans in the American West 1528-1990* (1998), p. 30.

Chile, and Jamaicans.⁹³ The 1860 census counted 4,086 “total free colored” people in California.⁹⁴ Sources vary in the estimates of enslaved people in California, with some sources estimating up to 1,500 enslaved Black Americans lived in California in 1852.⁹⁵ The 1920 census counted 38,763 Black Americans, out of a total population of 3.4 million in the state.⁹⁶

California’s Black population increased significantly during World War II, as many moved to the state in search of war industry jobs. More Black people moved to California in the 1940s than in the entire previous century of statehood combined.⁹⁷ The Black population of California ballooned from 124,306 in 1940 to 1,400,143 in 1970.⁹⁸

VI. State of Black California

California is home to the fifth largest Black population in the United States, after Texas, Florida, Georgia, and New York.⁹⁹ As of 2020, about 39.5 million people live in California, of whom about 2.8 million self-identify as Black.¹⁰⁰ While the number of Black Californians has increased in the last thirty years, the overall percentage of Black Californians has fallen over the same period.¹⁰¹ Black Californians make up about six percent of the state’s population today, a decrease from 8.1 percent of the state’s population in 1990.¹⁰²

Black Californians live in all 58 Californian counties, but most Black Californians live in Los Angeles County (943,145), San Bernardino County (223,116), San Diego County (211,354), Alameda County (198,250), and Riverside County (197,329).¹⁰³ The counties with the highest number of Black Californians, as a percentage of the total population, are Solano County (16.87 percent), Sacramento County (12.43 percent), Alameda County (11.78 percent), Contra Costa County (10.69 percent), and San Bernardino County (10.23 percent).¹⁰⁴ In the past three decades, about 275,000 Black Californians have left expensive coastal cities to move inland or to other states.¹⁰⁵ During the same timeframe, the Black populations of some of California’s historically Black neighborhoods in cities across California have plunged: Compton by 45 percent, San Francisco by 43 percent, and Oakland by 40 percent.¹⁰⁶

⁹³ *Id.* at p. 83

⁹⁴ U.S. Census Bureau, 1860 Census: Population of the United States, p. 28 <<https://tinyurl.com/yjnj52x4>> (as of Mar. 22, 2022).

⁹⁵ Smith, *Freedom’s Frontier*, *supra*, at pp. 40, 257.

⁹⁶ U.S. Census Bureau, 1920 Census: Volume 3. Population, Composition and Characteristics of the Population by States, p. 106 <<https://www2.census.gov/library/publications/decennial/1920/volume-3/41084484v3ch02.pdf>> (as of Mar. 22, 2022),.

⁹⁷ Wilkerson, *The Warmth of Other Suns* (2010), p. 188.

⁹⁸ Gibson and Jung, *Historical Census Statistics on Population Totals by Race, 1790-1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, U.S. Census Bureau, Table 19 <<https://tinyurl.com/7shrp732>> (as of Jan. 20, 2022).

⁹⁹ The Campaign for College Opportunity, *The State of Higher Education for Black Californians* (Feb. 2021), p. 10, <<https://tinyurl.com/c7rf7uwk>> (as of Nov. 2, 2021).

¹⁰⁰ U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021). This number includes all Californians who identify solely as Black or as Black and at least one other race.

¹⁰¹ Compare U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021) with Raphael and Stoll, *The State of Black California*, UCLA: School of Public Affairs (Feb. 1, 2008), p. 78 <<https://tinyurl.com/zfwe8nn3>> (as of Mar. 22, 2022).

¹⁰² *Ibid.*

¹⁰³ U.S. Census Bureau, Race (2020) <<https://tinyurl.com/fzz7jvwz>> (as of Nov. 3, 2021).

¹⁰⁴ *Ibid.*

¹⁰⁵ Hepler, *The Hidden Toll of California’s Black Exodus*, Cal Matters (Jul. 15, 2020) <<https://tinyurl.com/36y2783a>> (as of Dec. 30, 2021).

¹⁰⁶ *Ibid.*

Despite the history of Black voter suppression throughout the United States and California, California has steadily improved voting access since the late twentieth century.¹⁰⁷ Surveys from 2019 show that six percent of likely voters are Black, equal to their share of the population in California.¹⁰⁸

Nevertheless, the effects of 400 years of compounding governmental and private acts of racial violence and discrimination described in this report have resulted in disparities between Black and white Californians in almost every corner of life. Compared to white Californians, Black Californians earn less and are more likely to be impoverished. In 2018, on average, Black Californians earned \$53,565, compared to \$87,078 for white Californians.¹⁰⁹ Around 19.4 percent of Black Californians live below the poverty line, compared to nine percent of white Californians.¹¹⁰ Black Californians are also far less likely to own a home than white Californians; in 2019, 59 percent of white households owned their homes, compared with 35 percent of Black Californians.¹¹¹ And in contrast to the advances in voting rights in California, the rates of Black homeownership in California have declined by over 11 percent since 2010.¹¹² In fact, Black homeownership in California in the 2010s has been lower than in the 1960s, when sellers could still legally discriminate against Black home buyers.¹¹³

Homelessness is a more acute problem in California than in the rest of the country, and the burden falls heaviest on Black Californians. Almost 50 percent—or nearly one in every two Black Californians—lives in a household where rent or mortgage payments eat up more than 30 percent of the residents' income, compared to about 30 percent of white Californians who suffer similar housing cost burdens.¹¹⁴ Nearly 40 percent of California's unhoused people are Black, even though Black Californians represent only six percent of the state's total population.¹¹⁵

The pervasive effects of racial discrimination have seriously harmed the health of Black Californians. In 2021, the life expectancy of an average Black Californian was 75.1 years, six years shorter than the state average.¹¹⁶ Black babies are more likely to die in infancy¹¹⁷ and Black mothers giving birth die at a rate of almost four

¹⁰⁷ See Katz, et al., *Reckoning with our Rights: The Evolution of Voter Access in California*, UCLA Luskin Center for History and Policy (Sept. 2020) pp. 20-27 <<https://tinyurl.com/5xzhj32p>> (as of Nov. 17, 2021).

¹⁰⁸ Baldassare et al., *California's Likely Voters*, Public Policy Institute of California (Sept. 2021), <<https://tinyurl.com/shnhwacm>> (as of Nov. 2, 2021).

¹⁰⁹ Sen. J. Economic Com., Rep. on The Economic State of Black America in 2020 (Feb. 14, 2020), p. 28 <<https://tinyurl.com/4ukt2w4u>> (as of Nov. 2, 2021).

¹¹⁰ *Ibid.*

¹¹¹ California Forward, Building Racial and Economic Equity Through Home Ownership (Apr. 2021) <<https://tinyurl.com/3wmsac7s>> (as of Nov. 3, 2021).

¹¹² *Ibid.*

¹¹³ *Black Homeownership Initiative: Building Black Wealth*, California Housing Finance Agency <<https://tinyurl.com/43h8sm9d>> (as of Jul. 12, 2020); See also *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020); Reid, *Crisis, Response, and Recovery: The Federal Government and the Black/White Homeownership Gap*, UC Berkeley Turner Center for Housing Innovation (Mar. 2021) <<https://tinyurl.com/2p9x8cz6>> (as of Jan. 24, 2022).

¹¹⁴ Levin, *Black Californians' Housing Crisis, by the Numbers*, Cal Matters (June 19, 2020) <<https://tinyurl.com/4hf7b2es>> (as of Nov. 3, 2021).

¹¹⁵ Cimini, *Black People Disproportionately Homeless in California*, Cal Matters (Oct. 5, 2019) <<https://tinyurl.com/z6xhxjsv>> (as of Nov. 3, 2021).

¹¹⁶ Aurrera Health Group, *Health Disparities by Race and Ethnicity in California: Pattern of Inequity* (Oct. 22, 2021), p. 7 <<https://tinyurl.com/2kser7js>> (as of Nov. 3, 2021)

¹¹⁷ *Id.* at p. 42.

times higher than the average Californian mother.¹¹⁸ Compared with white Californians, Black Californians are more likely to have diabetes,¹¹⁹ to die from cancer,¹²⁰ or be hospitalized for heart disease.¹²¹

Racial discrimination in housing, education, and the legal system, along with institutionally racist approaches and militarized culture, have collectively resulted in the over-policing of Black communities and the mass incarceration of Black citizens.¹²² According to data from 2020, the police are more than two times more likely to stop and search Black Americans in California than white Americans, even though officers reported no criminal activity for the Black individuals stopped more than twice as often as they did for the white individuals stopped.¹²³ In 2020, law enforcement officers used force against Black Americans in California 2.6 times more often than they did against white Americans,¹²⁴ and data from 2016 to 2019 indicates that law enforcement officers in California are three times more likely to seriously injure, shoot, or kill a Black American in California, even when other factors are taken into account.¹²⁵ About 28.3 percent of people imprisoned in California are Black—even though they make up about six percent of the population in the state.¹²⁶

Black youth in the state also face heightened risk of punishment. Black students in California are suspended at three times the rate of white students,¹²⁷ and lose nearly four times the number of days of instruction to suspensions and expulsions as white students.¹²⁸ Recently, the California Attorney General's Office identified racial disparities in discipline for Black students across four different school districts.¹²⁹

Further, school discipline is often the first step toward law enforcement involvement. Black students in California are disproportionately referred by schools to law enforcement.¹³⁰ A California Attorney General's Office investigation found that, since 1991, school resource officers in the Stockton Unified School District had

¹¹⁸ Cal. Maternal Quality Care Collaborative, *The California Pregnancy-Associated Mortality Review* (2018), p. 21 <<https://tinyurl.com/yc5uc8dx>> (as of Jan. 21, 2022).

¹¹⁹ Cal. Health Care Foundation, *Health Disparities by Race and Ethnicity in California: Pattern of Inequity* (Oct. 22, 2021), p. 25 <<https://tinyurl.com/2kser7js>> (as of Nov. 3, 2021).

¹²⁰ *Id.* at p. 28.

¹²¹ *Id.* at p. 19.

¹²² Reskin, *The Race Discrimination System* (2012) 38 Annual Rev. of Soc. 17, 17–35.

¹²³ Racial and Identity Profiling Advisory Board, 2022 Report Quick Facts (2022), <<https://tinyurl.com/5n8ybsdb>> (as of Feb. 9, 2022); see also Premkumar et al., *Police Use of Force and Misconduct in California*, Public Policy Institute of California (Oct. 2021), <<https://tinyurl.com/366k6kew>> (as of Nov. 2, 2021).

¹²⁴ Racial and Identity Profiling Advisory Board, *supra*.

¹²⁵ Premkumar et al., *supra*.

¹²⁶ U.S. Census Bureau, Quick Facts: California <<https://tinyurl.com/2p83savh>> (as of July 22, 2021).

¹²⁷ Cal. Dept. of Education, *State Superintendent Torlakson Announces 2018 Rates for High School Graduation, Suspension and Chronic Absenteeism* (Nov. 19, 2018) <<https://tinyurl.com/w2ftmywf>> (as of June 22, 2021).

¹²⁸ Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California*, The Civil Rights Project (Sep. 18, 2018) p. 5 <<https://tinyurl.com/2p8zubhk>> (as of Mar. 22, 2022); see also Office for Civil Rights, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, U.S. Dept. of Ed. (June 2021) <<https://tinyurl.com/yn6bhaz3>> (as of June 24, 2021).

¹²⁹ *California v. Barstow Unified School District*, No. 20STCV3228, Complaint filed Aug. 25, 2020, pp. 6-7.

¹³⁰ U.S. Commission on Civil Rights, *Beyond Suspension: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, Briefing Report (2019) pp. 10–11, 46-55, 66 <<https://tinyurl.com/k54y7sf4>>; Whitaker et al., *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students*, ACLU (2019) pp. 5, 24, 35 <<https://tinyurl.com/2p968nm7>> (as of June 23, 2021); Black Organizing Project et al., *From Report Card to Criminal Record: The Impact of Policing Oakland Youth* (Aug. 2013), p. 17 <<https://tinyurl.com/4hayv2m8>> (as of Mar. 22, 2022).

arrested 34,000 students, including 1,600 under 10 years old, with many minor misbehaviors turned into criminal offenses, disproportionality impacting Black and Latino students, and students with disabilities.¹³¹

As a result, compared to white youth in California, Black youth are over 30 times more likely to be held in a juvenile justice facility in the State.¹³² In June 2020, Black American youth comprised 36 percent of those ordered to be placed in state juvenile detention facilities, even though they make up only 14 percent of the youth population in California.¹³³

VII. Terms Used Throughout the Report

When discussing issues as complex as race and reparations, precision is paramount. Precision helps ensure that we — the writers and the reader, as American and Californian citizens and residents — begin in the same place, to arrive at the same understanding. As described later in this report, words have been weaponized throughout American history to dehumanize Black Americans. Words can also be used to mend —to acknowledge, to respect, and to uplift. To that end, this report defines and adopts the following terms throughout its pages.

The N-words— the word “nigger” has been used for centuries to dehumanize Black Americans.¹³⁴ The terms “Negro” and “Colored person” (as opposed to “person of color”), although adopted by Black communities for periods of time, have since been recognized as derogatory terms.¹³⁵ When quoting historical documents, this report will quote these words—not to condone the words or their vicious meanings—but to present them in the context in which these slurs were used. The California Legislature enacted AB 3121, recognizing that the lasting wounds of slavery and discrimination cannot begin to mend until those wounds are first addressed. In that same spirit, we quote these terms recognizing that reparations or any other answer to racism cannot be complete until we squarely face slavery and the systemic discrimination that followed and persists today.

White supremacy – white supremacy is a system of belief and power that white people are superior to other races.¹³⁶ This report confronts the idea of white supremacy and the various forms that it takes. When discussing the concept of white supremacy, the report uses the term to refer to one of two concepts.

First, this report uses the terms “white supremacy” or “white supremacists” to identify groups or individuals who believe that white people are superior to people of other races. When used this way, “white supremacy” describes individual prejudice. Examples of white supremacist groups—including groups that exist to this day—include, for example, the Ku Klux Klan.¹³⁷

¹³¹ Cal. Dept. of Justice, *Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities*, Press Release (Jan. 22, 2019) <<https://tinyurl.com/2jsnd6m7>> (as of June 24, 2021).

¹³² Ridolfi, et al., *California Youth Face Heightened Racial and Ethnic Disparities in Division of Juvenile Justice*, Center on Juvenile and Criminal Justice (Aug. 2020) <<https://tinyurl.com/fx292mre>> (as of Jan. 24, 2022).

¹³³ *Ibid.*

¹³⁴ Kennedy, *Nigger: The Strange Career of a Troublesome Word*, Wash. Post (Jan. 11, 2001) <<https://tinyurl.com/9ancunj3>> (as of Nov. 4, 2021).

¹³⁵ Malesky, *The Journey from ‘Colored’ to ‘Minorities’ to ‘People of Color’*, NPR (Mar. 30, 2014) <<https://tinyurl.com/2ha7s27m>> (as of Nov. 3, 2021); Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American”* (1992) 56 *Public Opinion Quarterly* 496, 497-501.

¹³⁶ See, e.g., Newkirk II, *The Language of White Supremacy* (Oct. 6, 2017) <<https://tinyurl.com/3uyj4b8a>> (as of Jan. 21, 2022).

¹³⁷ Southern Poverty Law Center, *Extremist Groups* <<https://tinyurl.com/4duwkua7>> (as of Nov. 4, 2021).

Second, this report uses the term “white supremacy” in the American context to describe the racist premise upon which social and legal rules and practices are formed with the intention of discriminating or enacting violence against people of color, including Black people.¹³⁸ This report also uses it to describe cultural images and stereotypes that reinforce prejudices against people of color, including Black people.¹³⁹ When used this way, white supremacy describes forms of racism that extend beyond individuals or organizations, a form of racism often described as structural or systemic racism.¹⁴⁰ As this report demonstrates, the fundamental political, social, and economic system of our country negatively impacts people of color regardless of the intent of any one person to be racist.

This report does not use the term “white supremacy” to describe white people as a group, white Americans, or white Californians. Not all white people are white supremacists. Anyone, regardless of race, with or without intent, consciously or unconsciously, can engage in acts of white supremacy, or be a part of a racist system. A racist system harms all who live in it, even those who may have historically reaped the benefits of the system.¹⁴¹

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

Rather than refer to “slaves,” we refer to “enslaved persons.” As the White House Historical Association notes, most historians now refer to “enslaved persons” instead of “slaves” because the term “slave” reduces the enslaved person to an object.¹⁴² Instead, historians use “enslaved person” to grant agency and recognition to the enslaved individual and to remind us about the violence and inhumanity of slavery.¹⁴³ For similar reasons, this report refers to “enslavers,” rather than “owners” or “masters.”¹⁴⁴

Similarly, instead of “owners” or “masters,” we refer to “enslavers.” The words master or owner suggests a false sense of natural authority and suggest that the enslaved person is less capable than the enslaver.¹⁴⁵ It also hides the fact that these individuals actively chose to enslave other human beings who are entitled to the same human rights as themselves.¹⁴⁶

Instead of “fugitive,” this report refers to “freedom-seekers” when describing enslaved persons or other people seeking to escape slavery and other forms of captivity. The term “fugitive” was commonly used with laws such as the Fugitive Slave Laws of 1793 and 1850 passed by Congress, which used the term to reinforce the system of enslavement and criminalize those who sought freedom.¹⁴⁷

¹³⁸ See Bailey et al., *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequities* (2021) 384 *New England J. of Medicine* 768, 768-69; Gates, Jr., *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow* (2019), p. xxii.

¹³⁹ See *ibid.*

¹⁴⁰ Wiecek, *Structural Racism and the Law in America Today: An Introduction* (2011) 100 *Ky. L. J.* 1, 5-19.

¹⁴¹ Metz, *Dying of Whiteness: How the Politics of Racial Resentment Is Killing America's Heartland* (2019).

¹⁴² White House Historical Association, *Slavery in the President's Neighborhood FAQ* <<https://tinyurl.com/6auw6eup>> (as of Oct. 27, 2021).

¹⁴³ *Ibid.*

¹⁴⁴ Nat. Park Service, *Language of Slavery* <<https://tinyurl.com/cuma563v>> (as of Nov. 4, 2021).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

Rather than refer to “felon” or “ex-offender,” this report uses terms such as “formerly incarcerated” and “returning citizen.” Similarly, this report uses terms such as “person in prison” or “incarcerated person,” rather than “inmates.” Like the term “fugitive,” the terms “felon,” “ex-offender,” and “inmate” have stigmatized people who are or have once been in jail or prison. By labeling people as nothing more than their criminal justice status, these words deny people their full personhood and reinforce a stigma that prevents people from fully participating in society.¹⁴⁸

Instead of referring to people without homes as “the homeless,” this report uses terms such as “unhoused people” or “people experiencing homelessness.” This follows the practice of the Associated Press Style Guide, which recognized that the phrase “the homeless” dehumanizes people by collectively reducing them to a label based on housing status, rather than their status as people.¹⁴⁹

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

In using person-centered words, this report recognizes that words alone may not cure the wounds that people have suffered.¹⁵⁰ While words may not fix the systems they describe, this report uses these words, recognizing that they are the beginning—not the end—of what we must do to redress racism, past and present.

¹⁴⁸ Cox, *The Language of Incarceration* (2020) 1 *Incarceration* 1, 5-9; see also Bedell et al., *Corrections for Academic Medicine: The Importance of Using Person-First Language for Individuals who have Experienced Incarceration* (2019) 94 *Academic Medicine* 172, 173-74.

¹⁴⁹ Perlman, *2020 AP Stylebook Changes: Person-First Language, and the Great ‘Pled’ Debate*, *Columbia Journalism Review* (May 6, 2020) <<https://tinyurl.com/9t25jscy>> (as of Nov. 4, 2021).

¹⁵⁰ See Betts, *Incarcerated Language*, *Yale Review* (2018) <<https://tinyurl.com/de8wysde>> (as of Nov. 4, 2021).

Chapter 2. Enslavement

I. Introduction

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

Frederick Douglass’s speech about the Fourth of July shows the conflict at the heart of American history. The United States prides itself on liberty, equality, and justice for all, but, for over 400 years, white people of European ancestry built and continued a brutal caste system based on false notions of racial difference: whites at the top, people of African descent at the bottom, and all other groups ranked in between.⁸ From the beginning, America’s wealth was built by the forced labor of people from Africa and their descendants. These people were forcibly sold and traded as commodities and millions of them cultivated crops—tobacco, sugar, rice, indigo, wheat, corn, and especially cotton—that allowed American colonies and the early United States to prosper. Colonial governments and the U.S. government at all levels allowed and participated in the exploitation, abuse, terror, and murder of people of African descent so that white people could profit as much as possible from their enslavement. To justify stealing the intellect, skill, and labor of Black Americans, enslavers created and spread false, racist ideas that Black Americans were less intelligent than whites, that they loved their children less than white parents, and that they felt less pain than white people.

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

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

² Balkansky, *supra*.

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

⁴ *What to the Slave, supra*.

⁵ *What to the Slave, supra*.

⁶ *What to the Slave, supra*.

⁷ *What to the Slave, supra*.

⁸ Wilkerson, *Caste: The Origins of Our Discontents* (Oprah’s Book Club Edition, 2020), pp. 28 – 29 (Wilkerson).

wages from Black Americans. The racist ideas invented to control enslaved people have echoed through centuries of American laws and policies and inflicted physical, mental, and emotional trauma on approximately 16 generations of Black Americans. The state and federal governments of this country have never atoned for these harms.

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

II. The Origins of American Enslavement

A. Pre-Modern Enslavement

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

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

⁹ Patterson, *Slavery and Social Death: A Comparative Study* (1982), pp. vii – viii (Patterson).

¹⁰ Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (2006), pp. 53 – 54 (Davis); Kolchin, *American Slavery: 1619 – 1877* (1993), pp. 5 – 6 (Kolchin).

¹¹ Davis, *supra*, at pp. 53 – 54.

¹² Kolchin, *supra*, at pp. 17 - 18.

¹³ Kolchin, *supra*, at pp. 4 – 5.

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

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

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

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

B. Beginnings of Modern Enslavement

Enslavement changed with European world exploration and global colonization between the 1400s and the 1600s.²¹ In North America and South America, English, Spanish, French, Portuguese, and Dutch colonizers took Indigenous peoples' land to grow crops such as sugarcane, tobacco, rice, and coffee and to mine for gold.²²

In most of these new colonies, natural resources and land to grow crops were common, but laborers were scarce.²³ In order to efficiently exploit these resources, Europeans first captured, enslaved, and exploited the Indigenous peoples of North and South America.²⁴ Because the enslavement of Indigenous people could not keep up with the demand for labor, European colonizers began to traffic enslaved people from the continent of Africa.²⁵

Portuguese and Spanish colonizers brought the first enslaved Africans to North and South America to supplement forced Indigenous labor.²⁶ Portuguese merchants had been trafficking West Africans and selling

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

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

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

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

¹⁹ Kolchin, *supra*, at p. 4.

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

²¹ Kolchin, *supra*, at p. 5.

²² Guasco, *The Fallacy of 1619: Rethinking the History of Africans in Early America* (Sept. 4, 2017) Black Perspectives, African American Intellectual History Society < <https://www.aaihs.org/the-fallacy-of-1619-rethinking-the-history-of-africans-in-early-america/> > (as of Jan. 17, 2022) (Guasco); Kolchin, *supra*, at pp. 5 – 6; Eltis, *A Brief Overview of the Trans-Atlantic Slave Trade: Introduction* (2007) SlaveVoyages < <https://www.slavevoyages.org/voyage/essays#interpretation/a-brief-overview-of-the-trans-atlantic-slave-trade/introduction/0/en/> > (as of Jan. 17, 2022) (*Introduction*).

²³ Kolchin, *supra*, at pp. 6 – 7.

²⁴ Kolchin, *supra*, at pp. 7 – 8.

²⁵ Kolchin, *supra*, at pp. 7 – 8; *Introduction, supra*.

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

them in Portugal for many years before the colonization of North and South America.²⁷ It was these captives who were first forcibly moved in small groups to European colonies across the Atlantic Ocean.²⁸ Portuguese and Spanish colonizers eventually started buying thousands of enslaved Africans along the coasts of West Africa and Central Africa and bringing them directly to colonies in the Caribbean and Brazil.²⁹ Around 500,000 enslaved people of African descent had already arrived in North and South America³⁰—including Spanish settlements in present-day South Carolina (by 1526)³¹ and Florida (by 1539)³²—by the time Dutch pirates sold around 20 African captives to English colonists in Jamestown, Virginia, in 1619.³³

C. Creating the American Racial Hierarchy

When these first Africans were brought by force to the English colonies that became the United States, a caste system based mostly on skin color did not yet fully exist. Instead, European colonists who wanted to exploit enslaved Black people and profit from their labor built this caste system gradually over the 1600s and 1700s.

In the very earliest years of English colonization in Virginia, European indentured servants were the most common workers.³⁴ Indentured servants were usually either poor people who agreed to work for wealthy people for several years in exchange for transportation to the colonies, or they were people found guilty of crimes who had to work for several years in the colonies before getting their freedom.³⁵

At first, there was not much difference between the treatment of enslaved Africans and European indentured servants.³⁶ The major divisions in Virginia were between wealthy people and poor people who were forced to labor, not between Black and white people.³⁷ Wealthy white Virginians who controlled the colony and profited from the labor of both indentured white people and enslaved African people feared that rebellions by these lower-class people might undermine their power and wealth.³⁸

Wealthy white colonists solved this problem by using race as a way to divide these two groups and stay in power.³⁹ Rich white Virginians began to grant more rights and privileges to poorer white people.⁴⁰ This move created a false sense of greater equality among rich and poor white English colonists, who began to come together around a shared idea that they were “white” people who were naturally superior to “Black” people of

²⁷ *Early Slaving Voyages, supra.*

²⁸ *Early Slaving Voyages, supra.*

²⁹ *Early Slaving Voyages, supra.*

³⁰ Guasco, *supra*; *Trans-Atlantic Slave Trade—Estimates Slave Voyages* <<http://www.slavevoyages.org/estimates/lryauFTD>> (as of March 12, 2022).

³¹ Guasco, *supra*.

³² Torres-Spelliscy, *Everyone is talking about 1619. But that’s not actually when slavery in America started* (Aug. 23, 2019)

Washington Post <<https://www.washingtonpost.com/outlook/2019/08/23/everyone-is-talking-about-thats-not-actually-when-slavery-america-started/>> (as of Jan. 17, 2022).

³³ Kendi, *supra*, at p. 38.

³⁴ Kolchin, *supra*, at pp. 8 – 10.

³⁵ Kolchin, *supra*, at pp. 8 – 10.

³⁶ Kolchin, *supra*, at pp. 15 - 16.

³⁷ Kolchin, *supra*, at pp. 14 - 16.

³⁸ Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (1975), pp. 327 – 328 (Morgan).

³⁹ Morgan, *supra*, at p. 328.

⁴⁰ Morgan, *supra*, at pp. 338 – 346.

African descent.⁴¹ The new unity between rich and poor white people in Virginia encouraged poor whites to keep Africans and their descendants enslaved and to help their wealthy neighbors squash rebellions of enslaved people.⁴²

Colonial lawmakers then established new laws that made the racial caste system a permanent part of American culture and society.⁴³ Colonial laws aimed to control people of African descent, keep them in life-long enslavement, and keep poor whites and enslaved African-descended people divided.⁴⁴ In the late 1600s and early 1700s, these colonial laws gradually built up a legal system that treated people of African descent as permanent outsiders whose skin color made them naturally different from and unequal to all white people.⁴⁵ These Virginia laws, called “Slave Codes,” did the following:

- Made enslavement permanent and automatic for most people of African descent by saying that children born to enslaved mothers would be enslaved for life⁴⁶; that becoming a Christian would not end enslavement⁴⁷; and that enslavers could not set enslaved people free unless they paid to take them out of the Virginia colony;⁴⁸
- Made it easier for whites to control free people of African descent (those born into freedom or who did manage to escape enslavement) by denying them legal, political, and social rights.⁴⁹ These included the right to vote, serve in colonial military organizations, have political office, or carry firearms;⁵⁰ and
- Divided all white people from all Black people by making interracial sex or marriage a crime,⁵¹ punishing white women who gave birth to mixed-race children,⁵² and forcing these mixed-race children (and their children) into indentured servitude until they were 31 years old.⁵³

Other southern colonies that depended on enslavement passed similar laws across the 1700s ensuring that this racial caste system became widespread across much of the area that would later become the United States.⁵⁴

Only after enslavement became widespread and profitable and racist policies were in place, did white people develop elaborate racist ideas to explain why the racial caste system was natural and good.⁵⁵ European enslavers argued either that enslavement “civilized” Africans by introducing them to European climates and lifeways, or that the Christian Bible had automatically cursed them to suffer enslavement.⁵⁶ The overall goal of these racist

⁴¹ Morgan, *supra*, at pp. 369, 385 – 386.

⁴² Kendi, *supra*, at p. 53.

⁴³ Kolchin, *supra*, at pp. 17 - 18

⁴⁴ Kendi, *supra*, at pp. 38 – 41.

⁴⁵ Kendi, *supra*, at pp. 38 – 41.

⁴⁶ Kendi, *supra*, at pp. 40 – 41.

⁴⁷ Kendi, *supra*, at p. 48.

⁴⁸ Morgan, *supra*, at p. 337.

⁴⁹ Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (1998), pp. 123 – 124 (Berlin).

⁵⁰ Berlin, *supra*, at pp. 123 – 124.

⁵¹ Morgan, *supra*, at pp. 334 – 335.

⁵² Kendi, *supra*, at p. 41.

⁵³ Berlin, *supra*, at p. 124.

⁵⁴ Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (2014), p. 32 (Baptist).

⁵⁵ Kendi, *supra*, at pp. 8 – 10.

⁵⁶ Kendi, *supra*, at pp. 31 – 32.

ideas was to defend enslavement and white supremacy by claiming that Black people were, and always had been, inferior to white people with European ancestry.⁵⁷

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

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

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

The enslavement of people of African descent played a major role in the population boom of English colonies in North America during the 1700s.⁵⁹ Enslaved Africans and African descended peoples made up 47.5 percent of all people who arrived in the English colonies between 1700 and 1775 (around 278,400 of the 585,800 new arrivals documented during this period).⁶⁰ This meant that the transatlantic slave trade was nearly as important to the growth of English North America as free (or indentured) immigration from Europe.⁶¹

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

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

⁵⁷ Kendi, *supra*, at pp. 9 – 10.

⁵⁸ Kolchin, *supra*, at pp.18 – 19.

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

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

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

⁶² Kolchin, *supra*, at p. 11.

⁶³ *Trans-Atlantic Slave Trade—Estimates*, SlaveVoyages < <http://www.slavevoyages.org/estimates/cA228HFG> > (as of March 12, 2022).

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

⁶⁵ Bilow, Royal African Company (Feb. 26, 2009) Blackpast.org < <https://www.blackpast.org/global-african-history/groups-organizations-global-african-history/royal-african-company-2/> > (as of March 15, 2022).

⁶⁶ Pettigrew, *Freedom's Debt: The Royal African Company and the Politics of the Atlantic Slave Trade, 1672 – 1752* (2013), p. 11 (Pettigrew)..

⁶⁷ Pettigrew, *supra*, at p. 11.

The English transatlantic slave trade of the 1600 to 1700s differed from the slave trades which existed in West Africa before or during the same period.⁶⁸ Enslavement was common in sub-Saharan Africa, including West Africa, which (in addition to Central Africa) was one of the main areas of the transatlantic slave trade.⁶⁹ In West African societies, enslaved people were usually people captured in wars or attacks on other ethnic or lineage (family ancestry) groups, people who owed debts, or people found guilty of crimes.⁷⁰ Enslaved people in West African societies also had a wide variety of social and economic roles.⁷¹ Many, especially children, lived in the same home as their enslavers and were treated as “pawns,” low-status members of the family group.⁷² Some worked in agriculture or as house servants, while some became wives or concubines (involuntary sexual partners or secondary wives).⁷³ This enslavement was not usually permanent or passed on to the next generation.⁷⁴ Most enslaved people and their children in West Africa gradually lost their enslaved status and became part of the families and communities of their enslavers.⁷⁵

The arrival of Europeans made enslavement along the western coast of Africa more widespread and violent.⁷⁶ European enslavers depended on African slave-trading networks for captives to send across the Atlantic Ocean.⁷⁷ But the massive demand for African captives, which kept growing as Europeans colonized more areas of the world, changed African enslavement greatly.⁷⁸ Warfare and kidnapping raids increased to capture more people to sell to Europeans.⁷⁹ The focus of the West African slave trade also shifted to the coasts and port cities where Europeans set up trading forts to buy people who had been captured.⁸⁰

The transatlantic slave trade eventually involved capturing Africans from an enormous geographic area covering much of West Africa and Central Africa, and even extending to the island of Madagascar off the Southeast coast of Africa.⁸¹ This trafficking in human beings spanned 3,500 miles along the western African coast from present-day Senegal in the north to present-day Angola in the south, and as many as 500 to 1,000 miles into the interior of the continent.⁸² Captive African people often changed hands many times and traveled long distances before they arrived at coastal ports where Europeans bought them.⁸³

⁶⁸ Davis, *supra*, pp. 100 – 101.

⁶⁹ Walvin, *Crossings: Africa, the Americas and the Atlantic Slave Trade* (2013), pp. 31 – 32 (Walvin); Davis, *supra*, at p. 89.

⁷⁰ Davis, *supra*, at pp. 12 – 13; Walvin, *supra*, at pp. 31 - 32; Kolchin, *supra*, at p. 20.

⁷¹ Kolchin, *supra*, at p. 20.

⁷² Walvin, *supra*, at pp. 31 – 32.

⁷³ Kolchin, *supra*, at p. 20.

⁷⁴ Kolchin, *supra*, at p. 20.

⁷⁵ Kolchin, *supra*, at p. 20.

⁷⁶ Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora* (2007), pp. 23 – 24 (Smallwood).

⁷⁷ Walvin, *supra*, at pp. 40 – 41.

⁷⁸ Davis, *supra*, pp. 100 – 101; Smallwood, *supra*, 20 – 32.

⁷⁹ Davis, *supra*, pp. 100 – 101; ⁷⁹ Mustakeem, *Slavery at Sea: Terror, Sex, and Sickness in the Middle Passage* (2016), pp. 30 - 32 (Mustakeem).

⁸⁰ Davis, *supra*, at pp. 12 – 13.

⁸¹ Davis, *supra*, at p. 100; Wilson-Fall, *Memories of Madagascar and Slavery in the Black Atlantic* (2015), pp. 2 – 3.

⁸² Davis, *supra*, at p. 100.

⁸³ Mustakeem, *supra*, at p. 31.

B. The Middle Passage

African captives suffered horrific physical, emotional, and mental trauma before and during the voyage across the Atlantic Ocean.⁸⁴ This journey was called the “Middle Passage” and it was so dangerous, unhealthy, and violent that almost 1.8 million people died before they ever reached the Americas.⁸⁵

Enslaved Africans’ suffering began even before the slave ships set sail for the Americas.⁸⁶ Once European enslavers purchased people who had been captured from African enslavers, they incarcerated them for days, weeks, or even months until they were ready to sail.⁸⁷ In the earlier years of the slave trade, European enslavers imprisoned enslaved people in large corrals called “barracoons.”⁸⁸ The most common practice, however, was to incarcerate enslaved people on board the slave ships until it was time to sail for the Americas.⁸⁹

During the journey across the Atlantic Ocean, enslaved Africans went through months of torture trapped inside slave ships.⁹⁰ The voyage, which was called the “Middle Passage” because it was the second leg of a triangular trade between Europe, Africa, and the Americas,⁹¹ took 80 – 100 days (around 2.5 to 3 months or more) in the early years of the trade (although new sailing technologies cut the length of the trip to 60 to 80 days in later years).⁹² Slaving ships came in many different sizes, but the average Royal African Company boat held around 330 enslaved people.⁹³

African men, who made up around two-thirds of all those captured,⁹⁴ spent almost all of the journey—sixteen hours or more every day—laying down in specially constructed rooms inside the ships.⁹⁵ Crews stripped them naked, chained them up,⁹⁶ and forced them to lay down on their sides, or to lay head to feet, so that they could fit in as many people as possible.⁹⁷ On English slave ships, each man had a space smaller than the size of a coffin.⁹⁸ On ships with “tight-packing,” captains added an extra platform so that men laid in two rows stacked

⁸⁴ Rediker, *The Slave Ship: A Human History* (2007), pp. 12 - 13 (Rediker).

⁸⁵ *Trans-Atlantic Slave Trade—Estimates* Slave Voyages < <http://www.slavevoyages.org/estimates/Oy27NrOi> > (as of March 13, 2022). This estimate is calculated by subtracting the number of enslaved people who disembarked after a slaving voyage from the entire number of enslaved people who embarked from Africa.

⁸⁶ Walvin, *supra*, at pp. 83 – 86.

⁸⁷ Walvin, *supra*, at pp. 83 – 86.

⁸⁸ Walvin, *supra*, at pp. 48, 83.

⁸⁹ Walvin, *supra*, at p. 83.

⁹⁰ Walvin, *supra*, at p. 83.

⁹¹ *The Middle Passage*, National Museum of American History, Smithsonian Institution < <https://americanhistory.si.edu/on-the-water/living-atlantic-world/forced-crossings/middle-passage> > (as of March 13, 2022).

⁹² Haines, McDonald, and Shlomowitz, *Mortality and Voyage Length in the Middle Passage Revisited* (Oct. 2001) 38 *Explorations in Econ. Hist.* 506.

⁹³ Smallwood, *supra*, at p. 71.

⁹⁴ Davis, *supra*, at p. 100.

⁹⁵ Rediker, *The Slave Ship: A Human History* (2007), p. 68 (Rediker).

⁹⁶ Eltis, *A Brief Overview of the Trans-Atlantic Slave Trade: The Middle Passage* (2007) < <https://www.slavevoyages.org/voyage/essays#interpretation/a-brief-overview-of-the-trans-atlantic-slave-trade/the-middle-passage/6/en/> > (as of March 13, 2022).

⁹⁷ Mustakeem, *supra*, at p. 59.

⁹⁸ Mustakeem, *supra*, at p. 59.

on top of each other with only 2.5 feet of vertical space to lay down.⁹⁹ Enslaved women and children, who were usually smaller in number, lived together in groups in small rooms inside the ship.¹⁰⁰

Conditions inside slave ships were horrific and caused massive amounts of sickness and death.¹⁰¹ Hundreds of people were crowded together in the blazing heat and tossed back and forth with the ship's movement, especially during bad weather.¹⁰² Enslaved captive Olaudah Equiano, who survived the Middle Passage, wrote that "the closeness of the place, and the heat of the climate, added to the number in the ship, which was so crowded that each had scarcely room to turn himself, almost suffocated us."¹⁰³

Captives did not have much fresh air and their rooms were covered with human waste.¹⁰⁴ Rats and insects swarmed around them.¹⁰⁵ Low-quality food, as well as scarce water, led to widespread lack of nutrition and dehydration.¹⁰⁶ Filthy conditions and poor nutrition caused waves of sickness, including scurvy (a lack of vitamins B and C) and "bloody flux" (amoebic diarrhea or dysentery).¹⁰⁷ Highly contagious diseases—especially smallpox—spread fast in the overcrowded spaces.¹⁰⁸ Slave ships were filled with people who were very sick, dying, or dead.

Enslaved Africans also suffered physical and sexual violence at the hands of ships' crews.¹⁰⁹ Crew members moved people who had been captured to the top deck of the ship on a regular basis to force them to bathe and dance for exercise.¹¹⁰ They often raped and impregnated women and girls.¹¹¹ Heavily armed crew members watched enslaved people carefully, and they threatened, beat, tortured, and sometimes killed them, especially if they resisted or rebelled.¹¹²

There is also evidence that ship crews threw sick enslaved people overboard to prevent them from spreading disease to others and to claim insurance money for "lost" human cargo.¹¹³ In one especially brutal case in 1781, an English slave ship captain ordered his crew to throw 132 Africans overboard because he had run out of supplies and his insurance company would only pay him if enslaved people drowned, not if they starved to death.¹¹⁴ During the worst storms, crews also tried to keep from sinking by throwing enslaved people overboard

⁹⁹ Kolchin, *supra*, at p. 21.

¹⁰⁰ Rediker, *supra*, at pp. 68 – 69.

¹⁰¹ Mustakeem, *supra*, at pp. 55 – 58.

¹⁰² Walvin, *supra*, at p. 91.

¹⁰³ Olaudah Equiano quoted in California Task Force to Study and Develop Reparation Proposals for African Americans (September 23, 2021), Testimony of Dr. Daina Ramey Berry, <<https://oag.ca.gov/ab3121/meetings/092021>> (as of Jan. 26, 2022).

¹⁰⁴ Mustakeem, *supra*, at pp. 59 – 62.

¹⁰⁵ Walvin, *supra*, at pp. 95 – 96.

¹⁰⁶ Mustakeem, *supra*, at pp. 64 – 70.

¹⁰⁷ Mustakeem, *supra*, at pp. 132 – 136.

¹⁰⁸ Walvin, *supra*, at pp. 86, 91 – 92; Mustakeem, *supra*, at pp. 136 – 144.

¹⁰⁹ Mustakeem, *supra*, at pp. 81 – 90.

¹¹⁰ Mustakeem, *supra*, at pp. 62 – 64, 71 - 72.

¹¹¹ Mustakeem, *supra*, at pp. 82 – 90.

¹¹² Mustakeem, *supra*, at pp. 76 – 82, 94 – 101.

¹¹³ Mustakeem, *supra*, at pp. 188 – 189.

¹¹⁴ Kolchin, *supra*, at p. 19.

to decrease the weight of the ship.¹¹⁵ British insurance companies allowed this and paid ship captains for any human beings who their crews threw overboard to drown.¹¹⁶

The transatlantic slave trade and the Middle Passage had a sickening cost in human lives. European enslavers forced around 12.5 million enslaved Africans to cross the Atlantic Ocean between 1500 and 1866.¹¹⁷ More than 14 percent of these people, around 1.8 million in total, died of sickness, neglect, abuse, murder, or suicide.¹¹⁸ The men, women, and children who survived the Middle Passage were then sold to local slave traders, merchants, or owners of plantations and forced labor camps.¹¹⁹

When their voyage across the Atlantic Ocean finally ended in North America, South America, or the Caribbean, enslaved Africans suffered “social death,” which meant they were now permanently separated from their home communities, cultures, and families.¹²⁰ They were outsiders in an unfamiliar place, surrounded by strangers with completely different cultures, religions, and languages. Enslaved Africans had to build new families, languages, cultures, and religious practices rooted both in the pre-colonial traditions of their homelands and the new cultures that they found in the Americas.¹²¹

IV. Enslavement and the Founding of the United States

Starting in the late 1600s, enslaved people and the institution of enslavement became increasingly important to the colonial societies of North America that would later become the United States.¹²² The southern English colonies of North America, which eventually included Maryland, Delaware, Virginia, the Carolinas, and Georgia, began trafficking more and more enslaved people as the 1700s went on.¹²³

These colonies gradually built economies and societies that depended heavily on enslavement for growing cash crops to sell in international markets.¹²⁴ In the colonies of the Upper South, including Maryland, Virginia, Delaware, and North Carolina, enslaved people grew tobacco. Enslaved people in the low country and coastal plains of the Carolinas and Georgia grew rice and indigo (a plant for making blue dye).¹²⁵

Enslavers who forced enslaved people to labor in agricultural production exploited not only their physical strength, but also their intellect, innovation, and skill. Growing rice and indigo, for instance, required skilled labor and knowledge of specialized techniques for successful production.¹²⁶ In fact, rice and indigo growing was already highly developed along the western coast of Africa, and, later the Caribbean, where people of

¹¹⁵ Walvin, *supra*, at pp. 90 - 91.

¹¹⁶ Walvin, *supra*, at pp. 90 - 91.

¹¹⁷ Trans-Atlantic Slave Trade—Estimates, Slave Voyages <<https://www.slavevoyages.org/assessment/estimates>> (as of Jan. 24, 2022).

¹¹⁸ Rediker, *supra*, at p. 5.

¹¹⁹ Mustakeem, *supra*, at pp. 160 – 165.

¹²⁰ Patterson, *supra*, at p. 5.

¹²¹ See Section VI below on these new communities and culture.

¹²² Foner, *Forever Free: The Story of Emancipation and Reconstruction* (2005), p. 8 (Forever Free).

¹²³ *Forever Free*, *supra*, at p. 8.

¹²⁴ Kolchin, *supra*, at pp. 24 – 26.

¹²⁵ Kolchin, *supra*, at pp. 24 – 26.

¹²⁶ *African Impact on Colonial Agriculture*, *The American Revolution*, Colonial Williamsburg <<https://www.ouramericanrevolution.org/index.cfm/page/view/m0135>> (as of March 15, 2022) (*African Impact*).

African descent had already innovated several production techniques.¹²⁷ Enslavers were eager to buy enslaved people who already had these specialized agricultural skills.¹²⁸

Human trafficking in enslaved people was not limited to the southern colonies.¹²⁹ Whites in northern colonies also trafficked enslaved people, and enslavement became a feature of life in every northern colony.¹³⁰ In most New England colonies, enslavement was not a major institution, but in colonies farther south, such as New York, enslavement was often a part of daily life.¹³¹ For example, one-fifth of New York City's population was enslaved in 1746, making it the second largest slaveholding city in the 13 original English colonies behind only Charleston, South Carolina.¹³²

By the time white English colonists began to complain about their mistreatment by the British government and began comparing their lack of rights in the British Empire to enslavement, the real enslavement of people of African descent was already well established in all 13 original British colonies.¹³³ Five hundred thousand enslaved Black people, who made up 20 percent of the entire colonial population, knew the real horrors and trauma of enslavement.¹³⁴

A. The American Revolution

When white colonists declared their independence from Great Britain, they explained their actions by saying that the King of England and the British government had taken away their freedom and their rights as “freeborn Englishmen.”¹³⁵ In the Declaration of Independence, Americans famously announced that “all men are created equal” and “that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”¹³⁶ At the same time, these same colonists bought and sold people of African descent who had no freedom and very few rights.

People who opposed the American Revolution were quick to point out the hypocrisy of these words.¹³⁷ Thomas Day, an Englishman who opposed enslavement, said that “[i]f there be an object truly ridiculous in nature, it is an American patriot, signing resolutions of independence with the one hand and with the other brandishing a whip over his affrighted slaves.”¹³⁸ Even white American colonists understood the hypocrisy of the Declaration

¹²⁷ Seck, Bouki fait Gombo: A History of the Slave Community of Habitation Haydel (Whitney Plantation) Louisiana, 1750 – 1860 (2014), chapter 3; Schafer, Indigo Cultivation: Life at Governor James Grant's Villa Plantation, Florida History Online <<https://history.domains.unf.edu/floridahistoryonline/projects-proj-b-p-html/plantations-plantations-indigo-cultivation-and-processing-htm/>> (as of March 15, 2022).

¹²⁸ *African Impact*, *supra*.

¹²⁹ Kolchin, *supra*, at pp. 26 – 27.

¹³⁰ Kolchin, *supra*, at pp. 26 – 27.

¹³¹ Kolchin, *supra*, at p. 27.

¹³² *Forever Free*, *supra*, at p. 8.

¹³³ *Forever Free*, *supra*, at pp. 8 – 9.

¹³⁴ Baptist, *supra*, at p. 4; *American Revolution, Slavery and Remembrance: A Guide to Sites, Museums, and Memory*, Colonial Williamsburg Foundation <<https://slaveryandremembrance.org/articles/article/?id=A0064>> (as of Dec. 10, 2021).

¹³⁵ *Forever Free*, *supra*, at pp. 8 – 9.

¹³⁶ Declaration of Independence (July 4, 1776) <<https://www.archives.gov/founding-docs/declaration-transcript>> (as of Jan. 24, 2022) (Declaration).

¹³⁷ *Forever Free*, *supra*, at p. 9.

¹³⁸ Thomas Day, quoted in Chernow, Alexander Hamilton (2004), p. 307.

of Independence.¹³⁹ Abigail Adams, an opponent of enslavement from New England, the wife of John Adams, and a future first lady of the United States, wondered just how strongly white colonists felt about human liberty when they were “accustomed to deprive their fellow citizens of theirs.”¹⁴⁰

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

Thomas Jefferson, the author of the first draft of the Declaration of Independence, owned around 600 enslaved people over the course of his lifetime.¹⁴¹ His original draft of the Declaration of Independence openly criticized the transatlantic slave trade, which he called “a cruel war against human nature itself, violating it’s [*sic*] most sacred rights of life and liberty,” but he blamed it almost all on King George III of England.¹⁴² Jefferson claimed that the king not only failed to stop the slave trade, but also that the king encouraged enslaved people to rise up and kill white colonists.¹⁴³

Embarrassment over enslavement, and the hope to keep making money from it, was clear when the Continental Congress rejected this part of the Declaration and voted to remove it.¹⁴⁴ Jefferson explained the rejection in his notes.¹⁴⁵ Representatives from South Carolina and Georgia depended on enslavement and wanted to continue in the trafficking of humans.¹⁴⁶ Men from the northern colonies were embarrassed by the criticism of the slave trade because they were highly involved in shipping enslaved Africans across the Atlantic.¹⁴⁷ The final version of the Declaration of Independence only mentioned enslavement indirectly by claiming that King George III was trying to cause “domestic insurrections” (code words for rebellions by enslaved people) in the colonies.¹⁴⁸

The founders of the United States tried to dodge the issue of enslavement, but enslaved and free people of African descent would not let them. They tested the new nation’s ideas of freedom during the American Revolutionary War (1775 to 1783).¹⁴⁹

Around 30,000 to 40,000 people (and maybe as many as 100,000 people) escaped their enslavement during the American Revolution.¹⁵⁰ Virginia’s colonial governor, John Murray, Earl of Dunmore, quickly took advantage

¹³⁹ Forever Free, *supra*, at p. 9.

¹⁴⁰ Abigail Adams, quoted in Forever Free, *supra*, at p. 9.

¹⁴¹ *Jefferson’s Attitudes Toward Slavery*, Jefferson and Slavery, Monticello <<https://www.monticello.org/thomas-jefferson/jefferson-slavery/jefferson-s-attitudes-toward-slavery/>> (as of Nov. 2, 2021).

¹⁴² Jefferson, *Jefferson’s “original Rough draught” of the Declaration of Independence*, Declaring Independence: Drafting the Documents, Library of Congress <<https://www.loc.gov/exhibits/declara/ruffdrft.html>> (as of Jan. 24, 2022) (*Original Rough Draught*).

¹⁴³ *Original Rough Draught*, *supra*.

¹⁴⁴ Jefferson, *Notes of the Proceedings in the Continental Congress, 7 June – 1 August, 1776*, Library of Congress, Founders Online <<https://founders.archives.gov/documents/Jefferson/01-01-02-0160>> (as of Jan. 24, 2022) (*Notes*).

¹⁴⁵ *Notes*, *supra*.

¹⁴⁶ *Notes*, *supra*.

¹⁴⁷ *Notes*, *supra*.

¹⁴⁸ Declaration, *supra*.

¹⁴⁹ Forever Free, *supra*, at p. 9.

¹⁵⁰ Nash, *The African Americans’ Revolution*, in the Oxford Handbook of the American Revolution, edited by Jane Kamensky and Edward G. Gray (2012), p. 261 (Nash).

of enslavement in the colonies by promising freedom to any enslaved man who fought for the British Army against the Americans.¹⁵¹ Some male freedom seekers did join the British Army, but large numbers died from smallpox during their service.¹⁵² Others, including many women and children, took advantage of wartime chaos to escape to areas where the British Army was strong.¹⁵³ The massive number of freedom seekers greatly damaged enslavement in the lower southern states.¹⁵⁴ For instance, around 30 percent of South Carolina's enslaved population left or died during the Revolution.¹⁵⁵

Some states tried to solve this problem by promising freedom to enslaved men who fought on the side of the Americans.¹⁵⁶ Other states recruited free Black men to boost the size of the small American army.¹⁵⁷ Even though they were smaller in number than whites, free Black men were more likely to volunteer for military service and to serve longer than whites because they wanted both independence for the United States and greater rights for themselves.¹⁵⁸ Overall, around 9,000 free or enslaved African American men served alongside whites in integrated military units to fight for American independence.¹⁵⁹

Black Americans' struggles for freedom during the American Revolution led to the end of the enslavement in most of the northern states where the enslaved population was small and local enslavement was less central to the economy.¹⁶⁰ Enslaved people used the revolutionary ideals of freedom to convince northern judges, and the general public, to end enslavement.¹⁶¹

When enslaved people in Massachusetts sued for their freedom, the state courts decided that enslavement went against the state's new constitution, which said that "all men are born free and equal."¹⁶² Enslavement ended there in 1783.¹⁶³ Nearby, the state of Vermont approved a new constitution that outlawed enslavement completely in 1777.¹⁶⁴ States farther south, such as New York and Pennsylvania, depended much more on enslavement and so passed gradual emancipation laws to cover enslavers' loss of profits.¹⁶⁵ These laws required children born to enslaved mothers to go through a long indenture (up to 28 years) and then be set free.¹⁶⁶

Southern states that profited the most from enslavement kept and rebuilt it, but the process looked differently in the Upper and Lower South.

¹⁵¹ Kolchin, *supra*, at pp. 70 – 71.

¹⁵² Nash, *supra*, at pp. 258 – 259.

¹⁵³ Nash, *supra*, at pp. 259 – 260.

¹⁵⁴ Kolchin, *supra*, at pp. 72 – 73.

¹⁵⁵ Kolchin, *supra*, at p. 73.

¹⁵⁶ Nash, *supra*, at pp. 256 – 257.

¹⁵⁷ Nash, *supra*, at pp. 254 – 256.

¹⁵⁸ Nash, *supra*, at p. 254 – 255.

¹⁵⁹ Nash, *supra*, at p. 254.

¹⁶⁰ Kolchin, *supra*, at p. 78.

¹⁶¹ Kolchin, *supra*, at pp. 78 – 79.

¹⁶² Kolchin, *supra*, at p. 78; Massachusetts Constitution of 1780, Part 1, Article 1 <<https://malegislature.gov/laws/constitution>> (as of Jan. 24, 2022).

¹⁶³ Nash, *supra*, at p. 258.

¹⁶⁴ Kolchin, *supra*, at p. 78.

¹⁶⁵ Kolchin, *supra*, at pp. 78 - 79.

¹⁶⁶ Kolchin, *supra*, at pp. 78 - 79.

States in the Upper South—Virginia, Maryland, and Delaware—temporarily began to relax their laws against freeing enslaved people.¹⁶⁷ “Manumission,” the legal process by which enslavers freed enslaved people or allowed them to save money and purchase their freedom, became more common.¹⁶⁸ This was partly because the Revolutionary War had hurt the market for tobacco and made enslavement less profitable in the Upper South.¹⁶⁹ Revolutionary ideas about human freedom also motivated some of this manumission, although with limits.¹⁷⁰ For instance, Virginian George Washington, leader of the revolutionary army and the first president of the United States, freed all of the people he enslaved, but only upon his death.¹⁷¹

Washington, however, was not the norm. Thomas Jefferson, the next slaveholder from Virginia to win the presidency, willingly freed only 10 the 600 people who he had enslaved over the course of his life.¹⁷² Four of those 10 people were his own children with Sally Hemings, an enslaved woman who he owned as his property and who he never freed.¹⁷³

Jefferson’s fellow white southerners in the Upper South increasingly stopped manumission when they found that selling “surplus” enslaved people to cotton growers in South Carolina and Georgia could be a profitable replacement for tobacco.¹⁷⁴ Meanwhile, the Lower or Deep South states rebuilt their plantation economies by buying enslaved people from the Upper South and trafficking in large numbers of enslaved Africans from the transatlantic slave trade.¹⁷⁵

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

B. The New Cotton Economy and the Expansion of Enslavement

Instead of dying out after the American Revolution, enslavement became the economic lifeblood of the United States, North and South. After winning independence, the United States built one of the largest and most profitable enslaved labor economies in the world.¹⁷⁶ Between the end of the American Revolution in 1783 and the start of the Civil War in 1861, roughly the length of one human lifetime, the enslaved population of the United States increased almost five times from just under 650,000 enslaved individuals to almost four million

¹⁶⁷ Kolchin, *supra*, at pp. 77.

¹⁶⁸ Kolchin, *supra*, at pp. 77 – 78.

¹⁶⁹ Kolchin, *supra*, at pp. 77 – 78.

¹⁷⁰ Forever Free, *supra*, at pp. 9 – 10.

¹⁷¹ Forever Free, *supra*, at pp. 9 – 10.

¹⁷² *Slaves who Gained Freedom*, Thomas Jefferson Encyclopedia, Monticello, <<https://www.monticello.org/site/research-and-collections/slaves-who-gained-freedom>> (as of Jan. 24, 2022) (*Gained Freedom*).

¹⁷³ *Gained Freedom, supra*; *The Life of Sally Hemings*, Monticello <<https://www.monticello.org/sallyhemings/>> (as of Jan. 24, 2022). After Jefferson’s death, his family allowed Sally Hemings to leave without pursuing her, effectively setting her free.

¹⁷⁴ Baptist, *supra*, at p. 18.

¹⁷⁵ Kolchin, *supra*, at pp. 85 – 86.

¹⁷⁶ Baptist, *supra*, at p. xxiii.

enslaved people.¹⁷⁷ Among the eleven southern states of the Confederacy, between 20 and 49 percent of white families enslaved people.

Two major processes made this possible. First, new technologies for producing cotton increased the value of enslaved people's labor and encouraged the expansion of enslavement into lands in the Deep South.¹⁷⁸ Second, white Americans adopted a national constitution that protected enslavement and gave proslavery whites outsized political power in the federal government.¹⁷⁹ This power allowed enslavers to increase the profits of enslavement and to enjoy those profits with little regulation by the federal government.

Starting in the 1790s new technologies made enslavement more profitable than ever in North America. A new machine, the cotton gin, made it much easier and faster to remove the seeds from short-staple cotton, a sturdy breed of cotton that could be grown in many different climates and soils in the South.¹⁸⁰ Cotton growing breathed new life into the institution of enslavement. Enslavers looked for new lands to the west to expand cotton plantations.¹⁸¹

To help these land-hungry cotton planters, the United States government increasingly pressured Native Americans in the Deep South to give up their homelands.¹⁸² Native Americans in the southeastern United States, some of whom had adopted the practices of white colonizers such as growing cotton and owning enslaved Black Americans, resisted this pressure.¹⁸³ The U.S. government eventually used a brutal policy of removal in which soldiers rounded up Native Americans, removed them from their land, and force marched (or sailed) them hundreds of miles to lands west of the Mississippi River.¹⁸⁴ People of African descent enslaved by Native Americans were also forcibly moved west with their enslavers, and some Native Americans even purchased more enslaved people to take west with them.¹⁸⁵ Thousands of Native Americans and an unknown number of enslaved African Americans died from disease and neglect along the way and the removal process came to be known as the "Trail of Tears."¹⁸⁶ As white southern cotton planters moved into Native homelands, the removal, death, and land theft suffered by Native Americans went hand-in-hand with the widespread enslavement and forced relocation of Black Americans.

C. Enslavement in the New U.S. Constitution

Around the same time that the cotton gin took off, southern enslaving states left a permanent mark on the American legal system by shaping the U.S. Constitution to meet their needs in upholding enslavement. During

¹⁷⁷ Baptist, *supra*, at p. xxiii; Bourne, "Slavery in the United States," EH.Net, Economic History Association, <https://eh.net/encyclopedia/slavery-in-the-united-states/>

¹⁷⁸ Baptist, *supra*, at p. 18.

¹⁷⁹ Forever Free, *supra*, at pp. 10 – 11.

¹⁸⁰ Baptist, *supra*, at pp. 18, 82.

¹⁸¹ Kolchin, *supra*, at pp. 94 – 96.

¹⁸² Krauthamer, *Black Slaves, Indian Masters: Slavery, Emancipation, and Citizenship in the Native American South* (2013), pp. 7 – 8 (Krauthamer).

¹⁸³ Krauthamer, *supra*, at pp. 17 – 19, 38 – 39.

¹⁸⁴ Baptist, *supra*, at pp. 228 – 229.

¹⁸⁵ Krauthamer, *supra*, at pp. 42 – 43.

¹⁸⁶ Naylor, *African Cherokees in Indian Territory: From Chattel to Citizens* (2008), p. 1.

the Constitutional Convention in 1787, southern proslavery representatives pushed for protections for enslavement, partly by threatening not to sign onto the new Constitution.¹⁸⁷

A major protection for enslavement in the Constitution came in a clause that prohibited Congress from outlawing U.S. participation in the transatlantic slave trade for another 20 years.¹⁸⁸ During those important 20 years, slave ships legally brought around 86,000 enslaved Africans to the United States.¹⁸⁹ Congress was also required, and given the power, to use military force to stop “Insurrections” and “domestic Violence,”¹⁹⁰ which would have included rebellions by enslaved people.¹⁹¹ Proslavery southerners also ensured that the Constitution included a fugitive slave law, which required the return of enslaved people who sought freedom across state lines.¹⁹²

The most important proslavery constitutional policy was the 3/5 Clause. The Constitution was built on the idea of representative government and that Americans should elect people to represent their needs and interests in the federal government. In the U.S. House of Representatives, the number of representatives each state got was based on population with the idea that more populous states should get more representation than less populous states.¹⁹³ This part of the Constitution raised controversial questions: Was it reasonable or fair for southern states with large numbers of enslaved people to count those people toward their Congressional representation when they allowed enslaved people no vote, no political rights, and very few legal rights? If enslavers usually treated enslaved people as property, why should they suddenly be counted as people for purposes of representation?¹⁹⁴ People who opposed counting enslaved people toward Congressional representation came mostly from the North and they argued that the enslaved population should give little or no boost to southern states’ power.¹⁹⁵ At the same time, enslavers demanded to count the enslaved as whole people, not because they believed enslaved people were equal to white Americans, but because they wanted more voice in Congress and to counterbalance the power of the more populous northern states.¹⁹⁶ The authors of the Constitution reached a compromise.¹⁹⁷ States would get to count each enslaved person toward their representation in Congress, but each enslaved individual would only count as 3/5 (or 60 percent) of a free white person when it came time to determine how many representatives each state received in the House.¹⁹⁸ This was an enormous benefit for

¹⁸⁷ Baptist, *supra*, at pp. 9 – 11.

¹⁸⁸ US Constitution, Article I, Section 9, Clause 1.

¹⁸⁹ *Trans-Atlantic Slave Trade—Estimates*, SlaveVoyages < <http://www.slavevoyages.org/estimates/z7rM6nhd> > (as of March 14, 2022).

¹⁹⁰ US Constitution, Article I, Section 8, Clause 15; and US Constitution, Article IV, Section 4.

¹⁹¹ Waldstreicher, *How the Constitution was Indeed Pro-Slavery* (Sept. 19, 2015) *The Atlantic* < <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/> > (as of Jan. 24, 2022) (Waldstreicher).

¹⁹² US Constitution, Article IV, Section 2, Clause 3.

¹⁹³ Rael, *A Compact for the Good of America?: Slavery and the Three-Fifths Compromise* (Dec. 19, 2016) *Black Perspectives*, African American Intellectual History Society < <https://www.aaihs.org/a-compact-for-the-good-of-america-slavery-and-the-three-fifths-compromise/> > (as of Feb. 9, 2022) (Rael).

¹⁹⁴ Rael, *supra*.

¹⁹⁵ Rael, *supra*.

¹⁹⁶ Rael, *supra*.

¹⁹⁷ Rael, *supra*.

¹⁹⁸ US Constitution, Article I, Section 2, Clause 3.

enslavers. They could continue to treat enslaved people as property but still get to count 60% of the enslaved population toward getting more power in Congress.¹⁹⁹

Representation in Congress also had a major influence on presidential elections.²⁰⁰ The Constitution set up an electoral college in which a group of representatives (called “electors”) voted to choose the next president. Each state got a number of electors equal to the number of senators and representatives that it had in Congress.²⁰¹ In this way, enslaving states, which gained more representatives in Congress from the 3/5 Clause, automatically gained more presidential electors, and more power to influence presidential elections, too.²⁰²

At the same time, some historians argue that white southerners would have gone even further to make the U.S. Constitution a proslavery document if they did not have to compromise with representatives from the northern states.²⁰³ The words “slave” and “slavery” could not be found anywhere in the new Constitution. Instead, it used code words for enslaved people such as “Person held to Service or Labour”²⁰⁴ or just “other Persons.”²⁰⁵ Some historians see this as a sign that white northerners who helped write the Constitution were growing less comfortable with enslavement and did not want the nation’s founding document to say openly that owning human beings as property was legal.²⁰⁶

The Constitution also gave Congress the power to end U.S. participation in the transatlantic slave trade in 1808, rather than leaving it completely open, and the fugitive slave law was vague and not well enforced.²⁰⁷ Finally, the 3/5 Clause probably disappointed proslavery southerners who pushed hard for enslaved people to be counted as whole people, rather than as 60 percent of a person, for purposes of representation in Congress.²⁰⁸

No matter what the Constitutional Convention intended to do, the new Constitution ended up giving proslavery southerners outsized power in the federal government, strengthening the institution of enslavement.²⁰⁹ Northerners complained that the enslaving states’ 60 percent boost in Congressional representation and in the electoral college, both due to the 3/5 Clause, gave enslavers too much power over national politics. Some northerners tried to get rid of the 3/5 Clause.²¹⁰

The linking of Congressional representation to presidential electors also helped proslavery southerners control the White House. Enslavers Thomas Jefferson, in 1800, and James K. Polk, in 1846, would not have won election to presidency without the South’s extra electoral votes based on counting enslaved people.²¹¹

¹⁹⁹ Rael, *supra*.

²⁰⁰ Baptist, *supra*, at pp. 9 – 10.

²⁰¹ US Constitution, Article II, Section 1, Clause 2.

²⁰² Baptist, *supra*, at p. 9.

²⁰³ Wilentz, *Constitutionally, Slavery is no National Institution* (Sept. 16, 2015) New York Times <<https://www.nytimes.com/2015/09/16/opinion/constitutionally-slavery-is-no-national-institution.html>> (as of Jan. 24, 2022) (*Constitutionally*).

²⁰⁴ US Constitution, Article IV, Section 2, Clause 3.

²⁰⁵ US Constitution, Article I, Section 2, Clause 3.

²⁰⁶ Wilentz, *No Property in Man: Slavery and Antislavery at the Nation’s Founding* (2018), pp. 10 – 11.

²⁰⁷ *Constitutionally, supra*.

²⁰⁸ *Constitutionally, supra*.

²⁰⁹ Waldstreicher, *supra*.

²¹⁰ Richards, *The Slave Power: The Free North and Southern Domination, 1780 – 1860* (2000), pp. 41 – 45 (Richards).

²¹¹ Waldstreicher, *supra*.

The power of proslavery white southerners was evident throughout the United States' early government. Fifty percent of the nation's pre-Civil War presidents were enslavers.²¹² Between George Washington's election and 1850, enslavers held the presidency for 50 years, the position of Speaker of the House for 41 years, and the chair of the House of Representatives Ways and Means Committee for 42 years.²¹³ Control of the presidency also meant control of the U.S. Supreme Court, where presidents chose justices to serve for life. Enslavers made up 18 of the 31 justices (or 58 percent) who sat on the U.S. Supreme Court before 1850.²¹⁴ Ultimately, throughout American history, more than 1,700 Congressmen, representing 37 states, once enslaved Black people.²¹⁵ They did not only represent the South, but also every state in New England, much of the Midwest, and many Western states.²¹⁶

Proslavery southerners' control of Congress, the presidency, and the U.S. Supreme Court increased the lifespan of enslavement and the geographic area where it was legal. Together, proslavery officials in the federal government paved the way for enslavement's expansion into new states and territories in the West by letting enslavers move without regulation into the large geographic area south of the Ohio River.²¹⁷

Between the ratification of the Constitution in 1788 and the start of the Civil War in 1861, Congress approved the creation of nine new enslaving states (roughly 43 percent of all 21 new states).²¹⁸ This expansion of enslavement included parts of the new territory of Louisiana, which the United States purchased from France in 1803. French Louisiana had long been an enslaving colony where sugar production based on enslaved labor was becoming a major source of wealth.²¹⁹ Louisiana became a state 1812 and by the time of the Civil War produced one quarter of the world's sugar and was the second richest state.²²⁰ In addition to creating this major new enslaving state, enslavers won another big victory in 1820 when Congress voted, after protests antislavery politicians, to let Missouri become a state with a constitution that both allowed enslavement and banned free Black Americans from settling there.²²¹ The major tradeoff that opponents of enslavement got from the Missouri Compromise was the policy that enslavement would be illegal in all parts of the Louisiana Territory

²¹² Presidents who owned enslaved people while in office included George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, John Tyler, James K. Polk, and Zachary Taylor. See Rosenwald, *Slave-owning presidents become targets of protestors* (June 3, 2020) Washington Post <<https://www.washingtonpost.com/history/2020/06/23/slave-owning-presidents-become-targets-protesters/>> (as of Jan. 24, 2022).

²¹³ Richards, *supra*, at p. 9.

²¹⁴ Richards, *supra*, at p. 9.

²¹⁵ Weil and Adrian Blanco, *More than 1,700 Congressmen Once Enslaved Black People. This Is Who They Were, and How They Shaped the Nation* (Jan. 20, 2022) Washington Post <https://www.washingtonpost.com/history/interactive/2022/congress-slaveowners-names-list/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most&carta-url=https%3A%2F%2Fwww.washingtonpost.com%2Fcar-in-tr%2F35b8b59%2F61dc6b2f9d2fda14d7e8b144%2F596c43ceade4e24119c923f2%2F8%2F72%2F61dc6b2f9d2fda14d7e8b144> (As of January 24, 2022) (Weil and Blanco).

²¹⁶ Weil and Blanco, *supra*.

²¹⁷ Baptist, *supra*, at p. 12.

²¹⁸ Richards, *supra*, at pp. 48 – 49.

²¹⁹ Khalil Gibran Muhammad, *The Sugar that Saturates the American Diet has a Barbaric History as the “White Gold” that Fueled Slavery* (August 14, 2019) New York Times <https://www.nytimes.com/interactive/2019/08/14/magazine/sugar-slave-trade-slavery.html>> (as of March 14, 2022) (Muhammad).

²²⁰ Muhammad, *supra*.

²²¹ Forever Free, *supra*, at pp. 28 – 29; Richards, *supra*, pp. 78 – 79.

located north of Missouri's southern border.²²² For the time being, white Americans reached an unsteady political peace over enslavement's westward expansion.

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

A. Domestic Trafficking of Enslaved People

Cotton solidified enslavement's importance to the United States, especially in the Deep South where the crop grew the best. The demand for enslaved people in the Deep South allowed enslavers in the Upper South to profit from enslavement in a new way: the interstate trafficking of enslaved people. Enslavers on worn-out tobacco farms in Maryland, Delaware, and Virginia could not grow cotton themselves, but they could sell enslaved people to the growing cotton plantations farther south.²²³

Between 1790 and 1859, slave traders sold approximately 845,720 people within the U.S.²²⁴ They made enormous fortunes in this trafficking of human beings, amounting to more than \$159 million between 1820 and 1860.²²⁵ Slave traders force marched, or sailed, hundreds of thousands of enslaved people to new territories along the Mississippi River or the Gulf of Mexico. Today's states of Alabama, Mississippi, Louisiana, and (later) Texas were built on the brutal forced migration of the enslaved.²²⁶

The trafficking of enslaved people destroyed enslaved people's families, communities, and their bodies. Enslavers and slave traders often ambushed enslaved people with a surprise sale so that they could not attempt to run away or plead to stay with their families.²²⁷ A person "sold south" was almost always separated from their family members and home communities forever. Parents and children, husbands and wives, brothers and sisters, and extended family members and friends never saw each other again.²²⁸

On top of the grief and mental and emotional trauma of family separation came physical violence. Slave traffickers usually chained the hands and feet of enslaved people and then chained several individuals together in a line (called a "coffle"). Then, traffickers force marched their captives by gunpoint to the next place of sale.²²⁹

Newly purchased people might be added to the coffle along the way, or enslaved people might be sold to a string of different traders as they moved South.²³⁰ Some enslaved people might make part of their forced journey via ship or riverboat.²³¹ But it was common practice to march enslaved people hundreds of miles over

²²² Baptist, *supra*, at pp. 154 – 158.

²²³ Kolchin, *supra*, at pp. 94 – 97.

²²⁴ Baptist, *supra*, at pp. 2 – 3.

²²⁵ Pritchett, Quantitative Estimates of the United States Interregional Slave Trade, 1820 – 1860 (June 2001) 61 J. of Econ. Hist. 474.

²²⁶ Baptist, *supra*, at pp. 2 – 3.

²²⁷ Baptist, *supra*, at p. 17.

²²⁸ Baptist, *supra*, at pp. 17 – 19, 23.

²²⁹ Baptist, *supra*, at pp. 18 – 32.

²³⁰ Baptist, *supra*, at pp. 18 – 32.

²³¹ [Joshua] Rothman, *The Ledger and the Chain: How Domestic Slave Traders Shaped America* (2021), pp. 91 – 92.

land to their destinations.²³² Handcuffs and chains rubbed their skin raw, their feet ached and bled, and they suffered from a lack of food, clothing, shelter, and sleep.²³³

Charles Ball, an enslaved man who slave traffickers bought in Maryland and forced marched to South Carolina, later remembered, "I had at times serious thoughts of suicide so great was my anguish. If I could have got a rope I should have hanged myself at Lancaster. The thought of my wife and children I had been torn from in Maryland, and the dreadful undefined future which was before me, came near driving me mad."²³⁴

At the end of their forced march south, enslaved people faced the terrifying process of being sold to their new enslavers. Many of the enslaved ended up in the city of New Orleans, the human trafficking center of the Deep South.²³⁵

Enslaved people waited until their day of sale in a high-walled outdoor yard, called a "slave pen," where they were crowded together with 50 to 100 people.²³⁶ Upon arrival, traffickers allowed enslaved people food, rest, baths, and new clothing to make them look more appealing to future buyers and bring a higher price upon sale.²³⁷ Later, slave traders sold them in a showroom next to the pen.²³⁸

As historian Walter Johnson has written, one of the great obscenities of enslavement was that enslavers forced enslaved people "to perform their own commodification."²³⁹ Slave traders coached enslaved people on how to act and what to say to potential buyers, to hide any injuries or disabilities, and to highlight their valuable skills.²⁴⁰ When sales began, enslaved people were required to line up by gender and height, separate from any family members.²⁴¹ Buyers questioned and examined them, forcing them to open their mouths to show their teeth and to undress to reveal any signs of illness, disability, disease, or scars from previous whippings (which whites saw as signs of disobedience).²⁴²

Enslaved people with specialized skills, such as the ability to play a musical instrument, might perform for buyers, while slave traders forced everyone to parade around and dance to show their physical well-being.²⁴³ Women and girls often suffered the most violent inspections of their bodies. Buyers took them behind closed doors, stripped them naked, and forcibly examined their breasts and genitals to see if they would be good "breeders" and were free of sexually transmitted infections.²⁴⁴

The moment of sale was extremely painful and traumatic. Buyers purchased enslaved people based on racist stereotypes about Black Americans' capabilities and skills, which were often connected to skin color, gender,

²³² Baptist, *supra*, at pp. 1 – 2.

²³³ Baptist, *supra*, at pp. 25 – 26.

²³⁴ Ball, *Fifty Years in Chains or the Life of an American Slave* (1859) p. 35

²³⁵ Baptist, *supra*, at pp. 87 – 88.

²³⁶ [Walter] Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (1999), pp. 2 - 3 (*Soul by Soul*).

²³⁷ *Soul by Soul*, *supra*, at pp. 119 – 121.

²³⁸ *Soul by Soul*, *supra*, at pp. 2 – 3.

²³⁹ *Soul by Soul*, *supra*, at p. 164.

²⁴⁰ *Soul by Soul*, *supra*, at pp. 129 – 130.

²⁴¹ *Soul by Soul*, *supra*, at pp. 121 – 123.

²⁴² *Soul by Soul*, *supra*, at pp. 141 – 142, 145.

²⁴³ *Soul by Soul*, *supra*, at pp. 130.

²⁴⁴ *Soul by Soul*, *supra*, at pp. 143 – 144, 147 – 149.

and physical size.²⁴⁵ Younger enslaved Black men and women, as well as teenagers, often sold at high prices as “prime” field hands to pick cotton and do other hard labor.²⁴⁶ Enslaved men with specialized knowledge and skills, such as carpentry, barrel making, or driving carts, also sold for higher prices.²⁴⁷ Enslavers often bought younger enslaved women to work in the cotton fields, but also valued their knowledge and skills in home-based work such as cooking, washing clothes, sewing, cleaning, and childcare.²⁴⁸ Finally, elderly people and very young children usually sold for a lot less money because white buyers viewed their labor and skills as less valuable.²⁴⁹

Some buyers specifically bought Black people that they could subject them to sexual and reproductive violence.²⁵⁰ The “fancy trade” was the term for selling young women and girls to white men for the purpose of constant rape and/or forced sex work in brothels.²⁵¹ Other enslavers bought young mothers (with or without their children) because a woman who had recently given birth to children showed that she was able to have more children in the future to enrich her buyer. Pregnant and breastfeeding women could be forced to nurse all the children, Black and white, on a plantation to free up other enslaved mothers for field work.²⁵²

All of these factors often meant that even if an enslaved family had managed to stay together up to this point, they would now face permanent separation. Solomon Northup, a free Black man from New York who was kidnapped and sold into enslavement, remembered the case of an enslaved woman named Eliza. Eliza begged to be sold with her two children, Emily, who was seven or eight years old and Randall, who was four to five years old. Slave traders sold off Randall to another buyer and refused to sell Emily to Eliza’s buyer because they hoped to sell the tiny girl as a “fancy” to a wealthy enslaver when she was a little older. Northup wrote that the sale of her children was absolutely soul crushing for Eliza. She died young from the grief of losing them.²⁵³

B. Cotton and Capitalism

Enslavers were capitalists, and like all capitalists, they strived for profit maximization. They wanted to get the most work out of enslaved people by pushing them up to, but not beyond, their physical breaking point. To do this, enslavers used violence, or the threat of violence, to make the enslaved work harder and faster and to maintain a constant, carefully calculated rate of production. The result for enslaved people was a nearly endless daily round of work under the constant threat of violence.²⁵⁴

²⁴⁵ Soul by Soul, *supra*, at p. 58.

²⁴⁶ Berry, The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation (2017), pp. 66 – 70 (Berry).

²⁴⁷ Baptist, *supra*, at pp. 102 – 103.

²⁴⁸ Soul by Soul, *supra*, at pp. 153 – 154; Berry, *supra*, at p. 18.

²⁴⁹ Berry, *supra*, at pp. 46 – 47, 136 – 137.

²⁵⁰ Berry, *supra*, at p. 18, 78 – 83.

²⁵¹ Berry, *supra*, at p. 18; Baptist, *supra*, at pp. 240 – 243.

²⁵² Soul by Soul, *supra*, at pp. 143 – 144.

²⁵³ Northup, Twelve Years a Slave (1853), pp. 80 – 82, 84 – 88 (Northup).

²⁵⁴ Baptist, *supra*, at pp. 116 – 124.

Once enslaved people were sold to the Deep South, their new enslavers subjected them to a lifetime of brutal, backbreaking work growing cotton, which was a never-ending, year-round process.²⁵⁵ Enslaved people began every spring by plowing the land and planting cotton seeds. For the next several months they hoed the fields to kill grass and weeds that might damage the fragile young cotton plants.²⁵⁶ Starting in August, enslaved people worked from sunup to sundown to pick cotton, sometimes working by the light of the moon to finish. They only stopped for a 10- to 15-minute meal break per day.²⁵⁷ This exhausting workday did not end when the cotton picking was done. Everyone still had to cut wood, feed farm animals, and do all of the other daily tasks that kept the plantation running. Then, enslaved people went back to their cabins, made their evening meals, and cooked food to eat in the cotton fields the next day.²⁵⁸

The cotton-picking season went on for months into the winter.²⁵⁹ After the cotton season ended, enslaved people harvested the corn crop, which, according to Solomon Northup, was used for “fattening hogs and feeding slaves.”²⁶⁰ After the corn harvest was complete, enslaved people burned all the dead corn and cotton plants and began the process of planting the next year’s crops all over again.²⁶¹

To make sure that enslaved people worked as hard and as quickly as possible, enslavers came up with the “pushing system.” The main idea behind the pushing system was that every enslaved person should farm a certain number of acres of cotton per year.²⁶² This number kept increasing, from five acres per enslaved person in 1805 to double that number (10 acres) by the 1850s.²⁶³ In fact, many of today’s financial accounting and scientific management practices to increase profits had their early beginnings among enslavers in the U.S. South and the Caribbean who wanted to perfect the pushing system.²⁶⁴

To make sure that the production of cotton and profits kept increasing, enslavers intensified the physical violence.²⁶⁵ Frederick Douglass remembered that sleep-deprived enslaved people who accidentally slept past sunrise were whipped for lateness.²⁶⁶ Solomon Northup, the free Black man kidnapped and sold into enslavement in Louisiana, remembered that enslavers followed enslaved people into the fields on horseback and whipped them if they stopped work or fell behind.²⁶⁷ He also remembered that each adult was responsible for picking 200 pounds of cotton per day and that those who did not pick enough got whipped. Even picking less than one’s own personal best daily weight record, or accidentally breaking a branch on a cotton plant, resulted

²⁵⁵ Dattel, *Cotton in a Global Economy: Mississippi (1800 – 1860)* (October 2006) Mississippi History Now < <https://www.mshistorynow.mdah.ms.gov/issue/cotton-in-a-global-economy-mississippi-1800-1860> > (as of March 15, 2022).

²⁵⁶ Northup, *supra*, at pp. 163 – 165.

²⁵⁷ Northup, *supra*, at pp. 165 – 167.

²⁵⁸ Northup, *supra*, at p. 168.

²⁵⁹ Northup, *supra*, at pp. 163 – 168.

²⁶⁰ Northup, *supra*, at p. 171.

²⁶¹ Northup, *supra*, at p. 172.

²⁶² Baptist, *supra*, at pp. 116 – 117.

²⁶³ Baptist, *supra*, at pp. 116 – 117.

²⁶⁴ Rosenthal, *Reckoning with Slavery: How Revisiting Management’s Uncomfortable Past Can Help Us Confront Challenges Today* (2021) 20 *Academy of Management Learning & Ed.* 467-472.

²⁶⁵ Baptist, *supra*, at pp. 120 – 123.

²⁶⁶ Douglass, *Narrative of the Life of Frederick Douglass, An American Slave. Written by Himself* (1845), p. 11 (Douglass).

²⁶⁷ Northup, *supra*, at p. 165.

in whipping.²⁶⁸ Northup himself was whipped for failing to pick cotton fast enough when he was sick and exhausted.²⁶⁹

Southern slave codes, the state and local laws that enforced enslavement, became more severe to support the increased brutality and profitability of enslavement, especially in the Deep South. Many southern states outlawed all meetings of enslaved people—including religious observance—without white supervision, prohibited teaching enslaved people to read and write, and banned enslaved people from trading.²⁷⁰ These laws also increased slave patrols, the police forces that enforced these laws.²⁷¹ Finally, new laws made it much more difficult for enslaved people to achieve their freedom by banning “manumission,” voluntary emancipation by enslavers. Altogether, these developments in slave codes aimed to maintain the racial caste system by cracking down on all resistance by enslaved people and to prevent them from ever getting their freedom.²⁷²

C. Neglect and Violence

Living conditions for enslaved people showed enslavers’ inhumane, brutal emphasis on profit maximization. Most of the enslaved lived in small, poorly built cabins. Gaps between the log walls were so big that the wind and rain constantly blew in.²⁷³ Furniture was either rare or non-existent. Solomon Northup’s bed “was a plank [of wood] twelve inches wide and ten feet long.”²⁷⁴

Frederick Douglass reported that enslaved people on the Maryland tobacco plantation where he was born had no beds at all; they slept on the cold dirt floor with only a rough blanket.²⁷⁵ On the coldest nights, the young Douglass would steal a sack used for carrying corn and sleep inside it with his head inside and his feet hanging out. Years later, when he wrote about his life, he remembered that “[m]y feet have been so cracked with the frost, that the pen with which I am writing might be laid in the gashes.”²⁷⁶

Besides cold, one of the greatest things Douglass suffered was hunger. Douglass’s enslaver fed enslaved children mashed-up boiled corn in a trough on the ground. The children were then forced to eat “like so many pigs” and “[h]e that ate fastest got most.”²⁷⁷ Solomon Northup remembered a similar lack of food on the Louisiana plantation where he lived for 10 years. Each person received only three and a half pounds of bacon and a peck of corn (about eight dry quarts) per week.²⁷⁸

Enslaved people, particularly women and girls, also suffered sexual and reproductive violence. Enslavers frequently raped and impregnated enslaved women and girls and increased their profits by doing so.²⁷⁹ Frederick Douglass pointed out that since children born to enslaved women were automatically enslaved at

²⁶⁸ Northup, *supra*, at pp. 165, 167 – 168.

²⁶⁹ Northup, *supra*, at p. 177.

²⁷⁰ Kolchin, *supra*, at pp. 127 – 128.

²⁷¹ Kolchin, *supra*, at p. 128.

²⁷² Kolchin, *supra*, at p. 128.

²⁷³ Northup, *supra*, at pp. 170 – 171.

²⁷⁴ Northup, *supra*, at p. 170.

²⁷⁵ Douglass, *supra*, at pp. 10 - 11.

²⁷⁶ Douglass, *supra*, at pp. 26 – 27.

²⁷⁷ Douglass, *supra*, at p. 27.

²⁷⁸ Northup, *supra*, at 168.

²⁷⁹ Berry, *supra*, at pp. 78 – 83.

birth, enslavers often owned and sold their own children as property.²⁸⁰ Additionally, Douglass remembered that white women often harassed enslaved victims of rape and their mixed-race children by insisting on their sale or punishing them even more cruelly than other enslaved people.²⁸¹

Enslavers also forced sexual intercourse between enslaved people—an act historian Daina Ramey Berry has called third-party rape—so that they could “breed” more children to make more money.²⁸² Frederick Douglass remembered that a poor white farmer named Edward Covey owned only one enslaved woman named Caroline and had to rent additional enslaved people from others (a practice called hiring out). To increase his own wealth, Covey forced Caroline and one of the rented enslaved men, who was already married, to have sex. Not long after, Caroline gave birth to twins. Douglass remembered that “[t]he children were regarded as being quite an addition to his wealth.” Sexual violence tripled Covey’s wealth—from one to three enslaved people—within just one year.²⁸³

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

D. Enslaved Communities and Cultures: Resilience, Resistance, and Rebellion

Enslaved people of African descent defied enslavers’ efforts to dehumanize them by creating resilient families and communities, vibrant cultures, and distinctive religious and intellectual traditions. Family ties, community ties, cultural practices, and religious traditions ensured African American survival. They were the foundation of Black resistance to enslavement and the struggle for human rights both before emancipation and long afterward.

Family life was the building block of enslaved life in the American South.²⁸⁴ Although enslaved families were always in danger of being broken apart by sale, enslaved people built strong extended family ties and fought to preserve these relationships.²⁸⁵ Husbands and wives struggled to have enslavers recognize their marriage ties by claiming their right to live together in their own private cabins, or to visit spouses who lived on different plantations.²⁸⁶ Enslaved parents chose their children’s names to honor their own family ties, not according to the will of their enslavers, and frequently named children after grandparents, aunts, uncles, and cousins.²⁸⁷ Enslaved people often chose their own last names, even if enslavers refused to recognize them, and they passed down their skills to their children.²⁸⁸ Enslaved people also rebelled against the sale of their family members, sometimes by fleeing to see their relatives on distant plantations.²⁸⁹

²⁸⁰ Douglass, *supra*, at pp. 3 – 4.

²⁸¹ Douglass, *supra*, at pp. 3 – 4.

²⁸² Berry, *supra*, at pp. 78 – 80.

²⁸³ Douglass, *supra*, at pp. 62 – 63.

²⁸⁴ Forever Free, *supra*, at p. 16.

²⁸⁵ Forever Free, *supra*, at p. 16 – 17.

²⁸⁶ Berlin, *supra*, at pp. 130 – 131.

²⁸⁷ Berlin, *supra*, at p. 130; Forever Free, *supra*, at p. 16; Kolchin, *supra*, at p. 140.

²⁸⁸ Kolchin, *supra*, at p. 140; Berlin, *supra*, at p. 130 – 131.

²⁸⁹ Berlin, *supra*, at p. 130.

Enslaved people built close communities bound together by blood, marriage, and adoptive family ties. On larger plantations, multiple extended family groups lived in the same “slave quarters” and were often linked to each other through marriages or adoptive kin relations.²⁹⁰ For instance, Frederick Douglass remembered that the enslaved children on the Maryland plantation where he was born referred to older enslaved men as their uncles, demonstrating both their respect for their elders and the close family-like relationships that grew between community members unrelated by blood.²⁹¹ These close ties can best be seen in cases of young enslaved children orphaned by the sale or death of their parents: extended family members and non-kin alike frequently raised these children along with their own children.²⁹²

Close-knit families and communities ensured that cultural practices, language, and oral histories were passed down to the next generation. “Slave quarters,” the clusters of cabins where the enslaved lived, were often distant from the “big house” of the enslavers and allowed the enslaved some privacy to pray, dance, sing, tell stories, rest, and tend to their homes.²⁹³ The lively cultural spaces that enslaved people created for themselves allowed for the persistence of elements of African language, music, medicine, and storytelling in African American culture across generations.²⁹⁴

Religious life was often the heart of family and community experience for enslaved people, creating spaces for freedom of expression, cultural resilience, and resistance. Enslaved people who were stolen from Africa continued the spiritual practices of their homelands, whether indigenous West African religions or Islam.²⁹⁵ Over time, enslaved communities fused elements of African religious practice—including song, dance, call and response, and healing practices—with Protestant Christianity.²⁹⁶ They created a distinctive American religious culture that taught a message of liberation, a “gospel of freedom.”²⁹⁷ Enslaved preachers emphasized freedom from enslavement, both in the afterlife and on earth. They focused on Biblical liberation stories, such as Moses leading the Israelites out of bondage in Egypt, as well as stories that emphasized the power of the weak to defeat the mighty, such as David and Goliath.²⁹⁸

Enslavers tried to suppress this religious expression by prohibiting religious gatherings or by emphasizing parts of the Bible that said that “servants” should obey their “masters.”²⁹⁹ Still, enslaved people resisted these efforts by meeting in secret to worship.³⁰⁰ As a formerly enslaved woman named Alice Sewell remembered, “We used to slip off in the woods in the old slave days on Sunday evening way down in the swamps to sing and pray to our own liking. We prayed for this day of freedom. We come from four and five miles to pray together to God that if we didn’t live to see it, to please let our children live to see a better day and be free.”³⁰¹

²⁹⁰ Berlin, *supra*, at pp. 132 – 133.

²⁹¹ Forever Free, *supra*, at p. 16.

²⁹² Forever Free, *supra*, at p. 16.

²⁹³ Kolchin, *supra*, pp. 149 – 150.

²⁹⁴ Kolchin, *supra*, pp. 149 – 150.

²⁹⁵ Raboteau, African American Religion (1999), p. 54 - 56 (Raboteau).

²⁹⁶ Raboteau, *supra*, at pp. 55 – 57.

²⁹⁷ Forever Free, *supra*, at p. 20.

²⁹⁸ Forever Free, *supra*, at p. 20.

²⁹⁹ Forever Free, *supra*, at pp. 19 – 20.

³⁰⁰ Forever Free, *supra*, pp. 20 – 21.

³⁰¹ Alice Sewell quoted in Forever Free, *supra*, pp. 20 – 21.

As Alice Sewell’s memory shows, religious and community life became a foundation for enslaved people’s resistance to the brutal and dehumanizing conditions of their enslavement. In some cases, religious and community ties catalyzed outright rebellions against enslavement. The alleged Denmark Vesey conspiracy in Charleston, South Carolina, in 1822, and the Nat Turner rebellion in Southampton County, Virginia, in 1831, developed among communities of free and enslaved African Americans who believed strongly in the gospel of freedom.³⁰² Most often, though, enslaved communities, cultures, and spiritual beliefs made possible smaller forms of everyday resistance that pushed back against the relentless work and violence of enslavement. Enslaved people slowed down work, broke tools, or temporarily escaped to avoid abuse or brutal working conditions.³⁰³ Everyday resistance forced enslavers to recognize enslaved people’s humanity and showed their deep longings to be free.

Ultimately, enslaved people in the United States created a distinctive *American* Black culture that was different from ancestral African cultures, white European cultures, or African-diaspora cultures elsewhere in the world. Distinctive Black American artistic expression—especially music and dance—,literary and linguistic styles, and culinary innovations, among many other practices, would shape mainstream American culture across centuries [See chapter 9].

VI. Northern Complicity in Enslavement

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

Although enslavement itself was disappearing in the North, white northerners’ participation in enslavement grew along with the southern cotton economy. Whites in New England, for instance, profited from the transatlantic traffic in enslaved Africans, rum manufacturing, and cotton textile production.

White northerners had been involved in the transatlantic trafficking of enslaved people for a long time as shipping company owners, slave ship captains, and slave traders. For example, businessmen from the northern state of Rhode Island controlled most of the trade in captive human beings.³⁰⁴ Slaving ships from Rhode Island brought rum to the coast of West Africa and traded barrels of the liquor for enslaved people, who they trafficked to North America.³⁰⁵ Around 24 rum distilleries in the town of Newport, Rhode Island, fed this profitable trade.³⁰⁶ By the time of the American Revolution, these Rhode Island merchants controlled two-thirds of the entire transatlantic slave trade in the Thirteen Colonies and they held onto this control after U.S. independence.³⁰⁷ When added together, white Rhode Islanders were responsible for bringing 100,000 enslaved Africans to North America.³⁰⁸ Fifty thousand of these enslaved people were captives whom Rhode Island

³⁰² Forever Free, *supra*, at p. 23.

³⁰³ Forever Free, *supra*, at pp. 22 – 23.

³⁰⁴ Farrow, Joel Lang, and Jennifer Frank, *Complicity: How the North Promoted, Prolonged, and Profited from Slavery* (2005), p. 95 – 99 (Complicity).

³⁰⁵ *Complicity, supra*, at pp. 98 – 99.

³⁰⁶ *Complicity, supra*, at pp. 98 – 99.

³⁰⁷ *Complicity, supra*, at p. 95.

³⁰⁸ *Complicity, supra*, at p. 95.

enslavers rushed to bring into the United States before Congress outlawed participation in the transatlantic trafficking of enslaved people in 1808.³⁰⁹

At the same time, textile mills, the factories which processed southern cotton into cloth, were the basis of early northern industrial growth.³¹⁰ Cotton grown by enslaved people in the U.S. South fed these mills and the mills employed thousands of people across New England.³¹¹ By the time of the Civil War in 1861, New Englanders had invested more than \$69 million in cotton fabric production and operated 570 separate mills.³¹² Over 81,000 Americans worked in the New England textile mills and the total profits amounted to over \$79 million dollars per year.³¹³

B. Enslavement and the Economic Power of New York City

New York City is a strong example of how northerners participated in and profited from enslavement. Captive Africans, enslaved by the Dutch West Indian Company, were part of the labor force that constructed the early walled street that eventually became Wall Street, the economic center of the United States.³¹⁴ Later, the street became the city's first slave market. City leaders decided in 1711 that whites who wanted to rent out enslaved Black or Native American people could only do so at the end of Wall Street next to the East River.³¹⁵

Enslaved people became less and less common in the city after the state of New York passed a law in 1799 that gradually freed children born to enslaved mothers, and then outlawed enslavement completely in 1817.³¹⁶ But as enslavement itself was dying out, white New Yorkers were building strong economic ties to southern enslavement that brought millions of dollars in profit every year. New York City was the main destination of southern cotton and the center of the transatlantic cotton trade.³¹⁷ New York-based shipping companies gathered the cotton in southern cities and took it north to New York City where merchants packed it and shipped it to Europe.³¹⁸

New York City was also the banking center of the United States and New York banks helped finance the expansion of enslavement in the South. Banks loaned money to enslavers to buy more land and more enslaved people.³¹⁹ Banks also accepted enslaved people as security for these loans, which meant that they could take and

³⁰⁹ Complicity, *supra*, at p. 95.

³¹⁰ Mintz, *Historical Context: Was Slavery the Engine of American Economic Growth?*, Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-was-slavery-engine-american-economic-growth>> (as of Jan. 24, 2022).

³¹¹ Complicity, *supra*, at pp. 6, 25 – 26.

³¹² US Bureau of the Census, *Manufactures of the United States in 1860*; compiled from the original returns of the Eighth Census under the direction of the Secretary of the Interior (1865), p. x (1860 Census). <<https://www2.census.gov/library/publications/decennial/1860/manufactures/1860c-02.pdf>> (as of Jan. 24, 2022) (1860 US Census).

³¹³ 1860 US Census, *supra*, at p. x.

³¹⁴ *White New Yorkers in Slave Times*, Slavery in New York virtual exhibit, p. 1 <http://www.slaveryinnewyork.org/PDFs/White_New_Yorkers.pdf> (as of Jan. 24, 2022).

³¹⁵ *Slave Market*, Mapping the African American Past, Columbia University Center for Teaching and Learning <<https://maap.columbia.edu/place/22.html>> (as of Jan. 24, 2022).

³¹⁶ Foner, *Gateway to Freedom: The Hidden History of the Underground Railroad* (2015), pp. 43 – 44 (Gateway).

³¹⁷ *Gateway*, *supra*, at pp. 44 – 45.

³¹⁸ *Gateway*, *supra*, at pp. 44 – 45.

³¹⁹ *Gateway*, *supra*, at pp. 44 - 45.

sell enslaved people if their enslavers failed to pay back their debts. For example, in 2005, JP Morgan Chase, the banking giant, wrote a formal apology because two banks that it now owned had taken 13,000 enslaved people as security for loans in the state of Louisiana. When enslavers could not pay back the loans, the banks ended up taking ownership of 1,250 of these people, and then most probably sold them.³²⁰

New York City was also strongly connected to southern enslavement through the insurance industry. Insurance companies insured the lives of enslaved, and paid enslavers if an enslaved person died.³²¹ Some insurance companies also insured shipments of trafficked enslaved people sold within the United States.³²² Some of these companies were the early ancestors of today's most important insurance companies, including New York Life, US Life, and Aetna.³²³ American insurance companies' investment and complicity in enslavement was so widespread that the California government required all insurers who did business in the state to make their records of participation in enslavement open to the public.³²⁴

C. Corporate Manufacturing Profits from Enslavement

A variety of New York businesses also profited from processing and manufacturing agricultural products grown by enslaved people into goods for consumers to buy. Brooks Brothers, still a well-known New York City clothing company, made money from enslavement in multiple ways. The company made fashionable, expensive clothing woven from southern cotton grown by enslaved people.³²⁵ It also profited from making cheap clothing that enslavers bought to dress enslaved people.³²⁶

At the same time, sugar refineries, factories which processed raw sugar into a usable form, became a major New York industry, especially in the borough of Brooklyn. These factories processed thousands of pounds of raw sugar grown by enslaved people in Louisiana and Cuba. By 1855, fifteen New York City refineries were producing over \$12 million of sugar per year.³²⁷

The profits of sugar refining can still be seen in New York City today. Columbia University's Havemeyer Hall was funded by and named after one of the city's most important sugar refining families from the 1800s whose business relied on sugar grown by enslaved people.³²⁸ The Havemeyer family built what was once the largest

³²⁰ Sidel, A Historian's Quest Links J.P. Morgan To Slave Ownership; Bank's Distant Predecessor Took Human Collateral For Rich Client's Debt (May 10, 2005) Wall Street Journal <<https://www.wsj.com/articles/SB111568595843228824>> (as of Jan. 24, 2022).

³²¹ Swarns, *Insurance Policies on Slaves: New York Life's Complicated Past* (Dec. 18, 2016) New York Times <<https://www.nytimes.com/2016/12/18/us/insurance-policies-on-slaves-new-york-lifes-complicated-past.html>> (as of Jan. 24, 2022) (Swarns).

³²² *Supporting the Trade, Purchased Lives*, The Historic New Orleans Collection, <<https://www.hnoc.org/virtual/purchased-lives/supporting-trade>> (as of Jan. 24, 2022).

³²³ Swarns, *supra*.

³²⁴ State of California, *Slavery Era Insurance Policies*, SB 2199, Chapter 934 (2000), <<http://www.insurance.ca.gov/01-consumers/150-other-prog/10-seir/sb2199.cfm>> (as of Jan. 24, 2022).

³²⁵ Thomas, *The hidden links between slavery and Wall Street* (Aug. 29, 2019) BBC News <<https://www.bbc.com/news/business-49476247>> (as of Jan. 24, 2022).

³²⁶ Gateway, *supra*, at p. 45.

³²⁷ White, *Building Havemeyer Hall: Charles Frederick Chandler and the Sugar Refining Industry*, Columbia University and Slavery, Columbia University <https://columbiaandslavery.columbia.edu/content/building-havemeyer-hall-charles-frederick-chandler-and-sugar-refining-industry/#_ftnref10> (as of Jan. 24, 2022) (White).

³²⁸ White, *supra*.

sugar refining factory in the world, the Domino Sugar Refinery, which still stands beside East River in Brooklyn.³²⁹ Although the Brooklyn location is no longer running, the Domino Sugar brand, now owned by the ASR Group, continues to be processed in factories in New York, Maryland, and Louisiana.³³⁰

The legacies of enslavement in the sugar industry continue in the present-day. After the Civil War and the end of enslavement, southern states such as Texas and Louisiana rented out imprisoned Black Americans to white sugarcane farmers. Many died in the brutal sugar production process.³³¹ The Louisiana State Penitentiary at Angola and the Texas State Penitentiary at Sugar Land also supported themselves, and profited these state governments, by growing and processing sugar cane on prison grounds.³³² Inmates at Angola continued to process sugar to sell in the prison gift shop as recently as 2014.³³³

VII. Enslavement and American Institutions

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

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

Harvard University Law School was created in 1817 and funded largely by land donations from a wealthy merchant named Isaac Royall, Jr. Royall, who was the son of a human trafficker in enslaved people, owned multiple sugar plantations in the Caribbean and Latin America that were worked by enslaved people.³³⁴ Other early Harvard donors made their money by trading enslaved people or goods produced by enslaved people in the Caribbean; smuggling enslaved Africans into the United States after Congress banned American participation in the transatlantic slave trade in 1808; or running textile mills fed by southern cotton.³³⁵

The wealth of Brown University (formerly known as the College of Rhode Island) was greatly tied to the human trafficking activities of its home state, Rhode Island. Members of the Brown family, early donors after whom the university is named, owned enslaved people and participated in the transatlantic slave trade.³³⁶ University

³²⁹ *Domino Sugar Factory*, NYC-Arts: The Complete Guide <<https://www.nyc-arts.org/organizations/100656/domino-sugar-factory>> (as of Jan. 24, 2022).

³³⁰ *Domino Sugar*, ASR Group <<https://www.asr-group.com/our-companies/domino-sugar>> (as of Jan. 24, 2022).

³³¹ Staples, *A Fate Worse Than Slavery, Unearthed in Sugar Land* (Oct. 27, 2018) New York Times <<https://www.nytimes.com/2018/10/27/opinion/sugar-land-texas-graves-slavery.html>> (as of Jan. 24, 2022) (Staples).

³³² Staples, *supra*.

³³³ Hardy, *Angola Inmates Make Sugar Cane Syrup the Old-Fashioned Way* (Dec. 23, 2014) The Advocate <https://www.theadvocate.com/baton_rouge/news/communities/west_feliciana/article_dbc913cb-9fc8-52ad-9de8-8ac99fc9def5.html> (as of Jan. 24, 2022).

³³⁴ Beckert, Katherine Stevens, et al., *Harvard and Slavery: Seeking a Forgotten History* (2011), p. 11 <<http://www.harvardandslavery.com/wp-content/uploads/2011/11/Harvard-Slavery-Book-111110.pdf>> (as of Jan. 24, 2022) (Harvard and Slavery).

³³⁵ Harvard and Slavery, *supra*, at pp. 11- 12, 15 – 17.

³³⁶ Slavery and Justice: Report of the Brown University Steering Committee on Slavery and Justice (2006), pp. 14 – 17 <<https://slaveryandjustice.brown.edu/sites/g/files/dprej1501/files/reports/SlaveryAndJustice2006.pdf>> (as of Jan. 24, 2022) (Slavery and Justice). One of the Brown brothers, Moses, converted to Quakerism, emancipated the enslaved people he owned, and became an antislavery activist.

Hall, the oldest building on the Brown University campus, was partially built by enslaved people and made of wood donated by one of the state's largest slave trading companies.³³⁷ South Carolina slave traffickers and enslavers also gave money to help fund the college.³³⁸

Other Ivy League schools have similar connections to enslavement. The University of Pennsylvania,³³⁹ Princeton University,³⁴⁰ Columbia University,³⁴¹ Yale University,³⁴² and Dartmouth College³⁴³ count enslavers, slave traffickers, and/or proslavery defenders among their early donors, founders, trustees, administrators, building namesakes, faculty, students, and alumni.

Enslavement was also strongly linked to religious life and religious organizations in colonial America and the early United States. Some churches and religious colleges owned, bought, and sold enslaved people.³⁴⁴ In the southern enslaving states, some churches raised money to buy enslaved people. Anglican and Episcopalian churches in Virginia during the 1600s and 1700s attracted new ministers by allowing them use of church-owned enslaved people.³⁴⁵ Some wealthy churchgoers donated enslaved people to churches so that the profits of their labor could be used to fund free schools for poor white children.³⁴⁶ In the 1700s and 1800s, many Virginia Presbyterian churches hired out enslaved people so that they could use the profits to pay ministers and fund church upkeep.³⁴⁷

Colleges with religious missions also owned and profited from enslaved people. Virginia's College of William and Mary, which was originally an Anglican college to train new ministers, started owning enslaved people by around 1704.³⁴⁸ Enslaved people worked in the college's kitchens, dormitories, laundries, stables, and gardens, or on the college-owned tobacco plantation to raise money for student scholarships.³⁴⁹ Although the college sold off many enslaved people during the American Revolution to pay off its debts, tearing them away from

³³⁷ Slavery and Justice, *supra*, at pp. 12 – 13.

³³⁸ Slavery and Justice, *supra*, at pp. 13 – 14.

³³⁹ Gutmann, *Statement on Penn's Connections to Slavery* (June 28, 2018) Penn Today <<https://penntoday.upenn.edu/announcements/statement-penns-connections-slavery>> (as of Jan. 24, 2022).

³⁴⁰ Sandweiss and Craig Hollander, *Princeton and Slavery: Holding the Center*, Princeton University <<https://slavery.princeton.edu/stories/princeton-and-slavery-holding-the-center>> (as of Jan. 24, 2022).

³⁴¹ Foner, *Columbia and Slavery: A Preliminary Report*, Columbia University <<https://columbiaandslavery.columbia.edu/sites/default/files/content/Spreadsheets/PreliminaryReport.pdf>> (as of Jan. 24, 2022).

³⁴² Remnick, *Yale Grapples With Ties to Slavery in Debate Over a College's Name* (Sept. 11, 2015) New York Times <<https://www.nytimes.com/2015/09/12/nyregion/yale-in-debate-over-calhoun-college-grapples-with-ties-to-slavery.html>> (as of Jan. 24, 2022).

³⁴³ Cano, *A Complicated History: Slavery at Dartmouth* (Feb. 19, 2020) The Dartmouth <<https://www.thedartmouth.com/article/2020/02/slavery-at-dartmouth>> (as of Jan. 24, 2022).

³⁴⁴ Oast, *Institutional Slavery: Slaveholding Churches, Schools, Colleges, and Businesses in Virginia, 1680 – 1860* (2016), p. 10 (Institutional Slavery).

³⁴⁵ Institutional Slavery, *supra*, p. 10

³⁴⁶ Institutional Slavery, *supra*, at p. 10.

³⁴⁷ Oast, "The Worst Kind of Slavery": Slave-owning Presbyterian Churches in Prince Edward County, Virginia (November 2010) 76 *J. of Southern Hist.* 867 – 868.

³⁴⁸ Institutional Slavery, *supra*, at p. 131.

³⁴⁹ Institutional Slavery, *supra*, at pp. 131, 133 – 136.

their families and communities,³⁵⁰ enslavement continued on the William and Mary campus until during the Civil War.³⁵¹

Some colleges run by the Society of Jesus, a Catholic religious group better-known as the Jesuits, also depended on the lives and labor of the enslaved. The Jesuits who operated Georgetown College (now Georgetown University) owned plantations and hundreds of enslaved people.³⁵² The profits of these plantations funded the school.³⁵³ In 1838, when the college was struggling due to a lack of funding, Jesuits sold 272 enslaved Black people to Deep South plantations so that they could pay off the school's debts.³⁵⁴ Even though Jesuit leaders in Rome required that the enslaved people be kept together as families and given Catholic religious education in their new homes,³⁵⁵ buyers in Louisiana failed to keep these promises.³⁵⁶ Altogether, the mass sale of elders, men, women, children, and infants raised \$115,000 (equal to around \$3.3 million in 2016) to fund Georgetown College/University.³⁵⁷

B. Direct Federal Government Investment and Participation in Enslavement

Finally, the federal government directly invested in, protected, and profited from the enslavement of Black Americans. The early U.S. national banking system played an important role in funding the expansion of cotton growing and the interstate slave trade. For example, in the years 1831 to 1832, the Second Bank of the United States, the private bank that the United States used to handle all of the federal government's banking needs, gave five percent of all its loans to just one slave trading company in New Orleans.³⁵⁸ By 1861, just under two percent of the entire budget of the United States went to pay for expenses related to enslavement.³⁵⁹ These expenses included dealing with the illegal transatlantic slave trade,³⁶⁰ colonization projects to remove formerly enslaved people from the United States and settle them in other parts of the world;³⁶¹ enforcing fugitive slave laws;³⁶² and renting enslaved people to build federal military sites in the South.³⁶³

The U.S. federal government also actively participated in upholding enslavement because it directly controlled the nation's capital at Washington, D.C. The District of Columbia was formed from lands that once belonged to

³⁵⁰ Institutional Slavery, *supra*, at p.147.

³⁵¹ Institutional Slavery, *supra*, at p. 156.

³⁵² Swarns, *272 Slaves were Sold to Save Georgetown. What Does it Owe their Descendants?* (April 16,2016) New York Times < <https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html>> (as of Jan. 24, 2022) (*Sold to Save Georgetown*).

³⁵³ *Sold to Save Georgetown, supra*. Another enslaving Jesuit institution was Saint Louis University. See Dorn, *Confronting SLU's History With Slavery* (Oct. 4, 2019) The University News < <https://unewsonline.com/2019/10/confronting-slus-history-with-slavery/>> (as of Jan. 24, 2022).

³⁵⁴ Report of the Working Group on Slavery, Memory, and Reconciliation to the President of Georgetown University (2016), pp. 13 - 15 <<https://georgetown.app.box.com/s/nzo1tx4elaerg13akjwxuve3pv9sb03a>> (as of Jan. 24, 2022) (Working Group).

³⁵⁵ Working Group, *supra*, at p. 14.

³⁵⁶ Working Group, *supra*, at p. 16.

³⁵⁷ Working Group, *supra*, at p. 15.

³⁵⁸ Baptist, *supra*, p. 239.

³⁵⁹ Ericson, *The Federal Government and Slavery: Following the Money Trail* (Spring 2005) 19 Stud. in Amer. Pol. Dev. 107 (Ericson).

³⁶⁰ Ericson, *supra*, at pp. 108 – 110.

³⁶¹ Ericson, *supra*, at pp. 110 – 112.

³⁶² Ericson, *supra*, at pp. 112 – 115.

³⁶³ Ericson, *supra*, at p. 115.

the two enslaving states of Maryland and Virginia. As a result of this, Washington, D.C. had to carry over the laws of those two states, including laws supporting enslavement.³⁶⁴ U.S. courts in Washington, D.C., took direct responsibility for punishing enslaved people and deciding cases involving the buying, selling, and inheritance of enslaved people.³⁶⁵ Since there were no laws against moving enslaved people through D.C., and because D.C. was centrally located in the Upper South, the area also became an important location in the interstate slave trade.³⁶⁶ Slave traffickers gathered and imprisoned enslaved people in D.C. “slave pens” where they waited to be moved to the Deep South and sold.³⁶⁷ Solomon Northup, a free Black man who was kidnapped and sold into enslavement in 1841, remembered that he waited to be sold south in a “slave pen within the very shadow of the Capitol!”³⁶⁸ That U.S. capitol building,³⁶⁹ along with another major national landmark and symbol of democracy, the White House, was partially built by the labor of enslaved people.³⁷⁰

VIII. Enslavement in California

A. The Compromise of 1850 and the Problem of Enslavement’s Expansion into the US West

Even though large numbers of white northerners profited from the labor of enslaved people, many also began to worry about the place of enslavement in the nation’s future and to question whether it should be allowed to expand west into new American territories. Some of this new concern sprung from the abolitionist movement, a northern interracial movement of Black and white antislavery activists who pushed to end enslavement immediately.³⁷¹ Across the 1830s – 1850s, American abolitionists published thousands of texts, and gave thousands of speeches, to convince their fellow citizens that enslavement was wrong and against the will of God.³⁷² They also helped thousands of freedom seekers escape enslavement via a secret network called the Underground Railroad.³⁷³

While most white northerners disapproved of abolitionism and worried that it would tear the North and South apart, the high-profile nature of the movement and the actions of freedom seekers raised new opposition to enslavement moving west. Most white northerners’ opposition to the westward expansion of enslavement was based on self-interest. They argued that new western territories should be “free soil” so that free white people could have access to inexpensive farmland and opportunities to build wealth without having to compete with

³⁶⁴ Fehrenbacher and McAfee, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery* (2002), pp. 61 – 62 (Slaveholding Republic).

³⁶⁵ Slaveholding Republic, *supra*, at p. 63.

³⁶⁶ Slaveholding Republic, *supra*, at p. 67.

³⁶⁷ Jeff Forret, *The Notorious “Yellow House” that Made Washington, D.C. a Slavery Capital* (July 22, 2020) Smithsonian Magazine < <https://www.smithsonianmag.com/history/how-yellow-house-helped-make-washington-dc-slavery-capital-180975378/>> (as of March 14, 2022).

³⁶⁸ Northup, *supra*, at p. 43.

³⁶⁹ Bell, *Commentary: Enslaved Labor and the Capitol* (2003) United States Capitol Historical Society <<https://uschs.org/explore/historical-articles/enslaved-labor-united-states-capitol/>> (as of Jan. 24, 2022).

³⁷⁰ Mann, *Building the White House*, The White House Historical Association, <<https://www.whitehousehistory.org/building-the-white-house>> (as of Jan. 24, 2022).

³⁷¹ Forever Free, *supra*, at pp. 25 – 27.

³⁷² Forever Free, *supra*, at pp. 25 – 27.

³⁷³ Gateway, *supra*, at pp. 4 – 7.

wealthy enslavers and enslaved people.³⁷⁴ Keeping slavery out of the West became a major goal for a growing number of northerners and it put them into conflict with proslavery southerners who wanted enslavement to keep growing westward and to create new enslaving states.³⁷⁵

The conflict over the westward expansion of enslavement caused bitter political battles and violence in the years leading up to the Civil War.³⁷⁶ In the 1840s, some northerners opposed allowing Texas, an independent enslaving nation that had broken off from Mexico, to join the United States. They worried that Texas would add an enormous amount of new territory for enslavement to grow.³⁷⁷ When the United States declared war on Mexico in 1846 over conflicts related to Texas, many northerners supported the idea of outlawing enslavement in any new lands that the United States might take away from Mexico.³⁷⁸ In 1848, the U.S. did force Mexico to give up a massive territory that included today's states of California, New Mexico, Nevada, and Utah, as well as parts of present-day Arizona, Wyoming, and Colorado.³⁷⁹

A political crisis grew over whether enslavement should be allowed into these new territories or closed out forever. This crisis intensified when thousands of people rushed to California after the discovery of gold in the state and to set up a new state government with a constitution that outlawed enslavement.³⁸⁰

Northern and southern politicians in Congress tried to hold the country together by passing a set of laws called the Compromise of 1850. Together, these laws said that California could join the U.S. as a free state and that the residents of New Mexico and Utah territories could decide for themselves whether they wanted to allow enslavement.³⁸¹

The Compromise of 1850 also gave other important concessions to both the opponents and defenders of enslavement. It ended the slave trade in Washington, D.C.³⁸² It also included a harsher fugitive slave law that gave enslavers greater federal aid in chasing down enslaved people who escaped to the free states, limited freedom seekers' ability to defend themselves in court, and harshly punished people who helped freedom seekers or people who refused to participate in enforcing the law.³⁸³

This fugitive slave law further divided white northerners and white southerners. Northerners hated the new law for forcing them to participate in enslavement.³⁸⁴ Southerners viewed northern opposition to the law as a refusal to enforce the U.S. Constitution.³⁸⁵ Eventually, this conflict spread all the way to California where proslavery

³⁷⁴ Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970), pp. 11 – 18, 27 – 29, 54 - 58.

³⁷⁵ *Forever Free, supra*, at pp. 28 – 31.

³⁷⁶ *Forever Free, supra*, pp. 28 – 29.

³⁷⁷ Rathbun, *The Debate over Annexing Texas and the Emergence of Manifest Destiny 4 Rhetoric and Pub. Affairs* 459 -

³⁷⁸ Kendi, *supra*, p. 186.

³⁷⁹ Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (2013), p. 7 (Freedom's Frontier).

³⁸⁰ *Freedom's Frontier, supra*, at pp. 7 – 8.

³⁸¹ *Forever Free, supra*, at pp. 29 – 30.

³⁸² *Gateway, supra*, at pp. 119 – 120.

³⁸³ *Gateway, supra*, at pp. 124 – 125.

³⁸⁴ *Gateway, supra*, at pp. 125 – 130.

³⁸⁵ McPherson, *Battle Cry of Freedom: The Civil War Era* (1988), p. 86 (McPherson).

southerners and antislavery northerners fought over what should happen to enslaved people who escaped their enslavement once they got to the free state³⁸⁶.

B. Enslavers and the Enslaved in the California Gold Rush

While people in northern and southern states fought over whether enslavement should be allowed to expand west, enslavement already had moved to California. Even though California was supposed to be a free state with an antislavery constitution,³⁸⁷ enslavement existed in the state.³⁸⁸ More importantly, California's early state government protected the institution of enslavement and greatly limited Black Americans' civil rights.³⁸⁹

The enslavement of Black Americans had already started in California before the state adopted an antislavery constitution in 1849. California had been part of Mexico before the United States took it in the U.S.-Mexico War of 1846 to 1848. Mexico had already outlawed enslavement in 1829,³⁹⁰ but American enslavers began trafficking enslaved Black Americans into California before, during, and after the U.S.-Mexico War, especially once the gold rush began in 1848.³⁹¹

The exact number of enslaved African descended people in California is difficult to estimate. Federal and state census records, which counted the number of people in California, show around 203 enslaved African descended people living in the state in 1850 and around 178 in 1852.³⁹² These are probably undercounts because early census records are very incomplete.³⁹³ These incomplete records, though, do show support for the findings of historian Rudolph Lapp who estimated that at least 500 to 600 enslaved Black Americans lived and worked in California during the gold rush.³⁹⁴ But these numbers may be even higher because another gold rush source estimated that 1,500 enslaved African Americans lived in California in 1852.³⁹⁵

Each of these enslaved people suffered traumatic uprooting from their homes and families. Going to California meant a forced separation from family, friends, and community by a distance of thousands of miles.³⁹⁶ Even though enslavers thought of the move to California as only temporary, most gold seekers spent at least two years in California—and usually many more—due to the distance and difficulty of traveling between the East and West Coast.³⁹⁷ For example, an enslaved North Carolina man, known only as John, arrived in California with slaveholder Robert M. Dickson in 1852 and stayed at least three years, until Dickson suddenly died in

³⁸⁶ Freedom's Frontier, *supra*, at p. 9.

³⁸⁷ Freedom's Frontier, *supra*, at pp. 7 – 8.

³⁸⁸ Freedom's Frontier, *supra*, at p. 9.

³⁸⁹ Smith, Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California (Feb. 2011) 80 *Pacific Hist. Rev.* 33 (Remaking Slavery).

³⁹⁰ Freedom's Frontier, *supra*, at p. 7.

³⁹¹ Lapp, Blacks in Gold Rush California (1977), pp. 4 – 9, 130 – 139 (Lapp).

³⁹² Freedom's Frontier, *supra*, at pp. 240 – 245.

³⁹³ Poor census taking in isolated mining camps, the constant population flux, the loss or destruction of census returns, and the possible desire of enslavers to hide enslavement from census takers, make it impossible to construct a complete picture of enslavement in 1850s California. On these difficulties, see Freedom's Frontier, *supra*, at pp. 237 – 238; and Lapp, *supra*, at pp. 64 - 65.

³⁹⁴ Lapp, *supra*, at p. 65.

³⁹⁵ Freedom's Frontier, *supra*, at pp. 40, 257.

³⁹⁶ Freedom's Frontier, *supra*, at p. 44.

³⁹⁷ Rohrbough, Days of Gold: The California Gold Rush and the American Nation (1997), pp. 256 – 261 (Rohrbough).

1855.³⁹⁸ We do not know how long John remained in California or whether he ever returned to North Carolina. His journey to California may have resulted in permanent separation from his family.

Like John, more than 75 percent of the enslaved people trafficked to California were younger men or teenaged boys who ended up working as gold miners.³⁹⁹ These enslaved miners faced backbreaking and often dangerous working conditions. Placer mining, the most common type of mining in the earliest days of the California gold rush, involved digging up soil from the beds and banks of rivers and creeks. Sometimes, miners dammed up these bodies of water to get at soil deep in the beds. These practices often required standing knee- or waist-deep in cold water for several hours each day in the broiling summer heat.⁴⁰⁰

Overwork, exposure to bad weather, unclean working and living environments, a lack of nutritious food, and the absence of medical care often resulted in long-term illnesses or death by disease.⁴⁰¹ For instance, several enslaved men from western North Carolina died from cholera, a disease caused by contaminated food or water, along with their enslaver, in Tuolumne County in 1852.⁴⁰² Accidents and injury were also common, as seen in the life of an enslaved man from Kentucky, known only as Rheubin. He drowned in the American River while working in a mining area in 1851.⁴⁰³

Not all enslaved people worked directly in mining. Women and girls, who made up less than one quarter of all recorded enslaved people in California,⁴⁰⁴ often worked as servants, cooks, or laundry workers in private homes, hotels, restaurants, or boarding houses.⁴⁰⁵ People with these skills were so scarce, and their work was so valuable, that enslavers often hired out both enslaved women and men as servants. Enslavers then pocketed all or most of the enslaved people's wages from their rented labor.⁴⁰⁶

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

Much like enslaved people in the South, those in California also faced brutal violence. In 1850, one slaveholder beat an enslaved man in the town square of San Jose for disobeying him. The police arrested both men, but ultimately determined that the slaveholder was not guilty of assault because his victim was legally his property.⁴⁰⁷

In another case from 1850, an elderly enslaved couple ran away near the town of Sonora. When the slaveholder caught them, he whipped the elderly man until his blood flowed so heavily that it filled his shoes. The couple later escaped with the help of a free Black neighbor.⁴⁰⁸ One of the worst violent events also happened in 1850,

³⁹⁸ Rohrbough, *supra*, at pp. 211 – 214.

³⁹⁹ Freedom's Frontier, *supra*, at pp. 239 – 245.

⁴⁰⁰ Rohrbough, *supra*, at pp. 136 – 138.

⁴⁰¹ Baur, *The Health Factor in the Gold Rush Era* (Feb. 1949) 18 *Pacific Hist. Rev.* 97 – 105.

⁴⁰² Inscow, *Mountain Masters: Slavery and the Sectional Crisis in Western North Carolina* (1996), p. 73.

⁴⁰³ Freedom's Frontier, *supra*, at p. 259.

⁴⁰⁴ Freedom's Frontier, *supra*, at pp. 239 – 245.

⁴⁰⁵ For some examples, see Beasley, *The Negro Trail Blazers of California* (1919), pp. 70 – 71.

⁴⁰⁶ *Remaking Slavery*, *supra*, at pp. 38 – 39; Lapp, *supra*, at pp. 132 – 133.

⁴⁰⁷ *A Slave Flogged in San Jose* (Feb. 16, 1850) *Daily Alta California*, p. 2, col. 3.

⁴⁰⁸ *Slaveholding in California* (Aug. 30, 1850), *Liberator*, p. 140, col. 5.

this time in Los Angeles. A group of white southerners chased, shot at, and captured a handful of escaped enslaved people and then beat them until one almost died.⁴⁰⁹

The forced journey to California had different outcomes for the enslaved people who survived it. Many people probably worked in California for a few years before returning to enslavement in the South. Others, especially those who were allowed to keep a small portion of their wages from hiring out or digging gold, saved enough money to buy their freedom.⁴¹⁰ Finally, some enslaved people worked under formal or informal “indenture” agreements by which they promised to work for a certain number of years in California, or to earn a certain amount of money, in exchange for their freedom.⁴¹¹ Enslaved people who bought their own freedom might then also earn enough money to free their family members.⁴¹²

Large numbers of enslaved people also saw California as a place where they could take their own freedom or challenge their enslavement. The California gold mining country was large, rural, and full of diverse people, including antislavery Black and white northerners. It was much easier to run away, hide, and find allies in California than in the southern enslaving states.⁴¹³ But it is important to remember that all enslaved people who went west were forced to leave their family members and communities behind in the South. For this reason, escape was not a good option for many enslaved people because staying with enslavers was their only way to keep in touch with their families.

In this way, enslavers used their control over enslaved people’s family members to force them to cooperate. For this reason, enslaved people may have been more likely to resist in other ways besides running away. For example, some refused to work or escaped temporarily until they were allowed to keep more of their earnings.⁴¹⁴ This might have been a safer path to freedom than running away if they could earn enough money to buy themselves and their family members out of enslavement.

D. The California Legislature’s Complicity in Enslavement

California’s 1849 antislavery state constitution did little to stop the violence and exploitation that enslaved people suffered. The new constitution said that “neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”⁴¹⁵

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

⁴⁰⁹ An Illustrated History of Los Angeles County, California (1889), pp. 358 – 359; *Letter from California* (Oct. 11, 1850) *Liberator*, p. 161 col. 3.

⁴¹⁰ *Freedom’s Frontier*, *supra*, at pp. 52 - 54.

⁴¹¹ *Freedom’s Frontier*, *supra*, at pp. 57 – 63.

⁴¹² *Freedom’s Frontier*, *supra*, at pp. 54.

⁴¹³ *Freedom’s Frontier*, *supra*, at pp. 50 – 52.

⁴¹⁴ *Freedom’s Frontier*, *supra*, at pp. 52 – 54.

⁴¹⁵ Cal. Const. of 1849, art. I, § 18.

enslaved, laws to free enslaved people, laws to punish enslavers, or laws to protect Black Americans' freedom.⁴¹⁶

Proslavery white southerners took advantage of this lack of specific laws against enslavement to keep enslavement going in California. During California's 1849 Constitutional Convention, a meeting to write the state's first constitution, proslavery politicians from the South quietly accepted the law banning enslavement.⁴¹⁷ But after statehood, a large number of southern proslavery men ran for political office in California so that they were overrepresented in the state government compared to their overall population in California. White southerners with proslavery views had a great deal of power in the state legislature, the state court system, and among California's representatives in the U.S. Congress.⁴¹⁸ During the 1850s, these men used their political power to make sure that California protected enslavers. They passed and upheld laws that skirted around the antislavery constitution.

The California government's most proslavery action was passing and enforcing a state fugitive slave law in 1852.⁴¹⁹ Proslavery southerners were angry when they discovered that the federal fugitive slave law of 1850, a harsh new law to help slavecatchers chase down and re-enslave freedom seekers who escaped enslavement, did not apply to most cases in California. Enslavers could only use the federal law to chase down and re-enslave people who escaped across state lines, not those who ran away inside one state's borders.⁴²⁰

In 1852, the California state legislature dealt with this issue by changing the definition of who counted as a "fugitive slave." Instead of just covering people who escaped across state lines, California's new state law said that a fugitive slave was any enslaved person who arrived before California officially became a U.S. state in September 1850 but who refused to return to the enslaving states with their enslavers. These people could be arrested, placed under the control of their enslavers, and forced to return to the South.⁴²¹

The legal reasoning behind this law was that California's antislavery constitution did not become official until the moment of statehood. Before then, California was a federal territory controlled by the U.S. government. Proslavery southerners believed that the U.S. Constitution gave every white citizen the right to move into the federal territories and to take their property with them, including human beings who were considered property. For this reason, the law's supporters argued that the state of California had no choice except to help enslavers capture any enslaved person who they had brought in before official statehood in late 1850.⁴²²

The California legislature's decision to pass this fugitive slave law made California a much more proslavery state than most other free states. In the northeastern U.S., many free states protested the federal fugitive slave

⁴¹⁶ Freedom's Frontier, *supra*, at p. 65.

⁴¹⁷ Freedom's Frontier, *supra*, at p. 7.

⁴¹⁸ Freedom's Frontier, *supra*, at p. 8.

⁴¹⁹ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, California Statutes, at 67–69.

⁴²⁰ Freedom's Frontier, *supra*, at pp. 66 – 67.

⁴²¹ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, Cal. Stat., at 67–69; Freedom's Frontier, *supra*, at pp. 67 – 70.

⁴²² Freedom's Frontier, *supra*, at pp. 67 – 70.

law of 1850 and tried to give Black Americans more legal rights to defend their freedom against slavecatchers. California did the opposite.⁴²³

The California fugitive slave law of 1852 allowed enslavers to use violence to capture enslaved people. The law also required state officials to help enslavers capture and arrest enslaved people. Those who refused to help could lose their jobs and/or have to pay expensive fines. Finally, the California fugitive slave law, much like the federal fugitive slave law, said that people accused of being fugitive slaves could not testify in court to defend their rights.⁴²⁴ Since California had already outlawed non-white people from testifying in any court case involving whites, free Black Californians, who were usually involved in helping people escape from enslavement, could not be witnesses in any of these cases either.⁴²⁵

California's fugitive slave law was supposed to be a temporary one-year policy, but it ended up lasting much longer. In 1853, California legislators extended the fugitive slave law for another year.⁴²⁶ They did the same thing again in 1854.⁴²⁷ This meant that for three years, from 1852 to 1855, anyone accused of being a runaway from enslavement could be chased down, dragged before a court, and sent back to lifelong enslavement in the South, even if they had been living in the free state of California for five years or more.⁴²⁸

E. The California Court System's Complicity in Enslavement

California's courts, including the California Supreme Court, also participated in the enslavement of Black Americans. Free Black activists, with the help of white lawyers, challenged the legality of the fugitive slave law because it went against the antislavery state constitution. They took a test case called *In re Perkins* all the way to the California Supreme Court in 1852.⁴²⁹ The state's supreme court justices finally decided that three Black men—Carter Perkins, Robert Perkins, and Sandy Jones⁴³⁰—should be forced to go back into enslavement in Mississippi because they had arrived with their enslaver before official statehood.⁴³¹

The court said that the antislavery law in the California constitution was only a “declaration of a principle.” The constitution said the state would not tolerate enslavement, but California had no laws in place to enforce it by actually setting people free.⁴³² The justices also agreed with the state legislature that California could not give freedom to enslaved people who arrived before official statehood. The court accepted the extreme proslavery legal view that the U.S. Constitution gave enslavers the right to bring enslaved people into the federal territories

⁴²³ Freedom's Frontier, *supra*, at pp. 67 – 68.

⁴²⁴ An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, Cal. Stat., at 67–69; Freedom's Frontier, *supra*, at pp. 67 – 69.

⁴²⁵ Freedom's Frontier, *supra*, at pp. 71 – 72.

⁴²⁶ An Act to Amend an Act respecting Fugitives from Labor and Slaves Brought to this State prior to her Admission into the Union, Act of April 15, 1853, ch. 67, Cal. Stat., at 94.

⁴²⁷ An Act Amendatory to an Act to Amend an Act respecting Fugitives from Labor and Slaves Brought to this State prior to her Admission into the Union, Act of April 13, 1854, ch. 22, Cal. Stat., at 30.

⁴²⁸ Freedom's Frontier, *supra*, at pp. 71 – 72.

⁴²⁹ *In re Perkins*, 2 Cal. 424 (1852); Freedom's Frontier, *supra*, at pp. 70 – 71.

⁴³⁰ The three men had arrived in California in 1849 with Charles Perkins, the son of their enslaver. When Charles Perkins went back to Mississippi in 1851, he informally emancipated the men. Once he heard about the new California fugitive slave law, Perkins decided to use it to reclaim the men and force them to return to Mississippi as slaves.

⁴³¹ *In re Perkins*, 2 Cal. 424 (1852).

⁴³² *In re Perkins*, 2 Cal. 424 (1852), 455 – 457.

without any limits.⁴³³ This decision came before the similar one in the much more famous case of *Dred Scott v. Sandford* five years later in 1857. In that historic decision, the U.S. Supreme Court ruled that the federal government could not outlaw enslavement in any of the federal territories.⁴³⁴

Altogether, California courts were involved in at least 10 cases, connected to the freedom of 13 people, under the state fugitive slave law between 1852 and 1855. In five of those 10 cases, the courts returned seven freedom seekers to enslavement. These numbers may seem small, but this list only includes cases that were well-known enough to make it into the newspapers, or for which court records happen to survive.⁴³⁵

The small numbers also do not accurately show the terror that all Black Americans, free or enslaved, would have suffered under this law. When combined with the outlawing of Black court testimony against whites, the California fugitive slave law put every Black person at risk of being accused of running away, arrested, and enslaved without being able to defend themselves.⁴³⁶

Finally, the California fugitive slave law was important for symbolic and political reasons. In supporting the law, California's legislature and courts sent an important message: they were friendly to the southern enslaving states, they believed enslaved people should have no legal rights, and they thought that the U.S. Constitution should protect enslavers and enslavement.⁴³⁷

The California legislature finally let the state fugitive slave law expire in 1855.⁴³⁸ Still, cases involving freedom seekers from enslavement continued. At least six additional cases, involving the freedom of 19 people, came before the California courts between 1855 and the official end of enslavement in 1865.⁴³⁹ All of these cases—

⁴³³ *In re Perkins*, 2 Cal. 424 (1852), 452 – 455.

⁴³⁴ *Dred Scott v. Sandford*, 60 U.S. 393; In fact, one California antislavery attorney asserted that the lawyers for Dred Scott's enslavers cited the California case of *In re Perkins* as a precedent to support Scott's continued enslavement. For this evidence, see Cornelius Cole, "Judicial Influence--Politics upon the Bench, no. 3," scrapbook no. 1, box 38, Cole Family Papers, Charles E. Young Research Library, Department of Special Collections, University of California-Los Angeles.

⁴³⁵ These include: 1) the Lathrop case, described in Lapp, *supra*, at pp. 141 – 142; 2) the Perkins case, described in *In re Perkins*, 2 Cal. 424 (1852); 3) the case of Harriet Jordan, described in *Another Fugitive Slave Case* (Sept. 22, 1852) *Daily Alta California* p. 2, col. 2 and *A Fugitive Slave Case* (Sept. 22, 1852) *Placer Times and Transcript* p. 3, col. 1; 4) an anonymous enslaved woman in El Dorado County, described in *Fugitive Slave Case* (Oct. 2, 1852), *Sacramento Daily Union* p. 2, col. 3; 5) the case of Lucy Brown, described in *Fugitive Slave* (April 20, 1853) *Daily Alta California*, p. 2, col. 2; 6) the O'Neil case, described in *Habeas Corpus* (Jan. 19, 1854) *Sacramento Daily Union* p. 3, col. 2; 7) the case of an anonymous enslaved boy in Marysville, described in *Kidnapping* (March 31, 1854), *Daily Alta California* p.2, col. 2 and *The Kidnapping Case* (April 1, 1854) *Placer Times and Transcript* p. 2, col. 4; 8) the case of Stephen Spencer Hill, described in Johnson, *Roaring Camp: The Social World of the California Gold Rush* (2000), pp. 67 – 68, 191 (Roaring Camp); 9) the Kibbe case, described in untitled article (April 7, 1855) *Daily Alta California*, p. 2, col. 4; and 10) the case of George Mitchell, described in Lapp, *supra*, at p. 147.

⁴³⁶ *Freedom's Frontier*, *supra*, at pp. 71 – 73.

⁴³⁷ *Remaking Slavery*, *supra*, at pp. 49 – 50.

⁴³⁸ *Freedom's Frontier*, *supra*, at pp. 75 – 76.

⁴³⁹ These include: 1) The case of Bridget "Biddy" Mason, Hannah, and their enslaved children and grandchildren, described in Taylor, *In Search of the Racial Frontier: African Americans in the American West, 1528 – 1990* (1998), pp. 79 – 80 (Taylor); 2) the case of Archy Lee, described in *Freedom's Frontier*, *supra*, at pp. 76 – 78; 3) the Mathews case, described in *Alleged Abduction Case* (Jan. 21, 1859) *San Francisco Bulletin*, p. 3, col. 2; 4) the case of Nathaniel Rice, described in *Almost an 'Archy Case'* (Aug. 20, 1860) *San Francisco Bulletin*, p. 3, col. 5; 5) the case of John Turner, described in *Attempt to Kidnap* (Jan. 25, 1861) *Sacramento Daily Union* p. 3, col. 2; and 6) the case of Ada (Edith) Blue, described in Smith, *California's Last Slave Case* (March 5, 2014) *New York Times* <<https://opinionator.blogs.nytimes.com/2014/03/05/californias-last-slave-case/>> (as of Jan. 26, 2022).

including the famous 1856 freedom case of Bridget “Biddy” Mason in Los Angeles County—eventually led to enslaved people’s freedom.⁴⁴⁰

But in one example, the case of Archy Lee from 1857 to 1858, the proslavery California Supreme Court made every effort to return him to enslavement. Lee’s enslaver, Charles Stovall, forced him to go with him to California years after the state fugitive slave law had expired. But California’s supreme court justices decided that since Stovall was a young man who suffered from constant illness, and he did not know about California’s laws, he should not be punished by losing his right to own Archy Lee. It took several more lawsuits by free Black Californians, and a new decision from a federal legal official, before Lee finally won permanent freedom.⁴⁴¹

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

During the 1850s, California’s political leaders, including governors, state assemblymen, and state senators, supported other anti-Black laws. California’s 1849 Constitutional Convention restricted the right to vote to white male citizens⁴⁴² and also debated (but did not pass) an exclusion law to outlaw all future African American migration to the state.⁴⁴³

Peter Burnett, California’s first governor, opposed both enslavement and the presence of Black Americans, so he was angry that the new state constitution did not have a Black exclusion law.⁴⁴⁴ Before coming to California, Burnett had served in Oregon’s provisional government and had personally helped pass a Black exclusion law, the “Lash Law,” which said that Black Americans who arrived in Oregon would be whipped every six months until they left.⁴⁴⁵

Burnett encouraged the California legislature to pass a Black exclusion law immediately.⁴⁴⁶ He said that failing to exclude Black residents would lead to enslavers bringing more enslaved people into the state.⁴⁴⁷ When the California legislature failed to pass a Black exclusion law in 1850, Burnett gave another speech in 1851 demanding a law to ban Black residents.⁴⁴⁸ This time he claimed that any free Black residents would be so poor, and so upset about not having any civil rights under California law, that they would start a race war against whites.⁴⁴⁹ Overall, California tried to pass a Black exclusion law at least four times during the 1850s, but the state legislature was either too politically divided to agree on a law or ran out of time before the legislative session ended.⁴⁵⁰

⁴⁴⁰ Taylor, *supra*, at pp. 79 – 80.

⁴⁴¹ Freedom’s Frontier, *supra*, at pp. 76 - 78.

⁴⁴² Cal. Const. of 1849, art. II, § 1.

⁴⁴³ Richards, *The California Gold Rush and the Coming of the Civil War* (2007), pp. 73 – 77.

⁴⁴⁴ Freedom’s Frontier, *supra*, at p. 61.

⁴⁴⁵ Greg Nokes, *Black Exclusion Laws in Oregon*, Oregon Encyclopedia

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

⁴⁴⁶ Freedom’s Frontier, *supra*, at p. 61.

⁴⁴⁷ Freedom’s Frontier, *supra*, at 61.

⁴⁴⁸ State of California, *Journal of the Senate*, 2nd sess. (1851) 19 – 21.

⁴⁴⁹ State of California, *Journal of the Senate*, 2nd sess. (1851) 19 – 21.

⁴⁵⁰ Freedom’s Frontier, *supra*, at pp. 61 – 63.

California legislators focused instead on limiting the rights of Black Americans who were already in the state. In addition to outlawing African American court testimony in cases involving whites, the California legislature also made interracial marriage between Black and white people illegal,⁴⁵¹ excluded African American people from getting homesteads (free or cheap farms) on state lands,⁴⁵² refused to offer state funding for Black children to attend public schools,⁴⁵³ and would not accept petitions from Black activists who wanted to change these unjust laws.⁴⁵⁴

After free Black activists successfully rescued Archy Lee from enslavement in 1858, angry proslavery legislators tried to make these anti-Black laws even worse. They tried to pass another state fugitive slave law and to pass yet another Black exclusion law. Although both of these laws failed to pass before the end of the legislative session, the vicious anti-Black tone of state politics prompted many Black Californians to leave the state in search of greater freedom and equality.⁴⁵⁵ Starting in 1858, up to 800 African American men, women, and children migrated north to the British colonies of Vancouver Island and British Columbia, in what is now Canada, where many became British subjects.⁴⁵⁶

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

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

Between 1850 and the start of the Civil War in 1861, the political fight over enslavement's westward expansion and Black Americans' legal rights became more intense and more violent. Proslavery politicians in Congress pushed through the Kansas-Nebraska Act of 1854, a law that overturned the 1820 Missouri Compromise that had outlawed enslavement in most of the Louisiana Purchase lands.⁴⁵⁷ This meant that white settlers in the new western territories of Kansas and Nebraska territories could allow enslavement if they wanted to do so. A bloody civil war broke out in Kansas between proslavery and antislavery settlers who had rushed there to claim the new territory for their side.⁴⁵⁸ The Kansas-Nebraska Act and "Bleeding Kansas," as this violence came to be called, shocked many northerners who opposed enslavement moving into the West. They formed a new political party, the Republican Party, which was based mostly in the North and whose main goal was stopping the westward expansion of enslavement.⁴⁵⁹

As northerners became more antislavery, proslavery southerners became even louder in their defense of enslavement.⁴⁶⁰ They falsely claimed that enslavement was a gentle and humane institution, and that enslaved people got just as many benefits from the institution as white people because they received life-long care and

⁴⁵¹ An Act Regulating Marriages, April 22, 1850, ch. 140, § 3, Cal. Stat., at 424.

⁴⁵² "An Act extending the Privileges of the Homestead Law to certain Persons, and to Regulate the Creation of the Same," March 18, 1860, ch. 120, § 2, Cal. Stats., at 87 - 88.

⁴⁵³ Smith, *Dred Scott on the Pacific: African Americans, Citizenship, and Subjecthood in the North American West* (Spring 2018) 100 S. California Hist. Q. 50 (Dred Scott on the Pacific).

⁴⁵⁴ Lapp, *supra*, at pp. 196 - 197.

⁴⁵⁵ Lapp, *supra*, at pp. 239 - 245.

⁴⁵⁶ Dred Scott on the Pacific, *supra*, at p. 46.

⁴⁵⁷ Forever Free, *supra*, at pp. 30 - 31.

⁴⁵⁸ McPherson, *supra*, at pp. 145 - 149.

⁴⁵⁹ Forever Free, *supra*, at pp. 30 - 32.

⁴⁶⁰ McPherson, *supra*, at pp. 56 - 57.

support in exchange for their work.⁴⁶¹ Proslavery people also used scientific racism, the false theory that all white people were naturally smarter and more “civilized” than African descended people, to argue that enslavement was good for people of African descent because it “uplifted” them.⁴⁶²

In the late 1850s, the U.S. Supreme Court supported these false theories that Black Americans were inferior to white Americans and helped open the western U.S. to enslavement. In the 1857 case of *Dred Scott v. Sandford*, the court decided that Black Americans were not citizens of the United States and did not have any of the legal rights that white Americans had.⁴⁶³ Chief Justice Roger Taney, from the enslaving state of Maryland, explained that white people had always treated Black people as slaves and that Black Americans were “so far inferior, that they had no rights which the white man was bound to respect.”⁴⁶⁴ In addition to denying Black Americans’ claims to legal rights, the court also said that the federal government had no power to close enslavement out of the western territories.⁴⁶⁵ The U.S. Constitution allowed slaveholding southerners to take their property, including property in human beings, into the western territories.⁴⁶⁶

Free African Americans resisted their legal exclusion from U.S. citizenship both before and after the *Dred Scott* decision by claiming birthright citizenship. This was the idea that birth on U.S. soil automatically made them citizens of the United States.⁴⁶⁷ Across the first half of the 1800s, Black Americans used local courthouses and everyday interactions with state and municipal governments to establish that their US birth entitled them to the title and rights of citizenship.⁴⁶⁸ The groundwork laid by free African Americans was eventually the foundation of the Civil Rights Act of 1866, and the Fourteenth Amendment to the U.S. Constitution, which made everyone born in the United States a citizen of the United States.⁴⁶⁹

The conflict over enslavement’s westward expansion and Black Americans’ rights broke out into a full civil war in 1861. Abraham Lincoln, a Republican, won the presidential election of 1860 by promising to keep enslavement from moving West into any new territories.⁴⁷⁰ Proslavery southerners claimed Lincoln’s election was proof that all northerners wanted to end enslavement, give citizenship rights to African Americans, and cause a race war in the South.⁴⁷¹

Less than two months after Lincoln’s election, South Carolina, an enslaving state, voted to leave the United States.⁴⁷² Over the next two months, an additional six enslaving states—Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas—also left the United States. They formed the Confederate States of America,

⁴⁶¹ McPherson, *supra*, at pp. 56 – 57.

⁴⁶² Kendi, *supra*, at pp. 179 – 180.

⁴⁶³ Kendi, *supra*, at pp. 203 – 204.

⁴⁶⁴ Kendi, *supra*, at pp. 203 – 204.

⁴⁶⁵ Kendi, *supra*, at p. 203.

⁴⁶⁶ Baptist, *supra*, at p. 377.

⁴⁶⁷ Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (2018), p. 1 (Jones).

⁴⁶⁸ Jones, *supra*, at pp. 1, 9 – 10, 12 – 13.

⁴⁶⁹ Jones, *supra*, at p. 14.

⁴⁷⁰ Kendi, *supra*, at p. 212.

⁴⁷¹ Kendi, *supra*, at p. 214.

⁴⁷² Baptist, *supra*, at pp. 389 – 390.

also known as the Confederacy. Once war broke out in 1861, another four enslaving states—Virginia, Arkansas, North Carolina, and Tennessee—joined the Confederacy.⁴⁷³ The deadliest war in U.S. history had begun.

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

The Confederate States of America, also known as the Confederacy, fought to create a new nation built on the enslavement of people of African descent. The Confederate Constitution was based strongly on the U.S. Constitution, except that it outlawed the national government from ending enslavement⁴⁷⁴ and it said that white people living in any new Confederate territories had the right to own enslaved people.⁴⁷⁵

Alexander Stephens, the Confederate Vice-President, declared that, unlike the United States, the Confederacy was not based on the notion that all men were created equal. Instead, the “cornerstone” of the Confederacy, the foundation on which it was built, was “the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition.”⁴⁷⁶

For many white southerners in the Confederacy, keeping enslavement was even more important than winning independence from the United States. When the Confederacy lacked soldiers to fight in the later years of the Civil War, Confederate military leaders, including General Robert E. Lee, supported recruiting enslaved men as soldiers. The idea was that enslaved men would fight for the Confederacy in exchange for their freedom.⁴⁷⁷

In the end, recruiting enslaved men as soldiers and giving freedom to those who fought for the Confederacy was very unpopular because proslavery whites feared that it would weaken enslavement and go against the enslaving states’ reason for seceding.⁴⁷⁸ For example, Howell Cobb, a Confederate general from Georgia, said that giving guns to the enslaved was a “suicidal policy” and “[t]he day you make soldiers of them is the beginning of the end of the revolution.”⁴⁷⁹

Since many white southerners agreed with Cobb, the Confederacy did not accept the idea of freeing and arming enslaved men as soldiers until March 1865, the last month of the Civil War. The Confederacy organized a handful of enslaved men as soldiers in these very last days of the war, but none of them fought in battle.⁴⁸⁰

Unlike the Confederacy, the Union made freeing the enslaved and recruiting enslaved men into the military a major part of its war strategy. Even though Abraham Lincoln and many Republican politicians were not

⁴⁷³ Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* (2010), pp. 161 – 162 (Fiery Trial).

⁴⁷⁴ Constitution of the Confederate States, March 11, 1861, Article I, section 9, clause 4

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

⁴⁷⁵ Constitution of the Confederate States, March 11, 1861, Article IV, section 3, clause 3.

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

⁴⁷⁶ Alexander H. Stephens, ‘Cornerstone’ Speech, March 21, 1861, <https://teachingamericanhistory.org/document/cornerstone-speech/>

⁴⁷⁷ Levine, *Confederate Emancipation: Southern Plans to Free and Arm Slaves During the Civil War* (2006), pp. 26 – 36 (Levine).

⁴⁷⁸ Levine, *supra*, at pp. 40 – 49.

⁴⁷⁹ Letter from Howell Cobb to James A. Seddon, January 1, 1865, Encyclopedia Virginia,

<https://encyclopediavirginia.org/entries/letter-from-howell-cobb-to-james-a-seddon-january-8-1865/>

⁴⁸⁰ Martinez, *Black Confederates* (April 23, 2021) Encyclopedia Virginia < <https://encyclopediavirginia.org/entries/black-confederates/#heading3> > (as of March 15, 2022).

interested in freeing the enslaved at first, the actions of enslaved people pushed the United States toward ending enslavement.⁴⁸¹

Enslaved people began escaping to U.S. military sites even before the war began.⁴⁸² When the United States Army began moving into the Confederacy, large numbers of refugees from enslavement—as many as 500,000 people or 12.5 percent of the entire enslaved population—sought freedom in U.S. Army camps.⁴⁸³ These freedom seekers worked as wagon drivers, laundry workers, cooks, manual laborers, and nurses for the U.S. army.⁴⁸⁴ However, not all Black Americans served in the Army voluntarily, as a small number were kidnapped and forced to enlist against their will.⁴⁸⁵

Congress understood that these freedom seekers would play a key role in winning the war against the Confederacy. Every formerly enslaved person working for the U.S. took away resources from the South and helped the Union.⁴⁸⁶ In 1861 and 1862, Congress passed laws called “confiscation acts,” which allowed the U.S. military to give shelter and work to enslaved people who were being forced to work for the Confederacy, and, later to any enslaved person whose enslaver supported the Confederacy.⁴⁸⁷

Even as the United States was dismantling enslavement, the Union could not immediately or completely abolish the institution. With the secession of 11 Southern states, the number of slaveholding congressmen decreased accordingly, which did give opponents of enslavement a political advantage.⁴⁸⁸ However, more than 20 percent of the members of Congress during the Civil War remained either current or former slaveholders, mostly from the Border States that had not seceded.⁴⁸⁹

Abraham Lincoln was also slow to use his presidential power to free enslaved people. In September 1862, Lincoln wrote a preliminary version of the Emancipation Proclamation, which freed all the enslaved people in any area still in rebellion against the United States on the first day of the new year in 1863.⁴⁹⁰ Lincoln’s preliminary proclamation also recommended transporting newly-freed Black Americans out of the United States and resettling them elsewhere⁴⁹¹ (a scheme that Lincoln considered seriously for years until it was clear that most Black Americans refused to leave the land of their birth).⁴⁹² Then, on January 1, 1863, Lincoln signed his final Emancipation Proclamation, setting enslaved people free everywhere in the Confederacy, except the parts

⁴⁸¹ Forever Free, *supra*, at pp. 42 – 44.

⁴⁸² Berlin, *Who Freed the Slaves?: Emancipation and its Meaning*, in *Union and Emancipation: Essays on Politics and Race in the Civil War Era*, edited by David W. Blight and Brooks D. Simpson (1997), p. 111 (*Who Freed the Slaves?*).

⁴⁸³ Woodward, *Marching Masters: Slavery, Race, and the Confederate Army During the Civil War* (2014), p. 107.

⁴⁸⁴ *Who Freed the Slaves?*, *supra*, at p. 111.

⁴⁸⁵ Army Engineer to the Headquarters of the Department of the South (Apr. 3, 1863), cited in Berlin, Reidy & Rowlands, eds., *Freedom: A documentary History of Emancipation, 1861-1867*, Series II: *The Black Military Experience* (1982) p. 56.

⁴⁸⁶ *Confiscation Acts*, Mr. Lincoln and Freedom: An American History Project of the Lehrman Institute <
<http://www.mrlincolnandfreedom.org/civil-war/congressional-action-inaction/confiscation-acts/>> (as of March 15, 2022)
(*Confiscation Acts*).

⁴⁸⁷ *Confiscation Acts*, *supra*.

⁴⁸⁸ Weil and Blanco, *supra*.

⁴⁸⁹ Weil and Blanco, *supra*.

⁴⁹⁰ *Who Freed the Slaves?*, *supra*, at p. 117.

⁴⁹¹ *Who Freed the Slaves?*, *supra*, at p. 117.

⁴⁹² Forever Free, *supra*, at p. 48.

already controlled by the U.S. Army,⁴⁹³ and making no reference to removing Black Americans overseas.⁴⁹⁴ The Emancipation Proclamation also left out the enslaving Border States that had not joined the Confederacy—Maryland, Kentucky, Delaware, and Missouri—to keep them loyal to the Union.⁴⁹⁵

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

Enslaved people set the Emancipation Proclamation in motion by seeking freedom by the thousands, and they also fought for their freedom on the battlefield. Congress stopped excluding Black men from the U.S. Army in 1862⁴⁹⁶ and the Emancipation Proclamation opened the way for Black men to join the army and navy.⁴⁹⁷ Free Black Americans in Union states quickly organized military units, including the 54th Massachusetts Volunteer Infantry.⁴⁹⁸

But most Black Civil War soldiers were formerly enslaved men recruited in the South as part of the United States Colored Troops (USCT). Altogether, 178,000 Black men served in 175 USCT regiments.⁴⁹⁹ Another 29,000 Black men served in the U.S. Navy.⁵⁰⁰ By the end of the Civil War, Black servicemen made up roughly 10 percent of the entire Union military.⁵⁰¹ They fought in every major Union military campaign between 1864 and 1865,⁵⁰² and participated in 39 major battles and 410 smaller armed conflicts.⁵⁰³ Around 40,000 of these men (around 20 percent) died during the Civil War.⁵⁰⁴

The federal government and the U.S. military did not treat Black soldiers equally. Black soldiers faced doing hard labor, being fed less nutritious food than white soldiers, and having less access to medical care.⁵⁰⁵ The federal government also paid Black soldiers less than white soldiers, and Black soldiers were closed out of opportunities to lead their units as high-ranking officers because these positions were given to white men only.⁵⁰⁶ Black soldiers' resistance to poor treatment helped fix some of these inequalities.⁵⁰⁷ After Black soldiers protested strongly against lower pay, Congress finally began paying Black and white soldiers equally in

⁴⁹³ Emancipation Proclamation, Jan 1, 1863, <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation>

⁴⁹⁴ Forever Free, *supra*, at p. 51.

⁴⁹⁵ Forever Free, *supra*, at p. 50.

⁴⁹⁶ Militia Act of 1862, 12 Stat. at 597 – 600 < <http://www.freedmen.umd.edu/milact.htm> >

⁴⁹⁷ Forever Free, *supra*, at p. 52.

⁴⁹⁸ Forever Free, *supra*, at p. 52.

⁴⁹⁹ Mouser, *The United States Colored Troops (1863-1865)* (July 22, 2017) BlackPast.org. <<https://www.blackpast.org/african-american-history/united-states-colored-troops-1863-1865/>> (as of Jan. 26, 2022) (Mouser).

⁵⁰⁰ Mintz, *Historical Context: Black Soldiers in the Civil War*, Gilder Lehrman Institute of American History < <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-black-soldiers-civil-war> > (as of Jan. 26, 2022) (*Black Soldiers in the Civil War*).

⁵⁰¹ *Black Soldiers in the Civil War*, *supra*.

⁵⁰² Mouser, *supra*.

⁵⁰³ Hanna, African American Recipients of the Medal of Honor: A Biographical Dictionary, *Civil War through Vietnam War* (2002), p. 10 (Hanna).

⁵⁰⁴ *Black Soldiers in the US Military During the Civil War* (Sept. 1, 2017) National Archives <<https://www.archives.gov/education/lessons/blacks-civil-war>> (as of Jan. 26, 2022) (National Archives)

⁵⁰⁵ *Black Soldiers in the Civil War*, *supra*.

⁵⁰⁶ *Black Soldiers in the Civil War*, *supra*.

⁵⁰⁷ *Black Soldiers in the Civil War*, *supra*.

1864.⁵⁰⁸ By the end of the war, 80 Black men also won their promotion to high-ranking officer positions.⁵⁰⁹ For a further discussion the U.S. military's discriminatory treatment of Black Americans, see Chapter [XX]

These Black servicemen fought bravely to win their freedom and to claim equal rights with white Americans. Sattira A. Douglas, a Black woman whose husband, H. Ford Douglas, fought in the war, explained that Black soldiers wanted "to strike the blow that will at once relieve them of northern prejudice and southern slavery."⁵¹⁰ They fought courageously because they had "everything to gain in this conflict: liberty, honor, social and political position," and losing the war would result in "slavery, [and] prejudice of caste."⁵¹¹

For instance, the 54th Massachusetts Volunteer Infantry, the most famous northern Black unit, and the one in which Frederick Douglass's two sons served, led a heroic attack on Fort Wagner, South Carolina in July 1863.⁵¹² More than 40 percent of the men died or were wounded in the attack.⁵¹³ One of the survivors of Fort Wagner, Sergeant William Harvey Carney, eventually was awarded the Medal of Honor, the highest military honor in the United States, for saving the 54th Massachusetts flag from the enemy.⁵¹⁴ Carney was among 26 Black Civil War soldiers who earned this prestigious medal for bravery above and beyond the call of duty.⁵¹⁵

Black soldiers also faced more violence on the battlefield than white soldiers. The Confederacy threatened to kill or enslave Black soldiers who Confederates captured as prisoners of war.⁵¹⁶ Abraham Lincoln tried to protect Black soldiers by warning the Confederacy that the Union would kill or force into hard labor one Confederate prisoner of war for every Black soldier that Confederates killed or enslaved.⁵¹⁷

Still, some Confederates targeted Black servicemen with violence. In 1864, Confederates attacked a much smaller Union force of mostly Black soldiers at Fort Pillow in Tennessee. The Confederates entered the fort and killed 300 men, 200 of whom were Black.⁵¹⁸ Witnesses said that Confederates killed these Black soldiers instead of capturing them as prisoners of war.⁵¹⁹ After this massacre, it became popular for Black soldiers to shout "Remember Fort Pillow!" as they went into battle to fight for their lives and their freedom.⁵²⁰

⁵⁰⁸ National Archives, *supra*.

⁵⁰⁹ National Archives, *supra*.

⁵¹⁰ Douglas to Robert Hamilton (June 9, 1863) quoted in *The Black Abolitionist Papers, Volume V, The United States, 1859 – 1865*, edited by C. Peter Ripley (1992), p. 212.

⁵¹¹ Douglas to Robert Hamilton, June 9, 1863, quoted in *The Black Abolitionist Papers, Volume V, The United States, 1859 – 1865*, edited by C. Peter Ripley (1992), p. 213.

⁵¹² *Black Soldiers in the Civil War, supra*.

⁵¹³ *Black Soldiers in the Civil War, supra*.

⁵¹⁴ Hanna, *supra*, at pp. 22 – 25.

⁵¹⁵ Hanna, *supra*, at p. vii.

⁵¹⁶ *Forever Free, supra*, at p. 53.

⁵¹⁷ Lincoln, Order by the President, July 30, 1863, Freedmen and Southern Society Project, <http://www.freedmen.umd.edu/retal.htm>

⁵¹⁸ *The Fort Pillow Massacre, 1864: A Spotlight on a Primary Source*, Gilder Lehrman Institute of American History <<https://www.gilderlehrman.org/history-resources/spotlight-primary-source/fort-pillow-massacre-1864>> (as of Jan. 26, 2022) (*Fort Pillow*).

⁵¹⁹ *Fort Pillow, supra*.

⁵²⁰ *Fort Pillow, supra*.

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

The United States won the Civil War against the Confederacy in 1865, effectively ending enslavement in all of the ex-Confederate states. Enslaved people in Texas, one of the very last places reached by the United States Army, did not hear that they had been legally freed until June 19, 1865.⁵²¹ This was two and a half years after the Emancipation Proclamation. Formerly enslaved Black Texans began celebrating June 19th as “Juneteenth,” a day to remember their hard-fought battle for freedom.⁵²²

Six months later, on December 6, 1865, the required number of states finally approved the Thirteenth Amendment to the U.S. Constitution outlawing enslavement and making emancipation permanent.⁵²³ The Amendment said that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”⁵²⁴ Section 2 of the Thirteenth Amendment also empowered Congress to pass “appropriate legislation” to enforce the elimination of enslavement,⁵²⁵ which the US Supreme Court later interpreted as the power to outlaw all “ ‘badges and incidents’ of slavery.”⁵²⁶

X. Reconstruction and the Lost Cause

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

After the end of the Civil War and the outlawing of enslavement, the United States went through a process known as Reconstruction, a period of rebuilding and reuniting the country.⁵²⁷ Abraham Lincoln had begun this process during the Civil War.⁵²⁸ But Lincoln’s assassination in April 1865 put Reconstruction in the hands of his vice-president, Andrew Johnson, and Republicans in Congress.⁵²⁹

President Johnson was a former Democrat from Tennessee who remained loyal to the Union. He disapproved of the Confederacy and wanted to punish wealthy enslavers who participated in it.⁵³⁰ But he also wanted to keep white people in charge of the South and opposed giving equal political rights to Black Americans.⁵³¹ As Johnson wrote in an 1868 letter to the governor of Missouri: “This is a country for white men, and by God, as long as I am President; it shall be a government for white men.”⁵³²

⁵²¹ *The Historical Legacy of Juneteenth* (June 19, 2019) National Museum of African American History and Culture, Smithsonian Institution <<https://nmaahc.si.edu/blog-post/historical-legacy-juneteenth>> (as of Jan. 26, 2022) (*Juneteenth*).

⁵²² *Juneteenth, supra*.

⁵²³ Kolchin, *supra*, at p. 207.

⁵²⁴ US Constitution, Amdt. 13, section 1, clause 1.

⁵²⁵ US Constitution, Amdt. 13, section 2, clause 1.

⁵²⁶ Greene and McAward, *A Common Interpretation: The Thirteenth Amendment* (Dec. 6, 2016) National Constitution Center <<https://constitutioncenter.org/blog/a-common-interpretation-the-thirteenth-amendment>> (as of March 11, 2022).

⁵²⁷ *Forever Free, supra*, at pp. xix – xx.

⁵²⁸ *Forever Free, supra*, at pp. 61 – 63.

⁵²⁹ *Forever Free, supra*, at pp. 79 – 80.

⁵³⁰ *Forever Free, supra*, at pp. 78 – 79.

⁵³¹ *Forever Free, supra*, at pp. 79 – 80, 109 – 110.

⁵³² Petrella and Loggins, “*This is a Country for White Men*”: *White Supremacy and U.S. Politics* (Jan. 5, 2017) Black Perspectives, African American Intellectual History Society <<https://www.aaihs.org/this-is-a-country-for-white-men-white-supremacy-and-u-s-politics/>> (as of March 15, 2022).

Johnson fought with Republicans in Congress over the direction of Reconstruction and Black Americans' civil rights, which eventually led to Johnson's impeachment.⁵³³ Congressional Republicans took over the process of Reconstruction and passed new laws aimed at giving formerly enslaved people basic legal rights.⁵³⁴

Congressional Republicans had several overlapping goals: re-growing the southern cotton economy, rebuilding the ex-Confederate states' governments before allowing them to come back fully into the United States, and making sure that formerly enslaved people could no longer be held in enslavement.⁵³⁵ Some of the most progressive Republicans (known as Radical Republicans) wanted to completely change social, economic, and political life in the South to support Black equality.⁵³⁶ But moderate and conservative Republicans mostly focused on laws that would give Black Americans basic legal and economic rights such as making contracts to work and getting paid for their work.⁵³⁷

The formerly enslaved and former enslavers in the South had their own goals. Formerly enslaved people wanted more than just basic legal rights. They wanted to be independent, out of the control of their former enslavers, and to own small farms where they could work for themselves.⁵³⁸ They wanted to educate themselves and their children.⁵³⁹ They wanted the ability to move around in search of family members sold away during enslavement.⁵⁴⁰ Finally, they wanted political rights such as the right to vote and hold office.⁵⁴¹

Former enslavers refused to acknowledge Black Americans' new freedom. In every ex-Confederate state, white southerners passed laws called "Black Codes."⁵⁴² Black Codes included vagrancy laws that allowed police to arrest any Black person without an employer and force them to work. Black Codes in some states also forced Black parents to give control over their children to their former enslavers. State courts generally punished Black Americans more harshly than white Americans charged with the same crimes.⁵⁴³

Republicans in Congress would have to force former enslavers in the South to treat the formerly enslaved fairly, equally, and with basic human dignity. Republicans briefly considered passing laws that would take away land from wealthy Confederates and give it to formerly enslaved people so that they could support themselves as independent farmers.⁵⁴⁴ Most white Americans, even in the North, thought these policies were too "radical" because they took away ex-Confederates' individual property rights and set a dangerous precedent that wealth could be redistributed to poorer members of society.⁵⁴⁵

Republicans' Reconstruction policies focused instead on making sure that formerly enslaved Black southerners had access to basic civil rights, such as rights to make contracts, own property, keep their families together,

⁵³³ Forever Free, *supra*, at pp. 107 – 113, 116 – 117, 145 - 146.

⁵³⁴ Forever Free, *supra*, at pp. 113 – 122.

⁵³⁵ Forever Free, *supra*, at pp. 111 – 115.

⁵³⁶ Forever Free, *supra*, at pp. 111 – 113.

⁵³⁷ Forever Free, *supra*, at pp. 113 - 115, 142.

⁵³⁸ Forever Free, *supra*, at pp. 82 - 83, 91.

⁵³⁹ Forever Free, *supra*, at pp. 88 – 89.

⁵⁴⁰ Forever Free, *supra*, at pp. 83 – 84.

⁵⁴¹ Forever Free, *supra*, at pp. 89 – 90.

⁵⁴² Forever Free, *supra*, at pp. 95 – 96.

⁵⁴³ Forever Free, *supra*, at pp. 95 – 96.

⁵⁴⁴ Forever Free, *supra*, at pp. 112, 141 – 42.

⁵⁴⁵ Forever Free, *supra*, at pp. 141 – 42.

have physical safety, and be treated fairly by the courts and the criminal justice system.⁵⁴⁶ In 1866, Congress passed a civil rights act that made anyone born in the United States a citizen, without regard to their race, color, or previous enslavement.⁵⁴⁷ Newly freed Black citizens were supposed to have the same equality under the law “as is enjoyed by white citizens.”⁵⁴⁸

Republicans feared that a federal law like the Civil Rights Act of 1866 could be overturned easily if another political party came into power. They pushed for a constitutional amendment that would make Black citizenship and civil rights permanent.⁵⁴⁹

The Fourteenth Amendment, approved by Congress in 1866 and ratified by the required number of states in 1868, said that any person born in the United States was a citizen (birthright citizenship); that state governments could not take away the life, liberty, or property of any person (citizen or non-citizen) without due process of law (following standard legal procedures); and that the states had to treat every person equally under the law.⁵⁵⁰ Black activists’ had finally won their decades-long battle for birthright citizenship, and all people born in the United States now benefitted from their work.⁵⁵¹

Congress soon decided that formerly enslaved people’s legal and economic rights could not be protected unless Black Americans had political rights, specifically rights to vote and hold office.⁵⁵² The Fifteenth Amendment, approved by Congress in 1869 and ratified by the required number of states in 1870, made it illegal for states to discriminate against voters based on “race, color, or previous condition of servitude.”⁵⁵³ The intention was to stop the states from denying voting rights to African American men.⁵⁵⁴ As with the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment gave Congress the power to pass future legislation to ensure that the states followed the law.⁵⁵⁵

F. California Rejects Reconstruction Civil Rights Legislation

The legislature and governor of California strongly opposed Congress’s Reconstruction civil rights laws and tried to stop them.⁵⁵⁶ During the Civil War, Black Californians had fought for and won new rights, such as the right to testify in court cases involving whites.⁵⁵⁷ This was because white Republicans controlled the legislature and governorship during the early 1860s and took power away from the proslavery Democrats who used to

⁵⁴⁶ Forever Free, *supra*, at pp. 113 – 115.

⁵⁴⁷ Forever Free, *supra*, at pp. 113 – 115.

⁵⁴⁸ An Act to Protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication (the Civil Rights Act of 1866), US Statutes, Chapter 31, sec. 1

⁵⁴⁹ Forever Free, *supra*, at pp. 117 – 118.

⁵⁵⁰ US Constitution, Amdt. 14, section 1.

⁵⁵¹ Jones, *supra*, 5, 14.

⁵⁵² Pildes and Smith, *Common Interpretation: The Fifteenth Amendment*, National Constitution Center <

<https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xv/interps/141> > (as of March 15, 2022) (*Fifteenth Amendment*).

⁵⁵³ US Constitution, Amdt. 15, section 1.

⁵⁵⁴ *Fifteenth Amendment*, *supra*.

⁵⁵⁵ US Constitution, Amdt. 15, section 2.

⁵⁵⁶ Freedom’s Frontier, *supra*, at pp. 209 – 214.

⁵⁵⁷ Lapp, *supra*, at pp. 206 – 209.

control the state.⁵⁵⁸ But many white Californians opposed Congressional civil rights laws to protect formerly enslaved people and worried that these laws would apply to other non-white people in the state.⁵⁵⁹

Democrats came back into power in California in 1867 by promising white voters that they would fight against Reconstruction and any new law that would make African Americans, Native Americans, or Chinese Americans equal to whites or give them voting rights.⁵⁶⁰

California Democrats who controlled the state legislature kept this promise when it came time to ratify the Fourteenth and Fifteenth Amendments.⁵⁶¹ California's legislature ignored the Fourteenth Amendment and never considered it.⁵⁶² The legislature voted to reject ratifying the Fifteenth Amendment in 1870.⁵⁶³ Enough other states had ratified the amendments that they became part of the U.S. Constitution without California's approval.⁵⁶⁴ Still, California would continue its resistance to Reconstruction civil rights legislation by refusing to ratify the Fourteenth Amendment until 1959⁵⁶⁵ and the Fifteenth Amendment until 1962.⁵⁶⁶

California also led the way in establishing the legal defense for segregation during Reconstruction. In 1874, the Supreme Court of California made a destructive decision that the rest of the United States eventually followed. In the case of *Ward v. Flood*, California's Supreme Court justices decided that segregation in the state's public schools did not violate the Fourteenth Amendment as long as Black children and white children had equal access to similar schools and educational opportunities.⁵⁶⁷ Twenty-two years later, the U.S. Supreme Court made a similar "separate but equal" decision in the case of *Plessy v. Ferguson*. This decision supported the segregation of public facilities in the United States for almost 60 years.⁵⁶⁸

G. The Destruction of Reconstruction

Black Americans fought for and took advantage of many new legal rights during Reconstruction, but this time period of growing legal equality was short. White supremacist terrorist groups, first the Ku Klux Klan and then later militias such as the White League of Louisiana and the Red Shirts of South Carolina, eventually overthrew the Reconstruction governments that Black and white Republicans had established together in the South.⁵⁶⁹ (For a detailed discussion of African Americans' political accomplishments during Reconstruction and white supremacist terrorism in the U.S. South, see Chapters 3 and 4 of this report).

Immediately before the end of the Civil War, Congress created the Bureau of Refugees, Freedmen, and

⁵⁵⁸ Freedom's Frontier, *supra*, at pp. 177 – 178.

⁵⁵⁹ Freedom's Frontier, *supra*, at pp. 207 – 208.

⁵⁶⁰ Freedom's Frontier, *supra*, at pp. 207 – 213.

⁵⁶¹ Freedom's Frontier, *supra*, at pp. 210 – 213.

⁵⁶² Freedom's Frontier, *supra*, at p. 210.

⁵⁶³ Freedom's Frontier, *supra*, at p. 213.

⁵⁶⁴ Freedom's Frontier, *supra*, at p. 213.

⁵⁶⁵ Waite, *Early California lawmakers also preached #resistance—but against immigration* (Aug. 3, 2018) Los Angeles Times <<https://www.latimes.com/opinion/op-ed/la-oe-waite-california-14-amendment-20180803-story.html>> (as of Jan. 26, 2022).

⁵⁶⁶ Cottrell, It took 92 years for California to ratify the 15th Amendment (June 26, 2020) The Union <<https://www.theunion.com/news/steve-cottrell-it-took-92-years-for-california-to-ratify-the-15th-amendment/>> (as of March 15, 2022)

⁵⁶⁷ *Ward v. Flood*, 48 Cal. 36 (1874).

⁵⁶⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵⁶⁹ Forever Free, *supra*, at pp. 171 – 177, 194 – 197.

Abandoned Lands, commonly known as the “Freedmen’s Bureau,” to provide for the welfare of formerly enslaved Black Americans, including through “issues of provisions, clothing, and fuel, as [necessary] for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children,” according to the statute.⁵⁷⁰ The Freedmen’s Bureau had the authority to supervise labor relations in the South, with the mandate to provide education, medical care, and legal protections for formerly enslaved Black Americans, along with the authority to rent out and eventually sell allotments of abandoned or confiscated land to free Black Americans.⁵⁷¹

The original goal of the Freedmen’s Bureau Act was the more radical notion of allowing Black Americans the means to become self-sufficient.⁵⁷² In the closing days of the Civil War, on January 16, 1865, as Union General William Tecumseh Sherman marched through Georgia, he issued Special Field Order No. 15 “providing that each negro might have forty acres at a low price on long credit.”⁵⁷³ Many free Black Americans and northern Republicans believed that land reform in the South—granting formerly enslaved Black Americans access to their own land—is the true way that formerly enslaved people can be free from their enslavers.⁵⁷⁴ The resulting independent Black farmers would provide a power base for a new social and political order in the postwar South.⁵⁷⁵

This new vision of social relations in the South was opposed by southerners and northerners who opposed enslavement but did not believe in full equality for Black Americans.⁵⁷⁶ A large number of Black landowners would threaten plantations, and the southern economy and social system.⁵⁷⁷ White capitalists in the North and South believed that Black freedom should mean Black workers continuing to work on a plantation, although they would now be paid.⁵⁷⁸ They did not believe that Black Americans should be able to support themselves independently.⁵⁷⁹ After the assassination of Abraham Lincoln, Andrew Johnson became president—and President Johnson supported this view, proclaiming, “This is a country for white men, and by God, as long as I am president, it shall be a government for white men.”⁵⁸⁰

Although the Freedmen’s Bureau tried to assert and protect the rights of the formerly enslaved, the Bureau under President Johnson perpetuated racist stereotypes, paternalistic attitudes, and continued to limit Black Americans’ economic and social power. Bureau agents often viewed formerly enslaved Black Americans as children, unprepared for freedom, and needing to be taught the importance of work and wages.⁵⁸¹ The

⁵⁷⁰ Freedmen’s Bureau Bill (Act of March 3, 1865, Chap. XC, 13 Stat. 507), <http://www.freedmen.umd.edu/fbact.htm>.

⁵⁷¹ Reich, *A Working People: A History of African American Workers since Emancipation* (2013) p. 13.

⁵⁷² Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 16, citing Fleming, “Forty Acres and a Mule,” *North American Review* 182 (1906): 729, <http://www.jstor.org/stable/25105565>.

⁵⁷³ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 16, citing Fleming, “Forty Acres and a Mule,” *North American Review* 182 (1906): 729, <http://www.jstor.org/stable/25105565>.

⁵⁷⁴ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 12.

⁵⁷⁵ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 12.

⁵⁷⁶ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) pp. 13-14.

⁵⁷⁷ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 12.

⁵⁷⁸ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 19.

⁵⁷⁹ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 19.

⁵⁸⁰ Johnson, *The Papers of Andrew Johnson*, vol. 10: February-July 1866 (Bergeron, ed. 1992), pp. 174-175.

⁵⁸¹ Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 15.

Freedmen's Bureau abandoned the possibility of land reform in the South, and focused on labor relations between Black and white southerners instead.⁵⁸²

White southern Democrats, who wanted to keep Black Americans working on plantations and out of politics, retook control of the southern states.⁵⁸³ The long and expensive process of Reconstruction lost popularity with white northerners, and many of them wanted to give up on the project of trying to change the racial, legal, and economic relationships of the South.⁵⁸⁴

During the U.S. presidential election of 1876, white northern Republicans abandoned Reconstruction in the South in exchange for keeping control of the presidency of the United States.⁵⁸⁵ After the election, Ohio Republican Rutherford B. Hayes and New York Democrat Samuel Tilden both claimed to be the winner.⁵⁸⁶ It was well-known that white southerners had used violence, threats, and fraud to keep Black Americans from voting for the Republican Hayes.⁵⁸⁷ The national leadership of the Republican and Democratic parties made a secret deal: in exchange for Democrats acknowledging Hayes's victory in the presidential election, Republicans would reduce federal support for Reconstruction.⁵⁸⁸ Soon after Hayes became president in 1877, he pulled US troops out of key areas in the South where they had been protecting Black Americans' political rights and Republican officeholders.⁵⁸⁹ Hayes's action effectively ended direct federal protection of Black Americans' political rights in the South.⁵⁹⁰

The U.S. Supreme Court played its own important role in defeating Reconstruction.⁵⁹¹ In the 1870s, the court made several decisions that greatly reduced the power of the Fourteenth Amendment and federal laws to protect Black equality.⁵⁹²

The last of these decisions happened in the 1883 *Civil Rights Cases*, a group of several cases that African Americans had brought under the federal Civil Rights Act of 1875.⁵⁹³ That act had made it illegal for theaters, hotels, and public transportation companies such as railroads to exclude Black Americans.⁵⁹⁴

The Supreme Court decided in 1883 that the Civil Rights Act of 1875 was unconstitutional because the Fourteenth Amendment, on which it was based, only gave Congress the power to stop state governments from discriminating against Black Americans. Congress could not outlaw individual people and private business owners from discriminating against Black Americans; only the state governments themselves could do that.⁵⁹⁵

⁵⁸² Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) p. 18.

⁵⁸³ Forever Free, *supra*, at pp. 195 – 197, 200 – 203.

⁵⁸⁴ Forever Free, *supra*, at pp. 190 – 193, 197.

⁵⁸⁵ Forever Free, *supra*, at p. 198.

⁵⁸⁶ Forever Free, *supra*, at pp. 197 – 198.

⁵⁸⁷ Forever Free, *supra*, at pp. 197 – 198.

⁵⁸⁸ Forever Free, *supra*, at p. 198.

⁵⁸⁹ Forever Free, *supra*, at p. 198 – 199.

⁵⁹⁰ Forever Free, *supra*, at p. 198 – 199.

⁵⁹¹ Forever Free, *supra*, at p. 194.

⁵⁹² Forever Free, *supra*, at p. 194. The key cases in the 1870s were the *Slaughter-House Cases*, 83 U.S. 36 (1873) and *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁵⁹³ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁵⁹⁴ An Act to protect all Citizens in their Civil and Legal Rights, 18 US Stat. 335-337.

⁵⁹⁵ *Civil Rights Cases*, 109 U.S. 3 (1883).

The Supreme Court decision in the *Civil Rights Cases* legalized racial discrimination and segregation in most public places. It set the stage for the “separate but equal” decision in *Plessy v. Ferguson* (1896) and practices such as housing discrimination and education segregation.⁵⁹⁶

H. The Rise of the Lost Cause Myth

After Reconstruction ended, white southerners created the myth of the Confederate “Lost Cause” in order to downplay the horrors of enslavement and terrorize Black Americans.⁵⁹⁷ Southerners who opposed Black civil rights falsely argued that the Civil War had little to do with enslavement. The Lost Cause myth claims that the Confederacy had fought a heroic war to save the southern way of life from being destroyed by the North.⁵⁹⁸ This untruthful history also claims that the Confederacy lost the Civil War only because the more populated, industrialized North overpowered white southerners, not because enslavement or the Confederate cause was wrong.⁵⁹⁹

The Lost Cause is not just a story that white southerners tell. It is a weapon of terror against Black Americans and a rejection of the southern defeat in the Civil War and Black civil rights. At the end of the 1800s and the start of the 1900s, white southerners began building thousands of monuments and statues all over the South to celebrate famous Confederates, and to name important buildings after Confederate figures.⁶⁰⁰

In the 1910s, the Ku Klux Klan, which the federal government had broken up during Reconstruction, re-emerged and began terrorizing and murdering African Americans. The combination of violence against Black Americans and the constant sight of monuments celebrating the enslaving Confederacy were terrorist tactics meant to silence Black Americans and keep them from challenging white supremacy.⁶⁰¹

Lost Cause symbols became especially important to white southerners who tried to stop the Civil Rights Movement in the 1950s and 1960s. White southerners who opposed African American civil and human rights beat and murdered Black (and some white) civil rights activists. They also began regularly flying versions of the battle flag of the Army of Northern Virginia (the Confederate “Stars and Bars,” popularly known as the “Confederate Flag”) to threaten civil rights activists and to show that they were determined not to give equality to Black Americans.⁶⁰²

Even though defenders of the Lost Cause have argued that Confederate monuments and flags stand for “heritage, not hate,” and they claim that removing them erases history, this argument ignores the true history of these objects. White southerners have used them strategically as symbols of terror to try and keep African Americans from fighting for full equality.⁶⁰³

⁵⁹⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵⁹⁷ Janney, *The Lost Cause* (Feb. 24, 2022) Encyclopedia Virginia < <https://encyclopediavirginia.org/entries/lost-cause-the/> > (as of March 15, 2022) (Janney).

⁵⁹⁸ Janney, *supra*.

⁵⁹⁹ Janney, *supra*.

⁶⁰⁰ *Whose Heritage? Public Symbols of the Confederacy* (February 1, 2019) Southern Poverty Law Center < <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy#findings> > (as of Jan. 26, 2022) (*Whose Heritage?*).

⁶⁰¹ *Whose Heritage?*, *supra*.

⁶⁰² *Whose Heritage?*, *supra*.

⁶⁰³ *Whose Heritage?*, *supra*.

I. California and the Lost Cause

In California, white Americans popularized the Lost Cause mythology with national audiences. The Hollywood film industry was responsible for bringing the Lost Cause to movie screens and making it popular with many white Americans, North and South, during the first half of the 1900s.⁶⁰⁴

D.W. Griffith's blockbuster film, *The Birth of a Nation* (1915), falsely showed members of the Ku Klux Klan as heroes who were protecting white women and southern honor against violent African Americans (mostly played by white actors who painted their faces black). This film was the main factor behind the revival of the Ku Klux Klan in the early 1900s.⁶⁰⁵ *Gone with Wind* (1939) celebrated the pre-Civil War South by showing a world of kindly enslavers, loyal and happy enslaved people, and heroic Confederates fighting for the southern way of life.⁶⁰⁶

White Californians also built Confederate monuments across the state. For example, a plaque honoring Confederate President Jefferson Davis, set up by the United Daughters of the Confederacy, stood along a Bakersfield, California, highway for almost 80 years.⁶⁰⁷ A monument in the Hollywood Forever Cemetery in Los Angeles, California, built in 1925, celebrated all Confederates who died on the Pacific Coast.⁶⁰⁸ Although both of these monuments have now been removed, their existence reminds us of California's complicity in the United States' long history of enslavement, white supremacist terrorism, and systemic racism against African Americans.

XI. Conclusion

In order to steal and profit from the labor of millions of human beings for 244 years, the colonial American and U.S. governments built an institution of enslavement that was markedly different than the type of slavery that the world had seen before. Americans passed laws that enshrined a racial hierarchy with white people at the top and Black people at the bottom. This hierarchy was based on the false idea that all white people were naturally superior in intelligence and morality to all Black people, and white Americans then used these ideas to justify the lifelong enslavement of people of African ancestry and their descendants. American law enslaved babies from the moment they were born, through adulthood, until the moment they died, and ensured that all their descendants suffered the same fate. During certain time periods, state governments even passed laws that made it illegal for enslavers to voluntarily free enslaved people from their bondage. Enslavement was a badge pinned on people of African descent because of the color of their skin.

When slavery formally ended in 1863, this racial hierarchy continued functioning. The end of Reconstruction and the rise of the Lost Cause brought a long period of political, social, economic, and legal inequality for African Americans that whites enforced through terrorism, violence, and exploiting legal loopholes. This period

⁶⁰⁴ Boyd, *Gone with the Wind and the damaging effect of Hollywood racism* (June 13, 2020) *The Guardian* <<https://www.theguardian.com/film/2020/jun/13/gone-with-the-wind-hollywood-racism>> (as of March 15, 2022) (Boyd).

⁶⁰⁵ *Forever Free*, *supra*, at pp. 217 – 219 (photo essay by Joshua Brown).

⁶⁰⁶ Boyd, *supra*.

⁶⁰⁷ Knight, *Commentary: A Fitting End to the Last Confederate Monument in Southern California* (July 8, 2020) *Los Angeles Times* <<https://www.latimes.com/entertainment-arts/story/2020-07-08/last-confederate-monument-southern-california>> (as of Jan. 26, 2022).

⁶⁰⁸ Waite, *The Struggle over Slavery Was Not Confined to the South, LA Has a Confederate Memorial Problem Too* (August 4, 2017) *Los Angeles Times* <<https://www.latimes.com/opinion/op-ed/la-oe-waite-socal-confederates-20170804-story.html>> (as of Jan. 26, 2022).

was known as “Jim Crow,” after a racist stereotyped character popular with whites, and it lasted roughly 60 – 70 years, from the 1890s to the Civil Rights Movement of the 1950s and 1960s. Without the laws that made enslavement legal, American citizens, aided by government officials, terrorized, murdered, and abused their Black neighbors to maintain this badge of slavery, as discussed in Chapter 3. During this period, white southerners gradually took away Black southerners’ rights to vote by using violent intimidation against Black Americans and legal loopholes such as literacy tests and poll taxes to disqualify Black voters, as discussed in Chapter 4. As Black people fled violence and oppression in the rural South to find economic opportunity in the North and the West, government officials maintained the racial hierarchy by putting up barriers to prevent Black and white Americans from living the same neighborhoods, as discussed in Chapter 5, and allowing private companies to prevent Black and white Americans from holding the same jobs, as discussed in Chapter 10. New systems of forced labor, such as convict leasing, sharecropping, and debt peonage kept formerly enslaved Black Americans working for whites on cotton plantations or in other industries, as discussed in Chapter 10. Much of this forced labor rested on discrimination in law enforcement, judicial decisions, and prison sentencing that doomed Black Americans to slavery-like conditions, as discussed in Chapter 11.

Government actions relegated Black Americans to mostly urban neighborhoods with underfunded schools, as discussed in Chapter 6, and menial and service jobs. US Supreme Court decisions such as the *Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896) excluded Black Americans from using public facilities such as schools on equal terms with whites and validated discrimination in housing that excluded Black Americans from desirable neighborhoods. These legal decisions and violent practices caused direct physical harm to Black Americans by segregating them in polluted, unhealthy neighborhoods, as discussed in Chapter 7 and denying them equal access to quality healthcare, as discussed in Chapter 12.

The racial hierarchy laws created during enslavement also created deeply harmful and untrue racial stereotypes, which have followed Black Americans throughout American history, as discussed in Chapter 9. Inequalities in the criminal justice system, child welfare laws, housing, and healthcare harmed the survival of Black families, as discussed in Chapter 8, while discriminatory, predatory banking practices and employment discrimination prevented many Black Americans from accumulating generational wealth to pass down to their children, as discussed in Chapter 13.

400 years of discrimination has resulted in an enormous and persistent wealth gap between Black and white Americans, as discussed in Chapter 13, and continuous and compounding harm on the health of Black Americans, as discussed in Chapter 12.

As the following chapters will show, these badges of slavery continue to be embedded in American society today and have never been eliminated. The governments of the United States and the state of California have never apologized to or compensated Black Americans for these harms.

Chapter 3. Racial Terror

I. Introduction

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

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

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

¹ See Equal Justice Initiative (EJI), [Lynching in America: Confronting the Legacy of Racial Terror](#) (2015), p. 3 (as of April 4, 2022) (EJI 2015).

² *Ibid.* at p. 3.

³ Coates, [The Case for Reparations](#), *The Atlantic* (June 2014) (as of April 4, 2022) (Case for Reparations); Byman, [The Failure of Counterterrorism After the Civil War](#), *Lawfare* (Aug. 22, 2021) (as of April 4, 2022) (Lawfare); Niraj Chokshi, [Racism at American Pools Isn't New: A Look at a Long History](#), *N.Y. Times* (Aug. 1, 2018) (as of April 4, 2022).

⁴ EJI 2015, *supra*, at p. 3, 7; EJI, [Lynching in America: Confronting the Legacy of Racial Terror: Third Edition](#) (2017), pp. 48-50, 65, 73 (as of April 4, 2022) (EJI 3d ed.); Wilkerson, *Caste: The Origins of Our Discontents* (2020), p. 151 (Caste); Lee, [How America's Vast Racial Wealth Gap Grew: By Plunder](#), *N.Y. Times*, (Aug. 14, 2019) (as of April 4, 2022) (Lee); *Case for Reparations, supra*; *Lawfare, supra*.

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

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

⁷ Niedermeier, *The Color of the Third Degree* (2019), pp. 17-19 (Third Degree); United Nations General Assembly, *Report of the Working Group of Experts on People of African Descent on its mission to the United States of America* (Aug. 18, 2016), p. 16 (U.N. Working Group Report); Love, [The Trayvon Martin case reveals a vigilante spirit in the US justice system](#), *The Guardian*, (Apr. 7, 2012) (as of April 4, 2022) (Trayvon Martin).

⁸ Lee, *supra*.

⁹ Bump, [The long history of black voter suppression in American politics](#), *The Washington Post*, (Nov. 2, 2016) (as of April 4, 2022) (Bump); Buhl, [Donald Trump's Call to Militia to 'Watch' Polling Places Raises Fears of Voter Intimidation](#), *Newsweek*, (Oct. 17, 2020) (as of April 4, 2022).

economically, and socially subordinate Black Americans. Finally, this chapter will discuss the consequences of racial terror, such as intergenerational trauma and the racial wealth gap, which continue to this day.

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

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

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

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

Rebellions of the enslaved were also violently suppressed.²¹ For example, white officials purportedly discovered an extensive conspiracy of insurrection in Charleston, South Carolina in 1822.²² The enslaved, led by the free Black carpenter Denmark Vesey, allegedly plotted to take over the city and kill all of its white residents, including women and children.²³ After the discovery of the alleged conspiracy, Vesey was arrested,

¹⁰ Caste, *supra*, at p. 17.

¹¹ *Ibid.*

¹² *Id.* at pp. 19, 52.

¹³ *Id.* at p. 151.

¹⁴ *Ibid.*

¹⁵ U.S. Const., 10th Amend.; *United States v. Morrison* (2000) 529 U.S. 598, 618.

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

¹⁷ *Id.* at pp. 152, 154.

¹⁸ *Id.* at pp. 153-55.

¹⁹ *Ibid.*

²⁰ *Id.* at pp. 151-154.

²¹ See, e.g., Thomas Wentworth Higginson, [The Story of Denmark Vesey](#) The Atlantic (June 1861) (as of April 4, 2022) (Higginson).

²² *Id.*

²³ *Id.*

along with dozens of enslaved persons.²⁴ Confessions and testimony against the alleged conspirators were procured in at least some instances by coercion and torture.²⁵ The prosecution had no physical evidence to support its case.²⁶ In the end, Vesey and thirty-four others were executed, although no insurrection ever occurred and no white person was actually killed.²⁷ Indeed, there is significant doubt as to whether any such insurrection plot ever existed.²⁸ Then-governor of South Carolina Thomas Bennet condemned the trial as hasty and unreliable; his brother-in-law, Supreme Court Justice William Johnson, described the proceedings as perjury and “legal murder.”²⁹

After the formal end of enslavement, Black southerners began to gain political and economic influence. As discussed in Chapter 2 on Enslavement, the Reconstruction Acts of 1867 gave voting rights to Black Americans, and following the laws’ enactment, Black voter turnout reached nearly 90 percent in many jurisdictions.³⁰ During Reconstruction, approximately 2,000 Black men held a public office, including 600 Black state legislators, 18 Black state executive officials, 16 Black representatives elected to Congress, and two of the nation’s first Black senators.³¹ Nearly twenty percent of all public officials in the South were Black between 1870-1876.³² In spite of violence and other obstacles, Black southerners began owning land, particularly in the Upper South (Delaware, Kentucky, Maryland, Missouri, North Carolina, Tennessee, Virginia, and Washington, D.C.).³³ Black land ownership grew to such an extent that by 1910, nearly half of the Black farmers in the Upper South owned land.³⁴ In addition, Black literacy rates surged from approximately 20 percent in 1870 to approximately 70 percent in 1910.³⁵

In 1876, partially as a result of a disputed presidential election, Reconstruction came to an end. In exchange for Democrats not blocking the certification of Republican Rutherford B. Hayes as President, Hayes and other Republicans agreed to remove federal troops from key locations of political conflict in the South.³⁶ With the end of Reconstruction, supporters of white supremacy returned to power.³⁷ They regained political, social, and economic control, and prevented Black Americans from voting.³⁸ After federal troops no longer had a strong presence in the South, white southerners intensified the violent oppression of Black Americans.³⁹ As shown in

²⁴ *Id.*
²⁵ *Id.*; see also Michael P. Johnson, *Denmark Vesey and His Co-Conspirators* (Oct. 2001) 58(4) *William and Mary Quarterly* 915, 919, 945-48 (Johnson).
²⁶ Johnson, *supra*, at p. 949.
²⁷ Higginson, *supra*.
²⁸ See generally Johnson, *supra*.
²⁹ Philip D. Morgan, *Conspiracy Scares* (Jan. 2002) 59(1) *William and Mary Quarterly* 159, 163.
³⁰ EJI 3d ed., *supra*, at p. 10.
³¹ Foner, [South Carolina’s Forgotten Black Political Revolution](#) Slate (Jan. 31, 2018) (as of April 4, 2022); EJI 3d ed., *supra*, pp. 10-12.
³² Lawfare, *supra*; Ifill, [Creating a Truth and Reconciliation Commission for Lynching](#) (Summer 2003) 21 *Law & Ineq.* 263, 273 (Ifill).
³³ Hinson, *Land Gains, Land Losses: The Odyssey of African Americans Since Reconstruction* (May-Sept. 2018) 77(3-4) *Am. J. of Economics and Sociology* 893, 909-10 (Hinson).
³⁴ *Id.* at p. 911, citing Schweninger, *Black Property Owners in the South, 1790-1915* (1990), p. 176.
³⁵ National Center for Education Statistics, [120 Years of American Education: A Statistical Portrait](#) (Jan. 1993), p. 21, tbl. 6 (as of April 4, 2022).
³⁶ Lawfare, *supra*.
³⁷ Third Degree, *supra*, at p. 16.
³⁸ *Ibid.*
³⁹ Case for Reparations, *supra*; Caste, *supra*, at p. 155; Third Degree, *supra*, at p. 17.

detail below, racial terror took on many forms throughout American history: lynchings, massacres, intimidation, murders, beatings, and police killings. Today, extrajudicial killings of Black Americans by police and vigilantes represent a modern form of racial terror.⁴⁰

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

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

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

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

Throughout American history, from enslavement to the present day, private citizens and government actors have perpetrated and enabled racial terror. Ordinary people committed heinous acts of violence, while others

⁴⁰ U.N. Working Group Report, *supra*, at p. 16; Trayvon Martin, *supra*.

⁴¹ Caste, *supra*, at p. 228.

⁴² Ifill, *supra*, at p. 274.

⁴³ Lawfare, *supra*.

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

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

⁴⁶ Martha T. McCluskey, *Facing the Ghost of Cruikshank in Constitutional Law* (Nov. 2015) 65(2) *Journal of Legal Education* 278, 280-81 (McCluskey); see generally Michael S. Smith, *The Lost Freedmen's Town of Hamburg, South Carolina* (2021); see also Renetta DuBose, *The Untold Story of Hamburg, SC*, WJBF (Feb. 22, 2021) (as of April 4, 2022).

⁴⁷ McCluskey, *supra*, at pp. 280-81.

⁴⁸ *Ibid.*

⁴⁹ EJI 2015, *supra*, at p. 7.

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

⁵¹ Caste, *supra*, at pp. 90-91, 151, 155; Third Degree, *supra*, at p. 20; Jordan, *A History Lesson: Reparations for What?* (2003) 58 *N.Y.U. Ann. Surv. Am. L.* 557, 593 (Jordan); Ward, *Critical Race Theory and Empirical Methods: Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts* (2016) 2016 *Wis. L. Rev.* 575, 607-08 (Ward); Ifill, *supra*, at pp. 267, 279-80, 284.

did nothing, watched, or obstructed investigations.⁵² Meanwhile, government officials often did nothing to prevent or prosecute racial terror—and sometimes encouraged or assisted the perpetrators.⁵³ Indeed, white supremacists and Ku Klux Klan members have held positions in all levels of American government.⁵⁴

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

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

A. Origins of the Ku Klux Klan

The first iteration of the Ku Klux Klan took shape in early 1866, during Reconstruction, and formally disbanded in 1869.⁵⁸ After the Civil War ended, many white southerners resented Reconstruction and its policies, which threatened their superiority.⁵⁹ Reconstruction policies led to social, political, and economic gains by formerly enslaved people.⁶⁰

Around this time, the KKK emerged to oppose Reconstruction, led by former Confederate General Nathan Bedford Forrest and a group of Confederate veterans in Pulaski, Tennessee.⁶¹ This first version of the KKK consisted of ex-Confederates and other white southerners, and it was tacitly supported by most white southerners.⁶² Their hooded costumes were intended to represent the ghosts of Confederate soldiers and evoke the history of slave patrols.⁶³ Their hoods also allowed KKK members to remain anonymous as they spread fear

⁵² EJI 2015, *supra*, at p. 7; EJI 3d ed., *supra*, at p. 73; Case for Reparations, *supra*; Klanwatch Project of the Southern Poverty Law Center, *Ku Klux Klan: A History of Racism and Violence* (2011), pp. 14, 18 (as of April 4, 2022) (SPLC History); Eckstrand, *The Ugliness of Trolls: Comparing the Strategies/Methods of the Alt-Right and the Ku Klux Klan* (2018) 10(3) *Cosmopolitan Civil Societies: an Interdisciplinary J.* 41, 46, (as of April 4, 2022) (Eckstrand).

⁵³ EJI 2015, *supra*, at pp. 3, 7; EJI 3d ed., *supra*, at pp. 48-50, 73; Case for Reparations, *supra*; SPLC History, *supra*, at pp. 14-15, 18; Eckstrand, *supra*, at pp. 46-47; Lawfare, *supra*; Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*, at p. 6 (May 2020) (as of April 4, 2022) (Human Rights Watch).

⁵⁴ See, e.g., Tara McAndrew, *The History of the KKK in American Politics*, JSTOR Daily (Jan. 25, 2017) (as of April 4, 2022).

⁵⁵ SPLC History, *supra*, at p. 4.

⁵⁶ *Id.* at pp. 4-5, 7, 25-26, 51.

⁵⁷ See generally SPLC History.

⁵⁸ *Id.* at pp. 9, 15.

⁵⁹ *Id.* at pp. 8, 10.

⁶⁰ Ifill, *supra*, at pp. 272-274; Balleck, *Hate Groups and Extremist Organizations in America: An Encyclopedia* (2019), at pp. 179-180 (Hate Groups); Lawfare, *supra*.

⁶¹ Hate Groups at p. 179.

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

⁶³ *Id.* at pp. 10-11.

and violence.⁶⁴ In order to re-exert control over the Black labor force and maintain white supremacy, the KKK used fear tactics and violence, such as robbery, rape, arson, and murder.⁶⁵ The KKK was effective at targeting its violence and intimidation tactics at Black voters, including hanging and beating Black officeholders.⁶⁶ It is unknown how many Black people were killed by white supremacists during Reconstruction, though it is estimated to be in the high thousands, if not tens of thousands.⁶⁷

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

State and local governments often looked the other way or supported the KKK. Although state governments passed laws in response to the KKK's violence, these laws were seldom locally enforced.⁷⁴ Sheriffs, prosecutors, local witnesses, and jurors were sympathetic to white supremacy or afraid of retaliation.⁷⁵ Some attacks were even led by local police.⁷⁶ Thus, few KKK members ever went to prison for their crimes.⁷⁷ And while the federal Enforcement Acts of the early 1870s helped lead to the dissolution of the KKK, the Supreme Court largely nullified the Enforcement Acts with its 1876 decision in *United States v. Cruikshank*, which hindered federal prosecutions and enabled white supremacist violence.⁷⁸

B. Second Iteration of the Ku Klux Klan

The second iteration of the Ku Klux Klan began in 1915, continued through the late 1920s and 1930s, and disbanded by 1944.⁷⁹ After the end of Reconstruction, the KKK remained dormant until 1915, when the California film industry played a unique role in reviving the KKK. That year, celebrated filmmaker D.W.

⁶⁴ Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture Violence in the American South* (Apr. 1998) 28(2) British J. or Political Sci., at p. 277, (as of Apr. 5, 2022) (Clarke).

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

⁶⁶ SPLC History, *supra*, at p. 15; Egerton, *Terrorized African-Americans Found Their Champion in Civil War Hero Robert Smalls* Smithsonian Magazine (Sept. 2018) (as of April 4, 2022).

⁶⁷ Lawfare, *supra*.

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

⁶⁹ *Ibid.* at p. 15; United States Senate, *The Enforcement Acts of 1870 and 1871, United States Senate* (as of April 4, 2022).

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

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

⁷² SPLC History, *supra*, at p. 15.

⁷³ Clarke, *supra*, at p. 277.

⁷⁴ Lawfare, *supra*.

⁷⁵ *Ibid.*

⁷⁶ SPLC History, *supra*, at p. 13.

⁷⁷ *Ibid.* at p. 15.

⁷⁸ McCluskey, *supra*, at pp. 280-81.

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

Griffith released *The Birth of a Nation*, which was based on Thomas Dixon's novel *The Clansman*.⁸⁰ Made in and around Los Angeles, *The Birth of a Nation* is acknowledged both as one of the most pioneering and most racist films in cinematic history.⁸¹ President Woodrow Wilson praised *The Birth of a Nation* and showed the film at the White House—a federal government endorsement of white supremacy and anti-Blackness.⁸²

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

The Birth of a Nation was a nationwide blockbuster, and its popularity led directly to the KKK's revival just months after its release.⁸⁷ During a five-year national roadshow of the film from 1915 to 1919, a scholar found that the film incited significant increases in racial violence.⁸⁸ The counties where the film was shown were five times more likely to have a lynching or race riot, and three times more likely to have a KKK chapter after the movie's arrival.⁸⁹ As a result of this surge in recruitment, there were four to five million KKK members by the mid-1920s.⁹⁰ The film remained a KKK recruiting tool for decades.⁹¹

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

⁸⁰ Corliss, [D.W. Griffith's The Birth of a Nation 100 years Later: Still Great, Still Shameful](#) Time (Mar. 3, 2015) (as of April 4, 2022) (Corliss).

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

⁸² Roy Rosenzweig Center for History and New Media, [The Birth of a Nation and Black Protest](#) (April 17, 2015) (as of April 5, 2022) (Rosenzweig); SPLC History, *supra*, at p. 21.

⁸³ Rosenzweig, *supra*.

⁸⁴ Brody, [The Worst Thing About "Birth of a Nation" Is How Good It Is](#) The New Yorker (Feb. 1, 2013) (as of April 4, 2022); NPR, [100 Years Later, What's The Legacy Of 'Birth Of A Nation'?](#) (Feb. 8, 2015) (as of April 4, 2022) (NPR *Birth of a Nation*); SPLC History, *supra*, at p. 21; Corliss, *supra*.

⁸⁵ Ifill, *supra*, at p. 277.

⁸⁶ Corliss, *supra*.

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

⁸⁸ James F. Smith, [Lessons on Dangers of Using Media to Spread Racial Hatred and Violence](#) (Feb. 9, 2021) (as of April 4, 2022) (Using Media).

⁸⁹ *Ibid.*

⁹⁰ Hate Groups, *supra*, at p. 180.

⁹¹ NPR *Birth of a Nation*, *supra*; Hudson, *West of Jim Crow: The Fight Against California's Color Line* (2020), p. 171 (Hudson).

⁹² Bringhurst, *supra*, at p. 368.

⁹³ *Ibid.*

⁹⁴ Hate Groups, *supra*, at p. 180.

⁹⁵ *Ibid.*

Regardless of its political turn, the second iteration of the KKK remained violent. In the summer of 1921, the KKK engaged in whippings and tar-and-feather raids.⁹⁶ According to the Southern Poverty Law Center, the KKK also “use[d] acid to brand the letters ‘KKK’ on the foreheads of [Black Americans], Jews, and others” whom the KKK considered to be anti-American.⁹⁷ In the mid-1920s, the KKK launched a terror campaign including lynchings, shootings, and whippings against Black Americans, Jews, Catholics, Mexicans, and other immigrant groups.⁹⁸

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

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

A third version of the Ku Klux Klan arose in the 1950s and 1960s.¹⁰⁰ While the KKK still exists today, it has been in decline since the late 1980s.¹⁰¹ This time, the KKK returned to its anti-Black roots to counter the social and political gains sought by the Civil Rights Movement.¹⁰² This version of the KKK was particularly violent against Black Americans and civil rights workers in the South.¹⁰³ For example, in 1963, the KKK detonated a bomb at a Birmingham Baptist church that killed four Black girls and injured several more.¹⁰⁴ KKK members also murdered three civil rights workers in Mississippi in 1964.¹⁰⁵ As recently as 1981, Klansmen in Mobile, Alabama lynched Black 19-year-old Michael Donald.¹⁰⁶ His mother brought a civil suit against the KKK and won a \$7 million award after one of the perpetrators admitted he was carrying out an organization-wide directive to harass, intimidate, and murder Black people.¹⁰⁷

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

⁹⁶ SPLC History, *supra*, at p. 18.

⁹⁷ *Ibid.*

⁹⁸ *Id.* at p. 20.

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

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

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

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

¹⁰³ Hate Groups, *supra*, at p. 180.

¹⁰⁴ *Id.* at pp. 180-81.

¹⁰⁵ *Id.* at p. 181.

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

¹⁰⁷ *Ibid.*

¹⁰⁸ *Id.* at pp. 14, 18.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*; Eckstrand, [The Ugliness of Trolls: Comparing the Strategies/Methods of the Alt-Right and the Ku Klux Klan](#) (2018) 10(3) *Cosmopolitan Civil Societies: an Interdisciplinary J.* 41, 46, (as of Apr. 5, 2022) (Eckstrand).

¹¹² Eckstrand, *supra*, at p. 46.

information about potential targets.¹¹³ Thus, where the KKK led, white society followed, participated, and looked on.

While the KKK no longer enjoys the degree of sociopolitical power it once held,¹¹⁴ contemporary white supremacist groups have taken up the KKK's mantle to threaten the dignified existence of Black Americans and others. The 2017 white nationalist rally in Charlottesville,¹¹⁵ the Proud Boys,¹¹⁶ and a 2021 "White Lives Matter" rally in Orange County¹¹⁷ have variously invoked the symbols, propaganda, and ideology of the KKK.

D. California

Neither racial terror nor the Ku Klux Klan were confined to the South.¹¹⁸ During Reconstruction, the federal government did not send troops to California, as a non-slave state.¹¹⁹ This allowed white supremacy groups to flourish in the West.¹²⁰ The western KKK complemented their southern counterparts by violently asserting white superiority against the perceived threat of racial outsiders.¹²¹ As the Black population in California was relatively small at the time, the KKK and other hate groups mainly terrorized Chinese communities.¹²²

During the second iteration of the KKK, California became a "strong Klan state" with a sizable and violent Klan resurgence in the 1920s.¹²³ Shortly after the release of *The Birth of a Nation*, the KKK emerged in San Francisco, establishing a KKK presence in California for the first time.¹²⁴ KKK chapters in Los Angeles, Oakland, Fresno, Riverside, Sacramento, Anaheim, and San Jose soon followed.¹²⁵

The KKK's national magazine, *Imperial Night-Hawk*, shows that California ranked 11th out of all 48 states in terms of the number of KKK events held between March 1923 and November 1924.¹²⁶ By hosting 89 events in that 20-month period, California even outranked the old enslavement states of Mississippi, Louisiana, North Carolina, and Tennessee.¹²⁷

California's KKK consisted of prominent individuals who held positions in civil leadership and police departments.¹²⁸ Its members were largely middle-class, educated Protestants who, in socioeconomic terms, were

¹¹³ *Id.* at p. 47.

¹¹⁴ Hate Groups, *supra*, at pp. 181-183.

¹¹⁵ Lois Beckett, [The year in Nazi propaganda: images of white supremacy in Trump's America](#) The Guardian (Dec. 27, 2017) (as of Apr. 5, 2022).

¹¹⁶ Southern Poverty Law Center, [Proud Boys](#) (as of Apr. 5, 2022).

¹¹⁷ Cardine, Turner, Szabo, [A KKK propaganda drop and a planned White Lives Matter rally rattle 2 O.C. communities](#) L.A. Times (Mar. 31, 2021) (as of Apr. 5, 2022).

¹¹⁸ Waite, [The Forgotten History of the Western Klan](#) The Atlantic (Apr. 6, 2021) (as of Apr. 5, 2022) (Waite); Bringhurst, *The Ku Klux Klan in a Central California Community: Tulare County During the 1920s and 1930s* (Winter 2000) 82(4), Southern California Quarterly 365, 368 (Bringhurst).

¹¹⁹ Waite, *supra*.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Kent, [The Hidden History of Culver City Racism](#) Streets Blog LA (Apr. 5, 2019) (as of Apr. 5, 2022).

¹²⁴ Bringhurst, *supra*, at p. 370.

¹²⁵ Hudson, *supra*, at pp. 171-72.

¹²⁶ *Id.* at p. 172.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

not much different from their neighbors.¹²⁹ These KKK members registered to vote (in higher percentages than non-members), joined civic organizations like the Chamber of Commerce and rotary club, and sought political power by running for elected office or supporting candidates who sympathized with the KKK.¹³⁰

The California KKK exerted significant political influence in the 1920s, winning seats on city councils, gaining control of the press and airwaves in some towns, and pressuring other public officials.¹³¹ In 1922, for example, Democrat Thomas Lee Woolwine lost his bid for governor, suggesting that his fight against the KKK was a political liability.¹³² The KKK backed winning candidate Republican Friend Richardson—who was believed to have been a KKK member, and which he never denied.¹³³

While the KKK declined on a national scale in the 1930s with the Great Depression, and after the 1925 trial and conviction of the KKK's then-leader, California's KKK remained active through the 1940s and into the 1950s.¹³⁴ As detailed below, the KKK had branches—and spread terror—throughout the state, and exercised significant power in local governments.

1. The Ku Klux Klan in Southern California.

Los Angeles was the epicenter of Ku Klux Klan activity in California.¹³⁵ Prominent and numerous city government officials were KKK members or had KKK ties, including the mayor, district attorneys, and police officers.¹³⁶ Due to aggressive recruitment efforts beginning in 1921, several KKK branches formed in Los Angeles.¹³⁷ KKK chapters also formed in the nearby communities of Santa Monica, Huntington Park, Redondo Beach, Hermosa Beach, Long Beach, Glendale, San Pedro, and Anaheim.¹³⁸

By the 1920s, the Los Angeles Police Department (LAPD) was “a den of corruption” that was infiltrated with KKK members who practiced retaliatory policing in the city's Black neighborhoods.¹³⁹ “In speaking to the police, you are frequently talking to the Klan,” warned the *Eagle*, a Black Los Angeles newspaper.¹⁴⁰ Los Angeles Deputy Sheriff Nathan Baker regularly recruited KKK members to the Los Angeles Police Department (LAPD) and was thought to be a member of the KKK himself.¹⁴¹

On April 22, 1922, more than 100 armed and hooded Klansmen broke into the Inglewood home of Spanish immigrants.¹⁴² The Klansmen forced the couple's two teenage daughters to disrobe and ransacked the house.¹⁴³

¹²⁹ *Ibid.*

¹³⁰ *Id.* at p. 173.

¹³¹ *Ibid.*

¹³² *Id.* at p. 182.

¹³³ *Ibid.*

¹³⁴ *Id.* at p. 188.

¹³⁵ Bringhurst, *supra*, at pp. 369-70.

¹³⁶ Brenda Elaine Stevenson, *The Contested Murder of Latasha Harlins: Justice, Gender, and the Origins of the LA Riots* (2013), p. 186; Hudson, *supra*, at p. 179.

¹³⁷ Bringhurst, *supra*, at pp. 369-70.

¹³⁸ *Id.* at pp. 370.

¹³⁹ Hudson, *supra*, at p. 180.

¹⁴⁰ *Ibid.*

¹⁴¹ *Id.* at p. 178.

¹⁴² *Id.* at pp. 177-78.

¹⁴³ Harrison, [From the Archives: Ku Klux Klan images from 1920s Southern California](#) LA Times (Oct. 4, 2017)= (as of Apr. 4, 2022) (Harrison).

The Klansmen then brutally beat, bound, and gagged the father and his brother, dragged them to a car, and dumped them six miles away.¹⁴⁴ Thirty-seven Klansmen were indicted for the Inglewood raid, but in a trial that the National Association for the Advancement of Colored People (NAACP) called a “farce,” all were acquitted.¹⁴⁵

The raid prompted an investigation by the District Attorney, who obtained membership lists revealing that the KKK had infiltrated all levels of state and local government.¹⁴⁶ There were 3,000 KKK members in Los Angeles County, over 1,000 in the city limits, and three KKK members on the District Attorney’s own staff.¹⁴⁷ LAPD Chief Louis D. Oaks and County Sheriff William I. Traeger were also identified as members.¹⁴⁸ Law enforcement from nearly every city in California appeared on the list, including 25 San Francisco police officers.¹⁴⁹

Even after the Inglewood raid exposed the breadth of KKK membership, and after the Legislature passed an anti-KKK bill, the KKK still proceeded to hold nine events in Los Angeles between March 1923 and April 1924.¹⁵⁰ The raid and its aftermath inspired KKK members and caused the KKK to redouble its efforts.¹⁵¹ In 1929, KKK supporters helped elect John C. Porter, who had a past with the KKK, as mayor of Los Angeles.¹⁵² And in the 1930s, even after enthusiasm for the KKK began to subside, the KKK still remained active in Los Angeles and the surrounding community, with rallies attended by thousands of people and cross-burnings.¹⁵³ In December 1939, the KKK ceremoniously marched through downtown Los Angeles burning crosses in full view of thousands of people.¹⁵⁴

Beyond Los Angeles, the KKK was active throughout Southern California, including in Orange County, Riverside, and San Diego.¹⁵⁵

In Anaheim, by 1923, the KKK had almost 900 members,¹⁵⁶ out of a total city population of about 6,000.¹⁵⁷ Its members generally held more prestigious jobs than the rest of the white population and were politically and civically active.¹⁵⁸ The Anaheim KKK burned crosses and held rallies drawing thousands of people.¹⁵⁹ One such event, an initiation in July 1924, attracted 20,000 people and included a parade of Klansmen with a

¹⁴⁴ *Ibid.*

¹⁴⁵ *Id.* at pp. 181-82.

¹⁴⁶ *Id.* at pp. 169, 179.

¹⁴⁷ *Id.* at p. 179.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Id.* at p. 180.

¹⁵⁰ *Id.* at p. 183.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*; L.A. Burrito, [The Los Angeles Mayor Who Was Also a KKK Leader](#) L.A. TACO (July 8, 2020) (as of Apr. 4, 2022) (*Los Angeles Mayor*).

¹⁵³ [Ku Klux Klan Makes Its Reappearance in Full Regalia in Los Angeles](#), Jewish Daily Bulletin (July 28, 1932), p. 2, (as of Apr. 5, 2022); Los Angeles Mayor, *supra*.

¹⁵⁴ Hudson, *supra*, at p. 189.

¹⁵⁵ Bringhurst, *supra*, at p. 370.

¹⁵⁶ Hudson, *supra*, at p. 173.

¹⁵⁷ See Anaheim Public Library, [1950s – 1980s](#) (1980s subsection), City of Anaheim (as of Mar. 23, 2022).

¹⁵⁸ Hudson, *supra*, at p. 173.

¹⁵⁹ La Tour, [A Brief History of the Ku Klux Klan in Orange County: Note on the Banality of Evil](#) Fullerton Observer (Jan. 7, 2019) (as of Apr. 5, 2022) (Orange County KKK History).

marching band, airplanes, and fireworks.¹⁶⁰ By spring 1924, the KKK dominated the Anaheim city council, which had initiated a program to replace non-KKK city employees with its own members. Their plan succeeded: ten new policemen, out of 15, were members of the KKK.¹⁶¹

In Brea, five of the town's first eight mayors were Klansmen, as were six of the 10 councilmen who sat on the board of trustees, half of the city's treasurers, half of the city's engineers, half of its city clerks, half of its city marshals, and two-thirds of its fire chiefs between 1924 and 1936.¹⁶² And in Fullerton, from 1918 to 1930, seven of 18 city councilmen were Klansmen.¹⁶³

The Riverside KKK were successful recruiters, claiming over 2,000 members in the 1920s.¹⁶⁴ In Riverside, the KKK held mass events that attracted thousands of people and included parades with marching bands, floats, and KKK members in full regalia.¹⁶⁵ The Riverside KKK prioritized policing interracial contact, which meant monitoring Black residents' activities.¹⁶⁶ For example, the KKK was preoccupied with the City's 1922 settlement with the NAACP to desegregate a white-only pool.¹⁶⁷ In response, they targeted Black swimmers with humiliation and violence.¹⁶⁸ The Riverside KKK gained political influence, and in 1927, helped elect a mayor, Edward M. Deighton, who openly boasted about his support from the KKK.¹⁶⁹ In the 1930s, Riverside Sheriff Carl Rayburn openly sympathized with the KKK, and "KIGY," meaning "Klan I Greet You," was painted on streets and sidewalks throughout the county.¹⁷⁰ The KKK's membership in Riverside decreased in the 1930s, but they still made appearances and burned crosses.¹⁷¹

The San Diego KKK, in the 1920s and 1930s, focused on using violence and other intimidating tactics to "chas[e] the wetbacks across the border."¹⁷² The KKK in the 1930s also merged with other racist and fascist groups, such as the Silver Shirts League, that were focused on attacking Black Americans, Latino Americans, and Jews.¹⁷³

2. The Ku Klux Klan in the Central Valley.

The Ku Klux Klan had an active presence in Fresno and Kern County.¹⁷⁴ As of 1922, a local Fresno newspaper reported over 240 alleged Klansmen in Fresno County, and the KKK held public events and parades with as

¹⁶⁰ *Ibid.*

¹⁶¹ Hudson, *supra*, at p. 173.

¹⁶² Orange County KKK History, *supra*.

¹⁶³ *Ibid.*

¹⁶⁴ Hudson, *supra*, at p. 187.

¹⁶⁵ *Id.* at p. 183.

¹⁶⁶ *Id.* at p. 186-187.

¹⁶⁷ *Id.* at p. 186.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Id.* at p. 187.

¹⁷⁰ *Id.* at p. 186.

¹⁷¹ *Id.* at p. 187.

¹⁷² Larralde and Castillo, [San Diego's Ku Klux Klan](#) (Spring/Summer 2000) 46(2-3) San Diego Historical Society Quarter (as of Apr. 5, 2022) (San Diego KKK).

¹⁷³ *Ibid.*

¹⁷⁴ Bringhurst, *supra*, at p. 370.

many as 600 attendees during the early to mid-1920s.¹⁷⁵ The investigation in the aftermath of the Inglewood raid also revealed that a number of Fresno officials were KKK members.¹⁷⁶

In the early 1920s, the KKK actively recruited in Kern County and developed what was considered the most violent KKK chapter in California.¹⁷⁷ In Kern County, in 1922 alone, there were over 100 cases of KKK violence, which included extrajudicial beatings, kidnappings, and tar-and-feathering.¹⁷⁸ In 1922, a local newspaper reported that several high-ranking officials in Kern County were associated with the KKK, including the deputy sheriff, the police chief, the Board of Supervisors chair, and a former assistant district attorney.¹⁷⁹ Although the KKK's influence started to decline in the 1930s,¹⁸⁰ white supremacist culture persisted in Kern County in the decades that followed.¹⁸¹ As recently as the 1960s, a sign across the Kern River between Oildale and Bakersfield read "Nigger, Don't Let the Sun Set on You in Oildale."¹⁸² There were also unconfirmed reports that a similar sign was spray painted on the same bridge as recently as the late 1990s.¹⁸³ In 1981, three KKK members were arrested for burning a cross on the front lawn of a Black family in the Kern County town of Boron, and KKK rallies were reported as recently as 1987.¹⁸⁴ In the early 1990s, Black motorists were attacked on the streets of Oildale by whites hurling racial slurs and epithets.¹⁸⁵ In the 2000s, members of the white supremacist group the Peckerwoods were involved in multiple violent attacks against Black, Hispanic, and Asian American residents that involved the use of racial slurs.¹⁸⁶

3. The Ku Klux Klan in Northern California and the Bay Area.

The Ku Klux Klan established a presence in the Bay Area during the 1920s.¹⁸⁷ By 1922, there were KKK chapters in San Francisco, Oakland, and San Jose.¹⁸⁸ In addition to burning crosses, KKK chapters in the Bay Area held rallies, initiation events, and public parades, which were attended by thousands.¹⁸⁹ In Oakland, the politically active KKK took control of the city government to create policy that would limit Black home ownership, including by embracing restrictive covenants.¹⁹⁰ Between 1921 and 1924, the Oakland KKK grew to at least 2,000, and the chapter enjoyed political success well into the 1920s, winning an election for county

¹⁷⁵ Ramirez, ["Violators of Almost Every Right": Analyzing the Ku Klux Klan of 1920's](#) (2017) 26 *Ex Post Facto: J. of the History Students at San Francisco State Univ.* 145, 147, > (as of Apr. 5, 2022) (Ramirez), citing *District Attorney Announces Names On Kleagle's Lists*, *Fresno Morning Republican* (May 5, 1922).

¹⁷⁶ Bringhurst, *supra*, at p. 370.

¹⁷⁷ *Id.* at p. 393.

¹⁷⁸ *Ibid.*; Eissinger, [Kern County: California's Deep South](#) (March 2011) (as of Apr. 5, 2022) at pp. 7-8 (Eissinger); Ramirez, *supra*, at p. 155, citing *Night Riders Halt Raids But Marked Victims Still Flee*, *Fresno Morning Republican* (Mar. 6, 1922); Hudson, *supra*, at p. 180.

¹⁷⁹ Ramirez, *supra*, at p. 155, citing *Chief of Police, Supervisor Head, Among Members*, *Fresno Morning Republican* (May 7, 1922).

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

¹⁸¹ Eissinger, *supra*, at pp. 10-19.

¹⁸² *Id.* at p. 19.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Id.* at p. 20.

¹⁸⁶ *Id.* at p. 20-21.

¹⁸⁷ Eli Moore et al., [Roots, Race & Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area](#) (Oct. 2019), Haas Institute, p. 26, (as of Apr. 5, 2022) (Haas).

¹⁸⁸ Hudson, *supra*, at p. 172.

¹⁸⁹ Haas, *supra*, at p. 26; Rhomberg, [White Nativism and Urban Politics: The 1920s Ku Klux Klan in Oakland, California](#) (Winter 1998) 17(2) *J. of Am. Ethnic History* 39, 44-46 (Rhomberg).

¹⁹⁰ Hudson, *supra*, at p. 174.

sheriff in 1926 and city commissioner in 1927.¹⁹¹ The Oakland KKK also operated as a vigilante group, accompanying federal agents on prohibition raids.¹⁹²

IV. Forms of Racial Terror

Racial terror has taken many forms throughout its long history. Although the primary component of racial terror is physical violence, perpetrators of racial terror have also destroyed and repossessed Black property. And given the public nature of racial terror, overt action has often been unnecessary. Threats and intimidation have often successfully kept Black Americans from voting, living in certain neighborhoods, and exercising other civil rights. As one scholar has argued, “fear of physical death not only hinders the possibility of freedom, but also limits productive and meaningful living . . . [A]s [the oppressed] submit to oppression and preserve biological life, they invariably suffer a degree of *psychological* and *social* death.”¹⁹³

From Reconstruction onward, racial terror undermined Black Americans’ legal rights, with lasting social repercussions. By attacking Black Americans who were never found guilty in a court of law, racial terror popularized the idea that Black people bear a presumption of guilt—contrary to the presumption of innocence, which the Supreme Court has described as “foundation[al]” to “our criminal law.”¹⁹⁴ Many white lynch mobs killed Black criminal suspects who were later found to be innocent.¹⁹⁵ Some Black men were even lynched after a jury found them innocent of their alleged offense.¹⁹⁶ White people justified racial terror as a mode of self-defense against Black Americans, as a tactic to deter future perpetrators, regardless of whether a crime had actually been committed.¹⁹⁷ This history of racial terror reinforced a view that Black Americans were dangerous criminals who posed a threat to white society.¹⁹⁸

A. Lynching

1. Key Features of Lynching Set It Apart from Other Forms of Racial Terror.

The most gruesomely iconic form of racial terror was lynchings: violent and public acts of torture, which were largely tolerated by officials at all levels of government.¹⁹⁹ Such violence traumatized Black people throughout the country, although it most frequently occurred in the South.²⁰⁰ Although lynchings were carried out against individual victims, the practice of lynching was ultimately aimed at the entire Black community.²⁰¹ Indeed,

¹⁹¹ Rhomberg, *supra*, at pp. 39, 44.

¹⁹² *Id.* at pp. 44-46.

¹⁹³ Hussein Abdilahi Bulhan, *Frantz Fanon and the Psychology of Oppression* (1985), p. 122.

¹⁹⁴ *Coffin v. United States*, 156 U.S. 432, 453 (1895); see also EJI 2015, *supra*, at p. 20.

¹⁹⁵ Jordan, *supra*, at p. 588-589.

¹⁹⁶ *Id.* at p. 588.

¹⁹⁷ EJI 3d ed., *supra*, at p. 61.

¹⁹⁸ EJI 2015, *supra*, at p. 21.

¹⁹⁹ *Id.* at pp. 3, 7. The Task Force recognizes that “lynching” has been defined differently at various points in history by the entities who recorded incidents of lynching. This has presented challenges in terms of tracking lynching data and assessing the complete impact of racial terror. Hudson, *supra*, at p. 135. For the purposes of this section, the Task Force uses “lynching” to refer to acts of terrorism, specifically the murder of one or more individuals by hanging, where the public or community supported the action. Hudson, *supra*, at p. 135. Lynchings are distinct from other forms of racial violence and hate crimes that were prosecuted as criminal acts.

²⁰⁰ *Ibid.*; EJI 3d ed., *supra*, at 65.

²⁰¹ EJI 2015, *supra*, at p. 5.

historians have described the trauma of lynching as a “contagion” that has a “multiplier effect” across families, communities, and generations.²⁰² Much like Jim Crow laws and racial segregation, lynching was primarily a method of enforcing the political, economic, and cultural exploitation of Black Americans.²⁰³ For instance, after Booker T. Washington visited the White House to meet with President Theodore Roosevelt, South Carolina Senator Benjamin Tillman remarked, “now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places.”²⁰⁴

Lynching was often carried out as a public spectacle. Lynchings did not simply involve hanging; rather, they often featured the prolonged torture, mutilation, dismemberment, and/or burning of the victim.²⁰⁵ These events attracted large crowds of white people, often numbering in the thousands, which included elected officials, prominent citizens, and entire families, including children.²⁰⁶ Children were given front-row views of the victim, imprinting upon their minds for the rest of their life the concept that Black people do not deserve human dignity.²⁰⁷ The white press justified and promoted these carnival-like events, while vendors sold food, and printers produced postcards featuring photographs of the lynching and corpse.²⁰⁸ Spectators would fight over fingers, ears, toes, sexual organs, and other body parts as souvenirs.²⁰⁹ The physical objects associated with a lynching were prized mementos for the crowd.²¹⁰

The publicity of lynchings not only terrorized Black Americans, but also allowed white communities to economically and politically benefit. The terror of being lynched prevented Black Americans from achieving political power, and preserved them as a compliant, intimidated workforce.²¹¹ This, in turn, largely maintained the Southern economy as it was during enslavement.²¹² And while lynching was overwhelmingly (though not exclusively) a Southern phenomenon,²¹³ its effects were felt throughout the United States—just as white supremacists intended to victimize and oppress all Black Americans.²¹⁴

2. Lynchings Were Carried Out for a Variety of Reasons, All Intended to Maintain White Supremacy.

Lynchings were based on a broad range of perceived violations of the racial caste system. Hundreds of Black people were lynched after being accused of murder or rape, though almost none were legally convicted of their alleged crimes.²¹⁵ Regardless, lynching is never an acceptable form of punishment. Many lynchings were based on weak or contrived evidence.²¹⁶ For example, white men perpetuated the myth of the “unbridled, brutish,

²⁰² Donald G. Mathews, *At the Altar of Lynching: Burning Sam Hose in the American South* (2018), p. 6.

²⁰³ EJI 3d ed., *supra*, at p. 27.

²⁰⁴ Ifill, *supra*, at p. 280.

²⁰⁵ Markovitz, *Legacies of Lynching: Racial Violence and Memory* (2004) (Markovitz); Caste, *supra*, at pp. 93-94; EJI 2015, *supra*, at p. 12.

²⁰⁶ EJI 2015, *supra*, at p. 12; Ifill, *supra*, at p. 285. Children were involved and given front row position of the victim, psychologically tainting their view of Black people from a young age.

²⁰⁷ Jordan, *supra*, at pp. 565-66; Ifill, *supra*, at pp. 285, 297-99.

²⁰⁸ EJI 2015, *supra*, at pp. 12, 14; Caste, *supra*, at pp. 93-94.

²⁰⁹ EJI 2015, *supra*, at pp. 12, 14; Jordan, *supra*, at p. 592; Ifill, *supra*, at pp. 285-86.

²¹⁰ Jordan, *supra*, at p. 592; Ifill, *supra*, at pp. 285-86.

²¹¹ Ifill, *supra*, at p. 294.

²¹² *Ibid.*

²¹³ EJI 2015, *supra*, at p. 21.

²¹⁴ *Id.* at p. 5; EJI 3d ed., *supra*, at pp. 27, 38; see also Hudson, *supra*, pp. 131-133.

²¹⁵ EJI 2015, *supra*, at p. 11.

²¹⁶ *Ibid.*; Clarke, *supra*, at p. 280.

black rapist” to justify lynching Black men for allegedly sexually assaulting white women.²¹⁷ The lynchings of Black men accused of rape or sexual assault often involved castration, which underscored how white men felt threatened by Black men and used lynching to attack Black manhood.²¹⁸

Many lynchings were based on much more minor accusations. According to the Tuskegee Institute, approximately 30 percent of lynching victims were accused of nonviolent “offenses.”²¹⁹ Some victims were lynched only for minor social transgressions, or for demanding basic rights and fair treatment. Black victims were lynched for referring to a white police officer by name, associating with white women, accidentally bumping into a white woman, “passing” as white, speaking out about racial equality, testifying on behalf of a Black defendant, and refusing to take off an Army uniform after returning from World War I.²²⁰

Black Americans were also lynched for asserting their labor rights and economic rights. For example, in 1918, a Black man in Earle, Arkansas refused to work on a white-owned farm without pay.²²¹ In response, the white citizens of the city cut him into pieces with butcher knives and hung his remains from a tree.²²² In numerous instances, Black Americans were also lynched after disputes over wages or debts: in such disputes, if a white person became violent and a Black person reacted in self-defense, the Black person was often lynched for murder or assault.²²³ By killing Black Americans for seeking fair treatment or for trivial social disputes, white Americans continued to assert the total control they had held over Black lives during slavery.

Apart from responding to specific accusations, lynchings were used to drive Black residents from a community. For example, after a 1912 lynching in Forsyth County, Georgia, white vigilantes distributed leaflets demanding that all Black people leave the county or suffer deadly consequences.²²⁴ As a result, the Black population dropped from 1,100 to 30 in eight years.²²⁵ And in 1918, in Unicoi County, Tennessee, after lynching a Black man, a group of white men rounded up 60 Black residents—including children—and forced them to watch the corpse burn.²²⁶ The white people told the Black people in the town to leave the county within 24 hours.²²⁷

Lynchings also united white Americans of all socioeconomic levels. The public violence of lynchings portrayed the white population as strongly allied against the perceived threat of Black Americans.²²⁸ White mobs asserted their racial superiority by publicly torturing and killing Black victims.²²⁹ Through the Jim Crow period, white Americans experienced divisions along political, economic, and social lines.²³⁰ Although poor whites

²¹⁷ Third Degree, *supra*, at p. 20; EJI 2015, *supra*, at p. 10; Clarke, *supra*, at p. 280.

²¹⁸ Ifill, *supra*, at p. 278.

²¹⁹ Clarke, *supra*, at pp. [Without Fear or Shame: Lynching, Capital Punishment and the Subculture Violence in the American South](#) (Apr. 1998) 28(2) British J. of Political Sci. 269, 269, 280 & fn. 34, (as of Oct. 20, 2021) (Clarke).

²²⁰ EJI 2015, *supra*, at p. 11; EJI 3d ed., *supra*, at p. 31; Jordan, *supra*, at p. 588; Ifill, *supra*, at p. 276-77.

²²¹ EJI 2015, *supra*, at p. 14.

²²² *Ibid.*

²²³ Clarke, *supra*, at pp. 270, 280; Ifill, *supra*, at pp. 278-79.

²²⁴ EJI 2015, *supra*, at p. 14.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ Third Degree, *supra*, at p. 20.

²²⁹ *Ibid.*

²³⁰ See Fox, *supra*, at p. 158.

Americans may have lived in conditions more similar to those of poor Black Americans, lynching helped prevent interracial class-based alliances by unifying white Americans around a core purpose and identity.²³¹

3. Government Officials, and White Society in General, Were Complicit in the Practice of Lynching.

Government actors, including police officers, prosecutors, judges, and elected officials, tacitly approved of or assisted in lynchings.²³² Law enforcement officers released Black people who had been incarcerated to mobs, placed Black prisoners in areas where lynch mobs were known to gather, joined mobs to find Black Americans, and assisted with lynchings.²³³ Prosecutors and law enforcement regularly failed to identify and try lynchings for their crimes.²³⁴ Only one percent of all lynchings after 1900 resulted in a conviction.²³⁵ Judges contributed to these outcomes by presiding over a process that systematically excluded Black Americans from juries, mistreated Black witnesses, and held trials in jurisdictions with a racist bias.²³⁶ Local coroners and coroners' juries refused to indict lynchings and made impossible conclusions—such as ruling a death was a suicide after a Black farmer was found riddled with bullets.²³⁷

Throughout the South, state and local politicians protected the perpetrators of violent acts instead of protecting Black southerners from extrajudicial violence.²³⁸ Some governors, rather than condemn lynchings, made statements that focused on the accused crime of the lynched Black person—suggesting that the lynching was justified—and in other cases, affirmatively supported the lynching.²³⁹ And government officials outside the South did little to stop the campaign of widespread lynching.²⁴⁰ National leaders, for their part, failed to pass even one of more than 100 anti-lynching bills that were proposed in Congress between 1852 and 1951.²⁴¹

The public was also complicit. Studies show that thousands of white people, at all levels of class and educational status, participated directly in lynch mobs. Many more participated as spectators, and millions did nothing.²⁴² Participants, meanwhile, were protected by a code of silence.²⁴³ Because witnesses refused to cooperate with law enforcement, criminal investigations were thwarted, and the perpetrators of lynchings were able to avoid accountability.²⁴⁴

4. The Prevalence of Lynching Has Changed over Time.

Despite numerous efforts, it is impossible to know how many Black people were killed by lynching. In the late 19th century, Ida B. Wells started the Red Record Efforts to identify incidents of extreme racial violence for research, advocacy, and public policy purposes.²⁴⁵ Other researchers and activists have followed Wells' lead,

²³¹ *Ibid.*

²³² Ifill, *supra*, at pp. 267-268.

²³³ Jordan, *supra*, at pp. 585-87; Ifill, *supra*, at p. 300.

²³⁴ Ifill, *supra*, at pp. 300-301.

²³⁵ EJI 2015, *supra*, at p. 18.

²³⁶ Ifill, *supra*, at p. 301.

²³⁷ *Id.* at pp. 300-01.

²³⁸ *Id.* at pp. 301-02.

²³⁹ *Ibid.*

²⁴⁰ EJI 2015, *supra*, at p. 18.

²⁴¹ Ifill, *supra*, at pp. 294, 302-03.

²⁴² Clarke, *supra*, at p. 281; Ifill, *supra*, at p. 296.

²⁴³ Jordan, *supra*, at pp. 579-80.

²⁴⁴ *Ibid.*

²⁴⁵ Ward, *supra*, at pp. 582-83.

but there is disagreement on figures among those who study racial terror. Researchers use different criteria of what counts as a lynching, and perpetrators hide their crimes—to list just two reasons that there is no definitive number of Black lynching victims.²⁴⁶ By any measure, however, lynching occurred in every region of the United States, with victims of all races and genders.²⁴⁷ And despite disagreement over exact numbers, there is a consensus that between the Civil War and World War II, thousands of Black Americans were lynched in the United States and were the primary targets of lynch mobs.²⁴⁸ The nonprofit organization Equal Justice Initiative, for example, counts nearly 6,500 lynchings nationwide between 1865 and 1950.²⁴⁹ Any count of lynchings, however, will fall short of the true number, as a result of inadequate reporting at the time, lack of documentation, cover-ups by perpetrators and local officials, and other gaps in the evidence.²⁵⁰

In the 1890s, when the frequency of lynchings peaked, an average of 104 Black people were estimated to have been killed each year by lynch mobs.²⁵¹ Then, as Black southerners moved north and west, lynching rates steadily declined during the 1930s, 1940s, and 1950s, and lynchings eventually became extraordinary events.²⁵² Thus, when 15-year-old Emmett Till was lynched in 1954 for allegedly whistling at a white woman,²⁵³ and when a white mob abducted Mack Charles Parker from his jail cell and lynched him in 1959,²⁵⁴ the killings provoked national public outrage.²⁵⁵ However, the decline in lynchings did not correspond with an end to the racial caste system that led to lynchings in the first place.²⁵⁶ Rather, the decline can be attributed to strict segregation laws, tactics of disenfranchisement, and the surge of the death penalty.²⁵⁷

Beginning in the early 1900s, white Southerners began to fear that the barbaric imagery of lynching would harm the Southern economy.²⁵⁸ The death penalty offered a more respectable form of violence and the appearance of the rule of law.²⁵⁹ As early as the 1930s, lynchings were often avoided when government actors made clear that the accused would receive a swift judicial conviction and execution.²⁶⁰ While there is no conclusive evidence proving that the death penalty replaced lynching in the South, data shows that executions increased as lynchings declined.²⁶¹ Indeed, Southerners themselves referred to these executions as “legal lynchings,” and Southern leaders argued that Black Americans could be intimidated and controlled just as effectively with the death

²⁴⁶ *Id.* at pp. 585, 596-97.

²⁴⁷ Hudson, *supra*, at p. 133. But these statistics often left out lynching of non-Black people, Native Americans, Mexicans, and Chinese. Hudson, *supra*, at p. 136.

²⁴⁸ EJI 2015, *supra*, at p. 3.

²⁴⁹ EJI, *Overview of Reconstruction in America* (2020) (as of Apr. , 2022). For the full report, see EJI, *Reconstruction in America: Racial Violence After the Civil War* (2020), <<https://eji.org/report/reconstruction-in-america/>> (as of Mar. 15, 2022) (EJI 2020). See also EJI 3d ed., *supra*, at pp. 40, 44 (counting 4,084 lynchings in the South, and 341 lynchings elsewhere, between 1877 and 1950).

²⁵⁰ See Ward, *supra*, at pp. 596-598; see also EJI 2020, *supra*.

²⁵¹ Third Degree, *supra*, at p. 19.

²⁵² Markovitz, *supra*, at pp. xxviii-xxix.

²⁵³ Ifill, *supra*, at p. 302

²⁵⁴ See generally Smead, *Blood Justice: The Lynching of Mack Charles Parker* (1988).

²⁵⁵ Markovitz, *supra*, at pp. xxviii-xxix.

²⁵⁶ Clarke, *supra*, at p. 282.

²⁵⁷ *Id.* at pp. 282-285.

²⁵⁸ *Id.* at pp. 282-83.

²⁵⁹ *Id.* at pp. 284-85; Third Degree, *supra*, at p. 24.

²⁶⁰ Third Degree, *supra*, at p. 24; Proposed Brief of *Amicus Curiae* The Honorable Gavin Newsom in Supp. of Def. and Appellant McDaniel, *People of the State of California v. McDaniel*, No. S171393, at pp. 36-37 (Oct. 26, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/10/10.26.20-Governor-Newsom-McDaniel-Amicus-Brief.pdf> (Newsom Amicus Brief); Frampton, *The Jim Crow Jury* (2018) 71 Vand. L. Rev. 1593, 1612-14.

²⁶¹ Clarke, *supra*, at p. 285.

penalty.²⁶² And “legal lynchings,” like actual lynchings, disproportionately victimized Black Americans.²⁶³ From the 1890s to the 1950s, between 53 and 81 percent of lynchings and executions were of Black Americans, although Black Americans represented approximately only 10 percent of the entire U.S. population.²⁶⁴

By 1915, court-ordered executions outpaced lynchings in the former slave states for the first time, and by the 1930s, two-thirds of those executed were Black—a trend that would continue.²⁶⁵ While Black people were executed for allegedly killing white people, the reverse was not true. As lynchings declined from 1930 to 1970, there was a sharp increase in the number of Black Americans who were executed for rape, but there is no evidence that a white person was executed for raping a Black woman.²⁶⁶ According to one study, out of more than 11,000 executions in the United States, only two white men were executed for killing a Black person.²⁶⁷ Another study of approximately 15,000 executions, from colonial times to the 1990s, found that white people were executed for killing Black people in only 29 cases—and in most of those cases, the defendants had also killed white people.²⁶⁸ These trends in executions reinforce a central theme of lynching: that the lives of Black people were worth less than those of white people.²⁶⁹

B. Mob Violence

Whereas lynching involves group action against a person as a response to that person’s alleged wrongdoing, mob violence involves assaults by civilians of one ethnic group on members of another ethnic group on the basis of their ethnicity.²⁷⁰ These tactics were often used together against the Black community.²⁷¹ Lynchings were sometimes followed by mob violence, with white mobs burning Black homes, devastating Black neighborhoods, and forcing Black residents to relocate.²⁷² Mob violence was motivated by the same objectives as lynchings, including to extinguish Black Americans’ political influence and economic gains, and to maintain social control over Black Americans.²⁷³

The racial hierarchy benefited from mob violence. Mob violence was a ritual that built a sense of community among white people and helped the South to sustain a cohesive culture of white supremacy and enforce legal segregation.²⁷⁴ (As discussed above, mass participation was a typical element of lynchings, which drew upwards of thousands of spectators.²⁷⁵) But mass violence was not strictly a Southern phenomenon. White mob violence occurred in several Northern states prior to 1865, including New York, Pennsylvania, and Ohio.²⁷⁶

²⁶² *Id.* at pp. 284-85.

²⁶³ Third Degree, *supra*, at pp. 24-25.

²⁶⁴ Clarke, *supra*, at p. 286.

²⁶⁵ EJI 3d ed., *supra*, at p. 63.

²⁶⁶ Third Degree, *supra*, at pp. 23-24; Clarke, *supra*, at p. 286.

²⁶⁷ Clarke, *supra*, at p. 288.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ Jordan, *supra*, at pp. 607-08.

²⁷¹ Ifill, *supra*, at p. 267.

²⁷² *Id.* at pp. 291-92.

²⁷³ Fox, [Intimations of Citizenship: Repression and Expressions of Equal Citizenship in the Era of Jim Crow](#) (Fall 2006) 50 *How. L.J.* 113, 184-185 (Fox).

²⁷⁴ *Id.* at pp. 158-59.

²⁷⁵ Jordan, *supra*, at p. 573.

²⁷⁶ Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges* (Nov. 1990), 76 *Cornell L. Rev.* 1, 30 & n. 137 (Colbert).

These Northern white mobs, which numbered in the hundreds or thousands, attacked and killed Black people and set fire to Black properties.²⁷⁷ The violence was often accompanied by inaction or inadequate response by law enforcement.²⁷⁸ Virtually none of the perpetrators were prosecuted or convicted; those that were, received extremely lenient punishments.²⁷⁹

When white Americans felt Black Americans threatened their superiority, mob violence sometimes escalated into massacres, destroying cohesive Black communities and the prosperity that they built.²⁸⁰ Historically, these attacks have often been called “riots” or “race riots,” but these terms obscure the nature of this violence. Throughout Reconstruction, segregation, and the civil rights era, so-called riots were actually massacres. In these attacks, white mobs proactively killed Black Americans and destroyed Black property, though the Black victims were often blamed for inciting the violence in the immediate aftermath.²⁸¹ This pattern of violence has evolved and continued through the 20th and 21st centuries, as is discussed in greater detail in Chapter 11 An Unjust Legal System.

Massacres inflicted tremendous damage upon Black lives and property.²⁸² It is estimated that over 100 such massacres occurred between the end of the Civil War and the 1940s.²⁸³ Among several notable examples,²⁸⁴ the 1921 Tulsa Race Massacre is especially prominent. In Tulsa, Oklahoma, in 1921, a Black man was arrested for allegedly assaulting a white woman.²⁸⁵ In response, a white mob looted, burned homes and businesses, and murdered at least 300 Black people in Greenwood, a prosperous Black neighborhood known as “Black Wall Street.”²⁸⁶ Over the course of 24 hours on May 31 and June 1, the mob destroyed 35 square blocks, more than 1,200 Black-owned homes, over 60 businesses, a hospital, a public library, and a dozen Black churches.²⁸⁷ Thousands of Black Tulsans were left homeless and placed in internment camps.²⁸⁸ Lawyer and reparations advocate Eric J. Miller has testified that, in addition to death and destruction, the massacre inflicted catastrophic mental and emotional trauma upon the Black survivors and their descendants.²⁸⁹ The destruction remained over

²⁷⁷ *Ibid.*

²⁷⁸ *Id.* at pp. 30-31.

²⁷⁹ *Ibid.*

²⁸⁰ Fox, *supra*, at p. 185.

²⁸¹ Human Rights Watch, *supra*, at p. 9; Mack, [Over a century later, facts of 1898 race riots released](#) Star News Online (Dec. 16, 2005) (as of Apr. 5, 2022)(archived Aug. 27, 2021) (as of Apr. 5, 2022) (1898 Race Riot Facts).

²⁸² EJI 2015, *supra*, at p. 7; EJI, [Political Violence and Racial Inequity in America](#) (Jan. 19, 2021) (as of Apr. 5, 2022) (EJI 2021); 1898 Race Riot Facts, *supra*; Lee, [How America’s Vast Racial Wealth Gap Grew: By Plunder](#) N.Y. Times (Aug. 18, 2019) (as of Apr. 5, 2022) (Lee); Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence* (Winter 2004) 79 Ind. L. J. 177, 226.

²⁸³ Channon Hodge et al., [Burned from the Land: How 60 Years of Racial Violence Shaped America](#) CNN (May 30, 2021) (as of Apr. 5, 2022).

²⁸⁴ Gillian Brockell, [Tulsa Isn’t the Only Race Massacre You Were Never Taught in School. Here Are Others.](#) The Washington Post (June 1, 2021), Washington Post (as of Apr. 5, 2022).

²⁸⁵ Human Rights Watch, *supra*, at p. 5.

²⁸⁶ Fain, [The Devastation of Black Wall Street](#) JSTOR Daily (July 5, 2017) (as of Apr. 5, 2022) (Fain); Human Rights Watch, *supra*, at p. 6.

²⁸⁷ Human Rights Watch, *supra*, at pp. 1, 6.

²⁸⁸ *Id.* at p. 7.

²⁸⁹ Reparations Task Force, Witness Testimony of Eric J. Miller (Dec. 7, 2021), <<https://www.youtube.com/watch?v=nstqrEFYcz0>> (as of Feb. 9, 2022), 7:35-7:46.

generations as the city, state, and chamber of commerce worked to prevent rebuilding and turned away funding that could have benefited Greenwood.²⁹⁰

The Tulsa Race Massacre Commission confirmed that Tulsa officials not only did nothing to prevent the massacre, but also participated in the violence and provided firearms and ammunition to the mob.²⁹¹ Indeed, the city and county police deputized hundreds of white people to participate in the massacre, and the Oklahoma National Guard joined the massacre as well.²⁹² The Commission's report confirmed that no one prosecuted or punished any of the perpetrators for the violent acts that occurred, despite overwhelming evidence of their guilt.²⁹³ Instead, the all-white grand jury falsely blamed Black people for the massacre.²⁹⁴ As stated in the grand jury report: "There was no mob spirit among the whites, no talk of lynching and no arms. The assembly was quiet until the arrival of the armed Negroes, which precipitated and was the direct cause of the entire affair."²⁹⁵

This example also highlights the role of the government, at all levels, in mob violence, just as government had once enforced the legal regime of slavery. By looking the other way, declining to prosecute mob members, or by actively fomenting and assisting mob violence, government officials enabled violent white mobs to devastate Black communities.

C. Torture

Southern lynchings often included torture of the victim before death, in addition to burning, mutilation, and decapitation after death.²⁹⁶ The torture preceding public killings usually lasted hours, and could involve shoving a hot poker iron down the victim's throat and pressing it against their body; gouging out eyes; castration; cutting off hands and feet; tearing into the flesh with a large corkscrew; and burning the victim alive.²⁹⁷ As historian Leon F. Litwack explains: "The story of a lynching . . . is the story of slow, methodical, sadistic, often highly inventive forms of torture and mutilation."²⁹⁸

Torture was thus another method with which white people sought to punish Black people for stepping beyond their relegated social roles.²⁹⁹ Victims were often tortured even if they were not convicted of any crime, such as when two brothers in Paris, Texas were tortured for trying to escape abusive work conditions.³⁰⁰

As lynching became less common, so too did the accompanying torture. But just as lynching was replaced with the "legal lynching" of state executions, the police used torture to extract confessions from Black suspects.³⁰¹

²⁹⁰ Reparations Task Force, Witness Testimony of Eric J. Miller (Dec. 7, 2021), <<https://www.youtube.com/watch?v=nstqrEFYcz0>> (as of Feb. 9, 2022), 7:46-7:57.

²⁹¹ Human Rights Watch, *supra*, at p. 8.

²⁹² Reparations Task Force, Witness Testimony of Eric J. Miller (Dec. 7, 2021), <<https://www.youtube.com/watch?v=nstqrEFYcz0>> (as of Feb. 9, 2022), 7:20-7:35.

²⁹³ Human Rights Watch, *supra*, at p. 8.

²⁹⁴ *Id.* at p. 9.

²⁹⁵ *Ibid.*

²⁹⁶ EJI 3d ed., *supra*, at p. 17; Ifill, *supra*, at pp. 281-82.

²⁹⁷ EJI 3d ed., *supra*, at p. 35; Jordan, *supra*, at pp. 589-90.

²⁹⁸ EJI 3d ed., *supra*, at p. 17.

²⁹⁹ *Id.* at p. 68.

³⁰⁰ *Id.* at p. 37.

³⁰¹ Third Degree, *supra*, at p. 24.

The police objective was to quickly convict the suspects.³⁰² Thus, even facing the death penalty, Black suspects were frequently denied a fair and impartial trial.³⁰³

For example, in 1938, Dave Canty, a Black man, was arrested for killing a white woman and wounding another in the course of a robbery in Montgomery, Alabama.³⁰⁴ After hours of police questioning, Canty signed a written confession, admitting responsibility for the attack.³⁰⁵ At trial, however, Canty testified from the witness stand that the police had forced him to confess by torturing him.³⁰⁶ He gave detailed information about the torture and his torturers, and he showed his wounds and scars to the jury.³⁰⁷ Police officers and prison staff, however, denied Canty's account of his torture, and at the conclusion of his three-day trial, Canty was sentenced to death.³⁰⁸ After a new trial reduced his sentence to life in prison, Canty died in the same prison in which he claimed to have been tortured.³⁰⁹

Unlike lynching, this form of torture was not public.³¹⁰ In fact, hiding it was critical to supporting a racist system.³¹¹ It was difficult for victims and advocates to realize the prevalence of torture, and denials and secrecy made it more difficult to fight the practice.³¹² When torture was reported and individuals tried to bring charges, allegations and evidence were ignored and invalidated by white judges, prosecutors, and other officials.³¹³ While this practice occurred throughout the country, it was especially prevalent in large cities like Chicago and New York City, as well as the American South.³¹⁴ There were very rarely any consequences for violence used by police in coercing confessions.³¹⁵ Police officers often denied the use of such violence, while claiming that regulating police work would lead to an increase in crime.³¹⁶ Thus, the decline of lynching and public torture was not a sign of enlightenment.³¹⁷ Rather, lynching and torture developed into more modern forms of racial violence—namely, swift executions and coerced confessions.³¹⁸ Evidence suggests that police continue to coerce confessions from suspects, including Black suspects, leading to wrongful convictions and years of undeserved jail time.³¹⁹ From the early 1970s to the early 1990s, for example, then-Chicago Police Commander Jon Burge led officers in torturing over 125 suspects into confessing to crimes, most of whom were Black, and

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Id.* at pp. 41-42.

³⁰⁵ *Id.* at p. 42.

³⁰⁶ *Id.* at p. 43.

³⁰⁷ *Id.* at pp. 44-45.

³⁰⁸ *Id.* at pp. 46-47.

³⁰⁹ Silvan Niedermeier, [“All These Scars, There and There.” Fighting Forced Confessions in the Pre-1954 South](#) University of North Carolina Press Blog (Nov. 25, 2019) (as of Apr. 5, 2022).

³¹⁰ Third Degree, *supra*, at pp. 9-12.

³¹¹ *Ibid.*

³¹² *Id.* at p. 9.

³¹³ *Id.* at p. 11.

³¹⁴ *Id.* at p. 7.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Id.* at pp. 24-25.

³¹⁸ *Id.* at p. 25.

³¹⁹ Andrew Cohen, [Confessing While Black](#) The Marshall Project (Dec. 12, 2014) (as of Apr. 5, 2022); Al Jazeera, [Coerced to Confess: How US Police Get Confessions](#) (Mar. 20, 2019) (as of Apr. 5, 2022).

many of whom have said their confessions were false.³²⁰ Burge was convicted for lying under oath about the torture.³²¹

D. Police Killings and Vigilantism

State-sanctioned violence against Black Americans continues today in the form of extrajudicial violence by police officers and vigilantes.

1. Current Police Violence Against Black Americans Has Similarities with the Actions of Slave Patrols and Has Been Considered a Modern Form of Lynching.

Throughout American history, including the present day, the police have held the power to strip Black people of their rights and lives for any reason—or for no reason at all. Police violence is a leading cause of death for Black people in America.³²² Today’s extrajudicial killings have historical roots in the social control of slave patrols,³²³ the lynchings of the late 1800s and early 1900s, and police violence against Black southerners during Jim Crow.³²⁴ Slave patrols, which began in the early 1700s, were made up of white volunteers.³²⁵ Patrollers were empowered to forcibly discipline enslaved persons, crush potential uprisings, and return enslaved persons who had escaped to their enslavers.³²⁶ Like slave patrols, police violence in Jim Crow was intended to intimidate Black communities and subordinate Black Americans within the segregated social order.³²⁷

From the end of the Civil War through the early 20th century, racialized policing was often tailored to local concerns.³²⁸ In urban areas, in response to growing economic competition between white workers and Black workers moving to cities, the police targeted Black residents with curfews, high incarceration rates, and violence—often deadly violence.³²⁹ In rural areas, sheriffs and deputy sheriffs enjoyed essentially unchecked power from their white constituents.³³⁰ As a result, the police violently enforced the racist social order against Black citizens, even for seemingly minor transgressions.³³¹

As recognized by the United Nations Working Group of Experts on People of African Descent, “contemporary police killings and the trauma that they create are reminiscent of the past racial terror of lynching.”³³² Recent incidents of police violence demonstrate this connection. The British Broadcasting Company has collected a list of recent high-profile killings of Black Americans by police,³³³ highlighting just a fraction of the more than

³²⁰ Logan Jaffe, [The Nation’s First Reparations Package to Survivors of Police Torture Included a Public Memorial. Survivors Are Still Waiting](#) ProPublica (July 3, 2020) (as of Apr. 5, 2022) (Survivors of Police Torture).

³²¹ Survivors of Police Torture, *supra*.

³²² Hasbrouck, [Abolishing Racist Policing with the Thirteenth Amendment](#) (2020) 67 UCLA L. Rev. 1108, 1110, (as of Apr. 5, 2022).

³²³ United Nations Human Rights Office of the High Commissioner, [UN experts condemn modern-day racial terror lynchings in US and call for systemic reform and justice](#) (June 5, 2020) (as of Apr. 5, 2022).

³²⁴ Third Degree, *supra*, at pp. 17-19.

³²⁵ Hassett-Walker, [The racist roots of American policing: From slave patrols to traffic stops](#) The Conversation (updated June 2, 2020) (as of Apr. 5, 2022) (Slave Patrols).

³²⁶ *Ibid.*

³²⁷ Third Degree, *supra*, at p. 18.

³²⁸ *Id.* at pp. 18-19.

³²⁹ *Ibid.*

³³⁰ *Id.* at p. 19.

³³¹ *Ibid.*

³³² U.N. Working Group Report, *supra*, p. 16.

³³³ BBC, [George Floyd: Timeline of black deaths and protests](#) (Apr. 22, 2021) (as of Apr. 5, 2022).

1,500 Black Americans killed by police since 2015.³³⁴ In 2016, after a Minneapolis police officer killed Philando Castile during a traffic stop,³³⁵ Castile’s sister said, “It’s just like we’re animals. It’s basically modern-day lynching that we’re seeing going on, except we’re not getting hung by a tree anymore—we’re getting killed on camera.”³³⁶ Similarly, in 2020, George Floyd was stopped for allegedly using a counterfeit \$20 bill, which could have been handled with a ticket.³³⁷ Instead, Floyd was killed by an officer kneeling on his neck for nine minutes and 29 seconds.³³⁸ Historian Arica Coleman described Floyd’s death as “a modern-day lynching.”³³⁹

2. Vigilantism, like police killings, carries the history of violence against Black people into the present day.

In addition to extrajudicial police violence, our country’s history of lynching is reflected in the vigilantism taken against Black people, even when they have not committed any offense.³⁴⁰ The Southern Poverty Law Center has compiled a list of Black Americans (and white activists) killed during the Civil Rights Movement.³⁴¹ More recent examples of this violence are the killings of Trayvon Martin and Ahmaud Arbery. In 2012, George Zimmerman shot and killed the unarmed, 17-year-old Trayvon Martin, who Zimmerman described as a “suspicious person” in his neighborhood.³⁴² After Zimmerman was acquitted for the shooting, in the tradition of lynching, he auctioned his gun as a souvenir.³⁴³

In 2020, while Ahmaud Arbery was out for a jog, he was chased, attacked, and killed by three white men who claimed he resembled a suspect in local break-ins (although no police reports were filed about the alleged break-ins). Arbery was unarmed, and as he lay dying on the ground, one of the white men called him a “fucking nigger.”³⁴⁴ Arbery’s family called the killing a lynching.³⁴⁵ The three men attempted to use a citizen’s arrest provision added into the Georgia Code of 1863.³⁴⁶ The men argued that the 1863 provision allowed them to arrest another person if a crime was committed “within his immediate knowledge.”³⁴⁷ The Georgia Code was drafted in part by Thomas R.R. Cobb, a legal scholar who claimed that a Black mother “suffers little” when her children are stolen from her, since she lacked maternal feelings.³⁴⁸ Cobb helped write principles of white

³³⁴ Washington Post, [Fatal Force: Police shootings database 2015-2021](#) (updated Nov. 11, 2021) (as of Apr. 5, 2022).

³³⁵ Lopez, [Philando Castile Minnesota police shooting: officer cleared of manslaughter](#) Vox (June 16, 2017) (as of Apr. 5, 2022) (Castile Vox Article).

³³⁶ CBS News, [Victim’s sister: Minnesota police shooting “modern day lynching”](#) (July 8, 2016) (as of Apr. 5, 2022).

³³⁷ Groves, [Explainer: Use-of-force experts evaluate Floyd arrest](#) AP News (Mar. 31, 2021) (as of Apr. 5, 2022) (AP Floyd Article).

³³⁸ *Ibid.*; Nicholas Bogel-Burroughs, [Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported](#) N.Y. Times (March 30, 2021) (as of Apr. 5, 2022).

³³⁹ Brown, [‘It was a modern-day lynching’: Violent deaths reflect a brutal American legacy](#) National Geographic (June 3, 2020) (as of Apr. 5, 2022) (National Geographic Floyd Article).

³⁴⁰ Love, [The Trayvon Martin case reveals a vigilante spirit in the US justice system](#) The Guardian (Apr. 7, 2012) (as of Apr. 5, 2022).

³⁴¹ Southern Poverty Law Center, [Civil Rights Martyrs](#) (as of Apr. 5, 2022).

³⁴² Pearson and Botelho, [5 things to know about the George Zimmerman-Trayvon Martin saga](#) CNN (Feb. 26, 2013) (as of Apr. 5, 2022) (CNN Martin Article).

³⁴³ DeBerry, [Lynching and the ghastly precedent to George Zimmerman auctioning gun that killed Trayvon Martin](#) NOLA.com (May 13, 2016) (as of Apr. 5, 2022).

³⁴⁴ Nathan Layne, [White defendant used racial slur after shooting Ahmaud Arbery, investigator testifies](#) Reuters (June 4, 2020) (as of Apr. 5, 2022).

³⁴⁵ BBC News, [Ahmaud Arbery: What do we know about the case?](#) BBC News (June 5, 2020) (as of Apr. 5, 2022).

³⁴⁶ Hurt, [In Ahmaud Arbery’s Name, Georgia Repeals Citizen’s Arrest Law](#) NPR (May 11, 2021) (as of Apr. 5, 2022).

<https://www.npr.org/2021/05/11/995835333/in-ahmaud-arberys-name-georgia-repeals-citizens-arrest-law>

³⁴⁷ *Ibid.*

³⁴⁸ Briggs, *supra*, at 25-26.

supremacy into Georgia law, including a provision that presumed Black Americans were slaves unless proven otherwise.³⁴⁹ The citizen's arrest provision was significantly weakened in 2021 in the wake of Arbery's murder.³⁵⁰

As with lynchings, a lack of accountability appears to exist for police violence and vigilantism. The Guardian reports that out of 1,136 killings registered in 2015, only 18 law enforcement officers were charged with crimes.³⁵¹ Moreover, the United Nations found that federal, state, and county regulations on use of force and firearms do not comport with international standards, which makes it more likely that extrajudicial violence against Black individuals will continue.³⁵²

E. Sexual Violence and Eugenics

As further discussed in Chapter 12 Harm and Neglect: Mental, Physical and Public Health, the Black female body has been brutally and routinely compromised in the absence of legal protection. Black women faced forced procreation during enslavement, while after enslavement, Black women were forcibly sterilized.³⁵³ As with other forms of racial terror, sexual violence served the social, economic, and political goals of white supremacy.

As discussed in Chapter 2 Enslavement, enslavers used sexual violence and the threat of sexual violence as a way to control enslaved Black people. Enslavers also used sexual violence and forced procreation to grow their fortunes.

While the end of enslavement as an institution may have removed an economic incentive for sexual violence, Black women have continued to suffer from the violence that arises from stereotypes projected upon them. During the Jim Crow era, white men used rape and threats of rape to oppress Black Americans, and particularly Black women.³⁵⁴ Throughout their daily routines, Black women and girls faced the threat of sexual violence by white men.³⁵⁵ Rapes during Jim Crow were intended to maintain white domination and for white men's sexual gratification.³⁵⁶ Some rapes also took place during other instances of racial violence, such as attacks to steal Black land and destroy Black property.³⁵⁷ White men were rarely punished for committing sexual violence against Black women and girls, while Black Americans frequently faced retaliation for reporting such attacks.³⁵⁸

³⁴⁹ Andrew P. Morriss, "Georgia Code (1861)," in *Slavery in the United States: A Social, Political, And Historical Encyclopedia*, vol. 2, ed. Junius P. Rodriguez (Santa Barbara: ABC-CLIO, 2007), 314-315.

³⁵⁰ Richard Fausset, [Ahmaud Arbery Shooting: What to Know About the Trial and More](#) N.Y. Times (Feb. 7, 2022) (as of Apr. 5, 2022).

³⁵¹ U.N. Working Group Report, *supra*, at p. 17.

³⁵² *Ibid.*

³⁵³ Washington, *Medical Apartheid: The Dark History of Experimentation on Black Americans from the Colonial Era to the Present* (2007), p. 648 (Medical Apartheid); see also Health Section, *infra*.

³⁵⁴ Sexual Assaults, *supra*, at p. 935. Where did you get this cite from?

³⁵⁵ *Id.* at p. 936.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

As discussed in Chapter 11 An Unjust Legal System, Black women continue to be depicted through tropes of hypersexuality, creating a myth that Black women cannot credibly claim to be victims of sexual violence.³⁵⁹

Black women also suffered a different kind of sexual violence as a result of the eugenics movement. During the early 20th century, the eugenics movement, which claimed to be acting according to “scientific” principles and for the good of human society, scrutinized Black sexual behavior and reproduction. The result was that Black people, and especially Black women, were disproportionately forced into sterility.³⁶⁰ This is discussed in detail in Chapter 12 Harm and Neglect: Mental, Physical and Public Health.

F. Violence Against Children and Family Separation

The threat of selling non-compliant enslaved people away from their families was one of the most terrifying tools of coercion that enslavers wielded to control enslaved persons and suppress rebellions.³⁶¹ As discussed above, under the laws of slave states, the status of a newborn followed the status of their mother.³⁶² Separation was horrifying and traumatic to the parents and their children.³⁶³ Children and their parents were treated not as people, who loved and cared for each other, one generation after another, but as bodies used exclusively for labor.³⁶⁴ Frederick Douglass said that he began to understand himself as a slave following the separation from his mother, as in the absence of nurturing kin, he was completely subjected to the will of others.³⁶⁵ The practice of selling away infants was so common that it was a focus of the northern abolitionist movement, and according to Professor Laura Briggs, in the 1850s, many Southern states outlawed taking infants from their mothers in an effort to prove that slavery was not as bad as antislavery northerners claimed.³⁶⁶

After enslavement, southern states re-enslaved Black children, removing them from their parents, and forcing them into so-called apprenticeships to white former enslavers.³⁶⁷ The children, sometimes as young as six, worked for white families as if they were enslaved.³⁶⁸ Throughout the 20th century, government officials disproportionately separated Black children from their families to threaten and coerce mothers into withdrawing from welfare programs.³⁶⁹ A detailed discussion of family separation is in Chapter [XX].

Mass incarceration, another tool of racist social control, has also had the consequence of breaking up Black families. The war on drugs, beginning with Richard Nixon’s 1968 presidential campaign, was explicitly designed to target the antiwar left and Black Americans.³⁷⁰ Due to these policies, by 2015, one in nine Black children had at least one parent in prison.³⁷¹ At the same time, Black families were targeted by racist policing of

³⁵⁹ Norwood, [Mapping the Intersections of Violence on Black Women’s Sexual Health within the Jim Crow Geographies of Cincinnati Neighborhoods](#) (2018) 39(2) *Frontiers* (Boulder) 97, pp. 1-2 (as of Sept. 8, 2021) (Norwood).

³⁶⁰ See Health Section, *infra*.

³⁶¹ Briggs, *Taking Children: A History of American Terror* (2020) pp. 18-19 (Taking Children)..

³⁶² *Id.* at pp. 19-20.; Sexual Economy, *supra*, p. 20.

³⁶³ *Id.* at pp. 24-25.

³⁶⁴ *Id.* at p. 22.

³⁶⁵ *Id.* at p. 21.

³⁶⁶ *Id.* at p. 27.

³⁶⁷ *Id.* at p. 28.

³⁶⁸ *Ibid.*

³⁶⁹ *Id.* at pp. 30, 33-35.

³⁷⁰ *Id.* at pp. 107-108.

³⁷¹ *Id.* at p. 103.

parenting.³⁷² Black children were increasingly placed in the child welfare system due to parental neglect—but in reality, this “neglect” was often only poverty.³⁷³ These two forms of racist policing combined to double and then triple the rate of incarceration of Black women during the 1980s.³⁷⁴ Eighty percent of these women had children living with them at the time of the arrest, many of whom were then placed in foster care.³⁷⁵ As a result, between 1985 and 1988, the number of children in out-of-home placement—foster care, psychiatric institutions, and the juvenile justice system—increased by 25 percent.³⁷⁶

Finally, Black children have faced disproportionate police violence. As discussed above, law enforcement continues to treat Black people as a dangerous criminal group; Black children are no exception.³⁷⁷ A 2020 study led by Children’s National Hospital researchers found that Black youth are six times likelier than white youth to be shot and killed by police.³⁷⁸ A detailed discussion of the criminalization of Black children is in Chapter [XX].

G. Economic Terror

White people have used various types of racial violence in order to erase Black economic gains, allowing the unrestricted theft of Black labor during enslavement to carry on in new forms. In the 1890s, the prominent journalist and anti-lynching advocate Ida B. Wells conducted a detailed study of lynchings and found that the vast majority were not in response to sexual crimes, but were rather motivated by economic or political concerns.³⁷⁹ For example, perpetrators initiated attacks as a form of economic intimidation against Black Americans who disputed labor contracts.³⁸⁰ Employers also whipped and lynched Black freedmen who argued with them or left the plantations where they were contracted to work.³⁸¹

Once Black Americans became successful, ran businesses, and owned homes, they were even more targeted. In the South, even before the Civil War, the Associated Press reports that 24,000 acres of land were stolen from 406 Black landowners, including by means of racial terror.³⁸² The success of Black neighborhoods and Black individuals triggered white mobs to initiate violence,³⁸³ as white Americans felt threatened by the growing economic power and independence of Black communities.³⁸⁴

³⁷² *Id.* at pp. 108-109.

³⁷³ *Id.* at p. 108.

³⁷⁴ *Id.* at pp. 108-109.

³⁷⁵ *Ibid.*

³⁷⁶ *Id.* at pp. 114-15.

³⁷⁷ See Phillip Atiba Goff et al., [The Essence of Innocence: Consequences of Dehumanizing Black Children](#) (2014) 106(4) *Journal of Personality and Social Psychology* 526, 526-527, 539-540 (as of Apr. 5, 2022).

³⁷⁸ Heyward and Costa, [Black children are 6 times more likely to be shot to death by police, study finds](#) CNN (Dec. 17, 2020) (as of Apr. 5, 2022).

³⁷⁹ Ward, *supra*, at p. 588.

³⁸⁰ Case for Reparations, *supra*.

³⁸¹ EJI 3d ed., *supra*, at p. 15.

³⁸² Case for Reparations, *supra*.

³⁸³ Ifill, *supra*, at p. 188.

³⁸⁴ Fox, *supra*, at pp. 146-147.

There are numerous historical examples of economically motivated violence against prosperous Black communities.³⁸⁵ Perhaps the most significant example is the 1921 Tulsa massacre, discussed above in relation to mob violence, in which a white mob devastated the prosperous Black neighborhood of Greenwood.³⁸⁶ In 1997, the Oklahoma legislature formed the 1921 Tulsa Race Riot Commission (recently renamed the Tulsa Race Massacre Commission³⁸⁷), which was tasked with investigating the Tulsa massacre and recommending methods for reparations.³⁸⁸ The Commission confirmed that hundreds of white people were responsible for looting, killing, and destroying property, enabled and assisted by Tulsa government officials.³⁸⁹ The Commission found that the massacre caused \$1.8 million in property damage—\$25 million in today’s dollars, though others estimate that the damage totaled \$50 to \$100 million in today’s dollars.³⁹⁰ However, the Commission found that no one, except one white pawnshop, was given any compensation for the damage to their property, and there was no other benefit or restitution for victims.³⁹¹

Economically motivated violence was also directed at prosperous Black individuals, not just communities and neighborhoods. An illustrative case is that of Elmore Bolling, a successful Black man in Lowenesboro, Alabama.³⁹² He owned a small fleet of trucks that ran livestock and made deliveries, and he also leased a plantation where he had a general store with a gas station and a catering business.³⁹³ At the peak of his business, Bolling employed 40 other Black people.³⁹⁴ In December 1947, a group of white men showed up at Bolling’s home where he lived with his wife and seven children, shot him seven times, and left him in a ditch to die.³⁹⁵ At the time of Bolling’s death, the family had \$40,000 in the bank and more than \$5,000 in assets (approximately \$500,000 in today’s dollars), but creditors (or those who purported to be creditors) took the money, leaving the family with nothing.³⁹⁶ As someone told the local newspaper at the time, “He was too successful to be a Negro.”³⁹⁷

In addition to attacks on successful Black business owners, white people also committed racial violence against Black individuals who moved into white neighborhoods.³⁹⁸ Their goal was to pressure the new Black residents to move away and maintain housing segregation, as discussed in Chapter [XX].³⁹⁹ Such violence consisted of

³⁸⁵ Fox, *supra*, at p. 147-148; North Carolina Department of Cultural Resources Office of Archives and History, [1898 Wilmington Race Riot Report](#) (May 31, 2006), p. 445-458 (as of Apr. 5, 2022) (Wilmington Race Riot Report); EJI 3d ed., *supra*, at p. 45; Brown, [Red Summer: When Racist Mobs Ruled](#) PBS (Feb. 4, 2021) (as of Apr. 5, 2022) (Red Summer); Case for Reparations, *supra*; Lee, *supra*; Ellis, [J. Edgar Hoover and the “Red Summer” of 1919](#) (Apr. 1994) 28 J. of Am. Studies 39, 52-54, (as of Apr. 5, 2022).

³⁸⁶ Fain, *supra*.

³⁸⁷ Human Rights Watch, *supra*, at p. 2.

³⁸⁸ Oklahoma H.J.Res. No. 1035 (1997), § 1; Human Rights Watch, *supra*, at p. 38.

³⁸⁹ Human Rights Watch, *supra*, at p. 8.

³⁹⁰ *Id.* at p. 11.

³⁹¹ *Ibid.*

³⁹² Lee, *supra*.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ Case for Reparations, *supra*.

³⁹⁹ *Ibid.*

pelting homes with rocks, throwing bricks and firebombs at homes, setting garages on fire, and beating Black neighbors in the streets.⁴⁰⁰

H. Political Terror

Just as groups of white people responded violently to Black economic gains, they also resorted to violence to set back Black political gains. Black voters, and political candidates favored by Black voters, were intimidated and sometimes murdered.⁴⁰¹ By using violence, white Americans kept their grip on political power. They used this power to oppress Black Americans and prevent Black Americans from achieving equal levels of wealth and political influence. In this way, even after slavery ended, Black Americans were often prevented from achieving political power and influence.

Reconstruction—and the resulting political gains made by Black Americans—provoked violent backlash from white southerners.⁴⁰² Violence typically soared right before elections, as the Ku Klux Klan and other white supremacist groups strategically targeted their violence to deny Black voters access to the polls, or to sway election results by forcing Black voters to vote for Democrats.⁴⁰³ As white supremacists killed thousands of Black Americans over numerous attacks during Reconstruction,⁴⁰⁴ the balance of power began to shift against Reconstruction and Republicans.⁴⁰⁵

For example, in 1868, in response to growing Black support for Republican candidates in St. Landry Parish, Louisiana, white people terrorized the Black community.⁴⁰⁶ Over the course of two weeks, the attacks left more than 100 Black people dead—and by some estimates, over 200.⁴⁰⁷ The white attackers achieved their intended effect: although the parish gave 5,000 votes to the Republican governor in the spring 1868 election, there was not a single Republican vote counted in the fall 1868 election in the parish.⁴⁰⁸ The Republican Party was unable to recover in the parish for the remainder of Reconstruction.⁴⁰⁹

White supremacists also assassinated political figures. On the eve of the 1868 election, KKK members murdered James Hinds, a white Republican member of the U.S. House of Representatives who advocated for Black civil rights.⁴¹⁰ This was the first-ever assassination of a U.S. congressman.⁴¹¹ Benjamin Franklin Randolph, a Black state senator from South Carolina, was assassinated in 1868; the Ku Klux Klan was suspected of his murder, though no one was convicted of the crime.⁴¹² Similarly, in 1875, election results split

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² Lawfare, *supra*.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*; EJI 3d ed., *supra*, at pp. 9, 12; Boissoneault, [The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 years Ago](#) Smithsonian Magazine (Sept. 28, 2018) (as of Apr. 5, 2022) (Boissoneault); Rhodes, [America Is No Stranger to Election Violence](#) The New Republic (Nov. 7, 2016) (as of Apr. 5, 2022); Ifill, *supra*, at p. 274.

⁴⁰⁵ Lawfare, *supra*.

⁴⁰⁶ EJI 3d ed., *supra*, at p. 12.

⁴⁰⁷ *Ibid.*; Boissoneault, *supra*.

⁴⁰⁸ *Ibid.*; Lawfare, *supra*.

⁴⁰⁹ Boissoneault, *supra*; Lawfare, *supra*.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² William C. Hine, [Randolph, Benjamin Franklin](#) South Carolina Encyclopedia (Nov. 28, 2016) (as of Apr. 5 2022).

the Florida legislature evenly between Republicans and Democrats.⁴¹³ White supremacist assassins broke the tie by killing E.G. Johnson, a Black state senator, to give the Democrats a majority.⁴¹⁴

After Reconstruction, Southern white politicians sought to advance white supremacy in state governments and to push back against federal laws protecting Black voting rights.⁴¹⁵ They relied on lynching and vigilante violence to achieve these political goals.⁴¹⁶ As the national lynching rate soared, in 1892, the Southern-dominated Democratic Party was able to win the White House and a majority of Congress.⁴¹⁷ In response, the Republican Party abandoned racial equality as part of its platform.⁴¹⁸ White supremacists were thus able to take control of state governments and pass laws that, in combination with racial terror, suppressed Black voters.⁴¹⁹ For instance, while more than 90,000 Black citizens voted in South Carolina in 1876, by the end of the 19th century, less than 3,000 Black citizens voted.⁴²⁰ While Black people represented a majority of registered voters in Mississippi in 1868, only six percent of eligible Black people were registered to vote in Mississippi in 1890.⁴²¹ And in Louisiana, the number of Black registered voters dropped from 130,344 to 5,320 between 1896 and 1900.⁴²²

Voter suppression was not always enough for white supremacists. In one instance, they also directly overthrew the local government. After the 1898 election in Wilmington, North Carolina, armed white men overtook the Republican-led city government.⁴²³ A months-long voter suppression agenda culminated on Election Day, when armed white men patrolled Wilmington to intimidate Black voters and their allies, and white supremacists threatened poll workers as they counted ballots.⁴²⁴ In one precinct, a group of 150 to 200 white men caused a scuffle, and in the process, stuffed ballot boxes to secure their party's victory.⁴²⁵ After the election, Black people were massacred in the street.⁴²⁶ A mob of nearly 2,000 white people indiscriminately murdered between 30 and 100 Black men, women, and children, and forced 2,000 other Black residents off their property.⁴²⁷

Meanwhile, a mob of over 100 white men occupied the Wilmington city hall and forced city officials to resign under threat of violence.⁴²⁸ All of those elected officials resigned and were replaced by men selected by an all-white committee.⁴²⁹ The new city leadership fired all Black municipal employees, and banned prominent Black leaders, Black businessmen, and white Republicans from the city.⁴³⁰ There was no state investigation of the

⁴¹³ Lawfare, *supra*.

⁴¹⁴ *Ibid*.

⁴¹⁵ EJI 3d ed., *supra*, at p. 50.

⁴¹⁶ *Ibid*; Ifill, *supra*, at p. 276.

⁴¹⁷ EJI 3d ed., *supra*, at p. 50; see also Desmond S. King & Rogers M. Smith, [Racial Orders in American Political Development](#) (Feb. 2005), 99(1) *The American Political Science Review* 75, 87.

⁴¹⁸ EJI 3d. ed., *supra*, at p. 50.

⁴¹⁹ Lawfare, *supra*.

⁴²⁰ *Ibid*.

⁴²¹ Ifill, *supra*, at p. 275.

⁴²² *Ibid*.

⁴²³ 1898 Race Riot Facts, *supra*.

⁴²⁴ EJI 2021, *supra*.

⁴²⁵ *Ibid*; 1898 Race Riot Facts, *supra*.

⁴²⁶ EJI, [Political Violence and Racial Inequity in America](#) (Jan. 19, 2021) (as of Apr. 5, 2022) (EJI 2021); 1898 Race Riot Facts, *supra*; Lee, *supra*.

⁴²⁷ EJI 2021, *supra*; 1898 Race Riot Facts, *supra*; Lee, *supra*.

⁴²⁸ EJI 2021, *supra*.

⁴²⁹ 1898 Race Riot Facts, *supra*.

⁴³⁰ *Ibid*.

violence in Wilmington, and the federal investigation produced no indictments.⁴³¹ To date, this has been the only successful coup d'état of a U.S. American government.⁴³²

Similar political violence continued into the 20th century. In Ocoee, Florida, on Election Day 1920, a mob of 250 white people, including KKK members, killed dozens of Black Americans, set fire to their homes, and drove them out of the city to prevent them from voting.⁴³³ This massacre has been called the “single bloodiest election day in modern American history.”⁴³⁴

Due to this extensive history of violence and political repression, it was not always necessary for the KKK or other white supremacists to take direct violent action to intimidate Black voters from the polls. Threats were often just as effective. For example, in August 1922, just a year after the Tulsa massacre, the KKK reportedly flew over Oklahoma City in airplanes, dropping cards into Black neighborhoods, warning people to be cautious before heading to the polls.⁴³⁵ That same year, the Topeka State Journal reported that the KKK committed to staking out polling places in Texas to “take careful note of the voting procedure.”⁴³⁶

Racist voter intimidation continues in contemporary times. During the 2016 election, neo-Nazi and white supremacist groups, including the KKK and the Oath Keepers, organized poll watchers in all 50 states, focusing on urban areas.⁴³⁷ In the 2020 presidential debate, President Trump told his supporters to “go into the polls and watch very closely,” and told a white supremacist organization, the Proud Boys, to “stand by.”⁴³⁸

The racist overtones that surrounded the 2020 election culminated in the January 6, 2021 Capitol Riot, where armed white people violently stormed the U.S. Capitol while Congress was counting the electoral vote.⁴³⁹ The rioters shouted racist epithets at Black Capitol Police officers, paraded around the Capitol waving a Confederate flag,⁴⁴⁰ and built a gallows to hang a noose in front of the Capitol building.⁴⁴¹ This was the first time the Confederate flag was brought into the Capitol as an act of insurrection, something that was not even done during the Civil War.⁴⁴²

Further discussion of the use of violence and terror to suppress the development and rise of Black political power is in Chapter 4 Political Disenfranchisement.

⁴³¹ *Ibid.*

⁴³² EJI 2021, *supra*.

⁴³³ Kaur, [On this day 100 years ago, a White mob unleashed the deadliest Election Day violence in US history](#) CNN (Nov. 2, 2020) (as of Apr. 5, 2022) (Kaur).

⁴³⁴ Caste, *supra*, pp. 228-29; Kaur, *supra*.

⁴³⁵ Bump, **Error! Hyperlink reference not valid.***supra*.

⁴³⁶ *Ibid.*

⁴³⁷ Schreckinger, [White nationalists plot Election day show of force](#) Politico (Nov. 2, 2016) (as of Apr. 5, 2022).

⁴³⁸ Buhl, *supra*

⁴³⁹ Lisa Mascaro et al., [Pro-Trump mob storms US Capitol in bid to overturn election](#) Associated Press (Jan. 2021—though n.b. the listed date of publication is obviously an error) (as of Apr. 5, 2022).

⁴⁴⁰ Montanaro, [Capitol Police Officer Testifies To The Racism He Faced During The Jan. 6 Riot](#) NPR (July 27, 2021) (as of Apr. 5, 2022); Morrison, [Racism of rioters takes center stage in Jan. 6 hearing](#) AP News (July 28, 2021) (as of Apr. 5, 2022).

⁴⁴¹ MacFarlane, [Noose Displayed at Capitol Insurrection in FBI's Custody](#) NBC Washington (Nov. 1, 2021) (as of Apr. 5, 2022).

⁴⁴² Cramer, [Confederate Flag an Unnerving Sight in Capitol](#) N.Y. Times (Jan. 14, 2021) (as of Apr. 5, 2022).

I. Intimidation Tactics and Cross-Burning

Even when not physical in nature, the perpetrators of racial terror used the threat of violence to intimidate Black Americans and preserve the American racial hierarchy. The Ku Klux Klan, for example, often conducted masked rides through towns at night to frighten Black residents, an intimidation technique that mirrored antebellum slave patrols.⁴⁴³ As discussed above, slave patrols used violence to discipline enslaved persons, prevent uprisings, and capture enslaved persons who managed to escape.⁴⁴⁴ Furthermore, the KKK's disguises were designed to capitalize on the superstitions of formerly enslaved people, and their activities resembled plantation scare tactics.⁴⁴⁵

The KKK also frequently burned crosses.⁴⁴⁶ While the cross-burning itself may not have physically harmed anyone, it undoubtedly became a well-known symbol of racial terror to intimidate minorities.⁴⁴⁷ During oral argument in *Virginia v. Black*, a 2002 case contemplating whether a state could criminalize burning a cross, Justice Thomas made a point of connecting the “symbol” of cross-burning to its terrorizing effect: the burning cross is “unlike any symbol in our society There’s no other purpose to the cross, no communication, no particular message.”⁴⁴⁸ As he explained, the burning cross “was intended to cause fear and to terrorize a population.”⁴⁴⁹ In his opinion in the case, Justice Thomas observed that a cross-burning could serve only to “terrorize and intimidate”: “In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”⁴⁵⁰

Government entities have also used tactics of racial intimidation to subjugate Black citizens and enforce white supremacy. The State of Mississippi, for example, created the Mississippi State Sovereignty Commission, which formally existed from 1956 to 1977, and was funded from the state budget.⁴⁵¹ The Sovereignty Commission was an intelligence organization targeting civil rights activists and engaged in spying, intimidation, false imprisonment, and jury tampering.⁴⁵² The Sovereignty Commission served as a model for similar agencies fighting to oppose racial justice in other states.⁴⁵³ The Sovereignty Commission’s activity was involved in the false imprisonment of Clyde Kennard.⁴⁵⁴ Kennard, a Black man, attempted to integrate a segregated local college in Hattiesburg, Mississippi.⁴⁵⁵ Files of the Sovereignty Commission reveal that state officials openly discussed that they would prefer to kill or frame Kennard rather than allow him to enroll.⁴⁵⁶

⁴⁴³ SPLC History, *supra*.

⁴⁴⁴ Slave Patrols, *supra*.

⁴⁴⁵ Robb, [Two Men in KKK Disguises: A Photograph from Reconstruction Alabama](#) (July 2017) 70(3) Ala. Review 222, 238-39 (Robb).

⁴⁴⁶ Anti-Defamation League, [Burning Cross](#) (as of Apr. 5, 2022).

⁴⁴⁷ Koerner, [Why Does the Ku Klux Klan Burn Crosses?](#) Slate (Dec. 17, 2002) (as of Apr. 5, 2022).

⁴⁴⁸ Greenhouse, [An Intense Attack by Justice Thomas on Cross-Burning](#) N.Y. Times (Dec. 12, 2002) (as of Apr. 5, 2022) (Greenhouse).

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Virginia v. Black* (2003) 538 U.S. 343, 391, 394 (dis. opn. of Thomas, J.).

⁴⁵¹ Kevin Sack, [Mississippi Reveals Dark Secrets of a Racist Time](#) N.Y. Times (March 18, 1998) (as of Apr. 5, 2022) (Sack).

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ Adam Liptak, [Pardon Unlikely for Civil Rights Advocate](#) N.Y. Times (May 4, 2006) (as of Apr. 5, 2022) (Liptak).

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

J. California

1. “Good” Western Vigilantism vs. “Bad” Southern Terror

In its first decades of statehood, California had a reputation for vigilantism, including extralegal executions by hanging.⁴⁵⁷ For example, the lynching of people who committed crimes was a common method of “justice” in gold mines,⁴⁵⁸ and Placerville was originally known as “Hangtown.”⁴⁵⁹ As in the South, California lynchings involved active participation by law enforcement.⁴⁶⁰

Ken Gonzales-Day, an expert in California lynchings, found evidence of 352 lynchings that occurred between 1850 and 1935, including of eight Black Americans, but mostly of Native, Chinese, and Latino Americans.⁴⁶¹ (As discussed above, counts of lynchings are lower than the true number, due to lack of documentation and cover-up efforts.⁴⁶²) As was the case elsewhere in the United States, Black Californians were often lynched in response to labor disputes or alleged crimes.⁴⁶³ In the 1871 Chinese massacre, 10 percent of Los Angeles (500 people) formed a mob and lynched 17 Chinese men and boys because they believed that Chinese people had killed a white saloon owner.⁴⁶⁴ Barely anyone was held accountable for these and the other many murders of people of color.⁴⁶⁵

A 1933 lynching of two white kidnapers in San Jose put a stamp of approval on lynching nationwide.⁴⁶⁶ The lynching received more attention than any other lynching in U.S. history, partly because the victims were white—an anomaly for lynchings.⁴⁶⁷ Then-California Governor James Rolph praised the lynchers and vowed to pardon them if they were charged.⁴⁶⁸ Although the victims in the San Jose lynching were white, anti-lynching activists understood at the time that Black Americans, who were the typical target of lynchings, would face the repercussions for the glorification of the San Jose lynching.⁴⁶⁹ As such, they swiftly and widely condemned the lynching and the Governor’s response.⁴⁷⁰

⁴⁵⁷ Hudson, *supra*, at p. 134

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Newsom Amicus Brief, *supra*, at p. 36, citing Carrigan & Webb, at pp. 414-17.

⁴⁶¹ Hudson, *supra*, at p. 136.

⁴⁶² See Ward, *supra*, at pp. 596-598; see also EJI 2020, *supra*.

⁴⁶³ Rudolph M. Lapp, *Blacks in Gold Rush California* (1977), p. 261; [Lynching Case at Newtown](#) Daily Alta California (Mar. 14, 1852), Vol. 3, No. 72, p. 2 (as of Apr. 5, 2022); Louise Amelia Knapp Smith Clappe, *The Shirley Letters from California Mines in 1851-52* (1922), pp. 272-73; [Hanging at Nicolaus](#) Daily Alta California (June 15, 1852), Vol. 3, No. 166, p. 2 (as of Apr. 5, 2022); [Great Excitement at Mormon Island](#) Sacramento Daily Union (Jan. 29, 1853), Vol. 4, No. 578, p. 2 > (as of Apr. 5, 2022).

⁴⁶⁴ Wallace, [Forgotten Los Angeles History: The Chinese Massacre of 1871](#) Los Angeles Public Library (May 19, 2017) (as of Apr. 5, 2021) (Chinese Massacre of 1871) see also Dorland, [Chinese Massacre at Los Angeles in 1871](#) (1894) 3(2) Annual Publication of the Historical Society of Southern California, Los Angeles, 22-26(as of Apr. 5, 2022).

⁴⁶⁵ Chinese Massacre of 1871, *supra* (charges on eight rioters were overturned on a legal technicality); Newsom Amicus Brief, *supra*, at p. 35, citing Carrigan & Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928* (2003) 37 J. Soc. Hist. 411, 417 (noting “almost no white man was ever made to stand trial for a lynching of a Mexican”) (Carrigan & Webb).

⁴⁶⁶ Hudson, *supra*, at p. 145.

⁴⁶⁷ *Id.* at p. 11.

⁴⁶⁸ *Id.* at p. 144.

⁴⁶⁹ *Id.* at pp. 144-45.

⁴⁷⁰ *Id.* at pp. 144-45, 148.

The anti-lynching activists were correct: mobs in other parts of the country followed the Governor's enthusiastic endorsement to perpetrate their own lynchings, mostly of Black Americans.⁴⁷¹ The fact that the San Jose lynching occurred in the West underscored that lynching was a national, not solely Southern, problem.⁴⁷² But the lynching and the subsequent praise of the mob by the Governor also lent credibility to the practice of lynching and decoupled its exclusive association with Jim Crow.⁴⁷³ The *New York Times* reported in 1933 that southerners widely reacted to the San Jose lynching by remarking, "California's my address from now on," or "those Westerners are learning how the South handles 'em."⁴⁷⁴ The *Times* concluded that, by endorsing the practice of lynching, the Governor of California had gone *further* than some Southern governors who had sought to prevent lynchings.⁴⁷⁵

2. Racial Terror as a Response to Black Prosperity in California

As was the case elsewhere in the country, the Ku Klux Klan and other perpetrators of racial violence in California focused their attacks against those who threatened the system of racial and socioeconomic subjugation of Black Americans—those Black people who found well-paying jobs, amassed wealth, bought homes, used public pools and parks, and otherwise engaged in civil society.

The surge of KKK activity, and its accompanying violence, was connected to the migration of over a quarter million Black Americans to California during World War II—the state with the largest increase in its Black population during that time.⁴⁷⁶ The "Great Migration" was inspired, at least in part, by the recurring incidents of racial terror throughout the South, as well as the poor economic, political, and social conditions that Black southerners experienced.⁴⁷⁷ California, which was experiencing a dramatic increase in manufacturing jobs during World War II, was an appealing destination.⁴⁷⁸ California's Black wartime workers, as the Black press noted, had a higher standard of living compared to Black workers in the South.⁴⁷⁹ Simultaneously, new KKK members moved to California during World War II just as Black homeowners renewed their offensive against restricted housing.⁴⁸⁰

The comparative freedoms that Black Californians enjoyed motivated white supremacists to organize against Black workers and homeowners (as well as other non-white veterans, such as Mexican and Japanese veterans, returning from the war).⁴⁸¹ White people were threatened by Black Americans with good jobs who purchased property, voted, and inhabited public spaces and institutions.⁴⁸² Fearful of a growing Black population, and emboldened by the silence and cooperation of police and government officials, the KKK initiated a new wave of violent activity in the late 1930s and 1940s to stem the influx of Black populations—or to keep Black people

⁴⁷¹ *Id.* at p. 145.

⁴⁷² *Id.* at p. 147.

⁴⁷³ *Id.* at p. 165.

⁴⁷⁴ *Id.* at p. 146.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Id.* at p. 189.

⁴⁷⁷ Ifill, *supra*, at p. 293; Hudson, *supra*, at p. 188.

⁴⁷⁸ Hudson, *supra*, at p. 188.

⁴⁷⁹ *Id.* at p. 190.

⁴⁸⁰ *Id.* at p. 169.

⁴⁸¹ *Id.* at pp. 169, 190.

⁴⁸² *Id.* at p. 207.

entirely out of white communities.⁴⁸³ For instance, the KKK's resurgence in the Inland Empire and Southern California in the 1940s was linked to the gains made by Black workers, homeowners, and civil rights activists.⁴⁸⁴

Throughout California, the revived KKK had one primary goal: to enforce racial segregation and maintain the social inferiority of Black Americans.⁴⁸⁵ They aimed to keep neighborhoods, schools, pools, parks, and beaches all-white and monitor people of color who transgressed racial boundaries.⁴⁸⁶ For further discussion of residential segregation, see Chapter 5 The Root of Many Evils: Housing Segregation.

3. Violence Against Black Homeowners in California

Violence to stifle and reverse Black advancement was perhaps most evident in the attacks on Black homeowners during the 1940s. As new Black migrants were able to afford homeownership, white supremacist backlash grew.⁴⁸⁷ The Ku Klux Klan sought to promote segregation and prevent the integration of Black residents into white neighborhoods.⁴⁸⁸ Violence against Black homeowners in California peaked in the 1940s.⁴⁸⁹ The KKK mainly relied on arson and physical attacks on homeowners to intimidate people of color from buying in majority-white neighborhoods.⁴⁹⁰ This practice dates back to 1909, when white Pasadena residents set fire to the homes of Black arrivals in the neighborhood.⁴⁹¹

This violence was thoroughly racist. The violence against Black homeowners was not caused by concern over a "lower social class of neighbors," as the Black homeowners were often of a higher occupational and social status than the white attackers.⁴⁹² Similarly, when Black homeowners moved into a neighborhood, they took better care of their homes and lawns than their white neighbors.⁴⁹³

The murder of O'Day Short, a refrigeration engineer, is emblematic of the racial terror perpetrated against Black communities during the 1940s in California. After he and his family moved into the white neighborhood of Fontana in 1945, Short was threatened by police, and a local vigilante group said it wanted the Shorts out of the neighborhood.⁴⁹⁴ On December 6, 1945, two weeks after they moved in, the Shorts died in a house fire that killed the family of four.⁴⁹⁵ As with much of the violence against Black Americans, state officials failed to hold anyone accountable for the murder, and inexplicably blamed the fire on the Shorts.⁴⁹⁶ Then-California Attorney General Robert W. Kenny investigated the murder, but the report failed to confirm that vigilantes caused the

⁴⁸³ *Id.* at pp. 174-75, 188.

⁴⁸⁴ *Id.* at pp. 201-203.

⁴⁸⁵ *Id.* at p. 190.

⁴⁸⁶ *Id.* at pp. 168-69, 190.

⁴⁸⁷ *Id.* at pp. 189-90.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Id.* at p. 168.

⁴⁹⁰ *Id.* at p. 190.

⁴⁹¹ *Id.* at p. 13.

⁴⁹² Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017), p. 251 (Color of Law).

⁴⁹³ *Ibid.*

⁴⁹⁴ Hudson, *supra*, at p. 193.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

fire or that there was any vigilante activity in the community.⁴⁹⁷ The NAACP called the report a “white wash.”⁴⁹⁸

The murder of the Shorts, and the subsequent failure to hold the perpetrators accountable, confirmed to the power of white supremacy in California. A Los Angeles Sentinel editorial said: “Jim Crow had kept Short from finding a home in Los Angeles; Jim Crow had cast him in the role of a violator of Community traditions if he built a house on the lot he purchased; Jim Crow had warped the sense of duty of deputy sheriffs to the extent that they themselves had joined in a plan to deprive an American citizen of his constitutional rights... All the Shorts are dead. Only Jim Crow is alive.”⁴⁹⁹

Within months following the explosion at the Shorts’ home, Black homeowners were increasingly under attack by the KKK in Southern California.⁵⁰⁰ For example, the KKK staged a comeback in Big Bear Valley focused on restrictive covenants, violence, and cross burnings.⁵⁰¹ The KKK’s stated goal was to achieve a “One Hundred Per Cent Gentile Community.”⁵⁰²

4. California’s Coercive Sterilization of Black Men and Women

As discussed in Chapter 12 Harm and Neglect: Mental, Physical and Public Health, California was one of the first states to begin forcibly sterilizing people in the early 1900s, and conducted by far the most sterilizations in the United States (one third of the nationwide total).⁵⁰³ From 1909 to 1979, under the state eugenics law, California state institutions forcibly sterilized approximately 20,000 people deemed “unfit to produce.”⁵⁰⁴ While men made up the majority of sterilizations at first, by the 1930s, women were more frequently the subject of sterilizations, and in the middle of the century, nearly all of the operations were performed on women.⁵⁰⁵ Black people were also disproportionately sterilized in California.⁵⁰⁶ They constituted just over one percent of California’s population in the 1920s, yet they accounted for four percent of total sterilizations by the State of California.⁵⁰⁷

5. Extrajudicial Police Violence in California

Scholars have argued that extrajudicial violence by police officers represents a modern form of lynching. In California, since 2015, 158 Black people were shot and killed by police, at least 16 of whom were known to be unarmed.⁵⁰⁸ Among those whose race and ethnicity were known, Black people represent 18.9 percent of those killed by the police, despite representing only six percent of the population.⁵⁰⁹ Those responsible for these

⁴⁹⁷ *Id.* at p. 197, 205.

⁴⁹⁸ *Id.* at p. 205.

⁴⁹⁹ *Id.* at p. 199.

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Id.* at p. 202.

⁵⁰² *Ibid.*

⁵⁰³ Hawkins, [California once forcibly sterilized people by the thousands. Now the victims may get reparations](#) The Washington Post (July 9, 2021) (as of Apr. 5, 2022) (Hawkins).

⁵⁰⁴ Jindia, [Belly of the Beast: California’s dark history of forced sterilizations](#) The Guardian (June 30, 2020) (as of Apr. 5, 2022).

⁵⁰⁵ Hawkins, *supra*.

⁵⁰⁶ Stern, [Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California](#) (July 2005) 95(7) Am. J. of Pub. Health. 1128, 1131, (as of Apr. 5, 2022) (Stern); see also Health Section, *infra*.

⁵⁰⁷ Stern, *supra*, at p. 1131.

⁵⁰⁸ [Fatal Force](#), The Washington Post (as of Apr. 5, 2022) (*Fatal Force*).

⁵⁰⁹ [Fatal Force, supra](#); U.S. Census, [Quick Facts: California](#) (as of Apr. 5, 2022).

killings have largely never been found to be criminally liable.⁵¹⁰ The Los Angeles Times reports, for example, that since 2001, Los Angeles County law enforcement has killed over 900 people—nearly 80 percent of whom were Black or Latino.⁵¹¹ On average, one police shooting occurred every five days.⁵¹² Out of all of those cases, only two officers were charged as a result of a civilian shot on duty, and in virtually all of the cases, the Los Angeles County District Attorney deemed the use of force legally justified.⁵¹³ Similarly, officers with the Vallejo Police Department killed 19 people from 2010 to 2020, but no Vallejo police officer has been found to be criminally liable for killing a civilian while on duty.⁵¹⁴

Below are only a few examples of the hundreds of incidents where police have used extrajudicial violence in California to inflict pain or cause death, a topic that is discussed in greater detail in Chapter 11 An Unjust Legal System. In general, these acts of violence were often the result of officers enflaming or failing to de-escalate the situation, and sometimes occurred in a manner that appeared to show little regard for the Black lives harmed or killed. Taken together, these incidents can be understood to perpetuate the myth of Black criminality and function as a threat to the overall well-being of Black people, whom law enforcement may often consciously or unconsciously view as dangerous criminals.

- In 1991, four LAPD officers repeatedly beat Rodney King on the ground with batons for 15 minutes while a dozen officers stood by and watched.⁵¹⁵ He was unarmed.⁵¹⁶ The officers had used racial slurs to refer to King over the LAPD communications systems.⁵¹⁷ The officers who committed the beating—three of whom were white—were acquitted, which sparked local unrest.⁵¹⁸
- In 1998, four officers were called to help Tyisha Miller, who had locked herself in the car and fallen asleep.⁵¹⁹ When the officers failed to wake her from outside, they broke her window to grab the firearm that was sitting in her lap.⁵²⁰ That caused Miller to bolt upright, and the officers shot her out of fear—firing 24 bullets and shooting her 12 times in the chest.⁵²¹ While the officers were fired, the U.S. Justice Department’s civil rights division—as well as the California Department of Justice, which was conducting a civil investigation into the police department as a whole—declined to bring charges against the individual officers.⁵²²

⁵¹⁰ Levin, [Los Angeles officers shot at Ryan Twyman 34 times. He was one of four they killed that day](#) The Guardian (Aug. 15, 2019) > (as of Apr. 5, 2022) (Levin).

⁵¹¹ Los Angeles Times, [Los Angeles Police Killings Database](#) (last updated Nov. 4, 2021) (as of Apr. 5, 2022).

⁵¹² Levin, *supra*; Sen. Com. on Pub. Safety, [Analysis of Assem. Bill No. 1506](#) (1999-2000 Reg. Sess.) Aug. 11, 2020, p. 7, (as of Apr. 5, 2022) (AB 1506 Analysis).

⁵¹³ AB 1506 Analysis, *supra*, at p. 7.

⁵¹⁴ *Ibid.*

⁵¹⁵ Sastry and Bates, [When LA Erupted in Anger: A Look Back at the Rodney King Riots](#) NPR (Apr. 26, 2017) (as of Apr. 5, 2022) (Rodney King Riots).

⁵¹⁶ *Ibid.*

⁵¹⁷ Orlov, [Police messages unearthed – Comments by officers called racist](#) Los Angeles Daily News (Mar. 19, 1991) (as of Apr. 5, 2022).

⁵¹⁸ Rodney King Riots, *supra*.

⁵¹⁹ Rosenzweig, [No Charges in Killing of Tyisha Miller](#) L.A. Times (Dec. 13, 2002) (as of Apr. 5, 2022) (Killing of Tyisha Miller). Los Angeles Times, <<https://www.latimes.com/archives/la-xpm-2002-dec-13-me-tyisha13-story.html>> (as of Nov. 12, 2021) (Killing of Tyisha Miller).

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² *Ibid.*

- On New Years' Day 2009, Bay Area Rapid Transit police officers responded to a report of fighting on a train.⁵²³ One officer pinned Oscar Grant down with a knee on his neck.⁵²⁴ While Grant was lying face-down, the other officer purportedly mistook his gun for a Taser and shot Grant.⁵²⁵ The officer who shot Grant was convicted of involuntary manslaughter.⁵²⁶
- In November 2013, Tyler Damon Woods was shot by police while on his knees after fleeing a traffic stop by foot.⁵²⁷ The officers believed he was armed, which was inaccurate, and shot at Woods approximately 39 times.⁵²⁸ Nineteen bullets hit him, six of which were each individually enough to kill Woods.⁵²⁹ The police continued to shoot him, claiming he exhibited superhuman resilience.⁵³⁰
- In 2019, Vallejo police responded to a wellness request for Willie McCoy, a 20-year-old Black man who was asleep in his car in a Taco Bell parking lot.⁵³¹ Six officers surrounded the cars when McCoy started to wake up.⁵³² The police claimed that McCoy was reaching for a firearm—which did not appear to be supported by the police video—and six police officers fired 55 shots at McCoy, killing him.⁵³³ All of the officers involved in the shooting returned to their regular duties. McCoy's family said McCoy was "executed by a firing squad."⁵³⁴
- In August 2020, the Los Angeles County Sheriff's Department stopped Dijon Kizzee for "riding a bicycle on the wrong side of the road" and "splitting traffic."⁵³⁵ Kizzee refused to stop, abandoned his bicycle, and fled on foot.⁵³⁶ The Sheriff's office claims that deputies fired when Kizzee reached back to pick up a gun he dropped, but video evidence appears to contradict this claim.⁵³⁷ An independent autopsy concluded that Kizzee was struck 15 times by two deputies' 19 rounds.⁵³⁸ After they fired, the deputies called for backup, and Kizzee bled to death on the street.⁵³⁹

There have also been incidents where law enforcement officers in California have participated in racist, nativist, and sexist social media activity online; showed white supremacist sympathies; or worse, systematically carried

⁵²³ Leonard, [Former BART officer convicted of involuntary manslaughter](#) L.A. Times (July 8, 2010) (as of Apr. 5, 2022) (Leonard).

⁵²⁴ Los Angeles Times, [Investigation reopens into death of Oscar Grant, a Black man killed by a BART transit officer in 2009](#) L.A. Times (Oct. 6, 2020) (as of Apr. 5, 2022) (Killing of Oscar Grant); Leonard, *supra*.

⁵²⁵ Killing of Oscar Grant, *supra*.

⁵²⁶ Malaika Fraley, [Oscar Grant Case: Civil Jury Rules in Favor of Johannes Mehserle, Denies Award to Slain Man's Father](#) (updated Aug. 12, 2016) (as of Apr. 5, 2022).

⁵²⁷ Moxley, [Social Cops Are Still Defending 39-Bullet Barrage on Unarmed Man](#) OC Weekly (Mar. 14, 2018) (as of Apr. 5, 2022) (Moxley).

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ Guevarra, [The Life and Death of Willie McCoy](#) KQED (Aug. 19, 2019) (as of Apr. 5, 2022) (Death of Willie McCoy).

⁵³² *Ibid.*

⁵³³ *Ibid.*

⁵³⁴ Levin, ['Executed by firing squad': video shows police firing a dozen shots at man](#) The Guardian (Feb. 14, 2019) (as of Apr. 5, 2022).

⁵³⁵ Moon, [Independent autopsy shows Dijon Kizzee was struck 15 times by LA Sheriff's deputies, according to family attorneys](#) CNN (Sept. 23, 2020) (as of Apr. 5, 2022) (Killing of Dijon Kizzee).

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

out attacks against minority members of the community.⁵⁴⁰ In the 1990s, a federal district court found that a group of deputies in the Los Angeles County Sheriff's Department, known as the Lynwood Vikings, was "a neo-Nazi, white supremacist gang" that engaged in "terrorist-type tactics" with the knowledge and acquiescence of their superiors.⁵⁴¹ The court found that these gangs committed "systemic acts of shooting, killing, brutality, terrorism, house-trashing, and other acts of lawlessness and wanton abuse of power," particularly against Latinos and Black people.⁵⁴² In 1996, the Sheriff's Department paid \$9 million in fines and training costs to settle the matter.⁵⁴³ Despite that settlement, according to independent reports, law enforcement gangs still allegedly thrive in low-income, high-minority areas of Los Angeles, where they have allegedly committed excessive force against minority members of the communities, sometimes using racial epithets while doing so.⁵⁴⁴

V. Legacy and Effects of Racial Terror

As discussed above, racial terror played a critical role in white efforts to subjugate Black people to an inferior economic, political, and social stature and maintain the caste structure that was established during enslavement. As such, racial terror has contributed to many racial inequities in America today.⁵⁴⁵ While Black communities have remained resilient in the face of numerous structural, social, economic, and political barriers, the threat of racial violence continues to harm Black Americans.⁵⁴⁶

A. Criminal Justice

The legacy of the Ku Klux Klan's infiltration of law enforcement continues today. Law enforcement officers in at least 14 states, including California, have been tied to white supremacist groups and far-right militant activities.⁵⁴⁷ Advocates and scholars have argued that police killings of unarmed Black people should be understood as the modern-day equivalent of lynching. Just as the threat of lynching controlled Black Americans, the threat of murder by police imposes controls on the lives of Black Americans. Today, some Black parents feel compelled to educate their children early on about how to interact with racialized targeting by the police.⁵⁴⁸ As was the case with lynchings, those involved in these extrajudicial killings are only rarely held accountable for their actions.⁵⁴⁹

⁵⁴⁰ German, [Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement](#) Brennan Center for Justice (Aug. 27, 2020) (as of Apr. 5, 2022) (Brennan Center).

⁵⁴¹ Tobar, [Deputies in 'Neo-Nazi' Gang, Judge Found: Sheriff's Department: Many at Lynwood office have engaged in racially motivated violence against blacks and Latinos, jurist wrote](#) L.A. Times (Oct. 12, 1991) (as of Apr. 5, 2022) (Deputies in Neo-Nazi Gang).

⁵⁴² *Ibid.*

⁵⁴³ O'Connor and Daunt, [The Secret Society Among Lawmen](#) L.A. Times (Mar. 24, 1999) (as of Apr. 5, 2022).

⁵⁴⁴ See, e.g., Loyola Law School Loyola Marymount University Center for Juvenile Law & Policy, [50 Years of Deputy Gangs in the Los Angeles County Sheriff's Department](#) (Jan. 2021) (as of Apr. 5, 2022); Lockhart, [A new lawsuit describes a violent gang in LA County. Its members are deputy sheriffs](#) Vox (Oct. 11, 2019) (as of Apr. 5, 2022); Joseph, Rakia, and Corey, [Claims of Racism and Brutality Dog Los Angeles County Sheriff 'Deputy Gangs'](#) The Appeal (Sept. 28, 2018) (as of Apr. 5, 2022).

⁵⁴⁵ Ward, *supra*, at p. 611

⁵⁴⁶ *Id.* at p. 609; Ifill, *supra*, at p. 287-88.

⁵⁴⁷ Brennan Center, *supra* (citing numerous news articles).

⁵⁴⁸ *Utah v. Strieff*, (2016) 136 S. Ct. 2056, 2070 (Sotomayor, J., dissenting) (discussing how Black and Brown parents have given children "the talk" for generations, citing Du Bois, Baldwin, and Coates).

⁵⁴⁹ AB 1506 Analysis, *supra*, at p. 7.

Created during enslavement in order for white enslavers to control Black enslaved people, and perpetuated through lynchings, the racist myth that Black people are criminals continues today. As discussed in Chapter 11 An Unjust Legal System, this myth of Black criminality still contributes to racial disparities between Black and white Americans in arrests, convictions, and imprisonment.⁵⁵⁰ The death penalty, which scholars argue is a vestige of racialized violence against Black Americans, also discussed in Chapter 11 An Unjust Legal System, disproportionately kills Black Americans.⁵⁵¹ Death penalty lawyer Stephen B. Bright argues that capital punishment in the United States is so thoroughly compromised by bias and racial disparities that it must be understood as “a direct descendent of lynching.”⁵⁵²

B. Economic Effects

Violence and terror targeting Black Americans has directly destroyed Black wealth—which has a compounding effect over time to prevent Black Americans from amassing more wealth and thus contributing greatly to the wealth gap.⁵⁵³ The disparities are stark: white Americans have seven times the wealth of Black Americans.⁵⁵⁴ Although Black people make up nearly 13 percent of the U.S. population, they hold less than three percent of the nation’s wealth.⁵⁵⁵ The median family wealth for white people is \$171,000, compared to \$17,600 for Black people.⁵⁵⁶ And 19 percent of Black households have zero or negative net worth, compared to nine percent of white families.⁵⁵⁷

Lynchings, police brutality, and other forms of violence and intimidation were used to seize land from Black farmers, rendering Black Americans landless and unable to accumulate generational wealth.⁵⁵⁸ Although Black farmers collectively increased their land holdings at a greater rate than whites between 1900 and 1920, Black farm owners lost 57 percent of their land, whereas white farm owners lost 22 percent of their land, from 1900 to 1978.⁵⁵⁹

Similarly, rates of Black homeownership have stagnated and declined. In 1909, 36 percent of Black residents of Los Angeles were homeowners before the implementation of policies and carrying out of violent acts designed to prevent Black home ownership.⁵⁶⁰ By 2021, the rate of Black homeownership had declined to 34 percent.⁵⁶¹

The effect of violence by the Ku Klux Klan, buttressed by the support of law enforcement, real estate brokers, and federal loan programs, paved the way for segregated neighborhoods with unequal city services for Black

⁵⁵⁰ EJI 3d ed., *supra*, at p. 61.

⁵⁵¹ Bright, [*Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*](#) (1995) 35 Santa Clara L.Rev. 433, 433-435 (Bright).

⁵⁵² *Id.* at pp. 439, 442-466.

⁵⁵³ Lee, *supra*.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Newkirk, [*The Great Land Robbery*](#) The Atlantic (Sept. 2019) (as of Apr. 5, 2022).

⁵⁵⁹ Hinson, *supra*, at p. 916.

⁵⁶⁰ Fleischer, [*Opinion: Want to tear down insidious monuments to racism and segregation? Bulldoze L.A. freeways*](#) L.A. Times (June 24, 2020) (as of Apr. 5, 2022).

⁵⁶¹ Munoz and Manthey, [*Black families own homes at a lower rate than white families in SoCal. Here’s why that matters*](#) ABC 7 News (July 16, 2021) (as of Apr. 5, 2022).

neighborhoods.⁵⁶² In Los Angeles, for example, Black residents were pushed to neighborhoods like Watts, while the city stopped running street cars that would have transported Black workers to shipyard and aircraft jobs in other parts of the city, limiting Black employment opportunities.⁵⁶³ Even though KKK activities declined after the 1940s, the KKK had already succeeded in restricting Black opportunities for wealth and homeownership at a time of significant economic opportunity after the end of World War II.⁵⁶⁴

Although the 1968 Fair Housing Act made violence to prevent neighborhood integration a federal crime, and the U.S. Department of Justice prosecuted several cases, frequent attacks on Black Americans attempting to move into predominantly white areas continued into the 1980s, with 130 cases of move-in violence in 1989 alone.⁵⁶⁵ Not until the late 1980s were a majority of these crimes prosecuted.⁵⁶⁶ The broad lack of enforcement sent a message that these crimes were tolerable, which emboldened perpetrators to continue their violent actions.⁵⁶⁷

C. Impact on Health and Family Life

Fear of racial terror, past and present, has also resulted in trans-generational trauma for Black Americans. Black families and communities were profoundly affected by lynchings.⁵⁶⁸ The constant threat of lynching affected interpersonal interactions.⁵⁶⁹ Family members of victims could not obtain justice out of fear that they too would be lynched, and they were often frightened to even attend a funeral of their lynched loved one.⁵⁷⁰ Images of mutilated bodies on public display or dragged through the streets traumatized the psyche of Black Americans.⁵⁷¹ These images left an especially indelible impression on Black children, framing their view of the world as a dangerous and unpredictable place, and causing lifelong damage, including sleep disturbances, flashbacks, and emotional detachment.⁵⁷²

These psychological traumas have extended across generations. Violence has reinforced white supremacist cultural and institutional systems, while the arbitrary nature of lynching socialized Black people to understand that any act of perceived insubordination could be a matter of life or death.⁵⁷³ In this way, racial terror was a powerful tool for social, educational, and political control, as it encouraged Black people to change their own behavior and avoid opportunities for advancement, lest they risk being the victim of violence.⁵⁷⁴ Black Americans continue to experience the effects of trauma induced by racial terror today, including heightened

⁵⁶² Hudson, *supra*, at p. 206.

⁵⁶³ *Id.* at pp. 206-07.

⁵⁶⁴ *Id.* at p. 207.

⁵⁶⁵ Color of Law, *supra*, at p. 147.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Id.* at pp. 257-58.

⁵⁶⁸ Ifill, *supra*, at p. 289.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Id.* at pp. 289-90.

⁵⁷² *Id.* at p. 291.

⁵⁷³ Ward, *supra*, at p. 607-08; Ifill, *supra*, at p. 287.

⁵⁷⁴ Ifill, *supra*, at p. 287.

suspicion and sensitivity to threat, chronic stress, decreased immune system functioning, and greater risks of depression, anxiety, and substance use.⁵⁷⁵

The history of racial terror has influenced the use of violence by both white people and Black people in the present day.⁵⁷⁶ For example, in Mississippi and North Carolina, studies show that Black people are killed at a higher rate in counties that had more lynchings and anti-civil-rights violence.⁵⁷⁷ The legacy of racial terror encourages vigilante violence among white communities.⁵⁷⁸ And, in Black communities, the government's failure to protect Black Americans from lynching has fostered the use of violence for self-help.⁵⁷⁹ As a result, criminologists have linked higher rates of Black involvement in crime with the violent racial subordination of Black Americans.⁵⁸⁰

VI. Conclusion

As a badge of slavery, racial terror has enforced the domination of a racial hierarchy set in place in service of slavery. After the formal end of slavery, racial terror became a method by which white Americans and the nation as a whole sought to keep Black Americans as poor and powerless as they had been while enslaved. From slavery through to the present day, racial terror has gravely harmed Black Americans mentally and physically.

Racial terror often takes direct forms, such as physical assault, threats of injury, and destruction of property. It also inflicts psychological trauma on those who witness the harm and injury.⁵⁸¹ Lynchings and other forms of racial terror occurred in communities where Black Americans today remain marginalized, disproportionately poor, overrepresented in prisons and jails, and underrepresented in positions of influence. The traumatic experience of surviving mass violence creates insecurity, mistrust, and alienation—psychological harms that were amplified by the dangers inherent in navigating Southern racial boundaries.⁵⁸² Lynchings in the American South were not isolated hate crimes committed by rogue vigilantes. Lynchings were targeted racial violence that formed part of a systematic campaign of terror perpetrated in furtherance of an unjust social order. Selective public memory compounds the harm of officials' complicity in lynching and maintains the otherness of Black people.⁵⁸³

The same is true of other forms of racial terror such as mob violence, torture, extrajudicial violence, sterilization and sexual violence, and economic and politically influenced terror. Racialized terror is woven into the fabric of America, and although many racial groups have been victims, perhaps no racial group has been targeted more than Black Americans. From the violence of enslavement to contemporary police killings, both actual and

⁵⁷⁵ See Walter Howard Smith, Jr., [The Impact of Racial Trauma on African Americans](#) The Heinz Endowments (2010) (as of Apr. 5, 2022), p. 5 (Impact of Racial Trauma).

⁵⁷⁶ Ward, *supra*, at p. 608.

⁵⁷⁷ *Id.* at p. 615.

⁵⁷⁸ *Id.* at p. 608.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Id.* at pp. 608-09.

⁵⁸¹ Impact of Racial Trauma, *supra*, at p. 4; Erlanger A. Turner & Jasmine Richardson, [Racial Trauma Is Real: The Impact of Police Shootings on African Americans](#) (July 14, 2016), American Psychological Association, Psychology Benefits Society, (as of Apr. 5, 2022).

⁵⁸² EJI 2015, *supra*, at p. 23.

⁵⁸³ *Ibid.*

threatened violence against Black Americans has functioned to establish and maintain white supremacy.⁵⁸⁴ Federal, state, and local governments have been complicit in the infliction of terror through silence, failure to hold the perpetrators accountable, and even on some occasions, endorsement of the actions. California is no exception; the state, its local governments, and its people have played a significant role in enabling racial terror and its legacy to persist here in California.

The tactics of white supremacy at any time in history are simultaneously overtly violent and subversively traumatic for Black Americans. Racial terror remains the constant backdrop and tool for other forms of discrimination intended to exert control of Black Americans—from redlining and segregated schools to disparate healthcare and denial of bank loans—that has prevented many Black Americans throughout history from living a dignified life of equal opportunity.

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⁵⁸⁴ See Hudson, *supra*, at p. 133.

Chapter 4. Political Disenfranchisement

I. Introduction

Black Americans have pursued equal political participation since before the Civil War.¹ But the federal, state, and local governments of the United States have suppressed, and continue to suppress, Black votes and Black political power. The United States did not prohibit states from discriminating against Black male voters until almost a century after the nation's founding, and it denied Black women this protection from discrimination for nearly a half century more.²

After the United States amended the Constitution to protect the voting rights of American citizens against racial and gender discrimination, for Black Americans, this right existed only on paper for most of American history. Whites terrorized Black voters with violence to prevent them from voting while federal, state, and local governments ignored the violence, failed to prosecute offenders, or participated in the violence themselves.³

States, especially in the South, passed vagrancy and curfew laws to criminalize Black Americans, strip away their right to vote, and prevent them from organizing politically.⁴ States found legal loopholes for the voting protections in the U.S. Constitution, including literacy tests, poll taxes, and other devices used to prevent Black Americans from voting in elections.⁵ States also barred Black Americans from serving on juries,⁶ effectively denying Black Americans other opportunities to serve in civic and public life.

These restrictions secured the power of white supremacists in local, state, and federal government, allowing them to block hundreds of civil rights laws and rewrite many of the country's most important pieces of legislation to exclude or discriminate against Black Americans.⁷ Over centuries, as Black activists struggled and made advances towards equal political participation, federal, state, and local governments throughout the United States continued to pass laws, issue court decisions, or take actions to smother Black political power.⁸

In recent years, the Supreme Court has issued decisions eliminating the protections of the Voting Rights Act,⁹ as federal, state, and local officials have continued to take actions that impair Black Americans' ability to vote and express their political voice. Despite the historical advancements Black Americans have made in political

¹ Nat. Park Service, U.S. Dept. of the Interior, [Civil Rights in America: Racial Voting Rights](#) (2009), p. 4 (as of Mar. 31, 2022).

² *Id.* at p. 8.

³ See, e.g., Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988), pp. 569-76 ("Foner, Reconstruction").

⁴ See Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis* (1976) 42 J. of Southern History 31, 48-54.

⁵ See, e.g., Nat. Park Service, *supra*, at pp. 10-14.

⁶ See, e.g., Hoag, *An Unbroken Thread: African-American Exclusion from Jury Service, Past and Present* (2020) 81 La. L. Rev. 55, 58-59.

⁷ See Caro, *Master of the Senate* (2009), pp. xiii-xiv; Katznelson, *When Affirmative Action was White* (2005), p. 113.

⁸ See, e.g., Agraharkar, [50 Years Later, Voting Rights Act Under Unprecedented Assault](#), Brennan Center for Justice (Aug. 2, 2015) (as of Mar. 31, 2022); Blackmon, *Silent Partner: How the South's Fight to Uphold Segregation was Funded up North*, Wall Street Journal (Jun. 11, 1999), Eastern edition, A1; *Brnovich v. Democratic Nat'l Comm.* (2021) 141 S. Ct. 2321; Garrow, *Bearing the Cross* (Vintage Books Media 1988), p. 255.

⁹ See, e.g., *Brnovich v. Democratic Nat'l Comm.* (2021) 141 S. Ct. 2321; *Shelby Cnty. v. Holder* (2013) 570 U.S. 529.

participation, Black Americans remain underrepresented, both in elected office¹⁰ and in the policies enacted to meet Black communities' needs.¹¹

California imposed similar restrictions on Black political participation throughout its history.¹² Though California professed to be a free state when it joined the union, white and Black Americans did not possess the same freedoms. California refused to ratify the Fourteenth and Fifteenth Amendments for nearly a century,¹³ and it built many of the same barriers to Black political participation as those used in the South, such as poll taxes, literacy tests, and the disenfranchisement of people convicted of felonies.¹⁴ The state also enacted other legal barriers, such as its law banning any non-white person from testifying in any court case involving a white person.¹⁵ While California eventually eliminated many of these restrictions,¹⁶ its adoption of these discriminatory practices has had longstanding effects on Black political participation, representation, and the current inequalities that persist within the state.¹⁷

This chapter begins in section II by discussing the long history of white officials portraying Black political participation as a threat to undermine Black political power and maintain racial subordination. Section III discusses the early history of Black political participation, from America's founding to the end of Reconstruction. Section IV and V describes the many devices that local, state, and federal officials have used to suppress Black political power, as well as the voting rights legislation that the United States and California have enacted after centuries of Black sacrifice and struggle. Finally, this chapter ends in Section VI by describing the consequences of both past and present efforts to suppress Black political participation, and how the exclusion of Black Americans from political power have produced deep inequalities in the policies that shape America and the lives of Black Americans.

II. Political Demonization of Black Americans

White politicians have long portrayed Black political participation as a threat in order to undercut Black political power and maintain the racial hierarchy of enslavement, even after Emancipation.¹⁸

During and after Reconstruction, white southern Democrats used fears of Black political power to propel themselves into office.¹⁹ For example, in 1870, West Virginia Democrats used the ratification of the Fifteenth Amendment to provoke fear that Black Americans would threaten the "white man's government."²⁰ After Democrats won the governor's seat and control of the state legislature in West Virginia, one Republican observed that "[h]ostility to negro suffrage was the prime element of our defeat."²¹ In 1901, the President of the

¹⁰ Noe-Payne, *Black Representation in Politics is Poor Nationwide, Except in State Houses* (Aug. 15, 2020) NPR (as of Apr. 8, 2022).

¹¹ Stephanopoulos, *Political Powerlessness* (2015) 90 N.Y.U. L. Rev. 1527, 1583 (Stephanopoulos, *Political Powerlessness*).

¹² See Katz, et al., *Reckoning with our Rights: The Evolution of Voter Access in California*, UCLA Luskin Center for History and Policy (Sept. 2020), pp. 3, 7 (as of Mar. 31, 2022).

¹³ Smith, *California's Last Slave Case*, N.Y. Times (Mar. 5, 2014) (as of Mar. 31, 2022).

¹⁴ Katz, et al., *supra*, at pp. 3, 7.

¹⁵ Cal. Dept. of Education, *Key Points in Black History and the Gold Rush* (as of Mar. 31, 2022); **Error! Hyperlink reference not valid.** Hudson, *West of Jim Crow: The Fight Against California's Color Line* (2020), p. 8 (as of Mar. 31, 2022).

¹⁶ See, e.g., Katz, et al., *supra*, at pp. 20-27.

¹⁷ See, e.g., Hepler, *The Hidden Toll of California's Black Exodus*, S.F. Chronicle (Jul. 25, 2020) (as of Mar. 31, 2022).

¹⁸ See, e.g., Foner, *Reconstruction*, *supra*, at p. 417.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

Alabama Constitutional Convention warned against the “menace of negro domination” to justify the state’s efforts “to establish white supremacy in this State.”²²

White politicians continued to employ the same tactics throughout the 20th century and into the 21st century. Despite the nonviolent protests led by Dr. Martin Luther King, Jr. and others during the civil rights movement in the 1950s and 1960s, white Americans portrayed Black civil rights activists as violent rioters and criminals.²³ Exploiting this racist imagery, then-Senator Richard Nixon promised “law and order” during the presidential campaign of 1968, preying on white fears of societal upheaval amidst the civil rights movement.²⁴ This move contributed to Nixon’s victory in the 1968 election, beginning what became known as the “Southern Strategy”: the Republican strategy to win votes from the South by appealing to the racial prejudice of white southerners.²⁵

In 1981, Republican campaign strategist Lee Atwater described the evolution of the Southern Strategy, shifting from express racial discrimination to more indirect dog whistles:

You start out in 1954 by saying, “Nigger, nigger, nigger.” By 1968 you can’t say “nigger”—that hurts you, backfires. So you say stuff like, uh, forced busing, states’ rights, and all that stuff, and you’re getting so abstract. Now, you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a byproduct of them is, [B]lack get hurt worse than whites.... “We want to cut this,” is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than “Nigger, nigger.”²⁶

Lee Atwater continued this strategy in the presidential election of 1988. With George H.W. Bush trailing his rival by 15 points in the polls, Atwater convinced the campaign to shift gears and go on the attack.²⁷ The weapon they would use: a Black man named Willie Horton.²⁸

Released from penitentiary in the state governed by Bush’s rival, Willie Horton was convicted and incarcerated for sexually assaulting a white woman.²⁹ Preying on stereotypes and fears of Black criminality and Black assault on white womanhood, Atwater and the Bush campaign played television ads prominently displaying Horton’s Black face over ominous warnings, to great success. In focus groups, half of prospective voters almost immediately switched to supporting Bush after seeing the ad.³⁰ In practice, the ad helped transform Bush’s 15

²² Behrens, et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002* (2003) 109 Am. J. Soc. 559, 571.

²³ Garrow, *Bearing the Cross* (Vintage Books Media 1988), p. 255; Cronin, [Martin Luther King Jr Cartoon Sheds Light on the Harsh Scrutiny He Faced from 1960s Media](#), CBR.com (Sep. 2, 2020) (as of Mar. 31, 2022).

²⁴ Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Campaign* (2002) 64 *The Historian* 351, 351; McAdam and Kloos, [Race and the Modern GOP](#), Politico (Sep. 25, 2014) (as of Mar. 31, 2022).

²⁵ Maxwell and Shields, *The Long Southern Strategy Explained: How Chasing White Voters in the South Changed American Politics* (2019), pp. 2-8.

²⁶ Perlstein, [Exclusive: Lee Atwater’s Famous 1981 Interview on the Southern Strategy](#), *The Nation* (Nov. 13, 2012) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

²⁷ Cramer, *What It Takes* (Vintage Books 1993), p. 996-1000.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

point deficit into a presidential victory, 426 electoral votes to 111.³¹ When critics pointed out the racial fearmongering of the Horton ad, the Bush campaign tried to distance itself from it.³²

Today, the same stereotypical imagery persists in American politics. Echoing the language of elections past, Donald Trump declared himself the “law and order candidate.”³³ After the police murder of George Floyd in the summer of 2020, Trump called protesters in Minnesota “thugs” and said that “when the looting starts, the shooting starts,” using the exact same phrase that a white Miami police chief repeated in response to Black protestors in 1968.³⁴ When peaceful protesters marched in D.C., the Trump administration met those protests with tear gas, smoke bombs, and beatings.³⁵

III. Reconstruction and the Constitution

A. Nationally

From its beginning, the United States excluded enslaved Black people from American citizenship, declining to count them as full people.³⁶ As discussed in Chapter 2 on enslavement, in 1789, the U.S. Constitution included a “Three-Fifths Clause,” counting enslaved Black persons as “three[-]fifths of all other persons” for the purpose of establishing the number of representatives each state would have in Congress, as well as the number of electoral votes each state would cast in a presidential election.³⁷

On the one hand, the Three-Fifths Clause dehumanized enslaved Black Americans by not counting them as a full person. On the other hand, by allowing proslavery southerners to partially count enslaved people toward their total number of electoral votes and representatives in Congress, even though enslaved people could not vote or express any political voice, the Constitution gave the states that enslaved them much more power than they would have had otherwise.

For example, southerner Thomas Jefferson would not have won the presidential election in 1801 without the additional electoral votes given to southern states based on the number of Black Americans they enslaved within their borders.³⁸ Further, the manner in which the federal government counted the enslaved population of Black Americans erased their humanity. The 1850 and 1860 federal censuses did not list most enslaved people by name, as they did for white Americans, but by the name of their enslavers.³⁹

While denying enslaved Black Americans their citizenship, the United States also denied free Black Americans the right to vote. When the Framers signed the Constitution in 1787, they left voting laws to the states—whose

³¹ Federal Election Commission, *Federal Elections 88* (Jun. 1989) (as of Mar. 31, 2022).

³² Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh*, N.Y. Times (Dec. 3, 2018) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

³³ Nelson, *Trump: ‘I am the Law and Order Candidate’*, Politico (Jul. 11, 2016) (as of Mar. 31, 2022) **Error! Hyperlink reference not valid.**

³⁴ Sprunt, *The History Behind ‘When the Looting Starts, the Shooting Starts’*, NPR (May 29, 2020) (as of Mar. 31, 2022).

³⁵ Easley, *How Trump Cleared the Park Around the White House for a Photo Op*, The Hill (Jun. 1, 2020) (as of Mar. 31, 2022); **Error! Hyperlink reference not valid.** Goldberg, *James Mattis Denounces President Trump, Describes Him as Threat to the Constitution*, The Atlantic (Jun. 3, 2020) (as of Mar. 31, 2022).

³⁶ U.S. Const. art. I, § 2, cl. 3.

³⁷ U.S. Const. art. I, § 2, cl. 3.

³⁸ Amar, *The Troubling Reason the Electoral College Exists*, Time (Oct. 29, 2020) (as of Mar. 31, 2022).

³⁹ Campbell, *Making Black Los Angeles: Class, Gender, and Community, 1850-1917* (2016), p. 8; U.S. Census Bureau, *History: 1850* (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

laws protected the right to vote only for white, male property owners.⁴⁰ Though a few northern states would eventually extend the right to vote to Black Americans, by the time of the American Civil War, most states, including every southern state, prohibited Black Americans from voting.⁴¹

During Reconstruction (1865 to 1877), the federal government aimed to give newly freed Black Americans access to basic civil rights. The Civil Rights Act of 1866 granted citizenship to anyone born in the United States regardless of color, or previous enslavement.⁴² The Fourteenth Amendment made birthright citizenship and civil rights permanent.⁴³ By achieving these changes, Black Americans not only redefined their own citizenship—they redefined citizenship for all Americans.⁴⁴ Birthright citizenship might not have come into existence in the United States without Black Americans’ struggle against slavery, and it helped open the door to citizenship for all immigrants and their U.S. born children.⁴⁵

Congress also recognized that political rights were essential to Black civil and economic rights,⁴⁶ so the Fifteenth Amendment was ratified in 1870 which prohibited states from discriminating against voters based on “race, color, or previous condition of servitude.”⁴⁷

However, the Fourteenth and Fifteenth Amendments had limitations. The Fourteenth Amendment did not protect Black Americans’ right to vote.⁴⁸ Instead, the Fourteenth Amendment only punished states that legally denied male citizens the right to vote by reducing their number of representatives in Congress,⁴⁹ a penalty that has never been enforced.⁵⁰ While the Fifteenth Amendment prohibited states from denying a person’s right to vote based on race, it contained no enforcement mechanism without an act of Congress.⁵¹

In 1870 and 1871, Congress passed several Enforcement Acts, giving the federal government the authority to prosecute violations of the Fifteenth Amendment.⁵² But in 1875, the U.S. Supreme Court held that because the Fourteenth and Fifteenth Amendments only empowered the federal government to prohibit discrimination by the states, it did not empower the federal government to prosecute the private white militants who used racial terror to suppress Black voting.⁵³ And to the extent that the Fifteenth Amendment protected Black men in the

⁴⁰ Engerman and Sokoloff, *The Evolution of Suffrage Institutions in the New World* (2005) 65 J. Econ. History 891, 895; Keyssar, *The Right To Vote: The Contested History of Democracy in the United States* (2000), pp. 8-21, 54-60; Waldman, *The Fight to Vote* (2016), pp. 7-8.

⁴¹ Nat. Park Service, *supra*, at p. 4; Cobb and Jenkins, *Race and the Representation of Blacks’ Interests During Reconstruction* (2001) 54 Pol. Research Quarterly 181, 184.

⁴² Foner, *Forever Free: The Story of Emancipation and Reconstruction* (First Vintage Books 2006), pp. 114-115 (“Foner, Forever Free”).

⁴³ *Id.* at pp. 117-118.

⁴⁴ See generally Jones, *Birthright Citizens* (2018).

⁴⁵ Jones, *The Real Origins of Birthright Citizenship*, *The Atlantic* (Oct. 31, 2018) (as of Mar. 31, 2022).

⁴⁶ Foner, *Reconstruction*, *supra*, at pp. 444-449.

⁴⁷ U.S. Const., 15th Amend., § 1.

⁴⁸ See generally U.S. Const., 14th Amend.

⁴⁹ U.S. Const., 14th Amend., § 2.

⁵⁰ Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy* (2015) 76 La. Law Rev. 149, 150, 178.

⁵¹ Darity and Mullen, *From Here to Equality* (2020), pp. 91-92.

⁵² Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870); Enforcement (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (1871).

⁵³ *United States v. Cruikshank* (1875) 92 U.S. 542, 552.

right to vote, it did not extend the same protection to Black women, who would have to wait another half century for the Nineteenth Amendment in 1920.⁵⁴

Black Americans responded by taking full advantage of their new political rights. Black Americans held conventions across the country⁵⁵ and participated in state constitutional conventions to secure their voting rights.⁵⁶ Republicans in Congress increasingly began to believe that they needed to overhaul southern governments and ensure that ex-Confederates did not return to power.⁵⁷ As a result, Congress passed a series of laws from 1867 to 1868 called the Reconstruction Acts, which required most ex-Confederate states to hold constitutional conventions and write new state constitutions acknowledging Black civil rights.⁵⁸

The Reconstruction Acts guaranteed Black men the right to vote for constitutional delegates and on the new constitutions.⁵⁹ Across the South in 1867, Black turnout ranged from 70 percent in Georgia to 90 percent in Virginia.⁶⁰ Black votes were nearly unanimous in support of ballot measures to hold constitutional conventions to amend their state constitutions to guarantee equal rights.⁶¹ Hundreds of Black men served in the southern state constitutional conventions under the Reconstruction Acts, and they participated alongside white Republicans in writing new constitutions which protected equal voting rights, civil rights, and educational rights (although usually in segregated facilities) for Black Americans.⁶² By 1868, more than 700,000 Black men were registered to vote in the South.⁶³ One white Republican in Alabama said that Black Americans “voted their entire walking strength—no one stayed at home that was able to come to the polls.”⁶⁴

With Black voters came Black elected officials. During Reconstruction, over 1,400 Black Americans held federal, state, or local office, and more than 600 served in state assemblies.⁶⁵ Many of these new Black officials were formerly enslaved, and many took seats formerly held by men who had enslaved others.⁶⁶ The ranks of elected Black officials included 16 Black men elected to Congress, 14 to the U.S. House of Representatives and two to the U.S. Senate.⁶⁷

The election of Black Americans into office, however, did not translate to full political representation. Black Americans took a lower share of elected seats in both state and federal office relative to their proportion of the electorate, and rising presence in office did not always carry greater power at the highest levels of state government.⁶⁸ White politicians—including Republicans who had favored Emancipation and Black enfranchisement—treated Black elected officials as junior partners in government.⁶⁹ In 1874, 16 Black

⁵⁴ U.S. Const. 19th Amend.

⁵⁵ Nat. Park Service, *supra*, at pp. 5-6.

⁵⁶ *Ibid.*

⁵⁷ Foner, *Forever Free*, *supra*, at pp. 121-22.

⁵⁸ *Ibid.*

⁵⁹ Nat. Park Service, *supra*, at pp. 5-6.

⁶⁰ Foner, *Forever Free*, *supra*, at p. 143.

⁶¹ *Ibid.*

⁶² *Id.* at pp. 143-44.

⁶³ Cobb and Jenkins, *supra*, at p. 184.

⁶⁴ Foner, *Forever Free*, *supra*, at p. 143.

⁶⁵ Nat. Park Service, *supra*, at p. 6; Facing History and Ourselves, [Black Officeholders in the South](#) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

⁶⁶ Nat. Park Service, *supra*, at p. 6.

⁶⁷ Nat. Park Service, *supra*, at p. 6; Facing History and Ourselves, [Black Officeholders in the South](#) (as of Mar. 31, 2022).

⁶⁸ Foner, *Reconstruction*, *supra*, at pp. 318, 538.

⁶⁹ *Id.* at pp. 544-45.

politicians in Louisiana publicly complained of being excluded from “any knowledge of the confidential workings of the party and government” and “not infrequently humiliated in our intercourse with those whom we have exalted to power.”⁷⁰

Over time, white northern support for Reconstruction collapsed. Southern Democrats intensified violent insurrection, and white northerners tired of the economic and military costs necessary to enforce equal rights.⁷¹ An economic depression in the 1870s further weakened the federal government’s resolve and undermined support for pro-Reconstruction officials in the south.⁷² To regain support, President Ulysses S. Grant shared power with southern Democrats who opposed Reconstruction, causing one northerner to complain that the government was filling “every Dep[artment]” with southern Democrats to “placate the rebels and get their votes.”⁷³

These pressures came to a head in the presidential election of 1876, when both the candidates—Republican Rutherford B. Hayes and Democrat Samuel Tilden—claimed to have won due to contested votes in the southern states where election violence and fraud was high.⁷⁴ Southern Democrats contested the results, threatening revolt.⁷⁵ To avoid another civil war, the Republicans and Democrats reached a compromise: the Democrats stopped contesting the presidential election and the Republicans agreed to withdraw federal troops from key locations in the south, effectively ending Reconstruction.⁷⁶ As the chairman of the Kansas state Republican committee wrote, “I think the policy of the new administration will be to conciliate to the white men of the South. Carpetbaggers to the rear, and niggers take care of yourselves.”⁷⁷ An article published in *The Nation* predicted, “[t]he negro . . . will disappear from the field of national politics. Henceforth, the nation, as a nation, will have nothing more to do with him.”⁷⁸

B. California

The State of California entered the union in 1850, and its constitution proclaimed that “neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”⁷⁹ But that very same document gave only “white male citizen[s]” the right to vote.⁸⁰ From the beginning, freedom in California meant something different for white and Black Californians. As detailed in Chapter 2 on enslavement, despite California’s prohibition on slavery, enslavers forced hundreds of enslaved Black Americans into the state.⁸¹ California became one of the few free states to pass a fugitive slave law, authorizing and even enforcing the ability of white Californians to kidnap and traffic Black Californians to southern enslaving states.⁸²

⁷⁰ *Id.* at p. 538.

⁷¹ *Id.* at pp. 511-63.

⁷² *Ibid.*

⁷³ *Id.* at p. 528.

⁷⁴ *Id.* at pp. 575-76.

⁷⁵ *Id.* at p. 576.

⁷⁶ *Id.* at pp. 581-82.

⁷⁷ *Id.* at p. 581.

⁷⁸ *Id.* at p. 582.

⁷⁹ Cal. Const. of 1849, art. I, § 18.

⁸⁰ Cal. Const. of 1849, art. II, § 1; Katz, [Modern California is All about Voter Access. History reveals a Far Grimmer Voting-Rights Past](#), L.A. Times (Nov. 3, 2020) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

⁸¹ Smith, [California’s Last Slave Case](#), N.Y. Times (Mar. 5, 2014) (as of Mar. 31, 2022).

⁸² Smith, [Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California](#) (2011) 80 Pacific Historical Rev. 28, 31.

Meanwhile, free Black Californians faced other restrictions on their ability to participate in civic life. California banned Black Americans and other nonwhite people from testifying in court against a white person.⁸³ In some cases, this law allowed a white man to get away with murder. In 1854, the California Supreme Court overturned the murder conviction of a white man because he was convicted based upon the testimony of Chinese witnesses.⁸⁴

Reversing the murder conviction, the Court explained: “In using the words, ‘No Black, or Mulatto person, or Indian shall be allowed to give evidence for or against a White person,’ the Legislature . . . adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste.”⁸⁵ Admitting that California designed the law to protect white defendants from justice, California’s Supreme Court defended the law as a matter of public policy, warning that allowing any non-white person to testify “would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls,” a prospect that the Court viewed as an “actual and present danger.”⁸⁶

One case drew public attention to the law and its effects on Black Californians. In 1861, a white man named Rodney B. Schell robbed a Black-owned business.⁸⁷ When George W. Gordon, a Black barber, complained to the police, Schell shot and murdered Gordon in his shop.⁸⁸ At Schell’s murder trial, his attorneys used California’s ban on non-white testimony to exclude the prosecution’s key witness, hiring two “hairologists” who examined the witness’s hair under a microscope and claimed that the witness had “African blood in his veins.”⁸⁹ Consequently, the court excluded the key testimony, resulting in Schell’s conviction for second-degree murder, rather than first-degree murder.⁹⁰

A Black-owned local newspaper called the case a “Mockery of Justice” in “one of the most deliberate and cold-blooded murders that ever disgraced California, even in her rudest and most lawless days.”⁹¹ One California legislator observed that Schell had murdered Gordon, knowing that Black testimony against him would be barred in court.⁹² Another legislator proclaimed that the law banning Black testimony served as “a legislative license for the commission of crimes.”⁹³ Though the Schell trial generated a firestorm of controversy, California’s Legislature refused to change the law that year.⁹⁴

Many other Black Californians suffered crimes without recourse to testimony and justice in court. When Jim Howard, a white man, stole from a Black laundryman named Albert Grubbs, Grubbs testified and helped secure

⁸³ Cal. Dept. of Education, [Key Points in Black History and the Gold Rush](#) (as of Mar. 31, 2022); **Error! Hyperlink reference not valid.** Hudson, West of Jim Crow: The Fight Against California’s Color Line (2020), p. 8 (as of Mar. 31, 2022).

⁸⁴ *People v. Hall* (1854) 4 Cal. 399; Moore, “*We Feel the Want of Protection*”: *The Politics of Law and Race in California, 1848-1878* (2003) 81 Cal. History 96, 114.

⁸⁵ *Hall*, *supra*, 4 Cal. 399, 403.

⁸⁶ *Id.* at p. 404.

⁸⁷ Chandler, *Friends in Time of Need: Republicans and Black Civil Rights in California During the Civil War Era* (1982) 24 J. of the Southwest 319, 325.

⁸⁸ *Ibid.*

⁸⁹ Hudson, *supra*, at pp. 37-38; see also Chandler, *supra*, at p. 325.

⁹⁰ Chandler, *supra*, at p. 326.

⁹¹ Hudson, *supra*, at p. 38.

⁹² Chandler, *supra*, at pp. 326-27.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

Howard’s conviction for grand larceny.⁹⁵ On appeal, the Chief Justice of the California Supreme Court, Stephen J. Field—who would later become a Justice on the U.S. Supreme Court—overturned the conviction, declaring that California’s law categorically barred any Black testimony, even if “crime may go unpunished.”⁹⁶

Discriminated against by both the laws and those who would break it, many Black Californians, like Peter Lester—who was assaulted and robbed in his store but unable to testify against the perpetrators—left the state.⁹⁷ From San Francisco alone, some 200 Black families, a substantial portion of the 4,000 total Black Americans who had settled in California between 1850 and 1860,⁹⁸ left during the 1850s in a mass exodus to British colonies in what is now Canada.⁹⁹

Other Black Californians organized in response to these restrictions. Black citizens formed the Colored Executive Committee and founded their own weekly newspaper, *Mirror of the Times*.¹⁰⁰ Drawing from Black activism in other parts of the nation, Black Californians held the first of four “Colored Citizens’ Conventions” in 1855 at the St. Andrews African Methodist Episcopal Church in Sacramento.¹⁰¹ At this convention and later meetings, they advocated against slavery, urged repeal of California’s law barring Black testimony against whites in state courts, and petitioned for the right to vote.¹⁰²

After an eight-year campaign, convention delegates convinced the California Legislature to repeal its ban on Black testimony in 1863.¹⁰³ As soon as the ban on Black testimony ended, Black Californians spearheaded legal efforts to protect their rights in court. Black women organized legal efforts to file charges against streetcar drivers who refused to pick up Black riders or harassed them on the car.¹⁰⁴

In other cases, Black testimony proved crucial to preventing Black Californians from being enslaved. Thirteen years after California entered the union as a free state, in 1863, an enslaver purchased and trafficked a 12-year-old Black girl, Edith, selling her to a farmer in Sacramento County.¹⁰⁵ But a free Black man named Daniel Blue intervened on her behalf, filing a case in court.¹⁰⁶ With his testimony and the testimony of other Black citizens, he persuaded the Sacramento probate judge to remove Edith from the enslaver’s custody.¹⁰⁷

After the repeal of the ban on Black testimony in 1863,¹⁰⁸ and the abolition of slavery in 1865,¹⁰⁹ Black activists in California turned their attention to voting rights. The California Colored Citizens’ Convention of 1865

⁹⁵ *People v. Howard* (1860) 17 Cal. 63, 64; Chandler, *supra*, at p. 324.

⁹⁶ *People v. Howard* (1860) 17 Cal. 63, 64; Chandler, *supra*, at p. 324.

⁹⁷ Adkins, *African Americans of San Francisco* (2012), p. 19.

⁹⁸ Gates, Jr., *The African-American Migration Story*, PBS (as of Nov. 18, 2021).

⁹⁹ *Id.* at p. 20.

¹⁰⁰ Chandler, *supra*, at p. 320.

¹⁰¹ California African American Museum Web Staff, [#Blackhistory: On November 20, 1855, Delegates Representing Ten of California's Twenty-Seven Counties Met at St. Andrews AME Church in Sacramento for the First California Colored Convention](#), California African American Museum (Nov. 20, 2019) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹⁰² ACLU of Northern California, [Gold Chains: The Hidden History of Slavery in California](#) (as of Mar. 31, 2022).

¹⁰³ *Ibid.*

¹⁰⁴ Hudson, *supra*, at p. 8.

¹⁰⁵ Smith, [California's Last Slave Case](#), N.Y. Times (Mar. 5, 2014) (as of Mar. 31, 2022).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ ACLU of Northern California, *supra*.

¹⁰⁹ U.S. Const., 13th Amend.

petitioned the state legislature for a constitutional amendment to give Black Americans voting rights.¹¹⁰ But when a Republican State Senator presented the petition to the state legislature, its members never discussed it.¹¹¹

In the following two years, Black activists drafted another petition asking the state legislature to grant voting rights to Black men, if approved by a two-thirds vote by the state assembly and the state senate.¹¹² But by then, the Democrats had taken over the legislature after campaigning on anti-Black and anti-Chinese platforms.¹¹³ Black activists could not find a single member of the state legislature who would agree to present the petition for the state legislature's consideration.¹¹⁴

California continued to deny equal rights for its Black citizens. When the United States adopted the Fourteenth Amendment to the United States Constitution in 1868, guaranteeing the equal protection of law to Black Americans, the California Legislature ignored the Amendment and never ratified it.¹¹⁵ Similarly, California later refused to ratify the Fifteenth Amendment, which prohibited states from discriminating against voters on the basis of race.¹¹⁶

Nevertheless, enough states voted for the Fifteenth Amendment to make it the law of the country in 1870, and upon its ratification,¹¹⁷ Black Californians registered to vote in droves.¹¹⁸ But California officials openly refused to abide by the Fifteenth Amendment.¹¹⁹ California's Attorney General Joseph Hamilton instructed county clerks not to register Black voters until Congress passed legislation commanding them to do so.¹²⁰

When Black Californians and their allies protested in response, in some areas, county clerks caved to public pressure and eventually permitted Black Californians to vote.¹²¹ Others resisted more firmly. In southern California, Louis G. Green was the first Black Californian in Los Angeles who tried to register to vote.¹²² When the Los Angeles County Clerk refused to allow him to do so, Green filed suit in court.¹²³ The County Judge—who was the brother-in-law of the County Clerk being sued—upheld the Clerk's refusal to register Green.¹²⁴

Recognizing the resistance to Black voting in California and other states, Congress enacted the Enforcement Act of 1870, a federal law imposing penalties for states who violated the Fifteenth Amendment.¹²⁵ Only after

¹¹⁰ Colored Conventions Project, *Proceedings of the California State Convention of the Colored Citizens, Held in Sacramento on the 25th, 26th, 27th, and 28th of October, 1865* (1865), pp. 15-19 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹¹¹ Shaffer, *California Reluctantly Implements the Fifteenth Amendment: White Californians Respond to Black Suffrage, March – June 1870*, Cal Poly Pomona (2020), p. 1 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹¹² *Petition*, Elevator (Oct. 11, 1867) p. 2. **Error! Hyperlink reference not valid.**

¹¹³ Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor*, Emancipation, and Reconstruction (2013), pp. 209-11.

¹¹⁴ *Our Petition*, Elevator (Mar. 27, 1868) p. 2 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹¹⁵ Waite, *Early California Lawmakers also Preached #Resistance — But Against Immigration*, L.A. Times (Aug. 3, 2018) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹¹⁶ Goldberg, *California's Shameful 1870 Vote on Black Suffrage*, L.A. Times (Feb. 28, 2021), A18.

¹¹⁷ *Ibid.*

¹¹⁸ Shaffer, *supra*, at pp. 41-65.

¹¹⁹ See *Report of the Attorney-General for the Years 1868 and 1869* (Sacramento: D.W. Gelwicks, c. 1870), pp. 6-7.

¹²⁰ *Ibid.*; Shaffer, *supra*, at pp. 42-43.

¹²¹ Shaffer, *supra*, at pp. 41-62.

¹²² *Id.* at pp. 62-65.

¹²³ *Ibid.*

¹²⁴ *Ibid.*; Colman, *John Ballard and the African American Community in Los Angeles, 1850-1905* (2012) 94 Southern Cal. Quarterly 193, 215-17.

¹²⁵ Enforcement Act of 1870, ch. 114, 16 Stat. 141 (1870).

the passage of this law did California officials submit and allow Black men to register to vote.¹²⁶ It would take California nearly another decade to change its constitution to partly conform to the Fifteenth Amendment's requirements in 1879,¹²⁷ and nearly another century to formally ratify the Fourteenth and Fifteenth Amendments to the U.S. Constitution in 1959 and 1962, respectively.¹²⁸

IV. Devices Used to Suppress Black Political Participation

Though Black Americans strove to build and maintain the promise of Black citizenship after Emancipation, the end of Reconstruction left them unprotected against the white supremacists who had previously enslaved them. After Reconstruction, white Americans in both the North and South employed a host of devices to reassert white supremacy and suppress Black political power. As a result, Black Americans who had already been voting for many years were barred from voting.

A. Racial Terror to Suppress Black Political Power

As Chapter 3 on racial terror details, white Americans resorted to kidnapping, mass murder, and other forms of racial terror to reassert white supremacy and destroy Black political power all across the southern states.¹²⁹ The federal and Republican-run state governments tried to suppress this violence, but white local officials and law enforcement across the South often turned a blind eye or even participated in the violence themselves.¹³⁰ Federal and state officials themselves have used their power to target and terrorize civil rights leaders.¹³¹

Even during Reconstruction, about 10 percent of Black political officials received violent threats and suffered physical assaults.¹³² At least 35 Black officials were murdered by the Ku Klux Klan or similar terrorist organizations.¹³³ Though the federal government intervened to stop early violence in Louisiana, white Americans in both the North and South began to protest federal military intervention in local affairs.¹³⁴ According to one historian, “[t]he spectacle of soldiers ‘marching into the Hall . . . and expelling members at the point of bayonet’ aroused more Northern opposition than any previous federal action in the South.”¹³⁵

President Grant's cabinet urged the President to “wash the hands of the Administration entirely of the whole business,” referring to the repeated white insurrections in Louisiana, and white political backlash made Congressional Republicans wary of further military intervention in the south.¹³⁶ When the Republican Governor of Mississippi, a member of Grant's own party, requested federal aid against white supremacist insurrection, President Grant wrote, “[t]he whole public are tired out with these annual autumnal outbreaks in the South . . . [and] are ready now to condemn any interference on the part of the Government.”¹³⁷ For much of American

¹²⁶ Shaffer, *supra*, at pp. 41-62.

¹²⁷ Cal. Const. of 1879, art. II, § 1.

¹²⁸ Smith, *California's Last Slave Case*, N.Y. Times (Mar. 5, 2014) (as of Mar. 31, 2022).

¹²⁹ See, e.g., Foner, Reconstruction, *supra*, at pp. 569-76.

¹³⁰ See, e.g., Foner, Reconstruction, *supra*, at p. 550.

¹³¹ See, e.g., German, *The FBI Has a History of Targeting Black Activists*, The Guardian (Jun. 26, 2020) (as of Mar. 31, 2022).

¹³² Foner, *Forever Free*, *supra*, at p. 134.

¹³³ *Ibid.*

¹³⁴ Foner, Reconstruction, *supra*, at p. 554.

¹³⁵ *Ibid.*

¹³⁶ Coffey, *The Reconstruction Years: The Tragic Aftermath of the War* (2014), p. 259.

¹³⁷ Foner, Reconstruction, *supra*, at p. 560.

history, then, the federal government sacrificed the lives and rights of Black Americans for political stability while white Americans in the South wrought racial violence to oppress Black Americans.

Despite the many threats to their lives, Black activists organized in response to these campaigns of racial terror. They formed organizations like the National Association for the Advancement of Colored People (NAACP), a group of Black intellectuals and activists who partnered with white liberals to pursue Black civil rights and equality, pursuing legal challenges against many of the devices described throughout this chapter.¹³⁸ State governments sought to sabotage these efforts. Mississippi, for instance, created the Mississippi State Sovereignty Commission, an agency created to resist the civil rights movement and preserve racial segregation.¹³⁹ The Commission planted clerical workers in the offices of civil rights attorneys, spied on civil rights organizations, obstructed Black voter registration, and encouraged police harassment of Black Americans.¹⁴⁰

The federal government, at times, targeted and terrorized civil rights leaders as well. During the 1950s and 1960s, for instance, when Dr. Martin Luther King, Jr. urged nonviolent protest to pursue racial justice, Federal Bureau of Investigation (FBI) Director J. Edgar Hoover viewed Dr. King as a communist threat and ordered the electronic surveillance of Dr. King and his staff.¹⁴¹ While doing so, the FBI produced reports claiming that one of Dr. King's advisors was a communist, suggesting that international communists might be controlling Dr. King.¹⁴² Though the FBI's surveillance uncovered no evidence of communist influence, it uncovered evidence of Dr. King's extramarital affairs, and used this information not only to try and discredit Dr. King as a leader of the civil rights movement, but also to attempt to convince Dr. King to take his own life.¹⁴³ "They are out to break me," Dr. King confided to a friend, "[t]hey are out to get me, harass me, break my spirit."¹⁴⁴

The federal government continued to surveil and sabotage other Black activists and organizations. In the 1960s and 1970s, the federal government took extensive measures to surveil the Black Panther Party, using undercover agents to infiltrate the group and sow discord, contributing to its collapse.¹⁴⁵ Though public exposure of the FBI's surveillance activities forced the government to enact several reforms, those reforms weakened over time, and the FBI has reportedly resumed similar programs surveilling Black activists, including those in the Black Lives Matter movement.¹⁴⁶

B. Black Codes and Vagrancy Laws

As discussed later in Chapter 11 on the legal system, southern states passed a series of laws between 1865 and 1866—which historians refer to collectively as the “Black Codes”—to criminalize freed Black Americans for

¹³⁸ Nat. Park Service, *supra*, at p. 14.

¹³⁹ Blackmon, *Silent Partner: How the South's Fight to Uphold Segregation was Funded up North*, Wall Street Journal (Jun. 11, 1999), Eastern edition, A1.

¹⁴⁰ *Ibid.*

¹⁴¹ Garrow, *supra*, at p. 195.

¹⁴² *Ibid.*

¹⁴³ *Id.* at p. 373-74.

¹⁴⁴ *Ibid.*

¹⁴⁵ Morrison, [Decades Later, a New Look at the Black Panthers and Their Legacy](#), Associated Press (Oct. 31, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

¹⁴⁶ German, *supra*.

engaging in ordinary activity and force them back into forms of enslaved labor.¹⁴⁷ During Reconstruction, Republicans in Congress managed to remove these Black Codes with the Civil Rights Act of 1866 and the Fourteenth Amendment.¹⁴⁸ But after the end of Reconstruction, former Confederate states began passing a flurry of laws similar to the post-Civil War Black Codes, that while racially neutral on their face, added up to slavery-like conditions in practice.¹⁴⁹ Every former Confederate state except Tennessee enacted vagrancy laws, between 1890 and 1909, which criminalized “idle” behavior and forced Black Americans back into conditions of enslavement,¹⁵⁰ limiting the formation of Black businesses and spaces that provided the foundation for Black community and political consciousness.¹⁵¹ By criminalizing Black Americans for everyday conduct, these laws suppressed Black political participation in two ways: Black Americans convicted of a crime could not vote or serve on juries, and Black Americans were prevented from organizing to protest these laws, because these laws made such gatherings illegal.¹⁵²

C. Literacy Tests

Because the Fifteenth Amendment to the United States Constitution declared that a person’s right to vote shall not be denied “on account of race, color, or previous condition of servitude,”¹⁵³ states created many laws designed to block Black voting without referring to race.¹⁵⁴ One of these methods was the literacy test: voting registrars or poll workers would test a person’s reading or writing capabilities before permitting them to register or vote. Usually, these tests required a prospective voter to either write down a certain piece of text (such as a part of the Constitution) or to write down answers to written questions.¹⁵⁵ Following Reconstruction, at least 21 states in both the North and South used literacy tests to deny Black Americans their voting rights.¹⁵⁶

As described in Chapter Six on education, states and local governments deprived Black Americans of educational resources and opportunities during enslavement and after Emancipation.¹⁵⁷ Consequently, states adopted literacy tests knowing that such barriers would primarily exclude Black voters.¹⁵⁸ At the South Carolina constitutional convention of 1895, Senator Ben Tillman explained that the literacy test was intended to take the vote away from “ignorant [B]lacks.”¹⁵⁹ When Mississippi adopted literacy tests, among other voting

¹⁴⁷ Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions* (1998) 107 Yale L. J. 2249, 2258-61.

¹⁴⁸ Foner, *Forever Free*, *supra*, at pp. 109-111, 114-15, 163-64.

¹⁴⁹ *Id.* at p. 202.

¹⁵⁰ Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis* (1976) 42 J. of Southern History 31, 48-54.

¹⁵¹ See Harris-Perry, *Barbershops, Bibles, and BET: Everyday Talk and Black Political Thought* (2010), pp. xvii-xxiii.

¹⁵² Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt* (2012) 117 Penn State Law Rev. 350, 360-61; Goluboff, *The Forgotten Law that Gave Police Nearly Unlimited Power*, *Time* (Feb. 1, 2016) (as of Mar. 31, 2022); **Error! Hyperlink reference not valid.** Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, Prison Policy Initiative (Feb. 18, 2021) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹⁵³ U.S. Const. 15th Amend., § 1.

¹⁵⁴ See, e.g., Nat. Park Service, *supra*, at pp. 10-14.

¹⁵⁵ See, e.g., United States Com. on Civil Rights, *Report of the United States Commission on Civil Rights* (1959) pp. 31-32, 67-68, 123-25, 144 (as of Mar. 31, 2022); Nat. Park Serv., *supra*, at p. 12.

¹⁵⁶ *Hearings before Senate Com. on Jud., Subcom. on Constitutional Rights, Bills Relating to Literacy Tests and Voter Requirements in Federal and State Elections*, 87th Cong., 2nd Sess., p. 395 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹⁵⁷ *Oregon v. Mitchell* (1970) 400 U.S. 112, 133.

¹⁵⁸ *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 333-34.

¹⁵⁹ Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination* (2004) 57 Stan. L. Rev. 611, 621.

restrictions, in its 1890 constitutional convention, the president of the convention declared: “Let us tell the truth if it bursts the bottom of the Universe. We came here to exclude the negro.”¹⁶⁰

Even when many Black Americans were well-equipped to pass ordinary literacy tests, states excluded Black voters by requiring them to satisfy more complex requirements than those required for white voters;¹⁶¹ asking subjective questions that gave white officials the discretion to exclude Black voters;¹⁶² or requiring Black voters to answer impossible questions, such as “how many bubbles are in a bar of soap?”¹⁶³ One Georgian official boasted, “I can keep the President of the United States from registering [to vote], if I want to. God, Himself, couldn’t understand that sentence [in the literacy test]. I, myself, am the judge.”¹⁶⁴

Black Americans challenged these literacy tests in court but met with little success. In 1898, the United States Supreme Court upheld Mississippi’s literacy test in a case called *Williams v. Mississippi*.¹⁶⁵ After an all-white jury convicted Henry Williams, a Black man, of murder, Williams appealed, arguing that he did not receive a fair trial because Blacks were excluded from the jury.¹⁶⁶

Because the jury list was drawn from the state’s voter registries, the Court examined whether Mississippi’s literacy tests had illegally blocked Black Americans from registering to vote.¹⁶⁷ The Court approved of the literacy tests, holding that the literacy test did not mention race and therefore did not discriminate based on race.¹⁶⁸ The strategy pursued by Mississippi and other states worked: states could pass racist laws designed to deny Black votes, and so long as the laws did not mention race, those laws would be upheld in court.

With the Supreme Court’s approval, states continued to use literacy tests to restrict Black voting through the 20th century.¹⁶⁹ It took 100 years after the end of Reconstruction for the federal government to permanently ban literacy tests nationwide through an amendment to the Voting Rights Act in 1975.¹⁷⁰ Despite this federal prohibition, some states, like North Carolina, still have unenforceable literacy tests on the books today.¹⁷¹

Thus, while states enacted literacy tests after Reconstruction in the late 1800s, these voting restrictions lasted well until the late 20th century, shaping the lives of Americans who currently live and serve in public office. President Joseph Biden, and at least 80 out of the 100 current U.S. Senators, were alive when literacy tests were still legal in the United States.¹⁷²

¹⁶⁰ McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (1990), p. 41.

¹⁶¹ *U.S. Com. on Civil Rights, Voting* (1961), p. 84 (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

¹⁶² Nat. Park Service, *supra*, at p. 12.

¹⁶³ *Ibid.*

¹⁶⁴ Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, Vol. 1 (Routledge 2017), p. 1325 fn. 34.

¹⁶⁵ *Williams v. Mississippi* (1898) 170 U.S. 213.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Id.* at 223.

¹⁶⁹ Ervin, Jr., *Literacy Tests for Voters: A Case Study in Federalism* (1962) 27 *Law and Contemporary Problems* 481, 483 & fn. 7; Nat. Park Service, *supra*, at p. 29.

¹⁷⁰ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101-102, 89 Stat. 400, 400 (1975).

¹⁷¹ Robertson, *North Carolina Lawmakers Begin Pushing Literacy Test Repeal*, Associated Press (Mar. 30, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

¹⁷² See The White House, *Joe Biden* (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**; Roberts, *This Senate is the Oldest in American History. Should we Do Anything About It?* Wash. Post (June 2, 2021) (as of Mar. 31, 2022);**Error! Hyperlink reference not valid.** United States Senate, *Senators* (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

D. Property Requirements and Poll Taxes

States also used property requirements and poll taxes to prevent Black Americans from voting.¹⁷³ Beginning in early American colonial history, states required individuals to own a certain amount of land or property before they could vote.¹⁷⁴ After American independence, more states removed or relaxed these laws, and many new states never adopted them at all.¹⁷⁵ But to prevent free Black men from voting, many states began limiting voting only to white men.¹⁷⁶ The Fifteenth Amendment forced states to eliminate this express racial discrimination, but with the end of Reconstruction, states in both the North and South reenacted these property restrictions or created new ones, imposing poll taxes to require potential voters to make a payment before they could cast their ballot.¹⁷⁷

While these laws had the effect of excluding all poor voters—white and Black alike—the law specifically exploited the fact that Black Americans, newly freed from slavery, often began their free lives without any wealth, preventing them from affording the costs of the poll tax. Additionally, some states, such as Alabama, required a person to pay poll taxes for prior elections in which they had not voted, a penalty that directly targeted Black Americans, who could not have voted until after Emancipation.¹⁷⁸

Despite repeated challenges from civil rights activists, poll taxes remained a persistent barrier to the right to vote until 1965.¹⁷⁹ In 1937, the U.S. Supreme Court upheld the use of state poll taxes, declaring that poll taxes did not deny any constitutional right because the “[p]rivilege of voting is . . . conferred by the state and . . . the state may condition suffrage as it deems appropriate.”¹⁸⁰

Recognizing the effects poll taxes had on voting, Congress attempted to ban poll taxes in some fashion in 1942, 1943, 1945, and 1947.¹⁸¹ None of those laws passed the Senate due to southern senators’ use of the filibuster—a Senate rule requiring a two-thirds majority before debate could end and a vote could be taken on a bill.¹⁸² The southern senators’ reasoning behind their defense of the poll tax was simple: the poll tax was one of the devices used to suppress Black voters and keep the senators in power.

Although the poll tax affected whites more than Blacks, the southern senators believed that repeal of the poll tax would provide momentum to removing other barriers blocking Black voting in the south.¹⁸³ It took decades more of activism and litigation before Congress prohibited poll taxes in 1965¹⁸⁴ and the Supreme Court ruled poll taxes to be unconstitutional in 1966.¹⁸⁵

E. Challenger Laws and Witness Requirements

¹⁷³ See Nat. Park Service, *supra*, at p. 9.

¹⁷⁴ Waldman, *Fight to Vote* (2016), pp. 8, 11-13.

¹⁷⁵ Onuf, *Thomas Jefferson: The American Franchise*, Miller Center (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

¹⁷⁶ *Ibid.*

¹⁷⁷ Walker, *The Poll Tax in the United States* (1923) 9 *The Bulletin of the Nat. Tax Association* 46, 47-48.

¹⁷⁸ Nat. Park Service, *supra*, at p. 22.

¹⁷⁹ *Id.* at p. 22-23, 70-71.

¹⁸⁰ *Breedlove v. Suttles* (1937) 302 U.S. 277, 283.

¹⁸¹ Nat. Park Service, *supra*, at pp. 23-24.

¹⁸² *Ibid.*

¹⁸³ *Id.* at p. 23.

¹⁸⁴ 52 U.S.C. § 10306.

¹⁸⁵ *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 670.

To exclude Black voters, states also used “challenger laws” and laws requiring witnesses to attest to a voter’s qualifications.¹⁸⁶ Challenger laws allow private citizens to contest another person’s qualifications to vote, usually by making a complaint before the local or state officials charged with registering voters or administering the polls during election day.¹⁸⁷ Many states enacted such laws before the Civil War, some as far back as the American Revolution.¹⁸⁸ Following Reconstruction, however, states in both the North and South used these laws to allow white supremacists to challenge, intimidate, and suppress Black votes.¹⁸⁹

Virginia enacted its first challenger law in 1870, a few months after the end of Reconstruction.¹⁹⁰ The state reenacted the law in 1904, following its 1901 to 1902 constitutional convention,¹⁹¹ which the state held “mainly for the purpose of disenfranchising the Negro voter.”¹⁹²

In Florida, lawmakers enacted laws in 1877 requiring voters challenged at the polls to produce two witnesses “personally known” to at least two polling officials.¹⁹³ Because Florida’s polling officials were almost exclusively white, few Black citizens could provide witnesses known to them, meaning that Florida’s challenger law allowed any white citizen to block a Black voter from casting their ballot.¹⁹⁴ Though many of these challenger and witness laws have been modified through time, they remain prevalent today: as of 2012, 46 states have laws that permit private citizens to challenge other citizens’ voting eligibility.¹⁹⁵

F. Grandfather Clauses

Many southern states understood that the onerous voting requirements they imposed, if applied fairly, could exclude white voters, too. To ensure that these restrictions primarily excluded Black voters, a half-dozen states in the South created so-called grandfather clauses.¹⁹⁶ Grandfather clauses allowed voters to vote, even if they could not pay the poll tax or otherwise would not have passed a literacy test, as long as they had been entitled to vote prior to 1866 or 1867, or were descended from someone who had been entitled to vote prior to 1866 or 1867.¹⁹⁷

In effect, this meant that Black Americans—who had not been eligible to vote prior to 1866 or 1867 in most of these states—would be the ones subject to the new voting restrictions. The Supreme Court ruled these grandfather clauses to be discriminatory and unconstitutional in 1915.¹⁹⁸ While grandfather clauses had a relatively shorter lifespan than literacy tests or poll taxes, they presented one of many tools used in combination

¹⁸⁶ See generally Riley, [Voter Challengers](#), Brennan Center (2012) (as of Mar. 31, 2022).

¹⁸⁷ *Id.* at p. 1. **Error! Hyperlink reference not valid.**

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Id.* at 2.

¹⁹⁰ *Id.* at p. 10.

¹⁹¹ *Ibid.*

¹⁹² [The Virginia Election: Convention Proposition Carried – To Disfranchise Negroes – Odd Features of the Voting](#), N.Y. Times (May 25, 1900) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹⁹³ Riley, *supra*, at p. 8.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Id.* at p. 1.

¹⁹⁶ Greenblatt, [The Racial History of the ‘Grandfather Clause’](#), NPR (Oct. 22, 2013) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹⁹⁷ *Ibid.*; Nat. Park Service, *supra*, at pp. 13, 15; United States Com. on Civil Rights, [Report of the United States Commission on Civil Rights](#) (1959) p. 34 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

¹⁹⁸ *Guinn v. United States* (1915) 238 U.S. 347, 347, 364-65.

with others to prevent Black Americans from exercising their right to vote, revealing how states enacted many of their supposedly race neutral laws with the purposeful design of disenfranchising Black voters.

G. Exclusion from State Primary Elections

White Americans also prevented Black voters from participating in state party primary elections.¹⁹⁹ Since the late 1890s, political parties in the United States have held primary elections to allow voters to determine the candidates from their party who would run for office.²⁰⁰ In 1910, state legislatures and state Democratic party chapters in the South created the “white primary,” excluding all Black voters from the state primary election process.²⁰¹

For states dominated by a single political party, determining who would run from that party essentially determined who would ultimately hold office. Because Democrats dominated state elections in the South in the late 1800s and early 1900s, the exclusion of Black voters from Democrat state primaries in the South during this period essentially excluded Black Americans from having any say in their elected representatives.²⁰²

The NAACP brought legal challenges against the white primary and won a case in 1927 when the U.S. Supreme Court held it unconstitutional under the Fourteenth Amendment for a state government to pass laws excluding Black citizens from a state primary election.²⁰³ However, because the Fourteenth Amendment applied only to state actions, southern Democratic party leaders skirted around the Supreme Court’s decision by excluding Black voters through the rules of its political party, which was considered a private organization.²⁰⁴

In 1944, the Supreme Court closed the loophole and ruled that states could not allow private political parties to exclude Blacks from voting in state primaries.²⁰⁵ Following the end of the all-white primary, a record 35,000 Black Americans voted in the 1948 Democratic primary in South Carolina.²⁰⁶

H. Laws Disqualifying People Convicted of Felonies from Voting

States throughout the country have long disqualified people convicted of felonies from voting. Together with America’s discriminatory criminal justice system, described in Chapter 11 on the legal system, states throughout America have used these laws to prevent Black Americans from voting and continue to do so today.²⁰⁷

¹⁹⁹ See generally Hasen, *Do the People or the Parties Own the Electoral Process?* (2001) 149 U. Penn. Law Rev. 815.

²⁰⁰ *Id.* at p. 821; Reynolds, *The Hustling Candidate and the Advent of the Direct Primary: A California Case Study* (2013) 12 The Journal of the Gilded Age and Progressive Era 31.

²⁰¹ Nat. Park Service, *supra*, at p. 16.

²⁰² United States Com. on Civil Rights, *Report of the United States Commission on Civil Rights* (1959) p. 109 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²⁰³ *Nixon v. Herndon* (1927) 273 U.S. 536, 541.

²⁰⁴ See, e.g., *Grovey v. Townsend* (1935) 295 U.S. 45, 53.

²⁰⁵ *Smith v. Allwright* (1944), 321 U.S. 649.

²⁰⁶ Nat. Park Service, *supra*, at p. 21.

²⁰⁷ See generally Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination* (2004) 57 Stan. L. Rev. 611.

Laws denying people convicted of felonies their right to vote have existed since at least the colonial period of American history, finding roots in earlier English, European, and Roman law.²⁰⁸ Although early U.S. state constitutions gave their legislatures the power to pass laws disenfranchising people who had committed crimes, many states—including Alabama, Arkansas, Georgia, Florida, and South Carolina—only passed such laws after the Civil War to deny Black Americans their newly gained right to vote.²⁰⁹

Following Reconstruction, state governments sought to maintain white supremacy by using vagrancy laws, curfews, and other restrictions to target Black Americans with criminal laws as a form of social control.²¹⁰ Because states targeted Black Americans for prosecution, and because convicted Black Americans were stripped of their ability to vote, states effectively used criminal laws to not only control Black Americans, but also to deprive them of their right to vote.

After the Civil War, in many southern states, the percentage of nonwhite people imprisoned nearly doubled between 1850 and 1870.²¹¹ In Alabama, for example, two percent of the prison population was nonwhite in 1850, but by 1870, 74 percent of the prison population was nonwhite, even though the total nonwhite population increased by only three percent.²¹² Ever since the Civil War era, states have imprisoned Black Americans at higher rates than white Americans.²¹³ One study examining historical data found that when more of the people imprisoned by a state are Black, the state is significantly more likely to enact laws removing their right to vote if they have been convicted of a felony.²¹⁴

Many states made clear that they targeted Black Americans with their laws removing the right to vote from people convicted of felonies. According to the North Carolina Democratic Party’s Executive Committee Handbook in 1898, North Carolina’s restriction originates from the state’s efforts “to rescue the white people of the east from the curse of negro domination.”²¹⁵ The Mississippi constitutional convention in 1890 changed its disenfranchising provision from one that included “any crime” to one affecting only certain offenses like burglary or theft, a change that the Mississippi Supreme Court explained as one made “to obstruct” Black voting by targeting certain crimes the state believed that Black residents committed more frequently.²¹⁶

Other southern states expressly tied disenfranchisement to “furtive offenses . . . peculiar to the Negro’s low economic and social status.”²¹⁷ Some scholars suggest that because denying the vote for those convicted of crimes was narrower in scope than literacy tests or poll taxes, and easier to justify than grandfather clauses,

²⁰⁸ Behrens, et al., *Ballot Manipulation and the “Menace of Negro Domination”*: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002 (2003) 109 Am. J. Soc. 559, 562-63; see also Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics* (2005) 32 Fordham Urb. L.J. 101, 102–03.

²⁰⁹ Behrens, et al., *supra*, at pp. 563, 566-69.

²¹⁰ See, e.g., Cohen, *supra*; Shofner, *Custom, Law, and History: The Enduring Influence of Florida’s “Black Code”* (1977), 55 The Fla. Historical Quarterly 277, 278-83.

²¹¹ Behrens, et al., *supra*, at p. 598.

²¹² *Ibid.*

²¹³ *Id.* at p. 560.

²¹⁴ Manza and Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006), pp. 37-39, 235.

²¹⁵ Levine, [A Black Woman Faces Prison Because of a Jim Crow-Era Plan to ‘Protect White Voters’](#), The Guardian (Dec. 16, 2019) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²¹⁶ *Ratliff v. Beale* (1896) 20 So. 865, 868; Goldman, *supra*, at pp. 626-27.

²¹⁷ Goldman, *supra*, at pp. 626-27.

states used criminal disenfranchisement laws as “insurance” if courts decided to strike down other, more blatantly discriminatory laws.²¹⁸

Most of these disenfranchisement laws continue to exist across the country in some form to this day. Though the Supreme Court has recognized that “[c]itizenship is not a [right] that expires upon misbehavior,”²¹⁹ the Supreme Court has not extended that same logic to the right to vote.²²⁰

In 1974, the Supreme Court upheld California’s law disenfranchising people convicted of felonies, concluding that the removal of their voting rights is consistent with the Fourteenth Amendment.²²¹ Though the Supreme Court eventually struck down a part of Alabama’s disenfranchisement law a decade later, it only struck down a specific provision—applying to crimes of “moral turpitude”—that it found had the specific intent and impact of preventing Black citizens from voting.²²² In that limited decision, the Court expressly declined to reconsider its decision in *Richardson v. Ramirez*, which continues to generally permit the disenfranchisement of people convicted of felonies.²²³

Today, people convicted of felonies—a disproportionate number of whom are Black—represent the largest single group of Americans disqualified from voting.²²⁴ For example, although the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses are Black or Latino.²²⁵ Another study found that states with greater Black and Latino prison populations are more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system.²²⁶

As of 2020, approximately 5.2 million Americans are barred from voting due to laws that disenfranchise citizens convicted of felony offenses.²²⁷ All states but Maine and Vermont have some restriction tied to felony conviction, probation, and parole.²²⁸ And while some states restore the right to vote once people have completed their sentence, these states condition that restoration of rights upon a person paying all fines and fees associated with their sentence, an economic burden that scholars and voting rights advocates have described as a modern day poll tax.²²⁹ In a country that professes a commitment to freedom, the country’s rates of mass incarceration and the corresponding increase in disenfranchisement reflect a conflict between its democratic ideals and its actual practice.

I. Gerrymandering

²¹⁸ *Id.* at p. 626.

²¹⁹ *Trop v. Dulles* (1958) 356 U.S. 86, 92.

²²⁰ *Richardson v. Ramirez* (1974) 418 U.S. 24, 54.

²²¹ *Ibid.*

²²² *Hunter v. Underwood* (1985) 471 U.S. 222, 228-33.

²²³ See, e.g., *Simmons v. Galvin* (1st Cir. 2009), 575 F.3d 24, 32.

²²⁴ Goldman, *supra*, at pp. 632–33.

²²⁵ Alexander, *The New Jim Crow* (2010), p. 98.

²²⁶ Goldman, *supra*, at p. 635.

²²⁷ Chung, [Voting Rights in the Era of Mass Incarceration: A Primer](#), The Sentencing Project (July 28, 2021) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²²⁸ *Ibid.*

²²⁹ Wood and Trivedi, *The Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls* (2007) 41 Clearinghouse Rev. J. of Poverty Law and Policy 30, 31, 35-41.

States also manipulated the shape of voting districts, through a process called gerrymandering, to dilute the voting power of Black Americans.²³⁰ Generally, states divide their regions into districts for the election of certain local, state, and federal representatives.²³¹ States can redraw those areas from year to year,²³² and government officials have used this process to substantially dilute and weaken the political power of Black Americans.²³³

Ordinarily, states draw electoral districts by drawing generally oval or square-shaped districts of neighboring communities with borders based on geographic barriers, like rivers and highways.²³⁴ However, politicians began manipulating this process by drawing electoral districts in more unnatural shapes to include more voters from a certain race or political party to ensure that group's victory in an election.²³⁵

This process, known as "gerrymandering," is named after Elbridge Gerry, an American vice-president who, as Massachusetts Governor in 1812 redrew voting districts in a way that caused the Boston-area district to resemble a salamander.²³⁶ Or, as one local newspaper dubbed it, a Gerry-mander.²³⁷ Gerrymandering has existed since this nation's infancy, and politicians have used it nearly as long to deny Black communities representation in government. After the end of Reconstruction, white government officials drew gerrymandered districts to purge Black politicians from state legislatures all across the south.²³⁸

For example, although Black Americans made up a majority of South Carolina's population in the 1870s and 1880s, white government officials redrew the state's electoral map to pack nearly all of the state's Black neighborhoods into one of the state's seven districts that had a Black majority, and it included nearly all of the state's Black neighborhoods in the awkward shape of a snake.²³⁹

Drawing the map this way had the effect of ensuring that only one of the state's seven legislators were Black, despite Black Americans making up more than 60 percent of the state's total population. White government officials drew similarly gerrymandered congressional districts across the south, including in North Carolina, Alabama, and Mississippi.²⁴⁰ The Mississippi government drew the Black electoral district in the shape of what one newspaper called a "shoestring."²⁴¹

Gerrymandering continued in the 20th century. After World War II, a thriving Black community began organizing politically in Tuskegee, Alabama.²⁴² But white segregationists responded by proposing a bill to redraw the boundary lines of Tuskegee to exclude all neighborhoods with Black residents and exclude Black

²³⁰ See generally Cox and Holden, *Reconsidering Racial and Partisan Gerrymandering* (2011) 78 U. Chi. Law Rev. 553

²³¹ *Id.* at 557-58; Crocker, [Congressional Redistricting: An Overview](#), Congressional Research Service (Nov. 21, 2012), at pp. 1-2 (as of Mar. 31, 2022); **Error! Hyperlink reference not valid.** see also, e.g., *Rucho v. Common Cause* (2019) 139 S.Ct. 2484, 2491-93.

²³² *Ibid.*

²³³ Cox and Holden, *supra*, at p. 577.

²³⁴ Crocker, *supra*, at p. 2.

²³⁵ Draper, [The League of Dangerous Mapmakers](#), The Atlantic (Oct. 2012) (as of Mar. 31, 2022).

²³⁶ *Ibid.*; Li and Lo, [What is Extreme Gerrymandering](#), Brennan Center (Mar. 22, 2019) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²³⁷ *Ibid.*

²³⁸ [Hearings before House Com. on Jud., Subcom. on Civil & Constitutional Rights, on Extension of the Voting Rights Act](#), 97th Cong., 1st Sess., pp. 2007-2014 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²³⁹ *Id.* at p. 2013.

²⁴⁰ *Ibid.*

²⁴¹ [Chalmers and His Tale](#), N.Y. Times (May 26, 1882) (as of Mar. 31, 2022) **Error! Hyperlink reference not valid..**

²⁴² Nat. Park Service, *supra*, at p. 38.

voters from having any input into the city's elections.²⁴³ Black residents fought back, bringing a case that reached the Supreme Court in 1960, where the Court struck down the racially gerrymandered map as a violation of the Fifteenth Amendment²⁴⁴ A few years later, Congress enacted the Voting Rights Act in 1965, which prohibits states from diluting the voting strength of Black Americans, including through redistricting plans that dilute the voting strength of Black communities.²⁴⁵

Despite prohibitions by both Congress and the Supreme Court, states continued to try and find ways to gerrymander state maps to limit Black representation. In the 1980s, Georgia State Representative Joe Mack Wilson declared, "I don't want to draw nigger districts."²⁴⁶ A little more than a decade later, the Supreme Court would strike down North Carolina's efforts to gerrymander on the basis of race, stating it was "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."²⁴⁷ Meanwhile, states continue to engage in two other forms of legally sanctioned racial gerrymandering: partisan gerrymandering and prison gerrymandering.

Political, or partisan, gerrymandering refers to the process of drawing districts to benefit one political party over another.²⁴⁸ As of September 2021, 38 states allow partisan actors—state legislatures or their appointees—to redraw their districts.²⁴⁹ While those who engage in partisan gerrymandering claim not to directly target Black voters, the fact that most Black voters register to vote as Democrats, today, means that partisan gerrymandering often affects Black representation as well.

Though Black Americans had historically supported the Republican party through post-Reconstruction due to the party's role in Emancipation and Reconstruction, the Republican party's apathy and mistreatment toward Black Americans during the Hoover Administration opened the door to their entry into the Democratic party during the New Deal, as northern Democrats like President Franklin Roosevelt promised economic aid amidst the Great Depression.²⁵⁰

Black support for the Democratic party then surged in the 1960s, when Democratic President Lyndon B. Johnson ushered in the Civil Rights Act of 1964 and the Voting Rights Act of 1965.²⁵¹ President Johnson's embrace of civil rights legislation caused many of the southern white supremacists in the Democratic party to defect to the Republican party, cementing Black support for Democrats to this day.²⁵² From 1994 to 2019, over 80 percent of Black registered voters have leaned toward or identified as Democrats.²⁵³

²⁴³ *Ibid.*

²⁴⁴ *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 346-47.

²⁴⁵ *Thornburg v. Gingles* (1986) 478 U.S. 30, 47-51.

²⁴⁶ Draper, *supra*.

²⁴⁷ *Shaw v. Reno* (1993) 509 U.S. 630, 641.

²⁴⁸ Draper, *supra*.

²⁴⁹ Li, et al., [Who Draws the Maps?](#) Brennan Center for Justice (Sep. 16, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁵⁰ Sears, *Black Americans and the New Deal* (1976) 10 *The History Teacher* 89; Nat. Park Service, *supra*, at p. 19.

²⁵¹ Apple, Jr., [G.O.P. Tries Hard to Win Black Votes, But Recent History Works Against It](#), *N.Y. Times* (Sep. 19, 1996);**Error! Hyperlink reference not valid.** McAdam and Kloos, [Race and the Modern GOP](#), *Politico* (Sep. 25, 2014) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁵² Kloos, *supra*.

²⁵³ Igielnik and Budiman, [The Changing Racial and Ethnic Composition of the U.S. Electorate](#), *Pew Research* (Sep. 23, 2020) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

Because most Black voters today register to vote as Democrats, partisan gerrymandering harms Black representation. In the last decade, more than two dozen Black officials have had their districts redrawn in ways that could cost them their seats, leading the former chair of the Congressional Black Caucus to declare partisan gerrymandering a “five-alarm fire” for Black representation.²⁵⁴

Moreover, unlike earlier forms of racial gerrymandering, neither Congress nor the U.S. Supreme Court have prohibited partisan gerrymandering.²⁵⁵ As scholars and advocates have observed, the Supreme Court’s refusal to strike down political gerrymandering permits legislators to get away with racial gerrymandering in places where race and party are highly correlated, simply by claiming that they made their redistricting decisions for partisan reasons, rather than racial ones.²⁵⁶

Prison gerrymandering refers to the practice of counting incarcerated people as part of the population in the region imprisoning them, rather than the location of their actual community.²⁵⁷ Because the government allocates greater numbers of political representatives and resources to places with greater populations, prison gerrymandering benefits districts that engage in mass incarceration, skewing resources and representation to areas with prisons at the expense of the communities to which those imprisoned people belong.²⁵⁸

This process particularly affects Black Americans, who are disproportionately imprisoned. In 2019, Black Americans made up about 33 percent of the United States’s imprisoned population,²⁵⁹ despite representing about 14 percent of the total population.²⁶⁰ Given the effects of prison gerrymandering, advocates describe it as akin to or worse than the Constitution’s Three-Fifths Clause, which counted enslaved people in the Census for the purpose of allowing states to amass more pro-slavery representatives, despite the fact that enslaved people were not allowed to vote and had no basic legal rights.²⁶¹

J. The Myth of Voter Fraud and Voter ID Laws

Claims of voter fraud have also been used to justify laws that suppress Black voting—most prominently, voter identification (ID) laws. While voter fraud has long been invoked throughout American history to justify restrictions on voting, such claims have made a recent resurgence, including in the 2020 election, despite the lack of any evidence to support allegations of widespread fraud.²⁶² In recent years, states have used this claim to

²⁵⁴ Corasaniti and Epstein, [Map by Map, G.O.P. Chips Away at Black Democrats’ Power](#), N.Y. Times (Dec. 18, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁵⁵ *Rucho v. Common Cause* (2019) 139 S. Ct. 2484, 2500-08.

²⁵⁶ Clarke and Greenbaum, [Gerrymandering Symposium: The Racial Implications of Yesterday’s Partisan Gerrymandering Decision](#), SCOTUSBlog (June 28, 2019) (as of Mar. 31, 2022);**Error! Hyperlink reference not valid.** Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery* (2018) 49 Colum. Human Rights L. Rev. 255, 285.

²⁵⁷ Bohrs, [Prison Gerrymandering and the 2020 Census](#), Harvard Civil Rights-Civil Liberties L. Rev. (Nov. 15, 2019) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁵⁸ *Ibid.*

²⁵⁹ E. Ann Carson, [Prisoners in 2019](#), Bureau of Justice Statistics (October 2020) table 3 (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁶⁰ Tamir, et al., [Facts About the U.S. Black Population](#), Pew Research (Mar. 25, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁶¹ Blakinger, [What Is Prison Gerrymandering and How Does It Impact Elections? Criminologist John Pfaff Explains](#), Houston Chronicle (Mar. 6, 2018) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁶² Cassidy, [Far Too Little Vote Fraud to Tip Election to Trump, AP Finds](#), Associated Press (Dec. 14, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

enact a number of strict ID laws that disproportionately impact Black and other nonwhite voters, hindering their ability to vote.²⁶³

States and politicians have invoked the specter of voter fraud since at least the late 1800s to justify the various rules they imposed disenfranchising Black and other nonwhite communities.²⁶⁴ The Ku Klux Klan and other white supremacists claimed voter fraud to justify the violence they inflicted upon Black Americans. One southern historian claimed in 1901 that “the white man of the lately dominant class in the South . . . saw his former slaves repeating at elections,” and quoted with favor a white supremacist leader and his announcement that he and his militants had violently suppressed Black voters such that “[f]ew negroes voted that day; none twice.”²⁶⁵ Thus, white supremacists have long used accusations of voter fraud as an excuse to justify the suppression of Black political participation.²⁶⁶

More recently, the idea of voter fraud and voter identification laws became popular following the 2000 election.²⁶⁷ The U.S. Attorney General at the time, John Ashcroft, pushed the U.S. Department of Justice to prioritize voter fraud as an issue,²⁶⁸ even though the U.S. Department of Justice itself found only a 0.00000132 percent rate of voter fraud.²⁶⁹

Congress enacted the Help America Vote Act in 2002, which required voter identification to register to vote and deferred to states’ requirements for voter identification.²⁷⁰ Many civil rights organizations opposed the bill for its discriminatory impact, arguing that the requirement would mirror a poll tax.²⁷¹ In 2005, Georgia and Indiana became the first states to enact photo identification voting laws, opening the floodgates for similar laws throughout the country.²⁷² In 2000, only 11 states required all voters to show some form of identification; this increased to 18 states in 2008,²⁷³ and, as of 2021, 35 states have laws requesting or requiring voters to show identification at the polls.²⁷⁴

Although voter identification laws may appear race neutral, they disproportionately burden Black voters due to disparities in both access and enforcement. According to one nationwide study, 20 percent of Black Americans

²⁶³ See Minnite, [The Misleading Myth of Voter Fraud in American Elections](#), Scholars Strategy Network (2014), pp. 1-2 (as of Mar. 31, 2022); Nat. Conference of State Legislatures, [Voter Identification Requirements: Voter ID Laws](#) (2021) (as of Mar. 31, 2022).

²⁶⁴ Cunningham, *Who are to be the Electors? A Reflection on the History of Voter Registration in the United States* (1991) 9 Yale L. & Policy Rev. 370, 379 & fn. 49, 383-85.

²⁶⁵ Brown, [The Ku Klux Movement](#), The Atlantic (May 1901) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁶⁶ Cunningham, *supra*, at pp. 379 & fn. 49, 383-85.

²⁶⁷ Redden, *Changing Focus and Exposing a Solution: Using Section 2 of the Voting Rights Act to Defeat Tennessee’s Voter Photo ID Law* (2013) 44 U. Mem. L. Rev. 229, 235-236; Zoch, [Then and Now: How 8 Election Policies Have Changed Since 2000](#), Nat. Conference of State Legislatures (Feb. 16, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁶⁸ Klarman, *The Supreme Court 2019 Term Foreword: The Degradation of American Democracy — And the Court* (2020) 134 Harv. L. Rev. 1, 48.

²⁶⁹ See Minnite, [The Misleading Myth of Voter Fraud in American Elections](#), Scholars Strategy Network (2014), pp. 1-2 (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

²⁷⁰ 52 U.S.C. §§ 20901-21145.

²⁷¹ See Ruda, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act* (2003) 31 Fordham Urb. L.J. 235, 246-253.

²⁷² Klarman, *supra*, at p. 49.

²⁷³ Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. Louisville L. Rev. 57, 79-80 (2008).

²⁷⁴ Nat. Conference of State Legislatures, [Voter Identification Requirements: Voter ID Laws](#) (2021) (as of Mar. 31, 2022).

did not possess a valid photo ID, compared to seven percent of whites.²⁷⁵ Due to segregation and unequal access, many elderly Black voters were not born in hospitals, resulting in many never being issued a birth certificate—and this fact, in turn, limits their ability to obtain other forms of photo identification.²⁷⁶

Additionally, states disproportionately enforce voter ID laws against Black voters. National studies have found that 70 percent of all Black voters were asked to show photo identification at the polls during the 2008 election, as opposed to only 51 percent of white voters.²⁷⁷ These disparities in enforcement forced Black voters to file provisional ballots at four times the rate of white voters.²⁷⁸ Provisional ballots, in turn, are more likely to go uncounted.²⁷⁹ In 2016, nearly 700,000, or 28.5 percent of all provisional ballots went uncounted; in 2018, nearly 790,000, or 42.6 percent of all provisional ballots were not counted.²⁸⁰

Additionally, citizens with ready access to voter identification might underestimate the burdens that voter ID requirements impose. But as the American Civil Liberties Union has calculated, for those who need to procure a voter ID, the combined cost of time, travel, and documentation ranges from \$75 to \$175,²⁸¹ a steep cost to consider when poll taxes “of as little as \$1.50 have been deemed an unconstitutional burden on the right to vote.”²⁸² Even obtaining “free” identification cards may require a person to not only purchase a birth certificate,²⁸³ but to travel to a DMV, which in some regions could be as far as 250 miles away.²⁸⁴

In many cases, states intentionally use voter ID laws to discriminate against Black voters and people with lower incomes, perpetuating America’s legacy of creating barriers to Black voting.²⁸⁵ For example, when crafting North Carolina’s voter identification laws, one state representative expressly asked a university official to provide information “about the number of Student ID cards that are created and the [percent] of those who are African American,” and a federal appeals court characterized these restrictions as targeting Black voters with “almost surgical precision.”²⁸⁶

²⁷⁵ Government Accountability Office, [Elections: Issues Related to State Voter Identification Laws](#) (Sep. 2014), p. 25 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²⁷⁶ Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections* (2012) 64 Rutgers L. Rev. 1019, 1039.

²⁷⁷ *Id.* at pp. 1054-1056.

²⁷⁸ *Ibid.*

²⁷⁹ Desilver, [Most Mail and Provisional Ballots Got Counted in Past U.S. Elections—But Many Did Not](#), Pew Research Center (Nov. 10, 2020) (as of Mar. 31, 2022).

²⁸⁰ *Ibid.* **Error! Hyperlink reference not valid.**

²⁸¹ American Civil Liberties Union, [Fact Sheet on Voter ID Laws](#) (2017), p. 1 (as of Mar. 31, 2022) **Error! Hyperlink reference not valid.**

²⁸² Haygood, *supra*, at p. 1051.

²⁸³ United States Gov. Accountability Office, [Issues Related to State Voter Identification Laws](#) (Sept. 2014), p. 32 (as of Mar. 31, 2022).

²⁸⁴ Klarman, *supra*, at p. 50; see also Sobel, [The High Cost of ‘Free’ Photo Voter Identification Cards](#), Charles Hamilton Houston Institute for Race & Justice (2014), p. 21 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²⁸⁵ Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right* (2013) 16 N.Y.U. J. Legis. & Pub. Pol’y 515, 552; see also Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests* (2014) 45 Columbia Human Rights L. Rev. 362, 366-367; Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy* (2009) 86 Denver U. L. Rev. 1023, 1025-26, 1038.

²⁸⁶ Wan, [Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law](#), Wash. Post (Sep. 2, 2016) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

As one scholar points out, it is no coincidence that the states with the most rigid voter identification laws also happen to be states with substantial Black populations and a history of post-Reconstruction-style discrimination at the polls.²⁸⁷ Multiple Republican strategists have admitted that voter ID laws have nothing to do with voter fraud, and are instead part of a strategy of ensuring that Democrats cannot vote.²⁸⁸ Because Black voters identify overwhelmingly with the Democratic Party,²⁸⁹ political strategists openly seeking to disenfranchise Democrats will necessarily target Black voters.²⁹⁰ Ultimately, scholars have found that strict voter ID laws substantially decrease voting turnout for Black and Latino voters, doubling the voting gap between white and Black voters.²⁹¹

K. Exclusion from Juries

In addition to barring Black Americans from voting, post-Reconstruction states in both the North and South also excluded Black Americans from serving on juries. The Sixth Amendment to the United States Constitution guarantees criminal trials by an “impartial jury.”²⁹² Juries serve the essential role of balancing government power by giving citizens the authority to determine a just outcome in a case of law.²⁹³

In the 1800s, many states, such as Tennessee and West Virginia, expressly allowed only white men to serve on juries.²⁹⁴ While many states in the north did not have laws excluding Black jurors, one historian observed that “[i]n most of the North, custom and prejudice . . . combined to exclude Negroes from jury service.”²⁹⁵ During Reconstruction, Congress partially undid these restrictions with the Civil Rights Act of 1875, which prohibited states from expressly discriminating based on race in the selection of juries in state court.²⁹⁶

However, the Act did not address the many other methods that states used to exclude Black jurors.²⁹⁷ For example, states ordinarily required a jury decision to be unanimous to determine whether someone is guilty or innocent of a crime.²⁹⁸ But this meant that the presence of a single Black juror could prevent a white jury from convicting a Black defendant. To get around this, states like Louisiana and Oregon passed laws allowing a jury to convict a defendant if only 10 of the 12 jurors voted to convict.²⁹⁹

²⁸⁷ Trotter, *supra*, at p. 553.

²⁸⁸ See Bouie, [Republicans Admit Voter ID Laws Are Aimed at Democratic Voters](#), The Daily Beast (July 11, 2017) (as of Mar. 31, 2022); **Error! Hyperlink reference not valid.** Wines, [Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain](#), N.Y. Times (Sept. 17, 2016) (as of Mar. 31, 2022).

²⁸⁹ Pew Research Center, [Party Affiliation Among Voters: 1992-2016, \(2016\)](#) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²⁹⁰ See Wan, *supra*.

²⁹¹ Hajnal, et al., [Voter Identification Laws and the Suppression of Minority Votes](#) (2017), p. 16 (as of Mar. 31, 2022).

²⁹² U.S. Const., Sixth Amend.

²⁹³ Amar, *Jury Service as Political Participation Akin to Voting* (1995) 80 Cornell L. Rev. 203, 218-21; *Ramos v. Louisiana* (2020) 140 S. Ct. 1390, 1394-97.

²⁹⁴ Hoag, *An Unbroken Thread: African-American Exclusion from Jury Service, Past and Present* (2020) 81 La. L. Rev. 55, 58-59.

²⁹⁵ Litwack, *North of Slavery: The Negro in the Free States, 1790-1860* (1961), p. 94; see also *Strauder v. West Virginia* (1879) 100 U.S. 303.

²⁹⁶ U.S. House of Representatives, History, Art, and Archives, [Civil Rights Act of 1765](#) (as of Mar. 31, 2022).

²⁹⁷ See Equal Justice Initiative, [Race and the Jury: Illegal Discrimination in Jury Selection](#) (Nov. 2005), p. 15 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

²⁹⁸ See *Ramos v. Louisiana* (2020) 140 S. Ct. 1390, 1396.

²⁹⁹ *Id.* at 1394.

As the U.S. Supreme Court observed in *Ramos v. Louisiana* (2020), states like Louisiana and Oregon removed jury unanimity requirements after Reconstruction “to ensure that African-American juror service would be meaningless,” since one or two Black jurors could not outvote a white majority.³⁰⁰ In many states, only registered voters can serve on juries, so because these states denied Black Americans the ability to register to vote, they denied them access to the jury box as well.³⁰¹ Finally, many states excluded Black jurors through various state rules that allowed judges, court officials, and local prosecutors to prevent a person from serving on a jury without giving a reason.³⁰² As discussed in Chapter 11 on the legal system, these methods produced deep disparities in the number of Black Americans convicted of crimes, including wrongful convictions.³⁰³

L. California

Though California amended its constitution in 1879 to allow nonwhite men to vote, the state adopted many laws similar to those adopted by northern and southern states to suppress the political participation of Black Americans.³⁰⁴ California added a poll tax into its constitution in 1879, requiring payment of an average half-day’s wage before someone could vote.³⁰⁵ The poll tax continued until repealed in 1914.³⁰⁶ In 1894, California added a literacy test for voting to its constitution to prevent Chinese residents from voting.³⁰⁷ Unsurprisingly, anti-Chinese and anti-Black racism in California frequently intertwined. The California state Democratic party, for instance, pledged in 1867 to establish “no Negro or Chinese suffrage,”³⁰⁸ and its racist pledge enabled Democrats to sweep state elections that year.³⁰⁹

In the years after World War II, the Black population in California rose dramatically.³¹⁰ With a growing presence in the state, Black communities in California continued pushing for greater political representation. But they faced resistance and retaliation along the way. California, like the federal government, frequently treated Black activism as a threat.³¹¹ In 1966, when civil rights protesters used the slogan of “Black power” to advocate for racial equality, the Republican Candidate for Lieutenant Governor, Robert Finch, declared that “it’s wrong, if . . . any minority, including the Negro people, think they can blackmail or blackjack their way into acceptance into our society, they’re just dead wrong, and the American people will not tolerate this kind of thing.”³¹²

³⁰⁰ *Ibid.*; Frampton, *The Jim Crow Jury* (2018) 71 Vanderbilt L. Rev. 1593, 1605, 1607.

³⁰¹ Nat. Park Service, *supra*, at p. 13.

³⁰² See, e.g., Frampton, *supra*, at p. 1598; Hoag, *supra*, at pp. 62-63.

³⁰³ See generally Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, *supra* (as of Mar. 31, 2022).

³⁰⁴ Katz, et al., *Reckoning with our Rights: The Evolution of Voter Access in California*, UCLA Luskin Center for History and Policy (Sept. 2020), pp. 3, 7 (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³⁰⁵ *Id.* at p. 9.

³⁰⁶ *Ibid.*

³⁰⁷ *Id.* at pp. 11-12.

³⁰⁸ Smith, *California’s Last Slave Case*, *supra*.

³⁰⁹ *Ibid.*; Wheeler, *Black California: The History of African-Americans in the Golden State* (1993), p. 121.

³¹⁰ Moore, *African Americans in California: A Brief Historiography* (1996) 75 Cal. History 194, 195.

³¹¹ See, e.g., Jones, *The Political Repression of the Black Panther Party 1966-1971: The Case of the Oakland Bay Area* (1988) 18 J. of Black Studies 415, 415-416 (Jones, *The Political Repression of the Black Panther Party*).

³¹² **Error! Hyperlink reference not valid.** Aug. 23, 1966 (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

That same year, Huey P. Newton and Bobby Seale formed the Black Panther Party in Oakland, California, seeking Black economic empowerment and the end of police brutality.³¹³ To pursue these goals, the Panthers adopted a number of community service programs, including health care clinics, a free breakfast program for school children,³¹⁴ and police observation patrols.³¹⁵

As with Dr. Martin Luther King, Jr., the federal government and California viewed the Black Panthers as a threat.³¹⁶ Vice President Spiro Agnew labeled the Black Panthers an “anarchistic group of criminals.”³¹⁷ Federal Bureau of Investigation Director Hoover declared that the Black Panther Party “without question, represents the greatest threat to the internal security of the country.”³¹⁸ Through its counterintelligence program (COINTELPRO), the FBI surveilled and sabotaged the Black Panthers.³¹⁹ The FBI sent anonymous, inflammatory letters to restaurants, grocery stores, and churches to dissuade them from providing food or facilities for the free breakfast program.³²⁰

To suppress the Black Panthers’ newsletter activities, the FBI ordered the Internal Revenue Service to audit the organization and any income they received from distributing newsletters.³²¹ Further, the FBI infiltrated the group with undercover agents and spread misinformation, paranoia, conflict, and distrust within the party.³²² Californian law enforcement also repeatedly arrested Black Panther members on harassment and public disorder charges, disrupting the organization and sapping resources away from its community service initiatives.³²³ These efforts contributed to the organization’s collapse in 1982.³²⁴

Like many states in the North and South, California also stripped individuals of their right to vote when they were convicted of a felony, embedding such a provision in its constitution since 1849.³²⁵ It took 125 years before California eventually changed this wholesale denial of voting rights in 1974, amending its constitution to allow individuals convicted of felonies to vote if they had completed their sentence and parole.³²⁶ In 2016, the state legislature restored voting rights to people convicted of a felony offense housed in jail, but not in prison.³²⁷

³¹³ Morrison, [Decades Later, a New Look at the Black Panthers and Their Legacy](#), Associated Press (Oct. 31, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³¹⁴ Blakemore, [How the Black Panthers’ Breakfast Program Both Inspired and Threatened the Government](#), History (Jan. 29, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³¹⁵ Jones, *The Political Repression of the Black Panther Party*, *supra*, at p. 417.

³¹⁶ *Id.* at pp. 415-416.

³¹⁷ *Id.* at p. 416.

³¹⁸ Abdelfatah, et al., [The Real Black Panthers](#), NPR (Apr. 15, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³¹⁹ Jones, *The Political Repression of the Black Panther Party*, *supra*, at pp. 415-416.

³²⁰ *Id.* at pp. 428-31.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Jones, *The Political Repression of the Black Panther Party*, *supra*, at pp. 421-25.

³²⁴ Morrison, [Decades Later, a New Look at the Black Panthers and Their Legacy](#), Associated Press (Oct. 31, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³²⁵ Cal. Const. of 1849, art. II, § 5.

³²⁶ 7 Witkin, Summary 11th Constitutional Law § 277 (2021); see also *Ramirez v. Brown* (1974) 12 C.3d 912, 117 C.R. 562, 528 P.2d 378.

³²⁷ Uggen, et al., [6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement](#), The Sentencing Project (Oct. 6, 2016), p. 4 (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

Still, in 2020, approximately 243,000 Californians were barred from voting due to a felony convictions.³²⁸ Of that number, 50,000 (or about 20 percent) are Black.³²⁹ Only recently, in 2020, did California voters approve Proposition 17, which amended the state’s constitution to restore the right to vote to all individuals who have completed their prison term, even if they are still on parole.³³⁰

V. Voting Rights Legislation

A. As Black Activists Fought for Civil Rights, White Americans Reacted with Violence

After the end of Reconstruction, Black Americans, facing increased threats to their liberty, organized and mobilized to assert their equal rights. Groups like the National Association for the Advancement of Colored People used protest and litigation to advance the civil rights of Black Americans and secure the rights guaranteed by the Fourteenth and Fifteenth Amendments.³³¹ Much of the NAACP’s legal work focused on defending Black Americans from wrongful convictions and bringing lawsuits to hold white perpetrators of racial terror accountable for their crimes.³³² The NAACP also brought legal challenges to end many of the devices states used to suppress Black political power, such as the all-white primary.³³³

In these efforts, NAACP lawyers played a critical role in using litigation to end racial segregation, most famously through *Brown v. Board of Education*, where the NAACP convinced the U.S. Supreme Court to strike down racial segregation in public schools as unconstitutional.³³⁴ In addition to its litigation, the organization lobbied the federal government to enact civil rights legislation, including anti-lynching laws, voting rights laws, and other civil rights laws that would ensure the equal protection of Black Americans.³³⁵

Black women, too, played a critical role in early Black activism. During the 1896 election in North Carolina, for instance, Sarah Dudley Pettey canvassed the Black sections of Raleigh to urge Black women to persuade their husbands, brothers, and sons to vote.³³⁶ In 1898, the “Organization of Colored Ladies” in Wilmington declared that for “Every Negro who refuses to register his name . . . that he may vote, we shall make it our business to deal with him in a way that will not be pleasant. He shall be branded a white-livered coward who would sell his liberty.”³³⁷

When the United States ratified the Nineteenth Amendment in 1920, Black women registered in large numbers to vote.³³⁸ For instance, in Kent County, Delaware, one local paper reported “unusually large” numbers of

³²⁸ *Id.* at p. 16.

³²⁹ *Id.* at p. 17.

³³⁰ McGreevy, [Proposition 17, Which Will Let Parolees Vote in California, Approved by Voters](#), L.A. Times (Nov. 3, 2020) (as of Mar. 31, 2022).

³³¹ Meier and Bracey, Jr., *The NAACP as a Reform Movement, 1909-1965* (1993) 59 J. of Southern History 3, 4.

³³² *Id.* at pp. 8-10.

³³³ *Id.* at pp. 4, 8, 10.

³³⁴ *Id.* at pp. 14-15, 25.

³³⁵ *Id.* at pp. 8, 23-25.

³³⁶ Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920* (1996), p. 102.

³³⁷ *Id.* at p. 107.

³³⁸ Jones, [What the 19th Amendment Meant for Black Women](#), Politico (Aug. 26, 2020) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; Nat. Park Service, *supra*, at pp. 16-17.

Black women who showed up to vote, though officials would prevent many of them—and many others across the country—from voting.³³⁹

World War II contributed to a surge in Black civil rights activism.³⁴⁰ The service and sacrifice of Black Americans—both abroad in the military and at home in factories and fields—underscored the moral imperative for equal treatment, especially given America’s war against the Nazism and white supremacy abroad.³⁴¹

With renewed energy, Black organizations pushed to secure voting rights, continuing efforts to organize, educate, and register Black voters, despite the threats of violence and the other barriers that states had created after Reconstruction.³⁴² Black women like Ella Baker led and directed civil rights campaigns and voter registration drives for some of the nation’s largest civil rights groups, including the NAACP, Southern Leadership Conference, and Student Nonviolent Coordinating Committee.³⁴³ In addition, interracial labor unions in the South played a part in registering Black voters.³⁴⁴ In 1947, Local 22 of the Food and Tobacco Workers in Winston-Salem, North Carolina helped register 3,000 Black residents in the city, helping elect the first Black alderman to the city’s board since Reconstruction.³⁴⁵

But Black veterans demanding equal treatment returned home to fierce resistance.³⁴⁶ In Decatur, Mississippi, a white senator, Senator Theodore Bilbo, warned Black residents to stay away from the polls for the Democratic primary in 1946, calling for “every red-blooded white man to use any means to keep the niggers away from the polls.”³⁴⁷

A mob of white people waving pistols turned five returning World War II veterans away from voting during that primary.³⁴⁸ A group of civil rights organizations complained to the U.S. Senate about Senator Bilbo’s intimidation tactics, prompting a Senate committee to hold four days of hearings in Jackson, Mississippi.³⁴⁹ Two hundred Black Americans, most of them veterans, packed the federal courtroom in Jackson to share their experience of violence and voter suppression.³⁵⁰

Black Americans faced similar threats in other places. In March 1948, the Ku Klux Klan paraded around Wrightsville, Georgia, warning that “blood would flow” if Blacks tried to vote in the forthcoming election.³⁵¹ Seven months later, two whites threatened Isaac Nixon, a Black veteran, telling him not to vote.³⁵² He refused

³³⁹ Jones, [For Black Women, the 19th Amendment Didn’t End Their Fight to Vote](#), Nat. Geographic (Aug. 7, 2020) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

³⁴⁰ Meier and Bracey, Jr., *supra*, at p. 21.

³⁴¹ Kluger, *Simple Justice* (Knopf 2011), p. 12; Nat. Park Service, *supra*, at p. 20.

³⁴² See, e.g., Nat. Park Service, *supra*, at p. 20; Garrow, *supra*, pp. 97-100, 163-64.

³⁴³ Scelfo, [On MLK Day, Honor the Mother of the Civil Rights Movement, Too](#), Time (Jan. 16, 2017) (as of Mar. 31, 2022).

³⁴⁴ Nat. Park Service, *supra*, at p. 27.

³⁴⁵ *Ibid.*

³⁴⁶ *Id.* at p. 28.

³⁴⁷ Fleegler, *Theodore G. Bilbo and the Decline of Public Racism, 1938-1947* (2006) 68 J. Miss. History 1, 1.

³⁴⁸ *Id.* at p. 20.

³⁴⁹ *Id.* at p. 22.

³⁵⁰ Nat. Park Service, *supra*, at p. 25.

³⁵¹ *Id.* at p. 28.

³⁵² *Ibid.*

to heed their warning, cast his ballot shortly after sunrise, and by nightfall he had been murdered.³⁵³ Though Nixon's murderers later stood trial, an all-white jury acquitted them.³⁵⁴

In Florida, on the Christmas Eve of 1951, the KKK bombed the home of the state's NAACP director, murdering Harry T. Moore and his wife.³⁵⁵ During the 1963 civil rights protests in Birmingham, Alabama, white policemen and firefighters unleashed hounds and blasted protestors with high pressure water hoses that stripped the clothes off their backs.³⁵⁶

In Greenwood, Mississippi, white citizens and officials responded to Black voter registration efforts by cutting off food supply to Black communities, imprisoning Black people for "breach of peace," setting fire to Black businesses, and firing gunshots at Black activists in their cars, their offices, and their homes.³⁵⁷ When Black activists organized the Freedom Vote and the Freedom Summer of 1964 in Mississippi,³⁵⁸ local sheriffs arrested three activists and turned them over to KKK members, who proceeded to murder the activists, burn their car, and bury their remains.³⁵⁹

On March 7, 1965, future Congressman John Lewis led some 600 protestors on a march from Selma to Montgomery, Alabama.³⁶⁰ That "Bloody Sunday," Alabama state troopers attacked.³⁶¹ Awaiting the protestors on the Edmund Pettus Bridge, state troopers rushed into the crowd with nightsticks.³⁶² Troopers beat and bloodied protestors, knocking many unconscious.³⁶³ Troopers fractured Lewis's skull in the assault.³⁶⁴ "I thought I was going to die on that bridge," he later recalled.³⁶⁵ The bloodshed at Selma prompted outrage across the nation, becoming the tipping point that spurred the federal government to enact the Voting Rights Act that year.³⁶⁶

B. The Voting Rights Act of 1965

The centuries-long Black struggle for freedom led to the passage of the Voting Rights Act, a landmark law that prohibited many of the barriers described in this chapter, allowing millions of Black Americans to vote.³⁶⁷ In 1964, prior to the protections of the Voting Rights Act, 57 percent of eligible Black Americans remained unregistered to vote.³⁶⁸ The passage of the Voting Rights Act resulted in a 21 percent increase in Black voter

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Garrow, *supra*, at p. 249.

³⁵⁷ Nat. Park Service, *supra*, at pp. 50-52.

³⁵⁸ *Id.* at p. 44.

³⁵⁹ *Ibid.*

³⁶⁰ May, *Bending Toward Justice* (2013), p. 87.

³⁶¹ U.S. Dept. of Justice, *History of Federal Voting Rights Laws* (as of Mar. 31, 2022)[Error! Hyperlink reference not valid.](#) Nat. Park Service, *supra*, at pp. 65-68

³⁶² May, *supra*, at p. 87.

³⁶³ *Ibid.*

³⁶⁴ Rojas, [Selma Helped Define John Lewis's Life](#), N.Y. Times (Jul. 28, 2020) (as of Mar. 31, 2022)[Error! Hyperlink reference not valid.](#)

³⁶⁵ *Ibid.*

³⁶⁶ Nat. Park Service, *supra*, at p. 70.

³⁶⁷ Berman, [The Lost Promise of the Voting Rights Act](#), The Atlantic (Aug. 5, 2015) (as of Mar. 31, 2022)[Error! Hyperlink reference not valid.](#)

³⁶⁸ Nat. Park Service, *supra*, at p. 65

registration—the largest gains were recorded in the south, where the percentage of registered Black voters increased from below 31 percent to over 66 percent by 1984.³⁶⁹

The Voting Rights Act empowered the United States Department of Justice to enforce voting rights, authorized individual voters to sue in federal court to enforce their voting rights, and authorized the federal government to send examiners to register voters.³⁷⁰ Among the Act’s most important provisions:

- Section 2 of the Voting Rights Act prohibits any voting restriction that “results in” the denial of the right to vote based on race, regardless of whether a state intended to discriminate;³⁷¹
- Section 4 of the law identified certain state and local governments that had a history of discrimination against Black Americans. State and local entities that demonstrated such past discrimination were “covered jurisdictions” subject to greater oversight from the federal government;³⁷² and
- Section 5 provided that “covered jurisdictions” were required to obtain approval—or “preclearance”—from the Department of Justice or a federal court in Washington, D.C. before passing any voting rights related law. The covered jurisdiction had to demonstrate that the proposed voting change did not have a discriminatory purpose or a discriminatory effect on Black or other nonwhite voters.³⁷³

Altogether, these provisions represented what the United States Department of Justice called “the most successful piece of civil rights legislation ever adopted by the United States Congress,” due to its role in eliminating many of the devices that had been used to deny Americans their right to vote.³⁷⁴

Within the last decade, however, the United States Supreme Court has removed or weakened key pillars of the Voting Rights Act.³⁷⁵ In *Shelby County v. Holder* (2013), the Supreme Court struck down Section 4 of the Act as unconstitutional.³⁷⁶ And because Section 5’s preclearance requirements only applied to areas identified through Section 4, the Supreme Court effectively eliminated Section 5 as well. Though admitting that “voting discrimination still exists,” the Court felt that enough had been done because 40 years had passed and minority voting rates had improved.³⁷⁷

Thus, the Court found Section 4 to no longer be necessary, despite Congress’s renewal of Section 4 in 2006 by an overwhelming majority (the House voted 390 in favor to 33 opposed; the Senate passed it unanimously), and despite Congress’s finding that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment[.]”³⁷⁸ The Court’s decision prompted Justice Ruth Bader Ginsburg to protest in dissent that striking down this provision of the

³⁶⁹ Tate, *From Protest to Politics: The New Black Voters in American Elections* (1998), p. 1.

³⁷⁰ Nat. Park Service, *supra*, at p. 69.

³⁷¹ 52 U.S.C. § 10301(a); see also SCOTUSBlog, *Section 2 of the Voting Rights Act: Vote Dilution and Vote Deprivation* (as of Mar. 31, 2022).

³⁷² Avila, et al., *Voting Rights in California: 1982-2006* (2007) 17 Southern Cal. Rev. of Law and Social Justice 132, 137.

³⁷³ *Ibid.*

³⁷⁴ U.S. Dept. of Justice, *Introduction to Voting Rights Laws* (as of Mar. 31, 2022).

³⁷⁵ See *Shelby Cnty. v. Holder* (2013) 570 U.S. 529; *Brnovich v. Democratic Nat. Com.* (2021) 141 S. Ct. 2321.

³⁷⁶ *Shelby Cnty. v. Holder* (2013) 570 U.S. 529.

³⁷⁷ *Id.* at pp. 547-57.

³⁷⁸ *Id.* at pp. 565, 593 (dis. opn. Ginsburg, J.).

Voting Rights Act “when it has worked and is continuing to work” is “like throwing away your umbrella in a rainstorm because you are not getting wet.”³⁷⁹

Eight years later, the Court weakened Section 2 of the Voting Rights Act as well.³⁸⁰ Though Section 2 prohibits any voting law that “results in” the denial of voting rights based on race, the Court, in *Brnovich v. Democratic National Committee*, rewrote the law to limit its reach.³⁸¹ While Section 2 speaks only to voters’ rights, and the need to protect them against racial discrimination, the Supreme Court created a new requirement for courts to consider the “strength of the state interests.”³⁸² By inserting the state’s goals into the equation, the Supreme Court flipped the Voting Rights Act from a civil rights act into a balancing act, allowing voting rights to be sacrificed if a court believed the state’s goals to be worthy enough.³⁸³

The Court also declared that the legality of a voting restriction should be evaluated partly based on whether the law “has a long pedigree” or was in “widespread use” as of 1982, the year Congress amended the Voting Rights Act to prohibit laws that “result in” racially discriminatory denials of the right to vote.³⁸⁴ But, as detailed in this chapter, many racially discriminatory voting restrictions have had a long and widespread pedigree in this nation’s history. Poll taxes and literacy tests existed for almost 100 years—some restrictions even longer.³⁸⁵ By considering a voting restriction’s use in the past as a basis for accepting it, the Supreme Court’s decision enables discriminatory restrictions to remain in place, simply because they had been used previously.

The Supreme Court’s elimination or weakening of the anti-discrimination protections in Sections 2, 4, and 5 of the Voting Rights Act has opened the floodgates for laws restricting voter access across the nation. Hours after the *Shelby County v. Holder* decision, Texas implemented a strict photo ID law that had previously been rejected under Section 5.³⁸⁶

That summer, the North Carolina legislature also passed a sweeping law that instituted a stringent photo ID requirement, eliminated same-day voting registration, and cut back on early voting.³⁸⁷ Over the four years following *Shelby County*, jurisdictions previously covered under Section 5 closed 1,173 polling places, many in districts with majority Latino and Black voters.³⁸⁸ States also limited voting hours, limited the ability to vote via mail-in ballots, and purged voter registration rolls.³⁸⁹

While these restrictions limited voting access for all Americans, they also targeted or specially affected Black Americans. The removal of polling places in Ohio ensured that “African Americans in Ohio wait[] in line for

³⁷⁹ *Id.* at p. 590 (dis. opn. Ginsburg, J.).

³⁸⁰ See *Brnovich v. Democratic Nat. Com.* (2021) 141 S. Ct. 2321.

³⁸¹ *Id.* at pp. 2337-2341.

³⁸² *Id.* at pp. 2339-40.

³⁸³ *Brnovich v. Democratic National Committee* (2021) 135 Harv. L. Rev. 481; Charles and Fuentes-Rohwer, [The Court’s Voting-Rights Decision Was Worse than People Think](#), *The Atlantic* (Jul. 8, 2021) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

³⁸⁴ *Brnovich, supra*, 141 S. Ct. 2321, 2338-39.

³⁸⁵ Nat. Park Service, *supra*, at p. 29.

³⁸⁶ Agraharkar, [50 Years Later, Voting Rights Act Under Unprecedented Assault](#), Brennan Center for Justice (Aug. 2, 2015) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

³⁸⁷ *Ibid.*

³⁸⁸ The Leadership Conference Education Fund, [Democracy Diverted: Polling Place Closures and the Right to Vote](#) (Sep. 2019), p. 10 (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

³⁸⁹ Brennan Center for Justice, [Voting Laws Roundup: December 2021](#) (Dec. 21, 2021) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**; see also *Brnovich v. Democratic Nat. Com.* (2021) 141 S. Ct. 2321, 2337-2341.

fifty-two minutes to vote, while whites wait[] only eighteen minutes.”³⁹⁰ After record turnout of Black voters in Georgia helped flip federal elections in favor of Democrats in 2020, Georgia’s Republican state legislature passed a law limiting drop boxes for mail ballots, introducing more rigid voter identification requirements for absentee ballots, and criminalizing the act of providing food or water to people waiting in line to vote.³⁹¹ In a recent lawsuit filed in federal court, the U.S. Department of Justice asserts that Georgia enacted these restrictions specifically to target Black voters.³⁹²

Overall, states across the country introduced 389 restrictive voting laws from January to May 2021, alone.³⁹³ With the Supreme Court’s recent limitations of the Voting Rights Act, laws like Georgia’s are becoming the new norm across the country.³⁹⁴

C. California

In the latter half of the 20th century, California began taking steps to expand voting access. California encouraged county and volunteer voting registration efforts in the 1950s and 1960s, and it amended its constitution to eliminate its literacy test in 1970.³⁹⁵ In the 1970s, California relaxed its rules for requesting absentee ballots and for remaining on the voter registries from year to year.³⁹⁶ More recently, the state enacted the California Voting Rights Act in 2001, which permits citizens to file suit in state court to challenge racially discriminatory restrictions in at-large elections without having to demonstrate the higher evidentiary standards required under the federal Voting Rights Act.³⁹⁷

Despite the state’s efforts to advance voting access, the federal government has observed that California and some of its cities and counties have continued to engage in voting discrimination throughout the late 20th century. The U.S. Attorney General determined that California’s use of a statewide literacy test to restrict voting during the November 1968 election violated the federal Voting Rights Act.³⁹⁸

From 1968 to 1976, the United States Department of Justice also identified Kings County, Monterey County, and Yuba County as engaging in discriminatory practices, monitoring these counties and objecting to various new voting restrictions proposed by these counties well into the 2000s.³⁹⁹ As another example, the United States Department of Justice objected to Merced County’s redistricting plan in 1992, a plan opposed by both Black and Latino communities because it would have denied them the opportunity to elect their preferred candidate.⁴⁰⁰

³⁹⁰ Klarman, *supra*, at pp. 59-60.

³⁹¹ Fausset, et al., [Why the Georgia G.O.P.’s Voting Rollbacks Will Hit Black People Hard](#), N.Y. Times (Mar. 25, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³⁹² U.S. Department of Justice, [Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law](#) (Jun. 25, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³⁹³ Brennan Center for Justice, [State Voting Bills Tracker 2021](#) (May 28, 2021) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

³⁹⁴ See Brennan Center for Justice, [Voting Laws Roundup: December 2021](#) (Dec. 21, 2021) (as of Mar. 31, 2022).

³⁹⁵ Katz, et al., *supra*, at pp. 20-27.

³⁹⁶ *Ibid.*

³⁹⁷ Avila, et al., *supra*, at p. 152.

³⁹⁸ 35 Fed. Reg. § 12354 (1970); see *Lopez v. Monterey County* (1999) 525 U.S. 266, 271.

³⁹⁹ U.S. Dept. of Justice, [Jurisdictions Previously Covered by Section 5](#) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**; U.S. Dept. of Justice, [Voting Determination Letters for California](#) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

⁴⁰⁰ Assistant Attorney General John R. Dunne, [Letter to Merced County Clerk Kenneth L. Randol](#) (Apr. 3, 1992) (as of Mar. 31, 2022).**Error! Hyperlink reference not valid.**

Thus, while California has enacted laws expanding voting rights, equal access to the ballot box continues to be an ongoing challenge in parts of the state.

VI. Effects of Restrictions on Black Political Participation

A. Before the Voting Rights Act of 1965

When adopting the numerous voting restrictions described in this chapter, states made their intent clear. As one Virginia Senator explained, these restrictions were meant “to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without impairing the numerical strength of the white electorate.”⁴⁰¹

These methods proved effective. Once Louisiana adopted a number of these restrictive rules in its 1898 constitution, the number of Black voters in Louisiana plummeted from 130,000 to 5,000.⁴⁰² In Virginia, the number dropped from 147,000 to 21,000.⁴⁰³ Mississippi’s constitutional convention cut Black voter enrollment from about 147,000 to around 8,600.⁴⁰⁴ In 1906, five years after Alabama designed its exclusionary rules, only two percent of Black voters remained on the state’s voter registries.⁴⁰⁵ With the suppression of Black votes, Black representation in Congress quickly dwindled. During Reconstruction, 16 Black men held seats in Congress.⁴⁰⁶ From 1887 to 1901, just five members of Congress—in either the House of Representatives and Senate—were Black.⁴⁰⁷ From 1901 to 1929, not a single Black American served in Congress.⁴⁰⁸ No Black congressman would be elected again from the South until the 1970s.⁴⁰⁹

These barriers prevented Black Americans from governing, while securing the power of southern white supremacists in Congress, who voted down civil rights legislation and embedded racism into federal laws that built modern America. Near the end of Reconstruction in the 1870s, white southerners formed the “Southern Bloc” in the Senate—a unified front of white Democratic Senators from the former confederate states.⁴¹⁰ After the passage of the Fifteenth Amendment in 1870, progressive senators proposed hundreds of pieces of civil rights legislation to remedy discrimination against Black Americans in education, employment, housing, transportation, public accommodations, and voting.⁴¹¹ But for 87 years, every attempt but one died in Congress, many blocked by the white “Southern Bloc” of the Senate, who vigilantly thwarted any effort to advance Black civil rights.⁴¹²

⁴⁰¹ Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia: Held in the City of Richmond, June 12, 1901 to June 24, 1901 (Vol. 2, Hermitage Press 1906), pp. 3076-77.

⁴⁰² Nat. Park Service, *supra*, at p. 14.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Id.* at p. 6; Facing History & Ourselves, [Black Officeholders in the South](#) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

⁴⁰⁷ U.S. House of Representatives, Office of History and Preservation, [Black Americans in Congress: 1870-2007](#) (2008), pp. 3-4. **Error! Hyperlink reference not valid.**

⁴⁰⁸ *Id.* at pp. 2, 4.

⁴⁰⁹ *Ibid.*

⁴¹⁰ Caro, *Master of the Senate* (2009), pp. xiii-xiv; Grantham, *The Life and Death of the Solid South: A Political History* (1992).

⁴¹¹ Caro, *supra*, at pp. xiii-xiv.

⁴¹² *Ibid.*

Not only did white southern lawmakers vote down civil rights legislation, they also rewrote watershed pieces of legislation to exclude Black Americans. Many historians and economists consider the New Deal responsible for creating the modern middle class and many of the programs that Americans depend upon today, such as Social Security.⁴¹³ But the New Deal excluded Black Americans from many of its benefits.⁴¹⁴ At the time, 90 percent of the southern Black workforce, and 60 percent of nation’s total Black workforce, worked as farm laborers or domestic servants.⁴¹⁵

During the legislative process to pass various parts of the New Deal, southerners on the Senate Finance Committee excluded farm laborers and domestic servants from programs providing Social Security, minimum wage, unemployment insurance, and workers’ compensation.⁴¹⁶ As several historians explain, the exclusion of farm laborers and domestic servants was “racially coded . . . Southern politicians, reported one architect of the new law, were determined to block any ‘entering wedge’ for federal interference with the handling of the Negro question.”⁴¹⁷ Thus, southern politicians rewrote the New Deal to exclude Black Americans from its benefits, fearing that federal benefits would discourage Black workers from taking low-paying jobs in their fields, factories, and kitchens.⁴¹⁸

In one of the final parts of the New Deal, the government spent \$95 billion in the Servicemen’s Readjustment Act of 1944 (GI Bill) to give millions of veterans returning from World War II the ability to attend college, receive job training, start businesses, and purchase homes.⁴¹⁹ Yet, one report from the 1940s observed that it was “as though the GI Bill had been earmarked ‘For White Veterans Only.’”⁴²⁰

During drafting, the chair of the House Veterans Committee, a white supremacist Congressman from Mississippi, ensured that the GI Bill was administered by states instead of the federal government to guarantee that states could direct its funds solely to white veterans.⁴²¹ Similar results arose in housing and healthcare. For both the Hill Burton Act, which underwrote the creation of a modern health care infrastructure,⁴²² and the Housing Act of 1949, Congress included segregation clauses or rejected anti-discrimination clauses to avoid southern lawmakers’ opposition, which otherwise would have doomed the legislation.⁴²³

⁴¹³ See, e.g., Katznelson, *When Affirmative Action was White* (2005), p. 113; Krugman, [Paul Krugman - New Deal Created the Middle Class](#) (Apr. 1, 2011) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (2005), p. 9.

⁴¹⁴ Katznelson, *supra*, at p. 113; California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), [Testimony of Jones](#), 7:20-8:55 (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴¹⁵ Thomas, *The Hill-Burton Act and Civil Rights: Expanding Hospital Care for Black Southerners, 1939-1960* (2006) 72 *J. of Southern History* 823, 827-28; Lichtenstein, et al., *Who Built America? Working People and the Nation's Economy, Politics, Culture, and Society* (Vol. 2, 2000), p. 429.

⁴¹⁶ Boyle, [The President Proposes . . .](#), *N.Y. Times* (Apr. 5, 2013) (as of Mar. 31, 2022); Kotz, [‘When Affirmative Action was White’: Uncivil Rights](#), *N.Y. Times* (Apr. 28, 2005) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; Lichtenstein, et al., *Who Built America? Working People and the Nation's Economy, Politics, Culture, and Society—Volume 2: Since 1877* (2000), p. 429.

⁴¹⁷ Lichtenstein, et al., *supra*.

⁴¹⁸ *Ibid.*

⁴¹⁹ Kotz, *supra*.

⁴²⁰ Katznelson, *supra*, at pp. 113-15; see also Blakemore, [How the GI Bill’s Promise was Denied to a Million Black WWII Veterans](#), *History* (Apr. 20, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴²¹ Katznelson, *supra*, at p. 121.

⁴²² Thomas, *supra*, at p. 823.

⁴²³ *Id.* at 836; Von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949* (2000) 11 *Housing Policy Debate* 299, 309.

Thus, by barring Black political participation after Reconstruction, white supremacists seized state, local, and federal power, perpetuated discriminatory policies, blocked efforts to redress discrimination, and excluded Black Americans from most of the major economic legislation that produced the modern economy of the United States.⁴²⁴

B. After the Voting Rights Act

Since the passage of the Voting Rights Act, Black voters have been among the most stable voting blocs, despite historic and ongoing efforts to restrict their ability to vote.⁴²⁵ Black support has proved critical, in particular, in modern elections. In the last three presidential elections, Black voter turnout was 67 percent in 2012, 60 percent in 2016, and 63 percent in 2020.⁴²⁶ Black voter turnout in each of these elections was higher than Latino and Asian Americans, and higher than whites in 2012.⁴²⁷ Though Black Americans represent about 12.4 percent of the U.S. population today,⁴²⁸ many political pundits recognized that the Black electorate played a significant role in determining the outcome in the presidential election in 2020.⁴²⁹

Nevertheless, these longstanding limitations on Black political participation have deeply shaped the lives of Black Americans. If the goal of political participation is to ensure a government is responsive to the needs of its citizens, Black political participation is particularly important to serve the needs of Black communities who experience the persisting effects of slavery and segregation. But the suppression of Black political participation has prevented Black Americans from exercising their democratic voice, perpetuating policies that entrench racial inequalities.

When Black Americans gain greater representation, Black Americans have a greater ability to request and enact policies that meet their economic and educational needs. One recent study—the first to examine the effects of Black politicians on public finances during Reconstruction—found that Reconstruction-era communities with more Black politicians had higher local tax revenue, as well as higher Black literacy rates.⁴³⁰ In other words, the study suggests that communities with more Black politicians increased their tax revenue, which in turn increased investment in local education and Black education.

Another study found that the passage of the Voting Rights Act led to some reduction in racial wealth disparities, especially in covered jurisdictions subject to greater federal oversight.⁴³¹ Comparing neighboring counties—

⁴²⁴ Bateman, et al., *Southern Nation: Congress and White Supremacy After Reconstruction* (2018), p. 385.

⁴²⁵ Griffin, et al., *States of Change, How Demographic Change is Transforming the Republican Democratic Parties*, Center for American Progress (June 2019), pp. 9-10 (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; see also Ray and Whitlock, *Setting the Record Straight on Black Voter Turnout*, Brookings Institution (Sept. 12, 2019) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴²⁶ Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. Census Bureau (Apr. 29, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴²⁷ *Ibid.*

⁴²⁸ Jones, et al., *2020 Census Illuminates Racial and Ethnic Composition of Country*, U.S. Census Bureau (Aug. 12, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴²⁹ Stafford, et al., *'This is Proof': Biden's Win Reveals Power of Black Voters*, Associated Press (Nov. 9, 2020) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; Wiltz, *2020: The Year Black Voters Said, 'Hold Up.'* Politico (Jan. 2, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; Igielnik, et al., *Behind Biden's 2020 Victory*, Pew Research Center (Jun. 30, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴³⁰ Logan, *Do Black Politicians Matter? Evidence from Reconstruction* (2020) 80 J. of Econ. History 1, 2-3, 22-33.

⁴³¹ Aneja and Avenancio-Leon, *The Effect of Political Power on Labor Market Equality: Evidence from the 1965 Voting Rights Act*, Wash. Center for Equitable Growth (Oct. 16, 2020) (as of Mar. 31, 2022).

where one county was a covered jurisdiction subject to heightened oversight under the Voting Rights Act and the other was not—the study found that the Voting Rights Act narrowed the Black-white wage gap 5.5 percent between 1965 and 1970, a change driven primarily by increases in Black wages.⁴³²

By protecting Black voting rights, the Act helped drive increases in wages by giving Black Americans greater voice to seek public employment opportunities and enabling Black Americans to ask for public funds to be invested in their communities.⁴³³ The Act also allowed Black communities and their representatives to implement affirmative action and anti-discrimination laws to protect Black Americans and their ability to access equal employment opportunities and equal wages.⁴³⁴ According to the study, the Voting Rights Act contributed to about one-fifth of the overall decline in the wage gap between Black and white Americans in the South between 1965 and 1970.⁴³⁵

Yet, Black Americans can secure the benefits of political participation only to the extent that government policies respond to their voices. Despite modern gains in political participation and representation—including Barack Obama, the first Black man to be elected President in 2008, and Kamala Harris, the first Black woman to be elected Vice President in 2020—Black Americans have not seen a similar rise in policies responsive to their needs.⁴³⁶

Studies examining more recent years have shown that not only do Black Americans hold less political sway than white Americans when it comes to influencing the government, Black support for a policy actually decreases the chances that the government will enact it.⁴³⁷ Law Professor Nicholas O. Stephanopoulos conducted a study to measure the political sway held by different types of voters. Relying on a database collecting group preferences on more than 2,000 policy issues from 1981 to 2006, Stephanopoulos found that as white support for a policy increased from zero percent to 100 percent, the likelihood of the federal government adopting the policy rose from about 10 percent to 60 percent.⁴³⁸ However, when Black support for a policy increased from zero percent to 100 percent, the likelihood of the federal government adopting the policy fell from about 40 percent to 30 percent.⁴³⁹

Stephanopoulos found similar results regarding state policy. “Whether most Black voters are conservative or liberal, state legislative outcomes barely budge. But vary the views of white voters to an equivalent degree, and a state’s policies go from looking like Alabama’s to resembling Michigan’s,” even when considering the number of Black and white people that live in the state.⁴⁴⁰ Stephanopoulos also noted that the passage of landmark laws—such as the Civil Rights Acts of the 1960s—is not proof that Black Americans are adequately represented by the government, because “[i]t remains possible that the group loses on most other matters. Individual victories might conceal aggregate defeats.”⁴⁴¹

⁴³² *Id.* at p. 17.

⁴³³ *Id.* at pp. 23-30.

⁴³⁴ *Ibid.*

⁴³⁵ *Id.* at p. 18.

⁴³⁶ Stephanopoulos, [The False Promise of Black Political Representation](#), *The Atlantic* (Jun. 11, 2015) (as of Mar. 31, 2022) (Stephanopoulos, *The False Promise*).

⁴³⁷ Stephanopoulos, *Political Powerlessness* (2015) 90 N.Y.U. L. Rev. 1527, 1583 (Stephanopoulos, *Political Powerlessness*).

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ Stephanopoulos, *The False Promise*, *supra*. **Error! Hyperlink reference not valid.**

⁴⁴¹ Stephanopoulos, *Political Powerlessness*, *supra*, at p. 1532.

Other researchers reached similar conclusions. John Griffin and Brian Newman published a book documenting a series of studies about how likely Congress will enact policies desired by different racial groups.⁴⁴² For one study, Griffin and Newman used long-running opinion surveys to determine racial groups' views on whether the federal government should increase or decrease spending in six areas, then compared the groups' views to changes in spending that actually took place. Like Stephanopoulos, they found that Congressional spending is much less likely to reflect the views of Black and Latino Americans.⁴⁴³ Griffin and Newman also measured political responsiveness by examining the positions taken by members of Congress in their votes on legislation. Their results, again, indicated that members of Congress were less responsive to their Black and Latino voters than to their white voters.⁴⁴⁴

Recent events underscore the government's failures to heed Black voices. For example, despite national and bipartisan support for police reform following the murder of George Floyd, Congress failed to enact any police reform legislation.⁴⁴⁵ Similarly, Congress failed to pass any voting rights legislation—including bills with bipartisan support—to counteract the slew of state laws increasing voting restrictions after the 2020 election.⁴⁴⁶

Likewise, Congress has consistently failed to pass legislation redressing the economic disparities faced by Black Americans. Black American households, on average, still earn one-tenth that of white households.⁴⁴⁷ Chapter 13 on the Wealth Gap delves into the wealth gap between Black and white families and its causes. Many of these problems can be traced to the discriminatory laws and policies that continue to be felt today. Take, for example, housing segregation. Laws that historically enforced or sanctioned racial housing segregation have produced neighborhood segregation that persists today.⁴⁴⁸ Because modern life revolves around a family's neighborhood—including access to employment, credit scores, housing values, the amount of funding for local schools or parks, and policing—the racist policies that produced neighborhood segregation have created a discriminatory foundation upon which other laws have been built.⁴⁴⁹

Although increased political representation can allow Black communities to try to change these systems, undoing these discriminatory systems is not a matter of flipping a switch. Discriminatory policies have piled over decades and centuries, and undoing these systems is much like undoing the literal concrete underlying a city and its streets and sidewalks.⁴⁵⁰ It requires many years, if not decades, of durable and long-term

⁴⁴² Griffin and Newman, *Minority Report: Evaluating Political Equality in America* (2008).

⁴⁴³ *Id.* at pp. 64-69.

⁴⁴⁴ *Id.* at pp. 81-107.

⁴⁴⁵ Sonmez and DeBonis, [No Deal on Bill to Overhaul Policing in Aftermath of Protests Over Killing of Black Americans](#), Wash. Post (Sep. 22, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; The Editorial Board, [Why National Police Reform Failed](#), Wall Street Journal (Sep. 27, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴⁴⁶ Logan, [John Lewis Voting Rights Bill Fails in the Senate Amid Rise of GOP-Led State Restrictions](#), L.A. Times (Nov. 3, 2021) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴⁴⁷ Rosalsky, [What a 1968 Report Tells Us about the Persistence of Racial Equality](#), NPR (Jun. 9, 2020) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴⁴⁸ Loh, et al., [The Great Real Estate Reset](#), Brookings Institute (Dec. 16, 2020) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**; California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), [Testimony of Paul Austin](#) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴⁴⁹ See, e.g., Godoy, [In U.S. Cities, The Health Effects of Past Housing Discrimination are Plain to See](#), NPR (Nov. 19, 2020) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.** Mitchell and Franco, [HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality](#), National Community Reinvestment Coalition (Mar. 20, 2018) (as of Mar. 31, 2022)**Error! Hyperlink reference not valid.**

⁴⁵⁰ See generally Caro, *The Power Broker* (1974).

commitment to both change the old system and design a new one. The sustained, long-term commitment required for change means that the election of any one or several Black politicians is not enough to fix the problematic policies at the root of racial inequalities.⁴⁵¹ Political participation therefore represents just one piece of the puzzle when it comes to identifying the ongoing legacies of slavery, systemic discrimination, and what needs to be done to redress them.

C. California

During California's early history, Black Californians struggled to gain representation in political office or to have a voice in party politics. Beginning in 1870, most Black Californians belonged to the Republican Party, the party that had abolished slavery.⁴⁵² But the white members of California's Republican Party ignored Black Californians' requests to serve in elected or appointed political offices.⁴⁵³ Some Black voters protested by joining the Democratic Party in the 1880s.⁴⁵⁴ But Democrats, too, refused Black men the offices that they had promised in order to lure Black voters to their side.⁴⁵⁵ Though Black men secured the formal right to vote in 1870, it would take nearly a half century before California's first Black legislator, Frederick M. Roberts, was elected to the California State Assembly in 1918.⁴⁵⁶ From 1918 to 1965, only six Black male Californians were elected to the California Legislature.⁴⁵⁷ California did not elect its first Black female legislator, Yvonne Brathwaite Burk, until 1966.⁴⁵⁸

In more recent years, California has made many strides in expanding voting rights access. As of January 2022, the number of Black elected officials in California's legislature is now proportional to the state's Black population.⁴⁵⁹ But as described in later chapters of this report, the state still has not addressed many of the socioeconomic disparities that have resulted from these longstanding barriers, disparities that profoundly shape the lives of Black Californians. While Black Californians may have a greater ability to vote in the ballot box today, Black Californians also have voted with their feet: many have left the state for opportunities elsewhere, reflecting continued failure to address their needs.⁴⁶⁰

VII. Conclusion

Despite the promise of American democracy, the United States has excluded Black Americans from equal participation in self-government. By doing so, government officials and private parties sought to recreate the racial hierarchy that existed during enslavement. Though Black Americans organized to pursue their equal citizenship, government officials resisted, retaliated, and undercut Black political power through the many

⁴⁵¹ Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success* (1991) 89 Mich. L. Rev. 1077, 1134-1153.

⁴⁵² Daniels, *Pioneer Urbanites: A Social and Cultural History of Black San Francisco* (1990), p. 50.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Id.* at pp. 50-51.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ California Legislative Black Caucus, [Past Members](#) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*; see also California Research Bureau, [Women of Color in California's Legislature](#) (Aug. 2015) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

⁴⁵⁹ Compare California Legislative Black Caucus, *supra*, with U.S. Census Bureau, [Race \(2020\)](#) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

⁴⁶⁰ Hepler, [The Hidden Toll of California's Black Exodus](#), S.F. Chronicle (Jul. 25, 2020) (as of Mar. 31, 2022). **Error! Hyperlink reference not valid.**

means and methods described in this chapter. Many of these methods persisted for nearly a century—others persist to this day. But all of these methods have limited the country’s efforts to redress the legacy of slavery and racial discrimination, producing deep inequalities in the politics and policies that shape America and the lives of Black Americans today.

DRAFT

Chapter 5. The Root of Many Evils: Residential Segregation

I. Introduction

After the Civil War, federal, state, and local government officials, working with private individuals, actively segregated American land into Black and white neighborhoods. This housing segregation occurred over almost 200 years, and through a variety of different government strategies and policies. These government actions were intentional and they supplemented and intensified the actions of private individuals. These widespread actions and the resulting segregation of Black Americans—both nationwide and in California—are enduring badges and incidents of slavery because they continue to affect Black Americans.

Immediately after the Civil War, the United States was less segregated than it is today.¹ Most Black Americans lived in the rural South, on or near the land on which they had been enslaved, in shacks or former slave quarters.² In the cities of the North and South, Black Americans mostly lived in racially mixed neighborhoods, even though Black residents lived in housing of worse quality and in back alleys.³

The average urban Black person in 1890 lived in a neighborhood that was only 27 percent Black.⁴ Since then, American federal, state, and local municipal governments amplified actions by private citizens to force Black Americans into urban ghettos, while helping white Americans buy single family homes in the suburbs.⁵ Rural America also became increasingly segregated, as Black residents left the rural South for economic opportunity and to escape racial violence and terrorism.⁶

As certain segregation methods were declared unconstitutional, federal, state, and local governments ignored them or thought up new ways to reach the same goals.⁷ Although the decisions of millions of private homeowners, real estate agents, and landlords settled Americans into segregated residential patterns, it was action by all levels of government which expanded and solidified these settlements into the segregated neighborhoods of today.⁸

¹ Cutler et al., *The Rise and the Decline of the American Ghetto* (1999) vol. 107, No. 3, J. of Political Economy 455, 456 (Cutler).

² U.S. Census Bureau, *Black Population 1790-1915* (1918) pp. 33, 80-90 (Black Population); Ransom & Sutch, *One Kind of Freedom: The Economic Consequences of Emancipation* (2001) p. 57 (Ransom); Du Bois, *The Negro American Family* (1908) pp. 45-51 (Negro American Family).

³ Cutler, *supra*, at fn. 1, p. 456; Massey & Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) pp. 26, 41 (Massey); see generally Grigoryeva & Ruef, *The Historical Demography of Racial Segregation* (2015) vol. 80, No. 4, *American Sociological Rev.* 814-842 (Grigoryeva); Logan & Martinez, *The Spatial Scale and Spatial Configuration of Residential Settlement: Measuring Segregation in the Postbellum South* (2018) vol. 123, No. 4, *American J. of Sociology*, 1161-1203 (*Measuring Segregation*).

⁴ Cutler, *supra*, at fn. 1, p. 456.

⁵ Rothstein, *The Color of Law* (2017) pp. vii-xvii (Rothstein).

⁶ Logan & Parman, *The National Rise in Residential Segregation* (2017) vol. 77, No. 1, *J. of Economic History* 127, 130, 155, 167; Taylor, *The Environment and the People in American Cities, 1600s-1900s: Disorder, Inequality, and Social Change* (2009) pp. 467-468 (*Environment and People*).

⁷ [citation needed] Cal. EPA, [Pollution and Prejudice: Redlining and Environmental Injustice in California](#) (Aug. 16, 2021) (as of Apr. 4, 2022) (Cal. EPA).

⁸ [citation needed] Rothstein, *supra*, at fn. 5, pp. vii-xvii.

Between the 1900s and the 1930s, local governments actively planned cities to be racially segregated.⁹ The real estate industry promoted restrictive covenants, which were clauses written into deeds that prohibited nonwhite residents from living in the house.¹⁰

By 1940, the average urban Black person lived in a neighborhood that was 43 percent Black.¹¹ From the 1930s to the 1970s, the United States federal government built public housing for white Americans, but not Black Americans. The federal government helped white Americans, but not Black Americans buy houses in the suburbs. Throughout American history, up until the 1970s, white residents terrorized their Black neighbors by destroying their property, bombing their houses, and burning crosses on their lawns to scare them away from living in white neighborhoods.¹² For a more detailed discussion, please see Chapter 3, Racial Terror.

By 1970, the average urban Black person lived in a neighborhood that was 68 percent Black.¹³ Even after the passage of the Federal Housing Act, which outlawed housing discrimination, urban renewal and other uses of local government actions funded by the federal and state governments maintained residential segregation.¹⁴

The problem of segregation has never been corrected. America is as segregated in 2019 as it was in the 1940s, with the average urban Black person living in a neighborhood that is 44 percent black.¹⁵

In California, the population of Black Americans remained small until World War II, when Black Americans moved to the state to find jobs in the war industry.¹⁶ On the one hand, Southern California is an African American success story.¹⁷ As W.E.B. Du Bois wrote of Los Angeles and Pasadena in 1913, “Nowhere in the United States is the Negro so well and beautifully housed, nor the average efficiency and intelligence in the colored population so high.”¹⁸

In 1910, 36 percent of African Americans in Los Angeles owned homes, far more than most cities at the time.¹⁹ On the other hand, all success is relative. Federal, state, and local government in California helped create segregation through discriminatory federal housing policies, zoning ordinances, decisions on where to build schools and a discriminatory federal mortgage policy called redlining.²⁰ As Robert Joseph Pershing Foster, a

⁹ [citation needed]

¹⁰ Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (2014) p. 154 (Toxic Communities); Kilgore, [Los Angeles Land Covenants, Redlining: Creation and Effects](#) (June 22, 2020), Los Angeles Public Library (as of Apr. 4, 2022).

¹¹ Cutler, *supra*, at fn. 1, p. 456.

¹² See, e.g., Coates, [The Case for Reparations](#) (June 2014), Atlantic (as of Apr. 4, 2022).

¹³ Cutler, *supra*, at fn. 1, p. 456.

¹⁴ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Stephen Menendian, <<https://oag.ca.gov/ab3121/meetings>> (as of Apr. 4, 2022).

¹⁵ Frey, [Neighborhood Segregation Persists for Black, Latino or Hispanic, and Asian Americans](#) (Apr. 6, 2021), Brookings Institution (as of Apr. 4, 2022).

¹⁶ Wiate, [The Forgotten History of the Western Klan](#) (Apr. 6, 2021), Atlantic (as of Apr. 4, 2022); Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020) pp. 188-189 (Hudson).

¹⁷ Hudson, *supra*, at fn. 16, p. 2.

¹⁸ Du Bois, *Editorial* (July 1913) *Crisis*, at p. 131.

¹⁹ Hudson, *supra*, at fn. 16, p. 2.

²⁰ See, e.g., Rothstein, *supra*, at fn. 5, pp. 11-14.

migrant from the small town of Monroe, Louisiana who moved to Los Angeles in the 1950s said of his first days in California, “I came all this way running from Jim Crow, and it slaps me straight in the face[.]”²¹

Like elsewhere in the country, the effects of these government policies at all levels continue to this day. In 2021, in Los Angeles and Orange counties, only 34 percent of Black households owned homes,²² *less than in 1910*.

Section III of this chapter describes the history of U.S. Supreme Court decisions which allowed residential segregation to intensify over the last 170 years. Section IV describes the state of residential segregation at the end of the Civil War, before government and private action segregated the American landscape. Section V, VI and VII explains how migration patterns across the country led states, cities and communities to exclude Black Americans, how Black Americans establish their own communities in response and the racism that they faced in doing so. Sections VIII – XIII details the various mechanisms used by federal, state and local governments to segregated America throughout history. Sections XIV and XV describes the state of housing segregation today and its effects. Section XVI concludes that residential segregation in America is a result of white supremacist beliefs created to support enslavement and is the root of many modern-day racial disparities. Section XVII is an appendix of relevant data for reference. Each of these sections show the persisting effects of slavery in the context of housing.

II. Constitutionally Sanctioned Housing Discrimination

The reason that housing segregation has never been fixed in America is due in part to the Supreme Court. As discussed in Chapter 2, Enslavement, and Chapter 4, Political Disenfranchisement, although the Civil Rights Act of 1866 and the Fourteenth Amendment to the U.S. Constitution banned actions that continued the effects of slavery, the Supreme Court of the United States decided in 1883 that the federal government could not prohibit racial discrimination by individual business owners and private parties.²³ This ruling later applied to housing.²⁴ As a result, government and private actors essentially ignored the Civil Rights Act of 1866 and Fourteenth Amendment protections against racial discrimination until Congress passed the Fair Housing Act in 1968.²⁵

The story did not end here. At the height of segregation in the 1970s, the U.S. Supreme Court popularized the myth that the American government had no role in creating housing segregation, and therefore should not and could not fix the personal choices of millions of private citizens.²⁶ California law did not protect Black Californians any further than the federal government.²⁷

III. The End of the Civil War

²¹ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration* (2010) p. 210 (Wilkerson).

²² Munoz & Manthey, [Black Families Own Homes at a Lower Rate Than White Families in SoCal. Here’s Why That Matters](#) (July 15, 2021), abc7.com (as of Apr. 4, 2022).

²³ Rothstein, *supra*, at fn. 5, pp. viii-ix; see generally *The Civil Rights Cases* (1883) 109 U.S. 3 (*Civil Rights Cases*).

²⁴ Rothstein, *supra*, at fn. 5, pp. viii-ix; see generally *Civil Rights Cases*, *supra*, at fn. 23.

²⁵ Rothstein, *supra*, at fn. 5, pp. viii-ix; see generally *Civil Rights Cases*, *supra*, at fn. 23.

²⁶ Rothstein, *supra*, at fn. 5, pp. x-xi.

²⁷ [citation needed]

At the end of the Civil War, the country was less segregated than it was today and the residential segregation that did exist was different than it is today.²⁸ Immediately after the Civil War, between 1860 and 1900, almost 90 percent of Black Americans lived in the South,²⁹ and 80 percent of those who lived in the South lived in rural areas.³⁰ Many Black workers lived in former slave quarters, on the same plantation on which they had been enslaved.³¹

Most modern-day scholars agree that white and Black Americans lived in the same geographic area in the cities at this time, although in unequal quality of housing.³² White families lived in front streets and broad avenues and Black families generally could only live in backyards, alleys, side streets, or their houses were separated by physical barriers.³³ Impoverished shanty towns of unemployed Black Americans also appeared around southern cities in undesirable areas like swamps, near city dumps, and next to cemeteries and railroad tracks.³⁴ “Ghettos were built up in nearly all Southern cities, not always sharply defined but pretty definite, and in these, Negroes must live,” wrote W.E.B. Du Bois.³⁵

At the same time, less than 10 percent of Black Americans lived in the North and less than 0.4 percent lived in the western states.³⁶ Most lived in urban areas³⁷ that were much more segregated by neighborhood than in the South,³⁸ and in worse housing conditions than white Americans.³⁹

In 1899, W.E.B. Du Bois’s landmark sociological study of Philadelphia summed up the situation: “[H]ere is a people receiving a little lower wages than usual for less desirable work, and compelled, in order to do that work, to live in a little less pleasant quarters than most people, and pay for them somewhat higher rents.”⁴⁰ Some families used up to 75 percent of their income on rent, as real estate agents raised the rent for Black tenants because they knew many landlords did not rent to Black tenants.⁴¹ Most Black Americans living in the North were only able to find jobs serving white families, and thus were forced to pay higher rents in the more expensive neighborhoods close to their employers.⁴²

In California around the end of the Civil War, Black Americans were few in number compared to other racial groups: the 1860 census counted 4,086 “[t]otal free colored,” 17,798 “Indian,” and 34,933 “Asiatic” people in California.⁴³ As a result of their small numbers, Black Californians at the time generally lived in multiethnic

²⁸ Massey, *supra*, at fn. 3, p. 20; see also Cutler, *supra*, at fn. 1, p. 456.

²⁹ Black Population, *supra*, at fn. 2, p. 33.

³⁰ *Id.* at pp. 89-90.

³¹ Ransom, *supra*, at fn. 2, p. 57; Negro American Family, *supra*, at fn. 2, pp. 45-51.

³² Massey, *supra*, at fn. 3, pp. 20-21; see generally Grigoryeva, *supra*, at fn. 3; *Measuring Segregation*, *supra*, at fn. 3.

³³ Massey, *supra*, at fn. 3, p. 26; see generally Grigoryeva, *supra*, at fn. 3; *Measuring Segregation*, *supra*, at fn. 3.

³⁴ *Measuring Segregation*, *supra*, at fn. 3, pp. 5-6; Foner, *A Short History of Reconstruction, 1863-1877* (2015) p. 37.

³⁵ Du Bois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (2013 ed.) p. 621.

³⁶ Black Population, *supra*, at fn. 2, p. 33.

³⁷ *Id.* at p. 90.

³⁸ Massey, *supra*, at fn. 3, pp. 20-21.

³⁹ Massey, *supra*, at fn. 3, pp. 19-20; see also Foner, *Reconstruction: America’s Unfinished Revolution, 1863-1877* (1988) p. 472.

⁴⁰ Du Bois, *The Philadelphia Negro: A Social Study* (1899) p. 296.

⁴¹ *Id.* at p. 295.

⁴² *Id.* at pp. 295-296.

⁴³ U.S. Census Bureau, 1860 Census, [California](#), p. 28 (as of Apr. 4, 2022).

communities⁴⁴ and occasionally also lived in small predominantly Black communities.⁴⁵ For example, a group of 44 settlers, half of whom were of African descent, who traveled from Sinaloa, Mexico, established a settlement that later became Los Angeles in 1781.⁴⁶ During the Mexican War, from 1846 to 1848, Los Angeles had a significant Black population as former enslaved Black Americans were brought to the area.⁴⁷ In Northern California, there was also a concentrated Black population along the banks of the Sacramento River in a neighborhood comprised of Mexican and Chinese settlers.⁴⁸ In that neighborhood, “rowdy young men and boys” attacked all three groups and vandalized Black and Chinese businesses.⁴⁹ Black Americans also lived and worked in multiethnic mining communities such as Little Negro Hill near Folsom Lake, California.⁵⁰ California had four counties with fewer than 10 Black residents in 1890.⁵¹ By 1930, California had eight counties with fewer than 10 Black residents.⁵²

IV. The Great Migration

Between 1870 and 1900, many Black Americans moved from rural to urban areas in the South, looking for better paying jobs.⁵³ Over the next seven decades, as violence targeting Black Americans intensified in the South, and as Southern states passed laws that relegated Black Americans in nearly every aspect of life to worse conditions than white Americans, the promise of better jobs and the illusion of racial equality pulled Black Americans out of the South to the North and the West.⁵⁴ This is called the Great Migration and, at its peak, 16,000 Black people left the South each month.⁵⁵

Historians have identified three migration paths out of the South (though not all Black Americans followed these paths exactly).⁵⁶ The eastern path carried people from Florida, Georgia, the Carolinas, and Virginia to Washington D.C., Philadelphia, New York, and Boston.⁵⁷ The Midwest path carried people from Mississippi, Alabama, Tennessee, and Arkansas to Cleveland, Detroit, Chicago, Milwaukee, and Pittsburgh.⁵⁸ The western path carried people from Louisiana and Texas to California and the rest of the West Coast.⁵⁹ More Black people moved to California in the 1940s than in the entire previous century of statehood combined.⁶⁰ The Black population of California mushroomed from 124,306 in 1940 to 1,400,143 in 1970.⁶¹ By the end of the Great

⁴⁴ Taylor, *In Search of the Racial Frontier: African Americans in the American West 1528-1990* (1999) p. 18 (Racial Frontier).

⁴⁵ *Id.* at p. 18.

⁴⁶ Racial Frontier, *supra*, at fn. 45, p. 34.

⁴⁷ *Id.* at p. 90.

⁴⁸ *Id.* at p. 89.

⁴⁹ *Ibid.*

⁵⁰ *Id.* at p. 85.

⁵¹ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2005) pp. 54-56 (Loewen).

⁵² *Ibid.*

⁵³ Environment and People, *supra*, at fn. 6, p. 467.

⁵⁴ *Id.* at pp. 467-468.

⁵⁵ *Id.* at p. 468.

⁵⁶ Wilkerson, *supra*, at fn. 21, p. 178.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Id.* at p. 187.

⁶¹ Gibson & Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970-1990, for the United States, Regions, Divisions, and States* (2002) U.S. Census Bureau, Table 19 (as of Apr. 4, 2022).

Migration in the 1970s, 47 percent of Black Americans lived outside of the South.⁶² Although many Black Americans left the South to escape discrimination, the lingering legacy of slavery, reinforced by government actions at all levels, followed them across the country. Historians have argued that the Great Migration led to an increase in racial violence in the North and West, and an intensification of residential segregation.⁶³

V. Exclusion or Destruction of African Americans' Communities

A. Nationally

As Black Americans left the South, entire states like Indiana and Oregon outright banned Black Americans from living in the state.⁶⁴ Peter Burnett, who later became the first governor of the State of California, was involved in passing these Oregon laws to ban Black residents from living in Oregon.⁶⁵

In addition to entire states, many towns across the country became known as sundown towns, where Black Americans were not allowed to remain after dark.⁶⁶ Although these rules were often unwritten, local sheriffs and armed, white mobs enforced them.⁶⁷ Sundown towns were created largely between 1890 to 1940 and they legally continued to exist through 1968.⁶⁸ The sociologist James Loewen argued that most suburbs in America began as sundown towns and that the hometowns of nine out of the 32 candidates for president in the 20th century were sundown towns.⁶⁹ For example, Harry Truman grew up in Lamar, Missouri, a Jim Crow town of 3,000 without a single Black family.⁷⁰ George W. Bush lived in Highland Park, a sundown suburb of Dallas that only welcomed its first Black homeowners in 2003.⁷¹

B. California

Much like Indiana and Oregon outright banned Black Americans from living in the state as they left the south,⁷² California also tried to pass laws banning African Americans from settling in the state.⁷³ Although the laws did not pass, the California legislature, dominated by white southerners at the time, sent the clear message that African Americans were not welcome.⁷⁴ (For further discussion, see Chapter 2, Enslavement.)

Later, as residential segregation reached its height between 1940 to 1970, local governments and residents created scores of sundown towns and suburbs in California,⁷⁵ some by ordinance and some by force.⁷⁶ Loewen

⁶² Wilkerson, *supra*, at fn. 21, p. 10.

⁶³ Toxic Communities, *supra*, at fn. 10, p. 153.

⁶⁴ *Id.* at p. 180; McClintock, *James Saules, Peter Burnett, and the Oregon Black Exclusion Law of June 1844* (1995) vol. 86, No. 3, Pacific Northwest Quarterly 121, 121-123 (McClintock).

⁶⁵ McClintock, *supra*, at fn. 65, p. 124.

⁶⁶ Loewen, *supra*, at fn. 52, p. 4.

⁶⁷ See *id.* at pp. 4, 15, 99-100.

⁶⁸ *Id.* at pp. 4, 6.

⁶⁹ *Id.* at pp. 13, 113.

⁷⁰ *Id.* at 13.

⁷¹ *Ibid.*

⁷² Toxic Communities, *supra*, at fn. 10, p. 180; McClintock, *supra*, at fn. 65, pp. 121-123.

⁷³ Hudson, *supra*, at fn. 16, pp. 21-22.

⁷⁴ *Ibid.*

⁷⁵ Loewen, *supra*, at fn. 52, p. 76.

⁷⁶ See, e.g., *id.* at pp. 9-10, 99-100.

found evidence that eight California counties effectively excluded Black people.⁷⁷ White Californians rioted to expel Black residents from California towns.⁷⁸ According to Loewen’s research, California had more sundown towns than the entire South, which Loewen attributes to the culture of racism in the South preferring to exploit rather than exclude Black residents.⁷⁹

California sundown towns included most of the suburbs of Los Angeles and San Francisco, and most of Orange County.⁸⁰ Some of these places gained a national reputation as sundown towns.⁸¹ Loewen has collected research on numerous sundown towns throughout California.⁸² A list of the sundown towns identified by Loewen is included in Table 3 in the Appendix to this chapter.

Fliers for the Maywood Colony, a suburban development surrounding Corning, California, announced: “GOOD PEOPLE - In most communities in California you’ll find Chinese, Japs, Dagoes, Mexicans, and Negroes mixing up and working in competition with the white folks. Not so at Maywood Colony. Employment is not given to this element.”⁸³

In South Pasadena, in the late 1940s, the city administration, local civic leaders, and realtors tried to cover South Pasadena with racially restrictive covenants.⁸⁴ A 1947 newspaper article noted the unusual and extreme extent of this effort; the goal was to blanket the entire city with racially restrictive covenants.⁸⁵

As a matter of official policy, Black Americans and other nonwhite persons were only allowed to work in South Pasadena if they left by dusk.⁸⁶ Limited exceptions were made for live-in servants and caretakers, but they could not live in the city on their own, and often could not bring their children to live with them.⁸⁷ This campaign to exclude all nonwhite residents from South Pasadena only failed after the Supreme Court ruled that racially restrictive covenants could not be enforced.⁸⁸

VI. Freedmen’s Town

A. Nationally

Banned from settling in entire geographic areas, and escaping discrimination and racial violence, Black Americans began building all Black towns in the 19th Century in the Southwest, Midwest, and West.⁸⁹ Also known as Freedmen’s Towns, these towns developed in order to, in the words of one Black town newspaper

⁷⁷ *Id.* at p. 76.

⁷⁸ See, e.g., *id.* at pp. 9-10.

⁷⁹ *Id.* at p. 70.

⁸⁰ Loewen, *supra*, at fn. 52, p. 76.

⁸¹ *Id.* at p. 276.

⁸² See *id.* at pp. 5, 14, 23, 29, 78, 100, 102-103, 220, 236, 239-240, 255, 258, 282, 293, 333, 338, 340, 410.

⁸³ Quoted in Loewen, *supra*, at fn. 52, p. 49.

⁸⁴ Loewen, *supra*, at fn. 52, pp. 258, 282.

⁸⁵ *Id.* at p. 282.

⁸⁶ Loewen, *supra*, at fn. 52, pp. 258, 282.

⁸⁷ *Id.* at p. 282.

⁸⁸ *Id.* at p. 258.

⁸⁹ Hudson, *supra*, at fn. 16, pp. 98-99.

editor, exercise freedom “as freedom was understood by [Black Americans].”⁹⁰ Approximately 100 such towns were built between early-1800s and mid-1900s.⁹¹ A particularly large number of Black Americans migrated to Kansas.⁹² Oklahoma had over 30 all Black towns.⁹³ Other states with such towns included Texas, Iowa, New Mexico, and Michigan, as well as some in the former enslavement states of Alabama, Mississippi, Kentucky, and Tennessee.⁹⁴ Over time, these towns became less common, as they succumbed to the racist social and political systems around them.⁹⁵

B. California

Although there is not much research on this topic, some records suggest that there were at least 15 Black towns in California between 1850 and 1910.⁹⁶ The best known and most successful was Allensworth, 40 miles north of Bakersfield.⁹⁷ Allen Allensworth, a formerly enslaved Lieutenant Colonel from the U.S. Army, founded Allentown with others in 1908.⁹⁸ The town attracted disillusioned Black migrants who had fled the South, but found a different type of discrimination in California.⁹⁹

Unlike other Black towns in California, Allensworth was self-governing, and at the height of its success before the Great Depression, over 300 families constructed churches, a library, a school, and a general store.¹⁰⁰ Black midwives cared for the health of the community, as most doctors in nearby towns refused to take Black patients unless the patient was employed by a white rancher.¹⁰¹

Allensworth spent more money on its schools than its neighboring school districts.¹⁰² Cornelius Pope, who lived in Allensworth and attended school there as a child, remembered that his teacher Alworth Hall “welcomed [him] to the Allensworth School and with open arms and asked [sic], ‘Learn something for me today.’”¹⁰³ When Pope left Allensworth, he said, “it didn’t take me long to find out that I was equal to the very best. I was just as powerful, could think just as good, there was nothing inferior about me. I was pretty hard to stop from there on in.”¹⁰⁴

⁹⁰ Stuckey, *Boley, Indian Territory: Exercising Freedom in the All-Black Town* (Fall 2017) vol. 102, No. 4, J. of African American History 492, 493.

⁹¹ Hudson, *supra*, at fn. 16, pp. 98-99.

⁹² Arrington, *Exodusters* (Apr. 10, 2015), National Park Service (as of Apr. 4, 2022).

⁹³ Hudson, *supra*, at fn. 16, p. 99.

⁹⁴ *Ibid.*

⁹⁵ See Hudson, *supra*, at p. 98, Stuckey, *Boley, Indian Territory: Exercising Freedom in the All-Black Town* (Fall 2017) Vol. 102 No. 4 The Journal of African American History, 492, 508.

⁹⁶ Cox, *The Archaeology of the Allensworth Hotel: Negotiating the System in Jim Crow America* (Sept. 2007) vol. 10, No. 3 African Diaspora Archaeology Newsletter 1, 11.

⁹⁷ Hudson, *supra*, at fn. 16, pp. 94-95, 99-102, 104.

⁹⁸ *Id.* at pp. 94, 99-104.

⁹⁹ *Id.* at pp. 94-95, 98-99.

¹⁰⁰ Hudson, *supra*, at fn. 16, pp. 93-94, 106.

¹⁰¹ *Id.* at p. 111.

¹⁰² Hudson, *supra*, at fn. 16, p. 114.

¹⁰³ *Ibid.*

¹⁰⁴ *Id.* at p. 115.

Despite Allensworth's success, it was never truly independent; it had to rely on the government and white-owned companies that controlled the water, the railroad, and job markets.¹⁰⁵ In testimony to the Task Force, Terrance Dean argues that water, land, and railroad companies discriminated against the town, leading to its demise.¹⁰⁶ The Pacific Farming Company, after first selling land plots to the Black settlers at inflated prices, then prohibited land sales to African Americans, which limited the town's growth.¹⁰⁷ Despite its promises, the Pacific Water Company built only four water wells for Allensworth, compared to the 10 wells it built in a neighboring white town.¹⁰⁸ The water dried up within two years and was contaminated with alkaline at first, then arsenic in 1967.¹⁰⁹ The founders maintained that the settlers were victims of a racist scam and were sold land that would never have enough water.¹¹⁰

When it was founded, Allensworth was on the Santa Fe railroad's main line, which allowed the town to derive revenue from the rail stop.¹¹¹ In 1914, the rail line was diverted away from Allensworth.¹¹² Not being able to earn revenue from the railroad stop or farming alone, residents worked multiple jobs in the surrounding, discriminatory white communities.¹¹³ Young people left the town to find jobs elsewhere, and Allensworth slowly died and disappeared as economic opportunities decreased and the water calcified.¹¹⁴ It was established as a state park in 1974, but remained critically underfunded and unbuilt until the 2000s.¹¹⁵

VII. City Planning for Segregation

A. Nationally

1. Anti-Black Zoning Ordinances

From the Civil War into the 1960s, as local governments planned the layout of their cities, they used planning regulations called zoning ordinances to prevent Black Americans from living in certain neighborhoods.¹¹⁶ First, city officials in southern cities in the early 1900s passed Black and white zoning ordinances to ban Black Americans from living in white neighborhoods.¹¹⁷ When the U.S. Supreme Court found that these explicitly race-based zoning ordinances violated the federal Constitution in 1917, city officials used other zoning ordinances as proxies for race in order to maintain all-white neighborhoods.¹¹⁸

¹⁰⁵ Hudson, *supra*, at fn. 16, p. 106.

¹⁰⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Terrance Dean, Ph.D., <<https://oag.ca.gov/ab3121/meetings>> (as of Apr. 4, 2022); see also Dean & Logan, *The California Boomtown That Racism Destroyed* (Sept. 30, 2021), Bloomberg (as of Apr. 4, 2022) (*California Boomtown*).

¹⁰⁷ *California Boomtown, supra*, at fn. 107.

¹⁰⁸ *Ibid.*

¹⁰⁹ Hudson, *supra*, at fn. 16, pp. 94, 105, 124.

¹¹⁰ *Id.* at p. 95.

¹¹¹ Hudson, *supra*, at fn. 16, pp. 122, 125-126.

¹¹² *Id.* at pp. 125-126.

¹¹³ *Id.* at pp. 121-126.

¹¹⁴ *Id.* at pp. 123-126.

¹¹⁵ *Id.* at pp. 127-128.

¹¹⁶ Cal. EPA, *supra*, at fn. 7.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

From the 1860s to 1900s, when Black Americans first left the rural South for the urban South, racial violence escalated, leading to a number of large scale race riots and massacres across the South.¹¹⁹ Soon after, anti-Black zoning ordinances were enacted in Southern and border cities.¹²⁰ In 1910, Baltimore enacted the city’s anti-Black zoning ordinance, making it illegal for Black people to move to blocks that were more than half white, and vice versa.¹²¹ Edgar Allan Poe, Baltimore’s city attorney and grandnephew of the famous poet, declared that the zoning was constitutional, and the city’s mayor stated, “Blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White majority.”¹²²

Numerous other southern cities followed Baltimore’s example, including Winston-Salem, Atlanta, Oklahoma City, Miami, Birmingham, Dade County (Miami), Charleston, Dallas, Louisville, New Orleans, Richmond, and St. Louis.¹²³ Although only about 10 percent of Black Americans lived in the North at this time, anti-Black ordinances were popular nationwide.¹²⁴ In 1915, the *New Republic* argued for residential racial segregation until “Negroes ceased wanting to ‘amalgamate’ with whites”¹²⁵

Although the U.S. Supreme Court declared racial zoning ordinances unconstitutional in 1917, states and cities ignored the decision for years.¹²⁶ In 1927, Texas passed a law authorizing cities to pass ordinances segregating Blacks and white.¹²⁷ Other cities, like Atlanta, Austin, Kansas City, and Norfolk, made discriminatory zoning decisions based on official city planning maps that explicitly labeled neighborhoods Black, until as late as 1987.¹²⁸

2. Company Towns

Beginning in the late 18th century, large corporations planned and built entire towns for their workers and attracted them with benefits including housing and mortgages.¹²⁹ Before the 1910s, these companies did not hire Black Americans and so denied Black Americans these opportunities to build wealth.¹³⁰ When companies began hiring African Americans after the Great Migration, these companies typically offered Black workers housing that was lower in quality.¹³¹

In company towns like Gary, Indiana and Sparrows Point in Baltimore County, Maryland, the best housing and jobs were reserved for American-born white managers.¹³² The worst jobs and the smallest, shabbiest housing

¹¹⁹ Toxic Communities, *supra*, at fn. 10, p. 153.

¹²⁰ *Id.* at pp. 152-153.

¹²¹ *Id.* at pp. 155-156.

¹²² *Id.* at pp. 156-57.

¹²³ See Toxic Communities, *supra*, at fn. 10, pp. 159-192.

¹²⁴ Rothstein, *supra*, at fn. 5, p. 45.

¹²⁵ *Ibid.*

¹²⁶ Rothstein, *supra*, at fn. 5, pp. 45-47.

¹²⁷ Toxic Communities, *supra*, at fn. 10, pp. 169-170.

¹²⁸ Rothstein, *supra*, at fn. 5, pp. 47-48.

¹²⁹ Environment and People, *supra*, at fn. 6, pp. 152-157.

¹³⁰ Environment and People, *supra*, at fn. 6, p. 216 [CHECK PINCITE.]

¹³¹ Environment and People, *supra*, at fn. 6, pp. 478-479 [CHANGE TO *Id.* DEPENDING ON PREVIOUS FN].

¹³² Environment and People, *supra*, at fn. 6, pp. 479-480.

went to Black Americans.¹³³ In Sparrows Point, Maryland, the site of Bethlehem Steel, Black residents were segregated from white residents.¹³⁴ Two room bungalows with outhouses originally constructed for Black workers, were given to white immigrants when there was a housing shortage.¹³⁵ Blacks workers were forced to rent bunks in shanties that were originally intended as temporary housing.¹³⁶

3. Racialized Neighborhood Zoning

After the Supreme Court declared explicit racial zoning unconstitutional in 1917, city officials developed new strategies to segregate Black residents from white residents by neighborhood.

The federal government joined this effort. In 1933, President Franklin D. Roosevelt’s appointment to the National Land Use Planning Committee, Alfred Bettman, explained that cities and states needed to establish planning commissions for zoning to “maintain the nation and the race.”¹³⁷ These new zoning strategies included:

- City officials zoned neighborhoods for single family homes, without change for decades.¹³⁸ This prevented apartment complexes from being built, which effectively kept out Black Americans who were less likely to afford single family homes.¹³⁹ Influential experts like Columbia Law School professor Ernst Freund stated that “the coming of colored people into a district” was the “more powerful” reason for the use of zoning, rather than the creation of single family neighborhoods.¹⁴⁰ The United States Supreme Court decided that this type of zoning law was constitutional in 1977.¹⁴¹
- City officials relaxed or did not enforce zoning laws against white residents, but strictly enforced them against Black Americans and other people of color and effectively chased Black Americans out of certain neighborhoods.¹⁴²
- City officials zoned Black residential communities as commercial or industrial regardless of their residential character.¹⁴³ This created a vicious cycle. Black residential communities zoned as commercial or industrial attracted polluting industries and lowered property values.¹⁴⁴ White families would be less likely to move into the industrial zone, as white families generally had more money.¹⁴⁵ As a result, it became increasingly difficult to remove the commercial or industrial zoning for these Black residential communities.¹⁴⁶

¹³³ *Ibid.*

¹³⁴ *Id.* at p. 480.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Rothstein, *supra*, at fn. 5, pp. 51-52.

¹³⁸ Toxic Communities, *supra*, at fn. 10, p. 164 [CHECK PINCITE].

¹³⁹ Toxic Communities, *supra*, at fn. 10, p. 164 [CHECK PINCITE].

¹⁴⁰ Rothstein, *supra*, at fn. 5, p. 52.

¹⁴¹ Village of Arlington Heights v. Metropolitan Housing Dev. Corp. (1977) 429 U.S. 252

¹⁴² Toxic Communities, *supra*, at fn. 10, p. 184.

¹⁴³ *Id.* at pp. 184-186.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

- City officials limited new buildings by banning or imposing large fees on new construction, apartment buildings, mobile homes, or factory-built houses,¹⁴⁷ a practice known as “snob zoning.”¹⁴⁸ Cities also demanded development or architectural specifications.¹⁴⁹ These ordinances had the effect of keeping poor people, large families, older residents, single individuals, and people of color out of particular areas.¹⁵⁰
- City officials used dead-end streets, highways, cemeteries, parks, industrial spaces, and rail lines to create boundaries between Black and white neighborhoods.¹⁵¹ Black people were even prohibited from burying the dead in white cemeteries¹⁵² and from using parks.¹⁵³

These strategies were often used in combination to maintain the segregated nature of a neighborhood. For example, in the St. Louis metropolitan area where 18-year-old Michael Brown was shot in 2014, city officials used a planning map that listed the race of each building’s occupants to zone Black neighborhoods and the land next to Black neighborhoods for industrial development in 1919.¹⁵⁴ The author of the city planning map explained that the goal was to prevent the movement into “finer residential districts . . . by colored people.”¹⁵⁵ In order to navigate the racial hostility that this segregation caused, Black Americans created their own maps, travel guides, and other publications.¹⁵⁶ For more information on this form of counter-mapping, see Chapter 11, An Unjust Legal System.

White neighborhoods were zoned as residential, and the single family homes in those neighborhoods used restrictive covenants, as discussed below, to prevent Black residents from moving in.¹⁵⁷ This ensured that the neighborhood stayed white.¹⁵⁸ The Black neighborhoods were zoned to permit polluting industry, liquor stores, and brothels, which were banned in white neighborhoods.¹⁵⁹ Later, the federal government cited the fact that Black neighborhoods were close to industry and vice as a risk to property values.¹⁶⁰ Based on the federal government’s analysis, private banks refused mortgages to Black Americans in a process called redlining.¹⁶¹

4. School Siting Policy

¹⁴⁷ Toxic Communities, *supra*, at fn. 10, p. 185.

¹⁴⁸ Winkler, [‘Snob Zoning’ Is Racial Housing Segregation by Another Name](#) (Sept. 25, 2017), Washington Post (as of Apr. 5, 2022).

¹⁴⁹ Toxic Communities, *supra*, at fn. 10, p. 185.

¹⁵⁰ *Ibid.*

¹⁵¹ *Id.* at p. 164.

¹⁵² [The Persistent Racism of America’s Cemeteries](#) (Jan. 16, 2017), Slate (as of Apr. 5, 2022).

¹⁵³ Taylor [citation needed]

¹⁵⁴ Rothstein, *supra*, at fn. 5, pp. 48-49.

¹⁵⁵ *Id.* at p. 49.

¹⁵⁶ See generally Alderman & Inwood, [How Black Cartographers Put Racism on the Map](#) (Feb. 24, 2020), Next City (as of Apr. 5, 2022).

¹⁵⁷ Rothstein, *supra*, at fn. 5, p. 49.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Id.* at p. 50.

¹⁶⁰ *Id.* at p. 50.

¹⁶¹ See *id.* at p. 50.

City officials used the decision of where to build a school as a way to concentrate Black Americans in poor neighborhoods with underfunded schools.¹⁶² This strategy is referred to as a school siting policy.¹⁶³ Cities first banned Black families from sending their children to white schools, then moved the only school that Black students were allowed to attend into designated Black neighborhoods and did not pay to transport Black students who lived outside the Black neighborhoods.¹⁶⁴

In 1928, the city of Austin, Texas, adopted a master plan to create a “negro district,”¹⁶⁵ which described this strategy as a “new mechanism to create segregation” in the city.¹⁶⁶ The mechanism worked well. In 1930, Wheatsville, a racially mixed community in Austin founded by a formerly enslaved person, was 16 percent Black.¹⁶⁷ In 1950, the Black population of Wheatsville was one percent.¹⁶⁸

After city officials segregated Austin, the “negro district”¹⁶⁹ on the east side had more unpaved streets, broken sewers, and fewer public transportation.¹⁷⁰ The city did not enforce the residential zoning ordinances, so the neighborhood became increasingly industrial.¹⁷¹ City officials in Atlanta used segregation maps to guide the school board’s decisions on which schools to close and where to build new schools.¹⁷²

B. California

The first known attempt by an American city to segregate on the basis of race was in 1890, when the San Francisco Board of Supervisors voted unanimously to move all Chinese people within San Francisco to a neighborhood set aside for “offensive” and noisy businesses.¹⁷³ As Black Americans arrived in California during the Great Migration, California used segregation to reinforce the racial hierarchy created by slavery.

1. Northern California

In 1953, when the Ford Motor Company moved its plant to Milpitas, California, and the labor union tried to build housing for its Black workers, the city rezoned the site for industrial use.¹⁷⁴ The city also adopted a zoning ordinance banning apartment buildings.¹⁷⁵ Anaheim, Costa Mesa, Orange, and Santa Ana zoned Black residential communities as industrial to maintain neighborhood segregation.¹⁷⁶

¹⁶² Rothstein, *supra*, at fn. 5, p. 132.

¹⁶³ *Id.* at p. 133.

¹⁶⁴ *Id.* at p. 132.

¹⁶⁵ Koch & Fowler, *A City Plan for Austin, Texas* (1928) p. 57 (Koch).

¹⁶⁶ Rothstein, *supra*, at pp. 132-133.

¹⁶⁷ Rothstein, *supra*, at fn. 5, pp. 132-133.

¹⁶⁸ *Ibid.*

¹⁶⁹ Koch, *supra*, at fn. 166, p. 57.

¹⁷⁰ Rothstein, *supra*, at fn. 5, p. 133.

¹⁷¹ *Ibid.*

¹⁷² *Id.* at p. 135.

¹⁷³ McClain, *In re Lee Sing: The First Residential-Segregation Case* (1990) 3 Western Legal History 179 [PINCITE?]; see generally *In re Lee Sing* (C.C.N.D. Cal. 1890) 43 F. 359.

¹⁷⁴ (Abrams 1966).

¹⁷⁵ Rothstein, *supra*, at fn. 5, p. 9.

¹⁷⁶ Toxic Communities, *supra*, at fn. 10, p. 186.

In 1958, the Palo Alto school district chose not to build two integrated high schools to solve overcrowding problems, but instead built a new school in the heart of the segregated Black East Palo Alto neighborhood, further entrenching segregation in Palo Alto.¹⁷⁷

2. Southern California

In California, the then-prosperous Los Angeles neighborhood of Sugar Hill is another example of the effects of racialized zoning. Hattie McDaniel, the first African American to win an Oscar for her role as Mammy in *Gone with the Wind*, Norman Houston, co-founder of what became the largest Black owned insurance company in the West, and singer Ethel Waters lived in the neighborhood. Waters remembered the day she moved into her house: “During the day the moving men had brought my things, and when I saw that they had placed each chair and table exactly where I wanted, I burst into tears[.] ‘My house,’ I told myself. The only place I’ve ever owned all by myself ... I felt I was sitting on top of the world. I had a home at last.”¹⁷⁸

In 1945, the white neighborhood association sued to apply its restrictive covenant and evict the Black families living there.¹⁷⁹ When the white neighbors lost their lawsuit, the Los Angeles City Council stepped in and rezoned the neighborhood for rentals despite the protests of the affluent Black families living there.¹⁸⁰ In 1954, the city built the Interstate 10 Santa Monica Freeway through Sugar Hill and succeeded, finally, in destroying the Black community.¹⁸¹

When South Central Los Angeles became a Black community in the 1940s, it had a mix of industrial plants and residential homes.¹⁸² The City of Los Angeles rezoned much of the neighborhood for commercial use.¹⁸³ A plant explosion killed five local residents, 15 white workers, and destroyed more than 100 homes.¹⁸⁴ When the pastor of a Black church protested the industrial zoning near his church, a city official replied, “Why don’t you people buy a church somewhere else?”¹⁸⁵

VIII. Condemnation/Eminent Domain

From the 1855 construction of iconic Central Park in New York City to urban renewal in the 1970s, America built parks, highways, and new economic developments that destroyed Black or integrated neighborhoods. Government officials used a legal concept called eminent domain to confiscate private land owned by Black Americans for these public uses.¹⁸⁶ The U.S. constitution demands that the government pay the landowner “just compensation,” which is usually fair market value, but often a disputed sum.¹⁸⁷

¹⁷⁷ Rothstein, *supra*, at fn. 5, p. 13

¹⁷⁸ Bogle, *Bright Boulevards, Bold Dreams: The Story of Black Hollywood* (2006) p. 263

¹⁷⁹ Rothstein, *supra*, at fn. 5, p. 131.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² [Citation needed]

¹⁸³ [Citation needed]

¹⁸⁴ [Citation needed]

¹⁸⁵ [Citation needed]

¹⁸⁶ *Toxic Communities, supra*, at fn. 10, p. 228.

¹⁸⁷ [Citation needed]

These government decisions evicted Black Americans from their homes and destroyed Black wealth.¹⁸⁸ It shuttered thriving businesses¹⁸⁹ and severed community ties.¹⁹⁰ Alfred Johnson, the executive director of the American Association of State Highway Officials and a lobbyist who worked on the 1956 Highway Act, put it this way: “Some city officials expressed the view in the mid-1950s that the urban Interstates would give them a good opportunity to get rid of the local niggertown.”¹⁹¹

Scholars disagree over whether federal, state, and local governments racially targeted Black neighborhoods for destruction, or whether these public works projects were situated in the area of least political resistance, which were incidentally Black neighborhoods.¹⁹² Regardless of intention, the effect is clear: one study in 2007 found that between 1949 and 1973, 2,532 eminent domain projects in 992 cities displaced a million people, two-thirds of whom were Black.¹⁹³ Black Americans made up only 12 percent of the American population at the time, and so they were five times more likely to be displaced than they should have been when considering their portion of the population.¹⁹⁴

These government actions destroyed the social, political, cultural, and economic networks created by a neighborhood.¹⁹⁵ Evicted Black residents struggled to find a new place to live, as the compensation offered by the government was often not high enough to buy or rent in other parts of the city.¹⁹⁶ Evicted Black businesses lost their location and client base and were not usually compensated.¹⁹⁷ Urban renewal displaced cultural centers, and in certain industries like jazz venues, it threatened the entire industry.¹⁹⁸ Forced evictions also are associated with increased risk of stress-related diseases like depression and heart attack.¹⁹⁹

A. Park Construction

The construction of parks in the United States has been used to harm Black people in many different ways. Parks have been used to destroy Black or integrated neighborhoods and act as a barrier between Black and white neighborhoods.²⁰⁰ The residents of these destroyed integrated neighborhoods were then resettled into segregated neighborhoods.²⁰¹ Black neighborhoods themselves lacked green spaces, as discussed in Chapter 7, Racism in Environment and Infrastructure, leading to negative health effects. Black Americans were often banned from public spaces, as discussed in Chapter 9, Control over Spiritual, Creative, and Cultural Life.

¹⁸⁸ [Citation needed]

¹⁸⁹ Fullilove, *Eminent Domain & African Americans: What Is the Price of the Commons?* (2007), Institute for Justice (as of Apr. 5, 2022), p. 6 (Fullilove).

¹⁹⁰ *Id.* at p. 5.

¹⁹¹ Rothstein, *supra*, at fn. 5, p. 128 (internal quotation marks omitted).

¹⁹² Taylor (2014), *supra*, at pp. 228-229, 233.

¹⁹³ Fullilove, *supra*, at fn. 190, p. 2.

¹⁹⁴ *Ibid.*

¹⁹⁵ Fullilove, *supra*, at fn. 190, pp. 5-6.

¹⁹⁶ *Id.* at p. 5.

¹⁹⁷ *Id.* at p. 6.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Id.* at p. 5

²⁰⁰ Environment and People, *supra*, at fn. 6, p. 365

²⁰¹ *Id.* at p. 365

Central Park in Manhattan was one of the most prominent examples of racial segregation by park construction. Cities across the country copied Central Park's policies, regulations, and design.²⁰² In 1855, about 1,600 people lived in the area in mixed race neighborhoods called Seneca Village, Yorkville, and Pigtown.²⁰³ Even though state law at the time prevented Black New Yorkers from owning land, more than half the Black households owned their homes in Seneca Village.²⁰⁴ The community included two Black churches and one racially mixed Episcopal church, a cemetery, and a Black school.²⁰⁵ City officials destroyed all of it by 1857²⁰⁶ to build Central Park with an all-white, male workforce.²⁰⁷

In California, at least one current park is on the site of a formerly thriving Black neighborhood. On the land that is currently Belmar Park in Santa Monica, the City of Santa Monica took away and burned down the homes and businesses of people in the Black neighborhood of Belmar Triangle through eminent domain for the construction of the city's expanded civic center, auditorium, and the Los Angeles County Courthouse.²⁰⁸ Now there is a park commemorating the neighborhood.²⁰⁹

The 1938 Underwriting Manual issued by the U.S. Federal Housing Administration (FHA) states: "A location close to a public park or area of similar nature is usually well protected from infiltration of business and lower social occupancy coming from that direction."²¹⁰

B. Slum Clearance

Throughout American history and across the country, government officials, who are often white (see discussion in Chapter 4, Political Disenfranchisement), labeled Black communities as slums, regardless of what the neighborhood was actually like.²¹¹ This allowed government officials to demolish so-called "slums" to make way for commercial development, upscale residences, parks, universities, hospitals, and corporate headquarters.²¹²

The federal government funded this strategy with the 1934 Housing Act,²¹³ and then again, comprehensively, with the 1949 Housing Act, which provided \$13.5 billion for slum clearance and urban redevelopment between

²⁰² Environment and People, *supra*, at fn. 6, p. 292.

²⁰³ *Id.* at p. 276, 366

²⁰⁴ *Id.* at p. 276.

²⁰⁵ *Ibid.*

²⁰⁶ *Id.* at p. 277.

²⁰⁷ *Ibid.*

²⁰⁸ Santa Monica Conservancy, [Belmar Neighborhood](#) (as of Apr. 5, 2022).

²⁰⁹ *Ibid.*

²¹⁰ U.S. Federal Housing Administration, *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act (1938) Part II*, § 9, ¶ 935.

²¹¹ Toxic Communities, *supra*, at fn. 10, p. 229. ("Comstock's (1912) study of housing conditions in Black neighborhoods in Chicago described the communities as slums, despite the fact that 72% of the housing was in good or fair repair and only 28% was in bad repair.")

²¹² *Id.* at pp. 229, 231, 246, 249.

²¹³ PBS/KQED, [The Fillmore: Fillmore Timeline 1860-2001](#) (as of Apr. 5, 2022) (*Fillmore Timeline*).

1953 and 1986.²¹⁴ At the height of urban renewal in 1967, the government destroyed 404,000 housing units, but only built 41,580 as replacements.²¹⁵

For example, in 1953 the Memphis Housing Authority declared that 46 acres of middle-class Black-owned single-family homes was a slum and replaced it with 900 units of public housing.²¹⁶ Homeowners had paid off their mortgages, improved their homes, and created a neighborhood; “[t]he home owners are sick and distressed beyond measure,” pleaded one resident in a letter to city authorities.²¹⁷

In another example, after Black Americans rebuilt in Tulsa following the 1921 Tulsa massacre, city officials declared the Greenwood community to be a slum, and destroyed it again.²¹⁸ Highway construction and urban renewal also appear to have compounded the economic collapse of the Greenwood community.²¹⁹

C. Freeway Construction

The Federal Aid Highway Act of 1956 built 41,000 miles of interstate highways and was the largest American public works program at the time.²²⁰ By the 1960s, highway construction was destroying 37,000 urban housing units per year.²²¹ From 1956 until 1965, the federal government did not provide any assistance to people whose homes were destroyed.²²² During the first 20 years of interstate highway construction, more than a million people were displaced.²²³

In 2021, the U.S. Secretary of Transportation acknowledged there is “racism physically built into some of our highways” because the federal highway system was built specifically to cut through neighborhoods where property values were lowest.²²⁴ In most cities, federal highways were routed through Black neighborhoods.²²⁵ For example, between 1948 and 1956, 86,000 people were displaced in Chicago, 66 percent of whom were Black, even though at the time, Black people only made up approximately 20 percent of the city’s population.²²⁶

In 1962, Detroit razed Black communities to build the Interstate 75 expressway, a plan that the U.S. Commission on Civil Rights warned in advance would displace 4,000 families, 87 percent of whom were Black.²²⁷ U.S. Department of Housing and Urban Development officials knew that they would destroy Black

²¹⁴ Rusk, *Inside Game/Outside Game: Winning Strategies for Saving Urban America* (1999) p. 90.

²¹⁵ Johnson p. 595

²¹⁶ Darity Jr. & Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2020) pp. 221-222 (Here to Equality).

²¹⁷ *Ibid.*

²¹⁸ Here to Equality, *supra*, at fn. 217, p. 222.

²¹⁹ Heath et al., [The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument](#) (May 2020), Human Rights Watch (as of Apr. 5, 2022).

²²⁰ U.S. Senate, [Congress Approves the Federal-Aid Highway Act](#) (as of Apr. 5, 2022).

²²¹ Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt*, Poverty & Race Research Action Council (Jan. 1, 2002) p. 2 (Mohl).

²²² Sonksen, *Inglewood Today: The History of South Central Los Angeles and Its Struggle with Gentrification* (June 20, 2018) Univ. of Southern Cal. Lusk Center for Real Estate <https://lusk.usc.edu/news/inglewood-today-the-history-south-central-los-angeles-and-its-struggle-gentrification> (as of Aug. 17, 2021).

²²³ Here to Equality, *supra*, at fn. 217, p. 223.

²²⁴ Ryan, [Buttigieg Says Racism Built into US Infrastructure Was a “Conscious Choice”](#) (Apr. 6, 2021), The Grio (as of Apr. 5, 2022).

²²⁵ Mohl, *supra*, at fn. 222, p. 2.

²²⁶ *Id.* at p. 250-251.

²²⁷ Rothstein, *supra*, at fn. 5, pp. 128-129.

homes and did nothing to help these Black families.²²⁸ The government did little to help these mostly Black families, businesses, churches, and schools.²²⁹

The formerly-thriving Black neighborhood of Greenwood in Tulsa, Oklahoma—infamous for the deadly anti-Black massacre of 1921—is now divided by Interstate Highway 244.²³⁰ Greenwood now has one block of businesses today.²³¹ Before the highway’s construction, the neighborhood had 35 blocks of businesses and homes.²³² Whenever affirmative infrastructure of this sort is constructed in Black neighborhoods, the initial construction-related harms created are compounded by the environmental pollution that is created and generated on an ongoing basis.²³³

Highway construction not only destroyed Black neighborhoods, government officials also used it to fence Black Americans into certain neighborhoods.²³⁴ A federal manual recommends that “[a] high-speed traffic artery or a wide street parkway may prevent the expansion of inharmonious uses to a location on the opposite side of the street.”²³⁵ The term “inharmonious racial or nationality groups” was used by the federal government to describe communities of color.²³⁶

In Chicago, 28 identical 16-story apartment buildings known as the Robert Taylor Homes were a national symbol of failed public housing and concentrated poverty.²³⁷ The project had been planned for 11,000 residents, but at its peak housed 27,000 residents, of whom 96 percent were African American.²³⁸

The City of Chicago used the Day Ryan expressway to cut off the Robert Taylor Homes from the surrounding neighborhoods.²³⁹ Studies have shown that interstate highways also fenced in Black neighborhoods in Memphis, Richmond, Kansas City, Atlanta, Tulsa, and Charleston.²⁴⁰

D. California

In California, eminent domain was used against Black communities, as well as other communities of color. As in the rest of the country, California used park construction, slum clearance, and freeway construction to destroy Black communities.

On September 23 and 24, 2021, California residents Jonathan Burgess and Dawn Basciano testified before the Task Force that state officials built the Marshall Gold Discovery State Historic Park in Coloma, California on

²²⁸ *Ibid.*

²²⁹ Rothstein, *supra*, at p. 131.

²³⁰ McKelvey, [Biden’s Unlikely Plan to Use Roads to Fight Racism](#) (Aug. 10, 2021), BBC (as of Apr. 5, 2022).

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.* (“Though activists from Syracuse to Los Angeles fought against the construction of these mega-roads, they were built anyway and left communities wrecked - bombarded with noise and pollution, and split down the middle.”)

²³⁴ Toxic Communities, *supra*, at pp. 178-179.

²³⁵ Cal. EPA, *supra*, at fn. 7.

²³⁶ *Ibid.*

²³⁷ Hunt, *What Went Wrong with Public Housing in Chicago? A History of the Robert Taylor Homes* (2001) vol. 94, No. 1, J. of the Illinois State Historical Society 96, 96.

²³⁸ *Ibid.*; [additional citation(s) needed]

²³⁹ Toxic Communities, *supra*, at fn. 10, pp. 249-250.

²⁴⁰ (Bayor, 2001)[pincite]

their family's land without compensation.²⁴¹ They also testified that the California Department of Parks and Recreation has not appropriately commemorated the history of the Black families who owned the land.²⁴²

In Southern California, the city of Manhattan Beach destroyed a racially integrated beach front neighborhood.²⁴³ Willa Bruce, who was Black, had purchased the beach front property in 1912 to run a lodge, café, and dance hall.²⁴⁴ White people in the area tried to push her out by slashing her tires, setting fire to a mattress under her deck, and posting "No Trespassing" signs and fake parking restrictions to chase away Black customers.²⁴⁵

In 1924, Manhattan Beach city officials confiscated the beach front property of several Black and white families, including the Bruces, citing an urgent need for a public park.²⁴⁶ The Bruces sued for \$120,000 and received \$14,500.²⁴⁷ The other families, Black and white, received between \$1,200 and \$4,200 per lot.²⁴⁸ According to the Bruce family lawyer, the city did not pay for years and barred them from purchasing new land in the area, forcing the Bruces to leave without any income.²⁴⁹

The land lay vacant for decades until a park was built in the 1950s.²⁵⁰ The family moved to South Los Angeles and eventually left California.²⁵¹ Having lost their property, Willa and her husband Charles worked for other business owners for the remainder of their lives.²⁵² Estimates of the fair market value today of the Bruce family land is between \$40 million to \$70 million.²⁵³ In the fall of 2021, the state of California authorized Los Angeles County to transfer the land back to the Bruce family after nearly 100 years.²⁵⁴

Black Americans were pushed out of other beach cities, as described by Dr. Alison Rose Jefferson to the Task Force on December 8, 2021.²⁵⁵ Initially, Santa Monica was not only home to a Black American community; it was also a tourist destination for Black Americans throughout the Los Angeles area.²⁵⁶ But, in 1922, a Black

²⁴¹ California Task Force to Study and Develop Reparation Proposals for African Americans (Sept. 23, 2021), Testimony of Jonathan Burgess, <<https://oag.ca.gov/ab3121/meetings>> (as of Apr. 5, 2022) (Burgess Testimony); California Task Force to Study and Develop Reparation Proposals for African Americans (Sept. 24, 2021), Testimony of Dawn Basciano, <<https://oag.ca.gov/ab3121/meetings>> (as of Apr. 5, 2021) (Basciano Testimony).

²⁴² Burgess Testimony, *supra*, at fn. 242; Basciano Testimony, *supra*, at fn. 242.

²⁴³ See Xia, [Manhattan Beach Was Once Home to Black Beachgoers, but the City Ran Them Out. Now It Faces a Reckoning](#) (Aug. 2, 2020), L.A. Times (as of Apr. 5, 2022) (Xia I).

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ Xia I, *supra*, at fn. 244.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ Paskin, [Officials Lead Effort to Return Bruce's Beach to the Black Family It Was Taken from 100 Years Ago](#) (Apr. 9, 2021), LAist (as of Apr. 5, 2022).

²⁵⁰ Xia I, *supra*, at fn. 244.

²⁵¹ *Ibid.*; see also Xia, [A Tale of Two Reckonings: How Should Manhattan Beach Atone for Its Racist Past?](#) (Mar. 28, 2021), L.A. Times (as of Apr. 5, 2022) (Xia II).

²⁵² Xia I, *supra*, at fn. 244; see also Xia II, *supra*, at fn. 252.

²⁵³ Xia II, *supra*, at fn. 252.

²⁵⁴ See generally [Sen. Bill No. 796](#) (2021-2022 Reg. Sess.).

²⁵⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Alison Rose Jefferson, <<https://oag.ca.gov/ab3121/meetings>> (as of Apr. 5, 2022).

²⁵⁶ *Ibid.*

investment group was blocked from developing a resort and amusement facility along the oceanfront.²⁵⁷ After the Black investors could not build the facility, white developers purchased the land and constructed the Casa del Mar and the Edgewater clubs in the area.²⁵⁸ Black investors were also unable to build a planned Black membership-based club in Santa Monica in 1958 because the city took over the land through eminent domain proceedings for a purported parking lot.²⁵⁹ These investors asserted racial discrimination and attempted to stop the cities proceedings in court but lost.²⁶⁰ Now, the upscale Viceroy hotel is located at the site.²⁶¹

In 1945, California passed the Community Redevelopment Act, which allowed for the redevelopment of “blighted areas” in urban and suburban communities.²⁶² The law defined a “blighted area” as a social or economic liability that needed redevelopment for the “health, safety, and general welfare” of the communities in which they existed.²⁶³ An area was deemed “blighted” if one of the following conditions was present:²⁶⁴

- Areas with buildings that had “faulty interior arrangement and exterior spacing,” or housed a “high density population,” leading to overcrowding and infectious disease outbreaks;²⁶⁵
- Areas with buildings that had “inadequate provision for ventilation, light, [or] sanitation,” or dilapidation;²⁶⁶
- Areas with economic deterioration or underuse of valuable land;²⁶⁷
- Areas with “depreciated values” that could generate more tax revenue to fund public services for the residents;²⁶⁸ and
- Areas that were “beyond remedy” and contributed “substantially” to problems of crime.²⁶⁹

Each of these conditions described the harms of residential segregation. As discussed above, buildings in Black neighborhoods are generally more likely to be overcrowded and are in poorer condition. The effects of redlining made land in Black neighborhoods less valuable than they actually were and local governments intentionally slowed and deprived these communities of services.²⁷⁰ Redlining concentrated poverty and crime into Black

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Stats. 1945, ch. 1326, p. 2478 et seq. (1945 C.R.A.). The law was amended numerous times over the next decades. See Stats. 1951, ch. 710, p. 1922 et. seq.; Cal. Const., art. XVI, § 16; Cal. Health & Saf. Code § 33030, et. seq.; (Stats. 1993, Ch 942 (A.B. 1290).); (Stats. 2006, Ch. 113 (A.B. 782, § 1)); (Stats. 2006, Ch. 595, § 2 (S. B. 1206)); (Stats. 2010, Ch. 665, § 1 (A.B. 1641)). Today, the original 1945 set of conditions remains basically the same, but it also includes an anti-discrimination policy regarding the undertaking of community redevelopment projects. Cal. Health & Saf. Code § 33031, subd. (a)(1), (5); subd. (b)(1), (3); Cal. Health & Saf. Code § 33050.

²⁶³ 1945 C.R.A., § 2.

²⁶⁴ *Ibid.*

²⁶⁵ *Id.*, § 2, subd. (a).

²⁶⁶ *Ibid.*

²⁶⁷ *Id.*, subds. (b), (d).

²⁶⁸ *Id.*, subd. (c).

²⁶⁹ *Id.*, § 2 (“Further declarations”).

²⁷⁰ [citation from environment chapter]

neighborhoods and implicit biases based in racist beliefs created during enslavement have, to this day, led the American public to associate Black Americans with crime, and contribute to the over- and under-policing of Black communities.

In Northern California, this law was used to demolish the Fillmore, which was San Francisco's most prominent Black neighborhood and business district.²⁷¹ Known as the Harlem of the West, the Fillmore was an integrated neighborhood²⁷² that was famous for its jazz venues that hosted Ella Fitzgerald, Billie Holiday, Charles Mingus, and Louis Armstrong.²⁷³

City agencies declared that the Western Addition was blighted in 1948 and began tearing it down in 1956.²⁷⁴ The plan was one of the largest projects of urban renewal on the West Coast.²⁷⁵ The City of San Francisco closed 883 business, displaced 4,729 households, destroyed 2,500 Victorian homes²⁷⁶ and damaged the lives of nearly 20,000 people.²⁷⁷ "The agency would go to a house and give the head of household a certificate that said they would be given preference in housing built in the future," Benjamin Ibarra, a spokesman for the agency, said in 2008. "But there wasn't a lot of housing built for a long time."²⁷⁸ The San Francisco city government left the land empty for 40 years.²⁷⁹

Another example of a predominantly Black community in Northern California that urban redevelopment destroyed is Russell City. Founded in 1853 along the Hayward shoreline in Alameda County, Danish immigrants initially lived in Russell City.²⁸⁰ During World War II, racially discriminatory policies and practices prevented Black families from buying houses in incorporated Hayward, and they settled in unincorporated Russell City, which lacked municipal services.²⁸¹ By World War II, Russell City became primarily Black and Latino.²⁸²

"We were left to fend for ourselves. We had no public sewer system, so you saw many homes with outhouses, we had wells with no running water, the electrical grid was so unstable that many times we were in the dark," said former Russell City resident Marian "Edie" Eddens, who stated that living in Russell City was "the major challenge of [her] life."²⁸³

²⁷¹ Fulbright, *Sad Chapter in Western Addition History Ending*, (Jul. 21, 2008), S.F. Chronicle (as of Apr. 5, 2021) (Fulbright).

²⁷² Taylor, *How "Urban Renewal" Decimated the Fillmore District, and Took Jazz with It* (Jun. 25, 2020), KQED (as of Apr. 5, 2022) (*Decimated Fillmore*).

²⁷³ *Fillmore Timeline*, *supra*, at fn. 214.

²⁷⁴ Fulbright, *supra*, at fn. 272.

²⁷⁵ *Decimated Fillmore*, *supra*, at fn. 273.

²⁷⁶ Fulbright, *supra*, at fn. 272.

²⁷⁷ *Decimated Fillmore*, *supra*, at fn. 273.

²⁷⁸ Fulbright, *supra*, at fn. 272.

²⁷⁹ *Ibid.*

²⁸⁰ *History and Heritage of Russell City*, City of Hayward (as of Apr. 6, 2022)

²⁸¹ *Ibid.*

²⁸² City Manager Kelly McAdoo, letter to Hayward Mayor and City Council, Nov. 16, 2021.

²⁸³ Marian "Edie" Eddens, letter to California Task Force to Study and Develop Reparation Proposals for African Americans, Feb. 24, 2022.

While Russell City lacked basic infrastructure and was economically poor, it was a culturally rich community.²⁸⁴ “Music and literature were my saving graces,” recalled Gloria Bratton Sanders Moore, former resident of Russell City.²⁸⁵ Blues legends like Ray Charles and Etta James were known to perform at Russell City clubs when touring the west coast.²⁸⁶

By the 1950s, Russell City was declared a “blight” by neighboring Hayward officials.²⁸⁷ In 1963, the local governments of the City of Hayward and Alameda County forcibly relocated all Russell City residents, bulldozed the community, and rezoned the land for industrial use.²⁸⁸ Descendants of Russell City residents claim that displaced homeowners were forced to sell their land without fair compensation.²⁸⁹ In 2021, the Hayward City Council passed a resolution formally apologizing to former Russell City residents for its participation in racially discriminatory housing practices such as racial steering and redlining.²⁹⁰

In Southern California, in 1950, the Los Angeles City Planning Commission planned to demolish 11 blighted areas; all but one were majority Mexican American or African American neighborhoods.²⁹¹

Many of California’s freeways were routed through Black neighborhoods. As noted above, the City of Los Angeles destroyed the prosperous Black neighborhood of Sugar Hill in 1954 by building the Interstate 10 freeway.²⁹² Former residents said that the amount that the government paid for their homes was inadequate, and below market value.²⁹³ Los Angeles did it again in 1968 by building the Century Freeway through the Black neighborhoods of Watts and Willowbrook, displacing 3,550 families, 117 businesses, parks, schools, and churches.²⁹⁴

The Interstate 210 freeway destroyed a Black business district and racially diverse communities in Pasadena in the 1950s.²⁹⁵ The city offered residents \$75,000 for their homes, less than the minimum cost of purchasing a new home in Pasadena.²⁹⁶ The freeway forced 4,000 Black and Mexican American residents to move back to inner-city Los Angeles.²⁹⁷

²⁸⁴ [Russell City and the Blues](#) (Feb. 2, 2017), City of Hayward (as of Apr. 6, 2022)

²⁸⁵ Gloria Bratton Sanders Moore, letter to California Task Force to Study and Develop Reparation Proposals for African Americans, Feb. 24, 2022.

²⁸⁶ Whitney, [Decades After “Cultural Genocide,” Residents of a Bulldozed Community Get Apology from Hayward](#) (Dec. 5, 2021), KQED (as of Apr. 6, 2022)

²⁸⁷ City Manager Kelly McAdoo, *supra*.

²⁸⁸ City Manager Kelly McAdoo, *supra*.

²⁸⁹ Jessie Mae Patterson, letter to California Task Force to Study and Develop Reparation Proposals for African Americans, Feb. 24, 2022.

²⁹⁰ City Manager Kelly McAdoo, *supra*.

²⁹¹ Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain* (2003) 21 Yale L. and Policy Rev. 1, 33-34.

²⁹² Rothstein, *supra*, at fn. 5, p. 131.

²⁹³ Chang et al., *Beneath the Santa Monica Freeway Lies the Erasure of Sugar Hill* (May 4, 2021), NPR (as of Apr. 6, 2022).

²⁹⁴ Mohl, *supra*, at fn. 222, p. 25.

²⁹⁵ Ramirez, [Black History in Pasadena](#) (Mar. 15, 2021), A Noise Within (as of Apr. 6, 2022).

²⁹⁶ *Ibid*.

²⁹⁷ Mohl, *supra*, at fn. 222, p. 25.

In Oakland, a total of 503 Black homes, 22 businesses, four churches, and 155 trees were demolished to construct Interstate 980.²⁹⁸ Once completed in 1985, the highway severed the predominantly Black neighborhoods of West Oakland from the rest of the city, setting the stage for underfunding of municipal projects in the area.²⁹⁹

In Fresno, the construction of highways 41 and 99 destroyed blocks of homes where Black families lived.³⁰⁰ In San Diego, much like in other parts of the state, the construction of freeways such as Interstate 5 disrupted Black American communities.³⁰¹

IX. Public Housing

The construction of government funded housing, or public housing, has contributed to housing segregation in two major ways throughout American history. First, from World War I until the 1950s, the federal government built high quality housing.³⁰² Generally, federal practices did not allow Black Americans to live in these high quality buildings, often building separate, low quality units for Black Americans.³⁰³

Then, from 1950s, as the federal government subsidized mortgages for white families to move to the suburbs and paid local governments to demolish racially integrated neighborhoods, it also built high-rise apartment buildings in urban neighborhoods that were cut off from the richer, white suburbs.³⁰⁴ These high-rise public housing projects concentrated poverty in Black neighborhoods in the inner city.³⁰⁵

A. High Quality Public Housing for White Americans

Private real estate development stalled during the Great Depression due to the lack of available credit. During the world wars, all available raw materials were directed towards military use and private housing construction was banned. By the end of World War II, these conditions created severe housing shortages for all Americans, regardless of race.³⁰⁶ In response, the federal government built low-rise buildings for middle-class Americans that were scattered throughout the city, but did not subsidize the rent or maintenance.³⁰⁷ Instead, tenants paid full market price and for the building's maintenance,³⁰⁸ so the quality of public housing was high.³⁰⁹ Federal agencies funded public housing, which either barred Black Americans, or the housing available to Black Americans was segregated and in worse condition.

²⁹⁸ Baldassari, *Report: Oakland's I-980 on National "Top 10" List for Teardown* (Feb. 14, 2017), Mercury News (as of Apr. 6, 2022).

²⁹⁹ *Ibid.*

³⁰⁰ Tobias, *How Fresno Is Confronting Its History of Racism* (Sept. 16, 2020), Cal Matters (as of Apr. 6, 2022).

<https://calmatters.org/california-divide/2020/06/west-fresno-racism-black-communities/> (as of January 24, 2022).

³⁰¹ Carrico et al., *Centre City Development Corporation Downtown San Diego African-American Heritage Study* (December 2004), Mooney & Associates (as of Apr. 6, 2022), p. II-13.

³⁰² Rothstein, *supra*, at fn. 5, pp. 45-47.

³⁰³ *Id.* at p. 70.

³⁰⁴ Rothstein, *supra*, at fn. 5, p. 50.

³⁰⁵ *Id.* at p. 50.

³⁰⁶ Rothstein, *supra*, at fn. 5, pp. 11, 47.

³⁰⁷ Rothstein, *supra*, at p. 47.

³⁰⁸ Rothstein, *supra*, at p. 47.

³⁰⁹ *Id.* at p. 70.

During World War I, the federal government-built housing for white workers in the war industries: 170,000 white workers and their families lived in 83 government-built housing projects across 26 states. The federal government did not allow Black workers to live in this federally built housing and forced Black workers into overpopulated slums.³¹⁰ In 1933, the federal government created the Public Works Administration (PWA), which cleared slums and built houses using its “neighborhood composition rule” to require federal housing projects to maintain the racial make-up of the neighborhood.³¹¹

All across the country, in cities like Detroit, Indianapolis, Toledo, New York, Birmingham, and Miami, the PWA segregated Black residents from white residents either by project or by concentrating Black Americans into high density, low-income neighborhoods.³¹² Another federal agency, the Tennessee Valley Authority, built 500 comfortable houses and leased them to its employees and construction workers.³¹³ The federal government banned Black federal workers from the houses who lived in low quality barracks instead.³¹⁴

In 1937, the federal government revised its strategy and created the U.S. Housing Authority (USHA), which gave federal money to local governments to build public housing.³¹⁵ Although the USHA manual stated that government housing projects should not segregate what were previously integrated neighborhoods, it also warned local officials not to build housing for white families “in areas now occupied by Negroes.”³¹⁶

During World War II, the federal government-built housing for white workers in the defense industry.³¹⁷ Black workers were either left to live in slums or in lower quality segregated housing.³¹⁸

B. Low Quality Housing for Black Americans

Beginning in the 1950s, the government began subsidizing the rent in public housing and allowed only families making less than a certain amount to live in the buildings.³¹⁹ The buildings collected lower maintenance fees as a result and the quality of public housing deteriorated.³²⁰ The federal government helped white families move out of the city and purchase single family homes in the suburbs by subsidizing their mortgage.³²¹ Black families were prevented from moving into the suburbs due to the racist federal housing policies and restrictive covenants, discussed in the section of this chapter on redlining³²² and racially restrictive covenants.³²³

The federal government began funding enormous, segregated high rise projects, like the Robert Taylor Homes in Chicago;³²⁴ at the same time, a dozen states, including California, required local city approval of public

³¹⁰ Rothstein, *supra*, at page 46.

³¹¹ *Id.* at page 49.

³¹² *Id.* at page 49.

³¹³ *Id.* at page 47.

³¹⁴ *Id.* at page 47.

³¹⁵ *Id.* at pages 52-53.

³¹⁶ *Id.* at page 53.

³¹⁷ *Id.* at page 55.

³¹⁸ *Ibid.*

³¹⁹ *Id.* at page 71.

³²⁰ *Id.* at page 71.

³²¹ [citation needed]

³²² Section X.

³²³ Section XI.

³²⁴ *Id.* at page 65.

housing projects.³²⁵ In 1971, the Supreme Court ruled that this approval process did not violate the federal constitution,³²⁶ so middle-class white communities rejected public housing projects.³²⁷

By 1973, President Richard Nixon announced that public housing projects were “monstrous, depressing places—rundown, overcrowded, crime-ridden.”³²⁸ In 1984, investigative reporters from the Dallas Morning News visited federally-funded developments in 47 metropolitan areas.³²⁹ The reporters found that 10 million public housing residents were almost always segregated by race and that every housing project where the residents were mostly white was better maintained, and had decent facilities, amenities, and services. The housing projects with mostly Black residents did not.³³⁰

Although the Supreme Court of the United States decided in *Brown v. Board of Education* in 1954 that segregation was unconstitutional, Berchmans Fitzpatrick, general counsel of the federal housing agency at the time, responded to the decision by saying that the decision did not apply to housing.³³¹ Civil rights activists tried to bring suits against government segregation in public housing and the federal government announced anti-discrimination policies in name only. In practice, it continued to segregate.

President John F. Kennedy tried to prohibit discrimination in housing by issuing Executive Order 11063, but the order only covered less than three percent of the total housing available in the United States.³³² Finally, the federal government, outlawed housing discrimination in 1964 with the passage of the Civil Rights Act, which was re-enforced by the Fair Housing Act in 1968.³³³

The Civil Rights Act and the Fair Housing Act did not change the reality on the ground, as civil rights advocates continued to file lawsuits over decades alleging that city housing authorities continued to discriminate in cities like Dallas, San Francisco, Yonkers, and Baltimore.³³⁴ In opinion after opinion, federal courts recognized that federal and local government created or maintained segregation.³³⁵

Following the recession of the 1990s, the government began to demolish these impoverished high rise public housing projects as part of multimillion dollar redevelopment efforts, often specifically choosing projects where Black families lived.³³⁶ In 2000, 48 percent of public housing residents were Black nationwide, but in cities like Birmingham, Detroit, Memphis, New Orleans, and Washington D.C., 99 percent of public housing residents

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Id.* at page 37.

³²⁹ *Id.* at page 67.

³³⁰ *Id.* at page 67.

³³¹ *Id.* at page 66.

³³² Toxic Communities, *supra*, at fn. 10, pp. 254-255.

³³³ [citations needed]

³³⁴ [case law citations needed]

³³⁵ *Ibid.*

³³⁶ Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities* (2022) vol. 48, No. 8, Urban Studies 1581, 1581 (Goetz).

were Black.³³⁷ Cities where housing prices have risen the fastest have been the most aggressive in tearing down public housing.³³⁸

These redevelopments have resulted in mostly white, but sometimes Black middle-class residents moving into and displacing low-income Black neighborhoods.³³⁹ These government funded public housing demolitions not only displace the Black residents in the demolished buildings, but they speed up the gentrification of the surrounding neighborhood, and displace more Black residents.³⁴⁰ Although scholars are unsure if these government demolitions cause the neighborhood to gentrify, research has shown that they are an important factor in the neighborhood's continued gentrification.³⁴¹

The redevelopments usually have fewer units of public housing, so residents generally move to other low-income neighborhoods.³⁴² This approach has produced mixed results.³⁴³ Although former residents report that they are more satisfied with the quality of their new housing and the reduction in crime, their children continue to attend racially and economically segregated schools, and their health and financial self-sufficiency reportedly did not improve.³⁴⁴

C. California

Segregation in California of Black Americans intensified during World War II when Black Americans arrived to work in the war industries. Unlike on the East Coast and in the Midwest, in California, because the Black population in California had been so small, there were no preset housing segregation patterns: Federal and local governments created segregation from a blank slate.³⁴⁵

Carey McWilliams, who had been California's housing commissioner in the early years of World War II, later wrote that "the federal government [had] in effect been planting the seeds of Jim Crow practices throughout the region under the guise of 'respecting local attitudes.'"³⁴⁶

In Northern California, one of the largest shipbuilders in the country during World War II was located in Richmond.³⁴⁷ From 1940 to 1945, Richmond's population increased from 24,000 to 100,000 with defense industry workers.³⁴⁸ Richmond's Black population increased from 270 in 1940 to 14,000 in 1945.³⁴⁹

As with the rest of the country, the federal government paid for segregated housing to be built for defense workers during World War II.³⁵⁰ Housing available only to white workers was more likely to be better

³³⁷ *Id.* at pp. 1583-1584.

³³⁸ See *id.* at p. 1582.

³³⁹ Goetz, *supra*, at fn. 337, pp. 1583, 1600.

³⁴⁰ *Id.* at p. 1600.

³⁴¹ *Id.* at p. 1601.

³⁴² Goetz, *supra*, at fn. 337, p. 1584.

³⁴³ *Id.* at p. 1585.

³⁴⁴ *Ibid.*

³⁴⁵ [Rothstein, citations needed]

³⁴⁶ *Id.* at page 71-72.

³⁴⁷ *Id.* at page 29.

³⁴⁸ *Id.* at page 31.

³⁴⁹ *Id.* at page 31.

³⁵⁰ *Ibid.*

constructed, permanent, and further inland.³⁵¹ The federal government issued low interest loans for white homeowners to remodel and subdivide their houses, and leased spare rooms for white workers to move in as tenants.³⁵²

Black housing was close to the shipbuilding site, badly constructed, and there simply was not enough of it.³⁵³ While white workers lived in rooms paid for by the federal government, Black war workers lived in cardboard shacks, barns, tents, or open fields.³⁵⁴ By 1947, half of the 26,000 Black residents of Richmond were living in temporary housing.³⁵⁵

The federal government then helped white families finance suburban homes and leave temporary apartments near the shipyard.³⁵⁶ For example, the federal government contracted with a private developer to build a new suburb called Rollingwood and forbade the developer from selling any of Rollingwood's 700 houses to Black Americans.³⁵⁷ In 1952, Wilbur Gary, a Black war veteran bought a house in Rollingwood, angering his white neighbors.³⁵⁸ Three hundred white residents gathered in front of his house, shouted racial slurs, threw a brick through the window, and burned a cross on his front lawn.³⁵⁹

Some Black workers bought land in unincorporated North Richmond, but could not get construction loans because unlike for white Americans, the federal government refused to insure bank loans for Black Americans.³⁶⁰ Other Black families moved into the housing projects that white families had left behind.³⁶¹ By 1950, more than three-quarters of Richmond's Black population lived in the housing projects built during the war.³⁶²

In 1942, the United States Navy demanded that the San Francisco Housing Authority segregate housing built for the 14,000 workers and their families at the Hunters Point Naval Shipyard.³⁶³ The San Francisco Housing Authority announced in 1942: "In the selection of tenants . . . [we shall] not insofar as possible enforce the commingling of races, but shall insofar as possible maintain and preserve the same racial composition which exists in the neighborhood where a project is located."³⁶⁴

San Francisco built five other segregated projects during World War II, four for whites only.³⁶⁵ Apartments earmarked for white workers only sat empty as Black workers waited on long waiting lists.³⁶⁶

³⁵¹ *Ibid.*

³⁵² *Id.* at page 32.

³⁵³ *Id.* at page 33.

³⁵⁴ *Id.* at page 33.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Id.* at page 32.

³⁵⁸ Rothstein, at pg. 3

³⁵⁹ Rothstein, at pg. 3

³⁶⁰ *Id.* at pages 33-34.

³⁶¹ *Id.* at page 33.

³⁶² *Id.* at page 33.

³⁶³ *Id.* at page 57.

³⁶⁴ *Id.* at page 60.

³⁶⁵ *Id.* at page 59.

³⁶⁶ *Ibid.*

One of the few integrated neighborhoods where Black Americans could live was the Western Addition,³⁶⁷ which was torn down later as part of urban renewal, discussed in the section on condemnation and eminent domain.³⁶⁸ When the federal government sent Japanese Americans living in the Western Addition to American concentration internment camps, African Americans moved in.³⁶⁹

In 1952, the National Association for the Advancement of Colored People sued the San Francisco Housing Authority for continuing to build whites only housing.³⁷⁰ The head of the agency testified that the city agency's intent was to "localize occupancy of Negroes" in the Western Addition and ensure that no African Americans would reside in projects inhabited by whites.³⁷¹ The NAACP won its legal case, but the city agency continued to build segregated housing in San Francisco.³⁷²

In some areas in California, the demolition of public housing occurred without replacement housing for displaced Black Americans. For example, in Richmond, the city prioritized developments primarily occupied by Black families in its demolition plans.³⁷³ The city abandoned plans to build over 4,000 permanent public housing units.³⁷⁴ The demolition displaced 700 Black families from their homes in 1952 and only 16 percent of them could find a home in the private housing market.³⁷⁵ By 1960, thousands of former public housing residents lost their homes.³⁷⁶

X. Redlining

Redlining refers to a federal and local governmental practice, acting together with private banks, to systematically deny home loans to Black people.³⁷⁷ Redlining was accomplished at the federal level with three agencies: Federal Housing Administration, Veterans Administration (VA), and the Home Owners' Loan Corporation (HOLC).³⁷⁸ The FHA helped new homeowners buy houses, the VA helped veterans (World War II and others), and HOLC helped prevent foreclosures as a result of the Great Depression for existing homeowners.³⁷⁹

These three federal agencies helped millions of mostly white Americans buy houses by insuring and subsidizing mortgages, while refusing the same opportunity to Black Americans.³⁸⁰ Or, in the words of the federal agencies, exclusion was directed at "inharmonious racial group or nationality groups."³⁸¹

³⁶⁷ *Ibid.*

³⁶⁸ Section IX.

³⁶⁹ *Ibid.*

³⁷⁰ *Id.* at page 61.

³⁷¹ *Id.* at page 61.

³⁷² *Id.* at page 62.

³⁷³ Montojo, et al., *supra*, at p. 41.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ [citation]

³⁷⁸ [citation]

³⁷⁹ Taylor (2014) *supra*, at page 236.

³⁸⁰ *Id.* at page 1.

³⁸¹ *Id.* at page 1.

With a federally insured mortgage, the federal government protects lenders, like banks, against losing money. If the homeowner stops paying their mortgage, the federal government would step in and pay the bank the amount of the unpaid principal in the loan.³⁸² As a result, banks were far more willing and likely to issue an insured mortgage to a white applicant, than an uninsured mortgage to a Black applicant.³⁸³

Enriched with these mortgages, white Americans moved out of America's city centers, taking with them their middle-class tax bases into the suburbs and leaving urban poverty in its wake.³⁸⁴ Unable to access the same mortgages to reach the suburbs, Black Americans remained in the impoverished urban centers.³⁸⁵

This practice continued legally until 1962, when President John F. Kennedy issued an executive order prohibiting the use of federal funds to support racial discrimination in newly constructed housing.³⁸⁶ Between 1934 and 1962, the federal government had issued \$120 billion in home loans, 98 percent of which went to white people.³⁸⁷

Although redlining is no longer legal, its effects appear to endure. Studies have found associations between historically redlined neighborhoods, air pollution and cancer, asthma, poor mental health, and people without health insurance.³⁸⁸ The same study also found that residents in historically redlined areas were close to twice as likely to have poor health when compared to areas that did not have redlining.³⁸⁹

A. Home Owners' Loan Corporation

The Home Owners' Loan Corporation refinanced tens of thousands of mortgages in danger of default or foreclosure and issued low-interest loans to help homeowners recover homes that were already foreclosed.³⁹⁰ Between July 1933 and June 1935, HOLC used \$3 billion to finance more than a million mortgages.³⁹¹

HOLC examiners assessed real estate values and mortgage lending risks for 239 midsized cities between 1939 and 1945, and developed "Residential Security Maps" for the entire country.³⁹²

These maps rated neighborhoods from "A," for the best neighborhoods, to "D," the worst neighborhoods.³⁹³ Grade "A" was shaded in green on the maps and assigned to blocks in neighborhoods that were new and all white. HOLC assigned Grade "B," shaded in blue, to stable, outlying, Jewish and white working-class

³⁸² U.S. Dept. of Housing and Urban Development, *Program Offices: The Federal Housing Administration*, <https://www.hud.gov/program_offices/housing/fhahistory> (as of June 15, 2021).

³⁸³ [citation]

³⁸⁴ Robert E. Lang & Rebecca R. Sohmer *Legacy of the Housing Act of 1949: The Past, Present, and Future of Federal Housing and Urban Policy* (2000), 291-298, at p. 296

³⁸⁵ [citation]

³⁸⁶ *Id.* at page 139.

³⁸⁷ *Id.* at pages 1-2.

³⁸⁸ See, e.g., Nardone, et al., *Historical Redlining and Urban Health Today in U.S. Cities*, *Environmental Justice* Vol. 3 Number 4, 2020 <http://iurd.berkeley.edu/uploads/Nordone_Chiang_Corburn_2020_Redlining_Urban_Health.pdf> (as of January 24, 2022).;

³⁸⁹ *Ibid.* Lane, et al., *Historical Redlining is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, *Environmental Science & Technology Letters* <<https://pubs.acs.org/doi/abs/10.1021/acs.estlett.1c01012>> (as of March 11, 2022.)

³⁹⁰ Taylor (2014) *supra*, at page 236.

³⁹¹ Taylor (2014) *supra*, at page 236.

³⁹² *Id.* at 237.

³⁹³ CalEPA, *supra*, at page 3.

neighborhoods. Grade “C” was for inner-city neighborhoods bordering mostly Black communities or neighborhoods that already had a small Black population and shaded yellow. Grade “D” was the worst category, and reserved for all-Black neighborhoods, even if it was middle class, and shaded in red.³⁹⁴ This process was called “redlining.”³⁹⁵

Historians debate the level of direct influence these maps had on how banks made their decisions,³⁹⁶ but generally agree that redlining resulted in the devaluation of Black homes across the entire country, making it difficult for Black Americans to buy, build, or renovate their homes.³⁹⁷

Along with the 1939 Federal Housing Administration Underwriting manual, the HOLC Residential Security Maps cemented the federal government’s support of the routine real estate industry practice of devaluing real estate owned by nonwhite property owners,³⁹⁸ a practice that continues to this day.³⁹⁹

Californian homeowner Paul Austin testified during the October 13, 2021 Task Force meeting that a home appraiser valued the property of he and his wife at just below \$1 million, which was much less than they expected because of significant improvements they had made to their home. They asked a friend to pretend to be his wife, removed anything in their house that would indicate their race, and hired a different appraiser. The new appraiser valued the property at just less than \$1.5 million, which was nearly half a million more than the previous estimate. Austin also testified his grandparents migrated from the South to the Marin City area during the 1940s to work in the shipyards, but were trapped in that area because of redlining. He also testified that his paternal grandparents secretly purchased land and built a home in Mill Valley because Black Americans were not allowed to buy property in the area.

B. Federal Housing Administration and Veterans Administration

Congress created the Federal Housing Administration in 1934 to insure bank mortgages for first time homeowners.⁴⁰⁰ Where the Home Owners' Loan Corporation reinforced segregation by creating the Residential Security Maps, the FHA issued the FHA Underwriting Manual.⁴⁰¹ The 1936 Manual warned of the increased risk that a homeowner would not pay their mortgage in a neighborhood with “inharmonious racial groups.”⁴⁰²

The 1947 and 1958 versions of the FHA underwriting manual did not directly mention race, but instructed mortgage lenders to consider “physical and social attractiveness[.]” and whether the families living in the neighborhoods were “congenial” when evaluating the credit risk.⁴⁰³ State-regulated insurance companies, like

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ CalEPA, *supra*, at page 3, *see also*, <https://www.governing.com/context/redlining-didnt-happen-quite-the-way-we-thought-it-did>

³⁹⁷ Taylor (2014) *supra*, at page 237.

³⁹⁸ *Ibid.*

³⁹⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Paul Austin, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁴⁰⁰ CalEPA, *supra*, at page 4.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

the Equitable Life Insurance Company and the Prudential Life Insurance Company, also declared that their policy was to not issue mortgages to whites in integrated neighborhoods.⁴⁰⁴

Because the FHA refused to insure mortgages for Black Americans, banks shouldered additional risk if they loaned to Black families rather than white families, so they essentially did not do so.⁴⁰⁵ Between 1935 and 1950, the FHA administered 2,761,000 home mortgages and only about 50,000 were made available to nonwhite Americans.⁴⁰⁶

In addition to encouraging banks to discriminate against Black Americans in the credit assessment process, author Richard Rothstein argues that the FHA made its biggest impact when it financed the development of entire suburbs.⁴⁰⁷ When the FHA reviewed plans for suburban development projects it demanded that the real estate developer not sell houses to Black Americans and sometimes withheld approval of the projects if Black families lived in nearby neighborhoods.⁴⁰⁸ Once the real estate developer built the housing development to the federal government's specifications, including a prohibition on selling to Black families, qualified white buyers did not need to have their new house appraised for the federal government to guarantee their mortgages.⁴⁰⁹ Without FHA or Veterans Administration financing, developers built inferior neighborhoods without community facilities like parks and playgrounds.⁴¹⁰

Further discussion of the health impact of a lack of green space is discussed in Chapter 7 on the environment. Because Black Americans could not access mortgages, many houses in these neighborhoods were rental properties instead. Black families were deprived of this opportunity to build wealth.⁴¹¹ A 1967 study showed that out of 400,000 housing units in FHA-insured subdivisions, only 3.3 percent had been sold to Black families.⁴¹²

After World War II, Congress passed the Servicemen's Readjustment Act of 1944, commonly known as the GI Bill, offering education, small business and unemployment benefits to military veterans. The GI Bill also authorized the VA to insure mortgages for veterans as the FHA did for civilians. It adopted FHA housing policies, and VA appraisers relied on the FHA's Underwriting Manual.⁴¹³ The VA guaranteed approximately five million mortgages nationally.⁴¹⁴ By 1950, the FHA and VA together were insuring half of all new mortgages nationwide.⁴¹⁵

⁴⁰⁴ Rothstein, *supra*, at page 41.

⁴⁰⁵ [citation needed]

⁴⁰⁶ Taylor (2014) at p. 241.

⁴⁰⁷ *Id.* at page 115.

⁴⁰⁸ *Id.* at page 117.

⁴⁰⁹ Rothstein at page 37.

⁴¹⁰ *Id.* at page 120.

⁴¹¹ *Id.* at page 120.

⁴¹² U.S. Commission on Civil Rights, 1973

⁴¹³ Rothstein, *supra*, at page 115.

⁴¹⁴ Taylor (2014) *supra*, at page 239.

⁴¹⁵ Rothstein, *supra*, at page 115.

With Federal government approval, white veterans often did not need a down payment to buy a home.⁴¹⁶ Although the GI Bill itself did not contain “a single loophole for different treatment of white and [B]lack veterans[,]”⁴¹⁷ reality was very different.⁴¹⁸ The approval of GI Bill benefits for each individual application was tied to local VA centers staffed almost entirely by white employees, local banks, or public and private schools.⁴¹⁹ As a Black veteran in Texas wrote to the NAACP: “NO NEGRO VETERAN is eligible for a loan.”⁴²⁰ The VA refused to keep racial records.⁴²¹

An *Ebony* survey of 13 cities in Mississippi showed that by mid-1947, only two of the 3,229 VA-guaranteed loans went to Black veterans.⁴²² In 1950, of the almost 70,000 VA mortgages issued in the New York-New Jersey area, “nonwhites” received less than 100.⁴²³ Many Black World War II veterans never applied for GI Bill guaranteed mortgages because they knew that they would not be approved because of race.⁴²⁴

C. California

The Home Owners' Loan Corporation maps described many Californian neighborhoods in racially discriminatory terms. In Berkeley, the HOLC characterized an area north of the University of California, Berkeley “as High Yellow [C], but for infiltration of Orientals and gradual infiltration of Negroes from south to north.”⁴²⁵ In Pasadena: “This area is favorably located but is detrimentally affected by 10 owner occupant Negro families... Although the Negroes [sic] are said to be of the better class their presence has caused a wave of selling in the area and it seems inevitable that ownership and property values will drift to lower levels... The area is accorded a ‘high red’ solely on account of racial hazards. Otherwise a medial yellow grade would have been assigned.”⁴²⁶ In Oakland: “Detrimental Influences: Predominance of Negroes and Orientals. Also mixed classes of wage earners and colored professional people.”⁴²⁷ In San Diego: There were “servant’s areas” of La Jolla and several areas “restricted to the Caucasian race.”⁴²⁸

Accordingly, many neighborhoods financed by the federal government were for white people only: Westlake in Daly City, south of San Francisco; Lakewood, south of Los Angeles; Westchester, south of Los Angeles and

⁴¹⁶ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 115

⁴¹⁷ Hurd, “Democracy Challenged,” *Opportunity* (Spring 1945) at p. 63.

⁴¹⁸ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 113-115.

⁴¹⁹ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 128

⁴²⁰ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2006) at p. 140

⁴²¹ Cohen, *A Consumers’ Republic*, (2004) p. 171

⁴²² Katznelson, *On Race and Policy History: A Dialogue about the B.I.Bill*, *Perspectives on Politics* Vol. 6, No. 3 (Sep., 2008), at pg. 323

⁴²³ Cohen, *A Consumers’ Republic* (2004), p. 171

⁴²⁴ *Id.* at page 15.

⁴²⁵ Nelson, et al., *Mapping Inequality: Redlining in New Deal America*, American Panorama, ed. <<https://dsl.richmond.edu/panorama/>> (as of June 15, 2021).

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ Beal, Redlining in San Diego, <<https://www.lisc.org/san-diego/impact/redlining-san-diego/>> (as of January 21, 2022).

developed by Kaiser Community Homes; Panorama City, in the San Fernando Valley; and the “Sunkist Gardens” development in Southeast Los Angeles.⁴²⁹

In Milpitas, the Federal Housing Administration approved subdivision plans, and real estate developers built homes that Black workers could not buy due to the restrictions demanded by the FHA, so Black families were forced to move to a segregated neighborhood or live in nearby Richmond.⁴³⁰ In Ladera, a neighborhood next to Stanford University, the FHA refused to finance the construction of a co-op suburb with Black members.⁴³¹ Without the government insuring its mortgages, the co-op could not find financing to build their homes, so they gave up, and the land was sold to a private developer.⁴³² Shortly after, the FHA approved the private developer’s plans, which contained a guarantee that no homes would be sold to Black families.⁴³³

In Northern California, from 1946 to 1960, 350,000 new homes were built with support from the FHA, but fewer than 100 of these homes went to Black people.⁴³⁴

Not only did federal agencies refused to insure mortgages to Black Americans, they also refused mortgages to white Americans who attempted to live alongside Black Americans.

In 1954, a resident of the white only neighborhood of East Palo Alto sold his house to a black family.⁴³⁵ This sparked a phenomenon called blockbusting, in which local real estate agents exploited racial fears and manipulated white residents to sell their houses at a low price, then reselling the houses at a higher price to Black families.⁴³⁶ As white residents fled the neighborhood, other white homeowners became desperate to sell their houses at even lower prices.⁴³⁷

A 1970 report concluded that the average markup Black families paid in blockbusted neighborhoods was from 80 to 100 percent higher than neighborhoods not undergoing racial change.⁴³⁸ In response to blockbusting in East Palo Alto, the California real estate commissioner stated that the commission did not regulate such “unethical practices.”⁴³⁹ FHA and Veterans Administration policies discouraged white residents from moving into neighborhoods in the process of being integrated like East Palo Alto at the time, since the government did not insure mortgages for white families in integrated neighborhoods where Black families lived.⁴⁴⁰ Within six years, the population of East Palo Alto was 82 percent Black, and housing conditions had deteriorated markedly.⁴⁴¹

⁴²⁹ . Nelson, *supra*, at pp. 118-19.

⁴³⁰ Rothstein at page 37.

⁴³¹ *Id.* at page 40.

⁴³² *Id.* at page 40.

⁴³³ *Id.* at page 40.

⁴³⁴ Loewen p. 128

⁴³⁵ Rothstein, *supra*, at page 41.

⁴³⁶ <https://www.blackpast.org/african-american-history/blockbusting/>

⁴³⁷ <https://www.blackpast.org/african-american-history/blockbusting/>

⁴³⁸ <https://www.blackpast.org/african-american-history/blockbusting/>

⁴³⁹ *Ibid.*

⁴⁴⁰ Rothstein, *supra*, at page 41.

⁴⁴¹ *Id.* at page 42.

In another example in 1958, a Black San Francisco schoolteacher named Alfred Simmons rented a house with a FHA-guaranteed mortgage from a fellow white schoolteacher in the Elmwood district of Berkeley.⁴⁴² The Berkeley police chief requested that the Federal Bureau of Investigation investigate how Mr. Simmons came to live in an all-white community, and the FBI referred the case to the U.S. Attorney.⁴⁴³ The FHA advised the white homeowner that because he rented his house to a Black colleague, any future application from him “will be rejected on the basis of an Unsatisfactory Risk Determination made by this office on April 30, 1959.”⁴⁴⁴

XI. Racially Restrictive Covenants

Racially restrictive covenants are legally binding contracts, usually written into the deed, that prohibit nonwhite people from living on a property or in a neighborhood.⁴⁴⁵ For example, a deed in 2010, in Fairhaven, Massachusetts included the following clause, introduced in 1946: “The said land shall not be sold, leased or rented to any person other than of the Caucasian race or to any entity of which any person other than that of said race shall be a member, stockholder, officer or director.”⁴⁴⁶ By helping preserve segregation and a system of racial hierarchy, such covenants are yet another example of the enduring effects of slavery.

Racially restrictive covenants began appearing in the late nineteenth century and were first directed against Chinese and Punjabi residents in California.⁴⁴⁷ By 1900, developers began inserting them into the deeds of homes built in new subdivisions all across the country.⁴⁴⁸ Minneapolis, Minnesota had racially restrictive covenants as early as 1910 and late as 1955.⁴⁴⁹ Further, between 1923 and 1924, real estate boards in Milwaukee, Detroit, Kansas City, Los Angeles, and other cities prohibited their realtors from selling or renting property in white neighborhoods to Black Americans.⁴⁵⁰

In 1917, racial zoning, discussed earlier in this chapter, was declared unconstitutional by the Supreme Court,⁴⁵¹ but the Supreme Court declared that racially restrictive covenants did not violate the constitution in 1926.⁴⁵² The Supreme Court reasoned that the covenant was a contract between private individuals not subject to state control.⁴⁵³

Government officials began promoting racially restrictive covenants as an alternative, constitutional way to maintain segregation.⁴⁵⁴ In 1931, President Herbert Hoover opened the President’s Conference on Home Building and Home Ownership by declaring that single-family homes were “expressions of racial longing” and

⁴⁴² *Id.* at page 111.

⁴⁴³ *Id.* at page 111.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Taylor (2014) *supra*, at page 210.

⁴⁴⁶ Taylor (2014) *supra*, at page 210.

⁴⁴⁷ Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution and Resident Mobility* (2014) p.195.

⁴⁴⁸ Taylor (2014) *supra*, at page 193.

⁴⁴⁹ Ehrman-Solberg et al., *Racial Covenants in Hennepin County*, Retrieved from the Data Repository for the University of Minnesota <<https://doi.org/10.13020/a88t-yb14>> (as of January 21, 2022).

⁴⁵⁰ *Id.* at p. 155.

⁴⁵¹ *Buchanan v. Warley* (1917) 245 U.S. 60.

⁴⁵² *Corrigan v. Buckley* (1926) 271 U.S. 323.

⁴⁵³ *Corrigan v. Buckley* (1926) 271 U.S. 323.

⁴⁵⁴ Rothstein, *supra*, at pp. 81-83.

“[t]hat our people should live in their own homes is a sentiment deep in the heart of our race.”⁴⁵⁵ Conference materials then recommended that all new neighborhoods include “appropriate restrictions,” such as barring the sale of homes to Black Americans.⁴⁵⁶

Federal officials also recommended homeowners form “[r]estricted residential districts’ [which] may serve as protection against persons with whom your family won’t care to associate, provided the restrictions are enforced and are not merely temporary.”⁴⁵⁷ These racially restrictive districts appeared soon afterwards and functioned like bylaws in a neighborhood association and a neighbor could sue to evict a Black family that bought a house in the neighborhood.⁴⁵⁸

Scholars have found that wealthy white communities used restrictive covenants, while white working class communities used a combination of violence and covenants to keep Black Americans from moving into their neighborhoods.⁴⁵⁹

Simultaneously, government actors and real estate agents often used different mechanisms to segregate a neighborhood. The 1936 Federal Housing Administration Underwriting Manual stated that zoning regulations alone are not enough “to assure a homogeneous and harmonious neighborhood. Recorded deed restrictions should strengthen and supplement zoning ordinances... Recommended restrictions include . . . [p]rohibition of the occupancy of properties except by the race for which they are intended [and a]ppropriate provisions for enforcement.”⁴⁶⁰ The 1938 FHA Underwriting Manual stated clearly: “If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.”⁴⁶¹ The Veterans Administration also recommended and frequently demanded that racial covenants be added into the deeds of the mortgages it sponsored.⁴⁶²

As a result, racially restrictive covenants appeared all over the country. By 1940, according to news reports quoted in the 1973 U.S. Commission on Civil Rights Report, 80 percent of homes in Los Angeles contained restrictive covenants barring Black families.⁴⁶³ A survey of 300 developments built between 1935 and 1947 in the suburbs of New York City found that 56 percent of the 300 developments and 85 percent of larger subdivisions had racially restrictive covenants.⁴⁶⁴

The University of Chicago subsidized the home owners’ associations surrounding its campus. From 1933 to 1947, it spent \$100,000 on legal services to defend racially restrictive covenants and evict African Americans who moved into the neighborhood.⁴⁶⁵

⁴⁵⁵ *Id.* at page 103.

⁴⁵⁶ Rothstein, *The Color of Law: A Forgotten History of How Out Government Segregated America* (2017) p. 82.

⁴⁵⁷ *Id.* at p. 61.

⁴⁵⁸ Rothstein, *supra*, at page 127.

⁴⁵⁹ Plotkin’s (1999) ; Brooks’s (2002)

⁴⁶⁰ Rothstein, *supra*, at p. 84.

⁴⁶¹ National Housing Act Underwriting Manual (Feb. 1938) Federal Housing Admin. ¶ 937, p. 110.

⁴⁶² Rothstein, *supra*, at p. 85.

⁴⁶³ *Understanding Fair Housing*, U.S. Commission on Civil Rights, (Feb. 1973) at p. 4.

⁴⁶⁴ Rothstein, *supra*, at p. 79.

⁴⁶⁵ *Id.* at p. 105.

All over the country, white neighbors sued their Black neighbors to prevent them from moving into or to evict them from their legally purchased homes.⁴⁶⁶ In 1942, the Oklahoma Supreme Court not only declared that the property purchased by a Black buyer was void due to a racial covenant, but it also ordered the Black buyer to pay for the court costs and attorney's fees of the white neighbor who sued.⁴⁶⁷ In Westlake in Daly City, California, the neighborhood fined a seller \$16,000 for selling to a Black family, greater than the typical home sale price.⁴⁶⁸

In 1948, the Supreme Court reversed course from its 1926 decision and held that although the government had no control over whether a racially restrictive covenant can be added to a deed, it is unconstitutional for American courts to recognize and enforce the covenants.⁴⁶⁹ Racially restrictive covenants were so widespread by then that three of the Supreme Court justices recused themselves from the case because they owned houses covered by racially restrictive covenants.⁴⁷⁰

Two weeks after the Court announced its decision, FHA commissioner Franklin D. Richards stated that the decision would "in no way affect the programs of this agency," which would make "no change in our basic concepts or procedures."⁴⁷¹ Although the FHA and VA changed their policy on paper to stop insuring housing with racially restrictive covenants, they continued to do so in practice.⁴⁷² In 1952, the FHA commissioner stated that "it was not the purpose of [the FHA] to forbid segregation or to deny the benefits of the National Housing Act to persons who might be unwilling to disregard race, color, or creed in the selection of their purchasers or tenants."⁴⁷³

Although racially restrictive covenants were declared unconstitutional in 1948, their popularity continued for decades.⁴⁷⁴ White residents of racially homogeneous neighborhoods continue to enforce them among themselves via coercive social norms.⁴⁷⁵ John F. Kennedy, Ronald Reagan, and George W. Bush all lived in neighborhoods or homes with racially restrictive covenants.⁴⁷⁶ The home that George W. Bush bought in 2008 was located where the neighborhood association enforced a racially restrictive covenant until 2000.⁴⁷⁷ In Myers Park, a neighborhood in Charlotte, North Carolina, the housing association appeared to be enforcing its racially restrictive covenant in 2010, when it added the covenant to its website.⁴⁷⁸

⁴⁶⁶ See, e.g., *Corrigan v. Buckley*, 271 U.S. 323; *Torrey v. Wolfes*, 6 Fed. 2d 702; *Russell v. Wallace*, 30 Fed. 2d 981; *Cornish v. O'Donogue*, 30 Fed. 2d 983; *Edwards v. West Woodridge Theater Co., Inc.*, 55 Fed. 2d 524; *Koehler v. Rowland*, 275 Mo. 573; *Queensborough Land Co. v. Cazeaux (La.)* 67 So. 641; *Chandler v. Ziegler*, 88 Colo. 1; *Porter v. Johnson*, 232 Mo. App. 1150; *Steward v. Cronan*, 105 Colo. 393,

⁴⁶⁷ *Lyons v. Wallen* (1942) 133 P.2d 555

⁴⁶⁸ Rothstein, *supra*, at p. 89.

⁴⁶⁹ *Shelley v. Kraemer* (1948) 334 US 1

⁴⁷⁰ Taylor (2014), *supra*, at p. 217.

⁴⁷¹ Rothstein, *supra*, at p. 85.

⁴⁷² Taylor (2014), *supra*, at p. 241.

⁴⁷³ Rothstein, *supra*, at p. 88.

⁴⁷⁴ Rose, *Hidden In Old Home Deeds, A Segregationist Past*, NPR (Feb. 6, 2010)

⁴⁷⁵ [citation]

⁴⁷⁶ Taylor (2014), *supra*, at pp. 223-224.

⁴⁷⁷ Taylor (2014), *supra*, at p. 224.

⁴⁷⁸ *Id.* at p. 223

A. California

California pioneered the use of racially restrictive covenants and they were widely used throughout the state.⁴⁷⁹ Like the rest of the country, although racially restrictive covenants were private contracts, they worked in conjunction with federal policy to devalue Black property and prevent Black Americans from accessing home loans. The Home Owners' Loan Corporation maps for Pasadena devalued a neighborhood because its restrictive covenants had expired, potentially allowing Black Americans to move in: "This district was originally much smaller but constant infiltration into other sections as deed restrictions expired has create[d] [sic] a real menace which is greatly concerning property owners of Pasadena and Altadena."⁴⁸⁰

In southern California, after its founding in 1903, the Los Angeles Realty Board campaigned to attach racially restrictive land covenants on as many new developments as possible.⁴⁸¹ Paul R. Williams, a prominent Black Los Angeles architect who designed houses for Frank Sinatra, Lucille Ball, Desi Arnaz, and Cary Grant, could not legally live in the neighborhoods he designed due to restrictive covenants.⁴⁸² Williams taught himself to draw upside down because his white clients were uncomfortable sitting next to him and toured construction sites with hands clasped behind his back to avoid the situation where someone would refuse to shake a Black man's hand.⁴⁸³

From 1937 to 1948, more than 100 lawsuits attempted to enforce covenants and evict Black families from their homes in Los Angeles.⁴⁸⁴ In one 1947 case, a Black homeowner refused to leave the home he bought in violation of a covenant and he was jailed.⁴⁸⁵ In Whittier, a Los Angeles suburb, the Quaker-affiliated Whittier College participated in a restrictive covenant applied to its neighborhood.⁴⁸⁶

In 1943, the city attorney of Culver City, an all-white suburb of Los Angeles, told a meeting of air raid wardens that when they went door to door to make sure families turned off the lights to avoid helping Japanese bombers find targets to also circulate documents in which homeowners promised not to sell or rent to African Americans.⁴⁸⁷

In 2000, a California law ordered homeowner associations to remove racial restrictions from their covenants and to enable individual homeowners to remove clauses from their deeds.⁴⁸⁸

XII. Racial Terrorism

⁴⁷⁹ [citation]

⁴⁸⁰ [HOLC map citation]; California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Joseph Gibbons, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁴⁸¹ Kilgore, Los Angeles Land Covenants, Redlining; Creation and Effects, Los Angeles Public Library (June 22, 2020) <<https://lapl.org/collections-resources/blogs/lapl/los-angeles-land-covenants-redlining-creation-and-effects>> (as of June 17, 2021).

⁴⁸² Bates, *A Trailblazing Black Architect Who Helped Shape L.A.* (June 22, 2012) National Public Radio <<https://www.npr.org/2012/06/22/155442524/a-trailblazing-black-architect-who-helped-shape-l-a>> (as of June 15, 2021).

⁴⁸³ *Id.*

⁴⁸⁴ Rothstein, *supra*, at pp. 80-81.

⁴⁸⁵ Rothstein, *supra*, at pp. 80-81.

⁴⁸⁶ *Id.* at p. 105.

⁴⁸⁷ *Id.* at p. 82.

[⁴⁸⁸ Taylor (2014), *supra*, at p. 225.

A. Nationally

As discussed in the Racial Terror chapter of this report, white Americans used racial terror and vigilante violence to prevent Black Americans from moving into white neighborhoods.⁴⁸⁹ The police often did not investigate or failed to arrest the perpetrators when crosses were burned on lawns, homes were bombed, and Black homeowners were murdered.⁴⁹⁰

B. California

Like elsewhere in the country, white Californians used violence to enforce the racial hierarchy created during slavery by preventing Black Americans from moving into desirable white neighborhoods.⁴⁹¹ In fact, violent incidents in California rose in the 1950s and 1960s, after courts declared restrictive covenants unenforceable.⁴⁹²

Ku Klux Klan terror and violence reached a peak in the Los Angeles area in the spring of 1946.⁴⁹³ Although KKK meetings were banned in California in May 1946 after the murder of the Short family who had been living in Fontana, California, as discussed in the Racial Terror chapter, the ban had little to no effect because no one enforced it.⁴⁹⁴ Of the 27 KKK actions (e.g., cross-burnings, fires, and threatening letters and phone calls) documented in Los Angeles in 1946, more than half occurred after the issuance of the ban.⁴⁹⁵ In a span of two weeks in May 1946, there were four separate actions, ranging from cross-burnings to severe physical beatings.⁴⁹⁶ One was targeted at a Black family that lived in an all-white neighborhood, and the others were targeted at white individuals who advocated against restrictive covenants.⁴⁹⁷ Law enforcement and the mayor shrugged off the violence as “pranks.”⁴⁹⁸ When concerned residents and members of social justice organizations approached the mayor to address the incidents, the mayor accused them of prejudice against the KKK.⁴⁹⁹

Los Angeles continued to be the epicenter of the violence in California, as Black residents who moved into white neighborhoods were met with verbal threats, cross-burnings, bombings, rock throwing, graffiti, and other acts of vandalism.⁵⁰⁰ Of the over 100 incidents of move-in bombings and vandalism that occurred in Los Angeles between 1950 and 1965, only one led to an arrest and prosecution.⁵⁰¹

Los Angeles was not the only area where the KKK attacked Black homeowners. In 1946, for instance, a home built by a Black war veteran was burned down in Redwood City after threats and move-out demands.⁵⁰² In 1952, in a white Bay Area neighborhood, a Black family became the target of death threats, violence, and

⁴⁸⁹ See Chapter 3, Racial Terror

⁴⁹⁰ *Ibid.*

⁴⁹¹ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020) p. 326.

⁴⁹² LOS ANGELES CITYWIDE HISTORIC CONTEXT STATEMENT Context: African American History of Los Angeles, City of Los Angeles Department of City Planning Office of Historic Resources (Feb. 2018) at p. 45.

⁴⁹³ Hudson, *supra*, at p. 203.

⁴⁹⁴ Hudson, *supra*, at p. 205.

⁴⁹⁵ Hudson, *supra*, at p. 205.

⁴⁹⁶ Hudson, *supra*, at p. 203.

⁴⁹⁷ Hudson, *supra*, at p. 203.

⁴⁹⁸ Hudson, *supra*, at p. 203.

⁴⁹⁹ Hudson, *supra*, at p. 203.

⁵⁰⁰ *Color of Law, supra*, at p. 257.

⁵⁰¹ *Color of Law, supra*, at p. 257.

⁵⁰² Haas, *supra*, at p. 27.

intimidation by white residents after the family refused a buyout of their home.⁵⁰³ A KKK cross was placed on their lawn and a 300 to 400 person mob stoned their home and shouted threats.⁵⁰⁴ Though the action happened in front of law enforcement, officers refused to make any arrests.⁵⁰⁵ Even when the Governor, Attorney General, and local district attorney ordered the city police and county sheriff to provide the family with protection, protests and harassment continued for months without any arrests.⁵⁰⁶ And in the 1950s, the weekend home of a San Francisco NAACP leader was mysteriously burned down.⁵⁰⁷ The violence and subsequent silence surrounding the crimes committed against Black Californians demonstrates how white Californians viewed Black presence and homeownership as a threat to white dominance.⁵⁰⁸

XIII. Housing Segregation Today

Housing segregation and its effects have never been eliminated in the United States.⁵⁰⁹ The racist housing policies and practices of the federal, state, and local governments have amplified private action, and continues to shape the American landscape today.⁵¹⁰

Although residential segregation between Black and white Americans in the United States peaked between 1960 and 1970,⁵¹¹ America is more segregated today for Black Americans than it was in 1940. While in 1940, the typical Black person lived in a neighborhood that was 40 percent white, in 2010, the typical Black person lived in a neighborhood that was 35 percent white.⁵¹² By contrast, in 2010, the typical white person lived in a neighborhood that was 75 percent white.⁵¹³ Even though white areas have become less solidly white since 1980, they have not become significantly more Black.⁵¹⁴ Today, 90 percent of Black Americans live in cities,⁵¹⁵ and 41 percent of the Black population of American metro areas live in city neighborhoods that are majority Black.⁵¹⁶

Housing segregation is more intractable than other forms of segregation and discrimination, like employment and entertainment.⁵¹⁷ Moving from an urban apartment to a suburban single family home is more difficult than registering to vote, eating at a restaurant, or even being bussed to a nearby school, and requires potentially generations of effort.⁵¹⁸ The Fair Housing Act of 1968 prohibited future discrimination, but did not fix the

⁵⁰³ Haas, *supra*, at p. 27; Color of Law, *supra*, at p. 245.

⁵⁰⁴ Haas, *supra*, at p. 27; Color of Law, *supra*, at p. 245.

⁵⁰⁵ Haas, *supra*, at p. 27; Color of Law, *supra*, at p. 245.

⁵⁰⁶ Color of Law, *supra*, at p. 245.

⁵⁰⁷ Haas, *supra*, at p. 27.

⁵⁰⁸ Hudson, *supra*, at pp. 168, 207.

⁵⁰⁹ The Roots of Structural Racism [pincite]

⁵¹⁰ Rothstein 177

⁵¹¹ Logan & Stults, The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census (Mar. 2011) p. 2

⁵¹² *Ibid.*

⁵¹³ *Id.* at 3

⁵¹⁴ *See ibid.*

⁵¹⁵ Perry et al., *supra* note 15, at p. 10.

⁵¹⁶ *Ibid.*

⁵¹⁷ Rothstein, *supra*, at p. 177

⁵¹⁸ Rothstein, *supra*, at p. 179

structures put in place by 100 years of discriminatory government policies.⁵¹⁹ Richard Rothstein argues that residential desegregation requires a massive effort of social engineering.⁵²⁰

No such massive effort has occurred. Instead, the Supreme Court has created a rule that makes private lawsuits fighting housing discrimination more difficult,⁵²¹ and housing discrimination persists in new and different ways.⁵²² Policies that may not seem to discriminate at first glance have reinforced the structures put in place by past racist government actions.⁵²³

A. The Supreme Court

In 1977, the Supreme Court upheld a zoning ordinance in a mostly white suburb of Chicago, which banned the construction of apartment buildings anywhere except next to a commercial area.⁵²⁴ The neighborhood in question had been zoned for single family houses without change since 1959.⁵²⁵ This zoning ordinance effectively prevented lower income residents and people of color, including Black families, from moving into the neighborhood.⁵²⁶

Even though there was evidence that white residents who lobbied the city council had racial intent, the Supreme Court decided that the city council members themselves had no discriminatory intent when it voted for the zoning ordinance.⁵²⁷ With *Arlington Heights* and the cases that followed, the Supreme Court essentially announced a rule that in order to prove that a law, regulation, or practice is unconstitutional, plaintiffs must prove that the decision makers intended to discriminate.⁵²⁸

This line of Supreme Court cases has made proving current housing discrimination and erasure of the effects of old government policies of housing segregation very difficult.⁵²⁹ In other words, it very difficult to bring a successful housing discrimination lawsuit.

B. Continued Housing Discrimination

Mortgage and housing discrimination continues in many forms today. Researchers continue to find that Black residents are charged higher prices for identical units in the same neighborhood as white residents.⁵³⁰ Lenders

⁵¹⁹ Rothstein, *supra*, at p. 180

⁵²⁰ Rothstein, *supra*, at p. 178

⁵²¹ Rothstein, *supra*, at pp. 53-54

⁵²² Rothstein, *supra*, at pp. 179-180

⁵²³ Rothstein, *supra*, at p. 180

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⁵²⁵ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S. 252, 255

⁵²⁶ *Arlington Heights* pincite

⁵²⁷ *Arlington Heights* pincite

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⁵²⁹ Rothstein 177

⁵³⁰ Early, Dirk et al., *Racial Rent Differences in U.S. Housing Markets* (2019) 59 J. Regional Sci. 669, 671, Early et al., *supra* note 3, at 670.

use predatory lending practices more often in predominantly Black than white neighborhoods.⁵³¹ Indeed, homeowners in segregated Black neighborhoods are more likely to have subprime mortgages.⁵³²

Before 2008, Black and Latino borrowers were four times more likely to receive a more expensive mortgage than white borrowers, a practice called reverse redlining.⁵³³ Big banks across the country used reverse redlining to target communities of color with higher interest rates and fees.⁵³⁴ Before 2008, banks specifically targeted Black and Hispanic homeowners to advertise toxic subprime mortgages and other predatory practices that triggered the Great Recession.⁵³⁵ Black homeowners received toxic subprime mortgages at three times the rate of white mortgage lenders.⁵³⁶

In Memphis, employees of Wells Fargo Bank referred to these loans as “ghetto loans[,]” and bank supervisors targeted Black zip codes because they believed that residents “weren’t savvy enough[.]”⁵³⁷ According to the U.S. Department of Justice in 2010, the more segregated a community, the more likely lenders targeted the homeowners for toxic loans, and the more likely the home was foreclosed.⁵³⁸

As a result, Black and Latino homeowners, were hit particularly hard by the 2008 crisis.⁵³⁹ From 2001 to 2019, the rate of Black homeownership declined five times as much as the homeownership rate for white families,⁵⁴⁰ erasing all the gains made since the passage of the Fair Housing Act in 1968.⁵⁴¹ Homes in Black neighborhoods were more likely to be foreclosed than homes in white neighborhoods.⁵⁴² By 2011, a quarter of Black homeowners had either lost their homes to foreclosure or were “seriously delinquent” on their mortgages.⁵⁴³

In settling a lawsuit against the Countrywide mortgage company, the federal Secretary of Housing and Urban Development said that due to Countrywide’s discriminatory practices, “[f]rom Jamaica, Queens, New York, to

⁵³¹ <https://www.jstor.org/stable/24361645>

⁵³² Derek S. Hyra, Gregory D. Squires, Robert N. Renner & David S. Kirk (2013) Metropolitan Segregation and the Subprime Lending Crisis, *Housing Policy Debate*, 23:1, 177-198, DOI: 10.1080/10511482.2012.697912

⁵³³ <https://www.jstor.org/stable/24361645>

⁵³⁴ See, e.g., *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, USDOJ (Dec. 21, 2011) <<https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>> (as of Jul. 12, 2021), Powell, *Memphis Accuses Wells Fargo of Discriminating Against Blacks*, *The New York Times* (Dec. 30, 2009), *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* USDOJ (Jul. 12, 2012) <<https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>> (as of Jul. 12, 2012).

⁵³⁵ Rothstein, *supra*, at p. 111.

⁵³⁶ Rothstein 111

⁵³⁷ Rothstein 112

⁵³⁸ <https://www.nytimes.com/2010/05/31/business/economy/31memphis.html>

⁵³⁹ *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020).

⁵⁴⁰ McCargo, *A Five-Point Strategy for Reducing the Black Homeownership Gap* (Feb. 14, 2019) Urban Institute <<https://urbn.is/3haMKGv>> (as of June 25, 2021).

⁵⁴¹ Goodman et al., *Are Gains in Black Homeownership History?* (Feb. 14, 2017) <<https://urbn.is/35UOPBg>> (as of June 25, 2021).

⁵⁴² Mikhitarian, *How the Housing Bust Widened the Wealth Gap for Communities of Color* (Apr. 25, 2019) Zillow <<https://bit.ly/3wZoaij>> (as of June 25, 2021).

⁵⁴³ Memorandum: A Review of the State of and Barriers to Minority Homeownership, before House Com. On Financial Services, 116th Cong., 1st Sess., at p. 2 (2019), memorandum prior to hearing.

Oakland, California, strong, middle-class African American neighborhoods saw nearly two decades of gains reversed in a matter of not years—but months.”⁵⁴⁴

Despite multiple lawsuits brought by the U.S. Department of Justice⁵⁴⁵ and by cities like Baltimore,⁵⁴⁶ Memphis,⁵⁴⁷ and Cleveland,⁵⁴⁸ the mortgage industry continues to discriminate against Black home buyers. From July 2019 to June 2020, Black mortgage applicants were 2.5 times more likely than white applicants to be rejected for mortgages.⁵⁴⁹ Studies continue to show that Black mortgage borrowers pay more in financing fees,⁵⁵⁰ mortgage insurance,⁵⁵¹ and property taxes.⁵⁵²

Compared to white buyers, Black home buyers go into more debt for homes that are valued less.⁵⁵³ Black homeowners who apply to refinance their homes are denied over 30 percent of the time, compared to 17 percent of white homeowners.⁵⁵⁴ This makes it more difficult for Black homeowners to make necessary repairs to their homes and to move out of dilapidated homes.⁵⁵⁵ These trends have continued even as mortgage lending has become more automated and internet based in recent years.⁵⁵⁶

C. California

California remains racially segregated,⁵⁵⁷ although Black-white segregation has decreased since 1980 in cities like Los Angeles, Oakland, and Riverside.⁵⁵⁸

There is also evidence that lenders discriminate against Black Americans in California. For example, one study found that in 2019, despite making up 5.5 percent of the state’s population, Black Californians received only 3.28 percent of home purchase loans.⁵⁵⁹ The magnitude of this disparity varies across metro areas in the state.⁵⁶⁰ Another study found that in 2013, Black Californians made up 2.7 percent of all home mortgage loan

⁵⁴⁴ Remarks of Sec. Donovan during Countrywide Settlement Press Conference, U.S. Dept. Justice (Dec. 21, 2011).

⁵⁴⁵ [citation to complaint]

⁵⁴⁶ [citation to complaint]

⁵⁴⁷ [citation to complaint]

⁵⁴⁸ [citation to complaint]

⁵⁴⁹ <https://www.nar.realtor/newsroom/nar-finds-black-home-buyers-more-than-twice-as-likely-to-have-student-loan-debt-be-rejected-for>

⁵⁵⁰ <https://www.nytimes.com/2021/08/17/realestate/new-york-black-homeowners.html>

⁵⁵¹ <https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf>

⁵⁵² <https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf>

⁵⁵³ <https://www.urban.org/urban-wire/three-differences-between-black-and-white-homeownership-add-housing-wealth-gap>

⁵⁵⁴ <https://www.lendingtree.com/home/mortgage/lendingtree-study-black-homebuyers-more-likely-to-be-denied-mortgages-than-other-homebuyers/>

⁵⁵⁵ Taylor (2014), *supra*, at p. 153, 179-180, 183, *see also* Carter, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) at p. 37

⁵⁵⁶ <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>

⁵⁵⁷ https://belonging.gis-cdn.net/us_segregation_map/?year=2020&bounds=42.81%2C-101.46%2C31.93%2C-131.48&geoid=42020

⁵⁵⁸ Logan & Stults, *supra* note 19, at pp. 6-9. See Appendix A for segregation measurements in these cities.

⁵⁵⁹ Elhalaby, Greenlining Inst., Home Lending to Communities of Color in California (Nov. 2020) p. 7.

⁵⁶⁰ See Appendix A for data on inequity in home purchase loans in California metro areas.

applicants, received 2.4 percent of all home mortgage loans originated, and received 1.7 percent of all home mortgage loan dollars in the state.⁵⁶¹

XIV. Effects

Once federal, state, and local governments, along with private actors, segregated the American landscape, they directed resources to white neighborhoods, and neglected Black neighborhoods. In 1967, President Lyndon B. Johnson appointed the National Advisory Commission on Civil Disorders to investigate the causes of the racial violence in the summer of 1967.⁵⁶² The report concluded that: “[S]egregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans.”⁵⁶³ The subsequent chapters on environment and infrastructure, education, health, labor, and wealth will discuss these persisting effects of slavery in detail.

Segregated black communities have less access to public transit and must deal with longer commute times, which contributes to higher rates of unemployment among Black Americans.⁵⁶⁴ In the past, local governments delayed providing public services like water and sewage at first.⁵⁶⁵ Once the services were eventually provided to Black neighborhoods, they were provided less often.⁵⁶⁶ Today, many all-black neighborhoods depend on aging water and sewage infrastructure and unreliable supplies.⁵⁶⁷ Local governments did not invest as much in road and street services in black neighborhoods, and the roads are less safe for pedestrians and cyclists.⁵⁶⁸

Black communities pay more for energy because they live in older energy-inefficient homes.⁵⁶⁹ Oil and gas extractions are more likely to be in Black neighborhoods, leading to environmental pollution.⁵⁷⁰ Segregated black neighborhoods are less likely to have access to parks and greenspace, and are less likely to have tree cover.⁵⁷¹ Tree cover cools neighborhoods during the summer and absorbs air pollution. Higher temperatures during the summer results in more heat related illnesses and exposure to more air pollution results in respiratory illness, both which occur more often in segregated neighborhoods.⁵⁷² A lack of greenspace also deprives Black

⁵⁶¹ Werblin et al., Greenlining Inst., Locked Out of the Market: Poor Access to Home Loans for Californians of Color (June 2017) p. 9.

⁵⁶² National Advisory Commission on Civil Disorders (1967). The Kerner Report. Princeton University Press. p. 2.

⁵⁶³ National Advisory Commission on Civil Disorders (1967). The Kerner Report. Princeton University Press. p. 2.

⁵⁶⁴ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>;
<https://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities/sanchez-moving-to-equity-transportation-policies.pdf>

⁵⁶⁵ https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf;

⁵⁶⁶ https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf;

⁵⁶⁷ <https://oehha.ca.gov/media/downloads/water/report/hrtwachievinhrtw2021f.pdf>

⁵⁶⁸ <https://www.brookings.edu/blog/the-avenue/2019/08/28/to-build-safe-streets-we-need-to-address-racism-in-urban-design/>;

https://www.apha.org/~media/files/pdf/topics/environment/built_environment/srtsnp_equitytransp_factsheet2015.ashx

⁵⁶⁹ <https://www.sierraclub.org/sierra/redlining-restorative-justice>

⁵⁷⁰ <https://naacp.org/resources/fumes-across-fence-line-health-impacts-air-pollution-oil-gas-facilities-african-american>

⁵⁷¹ <https://www.tpl.org/parks-and-an-equitable-recovery-parkscore-report>;

<https://www.sciencedirect.com/science/article/abs/pii/S0169204616300846>; Borunda, How ‘Nature Deprived’ Neighborhoods Impact the Health of People of Color, (July 29, 2020) Nat. Geographic <<https://www.nationalgeographic.com/science/article/how-nature-deprived-neighborhoods-impact-health-people-of-color>> (as of June 22, 2021).

⁵⁷² Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure* (Mar. 2019) Proceedings of the National Academy of Sciences <<https://pubmed.ncbi.nlm.nih.gov/30858319/>> (as of June 22, 2021).

communities, and especially poor Black communities, of the benefits of nature, especially beneficial for child development.⁵⁷³

Segregation has concentrated poverty in Black and Latino neighborhoods in America, and is associated with worse outcomes in almost every aspect of life. Neighborhood poverty rates are three times higher in segregated communities of color than in white neighborhoods.⁵⁷⁴ Segregation is associated with lower high school graduation, lower earnings, and single motherhood among Black Americans.⁵⁷⁵ Residents of segregated neighborhoods have more illnesses and die younger.⁵⁷⁶ Residential segregation is a major contributing factor to the Black and white wealth gap, as discussed in Chapter 13 on wealth. Homes in segregated black neighborhoods tends to be older, smaller, and on more densely settled lots than in disproportionately white neighborhoods.⁵⁷⁷ According to U.S. Census Bureau, the median home value in majority Black neighborhoods is \$149,217, while the median home value in neighborhoods that are less than one percent Black is \$306,511.⁵⁷⁸ School districts are funded by local tax bases, which are determined by home values, so Black and Latino segregated local districts receive less funds, fewer resources, and less experienced teachers than white school districts. Further, as Joseph Gibbons testified during the December 7, 2021 Task Force meeting, gentrification has many negative effects on Black Americans beyond the obvious displacement of Black Americans, such as higher rates of stress and other adverse health effects.⁵⁷⁹

Some researchers have argued that segregation plays an important role in the racial disparity among unhoused individuals.⁵⁸⁰ Throughout American history, significant numbers of Black Americans have been unhoused,⁵⁸¹ although specific data based on race is not always available.⁵⁸² The story of Black Americans experiencing homelessness has often been left out, underreported, or misrepresented.⁵⁸³

Many enslaved people seeking freedom became unhoused after escaping bondage.⁵⁸⁴ After the Civil War, close to four million Black Americans were unhoused.⁵⁸⁵ Black Americans were hit the hardest during the Great Depression, were excluded from many private agencies offering aid and the benefits of the New Deal, and many

⁵⁷³ *Id.*

⁵⁷⁴ <https://belonging.berkeley.edu/roots-structural-racism>

⁵⁷⁵ Carter, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) at p. 37

⁵⁷⁶ Richardson et al., Nat. Community Reinvestment Coalition, The Lasting Impact of Historic “Redlining” on Neighborhood Health: Higher Prevalence of COVID-19 Risk Factors (2020) pp. 23, 26-27.

⁵⁷⁷ *Id.* at 13.

⁵⁷⁸ *Id.* at 11.

⁵⁷⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Joseph Gibbons, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁵⁸⁰ Carter, From Exclusion to Destitution: Race, Affordable Housing, and Homelessness, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) at p. 37; <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html>

⁵⁸¹ Johnson, African Americans and Homelessness: Moving Through History, *Journal of Black Studies* (2010) vol. 40, no. 4 pp. 583–605 <www.jstor.org/stable/40648529> [as of July 23, 2021]

⁵⁸² Johnson 596.

⁵⁸³ Johnson 601

⁵⁸⁴ Johnson, African Americans and Homelessness: Moving Through History, *Journal of Black Studies* (2010) vol. 40, no. 4 pp. 583–605, p. 584 <www.jstor.org/stable/40648529> [as of July 23, 2021]

⁵⁸⁵ Johnson, p. 587.

became unhoused.⁵⁸⁶ During the Post World War II period, between nine to 40 percent of Skid Row residents were Black men, depending on the city.⁵⁸⁷ However, the number of Black Americans who have been unhoused is relatively small when considering the number of impoverished or unemployed Black Americans.⁵⁸⁸ Scholars have attributed this to the robust family and neighborhood support systems of Black communities.⁵⁸⁹

In the last 50 years, the number of Black unhoused individuals has risen.⁵⁹⁰ Black Americans now make up 39 percent of people experiencing homelessness and 53 percent of families experiencing homelessness with children.⁵⁹¹ Scholars have attributed this to the compounding harms of urban renewal,⁵⁹² loss of blue collar jobs,⁵⁹³ the crack cocaine epidemic,⁵⁹⁴ historical and continued housing discrimination,⁵⁹⁵ mass incarceration,⁵⁹⁶ lack of access to health insurance and mental health services,⁵⁹⁷ and lack of affordable housing.⁵⁹⁸

Due to the effects of government segregation policy,⁵⁹⁹ Black Americans earn less and are more likely to be renters than white Americans, making them more vulnerable to homelessness. In general, renters are more likely to be homeless.⁶⁰⁰ Because government policies have historically crippled the ability of Black households to purchase houses, they are more likely to be renters than white households.⁶⁰¹ One study found that Black renters continue to pay more than white renters for similar housing in similar neighborhoods.⁶⁰²

Because Black families are more likely to be impoverished, the housing shortage is more likely to affect Black households.⁶⁰³ In the country, there are only 37 rental homes for every 100 extremely low-income renter households, defined as households with incomes at or below the poverty level, or 30 percent of the median income of the geographic area.⁶⁰⁴ Twenty percent of Black households are extremely low-income renters, compared with six percent of white non-Hispanic households.⁶⁰⁵

Black families are more likely to be rent burdened, which is generally defined as a household that spends more than 30 percent of monthly income on housing.⁶⁰⁶ Although the percentage of rent-burdened Black families has

⁵⁸⁶ Johnson p. 592-93

⁵⁸⁷ Johnson 596

⁵⁸⁸ Johnson 596

⁵⁸⁹ Johnson 596

⁵⁹⁰ Johnson 600

⁵⁹¹ The 2020 Annual Homeless Assessment Report (AHAR) to Congress, p1

⁵⁹² Johnson 600

⁵⁹³ Johnson 600

⁵⁹⁴ Johnson 600

⁵⁹⁵ "Housing Discrimination against Racial and Ethnic Minorities 2012," HUD. 2013

⁵⁹⁶ <https://core.ac.uk/download/pdf/6350111.pdf>

⁵⁹⁷ https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2017.pdf

⁵⁹⁸ <https://www.thecommunityguide.org/sites/default/files/publications/he-AJPM-evrev-housing.pdf> at p.

⁵⁹⁹ <https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness>

⁶⁰⁰ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁶⁰¹ Rothstein, *supra*, at pp. 180-183.

⁶⁰² *Id.* at 671.

⁶⁰³ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁶⁰⁴ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁶⁰⁵ <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>

⁶⁰⁶ American Housing Survey Data.

decreased in the past five years, a majority of Black renter families in 2019, the last year for which data is available, still spent over 30 percent of their income on rent.⁶⁰⁷

A. California

State and local urban renewal, highway construction, and gentrification have destroyed Black communities throughout the state. In the 1960s, vibrant communities like San Francisco's Fillmore district and Los Angeles's Sugar Hill have been reduced to rubble or an eight lane highway. Today, segregated neighborhoods in California are often populated by a mix of Black and Hispanic residents,⁶⁰⁸ and are more vulnerable to be displaced by gentrification.⁶⁰⁹

One study found that five of the 20 most rapidly gentrifying cities from 2013 to 2017 were in California: San Francisco-Oakland (1), San Jose (8), Sacramento (10), San Diego (14), and Los Angeles (15).⁶¹⁰ In many California cities today, gentrification (characterized by "economic and demographic shifts in historically disinvested neighborhoods") is concentrated in formerly redlined neighborhoods.⁶¹¹ Close to 90 percent of currently gentrifying areas in San Francisco were formerly redlined or rated "definitely declining" by the Home Owners' Loan Corporation, as were 83 percent of gentrifying areas in the East Bay and 87 percent of gentrifying areas in San Jose.⁶¹² According to the U.S. census, in the 1970s, 10 percent of San Francisco's population identified as Black, compared to five percent today.⁶¹³

Darrell Owens testified during the December 7, 2021 Task Force meeting that census data shows that Black Americans have been displaced from California for decades.⁶¹⁴ In particular and more recently, Blacks are leaving Alameda County and Los Angeles County.⁶¹⁵ In addition to the residents who leave the state altogether, many are moving inland and many Black Californians are moving away from the more costly coastal cities in search of affordable housing.⁶¹⁶ For example, located just south of Sacramento, Elk Grove has seen a 51,000 percent increase in Black residents since 1990.⁶¹⁷ Similarly, as the population of Black residents plunged 45 percent in Compton, 43 percent in San Francisco, and 40 percent in Oakland, the San Joaquin-Sacramento Delta, Southern California's Inland Empire, and the Central Valley have all seen increases in their Black

⁶⁰⁷ American Housing Survey Data.

⁶⁰⁸ <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html>

⁶⁰⁹ *Redlining and Gentrification*, University of California Berkeley Urban Displacement Project <<https://bit.ly/3h6XCFd>> (as of June 25, 2021).

⁶¹⁰ Richardson et al., *Gentrification and Divestment 2020* (June 2020) Nat. Community Reinvestment Coalition <<https://ncrc.org/gentrification20/>> (as of June 25, 2021).

⁶¹¹ *Redlining and Gentrification*, University of California Berkeley Urban Displacement Project <<https://bit.ly/3h6XCFd>> (as of June 25, 2021).

⁶¹² *Ibid.*

⁶¹³ <https://www.kqed.org/news/11825401/how-urban-renewal-decimated-the-fillmore-district-and-took-jazz-with-it>

⁶¹⁴ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Darrell Owens, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁶¹⁵ *Ibid.*

⁶¹⁶ Hepler, Lauren. "The Hidden Toll of California's Black Exodus." *Cal Matters*, 2020. <https://calmatters.org/projects/california-black-population-exodus/>.

⁶¹⁷ Hepler, Lauren. "The Hidden Toll of California's Black Exodus." *Cal Matters*, 2020. <https://calmatters.org/projects/california-black-population-exodus/>.

population.⁶¹⁸ Overall, the Black population in California is projected to increase almost 40 percent between 1999 and 2040, which is slower than the projected total population increase for the state of 72 percent.⁶¹⁹

In writing about the gentrification of her historically Black neighborhood of Inglewood in Los Angeles, Erin Aubry Kaplan says, “Black presence has value — in every sense of the word, and on its own terms. That value should make the casual displacement of Black people untenable, even immoral.”⁶²⁰

More Californians experience homelessness than any other state in the country.⁶²¹ Nearly a quarter of all unhoused Americans live in California.⁶²² Black Californians experiencing homelessness is a more acute crisis than in the rest of the country. Black people account for 6.5 percent of Californians but nearly 40 percent of the state’s unhoused individuals.⁶²³ Nationally, Black people account for 13.4 percent of the population and are 39.4 percent of the unhoused population.⁶²⁴

In addition to experiencing homelessness, as with the rest of the country, Black Californians are more likely to be renters than white Californians.⁶²⁵ In the last decade, Black Californians were less likely to own a home than in the 1960s, when housing discrimination was legal.⁶²⁶ The Black homeownership rate in California has dropped almost 10 percent since 2004 and has not recovered.⁶²⁷ Sixty-eight percent of white Californians own a home, compared with 41 percent of Black Californians.⁶²⁸ One study shows that Proposition 13, which limits property taxes for homeowners by essentially freezing property tax assessment at the last date of purchase, has benefited white homeowners more than Black homeowners in California.⁶²⁹ Fifty-eight percent of the state’s

⁶¹⁸ Hepler, Lauren. “The Hidden Toll of California’s Black Exodus.” *Cal Matters*, 2020. <https://calmatters.org/projects/california-black-population-exodus/>.

⁶¹⁹ Reyes, Belinda. “A Portrait of Race and Ethnicity in California; An Assessment of Social and Economic Well-Being.” *Public Policy Institute of California*. https://www.ppic.org/wp-content/uploads/content/pubs/report/R_201BRR.pdf pp 12.

⁶²⁰ Kaplan, *Is My Little Library Contributing to the Gentrification of my Black Neighborhood?* N.Y. Times, Dec. 5, 2021 <<https://www.nytimes.com/2021/12/05/opinion/gentrification-los-angeles-little-library.html>> (as of January 20, 2022).

⁶²¹ <https://www.usich.gov/homelessness-statistics/ca/>

⁶²² <https://www.usich.gov/homelessness-statistics/ca/>

⁶²³ Cimini, *Black people disproportionately homeless in California*, CalMatters (Oct. 5, 2019) <<https://calmatters.org/california-divide/2019/10/black-people-disproportionately-homeless-in-california/>> (as of Jul. 12, 2021).

⁶²⁴ Cimini, *Black people disproportionately homeless in California*, CalMatters (Oct. 5, 2019) <<https://calmatters.org/california-divide/2019/10/black-people-disproportionately-homeless-in-california/>> (as of Jul. 12, 2021).

⁶²⁵ *Snapshot of Tenants in California* (2019) Tenants Together <<https://bit.ly/3vWuPIZ>> (as of June 25, 2021); Cal. Assem. Coms. On Housing & Community Development and Banking & Finance, *Addressing Racial Disparities in Housing Background Paper* (Mar. 25, 2021) p. 4.

⁶²⁶ <https://www.calhfa.ca.gov/community/buildingblackwealth.htm>

⁶²⁷ *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020).

⁶²⁸ *Underserved Communities*, California Housing Finance Agency <<https://www.calhfa.ca.gov/community/index.htm>> (as of Jul. 12, 2020).

⁶²⁹ SPUR and The Tax Fairness Project, *Burdens and Benefits: Investigating Prop. 13’s unequal impacts in Oakland*, Research Brief February 2022 <https://www.spur.org/sites/default/files/2022-02/SPUR_Burdens_and_Benefits.pdf> (as of March 14, 2022).

Black renters spent more than 30 percent of their household income on rent.⁶³⁰ In certain neighborhoods like South Los Angeles, over half of Black households pay more than 50 percent of their income on rent.⁶³¹

As a likely result, despite constituting five percent of the state's population, Black Californians comprise nearly 40 percent of unhoused Californians. As Brandon Greene testified during the December 7, 2021 Task Force meeting, Black Americans are disproportionately represented among the unhoused population throughout California.⁶³² Further, according to Greene, anti-homeless laws exclude Black Americans from public spaces—like Jim Crow laws—by empowering police to remove unhoused individuals from public spaces.⁶³³

As with the rest of the country, segregated neighborhoods have fewer access to public transportation by design.⁶³⁴ For example, the Bay Area Rapid Transit (BART) trains run for almost three miles without stopping through Oakland's San Antonio, the most racially diverse and densest part of the Bay Area.⁶³⁵ In contrast, Walnut Creek and Pleasant Hill are less than half as dense in comparison, but the BART stations are only 1.75 miles apart.⁶³⁶ The city designed the BART in the late 1960s to carry white commuters from the suburbs to their urban jobs, bypassing poor Black neighborhoods.⁶³⁷

Segregated communities have less greenspace and are more polluted. Fifty-two percent of Black Californians live in areas deprived of nature, compared to 23 percent of white Californians.⁶³⁸ Their streets and sidewalks are more dangerous.⁶³⁹ Segregated neighborhoods in California are more impoverished⁶⁴⁰ and the homes are undervalued.

The typical Californian Black-owned home is worth 86 percent as much as the typical U.S. home, while the typical white-owned home is worth 108 percent as much as the typical U.S. home.⁶⁴¹ And a study has found that in the Los Angeles-Long Beach-Anaheim and San Francisco-Oakland-Hayward metropolitan areas, houses in majority Black neighborhoods are devalued by 17.1 percent and 27.1 percent, respectively.⁶⁴² This makes it particularly vulnerable to gentrification.⁶⁴³

⁶³⁰ *Snapshot of Tenants in California* (2019) Tenants Together <<https://bit.ly/3vWuPIZ>> (as of June 25, 2021); Cal. Assem. Coms. On Housing & Community Development and Banking & Finance, Addressing Racial Disparities in Housing Background Paper (Mar. 25, 2021) p. 4.

⁶³¹ <https://www.nytimes.com/interactive/2019/12/22/us/los-angeles-homeless-black-residents.html>

⁶³² California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Brandon Greene, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

⁶³³ *Ibid.*

⁶³⁴ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁶³⁵ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁶³⁶ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁶³⁷ <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>

⁶³⁸ Rowland-Shea et al., *The Nature Gap: Confronting Racial and Economic Disparities in the Destruction and Protection of Nature in America* (July 21, 2020, 7:30 AM) Center for American Progress

<<https://www.americanprogress.org/issues/green/reports/2020/07/21/487787/the-nature-gap/>> (as of June 22, 2021).

⁶³⁹ [citation]

⁶⁴⁰ <https://www.cato.org/study/overview-poverty-inequality-california#who-are-californias-poor>

⁶⁴¹ Manhertz, *supra* note 16.

⁶⁴² Perry et al., *The Devaluation of Assets in Black Neighborhoods* (Nov. 27, 2018) Brookings <<https://brook.gs/35T7qNY>> (as of June 25, 2021).

⁶⁴³ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Joseph Gibbons, <<https://oag.ca.gov/ab3121/meetings>> (as of January 20, 2022).

XV. Conclusion

The American government reinforced the effects of slavery by maintaining a racialized caste system and effectuating segregation. Federal, state, and local governments across the country and in California, along with private actors, created separate and unequal cities and neighborhoods for Black and white Americans. Led by the federal government, local governments passed zoning ordinances and state courts enforced racially restrictive covenants to exclude Black Americans from neighborhoods. These actions were amplified by federal housing policy.

When white supremacists burned crosses, bombed houses, harassed, and terrorized Black families moving into white neighborhoods, local governments rarely investigated and prosecuted the perpetrators. Funded by the federal government, local governments first built quality public housing exclusively for white Americans, then built and neglected enormous apartment complexes that concentrated poverty in Black neighborhoods. In the last three decades, local governments then chose to demolish these housing projects, intensifying gentrification and once again displacing Black Americans.

This gentrification is part of a long history of displacement of Black Americans. Erin Aubry Kaplan, a resident of the historically Black neighborhood of Inglewood, California wrote:

“I thought about how fragile my feeling of being settled is. It didn’t matter that I own my house, as many of my neighbors do. Generations of racism, Jim Crow, disinvestment and redlining have meant that we don’t really control our own spaces. In that moment, I had been overwhelmed by a kind of fear, one that’s connected to the historical reality of Black people being run off the land they lived on, expelled by force, high prices or some whim of white people.”⁶⁴⁴

As Kaplan describes, wherever Black Americans settled and prospered throughout American history, federal, state, and local governments, along with private actors, used numerous mechanisms: park and highway construction, slum clearance, and urban renewal to destroy those communities. Across the country, the federal government helped white Americans buy single family homes in the suburbs while crippling the ability for Black Americans to access home loans and buy houses in the neighborhoods that white families left behind.

Almost 150 years of active, conscious federal, state, and local government action and neglect of duty have resulted in compounded harms that are unique to Black Americans.⁶⁴⁵ Housing segregation stole wealth from Black Americans, while building the wealth of white Americans (discussed in Chapter 13). Once segregated, government actors turned urban Black neighborhoods into ghettos by depriving them of public services (discussed in Chapter 7), school funding (discussed in Chapter 6), and encouraged polluting industries to move in (discussed in Chapter 7). As a result, Black Americans suffer higher rates of asthma and other diseases (discussed in Chapter 8). Housing segregation partially created the foundation and exacerbated the over-policing of Black neighborhoods, resulting in the injury and death of Black Americans at the hands of police (discussed in Chapter 12).

These harms have never been adequately remedied.

⁶⁴⁴ Kaplan, *supra*.

⁶⁴⁵ [citation needed]

Chapter 6. Separate and Unequal Education

I. Introduction

A. Nationally

A quality education is the foundation for a good job, income growth, and, in the words of the Supreme Court of California, “for the preservation of the rights and liberties of the people.”¹ During slavery, the government of the United States of America at all levels, including the government of the State of California, deprived 11 generations of Black Americans of the benefits of education.

After slavery, governments in the United States required nearly all Black children to attend segregated schools with far fewer resources and funding than the schools white children attended.² In many schools today, these separate and unequal education conditions continue for Black children. The benefits of a good education—a better job and higher income—build up over generations.³ Just as benefits mount and increase, so too, do the harms. For hundreds of years, governments at all levels in America have inflicted compounding educational harm upon Black children, and they have never made sufficient amends.

During the slavery era, in order to control the Black enslaved people who toiled to build the wealth of this country, enslaving states denied education to nearly all enslaved people.⁴ Free states of the North and Midwest segregated their schools and limited or denied freed Blacks access.⁵ With rare exceptions, Black Americans could not go to college.⁶

After the Civil War, southern states and others on the borders denied equal education to free Black people to maintain a servant class and prevent Black people from voting.⁷ Until 1945, state governments legally

¹ *Piper v. Big Pine Sch. Dist. of Inyo Cty.* (1924) 193 Cal. 664, 668, 673-74.

² Orfield & Jarvie, *Black Segregation Matters: School Resegregation and Black Educational Opportunity*, UCLA Civil Rights Project/Proyecto Derechos Civiles (Dec. 2020) pp. 4-6 <<https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf>> (as of July 1, 2021) (hereafter *Black Segregation Matters*); Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 5.

³ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, pp. 5-6; Tamborini et al., *Education and Lifetime Earnings in the United States* (2015) 54 *Demography* 1383, 1385-1386.

⁴ Sambol-Tosco, *The Slave Experience: Education, Arts & Culture*, Thirteen (2004) p. 2 <<https://www.thirteen.org/wnet/slavery/experience/education/history2.html>> (as of March 5, 2021) (hereafter *The Slave Experience*).

⁵ Sambol-Tosco, *The Slave Experience*, *supra*, at fn. 3, p. 2; Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (2004) p. 52 (hereafter *Silent Covenants*).

⁶ Woodson, *The Education of the Negro Prior to 1861*, *supra*, at fn. 22, Introduction.

⁷ Burnette II, *Do America's Public Schools?*, *supra*, fn. 20; *Jim Crow Laws* (Feb. 21, 2021) History <<https://www.history.com/topics/early-20th-century-us/jim-crow-laws>> (as of June 21, 2021); see also *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 310-13, 311, fn. 10 (noting that Southern states “rapidly instituted racial segregation in their public schools” following the Civil War and discussing the interplay between efforts to restrict literacy and efforts to restrict the vote); Du Bois, *The Souls of Black Folk: Essays and Sketches* (2d ed. 1903); Tyack & Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South* (1986), 94 *Am. J. Ed.* 236, 238-239, 250-252; Anderson, *The Education of Blacks in the South, 1860-1935*

segregated Black children in principally one room schoolhouses with fewer resources and funding than white schools. White terrorist groups, supported by government officials, destroyed Black schools.⁸ In the rest of the nation, government supported housing segregation and neighborhood-based school assignment policies sent most Black children to schools that were separate from white students and unequal with respect to both funding and resources. Most state-funded and private white colleges and universities refused to admit Black students.

The Supreme Court's landmark 1954 case, *Brown v. Board of Education*, which outlawed school segregation on paper, did not mark the end of segregation, as some Americans believe.⁹ Many white government actors throughout the country aggressively resisted integration—shutting down public schools, harassing, threatening, and terrorizing Black students and parents who sought to integrate schools, and providing vouchers for white students to attend newly created private schools.¹⁰ In the rest of the country, government actors created and preserved school segregation through housing segregation and neighborhood-based school assignment policies.

Today, in America, the vast majority of Black children remain locked into unequal schools and classrooms, separate from their white peers. With regard to higher education, predominantly white colleges and universities slowly increased the number of Black students attending for about 40 years following the passage of the Civil Rights Act of 1964. However, in more recent years, the overall number of Black students attending college has declined.

B. California

Before the Civil War, California also denied education to Black Americans or forced them to attend segregated schools with far fewer resources and funding than the schools white children attended.¹¹ For a period of time, California law denied state funding to any schools that taught Black children, and also allowed public school districts to refuse to teach Black children even in a segregated school under certain circumstances.¹² Although California law officially ended segregated schooling for Black students in 1890, as in the rest of the nation,

(1988) pp. 95-96 (“From the vantage point of the southern white majority, any system of universal education for blacks, even industrial education, would potentially lead to universal suffrage.”).

⁸ Coates, *The Case for Reparations*, *The Atlantic* (Jun. 2014) <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>> (as of June 21, 2021); Du Bois & Dill, *The Common School*, *supra*, at fn. 66, p. 117 (in 1909 in one county in Georgia, “five school houses for colored children, with their contents, have been burned” and over the last few years “burning of Negro school houses . . . by white neighbors had been frequent in the gulf states.”).

⁹ *Brown v. Board of Education* (1954) 347 U.S. 483, 495.

¹⁰ Horsford & McKenzie, ‘Sometimes I feel like the Problems Started with Desegregation’: Exploring Black Superintendent Perspectives on Desegregation Policy (2008) 21 *Int. J. of Qualitative Studies in Ed.* 443, 444 (hereafter *Exploring Black Superintendent Perspectives*).

¹¹ *Don Wilson Builders v. Superior Ct. for Los Angeles County* (1963) 220 Cal. App. 2d 77, 89 (dis. opn. of Fourt, J.) [“California history indicates that at the time the state was organized in 1849 and for some several years thereafter many southerners were influential in the state government and otherwise and their influence is reflected in many statutes. The statutes of 1850, ch. 140, p. 424, set forth the law against miscegenation and such remained the law in one form or another until 1948 [.]”]; Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California* (2011) 80 *Pacific Historical Rev.* 28, 49-50.

¹² Hudson, *West of Jim Crow*, *supra*, at fn. 46, p. 32; Hendrick, *Education of Non-Whites in California, 1849-1970* (1977) p. 7; Wollenberg, *All Deliberate Speed*, p. 12, n. 10; see *Stats.* 1855, ch. 185, § 12, p. 232.

government officials created less obvious, but equally effective policies to keep Black children in mostly Black, underfunded schools.¹³

Today, in California many Black students continue to attend unequally funded, under-resourced, and highly segregated public schools due to government policies that continue to segregate many schools and school funding by neighborhood. Recently, California has tried to provide a more equitable funding system by providing more state money to school districts that serve our poorest students. However, the system does not ensure that the money is actually spent on those students, many of whom are Black children, and there is some evidence that this is a reason that Black students continue to be the lowest performing sub-group in California.

Section III of this Chapter focuses on the period of legalized enslavement of Black Americans through the Civil War and the government-supported laws, policies, and practices in the North, South, and in California that resulted in the denial and deprivation of education to Black Americans during that period. Section IV of this Chapters focuses on the period after the Civil War until the present, and the government-supported laws, policies, and practices across the country and in California that established and cemented the segregated and unequal primary and secondary schooling that the vast majority of Black students experience, even today. Section V of this Chapter focuses on higher education and the government-supported laws, policies, and practices across the country and in California that denied Black Americans equal access to higher education. Section VI of this Chapter focuses on the ways in which the teaching of our nation’s history has excluded Black Americans and their experiences and how the absence of curricula and literature books that are inclusive of Black student has a negative impact on education. Section VII of this Chapter concludes with a summary of the ongoing and compounding harms caused to Black Americans through the denial of education and deprivation of equal educational opportunity that began during enslavement and continues today.

II. Prohibition and Denial of Education During Slavery – 1619 to 1865

The promulgation of racist pseudo-scientific theories in the decades before the Civil War gave rise to false ideas about the inferiority of Black Americans, which served to justify prohibitions on the education of Black Americans. Most enslaving states formally outlawed the education of enslaved Black Americans, so enslaved Black Americans who sought to learn to read and write had no choice but to do so in secret at great risk to themselves. While Black Americans were enslaved and banned from schooling in the South, their labor helped pay for public schools in some states in the North. Schooling available to free Black Americans in the North was mostly in segregated schools with fewer resources. At several schools that attempted to provide integrated education to Black Americans, white Americans subjected teachers and students to threats, harassment, and terror.

In California, for a period of time, laws intended to enforce segregated schooling also withheld state money from schools that taught Black children and allowed school districts to deny education to Black children

¹³ Rothstein, *The Color of Law*, *supra*, at pp. 28, 36, 73, 79, 123, 132; Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, pp. 12-13.

altogether under certain circumstances. Even when local governments provided money and resources to support Black schools, white schools disproportionately received greater funding and resources.

A. America's Leaders Promote Racist Pseudoscience

In *Notes on the State of Virginia*, Thomas Jefferson “proposed that black inferiority – ‘in the endowments of both body and mind’ – might be an unchangeable law of nature.”¹⁴ Some scholars argue that Jefferson’s statements became an important first document of racist scientific theories that were popular in the decades before the Civil War.¹⁵ Some of the so-called “race scientists” graduated from elite northern colleges and claimed that Black people were subhuman and not descendants of Adam and Eve to support, as one scholar argues, “the self-image of the nation’s white supremacist majority.”¹⁶

Even Abraham Lincoln also believed that white people were superior to Black people, stating in his famous debate with Stephen Douglas: “I as much as any other man am in favor of having the superior position assigned to the white race.”¹⁷ Other early leaders of America, including Thomas Jefferson, Abraham Lincoln, and Benjamin Rush, a Founding Father who has been called the father of American psychiatry, endorsed these false ideas about the inferiority of Black Americans that served to justify education prohibitions.¹⁸ Scientists later proved that these “race scientists” were wrong in the racist theories used by government officials and private citizens to justify slavery and discrimination.¹⁹ (See also Chapter 12 on health, which discusses studies finding no biological difference between Black and white people.) A recent 2019 *Education Week* survey suggests that these racist theories live on among America’s teachers today. The survey found that more than 40 percent of American teachers believe incorrectly that genetics is “a slight factor” in explaining why white students do better in school than Black students.²⁰

B. The South

During more than 250 years of slavery, state governments prohibited education of Black Americans, except for certain religious education.²¹ In fact, the institution of slavery depended, in part, on enslaved Black people

¹⁴ Farrow et al., *Complicity: How the North Promoted, Prolonged, and Profited from Slavery* (2005) p. 181 (hereafter *Complicity*).

¹⁵ Farrow et al., *Complicity*, *supra*, at fn. 14, p. 181.

¹⁶ Farrow et al., *Complicity*, *supra*, at fn. 14, p. 181-82.

¹⁷ Farrow et al., *Complicity*, *supra*, at fn. 14, p. 191.

¹⁸ Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. Schools* (2006) 35 *Educational Researcher* 3, 6 (hereafter *Achievement Gap to the Education Gap*); History News Network, *Columbian College of Arts & Sciences, The George Washington University, Psychiatry Confronts Its Racist Past, and Tries to Make Amends* (Apr. 30, 2021) <<https://historynewsnetwork.org/article/180130>> (as of February 9, 2022).

¹⁹ Farrow et al., *Complicity*, *supra*, at fn. 14, p. 191.

²⁰ Burnette II, *Do America's Public Schools Owe Black People Reparations?*, *Education Week* (Sept. 23, 2020) <<https://www.edweek.org/leadership/do-americas-public-schools-owe-black-people-reparations/2020/09>> (as of June 21, 2021) (hereafter *Do America's Public Schools?*).

²¹ Sambol-Tosco, *The Slave Experience: Education, Arts & Culture, Thirteen* (2004) p. 2

<<https://www.thirteen.org/wnet/slavery/experience/education/history2.html>> (as of March 5, 2021) (hereafter *The Slave Experience*)

remaining uneducated.²² Frederick Douglass' former enslaver forbade him from learning to read, as "[a] nigger should know nothing but to obey his master – to do as he is told to do."²³

Most enslaving states formally outlawed teaching an enslaved person to read or write as early as 1739.²⁴ Enslaved people caught learning to read or write in states where this was outlawed could face prison, public whipping, or be threatened with having a finger or arm cut off.²⁵ When religious education was permitted, it generally taught enslaved people basic reading but not writing, because learning to write could help an enslaved person escape.²⁶ Some enslaved Black Americans sought out instruction provided in secret. For example, Douglass secretly taught other enslaved people how to read, and described "[t]he work of instructing my dear fellow-slaves" as "the sweetest engagement with which I was ever blessed. We loved each other, and to leave them at the close of the Sabbath was a severe cross indeed."²⁷ As a result of such secret lessons taught by enslaved people, free Black Americans, and some white Americans,²⁸ about 10 percent of Black Americans in the South learned to read by 1865.²⁹

C. The Rest of the Country

In the North, Black Americans were more likely to have basic reading and writing skills. Black Americans sometimes attended schools that were mostly segregated, either through government policy or local practice.³⁰ In some places, state and local officials prohibited Black Americans from opening schools, and white Americans harassed and threatened teachers of Black students until they stopped teaching. In some places, white Americans also vandalized or destroyed schools that permitted Black students to attend.³¹ For example, in 1832, Prudence Crandall, a white schoolmaster, allowed Sarah Harris, a Black student, to enroll in Crandall's small Connecticut school run out of her home until Crandall was forced out of her home by white townspeople.³² When white parents withdrew their children because of Sarah Harris' enrollment, Crandall

²² Woodson, *The Education of the Negro Prior to 1861: A History of the Education of the Colored People of the United States from the Beginning of Slavery to the Civil War* (1919) Introduction (hereafter *Education of the Negro Prior to 1861*); Albanese, *The Plantation School* (1976).

²³ Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1845) Electronic Edition, p. 33.

²⁴ Woodson, *Education of the Negro Prior to 1861*, *supra*, at fn. 22, pp. 193-96, 70-92; Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 5.

²⁵ Span, *Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America* (2005) 31-32, 47-48.

²⁶ Woodson, *Education of the Negro Prior to 1861*, *supra*, at fn. 22, p. 70-92.

²⁷ Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (1845) Electronic Edition, pp. 49.

²⁸ Langhorne, *The African American Community: Circumventing the Compulsory Education System* (2000) 33 *Beverly Hills Bar Assn. J.* 12, 13-17.

²⁹ Bracey, *The Significance of Historically Black Colleges and Universities (HBCUs) in the 21st Century: Will Such Institutions of Higher Learning Survive?* (2017) 76 *Am. J. Econ. & Socio.* 670, 671 (hereafter *Significance of HBCUs*).

³⁰ Sambol-Tosco, *The Slave Experience*, *supra*, at fn. 3, p. 2; Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (2004) p. 52 (hereafter *Silent Covenants*).

³¹ Woodson, *Education of the Negro Prior to 1861*, *supra*, at fn. 22, Introduction; Sambol-Tosco, *The Slave Experience*, *supra*, at fn. 21, p. 2. In 1857, the Supreme Court held in *Dred Scott* that Black people were not citizens and, as such, gave the states express permission to deny Black people equal rights, including to education. *Scott v. Sandford* (1857) 60 U.S. 393.

³² May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 52-53 < <https://www.gutenberg.org/files/50313/50313-h/50313->

decided to open her school to other interested Black students from Connecticut and other nearby states.³³ Crandall eventually enrolled 20 Black students.³⁴

On May 24, 1833, the Connecticut legislature passed a “Black Law,” prohibiting any school from teaching Black students from outside the state without permission.³⁵ Local officials arrested Crandall because she kept her school open. She spent the night in jail and charges were brought against her. Then, in January 1834, vandals set the school on fire.³⁶ Crandall finally closed the school in September 1834 after white townspeople broke 90 panes of glass on her home using iron bars.³⁷ This was the second unsuccessful attempt to establish a school for Black students in the state.³⁸

While Black Americans were enslaved and banned from schooling in the South, their labor helped pay for public schools in some states in the North.³⁹ Enslaved people worked for free in the South picking cotton, and their labor in the South created great wealth for the textile manufacturers in the North. By the early 1830s, New England mills consumed such large quantities of cotton from the South—78 million pounds of cotton fiber per year—that the United States became the second largest producer of textiles in the world.⁴⁰ This textile industry in the North paid taxes. These taxes helped to fund the public schools in New England. During slavery, due to government policies and local practices, very few Black students were permitted to attend these public schools, even though the labor of Black Americans enslaved in the South helped fund them. During this time, the federal government also supported enslavers kidnapping Black Americans in the North who had escaped from slavery to re-enslave them in the South, where they were again denied education.⁴¹ (See Chapter 2 on enslavement for further discussion of related issues.)

During the 1800s, Black students generally could not receive an education beyond high school because it was legal for colleges and universities to refuse to admit Black students.⁴² In response, free Black Americans, often affiliated with Black churches, established the first Black colleges and universities.⁴³ Until the early 1900s,

[h.htm#hp39](#)> (as of June 24, 2021).

³³ May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 52-53 <<https://www.gutenberg.org/files/50313/50313-h/50313-h.htm#hp39>> (as of June 24, 2021).

³⁴ May, *Some Recollections of Our Antislavery Conflict* (1869) p. 50.

³⁵ May, *Some Recollections of Our Antislavery Conflict* (1869) p. 52.

³⁶ May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 70-71.

³⁷ May, *Some Recollections of Our Antislavery Conflict* (1869) p. 71.

³⁸ May, *Some Recollections of Our Antislavery Conflict* (1869) pp. 71-72.

³⁹ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 6 (noting that by 1860, New England was home to 472 cotton mills and between 1830 and 1840, Northern mills consumed more than 100 million pounds of Southern cotton); Oast, *Institutional Slavery: Slaveholding Churches, Schools, Colleges, and Businesses in Virginia, 1680–1860* (2016) p. 51.

⁴⁰ Encyclopedia.com, *Impact of Slavery on the Northern Economy* <[Impact of Slavery on the Northern Economy | Encyclopedia.com](https://www.encyclopedia.com)> (as of January 26, 2022.).

⁴¹ Farrow et al., *Complicity*, *supra*, at fn. 14, p. 139.

⁴² Woodson, *The Education of the Negro Prior to 1861*, *supra*, at fn. 22, Introduction.

⁴³ Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 675; Office for Civil Rights, *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. Dept. of Ed. (Mar. 1991) <<https://nature.berkeley.edu/agroecologylab/wp-content/uploads/2020/06/Historically-Black-Colleges-and-Universities-and-Higher-Education-Desegregation.pdf>> (as of June 21, 2021) (hereafter *HBCUs and Desegregation*).

these schools mostly offered middle and high school level education to Black Americans who had been prohibited from attending school.⁴⁴ By the eve of the Civil War, only 28 of the nation’s nearly four million newly freed enslaved people had received bachelor’s degrees from American colleges.⁴⁵

D. California

California became a state in 1850, a decade before the onset of the Civil War. Despite the anti-enslavement clause in California’s constitution, enslavers brought several hundred Black enslaved people to California and generally denied them education.⁴⁶ The early California legislature, dominated by white southerners from enslaving states, revised the school laws to enforce segregated schooling.⁴⁷ (See Chapter 2 on enslavement.) These state lawmakers successfully enforced segregated schools to avoid racial intermixing.⁴⁸ California’s State Superintendent of Public Instruction Andrew Jackson Moulder, who served from 1857 to 1862 stated: “[I]f this attempt to force Africans, Chinese, and the Diggers [Native Americans] into our schools is persisted in, it must result in the ruin of our school.”⁴⁹

Moulder helped pass a California law in 1855 that withheld state funds from schools that taught Black and Chinese children.⁵⁰ So, although California taxed Black people to pay for the state’s public schools, Black Californian’s taxes only paid for the education of white children, and they had no right to education for their own children. As early as 1855, the law also calculated how much the State of California would fund a school “in proportion to the number of white children” in each county, so that local governments would not receive any extra money from the state when they taught a Black student.⁵¹

⁴⁴ Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 676; Office for Civil Rights, *Historically Black Colleges and Universities and Higher Education Desegregation*, U.S. Dept. of Ed. (Mar. 1991) <<https://nature.berkeley.edu/agroecologylab/wp-content/uploads/2020/06/Historically-Black-Colleges-and-Universities-and-Higher-Education-Desegregation.pdf>> (as of June 21, 2021) (hereafter *HBCUs and Desegregation*).

⁴⁵ Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts* (2009) 80 *J. of Higher Ed.* 389, 393 (hereafter *Access and Equity*) Roebuck & Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* (1993) p. 22 (“only twenty-eight blacks received baccalaureate degrees . . . prior to the Civil War.”)

⁴⁶ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020) p. 22-23 (hereafter *West of Jim Crow*); see, e.g., *In re Perkins* (1852) 2 Cal. 424, 437-441, 454-457 (upholding 1852 Fugitive Slave Act, affirming that enslavers who brought enslaved persons from other states were not affected by the anti-slavery clause in the constitution); Gold Chains: The Hidden History of Slavery in California, ACLU <<https://www.aclunc.org/sites/goldchains/explore/gold-rush.html>> (as of June 24, 2021).

⁴⁷ E.g., *Don Wilson Builders v. Superior Ct. for Los Angeles County* (1963) 220 Cal.App.2d 77, 89 (dis. opn. of Fourt, J.) [“California history indicates that at the time the state was organized in 1849 and for some several years thereafter many southerners were influential in the state government and otherwise and their influence is reflected in many statutes. The statutes of 1850, ch. 140, p. 424, set forth the law against miscegenation and such remained the law in one form or another until 1948 [.]”]; Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California* (2011) 80 *Pacific Historical Rev.* 28, 49-50.

⁴⁸ Hudson, *West of Jim Crow*, *supra*, at fn. 46, pp. 19, 31.

⁴⁹ Hudson, *West of Jim Crow*, *supra*, at fn. 46, p. 32 (citing Moulder, *Annual Report of the State Superintendent of Public Instruction* (1858) p. 14, San Francisco Public Library Archives).

⁵⁰ Hudson, *West of Jim Crow*, *supra*, at fn. 46, p. 32; Hendrick, *Education of Non-Whites in California, 1849-1970* (1977) p. 7; Wollenberg, *All Deliberate Speed*, *supra*, at fn. **Error! Bookmark not defined.**, p. 12, n. 10; see Stats. 1855, ch. 185, § 12, p. 232.

⁵¹ Hudson, *West of Jim Crow*, *supra*, at fn. 46, p. 32; Hendrick, *Education of Non-Whites in California, 1849-1970* (1977) p. 7;

Because of both of these laws, local governments, instead of the state, paid to educate nonwhite students. Further, those local governments that ran schools for Black students generally provided less funding and resources for Black schools in comparison to white schools. For example, six years after the first all-Black school was established in 1854 in the basement of a San Francisco church,⁵² the San Francisco School Superintendent George Tait stated to his school board that: “[T]he room occupied by this school for the past few years is disgraceful to any civilized community” and was “squalid, dark, and unhealthy.”⁵³

In 1864, the state changed the law to allow school districts to provide education to Black students in a segregated classroom or school if requested in writing by “the parents or guardians of 10 or more colored children.”⁵⁴ This meant that if fewer than 10 students lived in the district, California law also allowed public school districts to refuse to teach Black children at all. In 1866, the state changed the law again to allow white parents to prevent Black students from attending their children’s schools, if a majority of parents objected in writing.⁵⁵

Because of these state laws, Black children were forced into separate public schools or out of the public-school system altogether. In response, Black Californians in Sacramento, Oakland, and San Francisco led efforts to organize church-based schools, private schools, and separate free-standing public schools.⁵⁶

In the mid-1860s, Black students across California were also generally denied access to public middle and high schools. Few public middle and high schools existed at the time, and California refused to fund and provide separate public middle and high schools for Black students, in part, because of the 1864 state law that permitted school districts not to provide a school where Black students were few in number.⁵⁷

III. Unequal Primary and Secondary Education

A. Nationally

Formerly enslaved Black Americans had a fundamental belief in the value of literate culture and this belief was expressed through their efforts to secure education for themselves and for their children.⁵⁸ For the first decade after the Civil War, Black Americans in former enslaving states, recently enfranchised, and the Black American and other politicians they elected, successfully fought for and built the South’s public-school system through a series of legislative and constitutional enactments.⁵⁹ Prior to the concerted leadership of freed Black American

Wollenberg, *All Deliberate Speed*, *supra*, at **fn. Error! Bookmark not defined.**, p. 12, n. 10; see Stats. 1855, ch. 185, § 12, p. 232.

⁵² Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 10.

⁵³ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 11.

⁵⁴ Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975* (1975) p. 14 (hereafter *All Deliberate Speed*).

⁵⁵ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 14.

⁵⁶ Hudson, *West of Jim Crow*, *supra*, at fn. 46, p. 32.

⁵⁷ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 16.

⁵⁸ James D. Anderson, *The Education of Blacks in the South, 1860-1935*, p. 5 (1988).

⁵⁹ Du Bois & Dill, *The Common School and the Negro American*, Report (1911) p. 22 (hereafter *The Common School*)

<<https://catalog.hathitrust.org/Record/000442258/Home>> (as of June 18, 2021); John Hope Franklin, *Reconstruction after the Civil*

leaders, none of the southern states, except for Tennessee, had a public education system.⁶⁰ As Black political leaders passed laws and set-aside funding to create a public education system for all children, Black students could attend schools in their communities.

However, government expansion of schooling for illiterate Black Americans threatened white economic domination.⁶¹ According to J.L.M. Curry, an Alabama state legislator in 1889, “[e]ducation would spoil a good plow hand.”⁶² So, even as educational opportunity for Black people in former enslaving states expanded, after reconstruction white-led governments and organizations created a web of government-approved policies and tactics, including burning schools down, to continue to deny Black people education and maintain legalized school segregation.⁶³ So, even though Black Americans led the creation of the public education system in the South, white students ultimately benefited far more than Black students.

Denying education or quality education to Black Americans was also critical to denying Black Americans political power and maintaining white political supremacy.⁶⁴ For example, most former enslaving states suppressed the Black vote by imposing a “literacy test” for voters and selectively enforcing it against Black people.⁶⁵ (See Chapter 4 on political disenfranchisement.) The vast majority of the policies and practices that created unequal and segregated schools for Black Americans in the South lasted another 100 years. And many continue to live on today in different forms, and their effects are still evident.

B. Black-Dominated Legislatures and Black Communities Created the Public Education System in the South

In the immediate aftermath of the Civil War, the vast majority of Black people lived in the South. Formerly

War (2d ed., 1994) pp. 107-113; Burnette II, *Do America’s Public Schools?*, *supra*, fn. 20.

⁶⁰ Id.; see also Hoffschwelle, *Public Education in Tennessee*, Essay, Middle Tennessee State University <<https://dsi.mtsu.edu/trials/hoffschwelle>> (as of March 16, 2022) (hereafter *Public Education in Tennessee*) (“Prior to the Civil War, only white Tennesseans had access to the state’s limited and decentralized public school systems. . . The Civil War and Reconstruction brought the first attempts at universal public education in Tennessee.”).

⁶¹ Burnette II, *Do America’s Public Schools?*, *supra*, fn. 20; *Jim Crow Laws* (Feb. 21, 2021) History <<https://www.history.com/topics/early-20th-century-us/jim-crow-laws>> (as of June 21, 2021); see also *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 310-13, 311, fn. 10 (noting that Southern states “rapidly instituted racial segregation in their public schools” following the Civil War and discussing the interplay between efforts to restrict literacy and efforts to restrict the vote).

⁶² Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) pp. 121-122, fn. 40 (hereafter *Slavery by Another Name*).

⁶³ See National Geographic, *The Black Codes and Jim Crow Laws* <<https://www.nationalgeographic.org/encyclopedia/black-codes-and-jim-crow-laws/>> (as of June 24, 2021).

⁶⁴ Du Bois, *The Souls of Black Folk: Essays and Sketches* (2d ed. 1903); Tyack & Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South* (1986), 94 Am. J. Ed. 236, 238-239, 250-252; Anderson, *The Education of Blacks in the South, 1860-1935* (1988) pp. 95-96 (“From the vantage point of the southern white majority, any system of universal education for blacks, even industrial education, would potentially lead to universal suffrage.”).

⁶⁵ Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (2017) p. 273; Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) pp. 121-122 (hereafter *Slavery by Another Name*); Greenblatt, *The Racial History of the ‘Grandfather Clause’*, NPR (Oct. 22, 2013) <<https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause>> (as of July 15, 2020).

enslaved Black Americans identified education as essential. Black-dominated Reconstruction-era legislatures in the South passed laws to create the public education system in the South. “The whites [in the South] had always regarded the public school system of the North with contempt. The [Black] freedman introduced and established it and it stands today a living testimony to his faith that education is necessary to social welfare,” said Colonel Richard P. Hallowell, Union Army and Pennsylvania Freedmen’s Relief Association.

Black men, recently allowed to vote and hold political office, helped draft new state constitutions in the South that mandated public education.⁶⁶ They served on and during Reconstruction, generally dominated state legislatures that passed the bills to provide funding to the new schools. Black political leaders worked in interracial political coalitions with white Republicans (generally poor whites or Northern transplants) to establish the South’s public-school system, what historians have called “the crown of Reconstruction.”⁶⁷ Prior to this time, only Tennessee had a system of public schooling. The Freedmen’s Bureau Act of 1865 also helped set-up some schools for Black people who had been newly freed.⁶⁸ Unfortunately, the federal government ended the Freedman’s Bureau Act after just three years.⁶⁹

Despite this setback and other obstacles and even after federal troops withdrew from the South in 1877, Black Americans who already knew how to read and write, shared their knowledge with others in their communities.⁷⁰ When, as described further below, Black communities did not receive the necessary funding from post-reconstruction white government officials to afford to pay teacher salaries, Black Americans sought financial assistance and teacher recruitment from federal agencies and benevolent organizations in the North.⁷¹ Given the unwillingness of white property owners to rent or sell to Black Americans and the refusal of white-led post-reconstruction governments to properly fund schools, Black Americans also struggled to access buildings that they could use as schoolhouses.⁷² Nonetheless, Black communities worked together to overcome these obstacles. Since most Black American churches were owned by Black American congregations, churches were often utilized as schoolhouses.⁷³ To also use these buildings for schooling, local residents often gathered together to apply liquid slate to the side walls of the church to create chalkboards.⁷⁴

⁶⁶ Du Bois & Dill, *The Common School and the Negro American*, Report (1911) p. 22 (hereafter *The Common School*) <<https://catalog.hathitrust.org/Record/000442258/Home>> (as of June 18, 2021); John Hope Franklin, *Reconstruction after the Civil War* (2d ed., 1994) pp. 107-113; Burnette II, *Do America’s Public Schools?*, *supra*, fn. 20; see also Hoffschwelle, *Public Education in Tennessee*, *supra*, fn. 48.

⁶⁷ Burnette II, *Do America’s Public Schools?*, *supra*, fn. 20.

⁶⁸ United States Senate, *Freedmen’s Bureau Acts of 1865 and 1866* <<https://www.cop.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm>> (as of June 18, 2021); see also Du Bois & Dill, *The Common School*, *supra*, at fn. 66, p. 19.

⁶⁹ *Id.*

⁷⁰ Antietam National Battlefield, *African Americans and Education During Reconstruction: The Tolson’s Chapel Schools* <<https://www.nps.gov/articles/african-americans-and-education-during-reconstruction-the-tolson-s-chapel-schools.htm>> (as of March 11, 2022).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

From 1908 to 1968, some of one-hundred-plus Black teachers in rural communities in 13 states (whose salaries were funded by a northern philanthropist) utilized their positions not only to teach Black students but to advocate for improvements to their schools, public health, living conditions, and teacher training.⁷⁵ Influential educators such as Nannie Helen Burroughs, a Black woman who was denied a teaching position at a public school in D.C., decided that if she could not get a job as a teacher, she would start her own school.⁷⁶ Burroughs refused to rely on white donors and instead relied on donations from community members, which enabled her to establish the Training School for Women and Girls in D.C. by 1909.⁷⁷ Although Burroughs' school taught vocational skills as well, her school differed in that she assisted women in becoming politically and financially autonomous in order to empower Black women to be “public thinkers and not just public doers.”⁷⁸

The persistence and enthusiasm of Black Americans created schools for Black Americans within their communities when white-led southern government refused to fund them.

C. Racial Terror

As discussed in Chapter 3 on racial terror, after federal troops withdrew from the South in 1877, for the next century, government officials supported private citizens who terrorized Black Americans and Black institutions with impunity. White Americans burned a number of Black schools and churches housing Black schools to the ground.⁷⁹ White-American-led post-reconstruction governments closed Black public schools and fired Black teachers.⁸⁰ A unanimous Supreme Court effectively authorized the elimination of high school for Black students.⁸¹ Hundreds of thousands of Black youth and adults were essentially re-enslaved on trumped up charges upheld by federal and local judges and police, and forced to labor for white-led U.S. companies and plantation owners under conditions that were as brutal, or even more so, than those endured during slavery.⁸² A number of those re-enslaved were pre-teens and teenagers, some were children under the age of 10.⁸³ All were denied education. The unpaid labor of these re-enslaved Black Americans also built wealth for white-led

⁷⁵ *The Women Who Ran the Schools: The Jeanes Teachers and Durham County's Rural Black Schools* < https://durhamcountylibrary.org/exhibits/jeanes/teachers.php#_edn1 > (As of March 10, 2022).

⁷⁶ Jess McHugh, *Denied a teaching job for being “too Black,” she started her own school – and a movement*, *The Washington Post* (February 2021) < <https://www.washingtonpost.com/history/2021/02/28/nannie-helen-burroughs-black-teacher/> >

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Coates, *The Case for Reparations*, *The Atlantic* (Jun. 2014) <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>> (as of June 21, 2021); Du Bois & Dill, *The Common School*, *supra*, at fn. 66, p. 117 (in 1909 in one county in Georgia, “five school houses for colored children, with their contents, have been burned” and over the last few years “burning of Negro school houses . . . by white neighbors had been frequent in the gulf states.”).

⁸⁰ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 91; Darity Jr. & Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2020) p. 287 (hereafter *From Here to Equality*).

⁸¹ *Cummings v. Board of Ed. of Richmond County* (1899) 175 U.S. 528, 530, 542 (court will not intervene in case where county closed a Black high school and used the “funds in hand”, including tax dollars from Black residents, to support a white high school to which Black students were denied entry).

⁸² Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 93.

⁸³ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 93, 97.

companies and plantation owners.⁸⁴ (See Chapter 11 on the legal system for further discussion of related issues.)

D. Segregation by Law

From the mid-1860s to 1954, Jim Crow laws operating in 17 former enslaving states forced Black Americans into segregated and unequal schools.⁸⁵ By the 1880s, a series of U.S. Supreme Court cases had severely limited the federal government's power to enforce Reconstruction civil rights legislation intended to protect Black Americans, leaving enforcement in the hands of white-led state and local governments.⁸⁶ This cleared the way for the Supreme Court in 1896 to endorse the idea that requiring Black Americans to be “separate” from whites in nearly every facet of life could be consistent with equality.⁸⁷ During the long period of segregation, Black Americans attended schools that were intentionally under-resourced and structured for the purpose of maintaining a servant class.⁸⁸

E. Double-Taxation for Black Schools.

After Reconstruction, white former enslavers created a state tax system designed to underfund education for Black Americans. Former Confederate states only allowed state tax revenues actually paid by Black taxpayers to pay for Black schools and public services for Black communities.⁸⁹ Under this system, no white taxpayer paid for the education of a Black child, but Black Americans paid for the education of both Black and white children. This dual-tax system created huge differences in the amount of money spent to educate Black and white children. In practice, in the early 1900s, Black Americans had to pay double. In addition to state taxes, white government officials also charged Black property owners exorbitant taxes, some of which went to white-only schools. In the 1930s, a local school superintendent in Louisiana reported bluntly: “We have twice as many colored children of school age as we have white, and we use their money. Colored children are mighty profitable to us.”⁹⁰

Then, the same Black Americans were forced to donate additional land and money to support Black schools because the state did not send enough money for Black schools.⁹¹ For example, when in the 1930s a fire

⁸⁴ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 93, 97.

⁸⁵ Orfield & Jarvie, *Black Segregation Matters: School Resegregation and Black Educational Opportunity*, UCLA Civil Rights Project/Proyecto Derechos Civiles (Dec. 2020) pp. 4-6 < <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf>> (as of July 1, 2021) (hereafter Black Segregation Matters).

⁸⁶ E.g., *United States v. Stanley* (Civil Rights Cases) (1883) 109 U.S. 3, 13, 25.

⁸⁷ *Plessy v. Ferguson* (1896) 163 U.S. 537, 546-548, 550-552.

⁸⁸ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 5.

⁸⁹ Thornton III, *Fiscal Policy and the Failure of Radical Reconstruction in the Lower South* in Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward (1982) p. 377; Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 105; Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (2014) pp. 415-416.

⁹⁰ Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration*, p. 88 (2010).

⁹¹ Anderson, *The Education of Blacks in the South, 1860-1935* (1988) pp. 183-84; Du Bois & Dill, *The Common School*, *supra*, at fn. 66, pp. 7-8 (Black people “themselves have purchased school sites, school houses and school furniture, thus being a peculiar way

destroyed classroom furniture and equipment in a Louisiana school, according to a local newspaper, the city refused to pay to replace any of the destroyed items, instead the tax dollars were given to the white school and Black parents would have to raise the money to repair the school.⁹²

F. Inferior Resources, Funding, and Time

By the late 1890s, Black Americans in former slaveholding states had “been shunted into their own inferior . . . schools” through an “unfettered grab by white supremacists,” according to historians.⁹³ The schools they attended were often in terrible condition and lacking in basic facilities, such as desks and chairs and working windows. These schools generally included fewer grades or, sometimes, no grades at all.⁹⁴ White school authorities intentionally selected the least-qualified teaching applicants and pushed a curriculum focused on “industrial work,” e.g., canning, sewing, and woodworking.⁹⁵ In May 1911, after completing a study of the conditions Black schools across the South, W.E.B. Du Bois concluded that the state of segregated elementary schools for Black Americans in the South and in border states is in “a deplorable condition,” worse off than 20 years prior “with poorer teaching, less supervision and comparatively few facilities.”⁹⁶

The disparities in funding were also severe. White schools received on average five to eight times more government funding than Black schools in nearly all former enslaving states.⁹⁷ In Louisiana in the 1930s, white teachers and principals made an average salary of \$1,165 per year while Black teachers and principals made about \$499 per year, forty-three percent of the amount that white teachers were paid.⁹⁸ In Mississippi, white teachers and principals made \$630 per year, while Black teachers were paid a third of that, \$215.⁹⁹ For Black teachers, as Isabel Wilkerson writes in *The Warmth of Other Suns*, this meant “even the most promising of colored people, having received next to nothing in material assets from their slave foreparents, had to labor with the knowledge that they were now being underpaid by more than half, that they were so behind it would be all but impossible to accumulate the assets their white counterparts could, and that they would, by definition, have less to leave succeeding generations than similar white families.”¹⁰⁰

In addition, the number of months Black students attended school was generally fewer than white students, e.g.,

double taxed” and are “paying into the school fund” in taxes much more than they are receiving in “actual appropriations for school facilities.”)

⁹² Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁹³ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 157.

⁹⁴ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 5.

⁹⁵ Du Bois & Dill, *The Common School*, *supra*, at fn. 66, pp. 100-107.

⁹⁶ Du Bois, et al., *The Common School And the Negro American*, Report of a Social Study, Atlanta University (May 30, 1911) p. 7.

⁹⁷ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 15 (citing Mark Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), pp. 5-6); Darity Jr. & Mullen, *From Here to Equality*, *supra*, at fn. 80, p. 291 (citing Horace Mann Bond, *The Education of the Negro in the American Social Order*, 46); Du Bois & Dill, *The Common School*, *supra*, at fn. 66, pp. 29-31; 118 (report that in Mississippi counties draw their share of funding according to the number of white and black children but spend the money almost exclusively on the white children).

⁹⁸ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

⁹⁹ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

¹⁰⁰ Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration*, p. 88 (2010).

four to three months in comparison to eight months for white students.¹⁰¹ The causes included lack of sufficient funding for schools in rural communities, where many Black Americans lived, white farm owners forcing Black children to work in the fields (or their sharecropping parents needing assistance), and government limits on the number of months that a Black school would be funded in comparison to a white school.¹⁰²

Despite the inferior quality of Black schools, some prominent thinkers such as W.E.B. Du Bois, suggested that integrated schools would ultimately disadvantage Black students, because the discrimination they would inevitably continue to experience would prevent Black Americans from receiving a proper education.¹⁰³ He wrote that separate schools were “necessary for the proper education of the Negro race.”¹⁰⁴ Moreover, he believed that race prejudice in the United States was such that “most Negroes cannot receive a proper education in white institutions” because the proper education of any group of people required sympathy, understanding, and social equality between teachers and their students.¹⁰⁵

In his 2014 article in the Atlantic, Ta-Nehisi Coates recounts the story of Clyde Ross, a student who was encouraged to attend a more challenging Black school outside of his community built with funds from a philanthropist and resources amassed by Black community members, who also donated physical labor to actually build the schools.¹⁰⁶ The school was too far away from Ross’ home for him to walk there and get back in time to work in the fields. Local white children had a school bus. But Ross and other Black children did not. So, Ross lost out on the opportunity for a better education.¹⁰⁷ For many Black students, the school that Ross was encouraged to attend was the first ever available to them in their community. In yet another way, Black Americans paid twice. They devoted funds and their own labor to build a school for their children while also paying taxes that supported better schools for white students.

In spite of concerted state efforts to deny them equal educational opportunities, Black southerners achieved a literacy rate of 43 percent by 1890, a rate of growth that far surpassed the rise of literacy in Spain and Italy during the same period and that continued to rise in nearly all southern states in the early 1900s.¹⁰⁸ Yet,

¹⁰¹ Blackmon, *Slavery by Another Name*, *supra*, at fn. **Error! Bookmark not defined.**, p. 106; Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 5; Brooker, *The Education of Black Children in the Jim Crow South*, America’s Black Holocaust Museum: Bringing Our History to Light <<https://www.abhmuseum.org/education-for-blacks-in-the-jim-crow-south/>> (as of June 18, 2021); Du Bois & Dill, *The Common School*, *supra*, at fn. 66, pp. 52-54; 58, 101 (describing differences in months of operation for black and white schools in Georgia and South Carolina).

¹⁰² *Id.*

¹⁰³ W.E.B. Du Bois, *Does the Negro Need Separate Schools?* *The Journal of Negro Education*, Vol. 4, No. 3, p. 328 (1935).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at p. 328-29.

¹⁰⁶ Coates, *The Case for Reparation* (The Atlantic Magazine) (2014) <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>> (as of Nov. 19, 2021).

¹⁰⁷ Coates, *The Case for Reparation* (The Atlantic Magazine) (2014) <<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>> (as of Nov. 19, 2021).

¹⁰⁸ National Center for Education Statistics, *National Assessment of Adult Literacy, 120 Years of American Education: A Statistical Portrait* <https://nces.ed.gov/naal/lit_history.asp> (as of January 26, 2022) (Black literacy rose from 20 percent in 1870 to 70 percent by 1910, close to 80 percent by 1920); Du Bois & Dill, *The Common School*, *supra*, at fn. 66, p. 16; see Tapia et al., *The Uneven Transition Toward Universal Literacy in Spain, 1860-1930* (2019) National Bureau of Economic Research (Working Paper No. 173) p. 26 (Spain’s literacy rate was 38.1% in 1887 and 44.8% in 1990); Tapia et al., *Two Stories, One Fate: Age-Heaping and Literacy in*

researchers have found that the “legacies of slavery” compounded by the many obstacles that Black children faced in acquiring education show a correlation with high rates of illiteracy among Black Americans nearly 80 years after slavery ended.¹⁰⁹

G. Resistance to Integration

In 1951, Black students led the fight for desegregation¹¹⁰ and, in 1954, the Supreme Court declared race-based segregation in public schools unconstitutional in its *Brown v. Board of Education* decision.¹¹¹ Although many Americans believed that the Supreme Court’s *Brown* decision was the end of school segregation, it was not. After the *Brown* decision, all across the country many white Americans and white state and local governments refused to implement the Court’s order. And the Federal government failed to adequately enforce the order and protect Black teachers, school administrators, and students.

In former enslaving states, white-controlled government school boards, and state and municipal governments almost universally refused to comply with *Brown* in what historians have called the “era of massive resistance.”¹¹² On May 12, 1956, 90 percent of the south’s Congressional delegation signed the “Southern Manifesto” pledging to fight integration using any means at their disposal.¹¹³ These lawmakers and others in southern states made good on their promise.

Some white Americans in the South used violence, harassment, and threats to stop integration. They attacked Black students and terrorized some Black families who dared to enroll their children in white public schools. For example, in Arkansas, on September 4, 1957, when nine Black students went to enroll in Little Rock’s all-white Central High School, Arkansas Governor Orval Faubus ordered the Arkansas National Guard to form a

Spain, 1877-1930 (2018) National Bureau of Economic Research (Working Paper No. 139) p. 18 (literacy rate in Italy was similarly poor as Spain and was below 50% in the nineteenth century).

¹⁰⁹ Bertocchi & Dimico, *The Racial Gap in Education and the Legacy of Slavery* (2012) 40 J. Comp. Econ. 581, 581-582, (hereafter the Racial Gap in Education).

¹¹⁰ Burnette II, *Do America’s Public Schools?*, *supra*, at fn. 20.

¹¹¹ *Brown v. Board of Education* (1954) 347 U.S. 483, 495. The idea that segregated schools were “equal” was unfounded—segregated public schools for Black students provided unequal education in nearly every category when compared to public schools for white students. See Margo, *Race and Schooling in the South 1880-1950: An Economic History* (1990) pp. 18-20.

¹¹² Horsford & McKenzie, ‘Sometimes I feel like the Problems Started with Desegregation’: Exploring Black Superintendent Perspectives on Desegregation Policy (2008) 21 Int. J. of Qualitative Studies in Ed. 443, 444 (hereafter Exploring Black Superintendent Perspectives); see, e.g., *Griffin v. County School Bd.* (1964) 377 U.S. 218, 221 (school districts closed public schools rather than integrate, cut off funding for public schools and instead provided private vouchers for private schools, then delayed adoption of integration plan); *Green v. County School Bd.* (1968) 391 U.S. 430, 433 (Green) (school board automatically reassigned children to schools they had attended the prior year, preventing integration); *Goss v. Bd. of Educ.* (1963) 373 U.S. 683, 686-687 (school board allowed students to request to be transferred if they had been assigned to a school previously attended only by members of a different race).

¹¹³ Driver, *Supremacies and the Southern Manifesto* (2014) 92 Tex. L. Rev. 1053, 1054, 1066-1067, 1079 (nineteen out of the twenty-two Southern senators signed the Manifesto and declared their aim to reverse *Brown* using all lawful means); see Ogletree, *Tulsa Reparations: The Survivor’s Story* (2004) 24 B.C. Third World L.J. 13, 22 (noting that “[s]ince the end of slavery, whites have resisted the challenge of integration and found more or less sophisticated ways by which to resist the efforts of African Americans to participate on equal terms in American society”).

blockade around the school's front door to keep the students out. The National Association for the Advancement of Colored People had to get a federal court order to make the National Guard stand down. But even with the court's order, the students were still not safe to enter because of the threat of white mob violence. Only after Dr. Martin Luther King, Jr. sent a plea for protection to President Eisenhower, did the federal government act. The federal government brought in 1,000 Army paratroopers and ordered the National Guard to provide an escort for the students as they entered the school. Twenty-one days after the nine Black students – now known as the “Little Rock Nine” – first tried to attend the high school, they were finally able to enter. As they walked in, angry white crowds of students and adults yelled racial insults and threw objects at them. Rather than allow integration to go forward in other schools, Governor Faubus then closed all public high schools in Little Rock for the 1958 to 1959 school year.¹¹⁴ Throughout their time in the school, the Little Rock Nine reported enduring severe harassment, including physical violence from some white students. Several years later on the eve of graduation, the home of Carlotta Walls, one of the Little Rock Nine was bombed by white supremacists.¹¹⁵

In Mississippi when then-NAACP civil rights attorney Derrick Bell filed a lawsuit to integrate one community's schools, he described how nightriders came through the community firing guns into Black homes. Black Americans who signed petitions to integrate the schools lost their jobs or had their credit cut off by merchants. Because of the severe intimidation and harassment by the white community, only one Black family was ultimately willing to send their child to the white school. When the child, Debra, arrived at school, a large crowd jeered and marshals had to escort her into the school. Debra's father lost his job the same day, and white Americans attempted to burn their house down.¹¹⁶

Southern states also passed laws to close both white and Black public schools, deny state money for any schools that integrated, and then provided vouchers or “freedom-of-choice” to over 3,000 newly created private schools for white students.¹¹⁷ For several years, Black students in certain areas in the South had no school to attend at all.¹¹⁸ In Georgia, Governor Herman Talmadge, who fiercely opposed public school integration, told the public at a press conference that the only solution to a public school segregation ban was “abolition of the public

¹¹⁴ Equal Justice Initiative, *Supreme Court Bans School Segregation, Sparking Massive White Resistance* <<https://calendar.eji.org/racial-injustice/>> (as of May 5, 2021); Southern Poverty Law Center, *Little Rock Nine: Decades-long battle for school equity began with nine Black students facing angry white mob* (Sept. 25, 2020) <<https://www.splcenter.org/news/2020/09/25/little-rock-nine-decades-long-battle-school-equity-began-nine-black-students-facing-angry>>(as of Nov. 19, 2021); Zinn Education Project, *Sept. 12, 1958: Little Rock Public Schools Closed*, <<https://www.zinnedproject.org/news/tdih/little-rock-schools-closed/#:~:text=On%20Sept.,without%20access%20to%20public%20education>>

¹¹⁵ Ross & Key, *In the wake of Central High crisis, crime and injustice*, *Arkansas Times* (Oct. 27, 2020) <<https://arktimes.com/history/2020/10/27/in-the-wake-of-the-central-high-crisis-crime-and-injustice>> (as of Nov. 19, 2021).

¹¹⁶ Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*, Oxford University Press (2004), p. 100-102.

¹¹⁷ Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature* in *Review of Research in Education* (1991) p. 335; Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 112, pp. 448-49; Bell, *Silent Covenants*, *supra*, at fn. 30, pp. 97, 100, 102.

¹¹⁸ E.g., Equal Justice Initiative, *Georgia Governor Proposes Abolition of Public School System to Avoid Integration* <<https://calendar.eji.org/racial-injustice/dec/18>> (as of Nov. 19, 2021).

school system.”¹¹⁹

The Supreme Court also contributed to the slow progress of desegregation. When asked to decide how quickly school districts across the country must desegregate, the Supreme Court answered that schools could do so with “all deliberate speed.”¹²⁰ One federal judge who heard cases filed by Black Americans challenging the failure to desegregate schools for almost 10 years, concluded that the effect of the Supreme Court’s decision was to “sacrifice[] individual and immediate vindication of the newly discovered right[s of blacks] to [a] desegregated education in favor of a mass solution.”¹²¹

Because of all of these government acts, legal school segregation in many places in the South continued into the 1960s and little desegregation of schools took place.¹²² In five Deep South states, 1.4 million Black school children continued to attend a segregated school until the fall of 1960, when integration efforts finally began.¹²³

H. Mass Firings of Black Educators

Federal government and court failure to adequately enforce the *Brown v. Board of Education* decision had other negative consequences.¹²⁴ Southern states engaged in en masse firing of Black teachers and administrators without cause to prevent a white administrator and teacher with the same or overlapping position as a Black administrator or teacher at the newly integrated school from losing their job.¹²⁵ In 1955, a federal government staff attorney responded to the firing of Black teachers, stating that: “In a war, there must be some casualties, and perhaps the black teachers will be the casualties in the fight for equal education of black students.”¹²⁶

One Black educator affected by the firings, told researchers that in his community the teachers’ college for Black Americans was closed in the name of integration, and many of the professors who taught there were required to go teach in the high schools. The president of the Black college was “given a central office do-nothing position and then someone with a Master’s degree, a [White] high school principal, was named

¹¹⁹ E.g., Equal Justice Initiative, Georgia Governor Proposes Abolition of Public School System to Avoid Integration <<https://calendar.eji.org/racial-injustice/dec/18>> (as of May 5, 2021).

¹²⁰ *Brown v. Bd. of Educ.* (1955) 349 U.S. 294, 300.

¹²¹ Carter, *The Warren Court and Desegregation* (1968) 67 Mich. L. Rev. 237, 243; Bell, *Silent Covenants*, *supra*, at fn. 30, p. 95.

¹²² See *Alexander v. Holmes County Bd. of Educ.* (1969) 396 U.S. 19, 20-21.

¹²³ Equal Justice Initiative, *Supreme Court Bans School Segregation, Sparking Massive White Resistance* <<https://calendar.eji.org/racial-injustice/may/17>> (as of May 5, 2021).

¹²⁴ Tate et al., *The Brown Decision Revisited: Mathematizing a Social Problem in Beyond Desegregation: The Politics of Quality in African American Schooling* (1996) pp. 29-52; Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown* (2004) 33 *Education Researcher* 3, 6 (noting that one of consequences of *Brown* included the “job loss and demotions for Black teachers and administrators”).

¹²⁵ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 112, p. 447; Toppo, *Thousands of Black Teachers Lost Jobs*, USA Today (April 28, 2004) <https://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2_x.htm> (as of June 21, 2021).

¹²⁶ Toppo, *Thousands of Black Teachers Lost Jobs*, USA Today (Apr. 28, 2004) (citing United States Health, Education and Welfare Department 1955 attorney’s statement) <https://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2_x.htm>

president of [the newly desegregated teachers college].”¹²⁷

Mass firing of Black educators deeply affected the economic, social, and cultural structure of the Black community because many middle-class Black people served in education.¹²⁸ It is estimated that Black communities lost millions of dollars as a result. For example, in 1970-71, the Black community in 17 southern states lost an estimated \$240 million in salaries.¹²⁹

The mass firings also have had long-standing repercussions, as the presence of Black principals and superintendents remain disproportionately low across America in relation to the number of Black public-school students.¹³⁰ Studies show that students who have teachers who look like them do better in school than those who do not. Black students with at least one Black teacher by third grade are 13 percent more likely to graduate high school and 19 percent more likely to enroll in college than Black students who had no Black teachers.¹³¹ However, about 80 percent of teachers nationwide are white.¹³² Black teachers represent just seven percent and Black male teachers represent just two percent of the teaching force,¹³³ yet 15 percent of public school students

¹²⁷ Horsford & McKenzie, ‘Sometimes I feel like the Problems Started with Desegregation’: Exploring Black Superintendent Perspectives on Desegregation Policy (2008) 21 *Int. J. of Qualitative Studies in Ed.* 443, 449.

¹²⁸ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, supra, at fn. 112, p. 449; Tillman, (Un)Intended Consequences?: The Impact of the Brown v. Board of Education Decision on the Employment Status of Black Educators (2004) 36 *Educ. & Urban Soc.* 280, 287-288 (hereafter Un)Intended Consequences); Will, 65 Years After ‘Brown v. Board,’ Where Are All the Black Educators?, *Education Week* (May 14, 2019) <<https://www.edweek.org/policy-politics/65-years-after-brown-v-board-where-are-all-the-black-educators/2019/05>> (as of June 23, 2021); Ethridge, Impact of the 1954 Brown vs. Topeka Board of Education Decision on Black Educators, 30 *Negro Ed. Rev.* 217, 223 (hereafter Impact of the Brown decision).

¹²⁹ Fultz, *The Displacement of Black Educators Post-Brown: An Overview and Analysis* (2004) 44 *Hist. Ed. Q.* 11, 37 ((hereafter Displacement of Black Educators); see Tillman, (Un)Intended Consequences, supra, at fn. 128, p. 288 (noting that firing of Black educators affected their communities economically); Ethridge, Impact of the Brown decision, supra, at fn. 128, p. 224.

¹³⁰ Fultz, *The Displacement of Black Educators*, supra, at fn. 129, pp. 28–29; Tillman, (Un)Intended Consequences, supra, at fn. 128, p. 294; Toppo, *Thousands of Black Teachers Lost Jobs*, *USA Today* (Apr. 28, 2004)

<https://usatoday30.usatoday.com/news/nation/2004-04-28-brown-side2_x.htm> (as of June 23, 2021); see Jones-Wilson, *Race, Realities, and American Educators: Two Sides of the Coin* (1990) 59 *J. of Negro Ed.* 119, 121; Walker, *The Architects of Black Schooling in the Segregated South: The Case of One Principal Leader* (2003) 19 *J. of Curriculum & Supervision* 54, 56.

¹³¹ Gershenson et al, *The Long-Run Impacts of Same-Race Teachers* (Nov. 2018) National Bureau of Economic Research (Working Paper No. 25254) pp. 1-2, 33 (finding that Black students with at least one Black teacher in K-3 are 13% more likely to graduate high school and 19% more likely to enroll in college than their Black peers who had no Black teachers).

¹³² Will, *Still Mostly White and Female: New Federal Data on the Teaching Profession*, *Education Week* (Apr. 14, 2020) <<https://www.edweek.org/leadership/still-mostly-white-and-female-new-federal-data-on-the-teaching-profession/2020/04>> (as of June 21, 2021); Gewertz, *Survey of Mostly-White Educators Finds 1 in 5 Think Textbooks Accurately Reflect People of Color*, *Education Week* (June 29, 2020) <<https://www.edweek.org/teaching-learning/survey-of-mostly-white-educators-finds-1-in-5-think-textbooks-accurately-reflect-people-of-color/2020/06>> (as of June 22, 2021) (hereafter *Survey of Mostly-White Educators*); U.S. Department of Education, *The State of Racial Diversity in the Educator Workforce* (2016) pp. 2, 6

<<https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf>> (as of June 21, 2021).

¹³³ Will, *Still Mostly White and Female: New Federal Data on the Teaching Profession*, *Education Week* (Apr. 14, 2020) <<https://www.edweek.org/leadership/still-mostly-white-and-female-new-federal-data-on-the-teaching-profession/2020/04>> (as of June 21, 2021); Gewertz, *Survey of Mostly-White Educators Finds 1 in 5 Think Textbooks Accurately Reflect People of Color*, *Education Week* (June 29, 2020) <<https://www.edweek.org/teaching-learning/survey-of-mostly-white-educators-finds-1-in-5-think-textbooks-accurately-reflect-people-of-color/2020/06>> (as of June 22, 2021) (hereafter *Survey of Mostly-White Educators*); U.S. Department of Education, *The State of Racial Diversity in the Educator Workforce* (2016) pp. 2, 6

are Black students.¹³⁴ Many Black students will go through their educational careers without having a Black teacher.

I. Other Government-Implemented Tools to Segregate Schools

Whereas in the South, Jim Crow laws prohibited Black students from attending schools with white students, in the rest of the country, government actors largely used different but nearly as effective tools to create segregated schools for Black students with less funding and resources. First, federal, state and local housing segregation policies, including redlining and restrictive covenants as described in Chapter 5 on housing, forced the vast majority of Black Americans to live in separate communities from white Americans.¹³⁵ School and government officials then assigned Black and white students to attend different schools based on where they lived. In this way, segregated schools were created and maintained.

The schools that Black students attended then received less funding and resources than the schools that white students attended. This occurred because public schools generally obtained a large portion of money from local property taxes raised within the city where the schools were located. So, the amount of funding for the school district and school depended on how much could be raised by taxes in each local, segregated community.

The more expensive the properties in a school district, the more money a school district received. When the federal government along with private actors devalued Black-owned properties, through redlining, they also locked Black students into schools that received far less funding for their schools than the white families in nearby neighborhoods with a higher property tax base.¹³⁶

Some cities' schools outside of the South were also segregated by law for a number of years after the Civil War. For example, segregated schools were not banned until 1920 in New York City.¹³⁷ In general, the quality of education received by Black students in these segregated schools was not equal to the quality of education received by white students, because schools largely attended by Black students were underfunded and provided

<<https://www2.ed.gov/rschstat/eval/highered/racial-diversity/state-racial-diversity-workforce.pdf>> (as of June 21, 2021).

¹³⁴ National School Boards Association, *Black Students in the Condition of Education 2020* (June 23, 2020)

<https://nsba.org/Perspectives/2020/black-students-condition-education> (as of January 26, 2022).

¹³⁵ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) pp. 28, 36, 73, 79 (hereafter *The Color of Law*); Ramsey, *The Troubled History of American Education after the Brown Decision*, *The American Historian* <<https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/>> (as of July 7, 2020).

¹³⁶ Burnette II, *As Districts Seek Revenue Due to Pandemic, Black Homeowners May Feel the Biggest Hit*, *Education Week* (July 23, 2020) <<https://www.edweek.org/leadership/do-americas-public-schools-owe-black-people-reparations/2020/09>> (as of June 22, 2021); Oliver & Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995) pp. 8-9, 20; Guastafarro, *Why Racial Inequities in America's Schools are Rooted in Housing Policies of the Past*, *USA Today* (Nov. 2, 2020) <<https://www.usatoday.com/story/opinion/2020/11/02/how-redlining-still-hurts-black-latino-students-public-schools-column/6083342002/>> (as of June 23, 2021) (hereafter *Why Racial Inequities are Rooted in Housing Policies*).

¹³⁷ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, *New York Public Radio* (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021).

with fewer resources.¹³⁸

Even after the *Brown v. Board of Education* decision, highly segregated schools fostered through official actions—government implemented housing segregation and school district boundary and assignment policies—also remained largely the rule.¹³⁹ White protests against integration, including some that involved violence against Black Americans integrating schools, occurred in different places across the country. For example, in February of 1964, after 460,000 Black and Puerto Rican students and their parents called on the New York City Board of Education to integrate majority-student of color schools that were so overcrowded they operated on split shifts—with the school day lasting only four hours for students, and so underfunded that they had inferior facilities and less experienced teachers—15,000 white New Yorker parents staged a counter-protest.¹⁴⁰ Milton Galamison, a civil rights activist and pastor of Siloam Presbyterian Church in Bedford-Stuyvesant, who helped lead the protest to integrate the schools stated: “Nobody can do these children more harm than these children are being done every day in this public school system.”¹⁴¹

The United States Commission on Civil Rights 1967 study, *Racial Isolation in Public Schools*, confirmed the nation-wide problem, finding that “violence against [Black people] continues to be a deterrent to school desegregation.”¹⁴² The report also found that Black children suffer serious harm when they must attend racially segregated schools, “whatever the source of that segregation might be.”¹⁴³

In 1968, the Kerner Commission warned President Lyndon Johnson that the nation was “moving toward two societies, one black, one white—separate and unequal” as a result of “[w]hite racism” and white supremacist institutions.¹⁴⁴ After a short period of active coordinated federal effort to enforce desegregation rights from 1965 to 1969, the Nixon Administration curtailed enforcement of the 1964 Civil Rights Act.¹⁴⁵ By the 1980s, roughly half of the nation’s children of color resided in the 20 or 30 largest school districts.¹⁴⁶ In urban areas, white Americans continued to fight vehemently against integration. For example, in Boston, schools that served Black children were poorly equipped and understaffed, and badly underfunded. They received about two-thirds

¹³⁸ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021); [additional citations needed because this only discusses New York]

¹³⁹ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 106; Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 146.

¹⁴⁰ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021).

¹⁴¹ Demand for School Integration Leads to Massive 1964 Boycott – in New York City, New York Public Radio (Feb. 3, 2016) <<https://www.wnyc.org/story/school-boycott-1964/>>(as of Nov. 19, 2021).

¹⁴² Equal Justice Initiative, *Resistance to School Desegregation* (March 1, 2014) <<https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/>> (as of June 21, 2021).

¹⁴³ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, pp. 147-48.

¹⁴⁴ Kerner, Report of the National Advisory Commission on Civil Disorders: Summary of Report (1968) pp. 1, 5-6 <<http://www.eisenhowerfoundation.org/docs/kerner.pdf>> (as of June 21, 2021).

¹⁴⁵ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 110.

¹⁴⁶ Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, p. 22; see also *Schools More Separate*, *infra*, at fn. 124 at p. 25 (26 central cities house districts which enroll 1/10 of the nation’s students, but only a minute fraction of the nation’s white student; five school districts were more than 90% nonwhite, while a large majority of the others had less than one-fifth white students).

the amount of funding received by schools in white neighborhoods.¹⁴⁷ In 1974, after Black families filed suit and a court ordered the city to desegregate its schools, white mobs threw bricks, bottles, and eggs at buses carrying black students to majority-white schools, injuring nine children.¹⁴⁸

As white Americans moved into the suburbs, redlining, restrictive covenants, and even violence prevented many Black Americans from doing the same. Suburban school district officials drew their boundaries at the city and suburb line, which ensured that Black students living in the inner city would be required to attend inner-city schools, while white children living in the suburbs attended suburban schools. In larger school districts in cities, unless a court desegregation order was in place, districts continued to assign students to schools based on the schools in their neighborhoods. Because the neighborhoods remained segregated by race, the schools continued to be segregated, too.

Intentional segregation in housing by federal and local government actors and the drawing of school district boundaries to mirror school segregation and funding inequities was well-known and documented. But, in 1974, when Black parents asked the Supreme Court to order 53 suburban school districts to participate in the desegregation of the predominantly Black and very under-resourced Detroit city school system, the Court said no.¹⁴⁹ Because the Supreme Court refused to address the government-supported residential segregation that forced Black Americans to attend a small subset of American schools, integration was stopped at the city-suburb line.¹⁵⁰ Today, the Detroit city school system remains segregated—approximately 80 percent Black—and severely underfunded and under-resourced.¹⁵¹

Then, in 1977, the Supreme Court made it hard for Black Americans to challenge housing decisions, which, in their effect, kept many Black Americans from moving into largely white residential areas.¹⁵² Professor Derrick Bell noted that the federal government and local governments created racially isolated communities, which in turn “created single-race schools” and then the Supreme Court “insulated these schools from court challenges.”¹⁵³ After these Supreme Court opinions, lower court judges began to declare school districts desegregated even when the percentage of Black students increased after white Americans moved to the suburbs aided by housing policies that continued to discriminate against Black Americans.¹⁵⁴ In general, these federal courts would not find that it was against the law for Black students to attend schools that received far

¹⁴⁷ Boston Research Center, Encyclopedia of Boston, Desegregation Busing <https://bostonresearchcenter.org/projects_files/eob/single-entry-busing.html> (as of January 26, 2022.)

¹⁴⁸History, This Day in History, *Violence erupts in Boston over desegregation busing* <https://www.history.com/this-day-in-history/violence-in-boston-over-racial-busing>> (as of January 26, 2022); Bubar, *The Jim Crow North*, *Upfront: The New York Times* (March 9 2020), <<https://upfront.scholastic.com/issues/2019-20/030920/the-jim-crow-north.html#1300L>>(as of January 26, 2022).

¹⁴⁹ *Milliken v. Bradley* (1974) 418 U.S. 717, 752.

¹⁵⁰ See e.g., Bell, *Silent Covenants*, *supra*, at fn. 30, p. 112.

¹⁵¹ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 111; Goldstein, *Detroit Students Have a Constitutional Right to Literacy*, *Court Rules*, *The New York Times* (April 27, 2020) <<https://www.nytimes.com/2020/04/27/us/detroit-literacy-lawsuit-schools.html>> (as of June 22, 2021).

¹⁵² Rothstein, *The Color of Law*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 82.

¹⁵³ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 96.

¹⁵⁴ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 115; Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, pp. 12-13.

less funding and had far fewer resources than those schools attended mostly by white students.¹⁵⁵

By the late 1980s, which was considered the peak of integration, schools remained or were returning to being predominantly white and predominantly non-white.¹⁵⁶ Ten years later things had gotten worse. On July 17, 2001, Harvard University’s Civil Rights Project published a study concluding that school districts across the nation had re-segregated or were re-segregating at an alarming rate, particularly in the South.¹⁵⁷ The study linked this re-segregation to a series of Supreme Court cases decided in the early 1990s, which made it easier for school districts to remain segregated.¹⁵⁸

In 2007, the Supreme Court eliminated school districts’ ability to use certain types of voluntary local desegregation plans.¹⁵⁹ Five years later a study found that school segregation across the nation was substantially worse than at the high point of desegregation in 1988, and that the typical Black student was in a school where almost two out of every three classmates (64 percent) are low-income, nearly double the level of schools of the typical white or Asian student.¹⁶⁰

Studies in the last five years continue to find that segregated and unequally resourced schools remain the reality for the vast majority of Black students and other students of color.¹⁶¹ However, they also note the extraordinary gains that Black students have made, in spite of remaining in segregated and unequally funded and resourced schools. Before the *Brown* decision, less than a fourth of Black students had graduated from high school; now about nine-tenths of Black students are graduating.¹⁶² Nonetheless, for Black Americans to ever attain academic justice, emphasis should be placed not just on the number of Black Americans receiving an education, but rather

¹⁵⁵ *Id.*

¹⁵⁶ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 110; Orfield, *Schools More Separate: Consequences of A Decade of Resegregation*, The Civil Rights Project, Harvard University (July, 2001) pp. 1-2 <<https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf>> (as of July 1, 2021) (hereafter *Schools More Separate*); see also Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, p. 6 (“Intense segregation, in 90-100% non-White schools, fell very sharply from 78% of Black students in 1968 to 24% in the South states by 1988, but [by 2020] has now risen back to 37% [”]).

¹⁵⁷ Orfield, *Schools More Separate*, *supra*, at fn. 156, pp. 15-44.

¹⁵⁸ *Id.* (citing *Board of Education of Oklahoma City vs. Dowell* (1991), *Freeman v. Pitts* (1992), and *Missouri v. Jenkins* (1995).)

¹⁵⁹ *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 551 U.S. 701.

¹⁶⁰ Orfield & Siegel-Hawley, E Pluribus . . . Separation, Deepening Double Segregation for More Students, UCLA Civil Rights Project/Proyecto Derechos Civiles (Sept. 2012) p. xviii <<https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/>>(as of July 1, 2021).

¹⁶¹ Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, New York Times (May 2, 2019) <<https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html>> (as of June 21, 2021) [“More than half of the nation’s schoolchildren are in racially concentrated districts, where over 75 percent of students are either white or nonwhite.”]; Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 687; Toppo, *GAO Study: Segregation Worsening in U.S. Schools*, USA Today (May 17, 2016) <<https://www.usatoday.com/story/news/2016/05/17/gao-study-segregation-worsening-us-schools/84508438/>> (as of June 22, 2021); Guastaferrro, *Why Racial Inequities are Rooted in Housing Policies*, *supra*, at fn. **Error! Bookmark not defined.** (discussing study showing that predominantly nonwhite school districts received \$23 billion less in state and local funding than majority white school districts in 2016); Orfield & Jarvie, *Black Segregation Matters*, *supra*. at fn. 85, pp. 6, 28.

¹⁶² Orfield & Jarvie, *Black Segregation Matters*, *supra*. at fn. 85, p. 28.

on the quality and content of the education received. As stated by Carter G. Woodson, if the education being provided to Black Americans is “of the wrong kind, the increase in numbers [of “educated” Black Americans] will be a disadvantage rather than an advantage.”¹⁶³

J. Tracking

After *Brown v. Board of Education*, in districts and schools that were marginally integrated, Black students faced segregation by other means. School officials were more likely to place Black students into special education programs and inferior vocational, non-diploma, and alternative school tracks than white students. And school officials were more likely to place white students into gifted or accelerated programs than Black students. This practice where educators group students by what they view as the student’s abilities is commonly referred to as “tracking.”¹⁶⁴

Studies have shown that tracking, which continues today, is correlated with race,¹⁶⁵ and eliminates the benefits of integration for Black students, like access to college classes and high-quality curriculum.¹⁶⁶

Researchers explain that teachers, the vast majority of whom are white, function as primary gatekeepers in gifted and talented identification, and are less likely to refer Black students for gifted programs than white students with similar levels of academic achievement.¹⁶⁷ Black students tracked out of the mainstream program

¹⁶³ Carter G. Woodson, *The Mis-Education of the Negro* (1933).

¹⁶⁴ Education Week, *Tracking* (Sept. 21, 2004) <<https://www.edweek.org/leadership/tracking/2004/09>> (as of June 24, 2021); Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science* (1990) p. 18-19 & fn. 6 (“[W]e are dealing with *teachers perceptions* of ability—we cannot assume that ability means the same thing from teacher to teacher, or from school to school.”) (hereafter *Multiplying Inequalities*); Anderson & Oakes, *The Truth About Tracking in The Big Lies of School Reform: Finding Better Solutions for the Futile Public Education* (2014) p. 113-114 (describing the arbitrary nature of tracking) (hereafter *The Truth About Tracking*).

¹⁶⁵ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 112, p. 452; Oakes, *Two Cities’ Tracking and Within-School Segregation* (1995) 96 *Teachers College Record* 681 <<https://www.tcrecord.org/books/pdf.asp?ContentID=49>> (as of June 24, 2021); Oakes, *Keeping Track: How Schools Structure Inequality* (2005) pp. 11-12, 40, 64-65; Oakes et al., *Detracking: The Social Construction of Ability, Cultural Politics, and Resistance to Reform* (1997) 98 *Teachers College Record* 482, 490-491, 496-500; Artiles et al., *Culturally Diverse Students in Special Education: Legacies and Prospects*, in *Handbook of Research on Multicultural Education* (2d ed. 2004) p. 716 (finding that many students because of factors including race are disproportionately referred and placed in special education programs); Conger, *Within-School Segregation in an Urban School District* (2005) 27 *Ed. Eval. & Policy Analysis* 225, 237-238; Saddler, *The Impact of Brown on African American Students: A Critical Race Theoretical Perspective* (2005) 37 *Ed. Studies* 41, 44 (observing that Black students are three times more likely to be placed in special education classes and more likely to be placed in vocational tracks); Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science* (1990) pp. 18-25.

¹⁶⁶ Bell, *Silent Covenants*, *supra*, at fn. 30, p. 112; see Kohli & Quartz, *Modern-Day Segregation in Public Schools*, *The Atlantic*, (Nov. 18, 2014); Mathis, *Moving Beyond Tracking*, National Education Policy Center (May 2013) (“[Tracking] generally plays out in a discriminatory way, segregating students by race and socio-economic status.”) <<https://nepc.colorado.edu/sites/default/files/pb-options-10-tracking.pdf>> (as of June 25, 2021) (hereafter *Moving Beyond Tracking*).

¹⁶⁷ Darity, *From Here to Equality*, *supra*, at fn. 80, p. 292; Oakes, *Multiplying Inequalities*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 18, 23; Anderson & Oakes, *The Truth About Tracking*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 118 (discussing their research finding that “African American and Latino students were much less likely than White or Asian students *with the same test scores* to be placed in high-ability classes”) (hereafter *The Truth About Tracking*).

are often re-segregated in another classroom within the school or in a setting in another school location.¹⁶⁸ Those placed in “lower tracks” do not receive the same quality of education—they often receive less resources and opportunities.¹⁶⁹

At the October 12, 2021 Task Force hearing, Professor Rucker Johnson testified to the harms of segregation within schools, including harm to student’s health, mental health, school success, and income growth, telling the panel “[t]oo often even when we see what look like diverse schools there are segregated classrooms” and “racialized tracking.”¹⁷⁰

K. Unequal and Segregated Schools Persist

As of the early 2000s and through today, the vast majority of Black children remain locked into schools separate from their white peers, and possibly more unequal than the schools that their grandparents had attended under Jim Crow.¹⁷¹ The U.S. Government Accountability Office found that, 60 years after *Brown v. Board of Education*, Black students are increasingly attending segregated, high-poverty schools where they face multiple educational disparities.¹⁷² The U.S. Department of Education’s Office of Civil Rights data between 2014 through 2018 shows the same disparities—large and persistent opportunity gaps and fewer education resources for Black students.¹⁷³ Black students are less likely to attend schools that offer advanced coursework and math and science courses,¹⁷⁴ and less likely to be placed in gifted and talented programs. Another found that Black

¹⁶⁸ Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 112, p. 451-452.

¹⁶⁹ Anderson & Oakes, *The Truth About Tracking*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 114-118 (“in every aspect of what makes for a quality education, kids in lower tracks typically get less than those in higher tracks and gifted programs”); Mathis, *Moving Beyond Tracking*, *supra*, at fn. 166 (“Low-track classes tend to have watered-down curriculum, less experienced teachers, lowered expectations, more discipline problems, and less engaging lessons.”) <<https://nepc.colorado.edu/sites/default/files/pb-options-10-tracking.pdf>> (as of June 25, 2021); Oakes, *Multiplying Inequalities*, *supra*, at fn. **Error! Bookmark not defined.**, 104-105 (“Students judged to have low ability may get less because they are thought to need less (they are considered unable to benefit) or deserve less (they are considered unwilling to benefit)”).

¹⁷⁰ AB 3121: Reparations Task Force Hearing (October 12, 2021)<<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

¹⁷¹ Bell, *Silent Covenants*, *supra*, at fn. 30, pp. 115, 161; Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 9 (“If we are unwilling to desegregate our schools *and* unwilling to fund them equitably, we find ourselves not only backing away from the promise of the *Brown* decision but literally refusing even to take *Plessy* seriously. At least a serious consideration of *Plessy* would make us look at funding inequities.”); Kozol, *Savage Inequalities: Children in American Schools* (1991) p. 3-6; Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* (2005) 18-21.

¹⁷² U.S. Government Accountability Office, *GAO-20-494, K-12 Education: School Districts Frequently Identified Multiple Building Systems Needing Updates or Replacement* (June 2020) <<https://www.gao.gov/products/gao-20-494>> (as of July 1, 2021).

¹⁷³ Shores et al., *Categorical Inequalities Between Black and White Students are Common in US Schools—But They Don’t Have to Be*, Brookings (Feb. 21, 2020) <<https://www.brookings.edu/blog/brown-center-chalkboard/2020/02/21/categorical-inequalities-between-black-and-white-students-are-common-in-us-schools-but-they-dont-have-to-be/>> (as of June 21, 2021).

¹⁷⁴ Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 687-688; Kerr, *Report Finds Segregation in Education on the Rise*, AP News (May 17, 2016) <<https://apnews.com/article/fb57033de174464c92031d7c1989ea03>> (as of June 23, 2021); Office for Civil Rights, *2015-16 Civil Rights Data Collection: Stem Course Taking*, U.S. Dept. of Ed. (2018) at p. 5 fig.4 <<https://ocrdata.ed.gov/assets/downloads/stem-course-taking.pdf>> (as of July 1, 2021); Compare College Board, *AP Cohort Data Report: Graduating Class of 2020*, at 20 (2020), <https://reports.collegeboard.org/pdf/2020-ap-cohort-data-report.pdf> with Handwerk et al., *Access to Success: Patterns of Advanced Placement Participation in U.S. High Schools 7* (July 2008) <

students who had been on an accelerated math track consistent with their white and Asian peers were disproportionately removed from that track, so that in high school they were no longer being placed with the highest achievers—reinforcing racial inequality.¹⁷⁵ Black students are also more likely to attend schools with large class sizes and teachers with the least amount of experience and qualifications, and that employ law enforcement officers but no counselors.¹⁷⁶ This can partially be attributed to the fact that urban school districts oftentimes have difficulty attracting and retaining teachers due to the low pay, substandard working conditions, and socioeconomic factors that affect such work environments.¹⁷⁷ Moreover, although many Black American students deal with greater social and environmental pressures, schools mostly attended by Black Americans fail to place greater emphasis on family counseling and community empowerment.¹⁷⁸

In addition, because Black students more often have less qualified teachers than their white peers, they fall further behind in school, and some researchers believe this is one reason for their excess placement in classes that support students with disabilities. In other words, even though they have only fallen behind because they have not received high quality instruction, schools believe incorrectly that they may have a learning or other disability.¹⁷⁹ These school placement and resource allocation decisions matter for student achievement and post-K-12 school outcomes.¹⁸⁰

www.ets.org/Media/Research/pdf/PIC-ACCESS.pdf> (as of July 1, 2021) (Black students were 14.2% of all public high school seniors in 2020, but only 8.3% of students nationwide who took an AP exam—an increase of only 1.3% since 2006).

¹⁷⁵ Irizarry, *On Track or Derailed? Race, Advanced Math, and the Transition to High School*, American Sociological Association, pp. 12-13 (2021) <https://journals.sagepub.com/doi/pdf/10.1177/2378023120980293> (as of January 28, 2022).

¹⁷⁶ Hammond, *Inequality in Teaching and Schooling: How Opportunity is Rationed to Students of Color in America in The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in Health Professions* (2001) pp. 208-209; Grissom & Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs* (2016) 2 *Aera Open* 1, 1-2; The Education Trust, *Inequities in Advanced Coursework: What's Driving Them and What Leaders Can Do* (2019), at p. 8 (“Our analysis [of the 2015-16 CRDC data] shows that although Black students make up 16% of elementary schoolers, they make up only 9% of students in gifted and talented programs.”); U.S. Dept. of Ed., Office for Civil Rights, *Dear Colleague Letter: Resource Comparability*, U.S. Dept. of Ed. (Oct. 1, 2014) at p. 4 <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (as of July 1, 2021); Office for Civil Rights, 2011-12 Civil Rights Data Collection, Data Snapshot: Teacher Equity, U.S. Dept. of Ed. (2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-Teacher-Equity-Snapshot.pdf>. [National Center for Education Statistics](https://nces.ed.gov/ipeds/data/2011-12_crdc/data_snapshots/teacher_equity/) > (as of July 1, 2021); Adamson & Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, 20 *Ed. Policy Analysis Archives* 1, 30-32 (2012); Whitaker et al., *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students*, ACLU (2019) p. 7 (finding that students of color are more likely to attend schools with law enforcement officers, be referred to law enforcement, and be arrested, and “students who attend schools with high percentages of Black students . . . are more likely to attend schools with tough security measures like metal detectors, random ‘contraband’ sweeps, security guards, and security cameras”) <<https://www.aclu.org/report/cops-and-no-counselors>> (as of June 23, 2021) (hereafter *Cops and No Counselors*).

¹⁷⁷ Ivory A. Toldson, *Breaking Barriers: Plotting the Path to Academic Success for School-Age African American Males*, Congressional Black Caucus Foundation, Inc. p. 46 (2008).

¹⁷⁸ *Id.* at p. 23.

¹⁷⁹ Powers et al., *Twenty-five Years after Larry P.: The California Response to Overrepresentation of African Americans in Special Education* (2004) 9 *The California School Psychologist* 145, 155 (hereafter *Twenty-five Years after Larry P.*)

¹⁸⁰ E.g., Office for Civil Rights, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students*, U.S. Dept. of Ed. (2021) p. 10 (citing Shores et al., *Categorical Inequality in Black and White: Linking Disproportionality across Multiple Educational Outcomes*, 57 *Am. Ed. Research J.* 2089, 2097 (2020)).

Severe funding disparities between schools serving white students and those serving Black students persist as well.¹⁸¹ Many school districts across the country today continue to be funded primarily by property taxes raised from the school district’s local community, even though neighborhoods continue to be segregated by race and income. Federal and state governments have not filled the gaps between high- and low-income districts. According to a study by EdBuild, “[n]ationally, predominantly white school districts get \$23 billion more than their nonwhite peers, despite serving a similar number of children” and there is a “\$1,500 per student gap between white districts . . . and equally disadvantaged nonwhite districts.”¹⁸² This funding differential matters: more school funding improves education quality.¹⁸³ In underfunded schools, students also face health and other risks because of the decrepit conditions of their school buildings.¹⁸⁴

L. Discriminatory Use of Discipline and the School-to-Prison Track or Pipeline

Black students are disproportionately subjected to exclusionary discipline with devastating consequences, which include significantly higher risk of dropout and juvenile justice involvement.¹⁸⁵ Over the last three decades,

¹⁸¹ Bellan, *\$23 Billion: Education Funding Report Reveals Less Money for City Kids*, Bloomberg.com (March 27, 2019) <<https://www.bloomberg.com/news/articles/2019-03-27/why-city-kids-get-less-money-for-their-education>> (as of June 21, 2021); Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? \$23 Billion, Report Says*, The New York Times (Feb. 27, 2019) <<https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html>> (as of June 21, 2021); Carey, *Rich Schools, Poor Schools and a Biden Plan*, The New York Times (June 9, 2021) (reporting that “districts where more than 75 percent of students are white receive \$23 billion more per year than districts where more than 75 percent of students are not white — even though there are more students in predominantly nonwhite districts”) <<https://www.nytimes.com/2021/06/09/upshot/biden-school-funding.html?smid=em-share>> (as of June 25, 2021).
¹⁸² EdBuild, *\$23 Billion* (Feb. 2019) pp. 4-5 <<https://edbuild.org/content/23-billion/full-report.pdf>> (as of June 25, 2021).
¹⁸³ Carey, *Rich Schools, Poor Schools and a Biden Plan*, The New York Times (June 9, 2021) <<https://www.nytimes.com/2021/06/09/upshot/biden-school-funding.html?smid=em-share>> (as of June 25, 2021); Cary & Harris, *It Turns Out Spending More Probably Does Improve Education*, The New York Times (Dec. 12, 2016) <<https://www.nytimes.com/2016/12/12/nyregion/it-turns-out-spending-more-probably-does-improve-education.html>> (as of June 25, 2021); Lafortune et al., *School Finance Reform and the Distribution of Student Achievement* (2018) 10 Am. Econ. J.: Applied Econ 1, 24 (finding that “money can and does matter in education”).
¹⁸⁴ Reparations 4 Slavery, *The Movement for Black Lives* <<https://reparations4slavery.com/the-movement-for-black-lives/>> (as of June 21, 2021); Horsford & McKenzie, *Exploring Black Superintendent Perspectives*, *supra*, at fn. 112, p. 444 (citing Kozol 1991); Bell, *Silent Covenants*, *supra*, at fn. 30, p. 129; Vazquez-Martinez et al., *Unsafe School Facilities Reinforce Educational Inequities Among Marginalized Students*, Brookings Institute (Sept. 1, 2020) <https://www.brookings.edu/blog/brown-center-chalkboard/2020/09/01/unsafe-school-facilities-reinforce-educational-inequities-among-marginalized-students/> (as of July 1, 2021); U.S. Government Accountability Office, *GAO-20-494, K-12 Education: School Districts Frequently Identified Multiple Building Systems Needing Updates or Replacement* (June 2020) <<https://www.gao.gov/products/gao-20-494>> (as of July 1, 2021); Kelley, *Study Unlocks Why Decrepit Schools Mean Poor Test Scores* (July 20, 2016) <<https://news.cornell.edu/stories/2016/07/study-unlocks-why-decrepit-schools-mean-poor-test-scores>>
¹⁸⁵ Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After School Suspension*, Youth & Soc’y (Jan. 17, 2018) (finding that suspended youth were less likely to have graduated from college or high school, and were more likely to have been arrested and on probation); Gordan, *Disproportionality in Student Discipline: Connecting Policy to Research*, Brookings (Jan. 18, 2018) <<https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/>> (as of June 21, 2021) (hereafter *Disproportionality in Student Discipline*); Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California: What the 2016-2017 Rates Tell Us about Progress*, The Center for Civil Rights Remedies (2018) pp. 7-9, 12; Losen & Whitaker, *Lost Instruction: The Disparate Impact of the School Discipline Gap in California*, The Center for Civil Rights

research has shown that Black students are far more likely than white students to be suspended, even when controlling for income level.¹⁸⁶ This disproportionate discipline also extends to preschool, where Department of Education data from the 2013-14 school year showed that Black preschoolers made up 18 percent of preschoolers, but nearly half of all out-of-school suspensions.¹⁸⁷ Overall, Black students made up approximately 16 percent of enrollment, yet they accounted for 40 percent of suspensions nationally during the 2013-14 school year.¹⁸⁸ And Black students were four times more likely to be suspended than their white peers during the 2017-18 school year.¹⁸⁹ Some researchers have shown that even when you control for the type of student misbehavior, Black students are suspended and expelled at far higher rates than their white peers. In short, even when white students and Black students misbehave in the same or similar ways, Black students are more likely to be removed from school for the behavior than their white peers who do the same or similar things.¹⁹⁰ Researchers have also found that the difference in suspension rates between white and Black students accounts for as much as one-fifth of the achievement gap between Black and white students, so if Black students were suspended less then achievement levels should go up.¹⁹¹

In addition, Black students are more likely to attend schools with law enforcement on campus and significant security measures, such as metal detectors, random security sweeps and searches, security guards, and security cameras.¹⁹² Having a large police presence and heightened surveillance measures on campus can cause students to

Remedies (2017) pp. 8-9; The Council on State Gov. & Pub. Policy Research Inst. at Tex. A&M Univ., *Breaking Schools' Rules: A Statewide Study on How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (July 2011) <<http://csgjusticecenter.org/youth/breaking-schools-rules-report/>> (as of July 1, 2021).

¹⁸⁶ Gordan, Disproportionality in Student Discipline, *supra*, at fn. 185, p. 6; Skiba et al., The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment (2002) 34 *Urban Rev.* 317, 318-319, 333 (finding that “[c]ontrary to the socioeconomic hypothesis, the current investigation demonstrates that significant racial disparities in school discipline remain even after controlling for socioeconomic status”); see CADRE et al., Redefining Dignity in Our Schools: A Shadow Report on School-Wide Positive Behavior Support Implementation in South Los Angeles, 2007-2010 (June, 2010) pp. 6-7, 12; Into New Rules for Schools: Remote Learning Means Remote School Discipline. But Not All Kids Are Treated Equally, MCNBC (Sept. 14, 2020) <<https://www.msnbc.com/podcast/new-rules-school-n1240087>> (as of June 25, 2021).

¹⁸⁷ National Public Radio, Code Switch, *Black Preschoolers Far More Likely to Be Suspended* (March 21, 2014) <<https://www.npr.org/sections/codeswitch/2014/03/21/292456211/black-preschoolers-far-more-likely-to-be-suspended>> (as of January 26, 2022).

¹⁸⁸ Gordan, Disproportionality in Student Discipline, *supra*, at fn. 185; U.S. Government Accountability Office, GAO 18 258, *Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018).

¹⁸⁹ Office for Civil Rights, Civil Rights Data Collection (for 2017-18), U.S. Dept. of Ed. (Oct. 14, 2020) <<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2017-18.html>> (as of July 1, 2021); see also Green et al., ‘A Battle for the Souls of Black Girls’, *The New York Times* (Oct. 1, 2020) (“The disproportionate discipline rates among girls indicate what researchers have long said about all Black children: It is not that they misbehave more than their peers, but their behaviors may be judged more harshly”) <<https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html>> (as of June 25, 2021).

¹⁹⁰ Rocque & Paternoster, Understanding the Antecedents of the 'School-to-Jail' Link: The relationship between race and school discipline (2011) 101 *The J. of Crim. L. & Criminology* 633, 653-54.

¹⁹¹ Morris & Perry, The Punishment Gap: School Suspension and Racial Disparities in Achievement (2016) 63 *J. Social Problems* 68, 68-69.

¹⁹² Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students, ACLU (2019) p. 7 <<https://www.aclu.org/report/cops-and-no-counselors>> (as of June 23, 2021) (hereafter Cops

feel less bonded to school adults, less engaged in school, more fearful and less trusting of school officials and police, and left with a feeling of alienation because they perceive that adults on campus inherently distrust them.¹⁹³

That schools serving mostly Black students have more law enforcement and fewer counselors is one reason that Black students have more contact with and are also disproportionately referred by schools to law enforcement. Arrests of Black students are higher in schools with a police officer on campus, even when controlling for school-wide academic achievement, racial/ethnic composition, urbanicity, and student misconduct.¹⁹⁴ In the 2015-16 school year, Black students made-up 15 percent of students enrolled in America’s public schools but 31 percent of referrals and arrests, and they were twice as likely to be referred or arrested than their white peers in 2018-19.¹⁹⁵ And Black girls are three times more likely than white girls to receive referrals to law enforcement.¹⁹⁶ There is also evidence that Black students are more likely to be subjected to excessive force by officers in schools.¹⁹⁷ One arrest during school can have severe consequences for a student’s future, as it doubles a high school student’s likelihood of dropout and increases their likelihood of incarceration as adults.¹⁹⁸

Disproportionality in discipline—and the school-to-prison pipeline such disproportionality begets—has been attributed to biases, implicit or otherwise, that school officials may carry into the schoolhouse. Research shows that these biases about Black students, which can result in discriminatory disciplinary decisions, may also exacerbate the achievement gap by decreasing expectations and opportunities.¹⁹⁹ In addition, when students

and No Counselors)

¹⁹³ E.g., ACLU, *The Right to Remain A Student: How California School Policies Fail to Protect and Serve*, p. 14 (Oct. 2016) <https://www.aclunc.org/sites/default/files/20161019-the_right_to_remain_a_student-aclu_california_0.pdf> (as of January 28, 2022).

¹⁹⁴ Servoss & Finn, *Security in American Schools: Are Schools Safer?* Presentation to Alberti Center for Bullying Abuse Prevention Colloquium Series (Nov. 8, 2015).

¹⁹⁵ Office for Civil Rights, *2015-16 Civil Rights Data Collection: School Climate and Safety*, U.S. Dept. of Ed. (2018) <<https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>> (as of June 22, 2021); Robles-Ramamurthy & Watson, *Examining Racial Disparities in Juvenile Justice* (2019) 47 J. Am. Academy of Psych. & L. 48 (hereafter *Examining Racial Disparities*); U.S. Dept. of Ed., *Civil Rights Data Collection (for 2017-18)* (Oct. 14, 2020) <<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2017-18.html>> (as of July 1, 2021).

¹⁹⁶ Green et al., ‘*A Battle for the Souls of Black Girls*’, *supra*, at fn. 189.

¹⁹⁷ E.g., California Department of Justice, *Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities*, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 22, 2021).

¹⁹⁸ E.g., ACLU, *The Right to Remain A Student: How California School Policies Fail to Protect and Serve*, p. 14 (Oct. 2016) <https://www.aclunc.org/sites/default/files/20161019-the_right_to_remain_a_student-aclu_california_0.pdf> (as of January 28, 2022).

¹⁹⁹ See, e.g., Gilliam et al., *Do Early Educators’ Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, Yale Child Study Center, p. 14 (Sept. 28, 2016) <https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf> (as of June 22, 2021); Dee, *A Teacher Like Me: Does Race, Ethnicity, or Gender Matter?* (2005) 95 Am. Econ. Rev. 158, pp. 5-11; Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society* (2006) 94 Cal. L.Rev. 1169; Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* (2006) 17 Psychological Sci. 383; Greenwald & Krieger, *Implicit Bias: Scientific Foundations* (2006) 94 Cal. L.Rev. 945; see also Dasgupta, *Implicit In Group Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations* (2004) 17 Soc. Justice Rsch. 146, 155 (discussing “[a]lmost a hundred studies” verifying the existence and importance of implicit bias in understanding racial stereotyping

perceive an unfair distribution of punishment, an environment of anxiety is created, with achievement outcomes decreasing and students reporting less of a sense of belonging.²⁰⁰ Consistent research has identified alternatives to exclusionary discipline, such as School-Wide Positive Behavior Interventions and Supports and social emotional learning lessons for students that improve educational outcomes, faculty cohesion, school safety, and teacher morale, but many school districts have not implemented these alternatives.²⁰¹ Furthermore, intergenerational exposure to trauma related to racism has been linked to higher incidences of depression, anxiety, and other mental health conditions in legacy Black American communities compared with other groups, including African immigrants, who have not experienced multigenerational slavery and institutionalized racism.²⁰² Yet, schools have not consistently recognized these harms by focusing on things that have been shown to help, such as mental health services and a trauma-informed education approach, and instead have increased security and police presence in schools with large numbers of Black students.²⁰³

The impact of the school-to-prison pipeline is also reflected in data over decades showing that, nationally, Black youth and adults are incarcerated at a disproportionately high rate compared with white youth and adults.²⁰⁴ (See Chapter 11 on the legal system.) Once in the system, education provided to Black students in juvenile facilities is often substandard and youth in adult facilities may receive no education at all.²⁰⁵ One of the many tragic consequences of the disproportionate incarceration of Black men is reflected in the academic struggles experienced by young Black boys.²⁰⁶ The incarceration of Black adult men contributes to the number of young Black students in fatherless homes. Moreover, research suggests that the lack of male models in the home has a

that results in different treatment on the basis of race or other protected categories); Gordon, *Disproportionality in Student Discipline*, *supra*, at fn. 185.

²⁰⁰ Bottiani et al., *A Multilevel Examination of Racial Disparities in High School Discipline: Black and White Adolescents' Perceived Equity, School Belonging, and Adjustment Problems* (2017) 109 *J. Ed. Psych.* 532, 532-533; Bottiani et al., *Inequality in Black and White High School Students' Perceptions of School Support: An Examination of Race in Context* (2016) 45 *J. Youth Adolescence* 1176, 1176-1177; Perry & Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools* (2014) 79 *Am. Sociological Rev.* 1067, 1070, 1084.

²⁰¹ Gordon, *Disproportionality in Student Discipline*, *supra*, at fn. 185; Bradshaw et al., *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary Schools* pp.133-135 (2010) 12 *J. Positive Behav. Interventions* 133; Luiselli et al., *Longitudinal Evaluation of Behavior Support Intervention in a Public Middle School* (2002) 4 *J. Positive Behav. Interventions* 184; OSI Baltimore, *Restorative Practices in Baltimore City Schools: Research Updates and Implementation Guide* (Sept. 2020) pp. 6-8 (finding that studies are continuing to confirm that restorative approaches result in positive outcomes and are associated with “decreases in harmful exclusionary discipline and improvements in school climate”) <<https://www.osibaltimore.org/wp-content/uploads/2020/09/RP-Report-2020-FINAL.pdf>> .

²⁰² Jackson et al., *Intergenerational Resilience in Response to the Stress and Trauma of Enslavement and Chronic Exposure to Institutionalized Racism* (2018) 4 *J. of Clinical Epigenetics* 1, 4.

Lu²⁰³ See, *supra*, at Section B.

²⁰⁴ Lu, *Michelle Alexander: More Black Men in Prison Than Were Enslaved in 1850: Clearly, Colorblindness Hasn't Gotten Us Very Far*, *Colorlines* (Mar. 30, 2011) <<https://www.colorlines.com/articles/michelle-alexander-more-black-men-prison-were-enslaved-1850>> (as of June 22, 2021); Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (hereafter, *The New Jim Crow*); Robles-Ramamurthy, *Examining Racial Disparities*, *supra*, at fn. 195.

²⁰⁵ Alexander, *The New Jim Crow*, *supra*, at fn. 204; The Sentencing Project, *Youth Reentry* (June 14, 2012) <<https://www.sentencingproject.org/publications/youth-reentry/>> (as of June 22, 2021).

²⁰⁶ Ivory A. Toldson, *Breaking Barriers: Plotting the Path to Academic Success for School-Age African American Males*, Congressional Black Caucus Foundation, Inc. p. 29 (2008).

significantly higher impact on Black male students than it does on Black female students.²⁰⁷

M. California

From the Civil War until the present, Black Americans attending school in California have been forced to endure the same segregated and unequal education conditions endured by Black Americans in the rest of the nation. In the early years, school segregation was required by state law. Later, the methods to maintain segregated and unequal schools—which included implementing housing policies that segregate communities by race and drawing school attendance lines and siting schools—have largely mirrored the methods employed in other states outside of the South.

1. Segregated and Unequal Education Systems

In 1866, California law was amended to “allow ‘colored’ children to attend” school with white children in areas where there were not enough children of color to create a separate school, unless the “majority of white parents objected in writing.”²⁰⁸ However, this change was short-lived because a California Superintendent of Public Instruction who believed in segregation and a governor who refused to abide by the Fourteenth and Fifteenth Amendments won the subsequent election.²⁰⁹

In 1870, California law was amended to read that every school shall be open for the admission of white children residing within the school district—and that the “education of children of African descent and Indian children shall be provided for in separate schools,” and that schools with “fewer than ten students of color” can “educate them in separate schools or in any other manner.”²¹⁰ The Oakland School Board interpreted state law as no longer requiring a school for Black children and, in 1871, abruptly closed its “colored school,” which had been operating since 1866.²¹¹

On September 22, 1872, after the principal of San Francisco’s white-only Broadway public school denied 11-year-old Mary Frances Ward entrance and told her to attend the separate, all-Black public school, she and her parents filed suit in California court.²¹² The California Supreme Court upheld the system of segregated schools with a caveat.²¹³ Where no separate school existed, the Court concluded that Black children could attend white schools.²¹⁴ Soon after, state law was conformed to the *Ward* decision—“children of African descent, and Indian children” must be educated in separate schools but if districts “fail to provide such separate schools, then such

²⁰⁷ *Id.*

²⁰⁸ Hudson, West of Jim Crow, *supra*, at fn. 46, p. 34; An Act to Provide for a System of Common Schools, Stats. 1866, ch. 342, § 57, p. 398.

²⁰⁹ Hudson, West of Jim Crow, *supra*, at fn. 46, p. 34.

²¹⁰ Hudson, West of Jim Crow, *supra*, at fn. 46, p. 36; Wollenberg, All Deliberate Speed, *supra*, at fn. 50, pp. 18, 20; see also *Don Wilson Builders v. Superior Court of Los Angeles County* (1963) 220 Cal.App.2d 77, 90 (dis. opn. of Fourt, J.) (describing statutes and regulation stating that children of African or Indian descent shall not be admitted into schools for white children).

²¹¹ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 17.

²¹² Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 8.

²¹³ *Ward v. Flood* (1874) 48 Cal. 36, 54-57.

²¹⁴ Hudson, West of Jim Crow, *supra*, at fn. 46, p. 38; Wollenberg, All Deliberate Speed, *supra*, at fn. 50, pp. 23-24.

children must be admitted into schools for white children.”²¹⁵

Records reveal that in 1874, there were 23 “colored schools” in California, but “conditions had worsened for many of the state’s black youths,” because such schools were “poorly equipped” and Black teachers were paid less than white teachers to work in Black schools.²¹⁶ One year later in 1875, the San Francisco School Board ended school segregation, principally due to the cost of maintaining segregated schools.²¹⁷ Soon after, in 1880, the legislature removed school segregation for Black students from state education law. The amended law stated that schools “must be open” for “all children,” except “children of filthy or vicious habits, or children suffering from contagious or infectious diseases.”²¹⁸

Nevertheless, 10 years later, in 1890, 12-year-old Arthur Wysinger was denied admission to Visalia’s “Little White” public school on account of race. The school for nonwhite Americans was manifestly unequal to the school for white Americans as illustrated by the fact that the Visalia School District built a new two-story school for white students and forced Black students to attend school in a barn.²¹⁹

Arthur Wysinger’s father, Edmond, both Black and Native American, had been brought to California as an enslaved person during the gold rush and eventually bought his freedom. Edmond became a part-time preacher and laborer and always stressed the value of education to his six children. Edmond wanted to send his son to Visalia’s newly constructed school, however, officials said his son could only attend the one held in the barn. Edmond sued in response and the California Supreme Court ultimately held in favor of Edmond, but he died before he could see his son enroll in the “Little White” school. The Supreme Court found that the 1880 education law allowed a Black student to attend any local public school.²²⁰ However, the Court also recognized the state legislature’s right to re-impose segregated schools whenever it wished.²²¹

Despite this decision, California continued to have racially segregated schools due to other discriminatory policies in housing and education. Just as education segregation existed in the North because of government-supported housing segregation, so too it existed in California. Government-supported housing discrimination in the form of restrictive covenants on properties, redlining, and white-only housing perpetuated school segregation. The federal government intentionally financed the creation of neighborhoods segregated by race—funding white-only public housing, redlining communities to deny homeownership loans to Black Americans, and promoting racially-restrictive housing covenants. (See Chapter 5 on housing.) And racially-restrictive covenants, enforced by California courts until 1947, were inserted into property titles as early as the 1890s and

²¹⁵ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 24.

²¹⁶ Hudson, West of Jim Crow, *supra*, at fn. 46, p. 34.

²¹⁷ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 25.

²¹⁸ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 25.

²¹⁹ Bailey, *Hidden History: Edmond Wysinger*, YourCentralValley.com (Feb. 14, 2017) <<https://www.yourcentralvalley.com/feature-edmond-wysinger/>> (as of June 22, 2021).

²²⁰ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 25 (citing *Wysinger v. Crookshank* (1890) 82 Cal. 588, 592–93.)

²²¹ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 26. The state legislature did so later in its history to re-create for separates schools for Asians and Native Americans; also some legislators attempted to do so again for Black children, but the legislation failed. *Id.*

became rampant in the 1910s, “effectively turning neighborhoods across the state white-only.”²²² Districts then assigned students to schools based on the segregated neighborhood where they lived or gerrymandered district boundaries to create segregated schools. School districts also zoned and constructed schools and drew school attendance boundaries in ways that created schools segregated by race.²²³ In addition, in the 1940s and 1950s, when Black homeowners tried to break the color lines, they came under attack by the Ku Klux Klan.²²⁴

On March 2, 1945, five Mexican-American families on behalf of 5,000 other families sued the Westminster School District in Orange County because the school district forced their children to attend a different set of schools with fewer resources than the children of white families.²²⁵ Two years later, the federal court of appeal in California ruled that California education law did not permit separate schools for Mexican children, so creation of segregated schools for Mexican children was arbitrary and not allowed under federal law.²²⁶ This case is called the *Mendez* case after the family who led the filing of the lawsuit. At the time of this lawsuit, most Black students in the state were also attending schools with all Black or nearly all Black children.

Because California law also did not permit the creation of separate schools for Black students, this case meant that where a school district had purposefully created a segregated school by, for example, creating school attendance boundaries around a Black neighborhood, this too was illegal. The lawyers who filed *Brown v. Board of Education* relied on the cases filed by Wysinger and Mendez and the other four Mexican-American families to help convince the Supreme Court to hold that separate schooling was unconstitutional. Also, as a result of the *Mendez* decision, on June 14, 1947, the last of California’s school segregation laws, which applied to Asian American and Native American children, was repealed.²²⁷

Even after the *Wysinger* and *Mendez* decision, and the *Brown* decision in 1954, local cities and school boards refused to take proactive steps to desegregate schools. For example, they did not change the school-site attendance boundaries that had been drawn to reflect racially segregated neighborhoods and that created racially segregated schools. Many also did not take proactive steps to allow students to attend other schools outside their racially segregated neighborhoods. Moreover, those that did, failed to provide Black students adequate transportation to get them to schools in the white neighborhood.

In the years after, California leaders and the state’s school board acknowledged that local school segregation continued and was illegal, but the problem was not fixed. In 1962, California’s Board of Education acknowledged the ongoing problem of highly segregated schools and directed local districts to “exert all effort to avoid and eliminate segregation”²²⁸ In 1964, prominent civil rights attorney, Loren Miller, confirmed that rampant segregation by race existed in California schools when he told an assembly of western governors,

²²² Hudson, West of Jim Crow, *supra*, at fn. 46, p. 61, fn. 11 & 12.

²²³ Rothstein, The Color of Law, *supra*, at fn. **Error! Bookmark not defined.**, pp. 28, 36, 73, 79, 123, 132; Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, pp. 12-13.

²²⁴ Hudson, West of Jim Crow, *supra*, at fn. 46, pp. 167, 199.

²²⁵ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 125.

²²⁶ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 127; *Westminster Sch. Dist. of Orange County v. Mendez* (9th Cir. 1947) 161 F.2d 774, 777-781.

²²⁷ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 108.

²²⁸ Wollenberg, All Deliberate Speed, *supra*, at fn. 50, p. 143.

“[M]ore [Black] children attend all-Negro schools in Los Angeles than in Jackson, Mississippi and Little Rock, Arkansas, combined.”²²⁹

Statewide racial school census data taken in 1966 also confirmed the high levels of segregated schools: 85 percent of Black Americans attended predominantly minority schools, whereas only 12 percent of Black students and 39 percent of white students attended racially balanced schools.²³⁰ To address this segregation, California Attorney General Stanley Mosk advocated for explicit consideration of race in formulating a plan to eliminate it, because to ignore race one would have to “not merely conclude the Constitution is colorblind, but that it is totally blind.”²³¹

Unfortunately, many local school boards and districts did not take the necessary steps to integrate schools, and so Black and Latino families and their advocates filed lawsuits and asked California courts to order school districts to integrate.²³² In the 1960s and 70s, Los Angeles, San Francisco, Pasadena, San Diego, Inglewood, and Richmond school districts, among others, faced court desegregation orders. Berkeley and Riverside initiated busing programs.²³³

Despite these orders, the passage of Proposition 64 in November 1964 allowed majority-white California to undermine efforts to integrate schools through desegregation of communities. This proposition allowed property sellers, landlords, and agents to continue to segregate communities—and, thereby, schools—on racial grounds when selling or renting accommodations, as they had been permitted to do before 1963.²³⁴ The highest courts ultimately struck the law down in 1967, but private racially restrictive covenants continued to be used by private owners to prevent Black Americans from moving into white neighborhoods with better funded and resourced schools.²³⁵ (See Chapter 5 on housing for further discussion of related issues.)

In addition, Californians successfully passed laws to limit the tools courts could use to order schools to desegregate. Because neighborhoods continued to be segregated by race, one of the main tools that courts used to desegregate schools was to have Black and white students attend schools outside of their neighborhoods via bus transportation to the new schools. But many white Californians strongly opposed integration plans, especially court-ordered ones that required Black people or other students of color to be bused to attend their white schools or vice versa. And, in 1979, majority-white Californians passed Proposition 1, a law that stopped courts from ordering school desegregation plans, unless families or students suing to desegregate the schools could prove that intentional discrimination by school officials caused the segregation or a federal court could

²²⁹ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020), 255 (citing Loren Miller, “Civil Rights and State’s Rights,” 1964 Address to Western Governors, folder 8, box 29, Loren Miller Papers).

²³⁰ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 144.

²³¹ Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, p. 143.

²³² E.g., *Crawford v. Bd. of Educ.* (1976) 17 Cal.3d 280, 284-285 (Los Angeles); *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 881-882 (Pasadena).

²³³ See e.g., Wollenberg, *All Deliberate Speed*, *supra*, at fn. 50, pp. 148-164.

²³⁴ Cal. Const. art. I, § 26, as adopted November 3, 1964.

²³⁵ Reft, *How Prop 14 Shaped California’s Racial Covenants*, KCET, <https://www.kcet.org/shows/city-rising/how-prop-14-shaped-californias-racial-covenants> (as of June 30, 2021).

impose the same order.²³⁶

The law, upheld by the United States Supreme Court, limited the ability of California courts to integrate schools that were segregated in fact, for example due to racially segregated neighborhoods, but not by a California law.²³⁷ Then, throughout the mid- to late-1970s, courts overturned, limited, or got rid of desegregation orders in many California districts, as the Supreme Court and Congress further restricted the use of remedies like busing and school reassignment to integrate schools.²³⁸ In a few cases, such as in Berkeley, schools remained relatively integrated because school districts continued busing students and using school-selection processes designed to achieve integration, even without a desegregation order.²³⁹

But, in the vast majority of California school districts, schools either re-segregated or were never integrated, and so segregated schooling persists today. As of 2003, California was one of the four most segregated states for Black students.²⁴⁰ As of 2014, California was identified as the third most segregated state for Black students, and a state where Black and Latino students are strongly concentrated in schools that have far lower quality and resources than their white and Asian peers.²⁴¹ As of 2020, California remained in the top 10 most segregated states for Black students.²⁴² Approximately 64 percent of Black students in California attend hyper-segregated, 90- to 100-percent nonwhite schools.²⁴³

In a recent case, the state found that the segregation that persisted in a Bay Area school district was by design. For example, the California Attorney General's office found in 2019 that the Sausalito Marin City school board had segregated its schools, leaving the vast majority of Black students in an underfunded and under-resourced school while providing a better-funded and resourced charter school for the majority of white students.²⁴⁴

2. Separate and Unequal Education Conditions Persist

In California's highly segregated schools, schools mostly attended by white and Asian children receive more funding and resources than schools mostly attended by Black and Latino children. Throughout the 20th century, school districts in California, like those across the nation, financed their operations mainly with local property tax revenue and limited amounts of state and federal funding. This system allowed richer, white neighborhoods

²³⁶ See Cal. Const., art. I, § 7; School Assignment and Transportation of Pupils, California Proposition 1 (1979).

²³⁷ *Crawford v. Bd. of Educ.* (1982) 458 U.S. 527, 535-536.

²³⁸ *Butt v. California* (1992) 4 Cal. 4th 668, 684-685; Orfield & Ee, Segregating California's Future: Inequality and Its Alternative 60 Years after *Brown v. Board of Education*, The Civil Rights Project, University of California Los Angeles (May 14, 2014) p. 3.

²³⁹ [add citation]

²⁴⁰ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 9 (citations omitted).

²⁴¹ Orfield & Ee, Segregating California's Future: Inequality and Its Alternative 60 Years after *Brown v. Board of Education*, The Civil Rights Project, University of California Los Angeles (May 14, 2014) p. 3.

²⁴² Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, pp. 30-31, Tables 13 and 14.

²⁴³ Orfield & Jarvie, *Black Segregation Matters*, *supra*, at fn. 85, p. 31.

²⁴⁴ California Department of Justice, *Attorney General Becerra: Sausalito Marin City District Agrees to End Segregation in Its Schools*, Press Release (Aug. 9, 2019) <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-sausalito-marin-city-school-district-agrees-end>> (as of June 22, 2021).

to better fund their schools districts than poorer, largely Black neighborhoods.²⁴⁵ In 1971, the California Supreme Court decided that this education funding system was discriminatory because, according to the Supreme Court, it made “the quality of a child's education a function of the wealth of his parents and neighbors.”²⁴⁶

In 1978, voters passed Proposition 13, which decreased the amount of local property tax revenues and increased the amount of state funding for K-12 education. In 1988, voters then approved Proposition 98, which requires the state to dedicate at least 40 percent of its General Fund to K-14 education each year.²⁴⁷ These measures still did not solve the issue, and Black parents and students and other parents and students of color have continued to challenge funding inequities in court.

In late April 1991, the Richmond Unified School District, which served a high proportion of Black students, announced that it would close its schools six weeks early on May 1, 1991 due to a budget shortfall. As discussed in Chapter 5 on housing, federal housing policies, and local officials segregated Richmond and made it extremely difficult for Black residents to move to the suburbs after World War II.²⁴⁸ Richmond parents sued, and the state Supreme Court decided that the closure did not meet the minimum level of education required by the state constitution.²⁴⁹ In the late 1990s, in the Compton Unified School District, which served mostly Black students, a teacher described the deplorable conditions in a temporary school building in Compton where she taught: “[T]he wooden beams across the ceiling were being eaten by termites, a fine layer of wood dust covered the students desks every morning. Maggots crawled in a cracked and collapsing area of the floor near my desk... The blue metal window coverings on the outsides of the windows were shut permanently, blocking all sunlight.”²⁵⁰

In 2000, students were part of a lawsuit, *Williams v. California*, again alleging that schools serving majority Black, Latino, and low-income students across the state failed to provide access to even the most rudimentary learning tools: school books, safe and decent facilities, and qualified teachers.²⁵¹ The lawsuit ultimately settled in 2004, with \$138 million in state funds to provide instructional materials to schools, \$800 million for facility repairs in low performing schools through establishment of the Emergency Repair Program (ERP), and \$50 million to create a complaint and oversight system to check to see if schools were providing the basics of an education.²⁵² Unfortunately, according to the American Civil Liberties Union, which brought the lawsuit, the state has failed its obligation under the settlement to fund the ERP and, as of 2013, the state’s cumulative net

²⁴⁵ Murphy & Paluch, *Financing California’s Public Schools*, Public Policy Institute of California (Nov. 2018) <<https://www.ppic.org/publication/financing-californias-public-schools/>> (as of June 18, 2021).

²⁴⁶ *Serrano v. Priest* (1971) 5 Cal.3d 584, 589.

²⁴⁷ Murphy & Paluch, *Financing California’s Public Schools*, *supra*, at fn. 245.

²⁴⁸ Rothstein, *Color of Law*, *supra*, at fn. pg. 6-10

²⁴⁹ *Butt v. State of California*, 4 Cal.4th 668 (1992).

²⁵⁰ Sarah Sentilles (2005) *Taught by America: A Story of Struggle and Hope In Compton*, pg. 72.

²⁵¹ Cal. Dept. of Ed., *The Williams Case – An Explanation* <<https://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp>> (as of July 1, 2021).

²⁵² Cal. Dept. of Ed., *The Williams Case – An Explanation* <<https://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp>> (as of January 28, 2022).

contribution to ERP for the five last years had been \$0.²⁵³ Further, despite progress made as a result of the *Williams* settlement, persistent challenges remain, such as textbook distribution issues and insufficient monitoring of school districts that are new to the *Williams* process.²⁵⁴ Without county oversight, school districts facing hard fiscal choices are often tempted to give textbooks less of a priority, despite the fact that, under *Williams*, students have a right to sufficient instructional materials.²⁵⁵ California's unequal funding system continues to mean that Black and Latino students, and low-income students have far fewer school resources.

In 2013, the state tried to address the inequalities in school funding by giving more money to schools that have higher numbers of low-income, homeless, and foster youth. This change in the way funding was provided to school districts is referred to as the "equity index" and is part of the state's Local Control Funding Formula that provides approximately 58 percent of the funding that California public schools receive each year.²⁵⁶ The state's funding formula does not focus on Black students specifically or require schools to ensure that the funding is spent on the high-needs students within the district.²⁵⁷ Because about 32 percent of the funding for California schools still comes from local property taxes, and wealthier communities with higher property values can more easily raise additional funds through local bonds and donations, rich and often more predominantly white neighborhoods continue to fund their schools at greater levels.²⁵⁸

At the October 2021 Task Force hearing, Kawika Smith, who graduated from Verbum Dei High School in Watts, a historic Black neighborhood of Los Angeles, testified about two high schools in Los Angeles. In the predominantly Black high school, Black students went without paper for three months simply because the school was underfunded. In contrast, the other school had access to extra funding, which allowed the school to purchase a fountain. Smith told the Task Force, "I strongly believe that we need to revisit the property tax laws and algorithms for how schools are funded . . . I can only imagine if that money was redirected into the Black school where they needed the money – what that could have meant for [those] Black students."²⁵⁹

As in the rest of the country, unequal funding translates to unequal opportunities. Schools with fewer resources

²⁵³ Chung, *Williams v. California: Lessons from Nine Years of Implementation*, ACLU Foundation of Southern California, p. 11 (2013) <https://www.aclusocal.org/sites/default/files/aclu_socal_williams_2013_report.pdf>

²⁵⁴ *Id.* at 19.

²⁵⁵ *Id.* at 19-20.

²⁵⁶ Murphy & Paluch, *Financing California's Public Schools*, *supra*, at fn. 245.

²⁵⁷ California State Auditor, *K-12 Local Control Funding: The State's Approach Has Not Ensured that Significant Funding Is Benefiting Students as Intended to Close Achievement Gaps* (Nov. 2019) p. 15 (finding that the implementation of the Local Control Funding Formula "has not yet proven effective at increasing transparency and accountability" and noting that "state law does not explicitly require districts to use unspent supplemental and concentration funds in the following year to benefit intended student groups").

²⁵⁸ Murphy & Paluch, *Financing California's Public Schools*, *supra*, at fn. 169; Cano, *Data exclusive: With California school bonds, the rich get richer and the poor, not so much*, *Cal Matters* (June 23, 2020) (districts with the highest concentrations of wealthier students average more than twice as many local bond dollars per student since 1998 as most impoverished district and can benefit from as much as \$270,000 per pupil in local bond money over the last 20 years) <<https://calmatters.org/education/2018/10/california-school-bonds-favor-richer-communities/>> (as of January 28, 2022).

²⁵⁹ AB 3121: Reparations Task Force Hearing (October 12, 2021) <<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

mean fewer Advanced Placement and college preparation courses, which means that Black students attending those schools are less competitive for college and university admission and may not have taken the courses necessary—called A-G courses in California—to go to a four-year state University. Within districts and schools, Black students continue to be placed in vocational tracks and out of Science, Technology, Engineering, Mathematics, and Advanced Placement programs.²⁶⁰ In addition, Black students in California are disproportionately likely to be identified as having a learning disability, at nearly twice the rate of Black students nationwide.²⁶¹ “Where we failed is discontinuing those efforts to integrate our schools, to invest in them equitably, and to begin in the pre-K years,” Dr. Rucker Johnson, Professor of Public Policy at Berkeley told the Task Force.²⁶²

Recent studies have shown the importance of having at least one teacher who looks like you.²⁶³ But the percentage of Black teachers in California declined from 5.1 percent in 1997-98 to four percent in 2017-18, even though Black students made up 5.6 percent of California’s student population.²⁶⁴ Black men comprise one percent of California’s teaching force.²⁶⁵

Furthermore, in California, while suspensions have decreased significantly statewide since 2013, Black students continue to be suspended at three times the rate of white students,²⁶⁶ and lose nearly four times the number of days of instruction to suspensions and expulsions as white students.²⁶⁷ Suspensions for subjective offenses, such as willful defiance or disruption—which can include anything from failing to take a hat off in class to

²⁶⁰ The Education Trust West, *Black Minds Matter: Supporting the Educational Success of Black Children in California* (Oct. 2015) pp. 14-16.

²⁶¹ Powers et al., *Twenty-five Years after Larry P.*, *supra*, at fn. 179, p. 153-54.

²⁶² AB 3121: Reparations Task Force Hearing (October 12, 2021) <<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

²⁶³ Assem. Com. on Ed., Analysis of Assem. Bill 520 (2021-2022 Reg. Sess.) as amended March 25, 2021, p. 6-7 (research shows that “[t]eachers of color boost the academic performance of students of color”); Freedburg, *Despite Progress, California’s Teach Force Far From Reflecting Diversity of Students*, EdSource.org (April 25, 2018) <https://edsources.org/2018/despite-progress-californias-teaching-force-far-from-reflecting-diversity-of-students/596536> (as of January 28, 2022).

²⁶⁴ California Department of Education, *Fingertip Facts on Education in California (2019-2020)* <<https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp>> (as of January 28, 2022); Assem. Com. on Ed., Analysis of Assem. Bill 520 (2021-2022 Reg. Sess.) as amended March 25, 2021, p. 6; California Department of Education, *State Superintendent Tony Thurmond, Assemblymember Mike Gipson, Educators and Scholars Urge Support for First-of-its-Kind Legislation to Diversify the Teaching Workforce* (Apr. 13, 2021) <<https://www.cde.ca.gov/nr/ne/yr21/yr21rel27.asp>> (as of June 25, 2021);

²⁶⁵ Sentinel News Service, *Gipson Bill Supports Male Educators of Color: AB 520 Diversifies Teaching Workforce*, Los Angeles Sentinel (Apr. 15, 2021) <<https://lasentinel.net/gipson-bill-supports-male-educators-of-color-ab-520-diversifies-teaching-workforce.html>> (as of June 22, 2021).

²⁶⁶ California Department of Education, *State Superintendent Torlakson Announces 2018 Rates for High School Graduation, Suspension and Chronic Absenteeism* (Nov. 19, 2018) <<https://www.cde.ca.gov/nr/ne/yr18/yr18rel76.asp>> (as of June 22, 2021).

²⁶⁷ Losen & Martin, *The Unequal Impact of Suspension on the Opportunity to Learn in California*, The Civil Rights Project (Sept. 18, 2018) p. 5 <<http://www.civilrightsproject.ucla.edu/research/k-12education/school-discipline/the-unequal-impact-of-suspension-on-the-opportunity-to-learn-in-ca/>> (as of June 22, 2021); see also Office for Civil Rights, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-2018 School Year*, U.S. Dept. of Ed. (June 2021) <<https://www2.ed.gov/about/offices/list/ocr/docs/crdc-exclusionary-school-discipline.pdf>> (as of June 24, 2021) (finding that “Black pre-school students were expelled at rates that were more than twice their share (38.2%) of total pre-school enrollment (18.2%)”).

talking in class—are a persistent but declining source of disproportionate discipline due to recent legislation limiting use for these reasons.

In recent stipulated judgments reached with four different California school districts, the California Attorney General’s office identified racial disparities in discipline for Black students with harmful negative impacts.²⁶⁸ For example, the Attorney General’s investigation of the Barstow Unified School District found that Black middle and high school students were 79 and 78 percent, respectively, more likely, to be suspended out of school than similarly situated white students, and the rate of days Black students were punished was 168 percent greater in elementary, 37.9 percent greater in middle school, and 54.5 percent greater in high school than their white peers.²⁶⁹

In California, Black students are also disproportionately referred by schools to law enforcement.²⁷⁰ A case investigated by the California Attorney General’s Office found that, since 1991, school resource officers in the Stockton Unified School District had arrested 34,000 students, including 1,600 under 10 years old, with many minor misbehaviors turned into criminal offenses, disproportionality impacting Black and Latino students, and students with disabilities.²⁷¹

A number of high-profile reported cases have also raised concerns that Black children in California face increased risk of invasive searches and excessive use of force in schools. In one reported case, during school hours, a police officer handcuffed a five-year-old Black boy with zip ties and charged him with battery because he “resisted” being arrested.²⁷² The American Civil Liberties Union has also reported a number of incidents. In

²⁶⁸ California Department of Justice, Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 24, 2021); California Department of Justice, Attorney General Becerra Secures Settlements with Barstow and Oroville School Districts to Address Discriminatory Treatment of Students Based on Race and Disability Status, Press Release (Aug. 25, 2020) <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-settlements-barstow-and-oroville-school>> (as of June 24, 2021).

²⁶⁹ People of the State of California v. Barstow Unified School District, No. 20STCV3228, Complaint filed Aug. 25, 2020, p. 6-7.

²⁷⁰ U.S. Commission on Civil Rights, Beyond Suspension: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities, Briefing Report (2019) pp. 10–11, 49, 66; Whitaker, et al., Cops and No Counselors, *supra*, at fn. 176, pp. 5, 35 (analyzing 2015-16 academic year data collected by U.S. Department of Education and finding that California had a 44 percent increase in referral to law enforcement from 2013-14 to 2015-16); Black Organizing Project et al., From Report Card to Criminal Record: The Impact of Policing Oakland Youth (Aug. 2013) p. 17 (“While Blacks make up only 30.5 percent of the student population, they make up more than 70 percent of all Oakland School Police arrests.”).

²⁷¹ California Department of Justice, Stockton Unified School District Enter into Agreement to Address Discriminatory Treatment of Minority Students and Students with Disabilities, Press Release (Jan. 22, 2019) <<https://oag.ca.gov/news/press-releases/california-department-justice-stockton-unified-school-district-enter-agreement>> (as of June 24, 2021); Males, California Decision to End Aggressive Policing in Schools (Feb. 14, 2019) <<https://www.yesmagazine.org/democracy/2019/02/14/california-decision-aims-to-end-aggressive-policing-in-schools>>

²⁷² Manoucheri, *5-Year-Old Handcuffed, Charged With Battery On Officer*, KCRA (Feb. 9, 2012) <<https://www.kcra.com/article/5-year-old-handcuffed-charged-with-battery-on-officer/6395087>> (as of June 25, 2021); see Males, *California Decision Aims to End Aggressive Policing in Schools*, *Yes! Magazine* (Feb. 14, 2019) <<https://www.yesmagazine.org/democracy/2019/02/14/california-decision-aims-to-end-aggressive-policing-in-schools>> (as of June 25, 2021); Nelson et al., *The Right to Remain a Student: How California School Police Fail to Protect and Serve*, ACLU of California (Oct. 2016) p. 13 (hereafter *The Right To Remain a Student*).

one, a Black student in a Los Angeles school was partially strip-searched in the presence of a male officer—a vice principal forced an “eighth grade girl to pull her bra away from her body and shake it” and when she “tried to cover her breast for modesty, the vice-principal pulled her hands away.”²⁷³ In another filed case, school police were alleged to have handcuffed and placed a 13-year-old Black student on probation after he was playing a makeshift game of soccer with an orange.²⁷⁴ In yet another, the American Civil Liberties Union reported that a school police officer who told a Black high school student that it was wrong to be gay and wear boy’s clothes, subsequently pushed her against the wall and handcuffed her for telling the officer that “it was also wrong that white people like the officer enslaved her people.”²⁷⁵ Subsequent to the incident, the same officer “continued to harass [her], routinely patting her down and demanding that she turn out her bag.”²⁷⁶

Jacob “Blacc” Jackson, the Los Angeles Youth Commissioner, explained to the Task Force during its October 2021 hearing how he was placed in an abusive adoptive home and lost his older brother in a police shooting but was focused on “finish[ing] high school [at Crenshaw High] and pass[ing] all of [his classes].”²⁷⁷ When, at school, Jackson made a mistake in dealing with a substitute teacher, instead of the teacher, counselors, and school administrators trying to work with him, he was questioned, threatened, and handcuffed by school police for an incident he had already apologized for. The school police officer told Jackson that “they would always be watching me. They said you’re just like everybody else at this school . . . I felt scared and anxious and unclear about what to do.” Jackson felt he could not stay at his high school and told the Task Force that, “What I wish the school [had] provided for me when I was there was real counselors, after-school programs, real nurses, Black people history, peace building, and [transformative justice] practice.”

In general, research shows that school officials are more likely to refer Black students like Jackson to law enforcement for minor behavior than white students.²⁷⁸ Such contacts with law enforcement increase a student’s feeling of isolation, and contributes to the school-to-prison pipeline and the disproportionate rates of Black people in our criminal justice system.²⁷⁹

Once in the juvenile justice system, Black students face an increased likelihood of dropout due to inconsistent education access and adequacy of instruction.²⁸⁰ (See Chapter 11 on the legal system.) For Black students

²⁷³ Nelson et al., *The Right to Remain a Student*, *supra*, at fn. 272, p. 15.

²⁷⁴ *Sigma Beta Xi, Inc. v. County of Riverside* (July 1, 2018) Case No. 5:18-cv-01399, at ¶ 83.

²⁷⁵ Nelson et al., *The Right to Remain a Student: How California School Police Fail to Protect and Serve*, ACLU of California (Oct. 2016) p. 13.

²⁷⁶ Nelson et al., *The Right to Remain a Student: How California School Police Fail to Protect and Serve*, ACLU of California (Oct. 2016) p. 13.

²⁷⁷ AB 3121: Reparations Task Force Hearing (October 12, 2021)<<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

²⁷⁸ See, *supra*, at fn. 121.

²⁷⁹ See, *supra*, at fn. 185; Harris et al., *California’s Prison Population*, Public Policy Institute of California (July 2019) <<https://www.ppic.org/publication/californias-prison-population/>> (as of July 24, 2020) (California numbers reflecting disproportionate representation of Black people).

²⁸⁰ See also, *supra*, at fn. 185; see also Ferriss, *Black Oakland Youth Arrested, but Not Charged, in Stunning Numbers, Report Says*, The Center for Public Integrity (Aug. 28, 2013) (reporting that “between 2008 and 2012, black children represented 29 percent of Oakland’s school-age population but 78 percent of the more than 13,680 juveniles arrested”)

charged with offenses that result in a transfer to the state prison system, few can access and complete higher education.²⁸¹

IV. Unequal Higher Education

Until *Brown v. Board of Education*, white colleges and universities largely refused to admit Black Americans.²⁸² In response, Black Americans raised funding to develop Historically Black Colleges and Universities. In the early 1900s, the federal government began to provide funding and land to open HBCUs, but it had to pass through white-controlled state legislatures. However, these historically Black institutions have been unequally funded in comparison to similar historically white institutions throughout American history.

After World War II, the GI Bill paid for veterans to attend college, graduate school, and go through training programs.²⁸³ Although the GI Bill should have helped Black and white veterans equally, due to Black veterans exclusion from white colleges and local white officials steering Black veterans into vocational programs, it actually increased the racial higher education gap between Black and white Americans.²⁸⁴ Even today, Black military veterans continue to face discriminatory barriers that can result in unequal access to education benefits available to veterans. In addition, although the Civil Rights Act of 1964 again promised some relief through a prohibition on discrimination in higher education programs receiving federal funds and some colleges and universities took affirmative action to remedy prior-discrimination in college admissions, gains were short-lived due to Supreme Court decisions and, in California, passage of Proposition 209, which prohibited race from being used as a factor in admissions.

A. Unequal Funding for Historically Black Colleges and Universities

Prior to the Civil War, a few colleges for free Black Americans existed in the north, and none in the south.²⁸⁵ In 1862, the federal government under the first Morrill Act granted federal land and funding to states to open colleges and universities, and mandated that funds be distributed annually on a “just and equitable” basis to Black Americans which led to the establishment of 17 Black state-supported institutions. However, these institutions emphasized a focus on mechanics and agriculture, which further reinforced false notions that Black

<<https://publicintegrity.org/education/black-oakland-youth-arrested-but-not-charged-in-stunning-numbers-report-says/>> (as of June 25, 2021).

²⁸¹ Murillo, *The Possibility Report, From Prison to College Degrees in California*, p. 4 (Feb. 5, 2021)

<<https://collegecampaign.org/wp-content/uploads/2021/02/Possibility-Report.pdf>> (as of June 22, 2021).

²⁸² Allen, et. al, *Historically Black Colleges and Universities: Honoring the Past, Engaging the Present, Touching the Future*, *The Journal of Negro Education*, Vol. 76, No. 3 (Summer 2007), 263 at p. 264.

²⁸³ History.com, G.I. Bill (June 7, 2019)<https://www.history.com/topics/world-war-ii/gi-bill> (as of January 28, 2022).

²⁸⁴ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* *The Journal of Blacks in Higher Education* No. 41 (Autumn, 2003), pp. 36-37 (2 pages), see also, Turner & Bound, *Closing the Gap or Widening the Divide: The Effects of the GI Bill and World War II on the Educational Outcomes of Black Americans*, *Journal of Economic History*, Vol. 63, No. 1 (March 2003).

²⁸⁵ Gasman, *Envisioning Black Colleges: A History of the United Negro College Fund*, (2007) p. 11 (hereafter *Envisioning Black Colleges*).

Americans were intellectually less capable.²⁸⁶ After the Civil War ended in 1865, the Freedmen’s Bureau began establishing Black colleges staffed by Civil War veterans with the support of white and Black religious missionaries.²⁸⁷ White missionaries funded Black education in order to Christianize the “menace” of uneducated enslaved people.²⁸⁸ These colleges were in name only and, like many white colleges at the time, generally provided only primary and secondary education.²⁸⁹

In 1890, Congress passed the second Morrill Act and required states to provide higher education to Black students as the states had for white students.²⁹⁰ In the north, where Black students were allowed to attend colleges and universities in extremely limited numbers, they often were not allowed to fully participate in the way that white, male students participated.²⁹¹

In order to continue receiving federal funding, former enslaving states, where the majority of Black Americans lived, created segregated public Black colleges as it had segregated primary and secondary school.²⁹² White-controlled legislatures underfunded Black colleges and universities, provided substandard facilities, and did not provide adequate resources to train faculty.²⁹³ White-controlled southern legislatures limited curriculum to mechanical, agricultural, and industrial arts, helping maintain Black Americans as a servant underclass to build white wealth.²⁹⁴

Few graduate programs admitted Black students, although after World War II, the NAACP successfully sued to expand graduate education opportunities for Black students.²⁹⁵ Although a few Black people were allowed to attend predominantly white institutions, 90 percent of all Black degree-holders in the late 1940s had been educated at Historically Black Colleges and Universities. On the eve of the 1954 *Brown v. Board of Education* decision, Black people were less than one percent of entering first-year students at predominantly white

²⁸⁶ Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts* (2009) 80 J. Higher Ed. 389, 395; Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 44, p. 2; see also Croft, *The U.S. Land-Grant University System: An Overview*, Congressional Research Services (2019) p. 3.

²⁸⁷ Gasman, *supra*, at fn. 273, p. 11

²⁸⁸ Gasman, *supra*, at fn. 273, pp. 11-12.

²⁸⁹ Gasman, *supra*, at fn. 273, p. 11

²⁹⁰ Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts* (2009) 80 J. Higher Ed. 389, 395; Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 44, p. 2; see also Croft, *The U.S. Land-Grant University System: An Overview*, Congressional Research Services (2019) p. 3.

²⁹¹ Synnott, *The Half-Opened Door: Researching Admissions Discrimination at Harvard, Yale, and Princeton*, Vol. 45, No. 2, p. 187 (1979); Horowitz, *Campus life: Undergraduate cultures from the end of the eighteenth century to the present* (1987)

²⁹² Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 673; Harper et al., *Access and Equity*, *supra*, at fn. 45, p. 395; Gasman, *Envisioning Black Colleges: A History of the United Negro College Fund* (2007) p. 12.

²⁹³ Harper et al., *Access and Equity*, *supra*, at fn. 45, p. 395-396; Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 674.

²⁹⁴ Harper et al., *Access and Equity*, *supra*, at fn. 45, p. 394; Allen & Jewell, *A Backward Glance Forward: Past, Present and Future Perspectives on Historically Black Colleges and Universities* (2002) 25 Rev. Higher Ed. 241, 244-245; Anderson, *The Education of Blacks in the South, 1860-1935* (1988) p. 122; Gasman, *Envisioning Black Colleges*, *supra*, at fn 292. at 13.

²⁹⁵ *Sipuel v. Board of Regents of University of Oklahoma* (1948) 332 U.S. 631 (state must offer schooling for Black students as soon as it provided it for white students); *McLaurin v. Oklahoma State Regents for Higher Ed.* (1950) 339 U.S. 637 (black students must receive the same treatment as white students); *Sweatt v. Painter* (1950) 339 U.S. 629 (state must provide facilities of comparable quality for black and white students).

institutions.²⁹⁶

Even after the *Brown* decision, white government officials in the south used state power to prohibit integration efforts, including in Mississippi.²⁹⁷ In 1959, Clyde Kennard, a 31-year-old Black veteran of the Korean War, who ran a small poultry farm, applied to Mississippi Southern College, now the University of Southern Mississippi.²⁹⁸ The university president reported Kennard's intention to apply to the Mississippi Sovereignty Commission, a state agency led by the governor of Mississippi, which was created in order to preserve segregation.²⁹⁹ After refusing to back down from applying to the university, even after the Mississippi governor requested that he withdraw his application, Kennard's local cooperative foreclosed on his farm and local government officials arrested and falsely convicted him for stealing \$25 of chicken feed.³⁰⁰ Kennard was sentenced to seven years on a chain gang, where he picked cotton, and was fed food leftover from what the white prisoners ate.³⁰¹ Kennard died of misdiagnosed and untreated colon cancer in 1963.³⁰²

Segregated higher education continued into the 1970s. In 1969 and 1970, the federal department of education concluded that Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia operated segregated colleges and universities and, in 1970, the NAACP sued the federal department of education for failing to force these institutions to desegregate.³⁰³ By the late 1970s, many years after the Civil Rights Act of 1964, at least 17 southern states were still operating racially segregated higher education systems.³⁰⁴ A number of public HBCUs closed or merged with traditionally white institutions, but most Black college students continued to attend HBCUs.³⁰⁵ HBCUs continued to struggle with poorer facilities and budgets compared to traditionally white institutions; some lacked adequate libraries and scientific and research equipment.³⁰⁶

²⁹⁶ Harper et al., *Access and Equity*, *supra*, at fn. 45, p. 396.

²⁹⁷ Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 685 (citing Harper et al., *Access and Equity*, *supra*, at fn. 45, p. 397).

²⁹⁸ Tierney, William G. "The Parameters of Affirmative Action: Equity and Excellence in the Academy." Review of Educational Research, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, at p. 168.

²⁹⁹ Blackmon, *Silent Partner: How the South's Fight to Uphold Segregation Was Funded up North*, <<https://slaverybyanothername.com/other-writings/silent-partner-how-the-souths-fight-to-uphold-segregation-was-funded-up-north/>> (June 1999); Minchin, *Clyde Kennard: A Little-Known Civil Rights Pioneer*, <<https://www.mshistorynow.mdah.ms.gov/issue/clyde-kennard-a-little-known-civil-rights-pioneer>> (2010).

³⁰⁰ Tierney, William G. "The Parameters of Affirmative Action: Equity and Excellence in the Academy." Review of Educational Research, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, at p. 168 <<https://doi.org/10.2307/1170625>>

³⁰¹ Jerry Mitchell, Story of false arrest called civil rights movement's saddest, CLARION LEDGER, December 31, 2005

³⁰² Bluhm Legal Clinic: Center on Wrongful Convictions, Clyde Kennard: The Clyde Kennard Story <<https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/ms/clyde-kennard.html>>

³⁰³ Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 44, *Adams v. Califano*, 430 F.Supp. 118 (US District Court DC 1977).

³⁰⁴ Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 689; Fox, Fox, T. Marshall Hahn Jr., *Who Remade Virginia Tech as President, Dies at 89*, New York Times (June 4, 2016) <<https://www.nytimes.com/2016/06/05/us/t-marshall-hahn-jr-who-remade-virginia-tech-as-president-dies-at-89.html>> (as of June 22, 2021); Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 44.

³⁰⁵ Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 44, p. 3.

³⁰⁶ Office for Civil Rights, *HBCUs and Desegregation*, *supra*, at fn. 44, p. 3.

Despite the underfunding, through the 1970s, private and public HBCUs educated a large proportion of the Black American middle class.³⁰⁷ In 2006, HBCUs made up three percent of higher education but enrolled 14 percent of Black undergraduates, and graduated 28 percent of all Black undergraduate students who earned a degree.³⁰⁸ Seventy percent of America's Black doctors, 35 percent of Black lawyers, and 50 percent of Black engineers and teachers have a degree from an HBCU.³⁰⁹ For Black students, HBCUs can provide an empowering, family-like environment of small classes and close relationships with faculty and students away from racial tensions experienced off campus.³¹⁰

Today, increased access for Black students to all colleges and universities has led to a relative decrease in enrollment to HBCUs.³¹¹ While Black enrollment at HBCUs increased by 17 percent between 1976 and 2018, the total number of Black students enrolled in all degree-granting postsecondary institutions more than doubled during this period.³¹² In 2018, there were 101 HBCUs located in 19 states, including one in Los Angeles, the Charles R. Drew University of Medicine and Science.³¹³ However, funding for HBCUs continues to be uneven and is tied to a state's fiscal health.³¹⁴ Reports in 2008 and 2014 concluded that state governments continue to deprioritize funding public HBCUs, leading to predominately white universities receiving more funding per student than HBCUs.³¹⁵ In 2008, for example, the University of North Carolina at Chapel Hill received about \$15,700 in state funding per student.³¹⁶ But students at historically Black North Carolina Agricultural and Technical State University received about \$7,800 in state funding per student.³¹⁷ In 2020, the federal government increased funding for HBCUs, but many HBCUs have closed in recent years due to financial

³⁰⁷ Gasman, *Historically Black Colleges and Universities in a Time of Economic Crisis*, <<https://www.aaup.org/article/historically-black-colleges-and-universities-time-economic-crisis#.YedKeP7MK70>>

³⁰⁸ American Association of University Professors, 2006, at 5

³⁰⁹ Johnson, et. al, *Historically Black Colleges and Universities (HBCUs) in the Twenty First Century: An Exploratory Case Study Analysis of their Mission, Race, Gender & Class* Vol. 24, No. 3-4, *Immigration, HBCUs, Criminology, and Education Issues* (2017), pp. 48.

³¹⁰ Johnson, et. al, *Historically Black Colleges and Universities (HBCUs) in the Twenty First Century: An Exploratory Case Study Analysis of their Mission, Race, Gender & Class* Vol. 24, No. 3-4, *Immigration, HBCUs, Criminology, and Education Issues* (2017) at p. 48, see also Gasman, *Historically Black Colleges and Universities in a Time of Economic Crisis*, <<https://www.aaup.org/article/historically-black-colleges-and-universities-time-economic-crisis#.YedKeP7MK70>>

³¹¹ Guy-Sheftall & Jackson, *Challenges and Possibilities at HBCUs after the COVID-19 Pandemic*, <<https://www.aaup.org/article/challenges-and-possibilities-hbcus-after-covid-19-pandemic#.YedZuf7MK70>>

³¹² National Center for Education Statistics, *Historically Black Colleges and Universities* <<https://nces.ed.gov/fastfacts/display.asp?id=667>> (as of July 2, 2021).

³¹³ Id.

³¹⁴ Orteg & Swinton, *Business Cycles and HBCU Appropriations*. *J Econ Race Policy* 1, 176–195 (2018).
<https://doi.org/10.1007/s41996-018-0009-5>

³¹⁵ Boland, W., & Gasman, M. (2014). *America's Public HBCUs: A Four State Comparison of Institutional Capacity and State Funding Priorities*. Penn Center for Minority Serving Institutions, Retrieved from https://repository.upenn.edu/gse_pubs/340 at p. 3; Belkin, *Maryland to Pay Four Black Colleges \$577 Million*, *Wall Street Journal* (Mar. 24, 2021) <<https://www.wsj.com/articles/maryland-to-pay-four-black-colleges-577-million-11616627378>> (as of June 22, 2021).

³¹⁶ Minor, J.T. (2008). *Contemporary HBCUs: Considering Institutional Capacity and State Priorities*. A research report. Michigan State University, College of Education, Department of Educational Administration. East Lansing, MI, at p. 23.

³¹⁷ Minor, J.T. (2008). *Contemporary HBCUs: Considering institutional capacity and state priorities*. A research report. Michigan State University, College of Education, Department of Educational Administration. East Lansing, MI, at p. 23.

issues, a trend that has worsened during the COVID-19 pandemic.³¹⁸

B. Unequal Access to the GI Bill

Due to expanded education opportunities and funding under the GI Bill, between 1950 and 1975, Black student college enrollment increased from 83,000 to 666,000 students.³¹⁹ However, in comparison to white veterans who used GI Bill benefits to go to college, government officials generally prevented Black veterans from accessing the full education benefits available to them.³²⁰

At the end of World War II, the vast majority of Black veterans returned to their residence in the southern states.³²¹ Universities in the South did not accept Black students, and white state legislatures did not increase funding to Historically Black Colleges and Universities to meet increased demand from returning veterans.³²² Many HBCUs had huge waiting lists of a year or more.³²³ In the North, where less than a quarter of Black Americans lived at the time, although public universities admitted Black students, many private colleges and universities continued to reject Black students, or only admitted them in small numbers.³²⁴ Local Veterans Administration officials in the South were overwhelmingly white, and steered Black people to vocational programs that funneled them to menial jobs or prohibited use of the GI Bill to pay for college.³²⁵ Only 12 percent of Black veterans were able to use the GI bill to enroll in college, compared to 26 percent for veterans as a whole.³²⁶ Although Black Americans used the educational benefits of the GI Bill more often than white

³¹⁸ Guy-Sheftall & Jackson, Challenges and Possibilities at HBCUs after the COVID-19 Pandemic, American Association of University Professors <<https://www.aaup.org/article/challenges-and-possibilities-hbcus-after-covid-19-pandemic#.YedZuf7MK70>>; Price, 1 in 10 HBCUs were Financially Fragile Before COVID-19 Endangered all Colleges and Universities, (2020) <<https://www.chicagoreporter.com/1-in-10-hbcus-were-financially-fragile-before-covid-19-endangered-all-colleges-and-universities/>>

³¹⁹ Allen & Jewell, A Backward Glance Forward: Past, Present and Future Perspectives on Historically Black Colleges and Universities, p. 249.

³²⁰ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), The Journal of Blacks in Higher Education, No. 41, p. 36.

³²¹ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), The Journal of Blacks in Higher Education, No. 41, p. 36.

³²² JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), The Journal of Blacks in Higher Education, No. 41, p. 36.

³²³ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), The Journal of Blacks in Higher Education, No. 41, p. 36.

³²⁴ JBHE Foundation, *How the GI Bill Widened the Racial Higher Education Gap* (Autumn, 2003), The Journal of Blacks in Higher Education, No. 41, p. 37.

³²⁵ Turner & Bound, Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans (2003) 63 J. of Econ. Hist. 145, 151-154, 172.

³²⁶ Katznelson, When Affirmative Action was White: An Untold History of Racial Inequality in Twentieth-Century America (2005) pp. 131-132 (hereafter When Affirmative Action was White); Blakemore, How the GI Bill's Promise was Denied to a Million Black WWII Veterans, History (Apr. 20, 2021) <<https://www.history.com/news/gi-bill-black-wwii-veterans-benefits>> (as of July 7, 2020); Bracey, *Significance of HBCUs*, supra, at fn. 29, p. 674-675; Herbold, *Never a Level Playing Field: Blacks and the GI Bill* (1994) 6 J. of Blacks in Higher Ed. 104; Onkst, 'First a Negro . . . Incidentally a Veteran': Black World War Two Veterans and the G. I. Bill of Rights in the Deep South, 1944-1948 (1998) 31 J. of So. His. 517, 519-20, 523-24; Darity, From Here to Equality, supra, at fn. 80, p. 311; Turner & Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans* (2003) 63 J. of Econ. Hist. 145, 151-154, 172.

Americans did, they could not use those benefits for college, like white Americans could, because they were denied entrance to white colleges and universities and often steered away from college degree programs and into vocational tracks.³²⁷ As a result, the educational and economic gap between white and Black Americans widened.³²⁸ (See Chapter 13 on wealth for further discussion of related issues.)

Today, discrimination in access to healthcare, employment, and housing continues to limit access to education benefits in the GI Bill for Black veterans compared to white veterans.³²⁹ While Black Americans make up 16.9 percent of the U.S. active duty force, studies show that Black veterans are not utilizing their benefits as much as white or Asian American veterans due to the aforementioned barriers.³³⁰

C. Deficiencies of Affirmative Action

The idea of affirmative action began as a concept with President John F. Kennedy issuing an executive order in 1961 requiring that federal contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin,” and establishing the President’s Committee on Equal Employment Opportunity.³³¹ Three years later, Congress passed the Civil Rights Act of 1964 to ban discrimination on the basis of race, color, and national origin not only in employment, but also in education.³³² With respect to employment, the federal department of labor ordered all federal contractors to prepare affirmative action plans including goals and timetables to improve the employment standing of specific groups of people, including Black Americans.³³³

In his 1965 commencement address at Howard University, President Lyndon Johnson stated that affirmative action should be approached as a moral and policy response to the material and psychological losses suffered by Black Americans during and after the time of slavery.³³⁴ He declared, “you do not take a person who, for years,

³²⁷ See, *supra*, at fn. 326.

³²⁸ Katznelson, *When Affirmative Action was White*, *supra*, at fn. 326, pp. 134; Bracey, *Significance of HBCUs*, *supra*, at fn. 29, p. 675.

³²⁹ Ottley, *Empty Promise: Black American Veterans and the New GI Bill* (2014) 144 *New Directors for Adult & Continuing Ed.* 79, 79.

³³⁰ Ottley, *Empty Promise: Black American Veterans and the New GI Bill* (2014) 144 *New Directors for Adult & Continuing Ed.* 79, 79-81 (according to the US Department of Housing and Urban Development, “nearly 56% of all homeless veterans are Black or Hispanic males”).

³³¹ Annenberg Classroom, *JFK Calls for Government ‘Affirmative Action’*, Executive Order 10925 < https://www.annenbergclassroom.org/timeline_event/jfk-calls-government-affirmative-action/> (as of January 28, 2022); Tierney, William G. “The Parameters of Affirmative Action: Equity and Excellence in the Academy.” *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, pp. 165–96, at p. 167 <https://doi.org/10.2307/1170625>.

³³² Tierney, William G. “The Parameters of Affirmative Action: Equity and Excellence in the Academy.” *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, at p. 167 <https://doi.org/10.2307/1170625>.

³³³ Tierney, William G. “The Parameters of Affirmative Action: Equity and Excellence in the Academy.” *Review of Educational Research*, vol. 67, no. 2, [Sage Publications, Inc., American Educational Research Association], 1997, at p. 167 <https://doi.org/10.2307/1170625>.

³³⁴ William M. Chace, *Affirmative Inaction*, *The American Scholar*, < <https://theamericanscholar.org/affirmative->

has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”³³⁵ Further, he emphasized the importance of Black Americans’ humanity and stated that what Black Americans sought was “not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result.”³³⁶

In the late 1960s and 1970s, some colleges and graduate schools began to develop similar affirmative action policies to increase the number of Black and other underrepresented students.³³⁷ After the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, civil rights leaders pushed for colleges to admit more Black students.³³⁸ In 1969, the next school year, the number of Black students admitted to America’s elite universities rose sharply, some by more than 100 percent.³³⁹

The lawsuits came quickly. In 1971, two years after schools adopted affirmative action policies, a white student sued the University of Washington Law School, citing reverse racism as the reason for his rejection.³⁴⁰ Because of this case, Harvard alumni believed that “semiliterate blacks are being accepted at the expense of white geniuses[,]” said David L. Evans, associate dean of admissions at Harvard in 1975.

By 1978, when the former nearly all white colleges and universities were still admitting fewer Black students than Black high school graduates, the Supreme Court decided in the *Regents of the University of California v. Bakke*, to limit states’ and universities’ ability to take race-based affirmative actions to address education discrimination.³⁴¹ The Supreme Court declared that the policy of the University of California at Davis’s medical school to set aside 16 of 100 total seats for “minority groups” like Black Americans was unconstitutional because it prevented white students from competing for the 16 seats set aside.³⁴² The Supreme Court declared in *Bakke* and subsequent cases that if a college or university wanted to have a more diverse class of students or make up for “societal” discrimination against Black Americans in the United States then it could only consider race as a factor, among many other factors, and with limitations.³⁴³

[inaction/#:~:text=In%20his%201965%20commencement%20address,justly%20believe%20that%20you%20have](#) > (As of March 11, 2022).

³³⁵ Id.

³³⁶ Id.

³³⁷ Torres, Affirmative Action in Higher Education: Relevance for Today’s Racial Justice Battlegrounds, American Bar Association, (2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

³³⁸ Hartocollis, 50 Years of Affirmative Action: What Went Right, and What It Got Wrong, (March 30, 2019) <<https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>>

³³⁹ Hartocollis, 50 Years of Affirmative Action: What Went Right, and What It Got Wrong, (March 30, 2019) <<https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>>

³⁴⁰ Hartocollis, 50 Years of Affirmative Action: What Went Right, and What It Got Wrong, (March 30, 2019) <<https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>>

³⁴¹ *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 307.

³⁴² *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 307.

³⁴³ E.g., *Grutter v. Bollinger* (2003) 539 U.S. 306; *Gratz v. Bollinger* (2003) 539 U.S. 244.

In doing so, the Supreme Court rejected affirmative action programs, like Davis’s program, that were intended to compensate Black students (and other racial minority groups) for the ways that federal, state, and local government had discriminated against them in education for more than 200 years, solely on account of their race. Instead, the Supreme Court described the American history of discrimination as “societal discrimination” that is “amorphous and ageless into the past[,]” which colleges and universities could not fix through programs like the one at Davis.³⁴⁴ At the same time, federal courts have not struck down university and college admissions policies, which provide a preference for legacy admissions, students whose parents, grandparents, and great grandparents attended the university or college.³⁴⁵ The argument is that such preferences are not race-based, but this does not grapple with the fact that white legacies may have received a preference in admission because they did not need to compete with Black students who were excluded from the admissions pool for centuries.³⁴⁶ Critics of the current way that colleges and universities practice affirmative action as sanctioned by the Supreme Court argue that using student diversity as a reason to include race as a factor does not address the original intention of desegregation or break down structural barriers for Black students.³⁴⁷

The percentage of Black college students has risen in the past 50 years, but it has fallen recently. The percentage of American college students who are Black increased from 10 percent in 1976 to 14 percent in 2017, but has dropped since from its high of 15 percent in 2011.³⁴⁸ College enrollment rates for Black 18- to 24-year-old Americans still lag behind those for Asian and white Americans of the same age.³⁴⁹ A 2020 study found that, since 2000, the percentage of Black students enrolled has decreased at nearly 60 percent of the 101 most selective public colleges and universities.³⁵⁰ Researchers identify that one cause of declining enrollment is a focus on standardized testing as an admissions requirement because the scores from such testing do not reflect the potential or ability of Black students but rather the inequities that Black students experience throughout their education career, from less access to high-quality early education to a greater likelihood of attending schools with less funding, fewer experienced teachers, and fewer rigorous course options.³⁵¹ Other causes for declining enrollment include closure of for-profit colleges and declines at two-year public colleges due to unemployment,

³⁴⁴ *Regents of University of California v. Bakke* (1978) 438 U.S. 265, 307.

³⁴⁵ Jack, *A Separate and Unequal System of College Admissions*, *The New York Times* (Sept. 16, 2020) [legacy students have a 25% percent higher chance of admission than nonlegacy with the same SAT scores] <<https://www.nytimes.com/2020/09/15/books/review/seligo-korn-levitz-college-admissions.html>> (as of June 22, 2021).

³⁴⁶ Jack, *A Separate and Unequal System of College Admissions*, *The New York Times* (Sept. 16, 2020) [legacy students have a 25% percent higher chance of admission than nonlegacy with the same SAT scores] <<https://www.nytimes.com/2020/09/15/books/review/seligo-korn-levitz-college-admissions.html>> (as of June 22, 2021).

³⁴⁷ Torres, *Affirmative Action in Higher Education: Relevance for Today’s Racial Justice Battlefields* (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

³⁴⁸ National Center for Education Statistics, *Fast Facts* <<https://nces.ed.gov/fastfacts/display.asp?id=98>> (as of June 18, 2021).

³⁴⁹ *The Condition of Education 2020, College Enrollment Rates*, https://nces.ed.gov/programs/coe/pdf/coe_cpb.pdf p. 1.

³⁵⁰ Nichols, *Segregation Forever?: The Continued Underrepresentation of Black and Latino Undergraduates at the Nation’s 101 Most Selective Public Colleges and Universities*, *The Education Trust* (July 21, 2020), p. 3 <<https://edtrust.org/resource/segregation-forever/?emci=041bef3d-b3ca-ea11-9b05-00155d03bda0&emdi=4d05e95b-07cb-ea11-9b05-00155d03bda0&ceid=310222>> (as of June 22, 2021) (hereinafter *Segregation Forever?*).

³⁵¹ Nichols, *Segregation Forever?*, *supra*, fn. 306, at pp. 6-7.

both types of colleges where Black students are overrepresented.³⁵²

D. California

In 1996, California voters passed Proposition 209, which eliminated consideration of race in public education admissions, regardless of long-standing segregation and past discrimination.³⁵³ This has had significant impacts on Black and other students of color in California.³⁵⁴ In 2020, a University of California, Berkeley study found that this affirmative action ban has harmed Black and Latino students by significantly reducing enrollment across the University of California campuses and lowering their graduation rates.³⁵⁵

An earlier 2006 study found that Black admissions had plummeted since the ban on affirmative action, particularly at the University of California Los Angeles and Berkeley campuses.³⁵⁶ In 2020, the President of the University of California Student Association, Varsha Sarveshwar, commented that, “[t]he exclusion of Black and Latinx students from selective colleges and universities is nothing short of a crisis. . . . 7 out of 9 UC undergraduate campuses receive D and F grades in access for Black and Latinx students.”³⁵⁷ Sarveshwar called on higher education leaders and policymakers to “move beyond public commitments to diversity – and act decisively to ensure that access is truly equitable.”³⁵⁸

The continued nature of the uneven playing field between Black and white students was highlighted in a recent legal settlement between student and community groups and the University of California.³⁵⁹ The lawsuit, leading up to the settlement, was brought by then 19-year-old Kawika Smith, a high school student from South Los Angeles, who asserted that the use of SAT and ACT scores in admissions and university scholarship

³⁵² Zahneis, *Why Has Black-Student Enrollment Fallen*, *The Chronicle of Higher Education* (Aug. 18, 2019)

<<https://www.chronicle.com/article/why-has-black-student-enrollment-fallen/>> (as of June 22, 2021).

³⁵³ *Hopwood v. University of Texas* (5th Cir. 1996) 78 F.3d 932; Kronley & Handley, *Miles To Go: A Report on Black Students and Postsecondary Education in the South*, Southern Education Foundation (1998) p. 14.

³⁵⁴ *Hopwood v. University of Texas* (5th Cir. 1996) 78 F.3d 932; Kronley & Handley, *Miles To Go: A Report on Black Students and Postsecondary Education in the South*, Southern Education Foundation (1998) pp. 14, 50.

³⁵⁵ Watanabe, *Prop. 209's Affirmative Action Ban Drove Down Black and Latino UC Enrollment and Wages, Study Finds*, *Los Angeles Times* (Aug. 22, 2020) <<https://www.latimes.com/california/story/2020-08-22/prop-209s-affirmative-action-ban-drove-down-black-and-latino-uc-enrollment-and-wages-study-finds>> (as of June 22, 2021); Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, Center for Studies in Higher Education, U.C. Berkeley (Aug. 2020) <<https://cshe.berkeley.edu/publications/affirmative-action-mismatch-and-economic-mobility-after-california%E2%80%99s-proposition-209>> (as of June 22, 2021); Harper et al., *Access and Equity*, *supra*, at fn. 45, p. 401.

³⁵⁶ Korry, *Black Student Enrollment at UCLA Plunges: Fallout from Prop. 209*, NPR (July 24, 2006)

<<https://www.npr.org/templates/story/story.php?storyId=5563891>> (as of June 22, 2021).

³⁵⁷ Nichols, *Segregation Forever?*, *The Education Trust* (July 21, 2020) <[Segregation Forever? - The Education Trust \(edtrust.org\)](https://www.edtrust.org/segregation-forever/)> (as of January 28, 2022).

³⁵⁸ Nichols, *Segregation Forever?*, *The Education Trust* (July 21, 2020) <[Segregation Forever? - The Education Trust \(edtrust.org\)](https://www.edtrust.org/segregation-forever/)> (as of January 28, 2022).

³⁵⁹ McDonnell Nieto del Rio, *University of California Will No Longer Consider SAT and ACT Scores*, *The New York Times* (May 15, 2021) <<https://www.nytimes.com/2021/05/15/us/SAT-scores-uc-university-of-california.html?referringSource=articleShare>> (as of June 18, 2021).

decisions may be discriminatory because they are proxies for wealth and race, and only exacerbate the gaps that exist due to unequal exam preparation between schools and based on whether parents can pay for private test tutors.³⁶⁰ In addition, research has shown that Black students may perform poorly on standardized tests, not because of genetic or cultural differences, but because negative stereotypes raise doubts and high-pressure anxieties in a test-taker's mind.³⁶¹ Kawika Smith told the Task Force at its October 2021 hearing that when he thought back to the day he took the SAT, he was “immediately met with this memory of feeling that I wasn’t worthy or capable of being in a collegiate environment, and this singular test determined that I would not be eligible for scholarship opportunities despite my academic achievements and having been in need of financial support to afford college[.]”³⁶² The legal settlement with the University California ensures that SAT and ACT scores will not be used in admission and scholarship decisions until spring 2025.³⁶³

V. Teaching Inaccurate History

Researchers and historians have raised significant concerns that the American K-12 education system is failing to teach a complete and accurate history of slavery and structural racism, along with the significant role that Black Americans had in developing this nation’s wealth without compensation. Dr. David Yacovone, a historian at Harvard University’s Hutchins Center for African & African American Research who has been studying United States history textbooks published from 1839 to the 1980s found that many textbooks taught that white people were superior to Black people and downplayed, minimized, or justified slavery based on a racial caste system, with Black Americans appearing “only as a problem.”³⁶⁴ Dr. Yacovone explained that in the older history textbooks “[w]hite supremacy is a toxin. . . . injected . . . into the mind of many generations of Americans.”³⁶⁵

³⁶⁰ McDonnell Nieto del Rio, *University of California Will No Longer Consider SAT and ACT Scores*, The New York Times (May 15, 2021) <<https://www.nytimes.com/2021/05/15/us/SAT-scores-uc-university-of-california.html?referringSource=articleShare>> (as of June 18, 2021); Watanabe, UC is Threatened with Lawsuit Over SAT, ACT Exams. Los Angeles Times <<https://www.latimes.com/california/story/2019-10-29/california-groups-demand-uc-drop-the-sat-saying-they-illegally-discriminate-against-disadvantaged-students>>

³⁶¹ American Psychological Association, *Stereotype Threat Widens Achievement Gap*, <<https://www.apa.org/research/action/stereotype>>

³⁶² AB 3121: Reparations Task Force Hearing (October 12, 2021)<<https://oag.ca.gov/ab3121/meetings/102021>> (as of January 28, 2022).

³⁶³ McDonnell Nieto del Rio, *University of California Will No Longer Consider SAT and ACT Scores*, The New York Times (May 15, 2021) <<https://www.nytimes.com/2021/05/15/us/SAT-scores-uc-university-of-california.html?referringSource=articleShare>> (as of June 18, 2021).

³⁶⁴ Benz, *Teaching White Supremacy: How Textbooks Have Shaped Our Attitudes on Race*, Huffington Post (Nov. 20, 2017) <https://www.huffpost.com/entry/teaching-white-supremacy-how-textbooks-have-shaped_b_5a0e4f65e4b023121e0e9142> (as of June 22, 2021); Stewart, ‘We are Committing Educational Malpractice,’ *Why Slavery is Mistought—And Worse—In American Schools*, The New York Times Magazine (Aug. 19, 2019) <<https://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html?searchResultPosition=3>> (as of June 22, 2021).

³⁶⁵ Mineo, *How Textbooks Taught White Supremacy*, The Harvard Gazette (Sept. 4, 2020) <<https://news.harvard.edu/gazette/story/2020/09/harvard-historian-examines-how-textbooks-taught-white-supremacy/>> (as of Nov. 22, 2021).

In addition, a 2018 study, *Teaching Hard History: American Slavery*, surveyed social studies teachers in K-12 schools across the country and found that 97 percent agreed that learning about slavery is essential, but that there is a lack of deep coverage on the topic; 58 percent reported dissatisfaction with their textbooks; and 39 percent reported their state offered little or no support for teaching about slavery.³⁶⁶ The study gave an average score of 46 percent with respect to whether 10 popular U.S. history textbooks provide comprehensive coverage of slavery and enslaved people. The study also found that only eight percent of 1,000 American high school seniors surveyed could identify slavery as the central cause of the Civil War.³⁶⁷ To ensure that schools accurately teach American history, Dr. Yacovone recommends “teach[ing] the truth about slavery as a central institution in America’s origins, as the cause of the Civil War, and about its legacy that still lives on.”³⁶⁸

In Texas, the state that uses the largest amount of textbooks, thereby shaping the K-12 textbook industry, the Board of Education, rather than historians, began changing the history books to refer to formally enslaved people as workers.³⁶⁹ In schools, students of color, including Black students, are less likely to see books with characters that share their cultural background and textbooks that reflect their experiences.³⁷⁰ Many educators recognize that textbooks do not accurately and fully reflect experiences of people of color; only one in five educators, the vast majority of whom were white, in a June 2020 nationwide survey thought so.³⁷¹ Educators of color were more likely to find textbooks lacking.³⁷² In 2020, Connecticut became the first state in the nation to require high schools to offer African-American, Black, Puerto Rican, and Latino studies.³⁷³

There is continued opposition to discussing the truth about slavery in public K-12 schools. Republicans in multiple states and in Congress have introduced bills to cut funding from schools that choose to use curriculum derived from the New York Times’ Pulitzer Prize-winning *1619* series of essays challenging readers to think about slavery as foundational to the nation’s origin story. They argue inclusion of this history delegitimizes the idea of the U.S. as a nation founded on principles of liberty and freedom and creates racial divisions.³⁷⁴ In

³⁶⁶ Shuster, *Teaching Hard History: American Slavery*, Southern Poverty Law Center (2018) pp. 9-10 <<https://www.learningforjustice.org/sites/default/files/2020-08/TT-2007-Teaching-Hard-History-Report.pdf>> (as of June 22, 2021) (hereafter *Teaching Hard History*).

³⁶⁷ Shuster, *Teaching Hard History*, *supra*, at fn. 366, pp. 9-10; see also Washington, *Diversity in Schools Must Include Curriculum*, The Century Foundation (“Studies have shown that most students lack a basic understanding of such things as slavery. . . .”) <<https://tcf.org/content/commentary/diversity-schools-must-include-curriculum/?session=1>> (as of June 24, 2021).

³⁶⁸ Mineo, *How Textbooks Taught White Supremacy*, *The Harvard Gazette* (Sept. 4, 2020) p. 6. <<https://news.harvard.edu/gazette/story/2020/09/harvard-historian-examines-how-textbooks-taught-white-supremacy/>> (as of Nov. 22, 2021)>

³⁶⁹ Isensee, *Why Calling Slaves ‘Workers’ is More than an Editing Error*, NPR (Oct. 23, 2015) <<https://www.npr.org/sections/ed/2015/10/23/450826208/why-calling-slaves-workers-is-more-than-an-editing-error>> (as of June 22, 2021).

³⁷⁰ Schwartz, *Teachers Push for Books with More Diversity, Fewer Stereotypes*, *Education Week* (June 11, 2019) <<https://www.edweek.org/teaching-learning/teachers-push-for-books-with-more-diversity-fewer-stereotypes/2019/06>> (as of June 22, 2021); Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 133.

³⁷¹ Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 133.

³⁷² Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 133.

³⁷³ Gewertz, *Survey of Mostly-White Educators*, *supra*, at fn. 133.

³⁷⁴ Kaur, *Bills in Several States Would Cut Funding to Schools that Teach the 1619 Project. But They Mostly Aren’t Going Anywhere*, *The Philadelphia Tribune* (Feb. 11, 2021) <<https://www.phillytrib.com/news/bills-in-several-states-would-cut-funding-to-schools-that>>

addition, the concept that schools may be teaching students critical race theory—a core idea of which is that race is a social construct embedded in legal systems and policies—is under attack across the nation by groups that say it divides Americans and places the blame on white Americans for current and historical harm to Black Americans and other nonwhite Americans.³⁷⁵ But Randi Weingarten, the President of the American Federation of Teachers, one of the nation’s largest teaching unions, has said that teaching critical race theory is really about teaching “the truth” and pledged to defend any teacher “who gets in trouble for teaching honest history . . . Teaching the truth is not radical or wrong. Distorting history and threatening educators for teaching the truth is what is truly radical and wrong.”³⁷⁶ Weingarten publicly stated that those attacking critical race theory have other motives: “labeling any discussion of race, racism or discrimination as critical race theory to try to make it toxic” and “to deprive students of a robust understanding of our common history.”³⁷⁷

As important as how schools shape their curriculum concerning the history of Black people in America is how schools teach the humanity of Black people before, during, and after enslavement. A curriculum that undoes the harmful narratives of African Americans that have historically been used to justify false conceptions of Black inferiority, requires schools to teach that African Americans’ stories did not begin with enslavement.³⁷⁸ Such a curriculum also requires schools to teach about humanity’s origins in Africa thousands of years before either Arabs or Europeans encountered people of West and Central African ancestry.³⁷⁹ Academics have also focused on the importance of teaching about the study of African lives and the African experience for true liberation.³⁸⁰ In order to empower Black communities through the study of Black history, academics discuss the importance of challenging European perspectives of the African experience to prevent others from defining the African experience and to give African people control over the narrative that is told about their experiences.³⁸¹ Redefinition of school curriculum discussing Black experiences, including the narrative about the African experience, is particularly important in California, a state which, as of 2015, was home to the fifth largest Black population in the country.³⁸²

The dehumanization inscribed in school textbooks causes miseducation and effectively contributes to Black

[teach-the-1619-project-but/article_90cd9c12-6c6c-11eb-ac9a-1b1eb28e00a2.html](https://www.washingtonpost.com/education/2021/06/22/rep-lawmakers-introduce-bill-to-defund-1619-project-curricula-in-schools/)> (as of June 22, 2021); Bernstein, *Republican Lawmakers Introduce Bill to Defund ‘1619 Project’ Curricula in Schools*, National Review (July 14, 2021)< [Republican Lawmakers Introduce Bill to Defund ‘1619 Project’ Curricula in Schools \(yahoo.com\)](https://www.yahoo.com/news/rep-lawmakers-introduce-bill-to-defund-1619-project-curricula-in-schools-123456789.html)>(as of Nov. 22, 2021).

³⁷⁵ Sawchuk, What is Critical Race Theory, and Why is It Under Attack? (May 18, 2021) EdSource <

<https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> (as of January 21, 2021).

³⁷⁶ Murakami, Teachers union vows to defend critical race theory in classrooms: ‘Truth is not radical’, The Washington Times (July 6, 2021)< <https://www.washingtontimes.com/news/2021/jul/6/teachers-union-vows-defend-critical-race-theory-cl/>> (January 28, 2022).

³⁷⁷ Murakami, Teachers union vows to defend critical race theory in classrooms: ‘Truth is not radical’, The Washington Times (July 6, 2021)< <https://www.washingtontimes.com/news/2021/jul/6/teachers-union-vows-defend-critical-race-theory-cl/>> (January 28, 2022).

³⁷⁸ Joyce E. King, *A Reparatory Justice Curriculum for Human Freedom: Rewriting the Story of African American Dispossession and the Debt Owed*, University of Chicago Press, p. 216.

³⁷⁹ Id.

³⁸⁰ Mazama, *The Afrocentric Paradigm: Contours and Definitions*, Journal of Black Studies, Vol. 31, No. 4 (Mar. 2001), p. 387 (citing and discussing Molefi Asante’s seminal work, *Afrocentricity: The Theory of Social Change*).

³⁸¹ Id. at pp. 387-88.

³⁸² The Education Trust – West, *Black Minds Matter: Supporting the Educational Success of Black Children in California*, (2015), p. 4.

Americans’ “cultural and social alienation from identity and existential belonging.”³⁸³ In the 1960s, W.E.B Du Bois spoke out about the dangers posed by the deficiencies in school curriculums with regard to Black history and culture.³⁸⁴ He warned that the intentional omission of these concepts from public school curriculums would ultimately cause Black history and culture to be lost, unless Black families and organizations actively and systematically impressed these fundamental principles upon subsequent generations of Black Americans.³⁸⁵

In line with this same notion of education for liberation and cultural preservation, many activists specifically focused their efforts on the establishment and expansion of “Black Studies” on university and college campuses to further the ongoing movement for the liberation of Black Americans. The majority of Black Studies programs began at predominantly white institutions and a handful of HBCUs.³⁸⁶ Although the Black Studies Movement was initially faced with stiff opposition, by 1971 an estimated 500 courses and programs had been organized in the United States.³⁸⁷

A. California

California student groups have long-raised concerns that the complete history of racism and segregation in the state and across the nation has been left out of textbooks, and that leaders from diverse backgrounds who helped create this nation and California are not reflected.³⁸⁸ “It isn’t just white heroes like Christopher Columbus or folks like George Washington or Thomas Jefferson. There was a lot more history behind it and we don’t learn a lot about the other important figures that contributed to making America[] into what it is,” Alvin Lee, President of Generation Up, a 4,000-member California student organization, shared with legislators considering how to change California’s history textbooks to better reflect the contributions of its diverse people. One state legislator who has advocated to ensure that California’s elementary and secondary schools teach a curriculum that reflects the history of Black Americans and other people of color, explained that: “Knowledge of our history plays a critical role in showing who we become” and “students [are more engaged] when they [see] themselves reflected in the coursework.”³⁸⁹

Among other things, California’s approach to teaching about slavery has been critiqued. In 2018, a classroom teacher made headlines for staging a classroom simulation of conditions on a slaver’s ship to provide a “unique

³⁸³ Shepherd, Justice for People of African Descent through History Education: Addressing Psychological Rehabilitation, Presentation by Ms Verene A. Shepherd (14th Session, March 31- April 4, 2014) p. 1.

³⁸⁴ W.E.B Du Bois, Speech to the Association of Negro Social Science Teachers (1960) <

https://steverichey.github.io/whither_now_and_why/ >

³⁸⁵ Id.

³⁸⁶ Alan Colon, *Review: Reflections on the History of Black Studies*, *The Journal of African American History* Vol. 93, No. 2 Discourses on Race, Sex, and African American Citizenship. The University of Chicago Press, p. 272 (2008).

³⁸⁷ Rooks, The Beginnings of Black Studies, *The Chronicle of Higher Education* (Feb. 10, 2006) <

<https://www.chronicle.com/article/the-beginnings-of-black-studies/> >

³⁸⁸ E.g., Martinez, *Newsom’s Veto of Ethnic Studies Requirement Stirs Applause, Disappointment*, KCRA (Oct. 1, 2020)

<<https://www.kcra.com/article/newsoms-veto-of-ethnic-studies-requirement-stirs-applause-disappointment/34243062#>> (as of June 22, 2021) (hereafter *Newsom’s Veto of Ethnic Studies Requirement*); Harris, *A Roadmap for Reparations*, *supra*, at fn. **Error!**

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³⁸⁹ Assembly Member Medina, author, A.B. 1331, Analysis, Assembly Committee on Education (2019).

learning experience.”³⁹⁰ A study by Southern Poverty Law Center found that California did a better job than other states in teaching slavery, but highlighted concerns with the approach of teaching about Harriet Tubman in second grade two years before slavery is taught and failing to discuss how false ideas of white economic and political supremacy fueled and perpetuated slavery as an institution.³⁹¹

In addition, research has shown that because school curricula often do not include content that reflects the experience, culture, and history of Black students, they and others students whose experience, culture, and history is not reflected, suffer.³⁹² When Black students do not see their experiences and history reflected in the school curricula, this leads to a feeling that they are not important and even invisible and voiceless in the classroom.³⁹³ And while culturally responsive teacher training is one way to help Black students and other students of color feel welcomed, included, and valued in schools, teacher preparation is inadequate in training teachers to be culturally-responsive and to carry those practices into the classroom in both the way they teach and the materials they use when they teach.³⁹⁴

One other way to increase diversity in curriculum is by adding ethnic studies courses. “Ethnic studies” is a term used to encompass Black, Chicano, Latino, Native, and Asian American studies, and was developed in response to lack of representation of people from these groups in curricula taught in U.S. schools, colleges, and universities. Generally, ethnic studies is not taught in California elementary and secondary schools, despite known academic performance and attendance benefits.³⁹⁵ In 2016-17, only a small number—17,354 K-12 students statewide—were enrolled in ethnic studies courses.³⁹⁶ One reason for this: Only 51 percent of the 777 ethnic studies courses in social science in 2016-17 were approved as meeting A-G state university admissions requirements.³⁹⁷

This may be changing. In 2016, California state law mandated creation of a voluntary K-12 ethnic studies

³⁹⁰ Branigin, *Calif. High School Sparks Criticism for Using Slave-Ship Role-Play to Teach Students History*, The Root (Sept. 18, 2017) <<http://www.theroot.com/calif-high-school-sparks-criticism-for-using-slave-shi-1818512323>> (as of June 22, 2021).

³⁹¹ Shuster, *Teaching Hard History*, *supra*, at fn. 366, p. 12.

³⁹² Adam, *When Authenticity Goes Missing: How Monocultural Children’s Literature is Silencing the Voices and Contributing to Invisibility of Children from Minority Backgrounds* (Jan. 15, 2021) *Education Sciences* 11, 32;

³⁹³ NEED BOOK CITATION, Chapter 1, p. 6 (citing Ali, Rohindra, & Coll, 2008; Boekaerts, 1998; Ladson-Billings, 1995).

³⁹⁴ NEED BOOK CITATION, Chapter 1, pp. 7-8 (citing Castagno & Brayboy, 2008; Hsaio, 2015; Ellerbrock, Cruz, Vasquez, & Howes, 2016; Ladson-Billings, 2000; Ladson-Billings, 2014; Renner et al., 2004; Siwatu, 2007; Thompson, 2015a; Villegas & Lucas, 2007; Zhao, Meyer, & Meyer, 2009; Irving & Hudley, 2008; Hsaio, 2015; Kaluanpur & Harry, 1997; Kea & Utley, 1998; Ladson-Billings, 2000; Ladson-Billings, 2006; Renner et al., 2004; Singh, 2011; Villegas & Lucas, 2002; Zhao, Meyer, & Meyer, 2009).

³⁹⁵ Dee, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, Stanford Center for Education Policy Analysis, Work Paper No. 16-01 (assignment to an ethnic studies court in ninth grade in high school increased ninth-grade student attendance by 21 percentage points, GPA by 14 grade points, and credits earned by 23).

³⁹⁶ Assem. Com. on Ed., *Analysis of Assem. Bill No. 331 (2019-2020 Reg. Sess.)* p. 4 -5 (hereafter *Analysis of AB 331*); see also San Francisco Unified School District, *San Francisco Board of Education Approves K-12 Black Studies Curriculum*, Press Release (Oct. 20, 2020)[discussing 2016 Stanford Graduate School of Education study demonstrating that San Francisco’s implementation of a year-long ethnic studies course boosted attendance by 21 percentage points and academic performance by 1.4 grade points]<<https://www.sfusd.edu/about/news/current-news/board-of-education-approves-k-12-black-studies-curriculum>>(as of June 15, 2021).

³⁹⁷ *Analysis of AB 331*, *supra*, at fn. 396, p. 4.

curriculum. Recently, on March 18, 2021, the State Board of Education approved the model ethnic studies curriculum.³⁹⁸ And while in 2019, a California bill to mandate ethnic studies in all K-12 schools was vetoed by Governor Newsom,³⁹⁹ in October 2021, he signed a different bill, Assembly Bill 101, which will require California high school students to take ethnic studies as a graduation requirement commencing in 2030.⁴⁰⁰ In the interim, several districts have recently made completion of a course in ethnic studies a graduation requirement, including Montebello, Sacramento City, and Coachella.⁴⁰¹ In 2020, San Francisco approved development of a K-12 Black studies curriculum.⁴⁰²

In California's public colleges and universities, the movement for Ethnic Studies began in 1968. At that time, the Black Student Union, the Third World Liberation Front, select faculty and staff, and other activists from the larger San Francisco Bay Area, organized and led a series of protests at San Francisco State University.⁴⁰³ Protestors denounced the deficiencies within the university's curriculum, which neglected and misrepresented the experiences of people of color, including Black Americans and indigenous people.⁴⁰⁴ On a mission to define and shape their own educational experiences, students drafted a list of demands for the university and protested for months until a deal was negotiated. Ultimately, the university agreed to establish a College of Ethnic Studies, the first in the nation, with classes geared toward communities of color.⁴⁰⁵ Since that time, 22 of 23 CSU campuses have maintained some level of ethnic studies, but a recent legislative analysis suggested that 53 percent of CSU students had not taken a course between 2015 to 2018.⁴⁰⁶

³⁹⁸ Asmelash, *After Years of Debate, California Finally Adopts Ethnic Studies Model Curriculum*, CNN (Mar. 22, 2021) <<https://www.cnn.com/2021/03/22/us/california-ethnic-studies-high-school-trnd/index.html?form=MY01SV&OCID=MY01SV>> (as of June 22, 2021) (hereafter *California Finally Adopts Ethnic Studies Curriculum*); see also California Department of Education, *State Board of Education Approves Historic Ethnic Studies Guidance for High Schools* (Mar. 18, 2021) <<https://www.cde.ca.gov/nr/ne/yr21/yr211rel21.asp>> (as of June 22, 2021).

³⁹⁹ Martinez, *Newsom's Veto of Ethnic Studies Requirement*, *supra*, at fn. 388.

⁴⁰⁰ Assem. Bill No. 101 (Oct. 8, 2021).

⁴⁰¹ Analysis of AB 331, *supra*, at fn. 396, 4; see Smith, *Orange County Debates Ethnic Studies: Vital learnings or 'Anti-White' Divisiveness?*, *Los Angeles Times* (Apr. 28, 2021) <https://www.latimes.com/california/story/2021-04-28/ethnic-studies-slammed-as-anti-white-in-orange-county?utm_id=28151&sfmc_id=805927> (as of June 25, 2021) (while there's been oppositions by critics who argue ethnic studies promotes hate and victimization, students have shown support for an ethnic studies requirement, with one student sharing that such courses are "important 'because it tells the stories that help us belong'").

⁴⁰² SFUSD, *Board of Education Approves K-12 Black Studies Curriculum*, Press Release (Oct. 20, 2020) <<https://www.sfusd.edu/about/news/current-news/board-of-education-approves-k-12-black-studies-curriculum>> (as of June 22, 2021); San Francisco Board of Education, Res. No. 208-25A2 In Support of Creating a K-12 Black Studies Curriculum that Honors Black Lives, Fully Represents the Contributions of Black People in Global Society, and Advances the Ideology of Black Liberation for Black Scholars in the San Francisco Unified School District, as adopted Oct. 20, 2020; Asmelash, *California Finally Adopts Ethnic Studies Curriculum*, *supra*, at fn. 398.

⁴⁰³ San Francisco State University, College of Ethnic Studies, < <https://ethnicstudies.sfsu.edu/history> > (As of March 10, 2022).

⁴⁰⁴ *Id.*

⁴⁰⁵ Ehsanipour, *Ethnic Studies: Born in the Bay Area from History's Biggest Student Strike*. KQED. <<https://www.kqed.org/news/11830384/how-the-longest-student-strike-in-u-s-history-created-ethnic-studies#:~:text=After%20two%20more%20months%20of,geared%20towards%20communities%20of%20color.>> (As of July 30, 2022).

⁴⁰⁶ Assem. Floor, Analysis on Assem. Bill No. 1460 (2019-2020 Reg. Sess.) Feb. 11, 2020, p. 3.

In August 2020, Governor Newsom signed Assembly Bill 1460, which, beginning in 2024 to 2025, requires a three credit ethnic studies course for graduation from a CSU—the first change to the CSU’s general education curriculum in over 40 years.⁴⁰⁷ Legislative findings in support of the bill’s passage included that white students and students of color benefit from taking ethnic studies courses, which “play an important role in building an inclusive multicultural democracy.”⁴⁰⁸ In discussing the importance of the bill’s passage, Senator Steven Bradford, the bill’s co-author commented, “Ethnic studies is critical in learning our contributions to America and telling the true story of our rich history.”⁴⁰⁹

VI. Conclusion

During the slavery era, enslaving states denied Black enslaved Americans an education so that they could maintain control over the enslaved people whom they depended upon to build this nation’s wealth. However, an understanding of how powerful knowledge can be, emboldened enslaved Black Americans to find ways to educate themselves, despite the great danger they risked in doing so. Following the Civil War, states adopted many laws and policies to ensure their continued denial of education to free Black Americans and to effectively maintain an illiterate servant class. In states where Black children were permitted to attend segregated schools, white-controlled legislatures severely underfunded these schools and subjected Black students to deplorable conditions. Aside from the inferior quality of these schools, Black communities also suffered from the ongoing racist attacks by white terrorist groups who committed themselves to destroying Black schools. Even after the Supreme Court outlawed school segregation in its 1954 *Brown v. Board of Education* decision, white policymakers and school boards adopted other policies to ensure the continued exclusion of Black students from their schools. Such policies continue to have lasting effects on the educational opportunities and the quality of academic opportunities available to Black Americans today.

Because government acts have denied the vast majority of Black Americans continued access to education and high quality and well-funded schools from enslavement until the present, they have suffered a number of harms, including lower levels of high school graduation, achievement, and college access and completion. These injuries widened the gap between Black and white wealth in America. The COVID-19 pandemic has made the education injuries even worse, because far more Black students than white students live in poverty, and students living in poverty have had less access to the technology needed to participate in remote schooling.⁴¹⁰ California and the nation have not adequately accounted for the harmful intergenerational effects of education

⁴⁰⁷ Assem. Bill No. 1460 (2019-2020 Reg. Sess.); *California Requires Ethnic Studies for University System*, KCRA (Aug. 17, 2020) <<https://www.kcra.com/article/california-requires-ethnic-studies-for-university-system/33629400>> (as of June 22, 2021).

⁴⁰⁸ AB 1460 (Aug. 17, 2020).

⁴⁰⁹ Press Release, Senator Steven Bradford, Co-author, AB 1460 <<https://sd35.senate.ca.gov/news/2020-08-19-governor-signs-bill-require-ethnic-studies-california-state-university>>(as of June 25, 2021).

⁴¹⁰ Harris, *A Roadmap for Reparations*, *supra*, at fn. **Error! Bookmark not defined.**; Office for Civil Rights, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students*, U.S. Dept. of Ed. (2021) pp. 2, 12-17 (finding that “the COVID-19 pandemic has had a strikingly negative impact on academic growth for many students of color, widening the pre-existing disparities” and that the “gap continued to widen sharply through winter 2021 for many Black and Latinx students.”) p. 15 <<https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>> (as of June 25, 2021).

discrimination and denial.

In recent years, the academic gap between all student groups has steadily narrowed except for the gap between Black and white students, which has widened, confirming the ongoing existence of deeply-rooted racial disparities in the nation's education system.⁴¹¹ In California, over the past decade, average math and reading test scores rose for all student groups, except Black students. In districts where there was the least significant gap between the academic achievements of different student groups, data showed that this could be attributed to less socioeconomic inequality among students, more spending per pupil by the district, and fewer disparities in access to experienced teachers.⁴¹² The gap also continues to exist in high school graduation rates, but it has reduced considerably nationwide and in California since the 1960s.⁴¹³ Nonetheless, the gap in college as well as graduate school admission and graduation rates has remained stagnant, with Black Americans half as likely as white Americans to have a college degree.⁴¹⁴

Due to intergenerational denials of equal educational opportunity, Black Americans have also been denied a number of other benefits, including a positive link between one's own education and the education received by one's children.⁴¹⁵ More schooling is associated with higher earnings in one's own life and in subsequent generations.⁴¹⁶ However, white and Black Americans with the same educational level do not have the same level of wealth.⁴¹⁷ White college graduates have seven times more wealth than their Black college graduate counterparts, even when it is assumed that the white and Black college graduates are in jobs making the same amount of money.⁴¹⁸ Black American college graduates also have two-thirds of the net worth of

⁴¹¹ Bertocchi & Dimico, Racial Gap in Education, *supra*, at fn. 109; Jones, *New Data Shines Light on Student Achievement Progress – And Gaps – In California and US*, EdSource (Feb. 8, 2021) <<https://edsource.org/2021/new-data-shines-light-on-student-achievement-progress-and-gaps-in-california-and-u-s/648321>> (as of June 22, 2021) (hereafter *New Data Shines Light on Student Achievement*).

⁴¹² Jones, *New Data Shines Light on Student Achievement*, *supra*, at fn. 411.

⁴¹³ Jones et al., 50 Years After the Kerner Commission: African Americans Are Better Off in Many Ways But Are Still Disadvantaged By Racial Inequality, Economic Policy Institute (Feb. 26, 2018) <<https://www.epi.org/publication/50-years-after-the-kerner-commission/>> (as of June 22, 2021); California Department of Education, California Department of Education Releases 2019-20 High School Graduation and Dropout Rates (Dec. 11, 2020) <<https://www.cde.ca.gov/nr/ne/yr20/yr20rel101.asp>> (as of June 22, 2021).

⁴¹⁴ Agrawal, *Black Students Are Succeeding in College at Higher Rates, But Far Behind White Peers, Report Says*, Los Angeles Times (Feb. 24, 2021) <[latimes.com/california/story/2021-02-24/black-students-are-succeeding-in-college-at-higher-rates-but-far-behind-white-peers-report-says](https://www.latimes.com/california/story/2021-02-24/black-students-are-succeeding-in-college-at-higher-rates-but-far-behind-white-peers-report-says)> (as of June 22, 2021); Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 4; Orfield et al., Losing our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis, The Civil Rights Project at Harvard University et al. (2004) <<https://civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/losing-our-future-how-minority-youth-are-being-left-behind-by-the-graduation-rate-crisis/orfield-losing-our-future-2004.pdf>> (as of June 22, 2021); Bridgeland et al., *The Silent Epidemic: Perspectives of High School Dropouts* (2006) p. i.

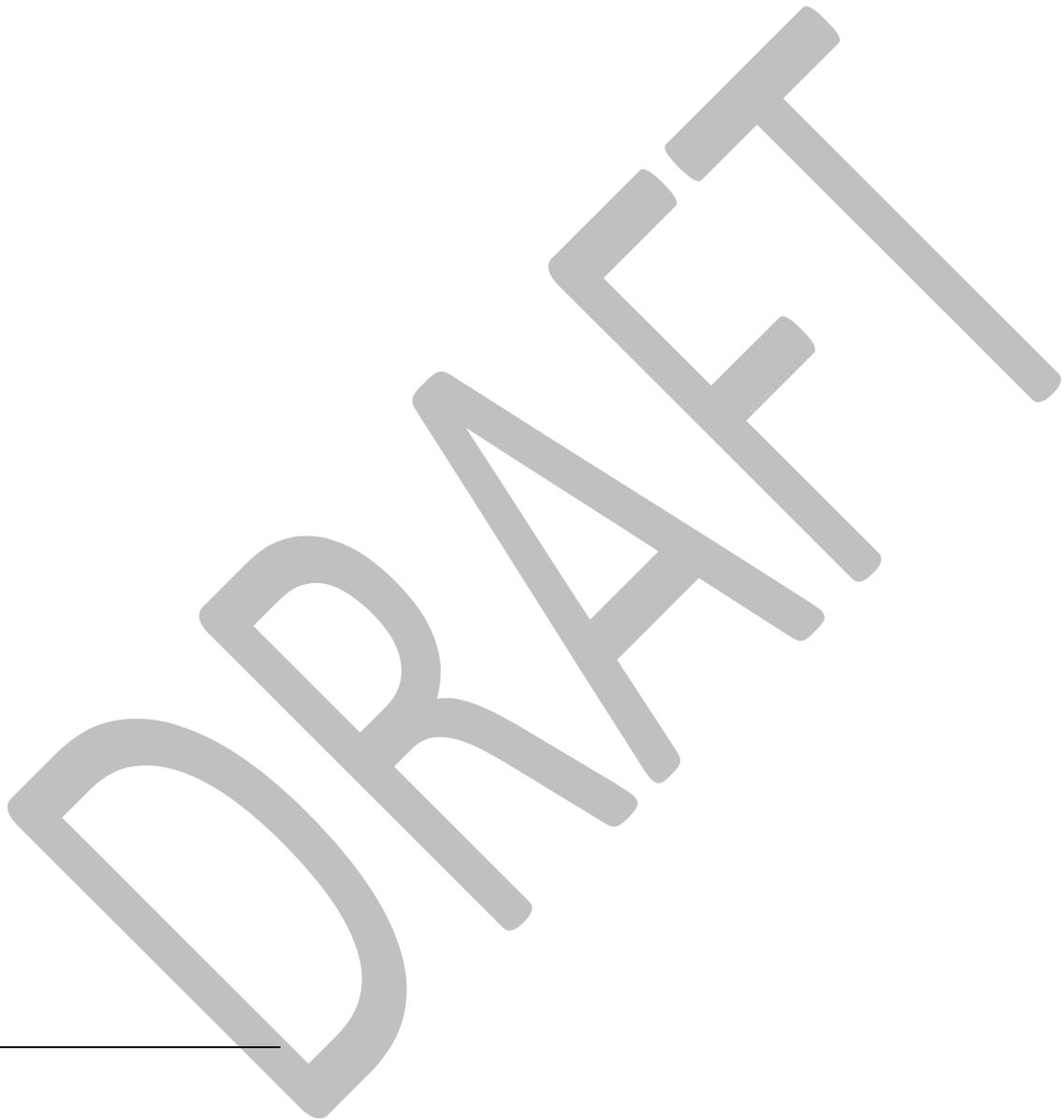
⁴¹⁵ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 5 (citations and quotations omitted).

⁴¹⁶ Ladson-Billings, *Achievement Gap to the Education Gap*, *supra*, at fn. 18, p. 6; Tamborini et al., *Education and Lifetime Earnings in the United States* (2015) 54 *Demography* 1383, 1385-1386.

⁴¹⁷ Altonji & Doraszelski, The Role of Permanent Income and Demographics in Black/White Differences in Wealth (2005) 40 *J. Human Resources* 1, 9.

⁴¹⁸ Broyles, *A Conversations About the Racial Wealth Gap—And How to Address it*, Brookings (June 18, 2019) <<https://www.brookings.edu/blog/brookings-now/2019/06/18/a-conversation-about-the-racial-wealth-gap-and-how-to-address-it/>> (as of June 22, 2021).

white Americans who never finished high school.⁴¹⁹ And Black college graduates continue to suffer higher unemployment rates than white college graduates.⁴²⁰ Centuries after the cessation of slavery in this country, white Americans continue to benefit from its effects, and Black Americans continue to suffer the compounded harms of the systematic denial of an equal education to Black Americans.



⁴¹⁹ Hicks, et al., Still Running Up the Down Escalator: How Narratives Shape our Understanding of Racial Wealthy Inequality, p. 13, Insight Center for Community Economic Development, Duke University (2021) <https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf> (as of January 28, 2022).

Gouf⁴²⁰ E.g., Gould & Cooke, *Unemployment for Young Black Grads is Still Worse Than it was For Young White Grades in the Aftermath of the Recession*, Economic Policy Institute (May 11, 2016) <<https://www.epi.org/publication/unemployment-for-young-black-grads-is-still-worse-than-it-was-for-young-white-grads-in-the-aftermath-of-the-recession/>> (as of June 22, 2021).

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XVI. Appendix

Table 1: Racial Disparities in Home Values, 2020 (Studied CA Metros)⁶⁴⁶

Metro Area	Value of the Typical Black-Owned Home as a Percentage of the Value of the Typical US Home (%)	Value of the Typical White-Owned Home as a Percentage of the Value of the Typical US Home (%)
Statewide	86	108
Los Angeles	81	118
Riverside	99	101
Sacramento	93	101
San Diego	81	106
San Francisco	78	107
San Jose	81	108

Table 2: Gap in Black Homeownership Rates and White Homeownership Rates in Formerly Greenlined Neighborhoods, 1980 vs. 2017 (Studied CA Metros)⁶⁴⁷

Metro Area	1980			2017		
	BHR (%)	WHR (%)	Gap	BHR (%)	WHR (%)	Gap
Fresno	31.4	71.2	39.8 points	2.5	62.6	60.1 points
Los Angeles	49.8	69.1	19.3 points	46.2	67.1	20.9 points
Oakland	76.9	82.6	5.7 points	84.1	85.9	1.8 points
Sacramento	35.7	79.5	43.8 points	16.7	73.4	56.7 points
San Diego	7.9	64.0	56.1 points	17.0	60.9	43.9 points
San Jose	9.9	58.8	48.9 points	41.1	60.5	19.4 points

Table 2c: Gap in Median Home Equity in Formerly Greenlined and Formerly Redlined Neighborhoods, 2019 (Studied CA Metros)⁶⁴⁸

Metro Area	Median Home Equity in Formerly Greenlined Neighborhoods (\$)	Median Home Equity in Formerly Redlined Neighborhoods (\$)	Gap (% difference)
Fresno	282,000	158,000	78
Los Angeles	1,111,000	587,000	89
Oakland	1,300,000	752,000	73
Sacramento	778,000	522,000	49
San Diego	1,058,000	471,000	125
San Jose	1,329,000	854,000	56

⁶⁴⁶ Manhertz, *Home Value Disparities Between Races are Shrinking, but Remain Very Wide* (Dec. 19, 2020) Zillow <<https://bit.ly/3jbhrxT>>.

⁶⁴⁷ Anderson, *Redlining's Legacy of Inequality: \$212,000 Less Home Equity, Low Homeownership Rates for Black Families* (Oct. 15, 2020) Redfin <<https://bit.ly/3jjHXVN>> (as of June 25, 2021) . .

⁶⁴⁸ Anderson, *Redlining's Legacy of Inequality: \$212,000 Less Home Equity, Low Homeownership Rates for Black Families* (Oct. 15, 2020) Redfin <<https://bit.ly/3jjHXVN>> (as of June 25, 2021) . .

Table 3 Sundown Towns identified in California from *Sundown Towns: A Hidden Dimension of American Racism* by James Loewen

- Brea⁶⁴⁹
- Bishop⁶⁵⁰
- Burbank⁶⁵¹
- Maywood Colony, Corning⁶⁵²
- Culver City⁶⁵³
- Glendale⁶⁵⁴
- Hawthorne⁶⁵⁵
- La Jolla⁶⁵⁶
- Numerous suburbs of Los Angeles⁶⁵⁷
- Palos Verdes Estates⁶⁵⁸
- Richmond⁶⁵⁹
- San Marino⁶⁶⁰
- South Pasadena⁶⁶¹
- Taft⁶⁶²
- Tarzana⁶⁶³

⁶⁴⁹ Loewen pp. 102-03; see also p. 293

⁶⁵⁰ Loewen p. 338

⁶⁵¹ Loewen p. 100, 239-240

⁶⁵² Loewen p. 29

⁶⁵³ Loewen, 112

⁶⁵⁴ Loewen 236, 255

⁶⁵⁵ Loewen 23, 333

⁶⁵⁶ Loewen, 5

⁶⁵⁷ Loewen 276

⁶⁵⁸ Loewen 258

⁶⁵⁹ Loewen 239

⁶⁶⁰ Loewen 340

⁶⁶¹ Loewen 258

⁶⁶² Loewen 410

⁶⁶³ Loewen 14

Chapter 7. Racism in Environment and Infrastructure

I. Introduction

The legacy of slavery, Jim Crow, and government policies known as redlining have created environmental impacts that have harmed and continue to harm Black Americans. First, government policies forced Black Americans to live in poor-quality housing, exposing them to disproportionate amounts of lead poisoning¹ and increasing their risks of infectious disease,² including COVID-19.³ Outside of their homes, Black Americans are also exposed to far more pollutants than white Americans, partially because redlining explicitly grouped Black Americans and other “inharmonious racial groups” with polluting sources.⁴ Second, government actors developed infrastructure projects, like highways and parks, in ways that destroyed and segregated Black communities, and also failed to provide or repair public services like sewage lines and water pipes.⁵ Finally, Black Americans and their homes are more vulnerable than white Americans to the dangerous effects of extreme weather patterns like heat waves and hurricanes, disparities which are made worse by manmade climate change.⁶

Section III of this chapter addresses the substandard housing and overcrowding problems faced by Black Americans throughout American history caused by government practices including redlining. Section IV of this chapter addresses discusses the environmental pollutants to which Black Americans are exposed as result of similar and related government practices, which disproportionately continues to subject Black Americans to hazardous waste management, oil and gas production, automobile and diesel fumes. Section V addresses the discriminatory choices made by government actors in implementing infrastructure development and related public services, which consistently have disadvantaged Black Americans. Section VI addresses the discriminatory impacts of climate change, which are experienced disproportionately by Black Americans as a result of government actions and policies that have imposed those harms on them.

¹ See, e.g., Haslam, Robert, Lead Poisoning, Paediatrics & Child Health Vol. 8,8 (2003): 509-10; Tong Shilu, von Schirnding, Yasmin & Prapamontol, Tippawan, Environmental Lead Exposure: A Public Health Problem of Global Dimensions, Bulletin of the World Health Organization, 2000, 78 (9).

² WHO Housing and Health Guidelines. Geneva: World Health Organization (2018), Household Crowding; Krieger, J., & Higgins, D. L. (2002), Housing and Health: Time Again for Public Health Action. American Journal of Public Health.

³ Jackie Botts and Lo Bénichou, The Neighborhoods Where COVID Collides with Overcrowded Homes, Cal Matters (June 12, 2020).

⁴ Pollution and Prejudice, CalEPA, January 25, 2021, p. 6.

⁵ Jeremy S. Hoffman, Vivek Shandas, Nicholas Pendleton, The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas Climate 2020, 8(1), 12; Published: 13 January 2020; Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 270.

⁶ Hoffman et al, *supra*.

II. Substandard Housing and Overcrowding

Throughout American history and to this day, Black Americans have lived in housing of worse quality than white Americans, and paid more to live in it.⁷

A. Nationally

Starting in the early 20th century, as Black Americans primarily rented housing in urban areas, they were consistently charged higher rents than white people.⁸ Before the federal Fair Housing Act made housing discrimination based on race illegal, landlords would freely admit that they needed to charge Black renters higher rent because white renters did not want to share an apartment building with Black Americans.⁹ To pay for the higher rents, Black families often took in lodgers or shared apartments, which created additional overcrowding.¹⁰

In modern times, about 2.6 million (7.5 percent) non-Hispanic Blacks and 5.9 million white people (2.8 percent) live in substandard housing in America, which is defined largely in relation to the housing's susceptibility to waterborne and airborne communicable diseases.¹¹ Black households are still twice as likely as white households to lack indoor plumbing nationwide.¹² Black households are more poorly ventilated than white households in general, leading to excess moisture that supports the growth of mold and vermin, which can lead to or exacerbate asthma and other breathing issues.¹³

Black families also still experience overcrowded housing—generally defined as having more than 1.5 or two persons per room living in a household—at three times the rates of white Americans.¹⁴ Overcrowded housing is linked with physical and mental health problems, including higher rates of exposure to household lead poisoning.¹⁵ This association may be correlative rather than causative, since overcrowded housing is more likely to be older housing, and also more likely to house low-income workers in heavy industries that may cause them to bring lead dust and other contaminants into the household.¹⁶ Overcrowding has similarly shown to increase the risk of spread of infectious diseases, such as tuberculosis, diarrhea, and infectious

⁷ Rothstein, *The Color of Law* (2017) pp. vii-xvii; Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, at 153, 179-180, 183; see also Carter, *From Exclusion to Destitution: Race, Affordable Housing, and Homelessness*, *Cityscape: A Journal of Policy Development and Research*, Vol. 13, No. 1 (2011) p. 37.

⁸ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, at 60, 173, 208, 280.

⁹ *Id.* at 210, 280.

¹⁰ *Ibid.*

¹¹ Jacobs D. E. (2011). Environmental health disparities in housing. *American journal of public health*, 101 Suppl 1(Suppl 1), S115–S122. <https://doi.org/10.2105/AJPH.2010.300058>.

¹² Nicole Acevedo, *When it comes to access to clean water, 'race is still strongest determinant,' report says*, *NBC News* (Nov. 27, 2019).

¹³ Jacobs D. E., *supra*.

¹⁴ U.S. Dep't of Housing and Urban Dev., Office of Policy Dev. and Research, *Measuring Overcrowding in Housing* (2007), at 18.

¹⁵ See, e.g., Haslam, Robert, *Lead Poisoning*, *Paediatrics & Child Health* Vol. 8,8 (2003): 509-10; Tong Shilu, von Schirnding, Yasmin & Prapamontol, Tippawan, *Environmental Lead Exposure: A Public Health Problem of Global Dimensions*, *Bulletin of the World Health Organization*, 2000, 78 (9).

¹⁶ *Ibid.*

respiratory illnesses.¹⁷ Although most studies on the link between overcrowding and infectious disease spread are correlative, the close proximity of, and inability to distance from, fellow household residents is almost certainly causal.¹⁸ At least one recent study demonstrated that overcrowding and other poor housing conditions correlated with dramatically greater incidence and mortality of COVID-19 infections across the country.¹⁹

Overcrowded housing also is linked with various mental health issues, including psychological distress, alcohol abuse, depression, and sleep disorders.²⁰ Living in overcrowded housing is also associated with social withdrawal and feelings of helplessness,²¹ as well as an increase in hostility among household residents due to the lack of privacy and time to oneself.²²

Overcrowded housing also harms school performance for children, which has lasting impacts on their educational attainment.²³ Living in a house with too many people makes it difficult to find a quiet place to study,²⁴ and even a quiet place to sleep.²⁵ Children in crowded houses are more likely to catch infectious diseases from others in their household, making it more likely for the child to stay home from school.²⁶ Children from overcrowded homes are more likely to be held back a grade,²⁷ they show reduced math and reading test scores,²⁸ and they demonstrate higher rates of behavioral problems such as bullying and other disruptive behaviors.²⁹ Moreover, some international research has found that children and adolescents in

¹⁷ WHO Housing and Health Guidelines. Geneva: World Health Organization (2018).

¹⁸ *Id.* at 30.

¹⁹ Ahmad K, Erqou S, Shah N, Nazir U, Morrison AR, Choudhary G, et al. (2020), Association of poor housing conditions with COVID-19 incidence and mortality across US counties. PLoS ONE 15(11).

²⁰ WHO Housing and Health Guidelines, *supra*, at 28-29.

²¹ W.C. Regoeczi, "Crowding in Context: An Examination of the Differential Responses of Men and Women to High-Density Living Environments," *Journal of Health and Social Behavior*, 49 (2008): 254-68; "When Context Matters: A Multilevel Analysis of Household and Neighborhood Crowding on Aggression and Withdrawal," *Journal of Environmental Psychology*, 23 (2003): 457-70.

²² Earle Chambers et al, MacArthur Foundation: How Housing Matters - The Link between Housing, Neighborhood, and Mental Health (2014).

²³ Claudia D. Solari and Robert D. Mare, Housing Crowding Effects on Children's Wellbeing, *Soc Sci Res.* 2012 Mar; 41(2): 464-476.

²⁴ *Id.* at 3.

²⁵ *Ibid.*

²⁶ *Ibid.*; see also Kate Cimini and Jacky Botts, Cal Matters, Close Quarters: California's Overcrowded homes fuel spread of coronavirus among workers (June 12, 2020).

²⁷ Goux D, Maurin E. The Effect of Overcrowded Housing on Children's Performance at School. *Journal of Public Economics.* 2005; 89:797-819.

²⁸ Claudia D. Solari and Robert D. Mare, Housing Crowding Effects on Children's Wellbeing, *Soc Sci Res.* 2012 Mar; 41(2): 464-476, at 10.

²⁹ Evans GW, Saegert S, Harris R. Residential Density and Psychological Health among Children in Low-Income Families. *Environment and Behavior.* 2001; 33(2):165-180.

overcrowded housing are more likely to engage in violent behavior in the home,³⁰ as well as to be victims of sexual abuse.³¹

B. California

California displays the same racial disparities regarding overcrowded housing as the rest of America.³² The most recent data provided by the California Department of Public Health reveals that Black Californians are approximately 2.5 times more likely to live in housing considered “overcrowded,” and 2.8 times more likely to live in housing considered “severely overcrowded,” compared to white Californians.³³

Black Californians have also been forced to live in substandard housing, sometimes as a direct result of government action. One particularly egregious historical example is the federal government’s building of public housing in Richmond to accommodate ship workers during World War II, which was officially and explicitly segregated.³⁴ As part of those efforts, the federal government put programs in place that enabled white workers to access permanent, residential housing, but offered Black workers no permanent housing.³⁵ While some Black workers were able to find low-quality long-term housing in areas of the East Bay, others lived in barns, minimal shelter like tents or cardboard shacks, or even without any shelter in open fields.³⁶

In California specifically, the problem of overcrowded housing has been linked to the rapid spread of COVID-19 in neighborhoods with a higher number of Black residents, such as the Salinas Valley, South Los Angeles, and Oakland.³⁷ Neighborhoods with overcrowded housing in California had rates of COVID-19 that were 3.7 times higher than neighborhoods without overcrowded housing.³⁸

III. Environmental Pollutants

U.S. government policies, as discussed in Chapter 5 on housing, penned Black Americans into poorer neighborhoods with polluting industries, garbage dumps, and other sources of toxic health harms.³⁹ Local governments zoned Black neighborhoods as industrial instead of residential specifically to segregate Black residents from white residents. White neighborhoods frequently were zoned by local entities to explicitly

³⁰ Makinde, O., Björkqvist, K., & Österman, K. (2016). Overcrowding as a risk factor for domestic violence and antisocial behaviour among adolescents in Ejigbo, Lagos, Nigeria. *Global mental health* (Cambridge, England), 3, e16. <https://doi.org/10.1017/gmh.2016.10>

³¹ Cant RL, O'Donnell M, Sims S, Harries M. Overcrowded housing: One of a constellation of vulnerabilities for child sexual abuse. *Child Abuse Negl.* 2019 Jul;93:239-248. doi: 10.1016/j.chiabu.2019.05.010. Epub 2019 May 22. PMID: 31128453.

³² Jacobs D. E., *supra*.

³³ California Department of Public Health, Office of Health Equity, Housing Overcrowding, <https://www.cdph.ca.gov/Programs/OHE/Pages/HCI-Housing-Overcrowding.aspx>.

³⁴ Rothstein, *The Color of Law* (2017) pp. 5-6.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Kate Cimini and Jacky Botts, *Cal Matters*, *Close Quarters: California’s Overcrowded homes fuel spread of coronavirus among workers* (June 12, 2020) (noting that West Adams, a mostly Black and Latino neighborhood of Los Angeles, has much higher rates of overcrowding and of COVID-19 cases).

³⁸ Jackie Botts and Lo Bénichou, *The Neighborhoods Where COVID Collides with Overcrowded Homes*, *Cal Matters* (June 12, 2020).

³⁹ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, at 503.

ensure that few industrial or polluting business could locate within them, again pushing environmental pollution into Black neighborhoods.⁴⁰ Redlined and segregated Black neighborhoods were cheaper for polluting industries to build on. This became a downward spiral: the more garbage dumps and sewer treatment plants a neighborhood had, the cheaper the land was, and the more likely that other polluting industries would move in.⁴¹ Without access to the mortgages and loans available to white Americans, Black homeowners also had less money to maintain and improve their homes, which made housing conditions worse and prevented Black Americans from moving away from polluting sources.⁴² Black communities across the country still experience higher rates of pollution and the negative health outcomes caused by exposure to pollutants.⁴³

A. Sources of Environmental Pollution

Black Americans are exposed to greater pollution from virtually every polluting source when compared to white Americans, including hazardous waste, heavy industry, vehicle traffic, and construction—all of which can be partially attributed to redlining and other historical discrimination.⁴⁴

1. Hazardous Waste

One source of pollution that has been continuously prevalent in Black communities is hazardous waste sites. This pollution has been shown to correlate with increased rates of asthma, cancer, lung disease, and heart disease.⁴⁵ For example, in 2020, the *New York Times Magazine* profiled the story of Kilynn Johnson, a Black resident of Philadelphia, who developed asthma as a child and eventually gallbladder cancer after growing up in a largely Black neighborhood proximate to hazardous waste facilities and oil refineries.⁴⁶ After recovering from surgery and chemotherapy, Johnson and a neighbor documented over two dozen close relatives who were diagnosed with some form of cancer, many rare, and many at unusually young ages.⁴⁷

Black Americans have long been disproportionately exposed to these harms. As of 1983, approximately three out of every four communities in which hazardous waste landfills were found were predominantly Black.⁴⁸ In 1991, the federal Environmental Protection Agency (EPA) acknowledged that a disproportionate number of toxic waste facilities were found in Black neighborhoods throughout the country.⁴⁹ More

⁴⁰ Pollution and Prejudice, CalEPA, January 25, 2021, p. 6-7.

⁴¹ *Id.* at 6; Taylor, *supra* at 1269-1271.

⁴² *Ibid.*

⁴³ See, e.g., Hayley Munguia, *Environmental Racism: Why Long Beach Residents of Color Have Worse Health Outcomes*, PRESS TELEGRAM (Mar. 8, 2021), <https://www.presstelegram.com/2021/03/08/environmental-racism-why-long-beach-residents-of-color-have-worse-health-outcomes>.

⁴⁴ Tabuchi & Popovich, People of Color Breathe More Hazardous Air. The Sources Are Everywhere (Apr. 28, 2021) N.Y. Times <<https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>> [as of June 21, 2021].

⁴⁵ Linda Villarosa, Pollution is Killing Black Americans – This Community Fought Back, *New York Times Magazine* (July 28, 2020).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Rothstein, *supra* at 56.

⁴⁹ *Id.* at 56.

recently, a study in 2007 analyzed 38 states and found Black Americans disproportionately live in neighborhoods that host hazardous waste facilities, and are twice as likely as white Americans to live near a hazardous waste facility.⁵⁰ As of 2020, Black Americans are still 75 percent more likely to live near facilities that handle hazardous waste.⁵¹

Moreover, studies have shown that that the EPA’s handling of toxic waste clean-up sites—i.e., so-called “Superfund” sites, or former industrial sites polluted with dangerous levels of hazardous waste—has consistently favored white communities over minority communities, and an external audit of the handling of discrimination complaints by the EPA determined that the agency failed to adequately respond to those complaints.⁵² From 1985 to 1991, fines assessed by the EPA against polluters in minority zip codes were approximately 46 percent lower than in white zip codes.⁵³ The EPA also took longer to address hazardous sites in minority communities than in white ones, and polluters were required to undertake more stringent cleanup measures in white communities.⁵⁴

2. Oil and Gas Pollution

The oil and gas industry, as permitted by governmental entities, has also imposed disproportionate environmental harms on Black Americans. Oil and gas extraction is associated with various carcinogenic pollutants, including benzene.⁵⁵ Studies have shown that living near these sources elevates one’s cancer risk.⁵⁶ Black communities across the country are 75 percent more likely to live near oil and gas extraction and refining facilities than other Americans.⁵⁷ Black Americans are also more likely than any other group to live near fracking facilities, which create similar pollution to more traditional oil and gas facilities.⁵⁸ The natural gas produced via fracking contains various toxins and carcinogens, including hexane, benzene, and hydrogen sulfide.⁵⁹ These dangerous, cancer-causing chemicals are emitted at the initial facilities that gather natural gas, at points along the systems that move the from those facilities, and at the destination plants at which they are processed, all of which occur disproportionately in Black neighborhoods.⁶⁰ Moreover, as Black Americans have grown increasingly involved in the fight against oil and gas pollution in their communities, fossil fuel companies have pushed back by arguing that the fight for environmental justice

⁵⁰ Saha, A Current Appraisal of Toxic Wastes and Race in the United States in *Toxic Wastes and Race at Twenty: 1987-2007* (2007) p. 58.

⁵¹ Villarosa, *supra*.

⁵² Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 99-100.

⁵³ *Ibid.*.

⁵⁴ *Ibid.*

⁵⁵ Garcia-Gonzalez et al. 2019. Hazardous Air Pollutants Associated with Upstream Oil and Natural Gas Development: A Critical Synthesis of Current Peer-Reviewed Literature. *Annual Review of Public Health*, 40, 283-304.

⁵⁶ Johnston et al. 2019. Impact of upstream oil extraction and environmental public health: A review of the evidence. *Sci Total Environ*, 20, 657, 187-199. <https://pubmed.ncbi.nlm.nih.gov/30537580/>

⁵⁷ Nathalie Baptiste, *Mother Jones, Study: Black People Are 75 Percent More Likely to Live Near Toxic Oil and Gas Facilities* (Nov. 14, 2007).

⁵⁸ Klara Zwickl, *The Demographics of Fracking: A Spatial Analysis for four U.S. States*, *Ecological Economics*, Volume 161, 2019, Pages 202-215.

⁵⁹ Leslie Flieschman & Marcus Franklin, *Fumes Across the Fenceline: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, NAACP & Clean Air Task Force (2017) 13.

⁶⁰ *Ibid.*

would particularly *harm* black communities by robbing them of oil and gas-related jobs, including through a false report that the National Association for the Advancement of Colored People was opposed to a clean energy plan.⁶¹

3. Automobile Traffic

Although not specific to one particular industry, Black Americans are also subject to disproportionate environmental harms as a result of automobile traffic. Black Americans generally live in areas with more than double the traffic density of white neighborhoods, and experience the highest traffic density of any racial or ethnic group.⁶² As a result, Black Americans are exposed to more on-road sources of carcinogenic pollution than any other racial or ethnic group.⁶³ Auto pollution includes, among other things, exposure to nitrogen dioxide (NO₂), which contributes to asthma and other respiratory ailments and generally reduces lung function.⁶⁴ While exposure to NO₂ is decreasing across all races in the United States, the percentage increased exposure experienced by Black Americans as compared to white Americans has changed little.⁶⁵ Moreover, among all pollution sources nationwide, Black Americans are more disproportionately exposed to air pollution attributable to construction than as to any other air pollution source.⁶⁶

4. Lead

Also not specific to any industry, lead pollution is disproportionately high in Black communities that were officially segregated through federal redlining.⁶⁷ Although this has been known for decades, commentators have noted that “surprisingly little research” has examined the extent of the problem.⁶⁸ This toxic lead exposure comes from myriad sources that are found in greater amounts in Black neighborhoods, including toxic industrial sites near to residences.⁶⁹ Exposure to lead from outside the home can be through lead water pipes, gasoline exhaust, and nearby smelting plants.⁷⁰ Even though most smelting plants that created lead pollution have been closed since the 1960s, soil pollution surrounding these facilities remains an active

⁶¹ Nikayla Jefferson & Leah C. Stokes, *Our Racist Fossil Fuel Energy System*, Boston Globe (Jul. 17, 2020); see also Hiroko Tabuchi, *How One Firm Drove Influence Campaigns Nationwide for Big Oil*, New York Times (Nov. 11, 2020).

⁶² Pratt, G. C., Vadali, M. L., Kvale, D. L., & Ellickson, K. M., *International Journal of Environmental Research and Public Health* (2015). *Traffic, Air pollution, Minority and Socio-Economic Status: Addressing Inequities in Exposure and Risk*.

⁶³ *Ibid*; see also Apelberg BJ, Buckley TJ, White RH. Socioeconomic and racial disparities in cancer risk from air toxics in Maryland. *Environ Health Perspect.* 2005; 113: 693-699.

⁶⁴ United States Environmental Protection Agency, *Nitrogen Dioxide (NO₂) Pollution, Basic Information about NO₂*, <https://www.epa.gov/no2-pollution/basic-information-about-no2>.

⁶⁵ Lara P. Clark, Dylan B. Millet, and Julian D. Marshall, *Changes in Transportation-Related Air Pollution Exposures by Race-Ethnicity and Socioeconomic Status: Outdoor Nitrogen Dioxide in the United States in 2000 and 2010*, *Environmental Health Perspectives* Vol. 125 (9) (2017), <https://doi.org/10.1289/EHP959>.

⁶⁶ Tabuchi & Popovich, *People of Color Breathe More Hazardous Air. The Sources Are Everywhere* (Apr. 28, 2021) N.Y. Times <<https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>> [as of June 21, 2021].

⁶⁷ Christopher Muller et al., *Environmental Inequality: The Social Causes and Consequences of Lead Exposure*, *ANNUAL REV. SOCIOL.* (2018), <https://escholarship.org/content/qt7z15t63g/qt7z15t63g.pdf>.

⁶⁸ Sampson, R., & Winter, A. (2016). *THE RACIAL ECOLOGY OF LEAD POISONING: Toxic Inequality in Chicago Neighborhoods, 1995-2013*. *Du Bois Review: Social Science Research on Race*, 13(2), 261-283. doi:10.1017/S1742058X16000151.

⁶⁹ *Ibid*.

⁷⁰ *Id.* at 265.

problem.⁷¹ Nationally, Black children are three times as likely to have elevated blood rates of lead, and these patterns have persisted even as lead exposure rates have decreased for children of other races and ethnicities.⁷² These disparities are even more dramatic in some areas with older housing stock. For example, a 2004 report found that in Chicago, Black children were five to 12 times as likely to exhibit lead poisoning than white children.⁷³ This is at least partially because Black Chicagoans are disproportionately located in older housing stock with deteriorating lead-based paint.⁷⁴

All of these forms of environmental pollution have serious health consequences, resulting in chronic illnesses like diabetes, asthma, and heart disease, and affecting maternal health and educational outcomes.⁷⁵ Unsurprisingly, Black Americans suffer disproportionately from these health problems.⁷⁶ Moreover, these health consequences persist long after exposure, with at least one study showing substantial central nervous system deficits 10 years after childhood exposures.⁷⁷ For further discussion of disparities in health outcomes not specific to environmental pollution, see Chapter 12 on health.

B. California

Historically, federal public housing was explicitly created to segregate Black Californians into areas with obviously greater pollution burdens due to immediately adjacent polluting sources. For example, when the federal government built public housing in Richmond to accommodate ship workers, as discussed above, it placed temporary housing for Black workers by the railroad tracks and shipbuilding areas, subjecting them to particulate matter (e.g., small cancer-causing particles associated with diesel exhaust) and industrial pollution, but built higher quality housing for white workers further inland.⁷⁸

Many areas within California still demonstrate racial disparities traceable to state and federal government action. A 1994 study found that the “dirtiest” zip code in all of California was in a largely Black and Latino neighborhood of East Los Angeles.⁷⁹ Neighborhoods that were explicitly redlined by federal agencies in the

⁷¹ *Id.* at 266.

⁷² Emily Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 HARV. ENV. L. REV. 494, 504-05 (2017); Sampson & Winter, *supra*.

⁷³ Chicago Department of Public Health & Loyola University Chicago Civitas ChildLaw Center, *Lead Safe Chicago: A Plan to Eliminate Childhood Lead Poisoning in Chicago by 2010* (June 30, 2004).

⁷⁴ Sampson & Winter, *supra*.

⁷⁵ Access to Safe Drinking Water, Public Policy Institute of America (2021), <https://www.ppic.org/publication/access-to-safe-drinking-water>.

⁷⁶ *Ibid.* See also NAACP, *WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA'S CITIES* (2019), https://www.naacpldf.org/wp-content/uploads/Water_Report_FULL_5_31_19_FINAL_OPT.pdf.

⁷⁷ Needleman HL, Schell A, Bellinger D, Leviton A, Allred EN. The long-term effects of exposure to low doses of lead in childhood. An 11-year follow-up report. *N Engl J Med.* 1990 Jan 11;322(2):83-8. doi: 10.1056/NEJM19901113220203. PMID: 2294437.

⁷⁸ Rothstein, *The Color of Law* (2017) pp. 5-6.

⁷⁹ Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, *Annals of the Association of American Geographers*, 90(1) 2000, p. 12-20 (citing Kay, J., 1994, *California's Endangered Communities of Color*, In R. Bullard, editor, *Unequal Protection*. San Francisco, CA: Sierra Club Books, p. 155-188).

1930s—ranging from South Stockton to West Oakland to Wilmington in Los Angeles—continue to have some of the highest average pollution levels in the state.⁸⁰

The historically Black area of Bayview-Hunters Point in San Francisco has a long history of environmental racism, with Black residents subjected to myriad environmental harms, including radioactive contamination from a nearby shipyard, not experienced by whiter, wealthier areas within San Francisco.⁸¹ Moreover, recent environmental remediation efforts have come hand-in-hand with a substantial decline in the percentage of Black residents.⁸² Starting in the 20th century, Black residents of the neighborhood were displaced by white and Asian-American residents.⁸³ Although this has largely been attributed to the “dot com” boom and rising housing prices across San Francisco, scholars have offered a variety of more discriminatory factors that drove Black residents out.⁸⁴ These include the San Francisco Housing Authority’s demolition of public housing, the San Francisco Police Department’s enforcement of gang injunctions, and the issuance of subprime mortgage loans.⁸⁵ As one Black long-time resident described it, the formerly-polluted community in which she had long lived is now dramatically cleaner, but is no longer meant for “her or for her grandchildren.”⁸⁶

Similarly, the divisions between the wealthier, white “hills” of Oakland, California, and the poorer, Black “flats” that were first established by federal redlining have remained today, with Black residents of the low-lying areas still subject to far greater environmental pollutants.⁸⁷ In Oakland’s earlier days, redlining placed Black Californians in these “flats” adjacent to various heavy industries and manufacturing centers, acknowledging that the housing available was of low quality and subject to noticeable industrial “odors.”⁸⁸ From the 1950s through the 1980s, substantial freeway construction projects placed substantial pollution burdens on all of the low-lying areas in Oakland, including in the few parks and other green space available to them.⁸⁹ Residents of these areas continue to experience quantifiably greater health consequences, such as emergency room visits due to asthma.⁹⁰

These patterns exist across California with respect to facilities that handle hazardous waste. Los Angeles has 1.2 million people living near facilities that handle hazardous waste, and 91 percent of them are people of

⁸⁰ Pollution and Prejudice, CalEPA, January 25, 2021, p. 10.

⁸¹ Helen H. Kang, Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification, 26 Mich. J. Race & L. 23, 31-34 (2021); Testimony of Helen Kang, California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021).

⁸² Kang, *supra*, at 31-34.

⁸³ *Id.* at 31-32.

⁸⁴ *Id.* at 32.

⁸⁵ *Ibid.*

⁸⁶ *Id.* at 33.

⁸⁷ Testimony of C.N.E. Corbin, California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021); C.N.E. Corbin, In Red, Black, and Green: The Political Ecological Eras of Oakland from 1937-2020 (unpublished draft manuscript provided by author).

⁸⁸ Corbin, *supra*, at 11.

⁸⁹ *Id.* at 21.

⁹⁰ Anthony L. Nardone et al, “Associations between Historical Residential Redlining and Current Age-Adjusted Rates of Emergency Department Visits Due to Asthma across Eight Cities in California: An Ecological Study,” *The Lancet Planetary Health* 4, no. 1 (January 1, 2020): e24–31.

color.⁹¹ Black Americans live near hazardous waste facilities at rates higher than other people of color as a whole.⁹² This is true elsewhere in California, leading to increased lifetime cancer risks for Black Californians that correlate with exposure to outdoor air toxins.⁹³

As is the case nationwide, the oil and gas industry disproportionately affects Black Californians. More than two million Californians live within 2,500 feet of an unplugged oil or gas well, with greater percentages of Black Americans living near these sources of pollution than the California population as a whole.⁹⁴ Aside from the exposure to carcinogenic chemicals involved with oil and gas production, toxic residues brought up by subterranean drilling can contaminate local aquifers that supply drinking water.⁹⁵ In the greater Los Angeles Area, notable oil production exists in Inglewood, Baldwin Hills, and Culver City—all areas which have a substantially greater Black population than Los Angeles generally.⁹⁶ Similar patterns exist in the San Francisco Bay Area, with major oil production facilities in Richmond and Martinez, again areas that are disproportionately Black when compared to the broader Bay Area.⁹⁷ Moreover, advocates have argued that public officials are more responsive to oil and gas-related health concerns from residents of whiter, wealthier neighborhoods, noting that the methane leak in the wealthy Porter Ranch neighborhood of Los Angeles elicited a massive, statewide response while hundreds of significant health complaints related to the AllenCo drilling site in largely Black Jefferson Park were ignored for years.⁹⁸

Even as to industries that do not inherently involve toxic or carcinogenic materials, increased rates of truck traffic and general industrial activity also lead to higher rates of heavy metal contamination of local soils.⁹⁹ Those soils are disproportionately found in the backyards, playgrounds, and urban gardens of Black Californians.¹⁰⁰ This heavy metal contamination poses a wide array of serious health consequences, including increased susceptibility to asthma, inflammation, pregnancy complications, high blood pressure, osteoporosis, kidney damage, and even Parkinson's disease.¹⁰¹ It also can prevent safe urban gardening in

⁹¹ Janet Wilson, California Has Largest Number of Minorities Near Hazardous Waste, L.A. TIMES (Apr. 12, 2007), <https://www.latimes.com/archives/la-xpm-2007-apr-12-me-toxic12-story.html>.

⁹² Robert D. Bullard et al, Toxic Wastes and Race at Twenty, 1987—2007, A Report Prepared for the United Church of Christ Justice & Witness Ministries (2007) at 80 (showing that while people of color broadly are overrepresented in neighborhoods adjacent to toxic waste facilities by approximately 38 percent, Black residents are overrepresented by approximately 45 percent).

⁹³ Rachel Morell-Forsch et al., Environmental Justice and Regional Inequality in Southern California: Implications for Future Research, 110 ENV'T'L HEALTH PERSPECTIVES 149 (2002).

⁹⁴ The Toxic Legacy of Old Oil Wells: California's Multibillion-Dollar Problem, L.A. TIMES (2020), <https://www.latimes.com/projects/california-oil-well-drilling-idle-cleanup>.

⁹⁵ *Ibid.*

⁹⁶ NAACP & Clean Air Task Force, Fumes Across the Fence Line (2017), <https://naacp.org/resources/fumes-across-fence-line-health-impacts-air-pollution-oil-gas-facilities-african-american>.

⁹⁷ See Naveena Sadasivam, Bay Area Regulators Just Delivered on a Promise to Help Frontline Communities Breathe Easier, GRIST (Jul. 22, 2021), <https://grist.org/regulation/bay-area-refinery-emissions-richmond-chevron-pbf-particulate-matter-baaqmd>.

⁹⁸ See Fumes Across the Fence Line, *supra* at 20.

⁹⁹ See Nathan McClintock, Assessing Soil Lead Contamination at Multiple Scales in Oakland, California: Implications for Urban Agriculture and Environmental Justice (2012), https://pdxscholar.library.pdx.edu/usp_fac/94/; Shahir Masri et al., Risk Assessment of Soil Heavy Metal Contamination at the Census Tract Level in the City of Santa Ana, CA: Implications for Health and Environmental Justice (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8224146>.

¹⁰⁰ Fumes Across the Fence Line, *supra* at 20.

¹⁰¹ Masri et al, *supra*.

neighborhoods that would desperately benefit from it.¹⁰² On average Black Californians breathe in about 40 percent more particulate matter from cars, trucks, and buses than white Californians.¹⁰³ Black Californians are exposed to a higher amount of PM 2.5—fine particles emitted by diesel engines—at a rate 43 percent higher than white Californians, the highest rate of any racial or ethnic group.¹⁰⁴ Black Californians also are exposed to disproportionately high levels of air pollution from other infrastructure-related non-mobile sources, such as shipyards, factories, warehouses, and aviation.¹⁰⁵ These sources of air pollution are a primary reason that African Americans have the highest rates of asthma among all groups in California,¹⁰⁶ leading to asthma-related deaths at two to three times the rates of any other racial or ethnic group.¹⁰⁷ Exposure to small particulate matter from cars, trucks, and buses is also tied to increased risk of heart and lung disease.¹⁰⁸

IV. Climate Change Disproportionately Harms Black Americans

Research on the concrete and worsening effects of climate change has made clear that harmful health and environment-related effects of climate change will be experienced by all Americans.¹⁰⁹ This effects include increased range and incidence of infectious disease vectors like ticks, mosquitos, and avian-borne pathogens, and decreased food quality and security.¹¹⁰ Rising sea levels will damage coastal communities, and reduce water quality and availability.¹¹¹ Extreme weather events, like floods, storms, fires, and extreme heat waves, are projected to occur more frequently and more severely.¹¹² All Americans will be at risk of these harms, but not all will face that risk equally. Communities that are already socially and economically struggling, including the urban poor, communities of color, the elderly and children, agricultural workers, and rural communities, will shoulder a disproportionate burden of these hazards.¹¹³

¹⁰² McLintock, *supra*, at 460-61.

¹⁰³ *People of Color and the Poor Disproportionately Exposed to Air Pollution, Study Finds*, Claudia Boyd-Barrett, CAL. HEALTH REPORT (Feb. 8, 2019), <https://www.calhealthreport.org/2019/02/08/people-of-color-and-the-poor-disproportionately-exposed-to-air-pollution-study-finds>.

¹⁰⁴ David Reichmuth, Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in California* (2019).

¹⁰⁵ Boyd-Barrett, *supra*.

¹⁰⁶ Ying-Ying Meng et. al., *California's Racial and Ethnic Minorities More Adversely Affected by Asthma*, UCLA (2007), <http://healthpolicy.ucla.edu/publications/Documents/PDF/California%27s%20Racial%20and%20Ethnic%20Minorities%20More%20Adversely%20Affected%20by%20Asthma.pdf>.

¹⁰⁷ Milet et al., *The Burden of Asthma in California: A Surveillance Report* (June 2007) p. 5.

¹⁰⁸ Reichmuth, *supra*, p. 1.

¹⁰⁹ Off. of Environmental Health Hazard Assessment, *Indicators of Climate Change in California: Environmental Justice Impacts* (2010), page 6 <<https://oehha.ca.gov/media/downloads/climate-change/document/climatechangeej123110.pdf>> (as of June 16, 2021).

¹¹⁰ *Id.* at 3.

¹¹¹ *Ibid.*

¹¹² *Id.* at 4; Cal. Dept. of Public Health, *Preparing California for Extreme Heat* (2013), page 8 <https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CCHEP-General/CDPH-EPA-2013-Preparing-CA-for-Extreme-Heat_ADA.pdf> (as of June 17, 2021).

¹¹³ Off. of Environmental Health Hazard Assessment, *supra*, at p. 2; *see also* Anthony Rogers-Wright, *Getting to the Roots: Requisites for Climate Reparations at 5* (Powerpoint Presentation, California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021)).

A. Nationally

Nationally, formerly redlined areas consistently show hotter temperatures than other areas.¹¹⁴ Therefore, climate change is certain to exacerbate existing, historically-codified disparities that track existing housing-related harms experienced by Black Americans.¹¹⁵ In particular, so-called “heat islands,” which will worsen due to climate change, exist where built-up urban areas have few trees, vegetation, or parks that serve to dissipate or reflect heat, and instead have pavement and building materials that absorb and retain it.¹¹⁶ Federal Environmental Protection Agency studies have found that the heat island effect can cause urban areas to be up to seven degrees hotter than outlying areas during the day, and up to five degrees hotter at night.¹¹⁷ Black Americans disproportionately live in such heat islands, experiencing higher temperatures on extreme heat days due to a lack of adequate tree cover.¹¹⁸ In a study of 108 urban areas nationwide, including several in California, the formerly-redlined neighborhoods of nearly every city studied were hotter than the non-redlined neighborhoods, some by nearly 13 degrees.¹¹⁹ Even aside from tree cover, other features of the urban landscape in Black neighborhoods—most notably, roadways and large building complexes—also absorb and slowly release heat, which also exacerbate heat islands and their effects as discussed above.¹²⁰

The greater presence of trees in a community has been shown to correlate with lower asthma rates, fewer hospital visits during heat waves, and generally improved mental health for the community’s residents.¹²¹ There are a variety of reasons for this, but the most significant is the prevalence of shade that trees create, lowering temperatures and providing a less oppressive environment during particularly hot days.¹²² Conversely, the heightened temperatures in “heat islands” has led to higher rates of heat-related adverse pregnancy consequences for Black women, including premature births and still births.¹²³ Elected officials have recognized that the issue of shade and heat islands is connected to social justice, with those facing the greatest risk as a result of these disparities often being the most vulnerable members of a community.¹²⁴

The association between parks and green space with wealthier, whiter neighborhoods is so strong that even modern efforts to add green space to largely Black neighborhoods sometimes involve racist narratives, with

¹¹⁴ Jeremy S. Hoffman, Vivek Shandas, Nicholas Pendleton, The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas, *Climate* 2020, 8(1), 12; Published: 13 January 2020.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Environmental Protection Agency, Learn About Heat Islands, <<https://www.epa.gov/heatislands/learn-about-heat-islands>> (as of June 18, 2021).

¹¹⁸ See Brad Plumer & Nadja Popovich, How Decades of Racist Housing Policy Left Neighborhoods Sweltering, *N.Y. TIMES* (Aug. 24, 2020), <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html>; see also Dexter H. Locke et al., Residential Housing Segregation and Urban Tree Canopy in 37 US Cities (2021), <https://www.nature.com/articles/s42949-021-00022-0>.

¹¹⁹ Hoffman et al, *supra*.

¹²⁰ *Ibid.*

¹²¹ Tim Arango, “Turn Off the Sunshine”: Why Shade Is a Mark of Privilege in Los Angeles, *NY TIMES* (Dec. 1, 2019), <https://www.nytimes.com/2019/12/01/us/los-angeles-shade-climate-change.html>.

¹²² *Ibid.*

¹²³ Christopher Flavelle, Climate Change Tied to Pregnancy Risks, Affecting Black Mothers Most, *NY Times* (Jan. 18, 2020).

¹²⁴ Arango, *supra* (quoting Los Angeles Mayor Garcetti as noting that “shade is an equity issue.”).

local efforts portraying green revitalization plans as benefiting primarily white residents even in Black neighborhoods.¹²⁵ Such revitalization plans can also lead to backlash suffered by the Black residents of the neighborhoods targeted by them, when Black residents in neighborhoods that are gentrifying are treated as suspicious by local government and new residents when they take advantage of newly-constructed parks and other green space.¹²⁶ Black residents of areas without tree cover have also faced gentrification and unaffordability as a consequence, intentional or inadvertent, of local government efforts to add green space.¹²⁷

B. California

Black Californians experience these disproportionate harms in many ways, many attributable to the decisions of state and local governments. As is the case nationally, redlining had the effect of clustering Black Californians in urban centers that often constitute heat islands, the worsening heat waves caused by climate change will impose disproportionate health burdens on Black Californians.¹²⁸ A 2009 report published by the University of Southern California, “The Climate Gap,” found that Black residents of Los Angeles were already almost twice as likely to die during a heat wave as other residents because of the “heat islands” attributable to a history of redlining and segregation.¹²⁹

According to the California Department of Public Health, Black Californians are 52 percent more likely than white Californians to live in areas where more than half the ground is covered by impervious surfaces like asphalt and concrete, and where more than half the population lacks tree canopy—by definition, the characteristics of a heat island.¹³⁰ This disparity is particularly pronounced in the Greater Los Angeles Area, where wealthier white areas have triple the amount of tree cover compared to poorer Black neighborhoods.¹³¹ This may be directly attributable to government action, since the City of Los Angeles intentionally kept tree growth to a minimum in Black communities where police officers expressed a concern—realistic or not—that trees could serve as places to hide drugs or weapons.¹³²

¹²⁵ C.N.E. Corbin, *Rendering Gentrification and Erasing Race: Sustainable Development & The (Re)visioning of Oakland, California as a Green City* 17 (unpublished draft manuscript provided by author) (noting that city documents portraying green revitalization plans for West Oakland “display a different and more affluent whiter population and a greener landscape, thus a depiction of green gentrification expressed in these municipal images”).

¹²⁶ *Id.* at 8 (noting that “Black and Brown bodies [] can and have also been rendered as trespassers, criminalized, and met by state violence historically and currently when in parks.”).

¹²⁷ See, e.g., Helen H. Kang, *Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification*, 26 *Mich. J. Race & L.* 23, 31-34 (2021). One displaced resident put it follows: “When you sit [in] a room full of poor folks on one side and homeowners on the other side, who are trying to bring all of this . . . ‘greening’ into our areas . . . And I’m saying, Good Lord! We’re black, we’re not stupid.” *Id.* at 34.

¹²⁸ Rachel Morello-Frosch et al., *The Climate Gap Report* (2009), page 5
https://dornsife.usc.edu/assets/sites/242/docs/ClimateGapReport_full_report_web.pdf (as of June 17, 2021), reporting that Black Angelinos are twice as likely to die from a heat wave than other Angelinos.

¹²⁹ *Ibid.*

¹³⁰ Off. of Health Equity, Cal. Dept. of Public Health, *Climate Change & Health Equity: Issue Brief* (2019) page 2
<https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CCHEP-General/CDPH_CC-and-Health-Equity-Issue-Brief.pdf> (as of June 17, 2021).

¹³¹ *Ibid.*

¹³² *Ibid.*

The California Department of Public Health has warned that, as heat waves begin earlier in the season and last longer, heat-related deaths are growing disproportionately more common for certain racial or ethnic groups, particularly Black Californians.¹³³ Exacerbating these harms, Black Californians are less likely to have air conditioning or a car to access cooler areas or government-sponsored cooling stations, and are more likely to have one or more chronic health conditions.¹³⁴ For example, in South Los Angeles, a disproportionately Black area, nearly three-fifths of households did not have air conditioning in 2020, a number which has not substantially changed over the past decade even as heat waves worsened.¹³⁵ These patterns have been seen across the state during heat waves, in which Black Californians consistently experience heightened rates of emergency medical visits and hospitalizations compared to white Californians.¹³⁶

V. Infrastructure and Public Services

Nationally and within California, Black Americans have suffered disproportionate harms—both environmental and otherwise—as a result of governmental investment and neglect relating to infrastructure and public services.

A. Neglect of Drinking Water Delivery Systems

While Black communities across the U.S. face these infrastructure disparities daily, the crisis of water quality and lead poisoning in Flint, Michigan, was notable as a particularly egregious example of governmental neglect and cost-savings leading to the poisoning of a Black community.¹³⁷

The now majority-Black city of Flint, Michigan, in Genesee County, was originally populated largely by white workers for the General Motors (GM) corporation, which recruited workers in the 1920s and 30s through housing it built itself and then sold subject to restrictive covenants preventing sale to nonwhite persons.¹³⁸ Private discrimination was cemented and continued through federal redlining in the 1940s, as GM also discriminated in the jobs it offered to the few Black residents of Flint, who generally worked as

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Smith, *How Communities of Color are Hurt Most by Climate Change*, Forbes (June 7, 2021) <<https://www.forbes.com/advisor/personal-finance/communities-of-color-and-climate-change/>> (as of June 18, 2021), referencing Chen, Ban-Weiss & Sanders, *Utilizing smart-meter data to project impacts of urban warming on residential electricity use for vulnerable populations in Southern California* (2020) 15 Environmental Research Letters 064001 at 6.

¹³⁶ See, e.g., Knowlton, Kim et al. “The 2006 California heat wave: impacts on hospitalizations and emergency department visits.” *Environmental health perspectives* vol. 117,1 (2009): 61-7. doi:10.1289/ehp.11594; Rupa Basu, Bart D. Ostro, A Multicounty Analysis Identifying the Populations Vulnerable to Mortality Associated with High Ambient Temperature in California, *American Journal of Epidemiology*, Volume 168, Issue 6, 15 September 2008, Pages 632–637, <https://doi.org/10.1093/aje/kwn170>; Shonkoff S, Morello-Frosch R, Pastor M, Sadd J. Environmental health and equity impacts from climate change and mitigation policies in California: a review of the literature. California, USA: California Environmental Protection Agency; 2009.

¹³⁷ Tamar Meshel, *Environmental Justice in the United States: The Human Right to Water*, 8 WASH. J. ENVTL. L. & POL’Y 264, 270-72 (2018).

¹³⁸ *Systemic Racism Through the Lens of Flint*, Michigan Civil Rights Commission (2017) at 26-27.

janitorial staff.¹³⁹ However, starting in the 1960s as a larger Black population arrived, pockets of Flint experienced “white flight,” which accelerated dramatically across Flint through the 1970s as the automotive industry suffered.¹⁴⁰

In 2014, the entire City of Flint decided to switch its drinking water source from Detroit’s system to the Flint River to save money.¹⁴¹ Residents thereafter complained for months that their water both tasted and appeared worse, but city and state officials continued to maintain the water was safe for human consumption, even as they explicitly chose not to test the water’s safety.¹⁴² After a leaked report from the U.S. Environmental Protection Agency reported high levels of lead seepage from older lead pipe systems due to the corrosivity of the Flint River water, state officials continued to falsely maintain the levels were safe and called the federal report an “outlier.”¹⁴³ By the time Flint switched back to Detroit’s water system, children were exposed to massive amounts of lead, with potentially irreversible health consequences for both young children and those exposed in utero through their mothers. Those consequences include learning and intellectual disabilities and behavioral problems.¹⁴⁴ Again, because Flint had become a majority-Black city at the time of the crisis, these impacts were experienced by Black Michiganders far more so than other groups: even in 2019, after years of attention and remediation, Flint’s water still had higher rates of lead than 98 percent of the rest of the state.¹⁴⁵

Studies showed that rates of lead pollution in Flint’s children approximately doubled as a result of the crisis, while both state officials and Michigan Governor Rick Snyder continued to downplay the issue.¹⁴⁶ The Michigan State Attorney General has attributed responsibility for the crisis to all levels of state and local government, filing criminal charges against various state and local officials including former Governor Snyder.¹⁴⁷ The charges range from perjury, related to actions designed to cover up malfeasance, to manslaughter.¹⁴⁸

B. Failure to Construct and Maintain Sewage Systems

Historically, Black Americans were subjected to environmental and health consequences as a result of failure to equitably construct sewer and other waste management systems. Originally, U.S. cities relied on private waterworks.¹⁴⁹ By the mid-19th century, cities across America had begun substantial investment in

¹³⁹ *Id.* at 25, 28.

¹⁴⁰ *Id.* at 56-57, 68-69.

¹⁴¹ Melissa Denchak, National Resources Defense Council, *Flint Water Crisis: Everything You Need to Know* (2018).

¹⁴² Merrit Kennedy, National Public Radio, *Lead-Laced Water In Flint: A Step-By-Step Look At The Makings Of A Crisis* (2018).

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Ron Fonger, *Flint Water Has More Lead Than 98 Percent of State, Despite Snyder's Claim*, MLive-The Flint Journal (Jan. 19, 2019).

¹⁴⁶ Kennedy, *supra*.

¹⁴⁷ Brakkton Booker, National Public Radio, *Ex-Michigan Gov. Rick Snyder And 8 Others Criminally Charged In Flint Water Crisis* (2021).

¹⁴⁸ *Ibid.*

¹⁴⁹ Coti Montag, NAACP Legal Defense and Educational Fund, Inc., *Water/Color: A Study of Race & The Water Affordability Crisis in America's Cities* (2019), 7.

constructing modern, sanitary sewer and garbage removal systems.¹⁵⁰ However, Black neighborhoods were not provided with such systems as early—or at all—as compared to white neighborhoods.¹⁵¹ In fact, the impetus for provision of such services to Black neighborhoods was sometimes to prevent diseases that resulted from the *lack* of such services from crossing from Black neighborhoods into white ones.¹⁵² Rates of illness and death resulting from poor sewage disposal dramatically diverged for Black and white Americans as the latter gained access to effective sewage systems while the former did not.¹⁵³ For example, in early 20th century New York, Black residents were forced to live in lowland areas near drainage pools for sewage while white residents lived on higher ground with better drainage.¹⁵⁴ As a result, Black people died from malaria at much higher rates than white people and experienced higher rates of diseases like dysentery and typhoid.¹⁵⁵ Similar patterns existed across the South as well.¹⁵⁶ And across the nation, as residential segregation increased throughout the 20th century, Black neighborhoods actually *lost* access to water and sewer municipal services, since it enabled municipalities to more easily prioritize white over Black neighborhoods for better services.¹⁵⁷ Nor are these disparities solely historical. As recently as 2019, New York City acknowledged its responsibility for a massive leak caused by a collapsed pipe in a largely Black neighborhood of Queens, which flooded 127 homes with raw sewage. Many of these houses were destroyed or severely damaged, losses that were not covered by basic homeowners or rental insurance.¹⁵⁸

C. Energy

Black Americans nationally are subject to disproportionately-high costs and disproportionately-poorer service with respect to the electrical grid. Black households in America spend more on residential energy bills than white households, even when controlling for income, household size, and other possibly-relevant factors.¹⁵⁹ Across the country, Black Americans shoulder energy burdens that are disproportionately larger than any other racial group, meaning they spend a larger portion of their income on energy.¹⁶⁰ This is true in major California cities as well, such as Los Angeles and San Francisco.¹⁶¹ These disproportionate costs are partially attributable to Black Americans living in older, energy-inefficient homes as a result of the legacy

¹⁵⁰ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 270.

¹⁵¹ *Id.* at 94.; Montag, *supra* at 12.

¹⁵² Taylor, *supra* at 94.; Montag, *supra* at 10.

¹⁵³ Taylor, *supra* at 94.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Id.* at 96.

¹⁵⁷ Montag, *supra* at 3.

¹⁵⁸ Katie Van Syckle, *Raw Sewage Flooded Their Homes. They're Still Waiting for Help*, N. Y. Times (Apr. 15, 2021).

¹⁵⁹ Eva Lyubich, *The Race Gap in Residential Energy Expenditures*, The Energy Institute at Haas Business School, UC Berkeley (June 21, 2020).

¹⁶⁰ Ariel Dreihobl, *American Council for an Energy-Efficient Economy, Lifting the High Energy Burden in America's Largest Cities: How Energy Efficiency Can Improve Low-Income and Underserved Communities* (April 20, 2016).

¹⁶¹ See *Energy Burdens in Los Angeles*, American Council for an Energy-Efficient Economy, https://www.aceee.org/sites/default/files/pdfs/aceee-01_energy_burden_-_los_angeles.pdf (Sept. 2020); *Energy Burdens in San Francisco*, American Council for an Energy-Efficient Economy, https://www.aceee.org/sites/default/files/pdfs/aceee-01_energy_burden_-_san_francisco.pdf (Sept. 2020).

of redlining and other discriminatory housing policies.¹⁶² Low-income Black Americans are also twice as likely to have their utility service shut off as similarly-low-income white Americans,¹⁶³ which advocates have argued are the result of inflexible shut-off regulations and disproportionate energy burdens.¹⁶⁴

Because of lower rates of home ownership in the Black community, Black Americans also often cannot take advantage of programs aimed at lessening energy burdens that require home ownership to utilize, such as home solar panels¹⁶⁵ or installation of free charging stations for electric vehicles.¹⁶⁶ And as discussed in more detail above, Black Americans also suffer disproportionate burdens related to the production of energy, as power plants—including those fired by coal—continue to be disproportionately located in their neighborhoods, producing particulate matter emissions that cause damage to the heart, lungs, and brain.¹⁶⁷

D. Transportation

Federal, state, and local governments have consistently failed to offer equitable transit options for Black communities throughout American history. The earliest form of transportation discrimination was the trafficking of Black Africans in slave ships, discussed more fully in Chapter 2. The federal government allowed and regulated this form of human trafficking until 1808, when the importation of enslaved people was outlawed.¹⁶⁸ By the late 1700s, the Underground Railroad, an organized effort of safe houses and activists, helped transport enslaved people to freedom.¹⁶⁹ Between 1810 and 1850, the Underground Railroad freed an estimated 100,000 enslaved persons.¹⁷⁰

Around the same time, both the South and the North segregated travelers by race. Frederick Douglass “was often dragged out of [his] seat, beaten, and severely bruised, by conductors and brakemen” when he refused to ride in the Jim Crow car as he rode trains in New England.¹⁷¹ The federal government supported these segregation efforts, even as some states attempted to desegregate. For example, in 1879, the U.S. Supreme Court *struck down* a Louisiana civil rights law requiring the desegregation of transport as

¹⁶² Sharonda Williams-Tack, From Redlining to Restorative Justice: Anti-Black Racism and Energy Insecurity Go Hand in Hand in America, *Sierra, The Magazine of the Sierra Club* (Feb 21 2021)

¹⁶³ Kathiann M. Kowalski, Energy News Network, Racial Disparities Persist in Electric Service. Is ‘Willful Blindness’ to Blame? (July 1, 2020).

¹⁶⁴ See, e.g., Josie B. H. Pickens and Robert W. Ballenger, This Pa. law on utility shutoffs unfairly impacts Black and Brown people. It must be repealed, *Pennsylvania Capital-Star* (Aug. 7, 2020);

¹⁶⁵ Deborah A. Sunter, Sergio Castellanos & Daniel M. Kammen, Disparities in Rooftop Photovoltaics Deployment in the United States by Race and Ethnicity, *Nature Sustainability* volume 2, pp. 71–76 (2019).

¹⁶⁶ See Access to Clean Mobility, GRID Alternatives, <https://gridalternatives.org/what-we-do/clean-mobility#:~:text=The%20Clean%20Vehicle%20Rebate%20Project,to%20qualifying%20low%20income%20consumers>.

¹⁶⁷ Maninder P. S. Thind, Christopher W. Tessum, Inês L. Azevedo, and Julian D. Marshall, Fine Particulate Air Pollution from Electricity Generation in the US: Health Impacts by Race, Income, and Geography, *Environmental Science & Technology* 2019 53 (23), 14010-14019.

¹⁶⁸ Brenman, *Transportation Inequity in the United States: A Historical Overview* (July 1, 2007) American Bar Association Human Rights Magazine <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol34_2007/summer2007/hr_summer07_brenma/> (as of March 15, 2022).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Douglass, *My Bondage and My Freedom* (1855), ch. 25, <https://railroads.unl.edu/documents/view_document.php?id=rail.gen.0061> (as of Mar. 24, 2022).

unconstitutional.¹⁷² Josephine Decuir, a Black woman, bought a first class ticket on a steamboat, but was sent to the second class cabin because first class was for whites only.¹⁷³ The Court overturned a decision from the Louisiana Supreme Court to award legal damages to Decuir based on a state law requiring desegregated transport, holding that Louisiana had no authority to regulate such transport.¹⁷⁴ In 1896, in contrast, the United States Supreme Court explicitly permitted segregation in public transit when it upheld Louisiana’s law *requiring* transportation segregation.¹⁷⁵ This history of government segregation set the stage for unequal transportation for Black Americans that continues to the present.

At the turn of the century, subsidized by government funds, private companies constructed mass transit systems in America’s cities.¹⁷⁶ Until around the 1950s, nearly all transit was built and operated by private companies.¹⁷⁷ Many transit companies struggled to remain profitable in the 1920s, especially after the Depression.¹⁷⁸ The widespread adoption of the automobile combined with white Americans’ move to the suburbs, as described in Chapter [XX], resulted in the companies’ financial failure.¹⁷⁹ Public transit systems cut back services as masses of white riders left the system, and never expanded to the suburbs.¹⁸⁰ As government and private actors erected barriers to prevent Black Americans from moving to the suburbs, poorer Black workers without cars were left with few public transportation options.¹⁸¹ When manufacturing and industrial jobs moved from urban centers to suburban or rural areas, urban Black workers were often unable to follow due to lack of transportation options.¹⁸²

In 1968, Dr. Martin Luther King, Jr., described how city planning decisions result in transportation systems that failed Black communities: “Urban transit systems in most American cities . . . have become a genuine civil rights issue—and a valid one—because the layout of rapid-transit systems determines the accessibility of jobs to the African-American community. If transportation systems in American cities could be laid out so as to provide an opportunity for poor people to get meaningful employment, then they could begin to move into the mainstream of American life.”¹⁸³

The federal government has been aware of this failure to support transportation for the Black urban workforce, but has not provided a remedy. In 1968, the report of the National Advisory Commission on

¹⁷² See e.g., Singer, *No Right to Exclude: Public Accommodations and Private Property* (1996) Northwestern University Law Review. 90 (4): 1396.

¹⁷³ Hall v. Decuir, 95 U.S. 485 (1878)

¹⁷⁴ 95 U.S. 485 (1878).

¹⁷⁵ *New Orleans & Texas Railway v. Mississippi*, 133 U.S. 587 (1890); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁷⁶ English, “Why Did America Give Up on Mass Transit? (Don’t Blame Cars.) Streetcar, bus, and metro systems have been ignoring one lesson for 100 years: Service drives demand.” (Aug. 31, 2018) Bloomberg CityLab <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story>.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Jacqueline Jones, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

¹⁸³ Martin Luther King, Jr., “A Testament of Hope,” reprinted in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (James Melvin Washington ed., 1991) pp. 326–27.

Civil Disorders, also known as the Kerner Commission report, studied the causes and effects of riots in U.S. cities. In order to enhance employment opportunities for central-city residents, the report recommended the creation of improved transportation links between Black urban neighborhoods and new job locations in the suburbs.¹⁸⁴

In the 1960s and 70s, the federal government began providing funding for public transit, and many municipalities took control of transit operations.¹⁸⁵ However, scholars argue that these revitalized agencies built a segregated system.¹⁸⁶ The municipal transit agencies that were created throughout the 70s and into the 80s were designed to be responsive to the demands of the local communities, demands which had often grown “re-segregationist” as a backlash to the Civil Rights Movement.¹⁸⁷ This created transit systems that were unequal by design. Municipal agencies did not cater to urban riders who relied exclusively on public transit, instead channeling greater resources to entice mostly white suburban commuters who could also choose to drive.¹⁸⁸ This translated to less comfortable seats, unshaded waiting areas, and bumpier, more unpleasant rides for Black users of public transit.¹⁸⁹

This system continues to operate today. Black Americans still rely on public transit to get to work at much higher rates than white workers. Black workers commute by public transit at nearly four times the rate of white workers.¹⁹⁰ Moreover, Black workers on average experience higher commute times than white workers, both nationally and in California.¹⁹¹ Finally, since most fares are usually flat, low income people pay a higher share of their monthly salary on transit, which is more likely to impact Black Americans and other people of color.¹⁹² Due to these government actions, workers relying on public transit, who are more often Black than white, often pay comparatively more money and commute for a longer amount of time if they are able to use transit to get to jobs at all.

In addition to discrimination in the public transit system, as discussed in Chapter 5, our country’s highway system destroyed Black neighborhoods and intensified residential segregation by separating Black neighborhoods from white neighborhoods.

¹⁸⁴ National Advisory Commission on Civil Disorders (1968) cited in Sanchez, Stolz & Ma, *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities* (2003) The Civil Rights Project at Harvard University, p. 3.

¹⁸⁵ Spieler, “Racism has shaped public transit, and it’s riddled with inequities” (Aug. 24, 2020) Rice Kinder Institute for Urban Research < <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>>.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Austin, “To Move Is To Thrive: Public Transit and Economic Opportunity for People of Color” (Nov. 15, 2017) *Demos* <https://www.demos.org/research/move-thrive-public-transit-and-economic-opportunity-people-color>.

¹⁹¹ Ibid.; https://nationalequityatlas.org/indicators/Commute_time#/.

¹⁹² Morgan, “Can Variable Transit Fares Increase Equity?” (Jan. 28, 2019) *Chicago Policy Review* < <https://chicagopolicyreview.org/2019/01/28/can-variable-transit-fares-increase-equity/>>; Brown, “Fair fares? How flat and variable fares affect transit equity in Los Angeles” (2018) Case Studies on Transport Policy.

E. Telecommunications and Internet Services

Black Americans also face disproportionate burdens with respect to the national telecommunications network. From 1960 through 2010, Black Americans have had significantly lower rates of telephone access than white Americans, though this gap has reduced over time as telephone use became more ubiquitous.¹⁹³ More recently, fewer Black Americans have access to broadband internet access than white Americans. A 2021 study in Indiana revealed that 56.2 percent of Black residents lacked reliable access to internet service and/or a computer, compared to 34.8 percent of white residents.¹⁹⁴

This lack of telecommunications impacts economic and educational opportunities. Black teens are almost twice as likely to report that they cannot complete all their homework due to lack of access to a computer or reliable internet access.¹⁹⁵

In addition to difficulty accessing the internet, Black Americans are disadvantaged by racist structures within it. Dr. Yeshimabeit Milner testified before the Task Force that search algorithms, machine learning, automated resource allocation systems, and even credit reporting agencies are all built by software engineers that are overwhelmingly white. As a result, the implicit biases of these human software engineers have been built into seemingly neutral algorithms and artificial intelligence, with discriminatory effects.¹⁹⁶ For example, in 2016, when Amazon Prime same day-delivery services were introduced in Atlanta, Georgia, virtually 100 percent of white residents were given access to the service but less than half of Black residents did.¹⁹⁷ Similar patterns existed for Black residents of Boston and Chicago.¹⁹⁸

F. California

California authorized segregated public transportation at least until 1864.¹⁹⁹ The governments of California and its municipalities have chosen infrastructure projects that have harmed Black communities. While the California and federal law require state and municipal agencies to consider racially disparate impacts of infrastructure projects today, the historical damage caused by highways in particular has contributed to higher exposure to air pollution among communities of color as discussed above.

As with the federal government, California's government historically neglected water infrastructure as it applied to Black Californians. One example is California's treatment of Black families fleeing the dust bowl. These families left the prairie states and came to farmland across California starting in the 1930s,

¹⁹³ Through the Wire: Understanding Inequality in Household Telephone Access, 1960-2010, Journeys.

¹⁹⁴ Farah Yousry, With Telemedicine On The Rise, Black Americans Risk Being Left Behind, Side Effects Public Media (Feb. 26, 2021).

¹⁹⁵ Testimony of Vinhcent Le, California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022)

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Alexandra, "A Century Before Rosa Parks, She Fought Segregated Transit in SF" (Mar. 12, 2009) KQED <<https://www.kqed.org/pop/108474/rebel-girls-from-bay-area-history-charlotte-l-brown-gold-rush-era-civil-rights-champion>>.

experiencing widespread infrastructure discrimination from state and local governments.²⁰⁰ For example, Black Californians in the San Joaquin Valley were excluded from most urban areas with access to clean water as a result of explicit redlining policies, racially-restrictive housing covenants, and even racially-motivated violence.²⁰¹

The neighboring towns of Dos Palos and South Dos Palos in Merced County serve as an example: while the white community of Dos Palos had access to sewer and water infrastructure, the predominantly Black community in South Dos Palos had no running water or indoor plumbing.²⁰² The same was true of the largely-Black community of Teviston, adjacent to the white community of Pixley, both in Tulare County.²⁰³ Again, this discrimination continued until recently: the town of Lanare, also formed by Black families fleeing the Dust Bowl, had no running water at all until the 1970s, and was subjected to dangerous levels of arsenic in the water even after wells and pipes were drilled.²⁰⁴ The town's residents did not get access to clean drinking until 2019.²⁰⁵

At times, government entities were explicit in weaponizing infrastructure against Black Californians. For example, in the 1950s, a developer in Milpitas, a town north of San Jose, sought to build a large housing development open to both white and Black homebuyers.²⁰⁶ He managed to overcome several zoning-related obstacles only to discover that the Milpitas City Council had increased the sewer connection fee more than tenfold explicitly to thwart the development.²⁰⁷

Black neighborhoods in California still suffer extremely high rates of water pollution in the water provided through government infrastructure. In 2019, the *New York Times* reported that as many as 1,000 community water systems in California may be at high risk of failing to deliver potable water, with a disproportionate number of these systems located in low-income areas that tend to be disproportionately Black.²⁰⁸ California's Environmental Protection Agency has also acknowledged that contamination of water sources disproportionately impacts communities of color.²⁰⁹

²⁰⁰ Hall, Black Farmworkers in the Central Valley: Escaping Jim Crow for a Subtler Kind of Racism (Feb. 22, 2019) KQED, <https://www.kqed.org/news/11727455/black-farmworkers-in-the-central-valley-escaping-jim-crow-for-a-subtler-kind-of-racism>.

²⁰¹ London et al, UC Davis Center for Climate Change, *The Struggle for Water Justice in California's San Joaquin Valley* (2018) at 10.

²⁰² Ibid.

²⁰³ Jose A. Del Real, How Racism Ripples Through Rural California's Pipes (Nov. 29, 2019), N.Y. Times.

²⁰⁴ Cowan & Del Real, Why Thousands of Californians Don't Have Clean Drinking Water (Dec. 6, 2019), N.Y. Times, <https://www.nytimes.com/2019/12/06/us/lanare-drinking-water-central-valley.html>.

²⁰⁵ Ibid.

²⁰⁶ Taylor, Dorceta E., *The Environment and the People in American Cities, 1600s-1900s*, 117-21.

²⁰⁷ Ibid.

²⁰⁸ Jose A. Del Real, *The Crisis Lurking in Californians' Taps: How 1,000 Water Systems May Be at Risk*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/the-crisis-lurking-in-californians-taps-how-1000-water-systems-may-be-at-risk.html>.

²⁰⁹ CALEPA, *ACHIEVING THE HUMAN RIGHT TO WATER IN CALIFORNIA* (2021), <https://oehha.ca.gov/media/downloads/water/report/hrtwachievinghrtw2021f.pdf>. Although all people of color are disproportionately impacted in California, the problem is particularly salient among Latinx communities because of poor water supplies in and around farmworker communities that are largely Latinx.

A UCLA report in 2021 identified 29 failing water systems in Los Angeles County, and these systems largely service communities of color.²¹⁰ For example, in 2019, authorities dissolved the Sativa Los Angeles county Water District for servicing brown water for decades to its customers in Willowbrook and the historically Black neighborhood of Compton.²¹¹ In Oakland, the majority-Black McClymonds high school has had a history of serious water contamination issues in recent years, from lead pollution to dangerously high levels of chemical solvent groundwater pollution that led to the school's temporary closure in 2020.²¹²

Transportation discrimination impacts Black Californians as well. In 1965, the California Governor created the McCone Commission to examine causes of civil unrest in Los Angeles in 1965, identifying "inadequate and costly" transportation as contributing to high rates of unemployment among the Black urban population. California has not designed its transportation system to address this need, often favoring rail options catering to suburbs rather than bus lines used by urban areas with greater Black populations.²¹³ These choices have led to several high-profile lawsuits, including in Los Angeles and San Francisco in the 1990s and 2000s.²¹⁴

Nevertheless, design of public transit by major municipalities in the state often catered to the largely white suburban residents because they were seen as needing better options in order to "choose" public transit. For example, Oakland's San Antonio neighborhood, the most racially diverse in the city and one of the densest parts of the Bay Area, sees the Bay Area Rapid Transit (BART) train travel for nearly three miles without stopping.²¹⁵ By contrast, in suburban Walnut Creek and Pleasant Hill, which are less than half as dense, BART stations are only 1 ¾ miles apart. "BART was literally designed (in the late 1960s) to speed white suburban commuters past Black inner-city residents."²¹⁶ This purposeful decision by the government left Black residents without the same transit options to reach jobs, and limited economic mobility and opportunity. In Oakland, a \$484 million elevated "people mover," which connects BART to the airport, lost federal funding because it was found to have a discriminatory impact; its construction led to the elimination of a bus route in the minority neighborhoods it bypasses.²¹⁷ But, though the project lost federal funding, it still went ahead, and the Oakland neighborhood still lost its bus line.

²¹⁰ <https://www.ioes.ucla.edu/wp-content/uploads/2021/01/human-right-to-water-in-poor-communities-of-color.pdf>

²¹¹ Ibid.

²¹² ABC 7 News, Oakland's McClymonds High School Safe To Return To, Months After Chemical Scare, District Says (Oct. 16, 2020) <<https://abc7news.com/mcclymonds-high-school-oakland-chemical-spill-testing/7082381/>> (as of March 18, 2022).

²¹³ Testimony of Dr. Bruce Appleyard, California Task Force to Study and Develop Reparation Proposals for African Americans (Dec. 7, 2021).

²¹⁴ Ibid.

²¹⁵ Spieler, "Racism has shaped public transit, and it's riddled with inequities" (Aug. 24, 2020) Rice Kinder Institute for Urban Research < <https://kinder.rice.edu/urbanedge/2020/08/24/transportation-racism-has-shaped-public-transit-america-inequalities>>.

²¹⁶ Ibid.

²¹⁷ Ramey, "America's Unfair Rules of the Road: How our transportation system discriminates against the most vulnerable" (Feb. 27, 2015) *Slate* <https://slate.com/news-and-politics/2015/02/americas-transportation-system-discriminates-against-minorities-and-poor-federal-funding-for-roads-buses-and-mass-transit-still-segregates-americans.html>.

Finally, although the disparities between Black and white residents in terms of raw internet *access* in California is much smaller than nationally,²¹⁸ research has shown that Black neighborhoods in both Los Angeles and Oakland had the least investment in broadband internet in those cities.²¹⁹

I. Conclusion

The various forms of environment and infrastructure-related discrimination suffered by Black Americans in this country are rooted in the badges and incidents of slavery that have never been eliminated in this country. Black enslaved persons were released from bondage and forced into unhealthy, dangerous, and overcrowded housing, located in the most toxic areas in our cities, which also lacked proper water and sewage services. Residential segregation and government decisions regarding modern infrastructure development reinforced these patterns throughout the 20th century. Black Americans have been denied equal access to telecommunication services, and are increasingly subjected to “algorithms” and other forms of computerized decisionmaking with racist underpinnings and outcomes. These racist systems have harmed and will continue to harm Black Americans.

²¹⁸ Niu Gao and Joseph Hayes, California’s Digital Divide, Public Policy Institute of California (Feb. 2021).

²¹⁹ Testimony of Vinhcent Le, California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022)

8. Pathologizing Black Families

I. Introduction

Starting over 400 years ago, the federal and state governments of our country have decimated Black families, both through their own official action and inaction, as well as through creating and supporting systems in which private actors enacted racist policies and practices. After the end of the legal enslavement of Black Americans, the apprenticeship system and segregation laws denied Black Americans the stability and safety of the family unit.¹ In the past century, both financial assistance and child welfare systems have based decisions on racist beliefs about Black Americans.²

As a result, these government-run systems have excluded Black Americans from receiving benefits and targeted Black families for investigations of child mistreatment and neglect.³ Further, these structures have placed Black children in foster care systems at much higher rates than white children.⁴ Meanwhile, the criminal and juvenile justice systems have intensified these harms to Black families by imprisoning large numbers of Black children, thereby separating Black families.⁵ All of these actions have systematically worked to deny Black Americans the opportunities to form stable, supportive family structures, and have often further stereotyped and blamed Black Americans themselves for resulting harms.

Section III of this chapter addresses the treatment—and decimation—of family structure among Black enslaved persons during the slavery era of American history. Section IV discusses the Black family from emancipation until the Civil Rights Era, during which government structures and policies empowered the continued enslavement of Black children, excluded both Black women and Black men from healthy parenting relationships, and continued to deny the legitimacy—both literal and figurative—of Black marriages and children, so as to ensure white wealth was not dispersed to them. Section V addresses the Moynihan Report, which largely blamed the culture of Black families for the injustices faced by Black Americans and proposed deeply problematic solutions to remedy them. Section VI addresses direct cash assistance welfare programs, from their overtly racist origins through modern programs that continue to systematically disadvantage impoverished Black families. Section VII lays out the history of the foster care

¹ Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland* (1988) 62 Ag. Hist. 57, p. 63; section IV, *infra*.

² Robinson, “*The Black Family*” and *US Social Policy: Moynihan's Unintended Legacy?*, *Revue Française d'études Américaines* (Sept 2003) p. 118-128; Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, and “Worthiness” in Poverty Discourse and Policy* (Spring 2010) *The Modern American*, Vol. 6.1; Minoff, Center for the Study of Social Policy, *The Racist Roots of Work Requirements* (Feb. 2020), <<https://cssp.org/wp-content/uploads/2020/02/Racist-Roots-of-Work-Requirements-CSSP-1.pdf>> (as of March 6, 2022); Cooper, *Racial Bias in American Foster Care: The National Debate* (2013) 97 Marq. L.Rev. 215, p. 230; sections VI & VII, *infra*.

³ *Ibid.*

⁴ Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule* (1997) 76 Child Welfare 9-21; White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act* (2006) 1 Nw. J. L. & Soc. Pol’y 303; Ladner, *Mixed Families Adopting Across Racial Boundaries* (1978), p. 67; Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers* (2012) 59 UCLA L. Rev. 1474, p. 1480-81.

⁵ Puzzanchera et al., *Easy Access to Juvenile Populations: 1990-2019*. National Center for Juvenile Justice (2020) <<https://www.ojjdp.gov/ojstatbb/ezapop>> (as of Jan. 28, 2021).

and other child welfare systems in America, discussing the myriad ways in which that system further attacked the Black family and denied them resources afforded to other Americans. Section VIII addresses the criminalization of Black youth, who are targeted consistently both within and outside of schools, further breaking families apart. Section IX addresses issues relating to Black victims of domestic violence, who are doubted and excluded from assistance in ways that many white victims are not.

II. Enslavement

Throughout the slavery era of American history, federal and state governments empowered and protected white enslavers in their destruction of Black family structures by treating enslaved people as chattel, unworthy of family love, care, and support.

A. The Transatlantic Slave Trade and Reproductive Slavery

As Frederick Douglass observed over 250 years ago, “[g]enealogical trees do not flourish among slaves.”⁶

The vast majority of the nearly 400,000 enslaved persons brought over from Africa were children or young adults, and more than a quarter were children.⁷ Upon the arrival of enslaved people in the United States, private parties and state governments maintained no records of the origins of Black Americans, replacing their names with those of their new enslavers, names by which they were called throughout their lives.⁸ This erased an individual’s identity, severed them from their family, and made it extremely difficult for them to find each other after emancipation.⁹ See Chapter 2 on enslavement for more detailed information about this process.

Federal and state governments passed laws that protected enslavers’ ability to destroy Black families and use Black women and their children as a way to increase the wealth of enslavers. Before 1662, English law governing the American colonies held that children of enslaved fathers were enslaved, but the child of enslaved women and white male enslavers were free persons upon their birth, thereby entitling them to the full protection of the law.¹⁰ This changed in 1662, when the colonial government of Virginia passed a law stating that all children born to enslaved mothers were enslaved themselves, regardless of whether or not the father was white, Black, enslaved, or free.¹¹ This law created a new source of wealth as slave owners used these children to settle debts, pass on a larger inheritance, or otherwise enrich themselves.¹² The doctrine

⁶ Douglass, *My Bondage and My Freedom* (1855).

⁷ Henry Louis Gates, Jr., *How Many Slaves Landed in the U.S.*, PBS.org (citing Eltis & Richardson, *Trans-Atlantic Slave Trade Database*), <<https://www.slavevoyages.org/voyage/database>> (as of March 6, 2022); Stacey Patton, *Corporal Punishment in Black Communities: Not an Intrinsic Cultural Tradition but Racial Trauma* (April 2017) American Psychological Association.

⁸ See generally Ellis, *Lost Lineage: The Quest to Identify Black Americans’ Roots* (Feb. 25, 2020) Washington Post.

⁹ See Williams, *Help Me to Find My People* (UNC Press 2012).

¹⁰ Briggs, *Taking Children: A History of American Terror* (2020) p. 20.

¹¹ *Id.* at 19.

¹² *Id.* at 43.

underlying this law became known as “partus sequitur ventrem,” Latin for “that which is born follows the womb.”¹³ It was adopted in laws by virtually all other states in which enslavement was legal.¹⁴

The United States outlawed trafficking enslaved people into the country in 1807.¹⁵ The only legal way to increase the number of enslaved people and free labor for the American economy was therefore through domestic birth of new enslaved persons. This created a financial incentive for impregnating Black women and girls and carrying the pregnancies to term.¹⁶ Historians have found evidence that enslavers raped Black women and forced them to birth children to create more enslaved people and further enrich their enslavers.¹⁷

Professor Daina Ramey Berry has argued that this sexual slavery served to provide great benefits to both government and private actors within both the southern and northern states.¹⁸ The labor of Black enslaved people created wealth for their enslavers, sustained cotton production and other private industries, and paid state and local taxes across the country.¹⁹ In the North, maritime industry, merchants, textile manufacturers, and even consumers of cheap cloth were all dependent on the southern cotton plantation economy, which was based on the sexual slavery of Black women and men²⁰ and the destruction of Black families.²¹ Professor Berry argues that enslavers focused on the fertility of young Black women during slave auctions, and that early childbirth was considered to be a valuable skill, like housekeeping and clothes-mending.²² Enslavers considered the birth of enslaved infants not with humanity, but “appraise[d]” them with a monetary value, one that typically increased as they aged.²³

B. Marriage Between Enslaved People

American governments prohibited or did not recognize marriage between enslaved people. Across the southern enslaving states, enslaved persons were generally prohibited by law from entering any legally-binding marriage.²⁴ Abolitionist William Goodell described the way that American law treated the families

¹³ Lamb, *The Peculiar Color of Racial Justice* (Jan. 25, 2022) Christian Science Monitor; see also Morgan, *American Slavery, American Freedom* (1975).

¹⁴ See generally Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland, Colonies of British America* (1977) 34 *Wm. & Mary Q.* 258, p. 262; Morris, *Southern Slavery and the Law, 1619-1860* (1996), pp. 44-48.

¹⁵ Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426, Chap. 22.

¹⁶ Testimony of Dr. Jacqueline Jones, California Task Force to Study and Develop Reparation Proposals for African Americans 3 (October 13, 2021); Briggs, *supra*, at 19; Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2014).

¹⁷ Testimony of Dr. Jacqueline Jones, *supra*; White, *Ar'n't I a Woman? Female Slaves in the Plantation South* (New York: W. W. Norton, 1985); Rachel A. Feinstein, *When Rape was Legal: The Untold History of Sexual Violence During Slavery* (New York: Routledge, 2019).

¹⁸ See Berry, *The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Boston: Beacon Press, 2017).

¹⁹ *Ibid.*

²⁰ Foster, “The Sexual Abuse of Black Men under American Slavery.” *Journal of the History of Sexuality*, vol. 20, no. 3, 2011, pp. 445–64, <http://www.jstor.org/stable/41305880>. Accessed 11 Apr. 2022.

²¹ *Ibid.*; Testimony of Dr. Jacqueline Jones, *supra*.

²² Berry, *supra*, at pp. 10-11.

²³ *Id.* at pp. 5-6.

²⁴ Goring, *The History of Slave Marriage in the United States* (2006) 39 *J. Marshall L. Rev.* 299, 299, 302-304 (2006).

of enslaved people in 1853 as: “The slave has no rights. Of course, he or she cannot have the rights of a husband, a wife. The slave is a chattel, and chattels do not marry. ‘The slave is not ranked among sentient beings, but among things;’ and things are not married.”²⁵ Tennessee was the only enslaving state that allowed for marriage between enslaved persons, but the law required consent of the enslavers for the marriage to be valid.²⁶ Because enslaved persons were not considered to be human beings under the law, they could not enter into legal contracts.²⁷ Therefore, enslaved people could neither own nor transfer property, which is what American law recognized their husbands, wives, and children to be.²⁸

The North Carolina Supreme Court in 1858 said: “The relation between slaves is essentially different from that of man and wife joined in lawful wedlock,” because “with slaves it may be dissolved at the pleasure of either party, or by the sale of one or both, depending upon the caprice or necessity of the owners.”²⁹ Their condition was compatible only with a form of “concubinage, voluntary on the part of the slaves, and permissive on that of the master.”³⁰

These attitudes and legal mandates were not limited to the South. One notable example is the case of Basil Campbell, who at the time of his death in 1906 was one of the wealthiest Black men in California.³¹ He arrived to California from Missouri in 1854 as an enslaved person, forcibly removed from his wife and two children, who never saw him again.³² After his death, his two adult sons from his marriage in Missouri sued to seek their inheritance, leading three different courts, including the California Supreme Court, to reject their claims.³³ Indeed, one appellate court held—nearly 50 years after the legal emancipation of enslaved Black Americans—that describing Campbell’s marriage to his enslaved wife as a marriage would make a “mockery” of the institution.³⁴

C. Interracial Marriage

Laws prohibiting interracial marriage, known as anti-miscegenation laws, devalued Black families. The earliest known anti-miscegenation law, passed in 1661 in the Colony of Maryland, stated that a white woman who married a Black man became an enslaved person herself.³⁵ Other colonies followed suit to prohibit interracial marriage during slavery.³⁶ However, from slavery through the era of legal segregation,

²⁵ Goodell, *The American Slave Code in Theory and Practice: Its Distinctive Features Shown by its Statutes, Judicial Decisions, & Illustrative Facts* (1853), p. 105.

²⁶ Goring, *supra*, at pp. 314-315.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Howard v. Howard* (N.C. 1858) 51 N.C. 235, p. 240.

³⁰ *Ibid.*

³¹ Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (University of North Carolina Press, 2013), p.231.

³² *Id.* at pp. 231-32.

³³ *Id.* at pp. 232-33.

³⁴ *Id.* at p. 233.

³⁵ Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California* (2000) 33 U.C. Davis L.Rev. 795, p. 798.

³⁶ Viñas-Nelson, *Interracial Marriage in “Post-Racial” America* (Sept. 2017) Origins <<https://origins.osu.edu/article/interracial-marriage-post-racial-america>> (as of Aug. 13, 2021).

American society accepted white men having sex with Black women—whether consensual or rape—especially when those women were treated as the property of white men. The children of these interracial interactions were typically enslaved and could not inherit their white father’s wealth.³⁷

Fears of interracial marriage often led to violence. In 1834, a false rumor that abolitionist ministers had married an interracial couple led to 11 days of racial terror in New York City.³⁸ Mobs attacked a mixed-race gathering of the American Anti-Slavery Society and destroyed Black churches, homes, schools, and businesses, as well as the homes and churches of leading abolitionists.³⁹ A similar incident occurred in Philadelphia in 1838.⁴⁰

Punishments for interracial marriage varied by state, but prior to the Civil War white Americans were punished more often than Black Americans, at least within the legal system. Scholars have argued that this reflects anti-Black racist attitudes that, depending on the circumstance, Black people were sometimes considered “too irresponsible and too inferior to punish” and “it was whites’ responsibility to protect the purity of their own bloodlines.”⁴¹ Punishments for Black Americans, however, were still severe, including whippings, fines, exile, or even enslavement if they were free at the time of their violation of the law.⁴² Although it is unclear how often anti-miscegenation laws were enforced, evidence suggests that they were used to make examples of high-visibility interracial couples, who were considered a threat to public order.⁴³

D. Parent-Child Relationships

Enslavement inherently treated enslaved Black Americans as replaceable property, so enslavers separated children from their parents if it was profitable to do so, and sometimes in order to discourage potential rebellion. This was justified by the enslavers in various ways. For example, Thomas R.R. Cobb, a legal scholar who drafted parts of the Georgia legal code of 1861,⁴⁴ claimed that the Black mother “suffers little” when her children are stolen from her, since she lacked maternal feelings.⁴⁵ Cobb helped write principles of white supremacy into Georgia law, including a provision that presumed Black Americans were enslaved unless proven otherwise.⁴⁶

From their birth, enslaved children were considered property of the enslaver, and therefore enslavers controlled a child’s life and upbringing.⁴⁷ From the time of birth, enslavers stripped away parental rights,

³⁷ Kwon, *Interracial Marriages Among Asian Americans in the U.S. West, 1880–1954* (2011) p. 13.

³⁸ Viñas-Nelson, *supra*.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ Kennedy, *Interracial Intimacies* (2003), at 220.

⁴² *Id.* at 221-22.

⁴³ Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009) pp. 135–36.

⁴⁴ McCash, *Thomas Cobb and the Codification of Georgia Law* (1978) *The Georgia Historical Quarterly*. 62 (1): pp. 9–23.

⁴⁵ Briggs, *supra*, at pp. 25-26.

⁴⁶ Morriss, *Georgia Code (1861)*, in *Slavery in the United States: A Social, Political, And Historical Encyclopedia*, vol. 2, ed. Junius P. Rodriguez (Santa Barbara: ABC-CLIO, 2007), pp. 314-315.

⁴⁷ Crew et al., *Slave Culture: A Documentary Collection of the Slave Narratives from the Federal Writers’ Project* (2014) pp. 191. Please see the Health chapter for further discussion of the process of birthing and the work demands placed on new mothers.

often not allowing the birth parents to choose the newborn's name.⁴⁸ Very soon after giving birth, enslaved mothers were expected to return to work and leave their children with extended family members or an older enslaved woman who was assigned the role to watch over children on the plantation.⁴⁹ Even if an enslaved parent had some control over their child's life, the enslaver held the highest authority and could make final decisions as to who would take care of the child, what activities they participated in, or whether they would be separated from their family by selling the parent or child to a different enslaver.⁵⁰ As a result of many children and parents being separated through chattel sales, orphaned children were often adopted and cared for by friends, extended family, or the enslaved community as a whole.⁵¹ This approach of allowing white strangers, aided by laws and government actors, to take a Black child from their family is echoed after enslavement via the apprenticeship system and by the modern foster care system, as discussed further below.

Enslaved children typically received no formal education and were expected to work as soon as they were physically able, forced to work in the fields as young as eight.⁵² They often worked in a similar capacity as the adults, working fields, tending animals, cleaning and serving in their enslavers' houses, and taking care of younger children.⁵³ State law legally entitled enslavers to separate enslaved parents and children at any time, and to relocate them at different plantations at the time of the child's birth.⁵⁴ In some southern states, approximately one-third of enslaved children were separated from one or both parents.⁵⁵

Harriet Mason, an enslaved women forced to separate from her family at age seven, related that she "used to say I wish I'd died when I was little."⁵⁶ Members of a family could be separately sold as enslavers fell into debt or wanted to raise profits.⁵⁷ A southern Black enslaved person had a 30 percent chance of being sold in his or her lifetime.⁵⁸ A quarter of trades of enslaved persons across state lines destroyed a first marriage, while approximately half destroyed a nuclear family by separating immediate family members.⁵⁹ "I have borne thirteen children and seen most all sold off into slavery, and when I cried out with a mother's grief,

⁴⁸ Id. at p. 193.

⁴⁹ Id. at p. 194.

⁵⁰ Id. at p. 193

⁵¹ Id. at p. 194.

⁵² Steven Mintz, *Childhood and Transatlantic Slavery, Children and Youth in History* <<https://chnm.gmu.edu/cyh/case-studies/57>> (as of Dec. 8, 2021).

⁵³ Nat'l Park Serv., *African American Children* <<https://www.nps.gov/articles/african-american-children.htm>> (as of Aug. 23, 2021).

⁵⁴ Gutman, *The Black Family in Slavery and Freedom: 1750-1925* (1977).

⁵⁵ Tadman, *The Hidden History of Slave Trading in Antebellum South Carolina: John Springs III and Other "Gentlemen Dealing in Slaves"* (Jan. 1996) 97 S.C. Hist. Mag. 6, 15.

⁵⁶ Holden, *Slavery and America's Legacy of Family Separation* (July 25, 2018) Black Perspectives <<https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation>> (as of Aug. 24, 2021).

⁵⁷ Id. at p. 16.

⁵⁸ Ta-Nehisi Coates, *The Case for Reparations* (June 2014) *The Atlantic*.

⁵⁹ *Ibid.*

none but Jesus heard[,]” said the abolitionist Sojourner Truth, who was bought and sold four times.⁶⁰ Truth escaped slavery with her infant daughter in 1826, and won a court case in 1828 to recover her son.⁶¹

Opponents of slavery, including those in the federal government, recognized how it destroyed the families of Black Americans. Advocating for the elimination of slavery, U.S. Senator James Harlan of Iowa stated that slavery effected “the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents.”⁶² Scholars argue that the anguish caused by this family separation coerced enslaved people into working without complaint.⁶³ The horrors of family separation during slavery were highlighted by abolitionists as a central strategy to enlist people to their cause.⁶⁴ Near the end of the slavery era, in the 1850s, some southern states responded to public horror at child separation by passing laws prohibiting the taking of infants from their enslaved mothers.⁶⁵ Modern scholars analyzing this development have argued that these laws were not passed out of concern for Black Americans, but to assuage public outrage in order to maintain slavery.⁶⁶

E. Extended Family Kinship Structures

In order to cope with the destruction of their nuclear family, enslaved people created deep, extended supportive relationships with other enslaved people.⁶⁷ Some historians have argued that the extended kinship structures of Black enslaved people mirrored similar structures in their native West African homelands.⁶⁸ The role of Black grandparents, other extended relatives, and older Black caregivers who were not biologically related took on particular importance,⁶⁹ with Black grandmothers often serving as a central figure within a plantation ensuring the care of all children of enslaved parents who were sold to other enslavers, killed, or otherwise removed from their nuclear families.⁷⁰ The reliance of Black mothers and Black Americans on extended kinship networks was a necessity for mere survival, beginning in the slavery era and continued through Jim Crow and other forms of discrimination.⁷¹

Early Black historians argued that the legacy of slavery created “disorganization and instability” in Black families for generations.⁷² In 1899 and again in 1909, prominent sociologist and social critic W.E.B. Du

⁶⁰ Nat'l Park Serv., Sojourner Truth <<https://www.nps.gov/people/sojourner-truth.htm>> (as of Dec. 2, 2021).

⁶¹ *Ibid.*

⁶² Briggs, *supra*, at p. 18 (quoting *Congressional Globe* (1864) 28th Congress, 1st Session 1439).

⁶³ *Id.* at p. 19.

⁶⁴ *Id.* at pp. 17–28 (noting that slave narratives “dwelt often on the question of child taking”).

⁶⁵ Billingsley & Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1972).

⁶⁶ *Id.*; Briggs, *supra*, at p. 27.

⁶⁷ See, e.g., Gutman, *supra*, at pp. 212-216, Hunter, Tera, *Bound in Wedlock: Slave and Free Black Marriage in the Nineteenth Century*. United States: Harvard University Press (2017).

⁶⁸ Herskovits, *The Myth of the Negro Past*, pp. 167-86 (1941).

⁶⁹ Fenton, *In A World Not Their Own: The Adoption of Black Children* (1993) 10 Harv. BlackLetter J. 39, p. 42.

⁷⁰ Rankin, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care* (2002) 10 Elder L.J. 153, p. 157.

⁷¹ See Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy* (1995) 68 Temp. L. Rev. 1649, p. 1660 (citing, inter alia, Gutman, *supra*).

⁷² Ruggles, *The Origins of African-American Family Structure* (Feb., 1994) American Sociological Review, Vol. 59, No. 1, pp. 136-151.

Bois published detailed, fact-driven analyses of Black families, demonstrating the many ways in which a lack of economic means and opportunities after the end of slavery harmed Black families in both the North and South.⁷³ In 1932, sociologist E. Franklin Frazier argued that Black families had particular difficulty adapting to the drastic changes of the early 20th century due to the way that enslavement destroyed Black families and traditions.⁷⁴ As discussed further below, these resulting harms have been used throughout American history to claim that the Black family itself was to blame because it was dysfunctional by its nature.

III. Black Families from Emancipation to the Civil Rights Era, 1865 to 1960

After slavery, states and private actors continued to discriminate against Black families, particularly with respect to the dominant gender norms of the time. Before the women’s liberation movement of the late 1960s redefined the role of women in society,⁷⁵ women were expected to take care of children and the home.⁷⁶ Only men were expected to participate in the public sphere.⁷⁷ For Black women, these expectations imposed impossible burdens. Black women were expected to be mothers and wives, but white society expected Black women to be their servants and workers.⁷⁸ Black women attempted to do both, which took a great emotional and physical toll on Black women and, in turn, their families.⁷⁹

For Black men, traditional gender roles dictated that they must dominate and lead, acting as the head of the family.⁸⁰ Under these norms of masculinity, society expected men to be stoic figures, enduring all injury without emotion or complaint.⁸¹ These expectations, too, demanded the impossible from Black men, as society expected them to accept the indignities of discrimination without complaint.⁸² When Black men responded to discrimination in anger—one of the few emotions society expected of and allowed for men to exhibit—Black men were criminalized and treated as threats, feeding the stereotypes imposed upon them.⁸³ This, too, has taken a toll on Black men and their families.⁸⁴

A. Black Parenthood

⁷³ Du Bois, *The Philadelphia Negro* (1899); Du Bois, *The Negro American Family* (1909).

⁷⁴ Frazier, *Ethnic Family Patterns: The Negro Family in the United States* (1932).

⁷⁵ Evans, *Feminist Theory Today: An Introduction to Second-Wave Feminism* (1995), p. 13.

⁷⁶ See *Craig v. Boren* (1976) 429 U.S. 190, 198–99; Beal, *Double Jeopardy: To be Black and Female* (2008) 8 *Meridians* 166, p. 167.

⁷⁷ Beal, *supra*, at p. 167; Jones, *Labor of Love, Labor of Sorrow: Black Women, Work and the Family from Slavery to the Present* (1985) (hereinafter “*Labor of Love*”), pp. 62–66.

⁷⁸ See California Task Force to Study and Develop Reparation Proposals for African Americans (Oct. 13, 2021), Testimony of Jones, 1:30-1:45, 5:47-7:00, 11:38-12:51 <<https://tinyurl.com/4smp9aek>> (as of Jan. 26, 2022) (hereinafter “*Testimony of Jones*”); Campbell, *Making Black Los Angeles: Class, Gender, and Community, 1850-1917* (2016), pp. 39–68.

⁷⁹ Campbell, *supra*.

⁸⁰ Hooks, *The Will to Change: Men, Masculinity, and Love* (2004), pp. 5-10, 18-35.

⁸¹ *Ibid.*

⁸² See generally Smith, et al., *Racial Battle Fatigue and the MisEducation of Black Men: Racial Microaggressions, Societal Problems, and Environmental Stress* (2011) 80 *J. of Negro Education* 63.

⁸³ Wingfield, *The Modern Mammy and the Angry Black Man* (2007) 14 *Race, Gender & Class* 196, pp. 198-99.

⁸⁴ Hooks, *supra*, at pp. 127-29; see generally Smith, et al., *supra*.

During this time, prevailing gender norms defined fathers as breadwinners and mothers as caretakers at home.⁸⁵ But racial discrimination combined with these gender expectations to place heavier burdens on Black families and Black parenthood. As described in greater detail in Chapter 10, government and private actors discriminated against Black men seeking employment, restricting them to ill-paid menial jobs and limiting their ability to earn income to support their families.⁸⁶ At times, this required Black men to direct their children to work to ensure that the family could survive.⁸⁷ Black children, therefore, often could not pursue schooling or their own goals and dreams.⁸⁸

Because discrimination limited Black men's employment opportunities, Black women also had to seek work to supplement the family's income even where white women did not.⁸⁹ This required Black women to play the social roles of both men and women, taking care of children and the household while working jobs at the same time.⁹⁰ The Freedmen's Bureau, a government agency established to aid the transition of enslaved people to freedom, singled out Black women as subset of poor women who were supposed to work rather than remaining at home.⁹¹ For example, South Carolina Freedman Bureau agent John de Forest criticized the "myriads of [Black] women who once earned their own living [who] now have aspirations to be like white ladies and, instead of using the hoe, pass the days in dawdling over their trivial housework[.]"⁹²

As a result, a higher percentage of Black married women worked than their white counterparts.⁹³ This systematically denied Black children the care of their mothers when compared to white children whose mothers could more often choose to stay home and provide care.⁹⁴ Later in the 20th century, Black women were generally precluded from taking public-facing retail jobs or professional secretarial work with traditional nine-to-five work schedules.⁹⁵ Instead, typically they were only given opportunities to serve as domestic caregivers and maids, often living in the homes of their white employers and on call at all hours.⁹⁶ These domestic service jobs took the individual work of caring and mothering from Black families and gave it to the children of white families, often preventing Black mothers from even living with their children.⁹⁷

B. Interracial Marriage

⁸⁵ See, e.g., Jones, *supra*, pp. 58-64.

⁸⁶ Testimony of Jones, *supra*, 13:15-13:26; see also Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 2003); Benson, *Counter Cultures: Saleswomen, Managers, and Customers in American Department Stores, 1890-1940* (Urbana: University of Illinois Press, 1986).

⁸⁷ Jones, *Labor of Love*, *supra*, at p. 64.

⁸⁸ *Id.* at pp. 64-65.

⁸⁹ Testimony of Jones, *supra*, 1:30-1:45, 5:47-7:00, 11:38-12:51.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*; Jones, *Labor of Love*, *supra*.

⁹² *Id.* at p. 59.

⁹³ Testimony of Jones, *supra*; see also Kessler-Harris, *supra*; Benson, *supra*.

⁹⁴ *Ibid.*

⁹⁵ Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* (New York: W. W. Norton, 1998), pp. 222-232.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Anti-miscegenation laws continued after the end of enslavement. When the Fourteenth Amendment was ratified, it was not considered to prohibit laws banning interracial marriage so long as the laws applied equally to both races.⁹⁸ In 1883, the Supreme Court upheld the constitutionality of laws outlawing interracial marriage, and state courts followed suit through the mid-20th century.⁹⁹ Members of Congress also tried—unsuccessfully—to ban interracial marriage nationwide through legislative proposals made in 1871, 1912, and 1928.¹⁰⁰ Eventually, a total of 38 states established such laws.¹⁰¹

Many scholars argue that the white-dominated state governments passed anti-miscegenation laws to prevent Black Americans—enslaved or otherwise—from accumulating wealth, in addition to controlling women’s sexuality.¹⁰² In America’s earliest days, white colonists were also concerned with possible mixing of African Americans and Native Americans, given that an alliance of both groups might provide sufficient strength to rise against slavery and other forms of economic oppression.¹⁰³

The most direct concern was a passing on of white wealth to interracial offspring through inheritance or probate laws, undermining race-based social stratification.¹⁰⁴ Children of legally-unrecognized interracial marriages were almost always excluded from economic benefits they would have received if their parents were both white. The children were legally considered “bastards,” and had no claim to the estates of their biological fathers, nor could the man or woman in such a “void” marriage claim alimony, child support, death benefits, or any inheritance.¹⁰⁵

White relatives also had a strong motivation to ensure these statutes were strictly and aggressively enforced, since a sibling who might inherit nothing on the death of a married brother or sister could inherit that sibling’s wealth by proving that the sibling’s spouse was Black, and that the marriage was therefore void.¹⁰⁶ Anti-miscegenation laws continued to deny economic benefits—especially in probate, i.e., a judicial process whereby a will is “proven” in court—to Black Americans who would have otherwise received them, since, by operation of law, assets of those who died without wills would be inherited by spouses.¹⁰⁷

⁹⁸ Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage* (2004) 82 Wash. U. L.Q. 611, p. 628.

⁹⁹ *Pace v. Alabama* (1883) 106 U.S. 583; Stein, *supra*, at p. 629; Melton, Note, *Constitutionality of State Anti-miscegenation Statutes* (1951) 5 Southwestern L.J. 452, p. 453 (“Precedent being established, the state courts uniformly upheld these laws for over half a century until [*Perez v. Sharp*].”).

¹⁰⁰ Stein, *supra*, at pp. 629–30.

¹⁰¹ Cruz & Berson, *Laws that Banned Mixed Marriages* (May 2010) Ferris State University – Jim Crow Museum of Racist Memorabilia <<https://www.ferris.edu/HTMLS/news/jimcrow/question/2010/may.htm>> (as of Aug. 13, 2021); Stein, *supra* at p.628, footnote 82. In addition, Washington, Kansas, and New Mexico “prohibited interracial marriages when they were territories, but repealed them when they became states.” *Ibid*.

¹⁰² Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities* (2007) 41 L. & Soc. Rev. 587, p. 594, Viñas-Nelson, *supra*.

¹⁰³ Cruz & Berson, *supra*.

¹⁰⁴ *Id.* at p. 594.

¹⁰⁵ Kennedy, *supra*, at p. 222.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

Government officials and white militants enforced bans on sexual intimacy between Black men and white women with particular intensity due to the overlapping aims of maintaining racial hierarchy and policing white women's bodies.¹⁰⁸ The Ku Klux Klan, an all-male group, claimed one of its purposes was to treat white women as the "special objects of [its] regard and protection."¹⁰⁹ Nevertheless, they abused, raped, and mutilated white women who fraternized with Black men.¹¹⁰

This also meant that Black men were special targets for violence after any interactions with white women. In Alabama in 1929, for example, Elijah Fields, a 50-year-old Black man, and Ollie Roden, a 25-year-old white woman, were both arrested and tried for violation of the state's anti-miscegenation law, which also prohibited cohabitation.¹¹¹ An Alabama jury convicted Fields even though Roden's father testified that he had only asked Fields to drive his daughter, who was incontinent and suffering from open sores, from a hospital to a boardinghouse.¹¹² The state sentenced Fields to two to three years in prison, although it was later reversed on appeal.¹¹³

In 1967, in *Loving v. Virginia*, the U.S. Supreme Court finally struck down all anti-miscegenation laws as unconstitutional.¹¹⁴

C. Continued Enslavement of Black Children Through Apprenticeship

The so-called "apprenticeship system" was a system that existed both before and after the Civil War under which state and local governments, through court decisions and agency actions, removed Black children from their families and placed them in the control of white adults who forced them to work without pay.¹¹⁵ This system had existed in some form since the late 1700s, but was less prevalent before the Civil War, when slavery was legal.¹¹⁶ However, even during the slavery era it was used to exploit the labor of *free* Black children, including in enslaving states. For example, records reveal that in 1857 a three-year-old free Black boy named Charles Bell was bound to an apprenticeship in Frederick County, Maryland, until the age of 21, through an agreement between local county officials and Nathaniel C. Lupton, which makes no mention of his parents.¹¹⁷

¹⁰⁸ Angyal, *I Don't Want to be an Excuse for Racist Violence Anymore*, New Republic (June 22, 2015) <<https://tinyurl.com/2p9dp8a3>> (as of Jan. 26, 2022); Hodes, *The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War* (1993) 3 J. of the History of Sexuality 402, 408-12, 417.

¹⁰⁹ Hodes, *supra*, at p. 409.

¹¹⁰ *Id.* at pp. 410-11.

¹¹¹ Kennedy, *supra*, at p. 214.

¹¹² *Ibid.*

¹¹³ *Id.* at 215.

¹¹⁴ (1967) 388 U.S. 1.

¹¹⁵ Fuke, *supra*, at p. 63.

¹¹⁶ Burnham, *Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum* (1996) 18 Cardozo L. Rev. 433, p. 437.

¹¹⁷ Mason, *The Uncommon Wealth: Voices from the Library of Virginia* (May 27, 2020) *The Farmer's Apprentice: African American Indentures of Apprenticeship In Virginia*.

Immediately after emancipation, former enslavers continued to exploit children, both sexually and as a cheap source of labor, through the apprenticeship system.¹¹⁸ Enslavers refused to free children when their parents were freed, either through apprenticeship laws or through outright kidnapping.¹¹⁹ Former enslavers petitioned state courts to remove Black children from their families based on apprenticeship laws.¹²⁰ These laws often allowed former enslavers to gain legal custody of Black children simply by claiming their parents were incapable of financially supporting them.¹²¹ In addition to the trauma of losing a child, Black families often suffered substantial economic harm since farming families relied upon children to assist in agricultural work.¹²² Many southern Black children in the apprenticeship system continued the traditional enslavement era labor of picking cotton.¹²³

This apprenticeship system controlled Black girls until they were 18 and Black boys until they were 21.¹²⁴ Although it is not known precisely how many children were effectively re-enslaved through apprenticeship, scholars estimate that many thousands of children in the South were taken from their recently-freed parents.¹²⁵

Court cases throughout the second half of the 19th century document occasionally-successful attempts of parents to free their children from this form of enslavement, but also reveal the continued success of the system at ensuring that white former enslavers could profit from their continued exploitation of Black children.¹²⁶

Southern white people continuously defended the apprenticeship system as benevolent in nature. One Maryland newspaper, for example, described the system in 1864 as being “prompted by feelings of humanity towards these unfortunate young ones.”¹²⁷ One Texas judge similarly described the Texas apprenticeship system as granting “justice to these children” by placing them in “good comfortable homes” where they would receive “some education.”¹²⁸

State and local courts were intimately involved in empowering this injustice. So-called “orphan” courts across the southern states, typically run by pro-slavery judges, bound an estimated 10,000 children of freed Black men and women to these apprenticeships, which for all intents and purposes were an extension of

¹¹⁸ Smallwood, *Emancipation and the Black Family: A Case Study in Texas* (1977) 57 Soc. Sci. Q. 849, p. 851.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Fuke, *supra*, at 63.

¹²² *Id.* at 63, 67, Smallwood, *supra*, at p. 851.

¹²³ Fuke, *supra*, at 63.

¹²⁴ Testimony of Jaqueline Jones and Cheryl Grills, California Task Force to Study and Develop Reparation Proposals for African Americans 3 (October 13, 2021).

¹²⁵ Burnham, *supra* at p. 436.

¹²⁶ *Id.* at pp. 439-448.

¹²⁷ Fuke, *supra*, at pp. 63-64.

¹²⁸ Farmer-Kaiser, *Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation* (2010), p. 106.

their forced labor under slavery, operating to the benefit of the children’s former enslavers.¹²⁹ Chief Justice of the United States Supreme Court Salmon Chase noted, in an 1867 case, that under the Maryland apprenticeship system “younger persons were bound as apprentices, usually, if not always, to their late masters.”¹³⁰ This legal dispute arose because, under Maryland law, anyone seeking to apprentice a white child was required to provide an education, and could not involuntarily “transfer” the apprenticed child to another.

However, Black children subjected to apprenticeship were not provided similar rights, and in fact were described overtly as a “property and interest.”¹³¹ In one well-known example, a young Black girl named Elizabeth Turner was apprenticed as a “house servant” at the age of eight, two days after her emancipation.¹³² She challenged her apprenticeship because of the differences between apprenticeship laws for Black and white children.¹³³ The Supreme Court held that no Black child could be bound to an apprenticeship without the protections afforded to white children, concluding that “the alleged apprenticeship in the present case is involuntary servitude, within the meaning of . . . the [thirteenth] amendment.”¹³⁴

Although this decision meant freedom for Elizabeth Turner, many southern trial courts ignored Justice Chase’s observations, and the re-enslavement of Black youth continued in the South.¹³⁵ Since apprenticeship laws allowed local courts to judge whether Black parents were financially able to raise their children, white former enslavers often easily convinced white judges that the children would be better off placed with them.¹³⁶

Scholars have noted that these attitudes have continued through modern family court and child welfare systems, which continue to apply three presumptions that are racist in practice: 1) That the state knows how to raise Black children better than their parents; 2) That poverty in and of itself prevents parents from raising their children well; and 3) That menial or vocational work, instead of an academic education, is more appropriate for Black youth.¹³⁷

During the New Deal, the federal government had a chance to remedy these abuses but did not. The Fair Labor Standards Act of 1938, a federal law that generally outlawed child labor explicitly carved out agricultural and domestic work, which was then largely done by Black workers.¹³⁸ The United States

¹²⁹ Weaver, *The Changing Tides of Adoption: Why Marriage, Race, and Family Identity Still Matter* (2018) 71 SMU L. Rev. 159, p. 168; Gutman, *supra*, at pp. 402-410.

¹³⁰ *In re Turner* (C.C.D. Md. 1867) 24 F.Cas. 337, p. 339.

¹³¹ *Ibid.*

¹³² Burnham, *supra* at pp. 439-440.

¹³³ *In re Turner*, *supra* at p. 339.

¹³⁴ *Ibid.*

¹³⁵ Burnham, *supra* at pp. 442-43.

¹³⁶ Fuke, *supra* at p. 63.

¹³⁷ See, e.g., Burnham, *supra* at p. 439.

¹³⁸ Fair Labor Standards Act of 1938 29 U.S.C. § 203.

Congress excluded these industries from labor protections, thereby denying Black children the labor protections given to white children.¹³⁹ See Chapter 10 on labor for further discussion of related issues.

D. Impacts of the Great Migration on the Black Family

In the first half of the 20th century, millions of Black Americans left the segregated South in search of greater opportunity in urban centers in the North and the West in a phenomenon called the Great Migration, which is discussed in detail in chapter [xx]. This was, in part, because these cities already had some existing Black social networks and possibly relatives with whom southern Black Americans could connect.¹⁴⁰ Older studies theorized that Black migrants during the Great Migration had disorganized family structures in the South, which they brought with them when they migrated to the North, contributing to higher rates of single parenthood and childbirth outside of marriage.¹⁴¹ Many Black families sent one parent, northwards or westwards first, with the rest of the family to follow months or years later.¹⁴²

Modern scholarship disputed these conclusions, noting that Black migrants from the South were more likely than Black Americans already living in the North to have children living with two parents, married women living with their spouses, and fewer mothers that had never married.¹⁴³ They were also less likely than northern Black Americans to receive welfare payments, contradicting claims in the Moynihan Report, which is discussed further below, that the higher welfare payments in the North drew migrants from the South.¹⁴⁴

E. California

California had an anti-miscegenation statute even as other nearby states, like Oregon, did not.¹⁴⁵ In fact, California enacted an anti-miscegenation law in its very first legislative session in 1850.¹⁴⁶ It initially singled out “negroes and mulattos” as the sole group which was prohibited from marrying “whites,” following the national trend of disenfranchising Black people from entering into legally-recognized marriages with white Americans.¹⁴⁷ Although the law was based in slavery-era motivations for prohibiting such marriages, other racial groups facing waves of societal discrimination in California were targeted by later amendments to the original law. California legislators exported its ban on interracial marriage to other states: In 1939, California legislators convinced the Utah legislature to add “Malay” to their state’s anti-

¹³⁹ Testimony of Rebecca Dixon, National Employment Law Project, From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act, Hearing before the U.S. House of Representatives Education and Labor Committee, Workforce Protections Subcommittee (May 3, 2021).

¹⁴⁰ Gregory, *The Southern Diaspora: How the Great Migrations of Black and White Southerners Transformed America*. Chapel Hill: University of North Carolina Press (2005).

¹⁴¹ Tolney, *The Great Migration and Changes in the Northern Black Family, 1940 to 1990*, *Social Forces*, Jun., Vol. 75, No. 4 (1997).

¹⁴² See, e.g., Wilkerson, *The Warmth of Other Suns* (2010), pp. 6, 240-41.

¹⁴³ Tolney, *supra*, at pp. 1221-32.

¹⁴⁴ *Id.* at p. 1232.

¹⁴⁵ Pascoe, *supra* at p. 193.

¹⁴⁶ Stats. 1850, ch. 140, § 3, page 424. The act, “An Act regulating marriages,” is actually older than the state itself: it passed on April 22, 1850, just over four months before California was granted official statehood.

¹⁴⁷ *Ibid.*

miscegenation law in order to avoid having to recognize marriages between Filipino Americans and white people performed in Utah.¹⁴⁸

It was not until 1948 that the California anti-miscegenation law was struck down by the California Supreme Court.¹⁴⁹ At oral argument, in defense of the law, the attorney for Los Angeles County asserted that “it has been shown that the white race is superior physically and mentally to the black race, and the intermarriage of these races results in a lessening of physical vitality and mentality in their offspring” and that “people who enter into miscegenous marriages are usually from the lower walks of both races... generally people who are lost to shame.”¹⁵⁰ Even after the law was struck down as unconstitutional, the California legislature repeatedly refused to repeal the law. It was not until *11 years* later that the California legislature finally repealed the statute, following consistent pressure from the National Association for the Advancement of Colored People.¹⁵¹

IV. The Moynihan Report

Few developments in the past half-century have been as impactful, or arguably as harmful, to America’s perception of Black families as the “Moynihan Report” of 1965.

A. Drafting and Content of the Moynihan Report

In the midst of the civil rights movement, in 1965, Daniel Moynihan, an Assistant Secretary of Labor researching policies as part of the Johnson Administration’s “War on Poverty,” drafted what was originally an internal Department of Labor Report entitled, “The Negro Family: The Case For National Action.”¹⁵² As described in the introduction of the report, one of its goals was to analyze the Black American family structure, which Moynihan saw as the fundamental problem underlying the gap in income, standards of living, and education between Black Americans and other groups.¹⁵³

The report described numerous ways that the historical legacy of slavery and institutional racism created lasting, harmful effects on Black Americans and the Black family.¹⁵⁴ However, while acknowledging the impacts of these historical realities, the report essentially claimed that the high rate of single motherhood in Black families in America was a major reason for the continued failure of Black Americans to achieve full and equal access to success in America.¹⁵⁵ It further asserted that such equality could only be achieved by

¹⁴⁸ Pascoe, *supra*, at p. 195.

¹⁴⁹ *Perez v. Sharp* (1948) 32 Cal.2d 711.

¹⁵⁰ Pascoe, *supra*, at 217.

¹⁵¹ Volpp, *supra*, at p. 824; Pascoe, *supra*, at p. 242.

¹⁵² Daniel Moynihan, Office of Policy Planning and Research, United States Department of Labor, *The Negro Family: The Case for National Action* (1965) (hereinafter, “Moynihan Report”);

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

changing the culture of Black Americans, and particularly of Black men, who had been “feminized” and rendered inadequate workers through being raised without male role models.¹⁵⁶

Even when advocating for governmental intervention to assist Black Americans, the Moynihan Report still portrayed them as helpless but for the intervention of white Americans, describing what Moynihan called the “pathology” of Black America as “capable of perpetuating itself without assistance from the white world.”¹⁵⁷ Although the Moynihan Report relied heavily on scholarship previously published by Black scholars, and linked the poverty experienced by Black Americans to the historical traumas of slavery, it also argued that the Civil Rights Act and equality of opportunity would not resolve them.¹⁵⁸

Instead, the Moynihan Report asserted that “[t]he gap between the Negro and other groups in American society is widening. The fundamental problem, in which this is most clearly the case, is that of family structure.”¹⁵⁹ Moynihan argued, for example, that the prevalence of single motherhood in Black families created “a matriarchal structure which . . . seriously retards the progress of the group as a whole.”¹⁶⁰

The overt sexism and gender-stereotyping of the report also dovetailed with existing hostility towards Black women serving as leaders in the Civil Rights movement.¹⁶¹ Contemporary Black women leaders were outraged that Moynihan explicitly advocated for improved governmental job opportunities for Black men over Black women to ensure male “breadwinners.”

Trailblazing advocate Pauli Murray stated that Moynihan’s criticism of Black women in the workforce was “bitterly ironic,” as criticism “for their efforts to overcome a handicap not of their own making.”¹⁶² Murray and others sharply disputed that traditional gender roles could solve Black poverty and racism.¹⁶³ Social scientist Donna Franklin argued that the family instability Moynihan focused on was mostly a result of the fact that Black women were hired as maids and child caregivers, while racial discrimination prevented Black men from finding jobs.¹⁶⁴ W.E.B. Du Bois made a similar observation nearly a half a century before the Moynihan Report.¹⁶⁵

Franklin also noted that the many single mothers in the Black community noted by Moynihan was at least partially due to the fact that adoption services did not accept Black children.¹⁶⁶ As a result, single Black women were forced into motherhood when white women had the option of giving their children up for

¹⁵⁶ *Ibid.*; Geary, *The Moynihan Report: An Annotated Edition*, The Atlantic (Sept. 14, 2015).

¹⁵⁷ Moynihan Report, *supra* at p. 47 (describing the “pathology” of Black America as “capable of perpetuating itself without assistance from the white world.”).

¹⁵⁸ Geary, *supra.*; see also Weaver, *African-American Grandmothers: Does the Gender-Entrapment Theory Apply? Essay Response to Professor Beth Richie* (2011) 37 Wash. U. J.L. & Pol’y 153, 161; Robinson, *supra.*

¹⁵⁹ Moynihan Report, *supra* at 3.

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Ibid.*; Waters, *Some Core Themes of Black Feminism*, in *Black Women's Intellectual Traditions: Speaking Their Minds* (Kristin Waters & Carol B. Conaway eds., 2007) p. 377.

¹⁶² Geary, *supra.*

¹⁶³ Geary, *Moynihan’s Anti-Feminism*, *Jacobin Magazine* (July 1, 2015).

¹⁶⁴ Franklin, *Ensuring Inequality: The Structural Transformation of the African-American Family* 39 (1997).

¹⁶⁵ Du Bois (1908), *supra* at 36.

¹⁶⁶ Franklin, *supra.*, at 138.

adoption.¹⁶⁷ From 1940 to 1960, 70 percent of white single mothers gave up their children for adoption, but only five percent or fewer of Black single mothers did so.¹⁶⁸

As Ta-Nehisi Coates wrote, the report helped create “the myth . . . that fatherhood is the great antidote to all that ails black people.”¹⁶⁹

Ultimately, no national effort resulted from the Moynihan Report. President Johnson called for a White House conference in its wake, which occurred in November of 1965. At that point, the report had engendered so much controversy that Moynihan himself was largely sidelined at the conference, having recently left the administration.¹⁷⁰

B. The Contemporary Response of Black Leaders to the Moynihan Report

Largely in response to the Moynihan Report, President Johnson acknowledged the legacy of state-sanctioned slavery and discrimination when he publicly stated, “Negro poverty is not white poverty.”¹⁷¹ Nevertheless, his administration followed that announcement with few meaningful efforts to address disparities of Black Americans.¹⁷²

Johnson did, however, convene a group of well-respected civil rights leaders to address Black poverty, which produced a report proposing that the federal government spend billions of dollars to ensure jobs, universal health insurance, and a basic minimum income paid to all Americans, regardless of race.¹⁷³ Their approach did not acknowledge that the American government has harmed Black Americans in a unique way, since they believed proposals solely aimed at helping Black Americans were likely to succeed.¹⁷⁴ Nevertheless, none of their recommendations ultimately manifested in any federal legislation from the Johnson Administration or otherwise.¹⁷⁵

C. Impacts on Public Discourse and Social Policy

Scholars have consistently criticized the Moynihan Report for blaming the victim.¹⁷⁶ For some politicians and government actors, the Moynihan Report justified a stance that Black Americans were unworthy of public assistance because Black culture was to blame for harms resulting from the enslavement and racial discrimination.¹⁷⁷

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Coates, *supra.*; see also Hill, *The Strengths of Black Families* (1972).

¹⁷⁰ Coates, *supra.*

¹⁷¹ Moynihan Report, *supra* at p. 9; see also Geary, *supra.*

¹⁷² Ibid.

¹⁷³ Randolph & Rustin, *A Freedom Budget for All Americans* (Annotated), *The Atlantic* (Feb., 2018).

¹⁷⁴ Coates, *supra.*

¹⁷⁵ Randolph & Rustin, *supra.*

¹⁷⁶ See, e.g., Ryan, *Blaming the Victim* (Vintage Books ed. 1976) p. xii; Peller, *The Moynihan Report, Self-Help, and Black Power* (2016) 8 *Geo. J.L. & Mod. Critical Race Persp.* 39, p. 41.

¹⁷⁷ Weaver, *supra.*, at 161.

Moynihan also suggested that every young Black man should join the armed forces, which would provide Black men with a much-needed “world away from women, a world run by strong men of unquestioned authority, where discipline, if harsh, is nonetheless orderly and predictable.”¹⁷⁸ This recommendation was made as American involvement in the Vietnam War was beginning to escalate, at a time in which Black men were underrepresented in the armed forces. Moynihan’s analysis and recommendation lead to Secretary of Defense Robert McNamara’s “Project 100,000,” a program ostensibly designed to allow greater access to the U.S. Military for those who initially failed the qualifications test.¹⁷⁹ Project 100,000 ultimately served as a successful recruitment tool for Black soldiers in the Vietnam War—fully 40 percent of those recruited were Black, nearly four times the percentage of Black Americans.¹⁸⁰ Regardless, Black men were more likely to be drafted than white men, further devastating Black families when thousands of Black men died in the war.¹⁸¹

Although the Moynihan Report and its central conclusions were immediately controversial and contested, President Johnson adopted its language and central focus in decrying the “breakdown of the Negro family structure” as fundamental to the challenges faced by Black Americans.¹⁸² Several high-profile scholars also used the conclusions of the Moynihan Report to argue against the very social welfare programs for which Moynihan had advocated to help Black Americans out of poverty. These included Arthur Jensen and Charles Murray—best known for their deeply controversial book “The Bell Curve”—who argued that the wealth gap between Black and white Americans existed because white Americans were more intelligent, a position Moynihan explicitly rejected.¹⁸³

Later scholars argued the Moynihan Report provided grounds for politicians to blame Black single-parent families for their poverty and to deny assistance to Black Americans in need.¹⁸⁴ Scholars have noted that Ronald Reagan, as California governor, “exploited” the perception of the single Black mother popularized by the Moynihan report when he coined the term “welfare queen” as part of his larger campaign for limited government.¹⁸⁵ Historians have argued that the Moynihan Report, despite arguing for greater interventions to combat Black poverty, nevertheless influenced the political movement within the federal government in

¹⁷⁸ Peller, *supra*, at 42.

¹⁷⁹ Geary, *supra*.

¹⁸⁰ Chow & Bates, *As Da 5 Bloods Hits Netflix, Black Vietnam Veterans Recall the Real Injustices They Faced During and After the War*, Time Magazine (June 12, 2020).

¹⁸¹ Geary, *supra*.

¹⁸² Robinson, *supra*.

¹⁸³ Id. (citing Murray, *Losing Ground* (1984)); Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994); see Jacoby & Glauber, *The Bell Curve Debate* (1995) (accumulating critical studies undermining the central premises of “The Bell Curve.”); Geary, *supra*.

¹⁸⁴ See, e.g., Steinberg, *The Moynihan Report at Fifty*, Boston Review (June 24, 2015).

¹⁸⁵ McMillian, *From Loving Mother to Welfare Queen to Drug Addict? LeBron v. Secretary of Florida Department of Children and Families and the Evolving Public View of the Poor as a Class of Sub-Humans with Sub-Rights* (2016) 35 Miss. C. L. Rev. 197, pp. 210–211.

the 1990s to cut welfare programs and impose punitive “welfare to work” training or employment requirements on recipients of cash assistance.¹⁸⁶

V. The Welfare System: Assistance to Families

Despite the consistent arguments of politicians in the 1980s and 1990s stereotyping Black Americans as unfairly taking advantage of government welfare policies, the American welfare system throughout history has actually discriminated against Black women and families, both explicitly and implicitly.

A. 1900 to 1935: State “Mothers’ Pensions”

States across America developed centralized welfare systems in the early 1900s to provide economic aid to low-income single mothers taking care of their children.¹⁸⁷ States made support payments every month to ensure a basic standard of living to care for both mother and child.¹⁸⁸ By 1930, all but two of the 48 existing states had created these “mothers’ pensions.”¹⁸⁹

Throughout the era of mothers’ pensions, Southern states consistently avoided giving aid to single Black mothers.¹⁹⁰ These policies discriminated against Black mothers, despite their greater economic need on average.¹⁹¹ This approach was in line with southern state officials’ administration of federal public works programs; such officials generally argued that Black Americans should not need or be given relief so long as menial jobs were available to them.¹⁹² Research has shown that between 1910 and 1920, the states in the South that enacted no “mothers’ pensions” were those with greatest percentage of Black single mothers.¹⁹³ Similarly, states that had higher Black single motherhood rates were slower to enact such pensions and/or less generous with them when they were enacted.¹⁹⁴

Both northern and southern states also implemented standards that disproportionately disqualified Black women, such as barring unmarried mothers from receiving benefits.¹⁹⁵ Many states across the nation only gave mothers’ pensions to widows, thereby excluding unmarried mothers who were more often Black

¹⁸⁶ *Id.* (noting that then-Senator Moynihan was “adamantly opposed” to the elimination of the modern federal welfare program in 1996); Robinson, *supra*; Baldwin, *Stratification of the Welfare Poor: Intersections of Gender, Race, and “Worthiness” in Poverty Discourse and Policy*, *The Modern American*, Vol. 6.1 (Spring 2010); Minoff, Center for the Study of Social Policy, *The Racist Roots of Work Requirements* (Feb. 2020) <<https://cssp.org/wp-content/uploads/2020/02/Racist-Roots-of-Work-Requirements-CSSP-1.pdf>> (as of March 8, 2022).

¹⁸⁷ Ctr. on Budget & Pol’y Priorities, *TANF Policies Reflect Racist Legacy of Cash Assistance* 10 (2021).

¹⁸⁸ *Ibid.*

¹⁸⁹ Ethan G. Sribnick & Sara Johnsen, *Institute for Children, Poverty & Homelessness*, *The Historical Perspective: Mothers’ Pensions*, 29 (2012).

¹⁹⁰ Moehling, *supra*, at pp. 12-18, table 9 (analyzing data from Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia).

¹⁹¹ *Ibid.*

¹⁹² Testimony of Jacqueline Jones, *supra*; Jones, *Labor of Love*, pp. 163-194.

¹⁹³ Moehling, *supra*, at pp. 12-18, table 9.

¹⁹⁴ *Ibid.*

¹⁹⁵ Gallo, *Marrying Poor: Women’s Citizenship, Race, and TANF Policies* (2012) 19 *UCLA Women’s L.J.* 61, pp. 80.

women.¹⁹⁶ Even nominally race-neutral programs were often racist in their administration, since discretion in administering these programs was often left to “line officials (judges as well as county agencies)” who made decisions “to separate the worthy mothers from the unworthy” and about whether to provide benefits at all.¹⁹⁷

A welfare field supervisor in the 1930s explained that the withholding of welfare payments from Black mothers was to prevent them from staying at home caring for their children and to instead force them into the work place.¹⁹⁸ This reflected the attitude of the white community that Black women should be forced to continue engaging in seasonal labor jobs or domestic service rather than receive any aid.¹⁹⁹

A survey of all mothers’ pensions across states in 1931 found that 96 percent of recipients were white; only three percent went to Black mothers.²⁰⁰ All the states of the Deep South—Arkansas, Florida, Louisiana, Mississippi, North Carolina, Tennessee, and Texas—created “mothers’ pension” programs, but provided almost no assistance to Black single mothers. Across these seven states in 1931, only 39 Black families received mothers’ pensions, compared to 2,957 white families.²⁰¹

B. 1935 to The Present: Federal Aid to Dependent Children and Modern Welfare

In 1935, the federal government passed the Social Security Act, which created a federal program similar to the state mothers’ pensions known as “Aid to Dependent Children,” later renamed “Aid to Families with Dependent Children.”²⁰² In the 1950s, the federal government established payment programs to help poor Americans, popularly known as welfare. These programs were funded by the federal government but administered by state government agents, who often denied welfare benefits to Black families by claiming that their homes were immoral, typically because children were born out of wedlock.²⁰³ For example, in 1960 the Louisiana government removed 23,000 children from its state welfare rolls solely because their parents were not married, which was more likely to be the case among Black families.²⁰⁴

In response, the federal government prohibited states from denying welfare benefits solely because a child was born to unmarried parents, and required them to decide on a case-by-case basis whether a family was “unsuitable” for welfare and to provide service interventions to such families.²⁰⁵ Although the intent of this rule, which became known as “Flemming Rule,” was to prohibit states from excluding families from welfare assistance by applying broad (and often arbitrary) rules to all recipients, the effect was to push more Black children into foster care.²⁰⁶ State welfare officials investigated Black families to consider whether to

¹⁹⁶ Moehling, *supra* at p. 17.

¹⁹⁷ Handler & Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (1991), p. 70.

¹⁹⁸ Briggs, *supra* at 31.

¹⁹⁹ *Ibid.*

²⁰⁰ Moehling, *supra* at pp. 7, 10.

²⁰¹ Ctr. on Budget & Pol’y Priorities, *TANF Policies Reflect Racist Legacy of Cash Assistance* 10 (2021).

²⁰² Title IV, Social Security Act, Publ. L. 74-271, 49 Stat. 620 (1935).

²⁰³ Lawrence-Webb, *supra*, p. 11.

²⁰⁴ *Id.* at p. 12.

²⁰⁵ *Ibid.*

²⁰⁶ *Id.* at pp. 20-21.

remove their children, often simply because the family was poor.²⁰⁷ Again, scholars have noted that these policies were in many ways a modern day continuation of the apprenticeship process of removing Black children from their low-income families.²⁰⁸

For example, in 1960 in Florida, the largely white state welfare worker staff investigated and challenged the “suitability” of approximately 13,000 families already receiving welfare assistance.²⁰⁹ Of these 13,000 families, only nine families were white, even though welfare recipients as a whole were 39 percent white.²¹⁰ The State of Florida forced these 13,000 families to choose between their children or their welfare benefits. Based on the racist beliefs that Black women had little maternal connection to their children, state workers expressed surprise that only 168 families agreed to place their children in state care.²¹¹

In modern times, the welfare system of cash assistance has remained biased against Black Americans. In 1996, as part of a public movement against so-called “welfare moms,” Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, which created the Temporary Assistance to Needy Families program, a system of federal funds sent to the states.²¹² This system awards fixed dollar amounts to each state, but allows them to spend that money how they see fit to achieve federal goals. Those goals include, but are not limited to, providing cash assistance to needy families and ending the dependence of needy parents on government benefits.²¹³

This system has allowed states to craft policies that determine who is eligible for assistance, and these state policies tend to disqualify Black families from receiving cash assistance at a higher rate than other racial and ethnic groups.²¹⁴ For example, seven states have policies that completely ban individuals with any drug-related convictions from eligibility for cash assistance.²¹⁵ As discussed in Chapter [XX], Black individuals are much more likely than white individuals to be convicted of drug offenses due to discrimination in the criminal justice system. Therefore, these restrictions are more likely to burden poor Black Americans.²¹⁶ Similarly, 11 states still maintain “family cap” policies that originated in “welfare mom” stereotypes, which deny benefit increases when welfare recipients have another child, and which have disproportionate impacts on Black families that tend to be larger than white families.²¹⁷

One other notable change has emerged in very recent times. Because the law gives states the power to spend federal money on programs other than direct cash assistance, states are motivated to minimize cash

²⁰⁷ Ibid.

²⁰⁸ See, e.g., Burnham, *supra* at p. 439.

²⁰⁹ Briggs, *supra*, at p. 38.

²¹⁰ Ibid.

²¹¹ Ibid.; see also Ards, *Racialized Perceptions and Child Neglect*, Child Youth Serv Rev. 2012 Aug 1; 34(8): pp. 1480–1491.

²¹² Public Law 104-193 (Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

²¹³ Ibid.

²¹⁴ Ctr. on Budget & Pol’y Priorities, *supra*, p. 30.

²¹⁵ Ibid. at 32.

²¹⁶ Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, New York: Vera Institute of Justice (2018) p. 6.

²¹⁷ Ctr. on Budget & Pol’y Priorities, *supra*, p. 31.

assistance so they can spend more on other programs that might otherwise drain state coffers.²¹⁸ Over the past 20 years there has been a dramatic reduction in the percentage of federal money spent on cash assistance. In 1997, 71 percent of federal money was spent on welfare benefits nationwide, whereas in 2019 states spent only 21 percent of their federal money on such benefits.²¹⁹ Again, Black Americans are more likely to suffer from this change, as states with larger percentages of Black residents have tended to spend the least percentage of their federal funds on welfare benefits.²²⁰

C. California

Historically, California provided “mother’s pensions” solely to widows, and were thus more likely to give these benefits to white single mothers because of the greater percentage of unwed Black mothers.²²¹ Moreover, the racist stereotype of “Welfare Queen” was arguably popularized by then-California Governor Ronald Reagan in 1976, who ran for President in part on a promise to cut welfare benefits, as he had done as Governor of California.²²²

Currently, California spends a greater percentage of its federal Temporary Assistance to Needy Families funds on basic assistance than most other states in the nation.²²³ However, that percentage has reduced from 51 percent in 2009 to 39 percent in 2020.²²⁴ Advocates and academics note that these reductions disproportionately harm Black families.²²⁵

VI. Foster Care Systems and Other Forms of Child Welfare

Historically and through today, Black families have faced racism in the child welfare system. After the Civil War, government agencies excluded Black orphans from government care and have consistently been more likely to investigate Black families. As of 2019, Black children “accounted for roughly 14 percent of the child population [but] 23 percent of the foster care population.”²²⁶

²¹⁸ Id. at 32.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Moehling, *supra* at p. 17.

²²² Ctr. on Budget & Pol’y Priorities, *supra*, p. 20; Turner, *Reagan Cuts \$503-Million From the Budget Passed by California Legislature*, New York Times, July 4, 1971, <<https://www.nytimes.com/1971/07/04/archives/reagan-cuts-503million-from-the-budget-passed-by-california.html>> (as of March, 7, 2022).

²²³ Congressional Resource Service, *The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions* (Dec. 14, 2020), Appendix B-1, <<https://sgp.fas.org/crs/misc/RL32760.pdf>> (as of March 8, 2022); see also Azevedo-McCaffrey & Safawi, Center on Budget and Priorities, *To Promote Equity, States Should Invest More TANF Dollars in Basic Assistance* (Jan 12, 2022) <<https://www.cbpp.org/research/family-income-support/to-promote-equity-states-should-invest-more-tanf-dollars-in-basic>> (noting that “states only spend a little over one-fifth of their combined federal and state TANF dollars on basic assistance” (as of March 7, 2022)).

²²⁴ Center on Budget and Priorities, *California TANF Spending*, <https://www.cbpp.org/sites/default/files/atoms/files/tanf_spending_ca.pdf> (as of March 7, 2022); Center on Budget and Priorities, *California TANF Spending Factsheet*, <https://peerta.acf.hhs.gov/sites/default/files/public/uploaded_files/CA.pdf> (as of March 7, 2022).

²²⁵ McCaffrey & Safawi, *supra*.

²²⁶ Children’s Bureau, *Child Welfare Practice to Address Racial Disproportionality and Disparity 2-3* (Apr. 2021).

The fact that child welfare agencies are more likely to investigate Black families is not because Black parents are more likely to mistreat their children, but rather due to many other factors.²²⁷ Some studies have found slightly higher rates of mistreatment, which scholars have argued is due to the fact that Black families are more likely to be poor, and the stresses of poverty correlate with child mistreatment.²²⁸ An official study of the U.S. Department of Health and Human Services found in 1996 that the disproportionality of Black children being taken from their parents and placed in foster care “does not derive from inherent differences in the rates at which they are abused or neglected,” but rather reflects the “differential attention” received by Black children “along the child welfare service pathway.”²²⁹

A. Foster Care and Adoption Throughout American History

Both during and for many decades after the slavery era, Black children were systematically excluded from orphanages and other resources designed to care for poor children.²³⁰ Instead, some free Black children were placed in charitable housing for homeless or very low-income adults, where they faced abuse and were sometimes “indentured” into forced labor, effectively re-enslaving them.²³¹ Non-governmental Black child welfare organizations were sometimes established to help some Black children rejected from private and public entities that only assisted white children.²³² For example, Pittsburgh’s Home for Colored Children was founded after a young Black girl, Nellie Grant, wandered the streets after being rejected from the city’s childcare institutions because she was Black.²³³

Scholars have argued that more Black children end up in foster care because adoption services believed that Black children were “unadoptable” due to the preferences of the white families which they served to adopt white children.²³⁴ After governmental child adoption services were officially open to Black children, most were not still given the same opportunities as white families because adoption agencies catered to the preferences of white families.²³⁵ Non-governmental agencies similarly excluded Black children by catering to the private adoption market, which was largely affluent and white.²³⁶ When these adoption institutions

²²⁷ Cooper, *Racial Bias in American Foster Care: The National Debate* (2013) 97 Marq. L.Rev. 215, p. 230; Sedlak & Broadhurst (1996). *Third National Incidence Study of Child Abuse and Neglect: Final Report*, U.S. Department of Health and Human Services; Dettlaff et al, *It Is Not a Broken System, It Is a System That Needs to Be Broken: The UpEND Movement to Abolish the Child Welfare System*, *Journal of Public Child Welfare* 14, no. 5 (October 19, 2020): pp. 500–517.

²²⁸ Sedlak et al (2010) *Supplementary Analyses of Race Differences in Child Maltreatment Rates in the NIS-4*, U.S. Department of Health and Human Services, Administration for Children and Families; Sedlak, et al. (2010) *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4)*: Report to Congress, U.S. Department of Health and Human Services, Administration for Children and Families; Bartholet, E. (2011). *Race & Child Welfare: Disproportionality, Disparity, Discrimination: Re-assessing the Facts, Re-thinking the Policy Options*.

²²⁹ Dettlaff (2020), *supra* (quoting congressionally-mandated national incidence study of 1996).

²³⁰ White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act* (2006) 1 Nw. J. L. & Soc. Pol’y 303; Ladner, *Mixed Families: Adopting Across Racial Boundaries* (1978), p. 67.

²³¹ Hogan & Siu, *Minority Children and the Child Welfare System: An Historical Perspective* (1988) 33 Soc. Work 493, p. 493.

²³² *Id.* at 494.

²³³ Ramey, *Child Care in Black and White* (2012), pp. 159–61.

²³⁴ See Billingsley & Giovannoni, *Children of the Storm* (1972), pp. 132–34.

²³⁵ White, *supra*; Landner, *supra*, at pp. 67–68.

²³⁶ *Ibid.*

failed to place Black children with families, they blamed the children and stigmatized them as “unadoptable.”²³⁷

State government systems that take children from caregivers believed to be unfit and place them in other environments designed to ensure their safety developed after World War II. From the start, state agencies removed Black children from their families and placed them into foster care far more often than white children. Between the years of 1945 and 1961, the number of nonwhite children in child welfare caseloads almost doubled, increasing from 14 percent to 27 percent.²³⁸

As the modern foster care system developed, various governmental policies have placed Black youth at greater risk of being taken from their families. As discussed above, until the 1950s, poor Black families continued to be denied benefits available to other poor Americans based on federal policies, and then were faced with potential removal of their children into foster care because of “unsuitable” home conditions.²³⁹

The criminalization of Black Americans through the “War on Drugs” also contributed to increasing numbers of Black children being removed from families and placed into the foster care system, as Black men in particular were disproportionately arrested for minor crimes, breaking apart families and often leaving children in the care of extended relatives or strangers.²⁴⁰ Child welfare agencies tasked with ensuring child safety also often pay particular attention to families experiencing homelessness and housing instability, which Black Americans are more likely to experience. Housing instability can also delay the return of a child who has been removed to their family.²⁴¹ From 1945 to 1982, the percentage of nonwhite children in foster care rose from 17 percent to 47 percent, with 80 percent of nonwhite children being Black.²⁴²

Scholars have found that racial discrimination exists at every stage of the child welfare process. State agencies are more likely to be involved with Black families than with white families.²⁴³ Black parents are more likely to be investigated than other families, because neighbors, teachers, and bystanders are more likely to report Black families than white families, likely due to their own racial biases.²⁴⁴

When equally poor Black and white families are compared, even where the families are considered to be at equal risk for future abuse, state agencies are more likely to remove Black than white children from their families.²⁴⁵ A 2008 study found that Black children were *77 percent more likely* than similarly-situated

²³⁷ Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children* (1993) 10 Harv. Black Letter J. 39, p. 42.

²³⁸ Roberts, *Shattered Bonds: The Color of Child Welfare* (Basic Civitas Books, 2002), p. 27.

²³⁹ Lawrence-Webb, *supra*.

²⁴⁰ Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers* (2012) 59 UCLA L. Rev. 1474, pp. 1480–81.

²⁴¹ *Ibid*.

²⁴² Sen. Select Com. on Indian Affairs, Hearing on Oversight on the Implementation of the Indian Child Welfare Act of 1978 (Apr. 25, 1984) pp. 35–36.

²⁴³ *Id*.

²⁴⁴ Dettlaff, *supra*; Children’s Bureau, *supra*, pp 2-3.

²⁴⁵ Dettlaff, et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare* (2011) Children and Youth Services Review, 33, pp. 1630–1637; Miller, *Racial Disproportionality in Washington State’s Child Welfare System* (2008) Olympia: Washington State Institute for Public Policy; Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children* (2008) Child Welfare, 87, pp. 151–168.

white children to be removed from their homes as opposed to receiving in-home services.²⁴⁶ Black children placed in foster care spend more time there, and are less likely to reunify with their families.²⁴⁷ All other factors being equal, Black parents are more likely than white parents to have their parental rights terminated.²⁴⁸

In 2017, the *New York Times* published evidence of racist foster care interventions in New York City in which Black mothers not only had their children taken away, but also faced unfair criminal consequences.²⁴⁹ One Black woman, who remained anonymous in the article, called emergency services when she went into premature labor, but then realized her boyfriend could not be reached unless she walked to his location. She left her six-year-old-daughter alone at her apartment and walked to get her boyfriend, returning 40 minutes later to find emergency services and police. Immediately after giving birth, she was handcuffed and placed under arrest for child endangerment, and both of her children—including her newborn baby—were placed in foster care.²⁵⁰ Scholars argue that the refusal of some academics to consider the narrative experiences of Black parents facing foster care interventions such as these echo the arguments of the Moynihan Report.²⁵¹

B. Consequences of Foster Care Disparities

As a group, children in the foster care system exhibit significant harmful consequences as a result of the experience. These children are more likely to be Black. For example, Brittany Clark spent 12 years in state care.²⁵² At age seven, she was placed as the only girl in a long-term home, during which she experienced physical and sexual abuse.²⁵³ After five years, Clark was relocated and spent the remainder of her time in foster care moving from home to home, encountering individuals who cared more about receiving foster care payments than caring for her.²⁵⁴ This instability, lack of control over circumstances, and repeated loss of connection harms foster children in compounding and lasting ways.²⁵⁵

Foster children as a group—in which Black children are greatly overrepresented—demonstrate various long term negative outcomes when compared to children not involved in the foster care system. Compared to youth nationally, children who age out of foster care are less likely to be employed or employed regularly, and earn far less, than young adults who were not in the foster care system.²⁵⁶ By age 26, only three to four

²⁴⁶ Rivaux, *supra*.

²⁴⁷ *Ibid*.

²⁴⁸ Children's Bureau, *supra*, pp. 2-3.

²⁴⁹ Clifford & Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'* (July 21, 2017) *New York Times*.

²⁵⁰ *Id*.

²⁵¹ Detlaff (2020), *supra*.

²⁵² Clark, *My Experiences in Foster Care*, Children's Rights (May, 24 2015) <<https://www.childrensrights.org/my-experiences-in-foster-care/>> (as of March 9, 2022).

²⁵³ *Ibid*.

²⁵⁴ *Ibid*.

²⁵⁵ Williams-Mbengue, *The Social and Emotional Well-Being of Children in Foster Care*, National Conference of State Legislatures, p. 2.

²⁵⁶ Urban Inst., *Coming of Age: Employment Outcomes for Youth Who Age Out of Foster Care Through Their Middle Twenties* (2008) p. 28.

percent of young adults who aged out of foster care earn a college degree.²⁵⁷ One in five of these youth will become homeless after turning 18.²⁵⁸ Only *half* will obtain *any* employment by 24.²⁵⁹ Over 70 percent of female foster youth will become pregnant by 21, and one in four former foster youth will experience Post-Traumatic Stress Disorder.²⁶⁰

Children in foster care are also far more likely to be involved with the criminal justice system. Some children taken from their families are placed in correctional facilities, and within this group, Black children were placed in various penal facilities at rates much higher than white children.²⁶¹ Approximately 25 percent of children in foster care will become involved with the criminal justice system within two years of leaving foster care, and over half of youth currently in foster care experience an arrest, conviction, or stay at a correctional facility by the age of 17.²⁶² For children who have been moved through multiple foster care placements, the risk is even higher, with one study indicating that over *90 percent* of foster youth who move five or more times will end up in the juvenile justice system.²⁶³ Foster youth, particularly girls, are especially targeted by sex traffickers, and the criminalization of sex work can funnel these victims of modern-day slavery into the criminal justice system.²⁶⁴

As a result of these severe disadvantages faced by foster youth, some modern scholars have advocated for the abolition of the modern “Child Protective Services” agency, arguing that it is inherently racist and should be replaced with a child protection model that implements policies and procedures designed from the ground-up to exclude racist presumptions.²⁶⁵

C. California

California’s Child Welfare system historically exhibited, and continues to exhibit, the same disparities between Black and white families that are discussed above at the national level, generally in even more extreme forms. For example, Black children in California make up 23 percent of the foster population, while only *six percent* of the general child population.²⁶⁶ Nationally, these percentages are 24 percent and 15

²⁵⁷ Squiers, *Aging Out of Foster Care: 18 and On Your Own* (Mar. 30, 2017) Shared Justice <<https://www.sharedjustice.org/most-recent/2017/3/30/aging-out-of-foster-care-18-and-on-your-own>> (as of Aug. 24, 2021).

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ Billingsley & Giovannoni, *supra* at p. 88.

²⁶² Palcheck, *Child Welfare and the Criminal System: Impact, Overlap, Potential Solutions* (Mar. 24, 2021), Georgetown J. on Poverty L. & Pol’y <<https://www.law.georgetown.edu/poverty-journal/blog/child-welfare-and-the-criminal-system-impact-overlap-potential-solutions/>> (as of Aug. 25, 2021).

²⁶³ *Ibid.*

²⁶⁴ Anspach, *The Foster Care to Prison Pipeline: What It Is and How It Works* (May 25, 2018), TeenVogue <<https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works>> (as of Aug. 25, 2021).

²⁶⁵ E.g., Dettlaff *et al.*, *supra*, at pp. 500–517.

²⁶⁶ Children in Foster Care, by Race/Ethnicity (2018) KidsData <<https://www.kidsdata.org/topic/22/foster-in-care-race/table>> (as of Aug. 27, 2021).

percent, meaning that, in California, Black children are more than twice as overrepresented in foster care when compared to the national average.²⁶⁷

A 2015 study ranked California among the five worst states in foster care racial disparities.²⁶⁸ Some counties in California—both urban and rural—have much higher disparities compared to the statewide average. In San Francisco County, which is largely urban and has nearly 900,000 residents, the percentage of Black children in foster care in 2018 was over *20 times* the rate of white children.²⁶⁹ In Yolo County, which is largely rural and has approximately 200,000 residents, the percentage of Black children in foster care in 2018 was nearly *10 times* the rate of white children.²⁷⁰ In 2014, Los Angeles County’s Commission on Child Protection issued a detailed report noting widespread failures and shortcomings across the county’s child welfare system—failures that fall disproportionately on the overrepresented Black population within that system.²⁷¹

Similar to national statistics, a 2003 study showed that, even when normalizing for other relevant factors like poverty, Black children in California are more likely to be removed from their caretakers and placed in foster care than white children.²⁷² Black children in California are approximately twice as likely as white children to experience a Child Protective Services investigation, and approximately three times as likely to spend some time in foster care or experience a termination in parental rights.²⁷³ California youth who enter foster care also consistently exhibit various achievement gaps compared to children not involved with foster care, further worsening disparities for Black Americans. By age 24, California foster youth who age out of foster care earn less than half what an average 24-year-old earns nationally.²⁷⁴ Only 53 percent of foster youth in California graduate high school on time, compared with 83 percent of all youth in California.²⁷⁵

California has made some recent attempts to address these dramatic disparities between foster youth and those not in the foster system, though little has been done to specifically target the racial disparities discussed above. In September 2021, California Assembly Bill 12 was passed into law, enabling foster youth to remain in care through age 21 as a tool to help increase foster youth college attendance rates and

²⁶⁷ Compare *ibid* with Children’s Bureau, *supra*, pp. 2-3.

²⁶⁸ Tiano, *Los Angeles’ Plan to Address the Overrepresentation of Black and LGBTQ Youth in Foster Care* (May 22, 2019) The Imprint <<https://imprintnews.org/news-2/1-a-s-plan-to-address-the-overrepresentation-of-black-and-lgbtq-youth-in-foster-care/35125>> (as of Aug. 25, 2021).

²⁶⁹ KidsData, *supra*.

²⁷⁰ *Ibid*.

²⁷¹ Los Angeles County Blue Ribbon Commission on Child Protection, *The Road to Safety for our Children: The Final Report of the Los Angeles County Blue Ribbon Commission on Child Protection* (April 18, 2014).

²⁷² Needell et al., *Black Children and Foster Care Placement in California* (2003) 25 *Children & Youth Servs. Rev.* 393, p. 405.

²⁷³ Lurie, *Child Protective Services Investigates Half of All Black Children in California* (Apr. 26, 2021) Mother Jones <<https://www.motherjones.com/crime-justice/2021/04/child-protective-services-investigates-half-of-all-black-children-in-california>> (as of Aug. 27, 2021).

²⁷⁴ Urban Inst., *supra*, p. 8.

²⁷⁵ Children’s L. Ctr., *Foster Care Facts* <<https://www.clccal.org/resources/foster-care-facts>> (as of Aug. 27, 2021).

address some of the negative consequences of youth aging out of care at 18 with no sources of support.²⁷⁶ In July 2021, California lawmakers approved the first ever state-funded plan to guarantee monthly cash payments to youth leaving the foster system.²⁷⁷ All University of California, California State University, and California Community College campuses now have foster youth programs designed to provide help and support to former foster youth on their campuses.²⁷⁸ Explicitly addressing the racial disparity in Los Angeles County’s foster care system, the Los Angeles County Board of Supervisors created an “office of equity” within the agency administering the foster care system.²⁷⁹ It was created, however, with “no proposed budget or more specific mandates on the office in terms of actual services it will provide.”²⁸⁰

VII. Criminalization of Black Youth

Black youth are more likely to be exposed to the criminal legal system as a result of racism and over-policing.²⁸¹ In recent years, these disparities have often gotten worse.²⁸² In 2018, while Black youth made up 16 percent of the youth population, the rate of arrest of Black youth was 2.6 times that of white youth, and Black youth accounted for 50 percent of all youth arrests for violent crimes.²⁸³

Once charged with a crime, Black youth are at risk of harsher prosecution, detention, and punishment.²⁸⁴ Black youth are transferred to adult court at a much higher rate than white youth. In 2018, while Black youth only accounted for 35 percent of all cases, they made up more than 51 percent of transfers from the juvenile court system to adult court.²⁸⁵ Black girls are 3.5 times more likely to be incarcerated than their white peers.²⁸⁶ Black girls also comprise 34 percent of girls in residential placements, but accounted for 15

²⁷⁶ Leecia Welch, National Center for Youth Law, *California’s AB 12: Historic Step Toward Helping Foster Youth Attend College, But Much Work Ahead* <<https://youthlaw.org/publication/californias-ab-12-historic-step-toward-helping-foster-youth-attend-college-but-much-work-ahead/>> (as of Nov. 9, 2021).

²⁷⁷ Beam, *California Approves 1st State-funded Guaranteed Income for Former Foster Youth* (July 15, 2021) Youth Today <<https://youthtoday.org/2021/07/california-approves-1st-state-funded-guaranteed-income-for-former-foster-youth/>> (as of Aug. 19, 2021).

²⁷⁸ Univ. of Cal., Current and Former Foster Youth <<https://admission.universityofcalifornia.edu/campuses-majors/campus-programs-and-support-services/current-and-former-foster-youth.html>> (as of Nov. 9, 2021); Cal. State Univ., Resources for Foster Youth <<https://www2.calstate.edu/attend/student-services/foster-youth>> (as of Aug. 24, 2021); Cal. Comm. Colleges, Foster Youth Success Initiatives <<https://www.cccco.edu/About-Us/Chancellors-Office/Divisions/Educational-Services-and-Support/Student-Service/What-we-do/Foster-Youth-Success-Initiatives>> (as of Nov. 9, 2021).

²⁷⁹ Tiano, *supra*.

²⁸⁰ *Ibid*.

²⁸¹ Henning, *The Rage of Innocence: How America Criminalizes Black Youth* (Pantheon Books, 2021) p. xv; Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Juvenile Arrest Rates by Race, 1980-2019* (Washington, D.C.: U.S. Department of Justice, 2019); Puzzanchera, *Juvenile Arrests, 2018* (June 2020) Juvenile Justice Statistics National Report Series Bulletin.

²⁸² *Ibid*.

²⁸³ *Ibid*.

²⁸⁴ Henning, *supra*, at p. xvi.

²⁸⁵ *Ibid*.

²⁸⁶ *Id.* at p. 105; Fact Sheet: Incarcerated Women and Girls, Sentencing Project, June 2019.

percent of the female youth population.²⁸⁷ A 2016 study found that for youth serving life without parole sentences in the United States, twice as many individuals were Black as white.²⁸⁸

Law enforcement and other government agencies across America often treat Black youth as adults, or as less than human, in myriad ways. Research confirms that law enforcement often overestimates the age of Black youth when they are suspected of a felony based on contact with police.²⁸⁹ One study found that Black boys are perceived as older than they are and less innocent than their white peers²⁹⁰

A. School Policing

In all 50 states, public schools, including elementary schools, employ student resource officers, which often do not go by the title of police.²⁹¹ Proponents of school policing have long tied this practice to fears after deadly mass shootings in places like Columbine, while some scholars have argued its prevalence is linked to white fear of Black youth under the guise of protecting school children.²⁹² In either case, over the past several decades the number of law enforcement officers on school campuses throughout the United States has skyrocketed.

In 1975, the number of U.S. schools with police presence on campus was only one percent.²⁹³ By 2016, there were 27,000 school resource officers patrolling U.S. schools, up from about 9,400 in 1997. This equated to sworn officers in approximately three percent of elementary schools, 67.6 percent of middle schools, and 72 percent of high schools in the 2017-18 school year.²⁹⁴ This is at least partially due to a dramatic increase in federal funding for school police. Congress passed the Violent Crime Control and Law Enforcement Act in 1994 to increase federal involvement in school policing and safety.²⁹⁵ The law provided massive federal aid for policing at the state and local level and in schools.²⁹⁶

Black students are more likely than white students to attend schools with a law enforcement presence and are more likely to be arrested at school. In the 2015-16 school year, Black students were arrested at three times the rate of white students, while only comprising 15 percent of the population in schools. This disparity widens for Black girls, who make up 17 percent of the school population, but are arrested at 3.3 times the rate of white girls.²⁹⁷ This is at least partially explained by findings that Black girls are seen by

²⁸⁷ Henning, *supra*, at p. 105.

²⁸⁸ *Id.* at p. 246.

²⁸⁹ *Id.* at p. 28.

²⁹⁰ Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (2014) *Journal of Personality and Social Psychology*, 106(4), 526–545.

²⁹¹ Henning, *supra*, at p. 123.

²⁹² *Id.* at p. 127.

²⁹³ *Id.* at p. 124.

²⁹⁴ *Ibid.*

²⁹⁵ *Id.* at 130; U.S. Code, Gun-Free Schools Act of 1994 § 7151 (1994); Violent Crime Control and Law Enforcement Act (H.R. 3355), 1994; U.S. Department of Justice, Office of Community Oriented Policing Services, About.

²⁹⁶ Henning, *supra*, at p. 124.

²⁹⁷ *Id.* at p. 132.

authorities and teachers as “oppositional” or “disrespectful” for similar but accepted behaviors from white children.²⁹⁸

Moreover, schools have historically disciplined clothing trends popular among Black youth, including “sagging,” oversized, and baggy clothes.²⁹⁹ Police played a role in creating a narrative in schools that sagging was a symbol of gang activity, and school officials proceeded to ban sagging as a way to prevent gang violence, graffiti, and create “safe” environments for kids, thereby further targeting Black youth.³⁰⁰ See Chapter 6 on education for more information on the so-called “school to prison pipeline.”

One in five students in the U.S. will develop mental health challenges that rise to the level of a diagnosis.³⁰¹ Yet, around the country, schools are more likely to employ law enforcement than mental health counselors, and Black students are three times more likely than their white peers to have police in their school but no psychologist.³⁰² Black male youth with disabilities in the 2015-16 school year had an arrest rate of five times the rate of the whole population.³⁰³

B. The Juvenile Justice System

Outside of schools, Black youth face disproportionate harms through various aspects of the juvenile justice system. A 2021 study by researchers from the University of California, Berkeley, found that Black youth in the 10 to 14 age group are injured in police-related incidents at 5.3 times the rate for boys, and 6.7 times the rate for girls, compared to their white peers.³⁰⁴ The study suggested that especially among Black girls, this disparity could be due to how Black girls are “adultified” compared to white girls and perceived of as older.³⁰⁵ Scholars have noted similar “adultification” of Black Boys, who at 10 years old are perceived as less childlike, less innocent, and four and a half years older than their white counterparts.³⁰⁶ Because of this perception of Black children as older and less innocent, they are seen as more responsible for their actions than white children who engage in the same behaviors.³⁰⁷ Both black boys and girls are also perceived as more dangerous than their white peers, though the magnitude of the bias has been shown to be stronger for boys than girls.³⁰⁸

²⁹⁸ General Accounting Office (March 22, 2018) *K-12 Education: Discipline Disparities for Black Students, Boys and Students with Disabilities*.

²⁹⁹ Henning, *supra*, at p. 53.

³⁰⁰ *Id.* at p. 52.

³⁰¹ *Id.* at p. 137

³⁰² *Ibid.*

³⁰³ *Id.* at p. 138

³⁰⁴ Shivaram, *Black Kids In California More Likely To Be Hospitalized For Police-Related Injuries*, NPR (Sept. 9, 2021); Farkas et al., *Injuries to Children and Adolescents by Law Enforcement: An Analysis of California Emergency Department Visits and Hospitalizations, 2005-2017*. *JAMA Pediatr.* Published online September 07, 2021.

³⁰⁵ *Ibid.*

³⁰⁶ Testimony of Dr. Howard Stevenson, California Task Force to Study and Develop Reparation Proposals for African Americans (January 28, 2022).

³⁰⁷ Goff, *supra*.

³⁰⁸ Thiem, et al., *Are Black Women and Girls Associated With Danger? Implicit Racial Bias at the Intersection of Target Age and Gender* (2019) *Personality and Social Psychology Bulletin*, 45(10) 1427–1439.

More broadly, as discussed in Chapter 11 of this report, Black American youth are more than four times as likely to be detained or committed in juvenile facilities as their white peers.³⁰⁹ Youth who are stopped more frequently by police are more likely to report feelings such as anger, fear, and stigma, and shame.³¹⁰ More invasive stops led to increased feelings of emotional distress and trauma, including posttraumatic stress after the stop.³¹¹ Stress among youth involved in police stops is not contingent on whether they were engaging in any misconduct.³¹²

The “War on Drugs” in the 1980s and 90s had an outsized impact on Black youth. White youth use drugs at the same or higher rate as Black youth, but Black youth are disproportionately prosecuted through drug cases in juvenile courts.³¹³ Again, this was largely enabled by the federal government. In 1990, Congress passed legislation authorizing Department of Defense resources to be used to combat drug activity by state and local agencies, including public schools.³¹⁴ In 2014, schools in states such as California, Florida, and Texas reported receiving military-grade equipment through the department’s program.³¹⁵

Black youth facing mental health problems or crises are also funneled into the juvenile justice system in ways white children facing similar issues are not.³¹⁶ Even when Black youth receive mental health treatment instead of or in addition to incarceration, they are more likely to be “over-pathologized” and medicated than their white peers.³¹⁷

Once in the juvenile justice system, outreach to families is inadequate.³¹⁸ Police and facility outreach to parents is usually limited to notice that their child has an upcoming court appearance, without more information such as why an arrest was made or the circumstances of their child’s confinement.³¹⁹ The bail system for youth in the criminal legal system is also deeply flawed. Courts rarely consider what a family can actually afford when setting bail, and bail is regularly set between \$100 to \$500 for children.³²⁰

C. California

³⁰⁹ Puzzanchera et al., *Easy Access to Juvenile Populations: 1990-2019*. National Center for Juvenile Justice (2020) <<https://www.ojjdp.gov/ojstatbb/ezapop>> (as of Jan. 28, 2021).

³¹⁰ Shivaram, *supra*, at p. 214.

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Id.* at 14; Hockenberry & Puzzanchera, *Juvenile Court Statistics 2018* (Pittsburgh: National Center for Juvenile Justice, 2020), p. 21.

³¹⁴ Henning, *supra*, at p. 124.

³¹⁵ *Id.*

³¹⁶ Marrast et al., *Racial and Ethnic Disparities in Mental Health Care for Children and Young Adults: A National Study* (2016) *International Journal of Health Services*, 46(4), 810-824, 810.

³¹⁷ Cancio, Grills, & García, The Casey Foundation, *The Color of Justice, The Landscape of Traumatic Justice: Youth of Color in Conflict with the Law* (2019) p. 17.

³¹⁸ Henning, *supra*, at p. 247.

³¹⁹ *Ibid.*

³²⁰ *Id.* at p. 275.

The issues discussed above apply to California’s history and present treatment of Black youth, although there has been some modern pushback to these approaches.

Recent California Attorney General investigations and settlements with California school districts, e.g., the Barstow Unified School District, the Oroville City Elementary School District, and the Oroville Union High School District are all representative of continued targeting of Black youth.³²¹ Investigations at these districts showed that Black students were more likely to be punished and/or suspended, and were subjected to greater punishments, than similarly-situated peers of other races.³²²

Other districts have taken proactive steps to change outdated approaches. For example, the Oakland school board voted to remove security officers from schools in June 2020.³²³ Before this vote, school officer practices were governed by a policy and procedure manual that described them as having a “calming presence” in the school.³²⁴ The manual also included authorization for officers to restrain students, search students and their property, and even detain individuals if they had reason to believe a crime had been committed.³²⁵ All of these powers, and the school police enforcing them, have disproportionate harmful impacts on Black students. California-specific research has determined that schools with larger police presences lead to decreased instruction for Black students, likely because police discipline and monitoring contributes to a climate that is incompatible with learning.³²⁶

Nevertheless, California still allows law enforcement discretion to add youth over the age of 12 to a gang database as long as two of the following factors—under certain limitations and requirements—are found: admission of gang activity, identification of a gang tattoo, frequent identification in a “gang area,” any known association with gang members, clothing associated with a gang, arrest for typical gang activity, or display of gang signals.³²⁷ In California, public defenders and youth advocates estimate that police have tracked children as young as 10 for suspected gang activity.³²⁸

In one high-profile incident related to the policing of Black children, in May 2019, police in Sacramento chased down a Black 12-year-old child who they claimed was asking people to buy goods he was selling,

³²¹ Press Release, Attorney General Becerra Secures Settlements with Barstow and Oroville School Districts to Address Discriminatory Treatment of Students Based on Race and Disability Status (Aug. 25, 2020).

³²² *Ibid.*

³²³ Henning, *supra*, at p. 134.

³²⁴ *Id.*; Wilson & Godown, *School Security Officer Policy and Procedures Manual* (Oakland: Oakland School District, June 29, 2016).

³²⁵ Henning, *supra* at p. 134.

³²⁶ *Id.* at p. 141; Losen & Martinez, *Is California Doing Enough to Close the School Discipline Gap?* (Los Angeles: Civil Rights Project, 2020); Losen & Martinez, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* (Los Angeles: Civil Rights Project, 2020), pp. 33–34; Fisher & Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-analysis* (Aug. 2016) *Adolescent Research Review* 1, no. 3; Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-term Education Outcomes* (2019) *Journal of Policy Analysis and Management*, Vol. 38 (2), pp. 338-365.

³²⁷ Henning, *supra* at p. 78.

³²⁸ *Id.* at p. 79.

and forcefully detained him while he was calling for his mom.³²⁹ One police officer covered his face with a mesh sack and forced him on the ground with a knee on his back while an officer put a knee on his thigh.³³⁰

VIII. Domestic Violence in Black Families

Domestic violence, also termed intimate partner violence, is a significant problem within Black families and communities across the country, and that problem is linked to many of the issues already discussed in this chapter.

A. Elevated Rates of Domestic Violence

Black women experience intimate partner violence at greater rates, and in more traumatic ways, than other women on average.³³¹ The American Bar Association estimated that, in 2000, Black females experienced intimate partner violence at a rate 35 percent higher than that of white women.³³² Black women are three times as likely to be murdered by a partner or ex-partner than women of other racial groups.³³³ Even among victims of intimate partner violence, Black women experience more traumatic forms of violence on average as compared to white women.³³⁴ Moreover, Black men also experience elevated rates of intimate partner violence when compared to white men.³³⁵ Similar patterns exist for Black LGBTQ+ victims of both genders, who experience intimate partner violence at greater rates than white LGBTQ+ victims.³³⁶ Despite these disparities, very little academic or practical attention has been paid towards specific interventions or assistance models that are explicitly catered to Black victims.³³⁷

B. Causal Factors

³²⁹ Id. at p. 220

³³⁰ Id.

³³¹ Taft et al, *Intimate Partner Violence Against African American Women: An Examination of the Socio-Cultural Context* (2019) Aggression and Violent Behavior, 14, pp. 50-58.

³³² Rennison & Welchans, U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Partner Violence* (May, 2000).

³³³ Langley & Sugarmann, *Black Homicide Victimization in the United States: An Analysis of 2011 Homicide Data* (Jan. 2014) Violence Policy Center <<http://www.vpc.org/studies/blackhomicide14.pdf>> (as of March 10, 2022).

³³⁴ Seng et al.. (2011). Disparity in posttraumatic stress disorder diagnosis among African American pregnant women. *Archives of Women's Mental Health*, 14(4), 295-306.

³³⁵ Palmetto et al, *Predictors of Physical Intimate Partner Violence in the Lives of Young Women: Victimization, Perpetration, and Bidirectional Violence* (2013) *Violence and Victims*, 28(1), 103-121; Langhinrichsen-Rohling et al *Rates of Bi-directional versus Unidirectional Intimate Partner Violence across Samples, Sexual Orientations, and Race/Ethnicities: A Comprehensive Review* (2012) *Partner Abuse* 3 (2), pp. 199–230.

³³⁶ See generally National Coalition Against Domestic Violence, *Domestic Violence and the LGBTQ Community* (2018) <<https://ncadv.org/blog/posts/domestic-violence-and-the-lgbtq-community>> (as of March 10, 2022); National Coalition Against Domestic Violence, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence in 2015* <https://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf> (as of March 10, 2022).

³³⁷ Jones & Thorpe, *Domestic Violence and the Impacts on African American Women: A Brief Overview on Race, Class, and Root Causes in the United States* (2016) *OMNES : The Journal of Multicultural Society*, Vol. 7, No. 1, pp. 22-36, <<http://dx.doi.org/10.15685/omnes.2016.07.7.1.22>> (as of March 10, 2022).

The higher rates of domestic violence in Black families cannot be explained by a single cause. Some scholars have noted that, aside from greater rates of poverty, overcrowding, and other domestic violence risk factors experienced by Black families, Black men have experienced systemic racism throughout American history that, when compounded with traditional gender roles, may contribute to displaced anger, hatred, and frustration toward family members.³³⁸ Throughout American history, Black men have been subjected to racial discrimination in employment (as further detailed in Chapter 10) while society simultaneously tells them that their role is to provide for their families.³³⁹ Scholars have argued that these pressures, which are impossible to reconcile, may lead to expressions of physical violence.³⁴⁰

Regardless of the causes of domestic violence, Black women are less likely to seek assistance from social services agencies because of distrust based on the racially discriminatory history described earlier in this chapter.³⁴¹ Evidence shows that this distrust is not misplaced. Government actors in social services agencies and the judicial system have unfairly disregarded Black victims as angry “welfare queens” who are immune to violence, or violent themselves.³⁴² These perceptions are further cemented by media portrayals of Black women as aggressive or emasculating.³⁴³ Similarly, Black women already involved with the justice system are less likely to seek help from police because they expect to be disbelieved, based on the extensive histories of racist government actions in supporting violence against Black women as detailed in Chapters 3, 11, and 12.³⁴⁴ Black female victims of abuse are sometimes reluctant to report abuse by Black men to the “white legal system” even when police intervention is appropriate, given their long exposure to inequities within that system for Black Americans.³⁴⁵ As explained by Cecily Johnson, director of strategic initiatives at the Domestic Violence Network,

I have been told personally [by a survivor] they can’t get help because they don’t want their partner to become a statistic. There’s a genuine and legitimate fear that if they call the police, their partner could be killed or they, as the survivor, could be killed.³⁴⁶

³³⁸ See, e.g., Hampton et al, *Domestic Violence in the African-American Community* (2009) Violence Against Women, Vol. 9, 533-557, p. 539; Blassingame, *The Slave Community* (New York: Oxford University Press 1972); Levine, *Black Culture and Black Consciousness* (New York, Oxford University Press 1977).

³³⁹ Hampton et al, *supra*, at p. 539; Madhubuti, *Black Men—Single, Dangerous, and Obsolete* (Chicago: Third World, 1990); Staples, *Black Masculinity: The Black Man’s Role in American Society* (San Francisco: Black Scholar Press 1982).

³⁴⁰ *Ibid.*

³⁴¹ Sumter, *Domestic Violence and Diversity: A Call for Multicultural Services* (2006) *Journal of Health and Human Services Administration*, 29(2), 173-190.

³⁴² Sokoloff & Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender Challenges: Contributions to Understanding Violence against Marginalized Women in Diverse Communities* (2005) *Violence against Women*, 11(1), 38-64.

³⁴³ Young et al, *Does African American Women’s Racial Identity Mediate Gendered Racism on Anticipated Relationship Threat?* (2021) *Journal of Interpersonal Violence*, Vol. 36(19-20) 9749–9769, p. 9752.

³⁴⁴ Carbone-Lopez et al, “*Police Wouldn’t Give You No Help*” *Female Offenders on Reporting Sexual Assault to Police* (2015) *Violence against Women*, 22(3), 1-31.

³⁴⁵ Richie, *Arrested Justice: Black Women, Violence, and America’s Prison Nation* (New York: New York University Press 2012); Manetta, *Interpersonal Violence and Suicidal Behavior in Midlife African American Women* (1999) *Journal of Black Studies*, 29, p. 518.

³⁴⁶ Coburn Place, *A Layered Look at Domestic Violence in the Black Community* <<https://coburnplace.org/stories/a-layered-look-at-domestic-violence-in-the-black-community/>> (as of March 10, 2022).

Black transgender women are similarly hesitant to report abuse to the police because they fear being falsely or illegitimately arrested, are particularly likely to be physically or sexually assaulted in prison,³⁴⁷ and because they are more than three times as likely to experience police violence compared to non-transgender people.³⁴⁸ High-profile instances of violence against transgender women sometimes support these perceptions, especially when transgender women defend themselves.³⁴⁹

A lack of understanding of the real and well-founded fears of Black victims of domestic violence, and the distrust of Black victims of police and social services, has consistently been a major challenge among those tasked with helping victims of intimate partner violence, both within California and nationally.³⁵⁰

C. California

The patterns discussed above exist in California as well as nationally. California has the largest number of domestic violence survivors in the country, and Black women in California are approximately 22% more likely than women generally to experience such violence during their lifetimes.³⁵¹ Moreover, a report from Blue Shield of California concluded that “Black women in particular . . . experience a significant resource gap after instances of intimate partner violence.”³⁵² These disparities have likely been exacerbated by the COVID-19 epidemic, with significant majorities of Black Californians surveyed saying that they believe the epidemic and its stay-at-home orders both made domestic violence more likely to occur and made it harder for victims of such violence to reach out for help.³⁵³

Qualitative studies within California have also confirmed that Black Californians perceive poverty, prior trauma, and systemic racism as root causes of domestic violence in Black families.³⁵⁴ Black female victims in California are also less likely to seek police assistance because they fear police will falsely believe them to be aggressors and arrest them as well.³⁵⁵

³⁴⁷ The Task Force, *Injustice at Every Turn: A Look at Black Respondents in the National Transgender Discrimination Survey*, <https://transequality.org/sites/default/files/docs/resources/ntds_black_respondents_2.pdf> (as of March 10, 2022).

³⁴⁸ National Coalition of Anti-Violence Programs, *National Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities Released* (2013) <www.avp.org/storage/documents/2012_nr_ncavp_hvreport.pdf> (as of March 10, 2022).

³⁴⁹ See, e.g., Finoh & Sankofa, *ACLU Human Rights Program, The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence* (2019) <<https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non>> (as of March 10, 2022).

³⁵⁰ Asbury, *African-American Women in Violent Relationships: An Exploration of Cultural Differences*, in Hampton (Ed.), *Violence in the Black Family: Correlates and Consequences* (1987) pp. 86-106; Hampton & Yung, *Violence in Communities of Color: Where We Were, Where We Are, and Where We Need to Be*, in Jenkins & Gullotta (Eds.), *Preventing violence in America* (1996) pp. 53-86.

³⁵¹ Blue Shield of California, *Perceptions of Domestic Violence in California’s African American Communities: Roots, Prevalence and Resources* (Feb. 2019), p. 11.

³⁵² *Id.* at 12.

³⁵³ Blue Shield of California Foundation, *Key Insights into the Experiences of Black Californians from a Statewide Survey about COVID-19, Equity, and Domestic Violence* (Apr. 2021)

<<https://blueshieldcafoundation.org/sites/default/files/webinars/PerryUndem%20Black%20Californians%20Fact%20Sheet.pdf>> (as of March 25, 2022).

³⁵⁴ Blue Shield of California, *supra*, at 17.

³⁵⁵ *Id.* at 20.

IX. Conclusion

The destruction, commodification, and exploitation of the Black family is nearly as old as the Republic itself, and enriched both private and government actors for generations of white Americans.

The racist and sexist stereotypes created during enslavement to sustain the cotton economy and enrich the entire nation are woven throughout American laws, policies, and government agencies. These retrograde beliefs—that Black women and men are socially and biologically destined for menial labor and servant work, that Black Americans who are unemployed are lazy or burdens on society, that Black parents feel no love for their children—tore apart Black families on the auction block during enslavement, justified re-enslaving children through the apprenticeship system, and underlie the continued removal of Black children from their parents in the foster care system. This reality has rarely been recognized, let alone remedied. To the contrary, in the past half-century government actors have blamed Black Americans for the harms that have resulted from racist government actions.

DRAFT

Chapter 9. Control Over Creative, Cultural, and Intellectual Life

I. Introduction

At its inception, the United States created a series of laws and policies that denied Black Americans the ability to create and own art and engage in sports and leisure activities.¹ During the period of enslavement, state governments controlled and dictated the forms and content of Black American artistic and cultural production.² Following the end of the enslavement period, governments and politicians embraced minstrelsy, which was the popular racist and stereotypical depiction of Black Americans through song, dance, and film.³ Government support of minstrelsy, which was enormously profitable, encouraged white Americans to laugh at, disregard, and reimagine the enslavement of Black Americans as harmless and entertaining.⁴

Federal and state governments failed to protect Black artists, culture-makers, and media-makers from discrimination and simultaneously promoted discriminatory narratives. State governments forced Black artists to perform in segregated venues.⁵ The federal government actively discriminated against Black Americans during wars, and projected a false image of respect for Black soldiers in propaganda.⁶ Federal and state governments allowed white Americans to steal Black American art and culture with impunity—depriving Black creators of valuable copyright and patent protections.⁷ State governments encouraged segregation and discrimination against Black American athletes.⁸ State governments denied Black American entrepreneurs and culture-makers access to leisure sites, business licenses, and funding for leisure activities.⁹ State governments memorialized the Confederacy as just and heroic through monument building, while suppressing the nation's actual history.¹⁰ States censored cinematic depictions of discrimination against and integration of Black people

¹ Sambol-Tosco, [Education, Arts, & Culture](#) (2004), Thirteen, p. 1 (as of March 20, 2022); Newton, *Slave Artisans and Craftsmen: The Roots of Afro-American Art* (1977), 9(3) *Plastic Arts and Crafts*, 35.

² *Ibid.*

³ Barnes, [Yes, Politicians Wore Blackface. It Used to be All-American 'Fun'](#) (Feb. 8, 2019), *Washington Post* (as of March 21, 2022).

⁴ National Museum of African American History and Culture, [Blackface: The Birth of An American Stereotype](#) (Oct. 30, 2017), National Museum of African American History and Culture (as of March 21, 2022) (NMAAHC).

⁵ Absher, [The Black Musician and the White City: Race and Music in Chicago, 1900-1967](#) (2014), pp. 1-2, 157 (as of April 6, 2022)

⁶ Koppes & Black, *Blacks, Loyalty, and Motion-Picture Propaganda in World War II* (Sept. 1986), 73 *The Journal of American History* 383.

⁷ Rothwell, [The Black Innovators Who Elevated the United States: Reassessing the Golden Age of Invention](#) (Nov. 23, 2020), Brookings Institution (as of March 21, 2022).

⁸ Reese, *The Socio-Political Context of the Integration of Sport in America* (1998), 3(4) *Journal of African American Men*, 5-22.

⁹ Alison Rose Jefferson, *Living the California Dream: African American Leisure Sites During Jim Crow Era* (2020).

¹⁰ Cox, *Dixies Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture* (2003).

into white society.¹¹ Today, Black American artists, culture-makers, presenters, and entrepreneurs must contend with the legacy of enslavement and racial discrimination as they attempt to pursue creative endeavors that empower and uplift Black communities.

Section III describes discrimination against Black artists. Section IV discusses the anti-Black narratives in American culture. Sections V and VI discuss government censorship and deprivation of intellectual property. Sections VII and VIII discuss discrimination against Black athletes and restraints on recreation by Black Americans.

II. Discrimination Against Black Artists and Culture

Black artists have faced intense discrimination and restriction in the United States since the era of slavery. During the period of enslavement, enslaved people faced legal restrictions from many state governments while creating arts, crafts, and engaging in education.¹² Many enslaved people were highly talented craftspeople and artists, including seamstresses and tailors, blacksmiths, woodcutters, and musicians of all types.¹³ They fabricated architectural materials, furnishings, musical instruments, such as banjos, and handicrafts, like baskets and rugs.¹⁴ Free Black American artists did engage in self-expression during the period of enslavement, however they had to rely on outside resources or wealthy white patrons to support their careers.¹⁵

Many white enslavers were suspicious of the subversive potential of Black art.¹⁶ After 1730, South Carolina outlawed dancing, drumming, and playing loud instruments by enslaved people for fear that it would incite rebellions—other states enacted similar laws.¹⁷ Concerned that literate enslaved people would incite insurrections, some southern enslavers banned enslaved people from learning to read or write.¹⁸ Enslaved people who were not allowed to read or write, instead, developed traditions of song and dance to pass along

¹¹ Scott, *Cinema Civil Rights: Regulation, Repression, and Race in the Classical Hollywood Era* (2015).

¹² Sambol-Tosco, *supra*, at p. 1.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ National Humanities Center, *Artists* (2013), National Humanities Center (as of March 20, 2022); Douglas A. Jones Jr., *Black Politics but Not Black People: Rethinking the Social and "Racial" History of Early Minstrelsy* (2013), 57(2) *The Drama Review* 21, 24-25.

¹⁶ Sambol-Tosco, *supra*, at p. 1.

¹⁷ National Park Service, *Performing Culture in Music & Dance*, National Park Service, U.S. Dept. of the Interior (as of March 20, 2022); Hines, *Black Musical Traditions and Copyright Law: Historical Tensions* (2005) 10 *Mich. J Race & L.* 463, 472; Sambol-Tosco, *supra*.

¹⁸ Stuckey, *Slave Culture: Nationalist Theory and the Foundations of Black America* (1987), p. 137; Sambol-Tosco, *supra*, at p. 2.

subversive messages and resist slavery—and to share routes for escape.¹⁹ Enslaved people created music during the period of enslavement, but they could not capitalize on their creative efforts the way that white people could.²⁰ Yet, through work songs, call and response, cries, and hollering, enslaved people coordinated labor, communicated with one another, and commented on the oppression they suffered.²¹

Black artists were subject to segregation by custom and by law, enforced by state and local governments.²² Black musicians were forced to join segregated local chapters of professional musician associations, which were segregated due to racism in the music industry.²³ They were prohibited from employment in city symphonies, radio stations, and clubs outside of segregated Black neighborhoods—due to racist employers, unions, and police enforcement of segregation.²⁴ Concert venues were often segregated due to racist customs.²⁵

Black musicians were subject to arbitrary, racist rules.²⁶ They could not make eye contact with white Americans who were usually standing right in front of the stage, while Black Americans were confined to balconies.²⁷ Black musicians also could not stay at many hotels, were banned from restaurants, and were often served rotten food at others.²⁸ Such customs were enforced by state and local police.²⁹ Black artists who challenged segregation were met with violence—for example, a musician in Georgia was brutally beaten for refusing to say “sir” in response to a white man’s question at a concert in 1951.³⁰ Black artists were driven from white towns in the south, barred from performing, and chased by white people brandishing guns.³¹ An interracial all-woman

¹⁹ Cox, [The Superpower of Singing: Music and the Struggle Against Slavery](#) (Dec. 8, 2021), National Park Service (as of March 20, 2022).

²⁰ Hines, *supra*, at p. 474.

²¹ Sambol-Tosco, *supra*, at p. 1; Stuckey, *supra*, at pp. 20-26.

²² Absher, *The Black Musician and the White City: Race and Music in Chicago, 1900-1967* (2014), pp. 1-2, 157.

²³ Absher, *supra*, at pp. 9, 13-14, 56.

²⁴ Absher, *The Black Musician and the White City: Race and Music in Chicago, 1900-1967*, 44 (2014). Absher, *supra*, at pp. 1, 21-22.

²⁵ Absher, *supra* at pp. 23-25; Knopper, [The Rope: The Forgotten History of Segregated Rock & Roll Concerts](#) (Feb. 22, 2021), Rolling Stone **Error! Hyperlink reference not valid.** (as of March 20, 2022).

²⁶ Knopper, *supra*; Lipsitz, *Midnight at the Barrelhouse: The Johnny Otis Story* (2010) pp. 46-48.

²⁷ Knopper, *supra*; Absher, *supra* at pp. 23-25; Hickey, [Segregated Rock and Roll Concert Posters from the 1950s](#) (2011-2012), Missouri State University (as of March 20, 2022).

²⁸ Knopper, *supra*.

²⁹ Knopper, *supra*; Lipsitz, *supra*, at pp. 46-48.

³⁰ Knopper, *supra*; Lipsitz, *supra*, at pp. 46-47.

³¹ Knopper, *supra*; Lipsitz, *supra*, at p. 47.

jazz group performed at some integrated concerts, but were occasionally turned away and even jailed.³² Consequently, governments failed to investigate or prosecute racist violence against Black American artists.

Black sacred spirituals, hymns, gospel music, and freedom songs deeply influenced 20th-century American popular music.³³ Many acclaimed and influential American musical artists began their careers in Black church choirs.³⁴ Black churches birthed gospel music—sound rooted in spirituals sung during slavery, integrated with chanting, clapping, and group participation.³⁵ Gospel choirs began broadcasting on public radio stations and church memberships grew to thousands.³⁶ Much of the music of the civil rights movement was inspired by gospel and congregational hymns.³⁷

Despite creating and innovating styles of music, such as blues, gospel, rhythm and blues, soul, jazz, rock and roll, and disco, Black musicians and artists suffered from limited opportunities for financial success.³⁸ White artists appropriated and profited from Black music.³⁹ For example, under the 1909 copyright act, a record could be covered only after obtaining a license from the original artist.⁴⁰ However, many Black musicians' contracts robbed them of these copyright protections.⁴¹ This led to a licensing regime that prevented Black musicians from gaining financial success.⁴² Black musicians recorded music on “race records,” which were played on segregated radio stations and marketed only to Black Americans.⁴³ During the 1920s and 1930s, Black musicians were subjected to contracts where the copyright for their work would be assigned to their employer, while being paid less than white musicians who had similar contracts.⁴⁴ For example, Elvis Presley imitated Black blues and R&B singers, and due to these exploitative contracts, the original song creators whose work he appropriated were not even paid for the use of their music.⁴⁵ One of Elvis' hit songs, “*That's All Right Mama*,”

³² Knopper, *supra*; Megan Mayhew Bergman, [The International Sweethearts of Rhythm](#) (Nov. 20, 2011), 75 *Oxford American* (as of March 20, 2022); Handy, *The International Sweethearts of Rhythm: The Ladies' Jazz Band from Piney Woods Country Life School* (1998) p. 26.

³³ Gates, Jr., *The Black Church: This Is Our Story, This Is Our Song* (2021) pp. 2-5.

³⁴ Gates Jr., *supra*, at p. 6.

³⁵ Gates Jr., *supra*, at pp. 120-125.

³⁶ *Ibid.*

³⁷ Gates Jr., *supra*, at p. 135.

³⁸ See generally Hines, *supra*.

³⁹ Hines, *supra*, at pp. 492-493.

⁴⁰ Hines, *supra*, at p. 485.

⁴¹ Hines, *supra*, at p. 485.

⁴² Hines, *supra*, at p. 485.

⁴³ Hines, *supra*, at p. 479-80.

⁴⁴ *Ibid.*

⁴⁵ Hines, *supra*, at pp. 485-486.

was originally written and recorded by Arthur Crudup, a Black man who was paid so little for his recordings that he had to work as a laborer selling sweet potatoes.⁴⁶ This type of appropriation was so pervasive that many Americans did not understand that these art forms were invented by Black artists.⁴⁷ The federal government neglected to take action to protect Black American artists from financial exploitation.

Black Americans have historically been discriminated against by governments and employers for their fashion, hair, and appearance through criminalization and fines.⁴⁸ The United States Army did not allow Black Americans to wear their hair in locs (locks, dreads, or dreadlocks) until 2017.⁴⁹ Black women in the army had been forced to straighten their hair with chemicals or hot irons, wear expensive and uncomfortable wigs, or cut their hair off to abide by the army's hair regulations.⁵⁰ Many states passed laws that prohibited sagging clothes in public places, and instituted a significant fine or jail sentence if an individual was caught sagging pants.⁵¹ Sagging originated from hip-hop culture, and sagging laws target Black boys and criminalize Black adolescent fashion, inviting police to intrude in Black life.⁵² In 2007, Shreveport, Louisiana passed a law banning sagging, resulting in Black men being 96 percent of those arrested for sagging.⁵³ Schools have removed Black American students for hairstyles that have violated their dress codes.⁵⁴ A Black student at a Texas school was told that he could not attend his prom because his locs were too long.⁵⁵ The CROWN Act, which stands for Creating a Respectful and Open World for Natural Hair, would prohibit discrimination based on hair texture or hairstyle.⁵⁶ While this act has been introduced in Congress, as of March 2022, it has not been passed.⁵⁷ As of 2021, only 13

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Myers, [Soldiers Cheer Army's Decision to Authorize Dreadlocks in Uniform](#) (Jan. 30, 2017), Army Times (as of March 20, 2022); Schwartzmann, [Shreveport Repeals its Discriminatory "Saggy Pants" Ban](#) (2019), ACLU (as of March 20, 2022).

⁴⁹ Myers, *supra*.

⁵⁰ Ibid.

⁵¹ Luscombe, [Florida City Ends Anti-Sagging Saga with Move to Allow Low Trousers](#) (Sep. 14, 2020), The Guardian (as of March 20, 2022); Sinopole, "No Saggy Pants": A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets (2008) 113 Dickinson L.Rev. 329, 331-334.

⁵² Mellor, [Balenciaga's \\$1,200 sagging pants are being decried as racist](#) (Sept. 7, 2021), Fortune (as of April 7, 2022); **Error! Hyperlink reference not valid.** Henning, *The Rage of Innocence: How America Criminalizes Black Youth* (2021) pp. 50-55; Schwartzmann, *supra*.

⁵³ MacNeil, [Black men make up 96 percent of sagging arrests in Shreveport](#) (June 2, 2019) Shreveport Times (as of April 7, 2022); **Error! Hyperlink reference not valid.** Schwartzmann, *supra*.

⁵⁴ Henning, *supra*, at p. 62.

⁵⁵ Weatherford, [The CROWN Act](#) (Oct. 9, 2020), Harpers Bazaar (as of March 20, 2022).

⁵⁶ Weatherford, *supra*; H.R. No. 2116, 117th Cong., 2d Sess. (2021).

⁵⁷ Ibid.

states have passed versions of the CROWN Act.⁵⁸

Many Black American fashion designers who were influential in American fashion history, whose clients included first ladies and government officials, suffered from racism that was supported by federal and state governments.⁵⁹ Elizabeth Keckley was a Black woman and fashion designer who dressed the first lady, Mary Todd Lincoln.⁶⁰ Keckley was born an enslaved person and suffered violence and sexual assault from white enslavers.⁶¹ Keckley worked as a seamstress for several years, attempting to raise money to pay back the loans she used to purchase her freedom.⁶² She faced legal restrictions in establishing her business—including the requirement that a white man vouch for her freedom.⁶³ Ann Lowe was a Black woman and fashion designer, who designed the wedding dress Jacqueline Bouvier wore when she married Senator John F. Kennedy along with many other gowns for an exclusive clientele.⁶⁴ Lowe worked as a seamstress with her mother on a plantation in Alabama and later made dresses for wealthy white women in the South.⁶⁵ She could not get credit or rent a workspace in the business district in the South, and was forced to operate out of a segregated neighborhood.⁶⁶ Ann Lowe did not receive recognition in the fashion industry, despite her well-loved designs.⁶⁷

Rap music, one of the most culturally potent and commercially successful forms of Black expression in the latter half of the 20th century, has been criminalized by federal, state, and local governments.⁶⁸ By the late 1980s, rappers were unable to book performances and were being subjected to intrusive searches and surveillance.⁶⁹ Rap lyrics and videos have been used in criminal trials to associate Black artists with crimes and to prove the substance of threats or incitements to violence during trial and sentencing.⁷⁰ One scholar found

⁵⁸ Mercer, [Banning Hair Discrimination Emerges as Racial Justice Issue](#) (Nov. 29, 2021), Pew Charitable Trusts (as of March 20, 2022).

⁵⁹ Mann, [From Slavery to the White House: The Extraordinary Life of Elizabeth Keckley](#) (Sept. 14, 2020), The White House Historical Association (as of March 20, 2022).

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Mann, *supra*.

⁶³ Ibid.

⁶⁴ Thurman, [Ann Lowe's Barrier-Breaking Mid-Century Couture](#) (March 22, 2021), The New Yorker (as of March 20, 2022).

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Dennis, [The Music of Mass Incarceration](#) (Dec. 1, 2020), American Bar Association (as of April 7, 2022); Hodgins, [Rap Lyrics and Evidence of Guilt: The Racial Impact Of The Weaponization Of Evidence Rules](#) (2021) Cardozo Journal of Equal Rights & Social Justice Blog (as of March 20, 2022).

⁶⁹ Nielson, "Can't C Me": *Surveillance and Rap Music* (2010), 40(6) Journal of Black Studies, 1254, 1258

⁷⁰ Hudson Jr., [Rap Music and the First Amendment](#) (2009), First Amendment Encyclopedia (as of March 20, 2022).

hundreds of cases in which rap lyrics have been used as evidence in criminal prosecutions.⁷¹ Writing rap lyrics and making rap music videos has led to Black students being disciplined.⁷² In *Bell v. Itawamba County Sch. Bd.* (2015), the U.S. Court of Appeals for the Fifth Circuit stated that a school could discipline a student for a rap music video he made off-campus, after learning that two white teachers allegedly sexually harassed several Black students.⁷³

Law enforcement agencies and local governments have attempted to chill or criminalize the sale of rap albums based on their content, sometimes cancelling rap performances outright.⁷⁴ For example, law enforcement agencies attempted to suppress the music of Compton rap group N.W.A.'s 1988 debut album, "*Straight Outta Compton*," and particularly their song "*Fuck Tha Police*."⁷⁵ In 1989, the Assistant Director of the Federal Bureau of Investigation Office of Public Affairs sent a letter to the distributor of the album, criticizing the group's lyrics regarding law enforcement and making the record label "aware of the FBI's position relative to this song and its message."⁷⁶ Law enforcement officials have attempted to prohibit record stores from selling rap albums to minors.⁷⁷ During a 1989 N.W.A. concert in Detroit, law enforcement in the crowd, which reportedly contained 200 police officers, rushed the stage and ended the concert early.⁷⁸

A. California

In California, city governments decimated thriving Black neighborhoods with vibrant artistic communities.⁷⁹ California theaters denied entry to Black patrons.⁸⁰ In 1876, Charles Green, a Black American man, was explicitly denied entry into the Maguire's New Theater in San Francisco.⁸¹ The theater owner was sued by the

⁷¹ Dennis, *supra*.

⁷² Hudson Jr., *supra*.

⁷³ *Bell v. Itawamba County School Bd.* (5th Cir. 2015) 799 F.3d 379.

⁷⁴ Hudson Jr., *supra*.

⁷⁵ Hudson Jr., *supra*.

⁷⁶ Hochman, [Compton Rappers Versus the Letter of the Law: FBI Claims Song by N.W.A. Advocates Violence on Police](#), L.A. Times (Oct. 5, 1989) (April 7, 2022); Letter from Milt Ahlerich, Ass't Dir., Off. Pub. Aff., FBI, to Gui Manganiello, Nat'l Promotions Dir., Priority Records (Aug. 1, 1989).

⁷⁷ Holmes & Subsaeng, [When N.W.A. Terrified White America](#) (2017) Daily Beast (as of Aug. 9, 2021). Jones, *Ban(ned) in the USA: Popular Music and Censorship* (1991), 15(1) Journal of Communication Inquiry, p. 73, 73-87.

⁷⁸ Counts, [Retired Detroit Sergeant Recalls Telling N.W.A. They Couldn't Play 'F*** Tha Police' at 1989 Concert](#) (2015) MLive (as of April 7, 2022).

⁷⁹ Pepin, [Music of the Fillmore](#) (2000), PBS (as of March 20, 2022).

⁸⁰ Bellegarde Francois, *A Lost World: Sallie Robinson, the Civil Rights Cases, and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence* (2021), 109 Georgetown Law Journal 1015, 1049-50.

⁸¹ *Ibid.*

U.S. Attorney but a jury acquitted him after the judge excluded evidence.⁸² Decades later, from the 1930s to 1960s, Black projectionists and other movie house workers fought for employment and equal wages at movie houses—striking, negotiating, and picketing in the face of violent confrontations with local police.⁸³ In San Francisco, Black American artists had limited opportunities due to segregation.⁸⁴ The bassist, Vernon Alley, described “the time in San Francisco when black bands couldn't play east of Van Ness Avenue, and that's true. I was a part of it.”⁸⁵ Alley stated that white musicians’ unions fought against Black musicians who attempted to play in downtown San Francisco.⁸⁶ Many Black musicians struggled to make a living by playing behind curtains for tourists or out of sight at strip clubs.⁸⁷ Consequently, the state openly allowed segregation and discrimination against Black musicians, workers, and artists.

Black Californians continue to face discrimination in the television and film industries in California. In 1940, when Hattie McDaniel became the first Black actor to receive an Academy Award, she was forced to sit at a separate table because the hotel in which the awards ceremony was held did not allow Black people into the building.⁸⁸ Today, research has shown that Hollywood studio executives associate casting Black actors with financial risk.⁸⁹ In a vicious cycle, Black-led projects are characterized as economically invariable; therefore, they are underfunded, despite earning higher returns.⁹⁰ Black actors face a lack of opportunity and Black people are underrepresented in top management in the film and television industries, as well as in off-screen talent in Hollywood.⁹¹ The state has failed, overall, to adequately engage in civil rights enforcement in the motion picture industry.

For a brief period in the 1940s and 1950s, the Fillmore neighborhood in San Francisco was home to a vibrant Black American community and referred to by locals as “the Harlem of the West.”⁹² The Fillmore was home to

⁸² Ibid.

⁸³ Scott, *Cinema Civil Rights: Regulation, Repression, And Race In The Classical Hollywood Era* (2015) pp. 147-149.

⁸⁴ Carol Chamberland, [Racism in the Clubs](#), Found SF (as of March 20, 2022).

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Abramovitch, [Oscar's First Black Winner Accepted Her Honor in a Segregated 'No Blacks' Hotel in L.A.](#) (Feb. 19, 2015), *Hollywood Reporter* (as of March 20, 2022)

⁸⁹ Erigha, *Racial Valuation: Cultural Gatekeepers, Race, Risk, and Institutional Expectations of Success and Failure* (2021), 68(2) *Social Problems*, 393–408.

⁹⁰ Dunn et al., [Black Representation in Film and TV: The Challenges and Impact of Increasing Diversity](#) (March 11, 2021), McKinsey & Company (as of March 20, 2022).

⁹¹ Ibid.

⁹² Jackson & Jones, [Remember the Fillmore: The Lingering History of Urban Renewal in Black San Francisco](#) (2012), UCSB Center for Black Studies Research, p. 61 (as of April 7, 2022).

a vibrant Black jazz scene, social clubs, and was an important cultural hub.⁹³ In the 1950s and 1960s, the City of San Francisco tore down Black-owned jazz clubs and businesses and built an expressway through the district in the name of “redevelopment.”⁹⁴ (See Chapter 5 on housing.)

In the 1930s and 1940s, the zoot suit, a particular style of suit with a long coat and loose pants, became an icon of resistance against assimilation for communities of color.⁹⁵ The increase in migration of Mexican Americans and Black Americans to Los Angeles resulted in the growth of interracial communities of color, which were targeted by the Los Angeles Police Department.⁹⁶ To confront the dehumanizing social and economic conditions imposed by the wartime political economy, local officials, and the mainstream press, the zoot suit became a symbol of resistance for those who wore it.⁹⁷ However, in the eyes of state officials and law enforcement, the zoot suit and those who wore it were labelled as criminal and hypersexual.⁹⁸

Black Americans in Los Angeles were victims of the mob violence and criminalization by local police that preceded and followed the Zoot Suit Riots of Los Angeles.⁹⁹ In June 1943, the Zoot Suit Riots of Los Angeles stemmed from tensions between white servicemen at the new Naval Reserve Armory and local Mexican-American youth.¹⁰⁰ Riots broke out as gangs of white sailors attacked brown and Black youth in zoot suits.¹⁰¹ On the worst day of the riots, white soldiers and civilians poured into Los Angeles and attacked the Black neighborhoods of Watts, as well as other neighborhoods around Los Angeles.¹⁰² All 94 nonwhite civilians who were seriously injured were arrested by the Los Angeles Police Department, compared to only two of the 18 white servicemen who participated.¹⁰³ The police arrested and jailed Mexican-American and Black-American victims of the mobs rather than the white sailors.¹⁰⁴ The Los Angeles Police Department engaged in preventative enforcement based on racial profiling, targeting Black Americans among other communities in Los Angeles.¹⁰⁵ Law enforcement efforts to publicize crackdowns on youth resulted in hundreds of arrests in the

⁹³ Jackson & Jones, *supra*, at p. 65.

⁹⁴ Jackson & Jones, *supra*, at pp. 63-65.

⁹⁵ Alvarez, *The Power of the Zoot: Youth Culture and Resistance during World War II* (2009) p. 64.

⁹⁶ Alvarez, *supra*, at p. 27.

⁹⁷ Alvarez, *supra*, at p. 79.

⁹⁸ Alvarez, *supra*, at pp. 43, 65

⁹⁹ Alvarez, *supra*, at pp. 156, 165.

¹⁰⁰ Alvarez, *supra*, at pp. 160-170

¹⁰¹ *Ibid.*

¹⁰² Alvarez, *supra*, at pp. 176-79.

¹⁰³ Alvarez, *supra*, at p. 180.

¹⁰⁴ *Ibid.*

¹⁰⁵ Alvarez, *supra*, at p. 71.

summer of 1942.¹⁰⁶ This show of force was designed to reassure white middle classes that wartime police forces could maintain law and order by rounding up innocent youth of color, many of whom were Black.¹⁰⁷

Local governments in California have discriminated against, punished, and penalized Black students for their fashion, hairstyle, and appearance. In March 2018, at Tenaya Middle School in Fresno, school officials pulled a Black student out of class for a haircut with shaved-in designs.¹⁰⁸ They cited a dress code policy and separated him from other students.¹⁰⁹ They also prevented him from going to lunch and gave him extra work to complete.¹¹⁰ In 2015, a Black biracial student was not allowed to attend school in Clovis because his hair was too long, in violation of the school dress code.¹¹¹ The student was given a warning, a subsequent lunch detention, two hours of after school detention, a four-hour after school detention, and three additional unofficial violations.¹¹²

State-funded California museums have excluded Black art from their institutions. In 2019, the Los Angeles Museum of Contemporary Art began an informal audit of its collection to increase the representation of Black Artists.¹¹³ In 2020, the museum announced a list of new acquisitions that included Black artists such as Lauren Halsey, LaToya Ruby Frazier, and Senga Nengudi.¹¹⁴ The University of California, Los Angeles's Hammer Museum engaged in a similar audit. In July 2020, the longest tenured curator at the San Francisco Museum of Modern Art resigned after stating that he did not believe in discrimination.¹¹⁵ The resignation was related to a larger problem at the museum with respect to racial equality.¹¹⁶ The museum's staff is only four percent Black and employees report that key leadership positions are dominated by white Americans.¹¹⁷

California has also criminalized Black rap artists. Law Angeles law enforcement leaders had been targeting rapper Nipsey Hussle's businesses, before and after his death in 2019—alleging gang activity and stopping

¹⁰⁶ Alvarez, *supra*, at pp. 71-72.

¹⁰⁷ Alvarez, *supra*, at p. 72.

¹⁰⁸ Paggett, [Cultural Incompetence: My Son was Kicked out of Class Because of His Hair](#) (March 8, 2018), ACLU of Northern California (as of March 21, 2022).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Abre' Connor, [#LongHairDontCare... Unless You Live in Clovis](#) (Sept. 3, 2015), ACLU of Northern California (as of March 21, 2022).

¹¹² *Ibid.*

¹¹³ Miranda, [How One Art Museum Has Reckoned with Race and Its Past](#) (Oct. 22, 2020), Los Angeles Times (as of March 20, 2022).

¹¹⁴ *Ibid.*

¹¹⁵ Pogash, [Its Top Curator Gone, SFMOMA Reviews Its Record on Race](#) (July 22, 2020), New York Times (as of March 21, 2022).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

hundreds of people in a predominantly Black neighborhood, while making very few arrests.¹¹⁸ For over 20 years, California courts allowed rap lyrics to be used as evidence related to street gang activity.¹¹⁹

III. Anti-Black Narratives in Arts and Culture

The federal government has produced and promoted anti-Black narratives through a series of racist and white supremacist cultural projects across time, beginning with minstrelsy. Minstrelsy was a performance of “Blackness” by white Americans in exaggerated costumes and black make-up, known as blackface.¹²⁰ White Americans distorted the hair and facial features of Black Americans and demeaned their language, accents, mannerisms, and character.¹²¹ The first minstrel shows were performed in the 1830s in New York by white people with blackened faces and torn clothing.¹²² These performances depicted Black Americans as lazy, ignorant, superstitious, hypersexual, and criminal.¹²³

In 1830, Thomas Dartmouth Rice created the popular blackface character, “Jim Crow.”¹²⁴ By 1845, the minstrel show led to the creation of a whole entertainment industry that thrived on prejudicial stereotypes against Black Americans.¹²⁵ Blackface minstrelsy grew after the end of the Civil War alongside racial hatred, and the “Jim Crow” laws that proliferated across the country after the end of the war took their name from this primary character in minstrel shows.¹²⁶ Minstrel performances eventually expanded beyond the stage and entered radio and television airwaves, as well as movie theaters.¹²⁷ The minstrel performance became a cross-generational racial parody and stereotype made for white amusement.¹²⁸ The performance of minstrelsy relied on racist stereotypes that dehumanized Black Americans.¹²⁹ This dehumanizing allowed white Americans to secure their own positive identity.¹³⁰ Minstrelsy repeated and entrenched this dehumanization into national and local

¹¹⁸ Levin, [Revealed: How LAPD Targeted Nipsey Hussle’s Street Corner and Store](#) (Nov. 7, 2021), Guardian (as of March 21, 2022).

¹¹⁹ *People v. Olguin* (1994) 31 Cal.App.,4th 1355.

¹²⁰ NMAAHC, *supra*.

¹²¹ *Ibid*.

¹²² *Ibid*.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.; Ferris State University, [The Origins of Jim Crow](#), Jim Crow Museum (as of March 21, 2022).

¹²⁷ NMAAHC, *supra*.

¹²⁸ *Ibid*.

¹²⁹ Butcher, [“Successful Beyond Expectation:” Blackface, Minstrelsy, and Racist Entertainment at the University of Wisconsin–Madison](#) (Oct. 26, 2020), Public History Project, University of Wisconsin-Madison (as of March 21, 2022).

¹³⁰ *Ibid*.

American culture.¹³¹ Watching and engaging in demeaning depictions of Black Americans, like blackface performances, was even a common pastime for U.S. presidents.¹³²

The federal government endorsed dehumanizing narratives of Black Americans as violent and propagated white supremacist narratives of the Ku Klux Klan as saviors of the nation through the medium of cinema. *The Birth of a Nation*, which bore its origin title *The Clansman*, for its first month of screenings, is an unapologetically racist 1915 silent film directed by D.W. Griffith.¹³³ The film, which premiered in Los Angeles at Clune's Auditorium, takes place between the Civil War and Reconstruction.¹³⁴ Essentially a powerful propaganda tool, it glorifies the rise of the KKK, the white supremacist terrorist group, and depicts them as white saviors attempting to “restore order” to the nation.¹³⁵ Woodrow Wilson had the film shown at the White House—a federal government endorsement of white supremacy and anti-Blackness.¹³⁶

From the silent film era through the 1950s, the U.S. Department of Agriculture (USDA) was an important filmmaking agency in the federal government.¹³⁷ The films produced by the USDA reinforced problematic racial stereotypes against Black communities.¹³⁸ USDA motion pictures supported separate-but-equal laws and customs.¹³⁹

Government war propaganda during World War II employed the strategic use of motion pictures as war propaganda.¹⁴⁰ This propaganda achieved two intertwined objectives, a false image of American democracy and the reinforcement of racist stereotypes about Black people.¹⁴¹ The Office of War Information, a government censorship agency, blocked racial depictions of discrimination against nonwhite people to show a falsely ideal racial democracy.¹⁴² The Office of War Information also approved blackface and jokes perpetuating and relying

¹³¹ Ibid.

¹³² Barnes, *supra*.

¹³³ Blakemore, [“Birth of a Nation”: 100 Years Later](#) (Feb. 4, 2015), JSTOR Daily (as of March 21, 2022).

¹³⁴ Thomas Doherty, [“The Birth of a Nation” at 100: “Important, Innovative and Despicable”](#) (Feb. 7, 2015), Hollywood Reporter (as of March 21, 2022).

¹³⁵ Blakemore, *supra*.

¹³⁶ Ibid.

¹³⁷ Winn, [A Brief History of the USDA Motion Picture Service to 1943](#) (2013), Kinema: A Journal for Film and Audiovisual Media (as of March 21, 2022).

¹³⁸ J. Emmett Winn, Documenting Racism: African Americans in US Department of Agriculture Documentaries, 1941-42 (2014), at pp. 107-130.

¹³⁹ Ibid.

¹⁴⁰ Koppes & Black, *Blacks, Loyalty, and Motion-Picture Propaganda in World War II* (1986), *The Journal of American History*, 383-406.

¹⁴¹ Koppes, *supra*.

¹⁴² Koppes, *supra*.

upon Black stereotypes.¹⁴³

Federal and state governments have constructed racist monuments on state property and altered school curriculum—glorifying slavery and white supremacy, perpetuating the “Lost Cause” myth, and erasing Black history.¹⁴⁴ State and local governments have collaborated with the United Daughters of the Confederacy, which seeks to memorialize and preserve Confederate culture for future generations,¹⁴⁵ to memorialize the “Lost Cause” myth—that the rebels were patriots and not traitors to the nation.¹⁴⁶ Organized and systematic efforts to manipulate and distort the nation’s history—began immediately after the end of the Civil War.¹⁴⁷ These included erecting Confederate monuments, many of them placed on courthouse grounds; naming schools, streets, and military bases after Confederate officers; and lobbying Congress for holidays.¹⁴⁸ The construction of these monuments coincided with a historical period in which increased racial terror through lynching and violence against Black people was at an all-time high.¹⁴⁹ (See Chapter 3 on racial terror for more information.) Monument construction has coincided with moments in which Black communities seem to gain some political power or voice.¹⁵⁰ The Supreme Court ruling of *Brown v. Board of Education*, which declared segregation unconstitutional, and the civil rights movement triggered another wave of Confederate monuments across the country.¹⁵¹

Federal and state governments have enacted laws to protect Confederate monuments and other monuments to white supremacy.¹⁵² Alabama, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia recently enacted these laws between 2012 to 2017.¹⁵³ In 2009, the U.S. Supreme Court also protected government monuments from free speech challenges in *Pleasant Grove City v. Summum*—a protection that includes Confederate monuments.¹⁵⁴

¹⁴³ Knppes, *supra*.

¹⁴⁴ Cox, *Dixies Daughters: The United Daughters of the Confederacy and the Preservation of Confederate Culture* (2003), pp. 1-3.

¹⁴⁵ Cox, *supra*, at pp. 1-3.

¹⁴⁶ Cox, *supra*, at p. 96.

¹⁴⁷ Cox, *supra*, at pp. 1-3; Murali, [Shaping History: Monument-Toppling, Racial Justice and the Law](#) (Dec. 2, 2019), Center for Art Law (as of March 21, 2022).

¹⁴⁸ Cox, *supra*, at pp. 1-3.

¹⁴⁹ Murali, *supra*.

¹⁵⁰ Ryan Best, [Confederate Statues Were Never Really About Preserving History](#) (July 8, 2020), FiveThirtyEight (as of March 21, 2022).

¹⁵¹ *Ibid*.

¹⁵² Murali, *supra*.

¹⁵³ Murali, *supra*.

¹⁵⁴ Murali, *supra*.

Black Americans were denied access to the mainstream media for much of American history, due to segregation and racism.¹⁵⁵ Since the 2000s, many newspapers have apologized for blatantly racist news coverage that they have engaged in for over a century-long period that encompasses the slavery era to today.¹⁵⁶ Consequently, Black Americans formed their own media—the Black press.

Freedom's Journal was one of the first of many subsequent Black newspapers and publications that would be formed throughout the United States.¹⁵⁷ These publications advocated for community cohesiveness, demonstrated racial pride, and challenged legislation.¹⁵⁸ The staff members of small, struggling Black publications often risked their lives to refute white supremacy in the news.¹⁵⁹ Ida B. Wells was a journalist for the Memphis weekly known as *The Free Speech*.¹⁶⁰ She conducted investigations, finding that mobs regularly lynched innocent victims as part of a racial terror regime.¹⁶¹ This was work that should have been done by federal and state law enforcement agencies. She found that the Black men who were charged with raping white women were often involved in consensual relationships with them.¹⁶² After she published her findings in an editorial, a white mob destroyed *The Free Speech*, suffering no legal consequences.¹⁶³ Black newspapers like *The Baltimore Afro-American*, *The Chicago Defender*, and *The Pittsburgh Courier* served as a corrective to the lies of the white press, and advanced the early civil rights movement.¹⁶⁴

Black Americans were often invisible in white press and mainstream media, unless they were alleged to have committed crimes.¹⁶⁵ They were often denied courtesy titles such as Mrs. and Mr., which were given to white Americans.¹⁶⁶ When Black Americans were cast in television shows, they acted out narratives crafted by white Americans that pigeonholed them in roles as domestics, criminals, brutes, or lazy and deceitful.¹⁶⁷ In 1945, John H. Johnson established *Ebony* magazine—one of the first magazines to be founded by and operated for Black

¹⁵⁵ Pratts, *Racial Segregation and Negro Journalism* (1947), 8(4) *Phylon*, 305-314.

¹⁵⁶ Staples, [How the White Press Wrote Off Black America](#) (July 10, 2021), *The New York Times* (as of March 21, 2022).

¹⁵⁷ Teresa, [The Jim Crow-Era Black Press: Of and for its Readership](#), *Organization of American Historians* (as of March 21, 2022).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Staples, *supra*.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Staples, [The Radical Blackness of Ebony Magazine](#) (Aug. 11, 2019), *N.Y. Times* (as of March 21, 2022).

¹⁶⁷ *Ibid.*

Americans.¹⁶⁸ *Ebony* highlighted historical figures who had been left out of textbooks.¹⁶⁹ The magazine also worked with corporations who sought to advertise to Black American communities.¹⁷⁰ In 1979, Robert Johnson (no relation to John H. Johnson), a cable industry lobbyist, started a television channel called Black Entertainment Television (BET).¹⁷¹ By the 1990s, he sold BET to Viacom for \$2.3 billion, making him the first Black American billionaire in U.S. history.¹⁷²

American television has a sordid history of creating television shows and series that reinforce racism against Black Americans and are written, conceived, and produced by white Americans.¹⁷³ White Hollywood has been complicit in the racist practices that thwarted Black freedom struggles.¹⁷⁴ The first Black sitcom originated from a radio program called Amos ‘n’ Andy, in the 1940s, in which two white men portrayed Black characters.¹⁷⁵ According to testimony by Dr. Darnell Hunt before the California Task Force to Study and Develop Reparation Proposals for African Americans, “[C]rime procedurals were found to routinely glamourize policing and to legitimize the criminal justice system, while downplaying the degree to which Black Americans are racially profiled and victimized by both. This finding is particularly alarming given what we know about the normalizing effects of media, about the potential for media, in this case, to condition police officers, prosecutors, juries, judges, and/or vigilantes to perceive Black bodies as a threat, and police violence against them as justified.”¹⁷⁶ This is important because, as Erika Alexander stated in her testimony, “[s]tory is the conduit to our mind, but once the seed is planted, it is the quickest way to our heart.”¹⁷⁷

The television industry was almost entirely white for many of its initial decades.¹⁷⁸ Black writers and actors in the 1970s faced exclusion at nearly every turn.¹⁷⁹ Television executives held the racist presumption that white writers could write for any audience, but Black writers only could contribute to Black shows.¹⁸⁰ The

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ NPR, [Black Entertainment Television: Robert Johnson](#) (Dec. 14, 2017), NPR (as of March 21, 2022).

¹⁷² Ibid.

¹⁷³ Chen, [Black Television Through the Years](#) (2022), University of Texas at Austin (as of March 21, 2022).

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021>> (as of February 8, 2022).

¹⁷⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Erika Alexander, <<https://oag.ca.gov/ab3121/meetings/122021>> (as of February 8, 2022).

¹⁷⁸ Chen, *supra*.

¹⁷⁹ Giorgis, [Not Enough has Changed Since Sanford and Son](#) (Sept. 13, 2021), Atlantic (as of March 21, 2022).

¹⁸⁰ Ibid.

Black screenwriters who are employed by mainstream television networks are often tasked with crafting stereotypical narratives of Black people and story lines that are acceptable to white producers, studio executives, and viewers.¹⁸¹ In 2005, the gap in median annual salary between white and Black writers in the television industry was nearly \$15,000.¹⁸² According to a 2017 survey of the television industry, 91 percent of shows are led by white creators and producers.¹⁸³ Only 1.3 percent of U.S. full-power commercial TV stations were Black-owned in 2019.¹⁸⁴ Black Americans are largely underrepresented in the entertainment industry.¹⁸⁵ While they comprise 12.4% of the general population in 2020, Black Americans only constituted 3.9% of major studio heads, 6.8% of network CEOs.¹⁸⁶ They comprised 4.5% of broadcast show creators, and 7.4 % of digital show creators for the 2019-2020 season.¹⁸⁷ Federal and state governments have neglected to address the anti-Black discrimination in the entertainment industry.

The buying practices of radio advertisers in the U.S. have been characterized by the Federal Communications Commission (FCC) as racially discriminatory—minority broadcasting stations earn 63 percent less than other stations with comparable market shares.¹⁸⁸ Despite this, the FCC has failed to enact regulations to protect Black radio stations and media businesses.¹⁸⁹ Of the 11,000 commercial radio stations across the country, fewer than 180 are owned by Black Americans—about 1.6 percent of the total.¹⁹⁰ Carole Cutting is a Black radio station owner who started a jazz station in 1999 in Springfield, Massachusetts—where there were no Black-owned radio stations.¹⁹¹ She went through a 15-year legal battle to be able to finally get her broadcast license and is the only Black American to own a commercial radio station, AM or FM, in New England.¹⁹²

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Karr, [FCC Media-Ownership Report Underscores the Agency's Historical Exclusion of Black People](#) (Sept. 7, 2021) (as of March 21, 2022)

¹⁸⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁸⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁸⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Dr. Darnell Hunt, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

¹⁸⁸ Millar, [Racism is in the Air: The FCC's Mandate to Protect Minorities from Getting Shortchanged by Advertisers](#) (2000), Commlaw Conspicuous, p. 311 (as of March 21, 2022)

¹⁸⁹ Ibid.

¹⁹⁰ Young & Raphelson, [Diversifying The Radio Dial: Black Station Owners Demand Action](#) (July 22, 2020) WBUR (as of March 21, 2022).

¹⁹¹ Ibid.

¹⁹² Ibid.

In 2020, the National Association of Black-Owned Broadcasters called on Congress to pass a bill that would reinstate a tax incentive to encourage people to sell radio stations to members of minority communities and women.¹⁹³ The legislation would bring back a tax break enacted in 1978 to account for the history of racism in broadcast licensing.¹⁹⁴ In the years it was in effect, minority ownership increased, however, in 1995, the tax incentive was overturned by Congress.¹⁹⁵ Black Americans have proposed that the FCC approve a new technology called radio geo-targeting—that would allow radio stations to provide geographic-specific traffic, weather, public interest information, and advertising to their local communities.¹⁹⁶ Geo-targeting would allow Black radio stations to better engage listeners, allow for more Black ownership, and more effectively reach Black-American communities.¹⁹⁷ As of September 2021, the proposal was pending FCC approval.¹⁹⁸ Consequently, the federal government has engaged in discriminatory regulation of the media, which has harmed Black media professionals and business owners.

Black women face excessive racism and discrimination on social media today. In 2018, Amnesty International and Element AI found that Black women on Twitter were 84 percent more likely than white women to receive hateful tweets.¹⁹⁹ Despite this harassment, Black women online are innovators who contribute greatly to digital cultural spaces.²⁰⁰ Black activists says that their remarks on racism are disproportionately stifled on Facebook.²⁰¹

A. California

In the 1850s, blackface minstrelsy dominated entertainment in San Francisco.²⁰² Minstrel songs were played during a banquet for the new University of California president in 1899.²⁰³

California has been home to racist monument and memorial construction for centuries. The Native Sons of the

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Clay Jr., [The FCC Must Act to Promote Minority-Owned Broadcasting](#) (Sept. 29, 2021) (as of March 21, 2022).

¹⁹⁷ Ibid

¹⁹⁸ Ibid.

¹⁹⁹ Amnesty International, [Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse against Women on Twitter](#), Amnesty International (as of March 21, 2022).

²⁰⁰ Whaley, [We Aren't Alone On TikTok, Black Girls Find Visibility—And Racist Hate](#), Bitch Media (as of March 21, 2022).

²⁰¹ Guynn, [Facebook While Black: Users Call it Getting 'Zucked' Say Talking about Racism is Censored as Hate Speech](#) (July 9, 2020) (as of March 21, 2022).

²⁰² Hudson, *West of Jim Crow: The Fight Against California's Color Line* (2020) at p. 50.

²⁰³ Hudson, *Entertaining Citizenship: Masculinity and Minstrelsy in Post—Emancipation San Francisco* (2008), 93 *Journal of African American History* 174, 181.

Golden West is a California organization that has erected racist monuments throughout the state.²⁰⁴ It was formed on July 11, 1865 with the goal of honoring the Forty Niners, the first white people to settle in California and take advantage of the gold rush and has erected monuments through the state.²⁰⁵ In the 1920s, the Native Sons of the Golden West Grand President wrote that “California was given by God to a white people, and with God’s strength we want to keep it as He gave it to us.”²⁰⁶ The United Daughters of the Confederacy had 14 chapters across California²⁰⁷ and erected plaques, monuments, and other memorials dedicated to Confederate generals and soldiers across California, such as in Monterey and San Diego, throughout the 1940s and 1950.²⁰⁸

California has erected a great number of Confederate monuments, including a dozen or more state markers and cemetery memorials.²⁰⁹ Some of these monuments were erected by southern veterans of the Confederacy who moved to southern California after the Civil War and sought to memorialize their service through the creation of monuments.²¹⁰ The Mendocino coastal town of Fort Bragg is named after a Confederate army general and enslaver, as of March 2021, the town has not yet changed its names despite numerous requests.²¹¹

In the radio, film, and television industries, California has neglected to adequately address widespread discrimination. Out of the hundreds of radio stations in California, only two are Black owned.²¹² The State of California has, overall, neglected to enforce the civil rights of Black people or address the widespread practice of anti-Black discrimination in Hollywood.²¹³ Black Americans have been depicted in crude stereotypical film roles in Hollywood: as servants, rapists, and enslaved people—or they were barred from roles in films altogether.²¹⁴

The *Los Angeles Times* apologized for being “an institution deeply rooted in white supremacy” for most of its history and admitted to a record that included indifference and “outright hostility” toward the city’s nonwhite

²⁰⁴ Desmarais, [Historic Wrongs on a Pedestal: Ugly Past Doesn’t Vanish When the Artwork Does](#) (Feb. 27, 2018) (as of March 21, 2022).

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ohara, [Inside California’s Surprising History of Confederate Monuments](#) (July 17, 2020), Cal Matters (as of April 7, 2022).

²⁰⁸ Castillo, [What’s Left of Confederate Monuments in California](#) (July 13, 2020), Cal Matters (as of March 21, 2022).

²⁰⁹ Castillo, *supra*.

²¹⁰ Castillo, *supra*.

²¹¹ Branson-Potts, [California Confronts its Racist Past as Tributes to Confederates and Colonizers Fall](#) (June 26, 2020), L.A. Times (as of March 21, 2022); Branson-Potts, [California City Named for a Confederate General Will Not Put Name Change on November Ballot](#) (June 23, 2020), L.A. Times (as of March 21, 2022).

²¹² Redd, [More than Music: How KDEE 97.5 FM Radio Serves Black Communities](#) (Feb. 17, 2022), ABC 10 (as of March 21, 2022).

²¹³ Ford, [What the ‘Hollywood Jim Crow’ Looks Like Today](#) (Feb. 24, 2019), Atlantic (as of March 21, 2022).

²¹⁴ Ibid.

population—acknowledging the underrepresentation of Black journalists in the newsroom.²¹⁵ For instance, the *Times* won a Pulitzer Prize for its coverage of the August 1965 civil unrest in Watts. While much of the Watts story’s content was reported by a 24-year-old Black advertising messenger, Robert Richardson, the reporters and editors of record were nearly all white.²¹⁶ Richardson covered the disturbances, driving to the scene and phoning in his reports.²¹⁷ He was designated a “reporter trainee” after the riots but was only provided minimal mentorship or opportunities to enhance his skills. He left the paper the following year.²¹⁸

In contrast, California’s Black newspapers hired Black reporters and writers and invested in them. From 1850 to 1870, the earliest Black newspapers published in California included *The Mirror of the Times*, *The Pacific Appeal*, and *The Elevator*.²¹⁹ These newspapers emphasized civil rights, community, and racial politics.²²⁰ Writers and editors were free to be activists and journalists.²²¹ *The California Eagle* was founded in 1879 and helped ease Black Americans’ transition to the west—providing them with housing and job information, and other information essential to surviving in a new environment.²²² With Charlotta Spears Bass at the helm, over the years, the *Eagle* protested racism in the motion picture industry, in the military, and successfully waged battles against discriminatory hiring in Los Angeles—work that should have been done by the state government.²²³ The state government has failed to prevent discrimination in mainstream media in California.

California’s Social Media Transparency and Accountability Act of 2021, Assembly Bill 587, would require social media platforms to publicly disclose their corporate policies regarding online hate, disinformation, extremism, harassment, and foreign interference, as well as key metrics and data regarding the enforcement of those policies.²²⁴ However, the bill only applies to social media companies that have at least \$100 million in revenue—which would exclude many websites where racist commentary and discourse is highly prevalent, such

²¹⁵ Times Editorial Board, [Editorial: An Examination of The Times’ Failures on Race, Our Apology and a Path Forward](#) (Sept. 27, 2020), L.A. Times (as of March 21, 2022).

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Drapkin, [“Advocate Our Own Cause”: Black Newspapers in California](#) (2016), Colored Conventions Project (as of March 21, 2022).

²²⁰ Public Broadcasting Service, [Newspapers: The California Eagle, Publisher – Charlotta Bass](#), Public Broadcasting Service (as of March 21, 2022).

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Office of Assemblymember Jessie Gabriel, District 45, [California Legislators Introduce Bipartisan Effort to Hold Social Media Companies Accountable for Online Hate and Disinformation](#) (March 29, 2021), Assemblymember Jessie Gabriel, District 45 (as of March 21, 2022).

as Parler.²²⁵ As a result, California’s attempts to address white supremacy and racism targeted at Black Americans online may still leave many vulnerable to abuse. In conclusion, the State of California has promoted blackface minstrelsy, funded confederate monuments, and neglected to enforce the civil rights of Black American artists, culture makers, and media makers.

IV. Racist Censorship

State censorship of depictions of Black Americans in movies, art, and books was constitutional until 1952.²²⁶ The institutions that regulated cinema, including the Production Code Administration, state censorship boards, and film studios themselves, produced a warped and racist view of Black American life in cinema.²²⁷ State government censorship was strongest from 1915 to 1952.²²⁸ States with active censorship boards focused on censoring miscegenation, the depiction of Black women’s sexuality, depictions of racial discrimination and lynching, and depictions of integration.²²⁹ States engaged in censorship to generate cultural narratives that upheld white supremacy, and rendered it invisible to the public—erasing depictions of Black power, humanity, and anti-Black state violence.²³⁰ After the U.S. Supreme Court banned state censorship in 1952, Hollywood began to casually depict violence against Black Americans on screen.²³¹ Scholars argue that the proliferation of these scenes has helped normalize anti-Black violence in society.²³²

States and local governments have engaged in racist censorship of books written by Black authors, primarily in public schools and in prisons. Many public high schools across the nation have banned acclaimed novels written by Black authors.²³³ Toni Morrison’s acclaimed novels have been banned for “depicting the inappropriate topic of...racism,” and for being “filthy,” in 1998 in Florida, and 2007 in Kentucky.²³⁴ Texas law prohibits teachers from portraying slavery and racism as “anything other than deviations from, betrayals of, or failures to live up to the authentic founding principles of the United States,”—explicitly prohibiting the *New York Times*’s 1619

²²⁵ Jabali, [I’ve Been on Parler. It’s a Cesspit of Thinly Veiled Racism and Hate](#) (Jan. 12, 2021), Guardian (as of March 21, 2022); Syed, [California Social Media Regulations – A Tougher Sell in 2021](#) (May 27, 2021), Cal Matters (as of March 21, 2022).

²²⁶ Scott, *supra*, at p. 10.

²²⁷ Scott, *supra*, at pp. 1-2.

²²⁸ Scott, *supra*, at pp. 68.

²²⁹ Scott, *supra*, at pp. 68-70; 187.

²³⁰ Scott, *supra*, at pp. 1-4.

²³¹ Scott, *supra*, at pp. 108-109.

²³² *Ibid.*

²³³ American Library Association, [Banned & Challenged Classics](#), American Library Association (as of March 21, 2022) (ALA).

²³⁴ *Ibid.*

Project, which places Black Americans and the consequences of slavery at the center of American history.²³⁵ In 2021, in York, Pennsylvania, an all-white school board banned books related to racial justice, which mentioned key Black civil rights leaders, such as Rosa Parks and Dr. Martin Luther King, Jr.—stating that they “may lean more toward indoctrination rather than age-appropriate academic content.”²³⁶ After sustained protests from community members, students, and teachers, the school board reversed the ban.²³⁷

State officials across the country have banned books on the enslavement of Black people, civil rights, and novels by Black authors in prisons and carceral settings.²³⁸ For example, as of 2021, Wisconsin bans Ralph Ginzburg’s *100 Years of Lynching*, but allows incarcerated people to read Adolf Hitler’s *Mein Kampf*—presumably the first was banned for obscenity and yet the latter was deemed to be acceptable.²³⁹ Florida banned the Equal Justice Initiative’s *Lynching in America* report—one of the most comprehensive reports available on the lynching of Black Americans—because it was supposedly a threat to prison security.²⁴⁰ To maintain the lie of white cultural supremacy, state governments have therefore participated in censoring Black American artistic work that was critical of American institutions, deemed subversive, or threatened white supremacy.

A. California

In the 1930s, Black activists protested pro-lynching films at movie theaters, fought against Hollywood’s depictions of Black people, and tried to use film to promote the fight for civil rights.²⁴¹ Early films that depicted lynching scenes included *Frisco Kid* (1935), *Barbary Coast* (1935), *Fury* (1936), and *They Won’t Forget* (1937).²⁴² These films made Black Americans “nauseous” because they glorified and applauded lynching—even when the person being lynched was not Black.²⁴³ These films encouraged and justified lynching at a time when the lynching of Black Americans was still highly prevalent.²⁴⁴

Many public schools and prisons in California have censored the literature of Black authors. The Oakland Board of Education banned Alice Walker’s book *The Color Purple* in 1984, due to “troubling ideas about race

²³⁵ Powell, [In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read](#) (Dec. 10, 2021), *The New York Times* (as of March 21, 2022).

²³⁶ Paz & Cramer, [How Students Fought a Book Ban and Won, for Now](#) (Oct. 2, 2021), *The New York Times* (as of March 21, 2022).

²³⁷ *Ibid.*

²³⁸ Equal Justice Initiative, [Banning Books in Prisons](#) (Jan. 7, 2020), Equal Justice Initiative (as of March 21, 2022) (EJI 2020).

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ Scott, *supra*, at pp. 147-149.

²⁴² Scott, *supra*, at p. 152-155.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

relations, man's relationship to God, African history, and human sexuality”—approving it only after nine months of community advocacy.²⁴⁵ At Irvington High School in Fremont, Richard Wright’s novel *Native Son*, was banned for being “unnecessarily violent” in 1998.²⁴⁶ At the state level, the California Department of Corrections and Rehabilitation still maintains a list of banned books for its prisons.²⁴⁷

V. Deprivation of Black Intellectual Property

The federal government’s copyright laws routinely deprived Black American artists of legal protection because this regime allowed art created by Black artists to be appropriated and stolen by white artists.²⁴⁸ As a result of complex and convoluted requirements of the 1909 Copyright Act, artists unfamiliar with legal requirements could easily find their works injected into the public domain.²⁴⁹ This resulted in the loss of economic rights and copyright protection—which resulted in generations of lost wealth for Black Americans.²⁵⁰ Additionally, the federal and state governments have not legally allowed descendants of enslaved people to own art made by their enslaved ancestors or photographs taken of their enslaved ancestors—depriving them of rightful earnings.²⁵¹

Even though Black people were leaders in invention, they could not access patent protections due to institutional racism and state-sanctioned anti-Black discrimination and violence.²⁵² There are estimates that racial violence accounts for 1,100 missing patents won by Black Americans.²⁵³ Cyrus McCormick received a patent for the mechanical reaper, even though it was actually invented by Jo Anderson, a man who was enslaved by the McCormick family.²⁵⁴ Obtaining a patent was difficult and expensive, and some Black inventors could not afford a lawyer.²⁵⁵ Some patent applications may have been rejected due to racial discrimination.²⁵⁶ To

²⁴⁵ ALA, *supra*.

²⁴⁶ *Ibid*.

²⁴⁷ EJI 2020, *supra*.

²⁴⁸ Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection* (1999), 21 *Hasting Comm Ent Law Journal* 339, 357-58.

²⁴⁹ Greene, *supra*, at pp. 353-54.

²⁵⁰ *Ibid*.

²⁵¹ Schuessler, [Your Ancestors Were Slaves. Who Owns the Photos of Them?](#) (March 22, 2019), *N.Y. Times* (as of March 21, 2022); Perez-Pena, [Settlement Over Artwork By an Ex-Slave](#) (Oct. 7, 1993), *N.Y. Times***Error! Hyperlink reference not valid.** (as of March 21, 2022).

²⁵² Rothwell, *supra*.

²⁵³ Cook, *Violence and Economic Activity: Evidence from African American Patents, 1870-1940* (2014), 19(2) *Journal of Economic Growth* 221.

²⁵⁴ Johnson, [The Colorblind Patent System and Black Inventors](#) (2019), *American Bar Association* (as of March 21, 2022).

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid*.

avoid discrimination, some Black Americans relied on white partners to apply for patents under the white person's name.²⁵⁷ One inventor, Henry Boyd, invented a new type of bed frame and partnered with a white man who applied for the patent in his name.²⁵⁸

Obtaining a patent was more difficult for Black artists and innovators because it often involved working with white lawyers who engaged in racist and unfair dealings—and the federal government took no action to ensure that Black innovators' patents were properly documented and preserved.²⁵⁹ Black innovators faced additional professional and financial barriers, in addition to racism, that white innovators did not face.²⁶⁰ In 1913, the U.S. Patent Office surveyed approximately 8,000 registered patent attorneys and found 1,200 inventions attributed to people of Black American ancestry.²⁶¹ However, the Office was only able to confirm 800 of them—a large undercount because attorneys reported failing to recall the names or inventions of some of their Black clients.²⁶² This failure to recall the names of Black inventors and their inventions resulted in Black American inventors being cheated out of profits for their creative work.²⁶³

Government-enforced racial segregation and disinvestment in Black communities resulted in a dearth of resources that crippled Black invention.²⁶⁴ These racist practices suppressed the ability of Black Americans to receive patents for their inventions.²⁶⁵ Today, Black patentees are underrepresented in America.²⁶⁶ There are wide disparities between the number of U.S. patents issued to Black inventors and the total number of patents issued in general.²⁶⁷ For example, one 2010 study found that from 1970 to 2006, Black American inventors received six patents per million people, compared to 235 patents per million for all U.S. inventors.²⁶⁸ According to Professor Kevin J. Greene's testimony before the California Task Force to Study and Develop Reparation Proposals for African Americans, American copyright law disadvantages Black American creators because it enables appropriation and under-compensation.²⁶⁹ There are significant disparities in how Black and white

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ Rothwell, *supra.*

²⁶⁰ Rothwell, *supra.*

²⁶¹ Rothwell, *supra.*

²⁶² Rothwell, *supra.*

²⁶³ Rothwell, *supra.*

²⁶⁴ Johnson, *supra.*

²⁶⁵ Johnson, *supra.*

²⁶⁶ Johnson, *supra.*

²⁶⁷ Johnson, *supra.*

²⁶⁸ Johnson, *supra.*

²⁶⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (December 8, 2021), Testimony of Professor Kevin J. Greene, <<https://oag.ca.gov/ab3121/meetings/122021> > (as of February 8, 2022).

music performers have been compensated for copyright use.²⁷⁰ Professor Greene stated, “It’s not just some problem that happened 200 years ago, it’s a problem that’s ongoing and happening today.”²⁷¹ Throughout American history, the federal government historically deprived Black American artists and innovators of intellectual property rights, copyright protections, and patent protections resulting in intellectual and cultural theft and exploitation.

VI. Discrimination Against Black Athletes

Following the end of slavery, most Black athletes were forced to compete in segregated teams, sports, and organizations.²⁷² Prior to World War II, some Black Americans played sports at white universities—where they were picked for their talent, yet ridiculed and mistreated by white students.²⁷³ Despite the inherent inequality of segregation, Black colleges and their football programs thrived in the mid-20th century.²⁷⁴ Many Americans believed Historically Black Colleges and Universities were of lower quality than white higher education institutions, so athletic achievement was a way to dispute this narrative.²⁷⁵ HBCUs had fewer material resources but produced high numbers of professional athletes—particularly in football.²⁷⁶

The reintegration of sports was a long and slow process because white Americans who held positions of power were hesitant to break the tradition of segregation.²⁷⁷ Most major college athletics programs did not allow Black players until 1947.²⁷⁸ The ‘gentlemen’s agreement’ was a standard, unwritten rule that allowed coaches to bench Black athletes during intercollegiate contests with all-white colleges and universities.²⁷⁹ In 1955, Georgia’s Governor asked the State Board of Regents to prohibit Georgia’s all-white football teams from playing against teams with Black players.²⁸⁰

During the 1960s, the government and the sports industry punished Black athletes who engaged in racial justice

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Reese, *The Socio-Political Context of the Integration of Sport in America* (1998), 3(4) *Journal of African American Men* 5, 6-8.

²⁷³ Reese, *supra*, at p. 12.

²⁷⁴ Tynes, [The Golden Age of Black College Football Lost to Integration](#) (Sep. 19, 2010), Ringer (as of March 21, 2022).

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Reese, *supra*, at pp. 12-14.

²⁷⁸ UCLA, [Black Bruin History at UCLA](#), UCLA (as of March 21, 2022).

²⁷⁹ Miller, *Slouching Toward a New Expediency: College Football and the Color Line During the Depression Decade* (1999), 40(3) *American Studies*, 5, 9.

²⁸⁰ Reese, *supra*, at p. 14.

and political protests, or resisted racial oppression.²⁸¹ Muhammad Ali, a Black American Muslim boxing champion, was stripped of his world heavyweight title for refusing to be drafted into the U.S. armed forces.²⁸² When explaining why he would not join the army, he pointed out the irony of being drafted to fight on behalf a nation in which he was subjected to racial oppression.²⁸³ “My conscience won’t let me go shoot my brother, or some darker people. . . for big powerful America,” he said.²⁸⁴ “They never called me nigger, they never lynched me, they didn’t put no dogs on me, they didn’t rob me of my nationality, rape and kill my mother and father. . . . Shoot them for what?”²⁸⁵ Ali was charged with a felony, fined, and banned from boxing.²⁸⁶ Later the Supreme Court would overturn his conviction. Justice John Harlan stated that the government had misinterpreted the doctrine of Black Muslims by not recognizing Ali as a conscientious objector.²⁸⁷ Ali experienced racial and religious discrimination by the government—which refused to recognize his religious beliefs and punished him for his resistance to racism.

Black American Olympic athletes have faced racial discrimination in athletics.²⁸⁸ The Amateur Sports Act of 1978, gave the United States Olympic and Paralympic Committee, a private organization, exclusive jurisdiction over all matters related to the Olympics.²⁸⁹ The federal government has provided funding for the Olympics when they are held in the United States.²⁹⁰ In 1968, Black Californian track athletes, Tommie Smith and John Carlos, protested the lack of Black Americans on the United States Olympic Committee, as well as the stripping of Muhammad Ali’s heavyweight belt at the Olympics.²⁹¹ They raised their black gloved fists in a Black power salute during the National Anthem, while standing on the victory podiums of the Olympic Games.²⁹² Subsequently, the International Olympic Committee kicked them out of the Olympic Village and banned protest during the Olympics.²⁹³ When Smith and Carlos returned to America, their families received death threats.²⁹⁴

²⁸¹ Brown, [‘Shoot Them for What?’ How Muhammad Ali Won His Greatest Fight](#) (June 16, 2018), Washington Post (as of March 21, 2022).

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Reese, *supra*, at pp. 16-17.

²⁸⁹ Stewart, [The Price of Olympic Glory](#) (July 22, 2021), Vox (as of March 22, 2021).

²⁹⁰ United States General Accounting Office, [Olympic Games: Federal Government Provides Significant Funding and Support](#) (2000), United States General Accounting Office (as of March 21, 2022).

²⁹¹ Reese, *supra*, at p. 16.

²⁹² UCLA, [Tommie Smith and John Carlos](#), UCLA (as of March 21, 2022).

²⁹³ Ibid.

²⁹⁴ Ibid.

Today, many Black American Olympic athletes are discriminated against—from being suspended for legal marijuana use to being forbidden from wearing swimming caps designed for natural Black hair.²⁹⁵ Most Olympic athletes, many of whom are Black Americans, live in poverty and receive little compensation for their hard work—while high-ranking Olympic committee executives and organizers are compensated generously, due to the billions of dollars in profit from sponsorships, donations, and broadcasting rights.²⁹⁶

Similarly, studies have shown that the National Collegiate Athletic Association (NCAA) has profited from the labor of poor Black students, many of whom live below the federal poverty line—and the United States Supreme Court has supported this through caselaw.²⁹⁷ The NCAA prohibits college athletes from being compensated for their labor.²⁹⁸ Many public universities, which are government funded, generate millions of dollars in revenue due to football and basketball teams that are part of the NCAA.²⁹⁹ Black students constitute nearly 60 percent of the rosters of football and basketball teams, and just 11 percent of the rosters of all other sports.³⁰⁰ Black American athletes who risk their health and safety to play these sports while in school do not receive any compensation.³⁰¹ Much of the money generated by football and basketball athletes is spent on salaries for coaches and administrators and on the construction of lavish facilities.³⁰²

Black Americans began to play baseball in the late 1800s and historically joined professional teams with white players.³⁰³ However, due to racism and Jim Crow laws, they were forced to leave these teams by 1900.³⁰⁴ In 1920, an organized league structure, called the National Negro League, was formed by Black businesspeople and athletes in Kansas City, Missouri.³⁰⁵ The leagues were professional and became central to economic development in many Black communities.³⁰⁶ In 1945, the Jim Crow policies of baseball changed when Branch

²⁹⁵ Germain, [Simone Biles, Sha'Carri Richardson, and How the Olympics Failed Black Women](#) (Aug. 13, 2021), ACLU (as of March 21, 2022).

²⁹⁶ Stewart, *supra*; Berlin, [The Olympic Color Barrier](#) (Aug. 21, 201), Politico (as of March 21, 2022).

²⁹⁷ Ingraham, [NCAA Rules Allow White Students and Coaches to Profit Off Labor of Black Ones, Study Finds](#) (Sept. 7, 2020), Washington Post (as of March 21, 2022); Drexel News, [Study College Athletes Worth Six Figures Live Below Federal Poverty Line](#) (Sep. 13, 2011), Drexel News (as of March 21, 2022).

²⁹⁸ Ingraham, *supra*.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ Negro Leagues Baseball Museum, [Negro Leagues History](#), Negro Leagues Baseball Museum (as of March 21, 2022).

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

Rickey signed Jackie Robinson of the Negro League's Kansas City Monarchs to a contract that would bring Robinson into the major leagues in 1947.³⁰⁷

Football has a history of racial discrimination in the United States, sanctioned by state and federal governments.³⁰⁸ Recently, the NFL has engaged in racist practices against Black athletes—many of whom suffered brain injuries while playing professional football.³⁰⁹ The NFL used “race-norming”—a racist medical practice where Black players were assumed to have lower cognitive function than white players as part of a dementia test to determine payouts in a brain injury settlement.³¹⁰ As of January 2022, there was only one Black head coach in the NFL.³¹¹

Tennis, like football, was originally a sport for elite white men.³¹² Due to segregation laws, most tennis clubs explicitly or implicitly prohibited Black Americans from participation.³¹³ Public courts were not fairly distributed in Black neighborhoods or accessible to Black players.³¹⁴ Today, prominent Black American women tennis players, like Serena Williams, are more likely to be disciplined, fined, and criticized while playing.³¹⁵

In the early 1950s, the National Basketball Association (NBA) had an unspoken rule that there could not be more than two Black players on a team, later that number was expanded to three.³¹⁶ More recently, in 2020, Black American women in the Women’s National Basketball Association went on strike to protest anti-Black police violence—building upon a long history of protests for racial justice.³¹⁷ Following the lead of Black women, Black male professional basketball players in the NBA protested anti-Black police violence in a historic strike—refusing to play games and talk to journalists.³¹⁸ Due to their efforts, sports arenas in areas with large Black American communities were turned into voting locations for the 2020 general election to allow for safe, in-person voting—work that should have been done by federal and state governments.³¹⁹ (See Chapter 4

³⁰⁷ Library of Congress, [Breaking the Color Line: 1940 to 1946](#), Library of Congress (as of March 21, 2022).

³⁰⁸ Associated Press, [The NFL Will Stop Assuming Racial Differences When Assessing Brain Injuries](#) (June 2, 2021), NPR (as of March 22, 2022).

³⁰⁹ Ibid.

³¹⁰ Cineas, [“Race Norming” and the Long Legacy of Medical Racism Explained](#) (July 9, 2021), Vox (as of March 22, 2021).

³¹¹ Mosley, [“Is the NFL Black Head Coach In a 'No-Win' Situation?”](#) (Feb. 1, 2022), SI.com (as off April 11, 2022)

³¹² Yolanda Hester, [Before the Open Era: African Americans in Tennis during the 50s and 60s](#), UCLA (as of March 21, 2022).

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Prasad, [Serena Williams and the Trope of the ‘Angry Black Woman’](#) (2018), BBC News (as of March 21, 2022).

³¹⁶ The Undeclared, [Basketball’s Battle for Racial Equality](#) (Sep. 18, 2018), Andscape (as of March 21, 2022).

³¹⁷ Ibid.

³¹⁸ Mahoney, [NBA to Resume After Historic Anti-Racism Protest Puts Post-Season on Pause](#), Global News (as of March 22, 2022).

³¹⁹ Ibid.

on political disenfranchisement.) There is consequently a history of racism in basketball, like in many other sports, which has harmed Black American athletes.³²⁰

There have long been inequalities between men's and women's sports—however, for Black American women, this is compounded by race.³²¹ One of the first women's track teams in the United States began at the all-Black Tuskegee Institute in 1929.³²² Three years later, two Black American women, Louise Stokes and Tidye Pickett, qualified for the 1932 Olympics in track and field but were not allowed to participate due to their race.³²³ Title IX of the Education Amendments of 1972 (Title IX) changed the landscape for women's sports. It requires any program or activity that receives federal financial assistance, including sports, to provide equal opportunities to all genders.³²⁴ Title IX resulted in a significant increase in women athletes, however, the percentage of women in coaching positions greatly declined.³²⁵ Today, Black women represent 88 percent of professional women's basketball, but there are no Black women in head coaching positions.³²⁶ Despite Title IX's legal guarantee of equal opportunity, Black parents have reported more sports programs for boys than girls in their communities.³²⁷ Fifty-three percent of white girls are most likely to be involved with sports at age six or younger, while only 29 percent of Black girls are.³²⁸ Due to the lack of Title IX enforcement that centers Black American women, they have suffered the consequences of both racism and sexism in the sports industry—including underrepresentation in sports leadership and limited access to sports in general. The history of sports in the United States is one of racial discrimination, segregation, and the exploitation of Black male and female athletes—a history in which governments have played a significant role.

A. California

Many Black football players experienced discrimination in California's colleges and universities. The University of Southern California did not permit black athletes to play until the 1920s.³²⁹ While the University

³²⁰ Undefeated, *supra*.

³²¹ Kelley, [WNBA Star Says Women's Basketball Isn't Popular Because Players are Predominantly Black, LGBTQ+](#) (Oct. 19, 2020), The Hill (as of March 21, 2022).

³²² History, [Trailblazing Black Women in Sports](#) (Feb. 4, 2010), History (as of March 21, 2022).

³²³ *Ibid*.

³²⁴ Women's Sports Foundation, [Title IX](#), Women's Sports Foundation **Error! Hyperlink reference not valid.** (as of April 7, 2022).

³²⁵ Hutchins, et. al., [Where are all the women coaches?](#) (Dec. 31, 2019) The New York Times (as of April 7, 2022).

³²⁶ Spruill, [The WNBA Has No Black Women in Head Coaching Positions and That's a Problem](#) (Jan. 8, 2020), SB Nation (as of March 21, 2022).

³²⁷ Women's Sports Foundation, [The Women's Sports Foundation Report Brief: Her Life Depends On It III & Girls and Women of Color](#) (Jan. 21, 2016), Women's Sports Foundation **Error! Hyperlink reference not valid.** (as of March 22, 2022).

³²⁸ Women's Sports Foundation, *supra*.

³²⁹ Demas, *Integrating the Gridiron: Black Civil Rights and American College Football* (2011), p. 8.

of California, Los Angeles did allow Black players to play in starting positions on its football team, the Los Angeles community was not as accepting of Black athletes.³³⁰ At San Jose State College, Black athletes reportedly faced discrimination in athletics, such as overbearing coaches, a lack of academic assistance, exploitative demands made on Black participants, prejudice outside of the sport, and hostility in the campus Greek system and the local community.³³¹ Professor Harry Edwards, a sociologist who helped organize Black athletes against discrimination was called “unfit to teach” by California governor and later president, Ronald Reagan.³³²

Black athletes have often protested discrimination in sports in California. Take for instance Colin Kaepernick, a Black Californian who was the quarterback for the San Francisco 49ers.³³³ In 2016, he knelt during the National Anthem in protest of anti-Black police violence.³³⁴ Subsequently, the President of the United States, said that he should, “find a country that works better for him.”³³⁵ The National Football League then stated that it would fine teams whose players did not stand for the National Anthem.³³⁶ Kaepernick was ultimately told he would be released from his contract by the general manager and coach of the 49ers.³³⁷ Since then, all NFL teams have refused to sign Kaepernick on as a player, despite his clear record of success and athleticism.³³⁸

The University of California system has also reproduced racial inequities in its revenue-generating athletic programs.³³⁹ It has some of the lowest graduation rates for Black male student athletes, who comprise a large majority of the male student athlete population, in comparison to overall graduation rates.³⁴⁰ As of 2018, the Black male student-athlete graduation rate for the University of California, Berkeley was 39 percent, much lower than the 91 percent graduation rate for students overall.³⁴¹ The graduation rate for Black male student-athletes at the University of California, Los Angeles was 57 percent, while the overall graduation rate was 91

³³⁰ Demas, *supra*, at pp. 29-33.

³³¹ Demas, *supra*, at p. 106.

³³² *Ibid.*

³³³ White, [Kap's NFL Absence Still Notable Despite Goodell's Claims](#) (Sep. 7, 2020), NBC Sports (as of March 21, 2022).

³³⁴ *Ibid.*

³³⁵ Levin, [Trump Also Told Colin Kaepernick That He Should Leave the Country](#) (July 15, 2019), Slate (as of March 21, 2022).

³³⁶ Levin, *supra*.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ Harper, [Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports](#) (2018), USC Race and Equity Center (as of March 21, 2022).

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

percent.³⁴² Black male student-athletes rarely accrue the benefits of higher education, beyond athletics.³⁴³ Black athletes report that coaches prioritize athletic accomplishment over academic engagement and discouraged participation in activities beyond their sport.³⁴⁴ Though many Black athletes aspire to become professional players, the NFL and National Basketball Association draft fewer than two percent of student athletes each year.³⁴⁵ The University of California system pressures Black student-athletes to labor for its highly profitable athletic programs while they receive no compensation, risk damage to their health, and divert their focus from their education—all for the unlikely chance at being drafted into professional sports.

VII. Restraints on Black Leisure and Recreation

Across the United States, state and local governments have prohibited Black Americans from participating in leisure.³⁴⁶ Public parks, recreation centers, and pools³⁴⁷ and the passageways to access them³⁴⁸ are located away from Black communities, restricted, or closed. Further, various government statutes, including anti-cruising, anti-gathering, and curfew laws, have often targeted Black Americans' ability to enjoy leisure time.³⁴⁹

A. California

The State of California engaged in racist restrictions on Black business owners through zoning ordinances, licensing laws, fire and safety codes, and anti-nuisance provisions, which discriminated against Black business owners and their Black customers. Racist state actions against predominantly Black leisure sites, included denying liquor or food licenses and heightened police surveillance at Black-owned bars and restaurants.³⁵⁰ In *Shaw v. California Dept of Alcoholic Beverage Control*, Black tavern owners brought a civil rights action against the California Department of Alcoholic Beverage Control and the City of San Jose in 1986.³⁵¹ The Black tavern owners sued for violation of their civil rights based upon improper revocation of their liquor license and discriminatory enforcement of the law.³⁵² The court agreed that the loss of the bar's liquor license

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Austin, "Not Just for the Fun of It!" *Governmental Restraints on Black Leisure, Social Inequality, and Privatization of Public Space* (1998), Faculty Scholarship at Penn Law, 667-714.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Austin, *supra*, at p. 669.

³⁵¹ Austin, *supra*, at p. 675.

³⁵² Ibid.

was due to racially discriminatory harassment by the San Jose police force.³⁵³

Cities in California also used eminent domain to seize the land of Black business owners who sought to establish leisure enterprises. The Manhattan Beach authorities in Southern California, prohibited the growth and development of Black-owned leisure businesses, such as Bruce’s Beach.³⁵⁴ In 1912, Ms. Willa “Willie” Bruce purchased two lots near Manhattan Beach from white real estate brokers for \$1,225. She developed the land with a cottage, food establishment, and store—called Bruce’s Lodge.³⁵⁵ The lodge was popular with Black Los Angeles residents.³⁵⁶ By 1926, six other Black families had bought property near the lodge for vacation homes.³⁵⁷ This caused many white neighbors and beachgoers to complain, harass, and attack the Black beachgoers, their families, and their establishments.³⁵⁸ The Manhattan Beach Board of Trustees and a white Manhattan Beach resident threatened to report Bruce’s Beach for allegedly selling liquor during the prohibition, so that all the people on Bruce’s property could be arrested.³⁵⁹

In 1924, Manhattan Beach authorities enacted new laws with fines and penalties for violations of parking and zoning laws to discourage Black visitors.³⁶⁰ For example, “10 minute only” parking signage was put up to prevent visitors from staying because parking would be extremely limited.³⁶¹ Ordinance 273 prevented “bathhouses” in same area as Bruce’s, so there could be no further bathhouse developments or expansions at the beach.³⁶² In 1924, Manhattan Beach authorities used eminent domain to condemn the beach as a public park under the Park and Playground Act of 1909.³⁶³ This action was petitioned for by white citizens in the area, and backed by Ku Klux Klan members, including those who befriended Board of Trustee members.³⁶⁴ Today, the two parcels of land that were part of Bruce’s Beach are worth an estimated \$75 million.³⁶⁵ In 2021, California Governor Gavin Newsom signed Senate Bill 796, authorizing the county to transfer the land back to the Bruce

³⁵³ Austin, *supra*.

³⁵⁴ Jefferson, *Living the California Dream: African American Leisure Sites During Jim Crow Era* (2020) pp. 34-35.

³⁵⁵ *Ibid*.

³⁵⁶ *Ibid*.

³⁵⁷ *Ibid*.

³⁵⁸ *Ibid*.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid*.

³⁶² Jefferson, *supra*, at p. 40.

³⁶³ *Ibid*.

³⁶⁴ Jefferson, *supra*, at p. 42.

³⁶⁵ NPR, [A Black Family Got Their Beach Back—and Inspired Others to Fight Against Land Theft](#) (Oct. 10, 2021), NPR (as of March 21, 2022).

family after nearly 100 years.³⁶⁶ The Los Angeles County Board of Supervisors voted unanimously to begin the process of transferring the land.³⁶⁷

Local governments in the State of California restricted access to public pools for Black Californians. The Brookside Plunge was a public pool in Pasadena, which opened on July 4, 1914.³⁶⁸ It was initially only open to nonwhite individuals on Wednesday afternoons and evenings.³⁶⁹ Eventually, it only opened for a shorter time—on Tuesdays between 2pm and 5pm—in retaliation to a legal challenge from Black taxpayers in the area.³⁷⁰ The Los Angeles branch of the National Association for the Advancement of Colored People sued the city following the denial of six Black men to the pool.³⁷¹ Though they won, Pasadena closed the pool until the NAACP secured an injunction forcing the pool to reopen in 1947 with no racial restrictions.³⁷² The pool site suffered from a lack of financial support and closed in 1983, leading a local swim coach and several donors to form the AAF Rose Bowl Aquatic Center.³⁷³ This center was supposed to be open to all, but discouraged access for Black people due to the “country club” atmosphere.³⁷⁴ The Pasadena city council ignored this issue and allowed the formation of the center with public funds.³⁷⁵

City and county police departments in California engaged in targeted harassment of Black owned businesses that provided leisure opportunities to Black Californians. In 1927, the Parkridge Country Club was sold to a group of Black entrepreneurs.³⁷⁶ After the Ku Klux Klan burned a cross on the front lawn and white club members sued the previous owner for the sale, the Black entrepreneurs were forced to withdraw their bid.³⁷⁷

VIII. Conclusion

Black Americans have suffered from discrimination in almost every type of cultural and artistic pursuit, including arts, sports, leisure, fashion, literature, media, and music. The United States has historically denied Black Americans to own their intellectual and artistic property, engage in leisure activities without restriction, and receive fair compensation for their athletic talent. State and federal governments have endorsed blackface

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Richard Winton, [Suit Accusing Coach of Racism Stirs Bitter Memories of Pool's Past](#) (April 16, 2021), Los Angeles Times (as of March 21, 2022).

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ UCLA Library Digital Collections, [Parkridge Country Club, Corona, 1925-1928](#), UCLA Library Digital Collections (as of March 21, 2022).

³⁷⁷ Ibid.

minstrelsy, promoted racist cinematic depictions of Black Americans, allowed segregation in arts and culture, denied patents to Black inventors, and punished Black Americans for protesting racial injustice. Federal and state governments failed to protect Black artists, culture-makers, and media-makers from discrimination while simultaneously promoting discriminatory narratives.

Today, Black American artists, culture-makers, presenters, and entrepreneurs must contend with the legacy of enslavement, as they continue to be deprived of rightful profits from their intellectual, artistic, athletic, and creative labors. Black Americans continue to face racial discrimination, difficulties in obtaining patents and copyrights, and at times, are not even compensated at all for their creative and physical labors. Black Americans are weighed down by the legacy of enslavement, echoing the impacts felt by their ancestors, even as they attempt to pursue creative endeavors that empower and uplift Black communities.

DRAFT

Chapter 10. Stolen Labor and Hindered Opportunity

I. Introduction

During enslavement, American government at all levels enabled and benefitted from the direct theft of Black Americans' labor. Since then, federal, state, and local government actions directly segregated and discriminated against Black Americans and also paved the way for private discrimination in labor. Federal, state, and local laws and policies, including those of California, have expressly limited how Black Americans work and what work they do. Federal laws have also protected white workers while denying the same protections to Black workers, setting up and allowing private discrimination. Government and private discrimination have contributed to the inability of Black Americans to build wealth over generations. Although progress has been made, Black workers continue to face serious discrimination today. The badges and incidents of slavery have carried forward. The devaluation of Black Americans, their abilities, and their labor did not end. It simply took on different forms.

Around the time of the Civil War, state and local governments passed laws known as the Black Codes and "Jim Crow" laws. While these laws touched all aspects of life, one of their main goals was to control how Black Americans earned a living in order to maintain Black Americans as a servant class for white Americans. These laws limited Black Americans' job opportunities and salaries and their ability to provide for their families.

The federal government itself directly discriminated against Black workers. Black workers were routinely excluded from federal employment until 1861 and, in 1913, President Woodrow Wilson allowed for the federal workforce be segregated. The segregated federal government demoted and relegated Black workers to lower paid jobs, and, for instance, forced Black workers to use separate toilets in the Treasury and Interior Departments. Although the military offered an opportunity for upward mobility for Black Americans, its ranks remained segregated until 1960, with lower pay and rank for Black service members. Even as the overall proportion of Black service members has grown, military leadership has remained overwhelmingly white, with only two Black officials out of 41 total holding four-star rank in 2020.

Although the federal government throughout history has passed laws, implemented policies, and made progress in protecting workers, its efforts were often limited in time and impact, and often left out Black workers due to compromises with racist southern legislators. After the Civil War, the Freedmen's Bureau provided for the welfare of previously enslaved Black Americans, but it did so in a manner that reinforced racist notions, and lasted only seven years before being dismantled by Congress under pressure from white southerners. The federal government failed to prevent white Americans from using violence and terror to limit Black Americans' ability to earn a living, and certified unions that excluded Black workers. Federal labor protections under the New Deal, which aimed to help American workers' economic prospects, excluded or harmed Black Americans.

The Civil Rights Act of 1964 included Title VII, which largely banned discrimination on the basis of race in employment. However, it did not remedy the discriminatory workplace structures that have accumulated for hundreds of years. In 1977, the Supreme Court limited these federal protections to only instances where an employee can prove that their employer intended to discriminate against them, an extremely high standard. Federal government affirmative action plans created in the 1970s did lead to an increase in the rate of minority employment in businesses that contracted with the federal government in those years, , but an organized backlash has narrowed the scope and impact of these programs since in the early 1980s. Despite some progress

in preventing labor discrimination against Black workers, the federal government has made little to no effort to address the harms of past government action.

Research has produced evidence that, as a result of the legacy of enslavement and subsequent and ongoing discrimination, white workers are paid more than Black workers, and Black and white workers are concentrated in different types of jobs.¹ As of 2019, median Black wages were equivalent to only 75.6 percent of white wages, falling from a height of 79.2 percent in 2000. Researchers estimate that between one-quarter to one-third of the wage gap between Black and white workers is due to racial discrimination.² Without a safety net of savings, Black Americans can be more vulnerable to upheavals in the labor market and less able to advocate for higher wages or other benefits. As of 2020, 19.5 percent of Black Americans were living in poverty compared to 8.2 percent of non-Hispanic white Americans.³ Out of the 2021 S&P 500 and Fortune 500 companies, only six of the chief executive officers of those companies were Black Americans.⁴ In 2020, Black Americans held only 8.7 percent of the board seats in Fortune 500 companies.⁵

Similar patterns of government neglect and discrimination exist in California. Black workers did not hold many government jobs in the state until World War II. When Bay Area Rapid Transit was built in 1967, no skilled black workers were hired because the National Labor Relations Board (NLRB)-certified unions did not admit Black members. BART, though a government agency, refused to use its power to insist on non-discrimination policies by the unions. In 1996, California changed its constitution to ban the use of affirmative action in government employment and education with Proposition 209. Persistent discrimination and limited affirmative action have prevented Black Americans from receiving the same wages and career opportunities as white Americans received with government support.

This chapter recounts this long history and the continuing impact of discrimination in labor and employment. Section III provides a brief summary of enslavement, a subject explored in greater detail in Chapter 2. Section IV discusses discrimination in the laws enacted and government programs carried out from the Civil War forward as well as government support of private discrimination in labor and employment. Section IV also includes discussion of the advances and limitations of civil rights laws. Section V outlines the history of discrimination in government employment. The effects still seen today from centuries of discrimination are summarized in Section VI.

II. Enslavement

The story of Black Americans in the United States begins with stolen labor. The purpose of enslavement was to exploit the fruits of Black labor for the benefit of mostly white Americans. For a full discussion of enslavement, please see Chapter 2. The labor of enslaved Black Americans built the infrastructure of the nation, filled the

¹ Reskin, *The Race Discrimination System* (2012) 38 Ann. Rev. Sociology 17, 21.

² See, e.g., Charles & Guryan, *Studying Discrimination: Fundamental Challenges and Recent Progress* (2011) 3 Ann. Rev. Economics 479; Fryer et al., *Racial Disparities in Job Finding and Offered Wages* (2013) 56 J.L. & Econ. 633, 670.

³ Shrider et al., U.S. Census Bur., *Income and Poverty in the United States: 2020* (September 2021) p. 13 (as of Apr. 7, 2022).

⁴ Kurt, *Corporate Leadership by Race*, Investopedia (Feb. 28, 2022) (as of Apr. 7, 2022).

⁵ Press Release, *Fortune 500 Boards Still Decades Away from Representation Parallel to the Presence of Women and Minorities in the US Population*, Deloitte (June 8, 2021) (as of Apr. 7, 2022).

nation's coffers, and produced its main agricultural products for domestic consumption and export.⁶

Federal and state law treated Black Americans themselves as commodities to be sold by enslavers.⁷ This system exploited the labor and love of Black mothers to recreate and grow the enslaved labor force.⁸ Between 1619 and 1808, 300,000 men, women, and children were trafficked to what would become the United States.⁹ By 1860, approximately 3.9 million enslaved Black Americans lived in the United States.¹⁰

Over the 200-plus years of slavery's existence in this country, enslavers extracted an estimated \$14 trillion of labor from the human beings they enslaved.¹¹ One recent study estimated that "enslaved workers were responsible for somewhere between 18.7 and 24.3 percent of the increase in commodity output per capita nationally between 1839 and 1859.¹² Through various forms of taxes and tariffs—often structured to protect the interests of enslavers—federal, state, and local governments all reaped financial benefit from this condoned economic activity.¹³

Enslavement effectively led to separate labor markets for Black and white Americans.¹⁴ White workers had access to a larger and more desirable selection of jobs, while free Black workers were relegated to menial labor.¹⁵ Frederick Douglass observed, "Finding my trade of no immediate benefit, I threw off my calking habiliments, and prepared myself to do any kind of work I could get to do."¹⁶

Although there were fewer legal limitations on Black Americans in the North, white workers were more motivated to reduce competition from Black Americans.¹⁷ Less threatened by free Black workers in the South, white employers were more likely to employ Black workers in skilled jobs than free Black wage earners in the

⁶ Trotter, *Workers on Arrival: Black Labor and the Making of America* (2019) p. xiv; see also Cal. Task Force to Study and Develop Reparation Proposals for African Americans, [Reparations Task Force Meeting – October 2021](#) (October 13, 2021), testimony of Jacqueline Jones (as of Apr. 7, 2022), citing Berry, *The Price for their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (2017); Baptist, *The Half has Never Been Told: Slavery and the Making of American Capitalism* (2016); Beckert, *Empire of Cotton: A Global History* (2015); Beckert & Rockman, eds., *Slavery's Capitalism: A New History of American Economic Development* (2018).

⁷ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. xiv; Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

⁸ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones, citing White, *Ar'n't I a Woman? Female Slaves in the Plantation South* (1985); Feinstein, *When Rape was Legal: The Untold History of Sexual Violence during Slavery* (2019); Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (2004).

⁹ Curtin, *The Atlantic Slave Trade: A Census* (1972).

¹⁰ U.S. Census Bur., [1860 Census: Population of the United States](#) (1864) p. vii (as of Apr. 8, 2021).

¹¹ See Solomon et al., Center for Am. Progress, [Systematic Inequality and Economic Opportunity](#) (August 2019) p. 2 (as of Apr. 8, 2022).

¹² Stelzner & Beckert, Wash. Center for Equitable Growth, [The Contribution of Enslaved Workers to Output and Growth in the Antebellum United States](#) (June 24, 2021) p. 2 (as of Apr. 8, 2022).

¹³ See Einhorn, *American Taxation, American Slavery* (2006); Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones at p. 244; Campbell, [Dispelling the Fog about Direct Taxation](#) (2012) 1 *British J. Am. Legal Studies* 109, 117; Paul Finkelman, [The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation](#) (2015) 42 *Akron L. Rev.* 431, 434; Brian Sawers, *The Poll Tax Before Jim Crow* (2017) 57 *Am. J. Legal Hist.* 166, 166-67.

¹⁴ Jones, *American Work: Four Centuries of Black and White Labor* (1998) pp. 258-59.

¹⁵ *Ibid.*

¹⁶ Douglass, *Narrative of the Life of Frederick Douglass: An American Slave* (1845, 1968 ed.) pp. 117-18.

¹⁷ Jones, *American Work*, *supra*, at fn. 14, p. 260.

North.¹⁸ In 1850, the number of free Black men employed as artisans was between 12 and 18 percent in Washington, D.C., Baltimore, and Louisville, but the figure was over 60 percent in New Orleans and Charleston.¹⁹

A. California

As discussed in Chapter 2, enslavement existed in California into the mid-1860s.²⁰ Enslavers brought enslaved Black Americans with them when they moved west.²¹ Additionally, California passed its own fugitive slave law in 1852 and, for the three years it was in force, it was harsher than the federal fugitive slave law and prevented courts from recognizing the freedom of those fleeing to California.²² California at the time also strongly discouraged free Black Americans from entering its territories.²³ The relatively few free Black Americans who resided in California worked as fur traders, scouts, cowboys, and miners.²⁴

California's lack of government oversight allowed slavery to take hold in certain regions, including where enslavers brought Black Americans to mine for gold.²⁵ By 1852, 300 enslaved persons were working to find gold, with other enslaved persons forced to work in other capacities.²⁶ The California Fugitive Slave Act, coupled with a law prohibiting the taking of testimony from a Black person against a white person, posed a threat to the lives of both free and enslaved Black residents.²⁷

One enslaver from Mississippi, Charles Perkins, brought three enslaved men, Robert Perkins, Carter Perkins, and Sandy Jones to California in 1849.²⁸ Perkins later left the men behind with a friend who released them in 1851.²⁹ The three freed men then set up a freight hauling business that earned them over \$3,000 in personal property, worth around \$98,000 in 2020 dollars, but in 1852, the California Supreme Court ordered the three back to slavery in Mississippi.³⁰

III. Discriminatory Laws and Government Support of Private Discrimination

Following the Civil War, Congress created programs to benefit Black Americans and passed statutes to protect their rights. But fierce opposition from white government officials undermined these programs and led to their

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Smith, [California's Last Slave Case](#), N.Y. Times (Mar. 5, 2014).

²¹ Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* (2011) p. 231; De Graaf & Taylor, *Introduction: African Americans in California History, California in African American History* in *Seeking El Dorado: African Americans in California* (De Graaf, Mulroy, & Taylor, eds. 2001) p. 9; Hudson, *West of Jim Crow: The Fight Against California's Color Line* (2020) p. 23.

²² [Stats. 1852, ch. 33, § 1](#), pp. 67-68 (as of Apr. 8, 2021); Wills, [Slavery in a Free State: The Case of California](#), JSTOR Daily (Feb. 25, 2021) (as of Apr. 8, 2022).

²³ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 233.

²⁴ *Ibid.*

²⁵ Taylor, [African American Men in the American West, 1528-1990](#) (2000) 569 *African Am. Male in Am. Life & Thought* 102, 105.

²⁶ *Ibid.*

²⁷ Wills, [Slavery in a Free State](#), *supra*, at fn. 22; Hudson, *West of Jim Crow*, *supra*, at fn. 21, p. 23.

²⁸ Smith, [Pacific Bound: California's 1852 Fugitive Slave Law](#) (Jan. 6, 2014) *Black Past* (as of Apr. 8, 2022).

²⁹ *Ibid.*

³⁰ *Ibid.*

premature end—while the Supreme Court undermined statutory protections, allowing state and local legislatures to impose segregation.

Throughout American history and as discussed in the preceding chapters, local and state governments with the tacit approval of the federal government passed many laws restricting Black conduct. The Black Codes and Jim Crow laws aimed to consolidate and maintain economic and political power generally in the hands of white Americans by controlling the type of work available to Black Americans, and how that work has been performed.³¹ This governmental discrimination against Black Americans supported private employment discrimination.³² Until the Great Migration, as discussed in Chapter 1 and 5, the majority of Black Americans lived in the South, and the majority of southern Black families did not own land and were exploited by white landowners in the sharecropping system.³³ Black women were mostly relegated to domestic service jobs until well into the 20th century.³⁴

When the federal government aimed to improve labor conditions in the 1930s with the New Deal, federal policies and programs often failed to benefit, or even harmed Black Americans, often by design. New Deal programs purposefully linked benefits like healthcare, paid vacations, pensions, tuition benefits, social security, and unemployment benefits to employment with large corporations, which at the time, generally did not hire Black workers.³⁵ Southern senators from states that passed laws to prevent Black workers from voting were instrumental in structuring the New Deal to exclude industries in which most Black workers were employed, like agriculture, personal services, and casual labor.³⁶

When the federal government tried to remedy the racism faced by Black workers, the actions often lacked power to enact real change and often lasted only a short time.

A. Freedmen's Bureau: Short-Lived Paternalism

In the wake of the Civil War, the federal government created programs to aid Black Americans and statutes to protect their rights. However, both failed to live up to their promise to give Black Americans equal access to economic and labor opportunities or remedy the harms of slavery.

Immediately before the end of the Civil War, Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands to provide for the welfare of formerly enslaved Black Americans, including through “issues of provisions, clothing, and fuel, as [necessary] for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children,” according to the statute.³⁷ Commonly known as the Freedmen's Bureau, it had the authority to supervise labor relations in the South, with the mandate

³¹ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017) pp. 18-22.

³² *Ibid.*

³³ See Jones, *The Dispossessed: America's Underclasses from the Civil War to the Present* (1992).

³⁴ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 233; Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (1985) pp. 131-62.

³⁵ See, e.g., Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act* (2011) 72 Ohio State L.J. 95.

³⁶ *Ibid.*; Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (2013) p. 163; Reich, *A Working People: A History of African American Workers Since Emancipation* (2013) p. 91; Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 101.

³⁷ [Freedmen's Bureau Bill](#) (Mar. 3, 1865) Chap. XC, § 2, 13 Stat. 507.

to provide education, medical care, and legal protections for formerly enslaved Black Americans, along with the authority to rent out and eventually sell allotments of abandoned or confiscated land to free Black Americans.³⁸

The original goal of the Freedmen's Bureau Act was the more radical notion of allowing Black Americans the means to become self-sufficient.³⁹ In the closing days of the Civil War, on January 16, 1865, as Union General William Tecumseh Sherman marched through Georgia, he issued Special Field Order No. 15 "providing that each negro might have forty acres at a low price on long credit."⁴⁰ Many free Black Americans and northern Republicans believed that land reform in the South—granting formerly enslaved Black Americans access to their own land—is the true way that formerly enslaved people can be free from their enslavers.⁴¹ The resulting independent Black farmers would provide a power base for a new social and political order in the postwar South.⁴²

This new vision of social relations in the South was opposed by southerners and northerners who opposed enslavement but did not believe in full equality for Black Americans.⁴³ A large number of Black landowners would threaten plantations, and the southern economy and social system.⁴⁴ White capitalists in the North and South believed that Black freedom should mean Black workers continuing to work on a plantation, although they would now be paid.⁴⁵ They did not believe that Black Americans should be able to support themselves independently.⁴⁶ After the assassination of Abraham Lincoln, Andrew Johnson became president—and President Johnson supported this view, proclaiming, "This is a country for white men, and by God, as long as I am president, it shall be a government for white men."⁴⁷

Although the Freedmen's Bureau tried to assert and protect the rights of the formerly enslaved, the Bureau under President Johnson perpetuated racist stereotypes, paternalistic attitudes, and continued to limit Black Americans' economic and social power. Bureau agents often viewed formerly enslaved Black Americans as children, unprepared for freedom, and needing to be taught the importance of work and wages.⁴⁸ The Freedmen's Bureau abandoned the possibility of land reform in the South, and focused on labor relations between Black and white southerners instead.⁴⁹

Bureau agents did protect Black workers' rights by invalidating enslavement-like labor contracts and enforced

³⁸ Reich, *A Working People*, *supra*, at fn. 36, p. 13.

³⁹ See Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (2011) pp. 68-69; Gates, Jr., *The Truth Behind "40 Acres and a Mule"* African Am. Hist. Blog (2013) (as of Apr. 10, 2022); see also Reich, *A Working People*, *supra* fn. ___, p. 11 (discussing freedmen's view of land ownership as key to economic autonomy).

⁴⁰ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 16, citing Fleming, *"Forty Acres and a Mule"* (1906) 182 North Am. Rev. 721, 729.

⁴¹ Reich, *A Working People*, *supra*, at fn. 36, p. 12.

⁴² *Ibid.*

⁴³ *Id.* at pp. 13-14.

⁴⁴ *Id.* at p. 12.

⁴⁵ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 19.

⁴⁶ *Ibid.*

⁴⁷ Johnson, *The Papers of Andrew Johnson*, vol. 10: February-July 1866 (Bergeron, ed. 1992), pp. 174-175.

⁴⁸ Reich, *A Working People*, *supra*, at fn. 36, p. 15.

⁴⁹ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 18.

contracts or settled wage disputes at the end of the harvest season.⁵⁰ However, the Bureau also harmed Black Americans by acting on the racist belief that Black Americans avoided work, and it was the Bureau's responsibility to reform such laziness.⁵¹ One commander noted that emancipation only meant "liberty to work, work or starve."⁵² General O.O. Howard, director of the Freedmen's Bureau, stated that Black Americans must enter into labor contracts regardless of the contract terms because any Black man "who can work has no right to support by the government."⁵³ To this end, Bureau agents withheld social services and food in order to force Black Americans into labor contracts,⁵⁴ prosecuted Black workers who broke labor contracts, and enforced vagrancy laws to prevent Black Americans from moving away.⁵⁵ The Bureau allowed plantation owners to deduct unfairly large sums for supplies and rations, until many workers would receive little wages at all.⁵⁶ The wage guidelines for Black workers provided less pay for Black women regardless of their productive capacity.⁵⁷

Nonetheless, the Freedmen's Bureau met severe resistance from southern politicians. In 1866, President Andrew Johnson vetoed the bill extending its existence past one year, and it was only enacted once Congress overrode the veto.⁵⁸ Six years later, in 1872, Congress bowed to pressure from white southerners and dismantled the Bureau.⁵⁹

B. Black Codes and Other Laws Controlled Black Workers

Immediately after the Civil War, "Black Codes," passed by state and local governments in both the North and the South, governed the conduct of free Black Americans. Free Black Americans posed a threat to the racial hierarchy of slavery, and Black Codes were a range of laws to maintain the lower status of Black Americans through restrictions on movement and activity, often in order to compel them to work in menial jobs for low pay.⁶⁰

The Thirteenth Amendment to the Constitution outlawed the institution of slavery, but it allowed involuntary servitude as a punishment for a crime. Mostly southern state and local governments used this loophole to develop a system of laws, often built around vagrancy laws, that turned Black Americans into criminals, and then allowed the government to turn those labeled "criminals" into de facto enslaved persons, forced to labor without pay or freedom of movement.⁶¹ For an in depth discussion of convict leasing, please see Chapter 11.

Vagrancy laws, passed by numerous states, criminalized unemployment. An 1865 Mississippi law required Black Americans to enter into a labor contract with white employers by January 1 of every year or risk being in

⁵⁰ Reich, *A Working People*, *supra*, at fn. 36, p. 14.

⁵¹ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

⁵² Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 56.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Reich, *A Working People*, *supra*, at fn. 36, p. 15.

⁵⁶ Jones, *Labor of Love*, *supra*, at fn. 34, pp. 54-55.

⁵⁷ *Id.* at p. 62.

⁵⁸ History.com, [Freedmen's Bureau](#) (Jun. 1, 2010, updated Oct. 3, 2018).

⁵⁹ *Ibid.*

⁶⁰ Baradaran, *The Color of Money*, *supra*, at fn. 31, pp. 18-22.

⁶¹ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2009) pp. 1, 53.

violation.⁶² The punishment for violation was a criminal conviction allowing the state or locality to force the Black American to work without pay.⁶³ Means of compelling the labor of Black Americans persisted even after some forced labor provisions were repealed. Other states “used open-ended fraud and false-pretenses laws to punish [workers] who had received advances and then breached contracts without repayment.”⁶⁴

Some jurisdictions used Black Codes to limit opportunities available to Black Americans. Some laws prohibited employers from hiring workers who were already under contract, and individuals who quit jobs could be arrested and returned to their employers.⁶⁵ South Carolina enacted a statute in 1869 that criminalized simple breaches of labor contracts.⁶⁶ Probate courts could order that Black children be “apprenticed” to their former enslavers.⁶⁷ For an in-depth discussion of apprenticeship, please see Chapter 8. In South Carolina, Black Americans were required to apply for a permit to do work that was not agriculture.⁶⁸ These codes often reinforced enslavement, even after it had been outlawed.

Later, as the Great Migration began, states also enacted laws that discouraged Black Americans from migrating to places elsewhere in the country that offered better work opportunities with improved conditions and higher pay. After the Civil War, interstate labor recruiters known as emigrant agents helped Black workers leave the South towards better jobs in the North.⁶⁹ The Southern states lost large numbers of workers and even when workers did not move, the possibility of leaving improved Black workers’ bargaining power.⁷⁰ The Southern states responded by passing laws that required emigrant agents to pay high license taxes.⁷¹ The Supreme Court in 1900 ruled that one such law was constitutional, and allowed Southern states to hinder the ability of poor and rural Black laborers to move towards better jobs elsewhere.⁷²

C. The Supreme Court Announces “Separate but Equal”

In 1866, Congress overrode President Johnson’s veto to pass the Civil Rights Act of 1866, the first federal legislation banning discrimination on the basis of race.⁷³ As discussed in other chapters, the Civil Rights Act of 1866 was aimed at ensuring that Black Americans had the same legal rights as white Americans. However,

⁶² *Id.* at p. 53.

⁶³ *Ibid.*

⁶⁴ Schmidt, [Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The “Peonage Cases”](#) (1982) 82 Colum. L. Rev. 646, 651.

⁶⁵ *Id.* at p. 650; Reich, A Working People, *supra*, at fn. 36, p. 19.

⁶⁶ Schmidt, [Principle and Prejudice](#), *supra*, at fn. 64, p. 651.

⁶⁷ *Id.* at p. 650; Reich, A Working People, *supra*, at fn. 36, p. 19.

⁶⁸ Wilkerson, The Warmth of Other Suns, *supra*, at fn. 21, p. 216.

⁶⁹ Bernstein, [The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African Americans](#) (1998) 76 Tex. L. Rev. 781, 781-82.

⁷⁰ *Id.* at pp. 783, 786-87.

⁷¹ *Id.* at 792-800.

⁷² *Williams v. Fears* (1900) 179 U.S. 270; Bernstein, [Post-Civil War Restrictions](#), *supra*, at fn. 69, p. 801.

⁷³ Castel, [The Presidency of Andrew Johnson](#) (1979) p. 71; Franklin, [The Civil Rights Act of 1866 Revisited](#) (1989) 41 Hastings L.J. 1135, 1135-36.

while criminalizing violations committed under color of law, the Act did not provide any civil remedy.⁷⁴

The Civil Rights Act of 1875 allowed individuals to pursue a monetary penalty against businesses and other public accommodations that discriminated against Black Americans.⁷⁵ This protection lasted only eight years, however, before the Supreme Court in 1883 decided in the *Civil Rights Cases* that the Fourteenth Amendment did not apply to private parties.⁷⁶

The decision allowed private employers and other businesses to discriminate openly against Black Americans with no repercussions.⁷⁷ Together with *Plessy v. Ferguson* in 1896, which condoned the doctrine of “separate but equal,” the Supreme Court’s decisions created the ability for both private and public employers to entrench an inferior labor market for Black workers, with lower wages, fewer protections, and limited opportunities for advancement for the next 100 years.⁷⁸

D. Lack of Government Protection from Violence Enabled Private Discrimination

In both the North and the South, federal, state, and local governments neglected their duty to protect Black workers from violence as a tactic to limit their job opportunities. White land owners, employers, vigilante groups, and others used violence and terror, more closely examined in Chapter 3, to deter Black Americans from earning fair wages for their labor and achieving economic success.⁷⁹ For decades following Emancipation, lynchings targeted Black Americans who were newly wielding some political and economic influence.⁸⁰ While private actors often were the perpetrators of these brutal killings, federal, state, and local governments, in failing to prosecute racial violence, accepted its use to limit economic and political opportunities of Black Americans.⁸¹

E. Legal Segregation and Discrimination Buttressed Private Discrimination

During the brief period of Reconstruction following the end of the Civil War until the 1870s, radical Republicans in the federal government passed laws increasing Black Americans’ economic and labor freedom. This included rights to change employers, keep a portion of crops grown through cooperative labor, and change locations.⁸² But this progress was temporary.

After the Union army withdrew from the South, as discussed in Chapters 2, 3, and 4 on enslavement, political disenfranchisement, and racial terror, respectively, southern states passed laws and white Americans used racial

⁷⁴ [Civil Rights Act of 1866](#) (Apr. 9, 1866) Chap. XXXI, 14 Stat. 27; see also Kaczorowski, [Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary, The Review Essay and Comments: Reconstructing Reconstruction](#) (1988-89) 98 Yale L. J. 565, 579-90.

⁷⁵ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 37.

⁷⁶ 109 U.S. 3 (1883).

⁷⁷ See, e.g., Saidel-Goley & Singer, *Things Invisible to See: State Action & Private Property* (2018) 5 Tex. A&M L. Rev. 439, 452; Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases* (1995) 70 Chicago-Kent L. Rev. 1123, 1174-75.

⁷⁸ Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* (2011), p. ___.

⁷⁹ Equal Justice Initiative, [Lynching in America: Confronting the Legacy of Racial Terror](#) (3d ed., 2017), pp. 5, 8.

⁸⁰ *Id.* at pp. 12, 15-17.

⁸¹ *Id.* at pp. 16-17.

⁸² Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 56.

terror and violence to prevent Black Americans from voting. The southern Democrats took back control of state and local governments across much of the South and built a power base in the federal government.⁸³ In the South, state and local governments passed laws that created a legally enforced system of segregation.⁸⁴ The federal government supported this system with a series of Supreme Court decisions culminating with *Plessy v. Ferguson*'s official acceptance of "separate but equal" Jim Crow segregation regimes in 1896.⁸⁵

Segregation affected all aspects of Black Americans' lives, including voting, marriage education, transportation, access to public accommodations, and labor and working conditions.⁸⁶ For example, South Carolina passed a statute that essentially required employers to create two separate work spaces, as it forbid white textile workers from working in the same room or using the same entrances, exits, pay windows, doorways, stairways, or windows at the same time as black workers.⁸⁷ Textile workers in South Carolina could not use the same "water buckets, pails, cups dippers or glasses" as white workers.⁸⁸ Not only did such laws directly regulate the labor of Black Americans, they also made it more expensive to hire Black workers when such additional facilities were required.⁸⁹ In order to be compliant with state law, an employer would need to pay twice for compliant facilities if they hired any Black workers.⁹⁰ Many employers simply refused to hire any Black workers.⁹¹ As a result, most of the jobs available to Black Americans were menial and service jobs.⁹²

State and local governments' refusal to enforce the economic and civil rights of Black Americans in contract and employment disputes allowed white Americans to exploit and discriminate against Black Americans. Black Americans in the South mostly remained in agriculture, in a sharecropping or tenant farming system.⁹³ Sharecropping and tenant farming emerged in the late 1860s and lasted into the 1940s, and tied Black workers to agricultural work rather than skilled labor.⁹⁴ A sharecropping or tenancy arrangement typically involved Black workers and tenants paying rent to a white farmer while living and working on the rented land. The tenant farmers purchased supplies—including seed, fertilizer, and tools—on credit from plantation stores that then attached significant markups to the supplies and charged high interest rates, often locking the tenant farmers into a permanent state of debt.⁹⁵ Tenants were required to pay off all debts before leaving the farm, and landlords enforced these requirements with threats of violence.⁹⁶ For decades, federal authorities did little to

⁸³ *Ibid.*

⁸⁴ Reich, *A Working People*, *supra*, at fn. 36, p. 58.

⁸⁵ Baradaran, *The Color of Money*, *supra*, at fn. 31, pp. 37-38; *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸⁶ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 472; see also Wilkerson, *Caste: The Origins of Our Discontents* (2020) p. 116-17.

⁸⁷ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 38.

⁸⁸ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 472.

⁸⁹ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Wilkerson, *Caste*, *supra*, at fn. 86, pp. 132-34.

⁹³ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 101.

⁹⁴ Jones, *Labor of Love*, *supra*, at fn. 34, p. 61; see also [Slavery by Another Name: Sharecropping](#) (Public Broadcasting Service Movie 2012).

⁹⁵ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 101.

⁹⁶ *Ibid.*

limit peonage, even after the Supreme Court declared the practice unconstitutional.⁹⁷

Although the sharecropping system also exploited poor white farmers, an added layer of racial terror plagued Black sharecroppers, with no hope of government or legal protection. In the South, a Black American challenged a white American at the risk of severe violence, or death.⁹⁸ For example, in 1948, two white Americans beat a Black tenant farmer in Louise, Mississippi, because the Black farmer had asked for a receipt after paying for his water bill.⁹⁹ If a Black farmer tried to sell extra agricultural product without permission to someone who was not their landlord, he could be whipped or killed.¹⁰⁰ “They could never leave as long as they owed the master...[t]hat made the planter as much master as any master during slavery, because the sharecropper was bound to him, belonged to him, almost like a slave[.]” a former sharecropper told Isabel Wilkerson, the Pulitzer Prize-winning journalist and author of both *The Warmth of Other Suns: The Epic Story of America's Great Migration* and *Caste: The Origins of Our Discontents*.¹⁰¹

“One reason for preferring Negro to white labor on plantations is the inability of the Negro to make or enforce demands for a just statement or any statement at all. He may hope for protection, justice, honesty from his landlord, but he cannot demand them. There is no force to back up a demand, neither the law, the vote nor public opinion.... Even the most fair and most just of the Whites are prone to accept the dishonest landlord as part of the system,” wrote anthropologist Hortense Powdermaker.¹⁰²

Elsewhere in the country, the Great Migration, as discussed in detail in Chapter 1 and 5, brought Black Americans from the South to the North, Midwest, and West. “Blacks, though native born, were arriving as the poorest people from the poorest section of the country with the least access to the worst education[.]” wrote Wilkerson.¹⁰³ Excluded even from better paying menial jobs, Black workers in the North and West earned the least money when compared with white immigrants at the time. Black Americans had an annual income of \$1,628.¹⁰⁴ Italian immigrants made \$2,295, Czechs made \$2,339, Poles made \$2,419, and Russians made \$2,717.¹⁰⁵

Until well into the 20th century, Black women could mostly only find work as domestic servants for white employers.¹⁰⁶ Following the Civil War, new career opportunities opened up for women in the fields of teaching and nursing.¹⁰⁷ Black women who entered these professions could only work in segregated facilities.¹⁰⁸ A few decades later, private employers hired mostly white women as receptionists, department store clerks, and

⁹⁷ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 101; see also Schmidt, *Principle and Prejudice*, *supra*, at fn. 64, pp. 654-60.

⁹⁸ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, pp. 50-51.

⁹⁹ *Id.* at p. 51.

¹⁰⁰ *Id.* at p. 58.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Id.* at p. 408.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Jones, *Labor of Love*, *supra*, at fn. 34, p. 74.

¹⁰⁷ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

¹⁰⁸ Hine, *Black Women in White: Racial Conflict and Cooperation in the Nursing Profession, 1890-1950* (1989); Fairclough, *A Class of their Own: Black Teachers in the Segregated South* (2007).

telephone and machine operators.¹⁰⁹ Black women took over household work as white women, including white immigrant women, moved into these better paying jobs with set work hours.¹¹⁰

In both the North and the South, Black female labor participation rates were double those of American-born white women and triple those of immigrant women. During the first half of the 20th century, the number of white female domestic workers fell from 1.3 million to 542,000, while Black women went from accounting for 30 percent of household workers around 1900 to about 60 percent of household workers at the end of World War II.¹¹¹ Some Black women working as servants lived in their employer's homes and were on call 24 hours a day.¹¹² Other Black women resorted to what was colloquially referred to as "slave markets" where they gathered on street corners early in the morning to wait for white housewives to bid on them for as little as fifteen cents an hour.¹¹³ One woman at a Chicago "slave market" reported that she made as much money as she would picking cotton in the field.¹¹⁴

In each of these eras, and through to the present, civil courts did not protect Black Americans to the same degree as white Americans. However, there were exceptions. One scholar has found evidence that Black Americans used civil courts in one district in Mississippi before the Civil War to vindicate their rights in claims over contracts and wages, and found that in many instances these litigants won their cases.¹¹⁵

But discrimination remained built into the law. Several states prohibited Black persons from testifying against those who were white, including California.¹¹⁶ Black Americans additionally faced *de jure* and then *de facto* exclusion from juries.¹¹⁷ Some states explicitly banned Black Americans from jury service, while others tied jury service to voting, which was then limited to white men.¹¹⁸ Exclusion continued by other means after the Supreme Court in 1879 ruled that a West Virginia statute limiting jury service to white men violated the Fourteenth Amendment.¹¹⁹ Other forms of discrimination, including segregation, also limited access to justice.¹²⁰

Over time, in addition to the racial terror discussed in Chapter 3 and the political disenfranchisement discussed in Chapter 4, the civil court system also contributed to a failure to protect Black Americans against the theft or government taking of property, which often has been a source of income and sustenance. For example, in 1856, an enslaver, Thomas Howlett, directed that his plantation be sold and the proceeds given to his enslaved Black

¹⁰⁹ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

¹¹⁰ *Ibid.*

¹¹¹ Trotter, *Workers on Arrival*, *supra*, at fn. 6, pp. 91-92.

¹¹² Jones, *Labor of Love*, *supra*, at fn. 34, p. 74.

¹¹³ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 326.

¹¹⁴ *Ibid.*

¹¹⁵ Kimberly M. Welch, *Black Litigants in the Antebellum American South* (2018).

¹¹⁶ Avins, *The Right to be a Witness and the Fourteenth Amendment* (1966) 31 Mo. L. Rev. 471, 473-74.

¹¹⁷ Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present* (2020) 81 La. L. Rev. 55, 56-57; see also Forman, *Juries and Race in the Nineteenth Century* (2004) 113 Yale L.J. 895.

¹¹⁸ Hoag, *An Unbroken Thread*, *supra*, at fn. 117, at pp. 58-59.

¹¹⁹ *Strauder v. West Virginia*, 100 U.S. 303 (1879); Hoag, *An Unbroken Thread*, *supra*, at fn. 117, pp. 61-62.

¹²⁰ See, e.g., Higginbotham, *Racism in American and South African Courts: Similarities and Differences* (1990) 65 NYU L. Rev. 479, 521-45.

American workers, who were to be freed upon his death.¹²¹ Two courts upheld Howlett's will over the challenges of Howlett's white relatives, but the formerly enslaved workers never received the proceeds from the plantation sale.¹²²

In another example, in 1964, Alabama sued two cousins, Lemon Williams and Lawrence Hudson, claiming that the 40-acre farm that the family had owned and operated since 1874 belonged to the state.¹²³ A state court judge ordered Lemon Williams and Lawrence Hudson off the land, despite tax and property records the AP found in the same courthouse showing that the family owned the farm.¹²⁴

Barriers to justice, including those outlined above and in Chapter 11 continue for Black Americans today. While the relationship between race and the civil justice system is under-researched, studies thus far indicate that Black Americans under-utilize the civil justice system, including in the area of labor and employment. In a 2016 study conducted by legal scholar and professor Sara Sternberg Greene of low-income minority group attitudes toward the civil justice system, Black American respondents were less likely than white American respondents to have considered seeking help for their civil legal issues, largely because of distrust in the legal system.¹²⁵ This lack of trust often stems from prior negative experiences.¹²⁶ Black people are more likely than white people to experience biased treatment in the judicial system, and individuals who experience discrimination are more likely to anticipate and perceive discrimination across institutional contexts.¹²⁷ There is also evidence that Black Americans are reluctant to complain when they perceive discrimination or experience other grievance.¹²⁸ Additionally, social science research shows that litigants may find their attorneys through their professional networks, and Black Americans have more limited professional networks.¹²⁹

Underutilization of the civil justice system and lack of access to justice have particular impact in the area of labor and employment. Black Americans hold a significant share of low-wage jobs, in sectors in which wage theft is prevalent, and yet the available evidence indicates that Black Americans rarely bring wage theft claims.¹³⁰ Black Americans are more likely than white Americans to file a discrimination lawsuit without a lawyer.¹³¹ A 2010 study found that Black Americans are half as likely as white Americans to have a lawyer.¹³² In general, less than five percent of worker discrimination claims go to trial and result in a ruling for the

¹²¹ Lewan & Barclay, [When They Steal Your Land, They Steal Your Future](#), LA Times (Dec. 1, 2001), (as of Apr. 8, 2022).

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ See Sternberg Greene, [Race, Class, and Access to Civil Justice](#) (2016) 101 Iowa L.R. 1263.

¹²⁶ *Ibid.*; see also Myrick et al., [Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs](#) (2012) 15 N.Y.U. J. Legislation & Pub. Policy 705, 751-52.

¹²⁷ Sternberg Greene, [Race, Class, and Access to Civil Justice](#), *supra*, at fn. 125, pp. 1268, 1275-79.

¹²⁸ Myrick et al., [Race and Representation](#), *supra*, at fn. 126, p. 722.

¹²⁹ *Id.* at p. 724.

¹³⁰ Green Coleman, [Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy](#) (2018) 14 Stanford J. Civ. Rights & Civ. Liberties 49, 75-76; Green Coleman, [Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm](#) (2016) 60 Howard L.J. 61, 64.

¹³¹ Myrick et al., [Race and Representation](#), *supra*, at fn. 126, p. 707.

¹³² Blasi & Doherty, Center for L. & Pub. Policy, [California Employment Discrimination Law and Its Enforcement: The Fair Employment Housing Act at 50](#) (2010) p. 12.

plaintiff,¹³³ and self-represented litigants are significantly less likely to achieve a favorable outcome in a discrimination suit.¹³⁴

F. Exclusion from Unions

Legal segregation laws not only confined Black workers in the South, but also impacted the economy of the entire country¹³⁵ and the rights of worker of all races.¹³⁶ Unions have a lengthy history in the United States as craftsmen have long joined together to solve problems related to their craft.¹³⁷ In the 18th century, strikes, labor organizing, and collective bargaining developed at the same time, and the first authenticated strike was called in 1786 by Philadelphia printers.¹³⁸ Unions reached their peak during World War II, as unions grew at the rate of approximately one million workers per year.¹³⁹

Prior to World War II, many unions refused to accept Black people as members.¹⁴⁰ Since before the Civil War, white workers have claimed that Black workers were not suited to skilled labor in order to avoid competition for jobs.¹⁴¹ In the North, companies and unions did not hire Black workers because white workers refused to work beside them, and for the sake of morale, the companies and unions would not force the issue.¹⁴² White workers sometimes walked off the job to force their employers to rid their workplace of Black employees.¹⁴³

During the nineteenth century trade unions organized by white workers typically excluded Black workers.¹⁴⁴ In response, Black workers sometimes formed their own unions.¹⁴⁵ For example, in 1869, Black delegates attended the Colored National Labor Union convention in Washington, D.C., which was a counterpart to the white National Labor Union.¹⁴⁶

Government action sometimes supported labor unions' discrimination against Black workers.¹⁴⁷ For example, when the city of St. Louis built a segregated hospital for Black patients, white union members protested the hiring of a single Black tile setter.¹⁴⁸ The city fired the contractor and did not hire any contractor that employed Black workers.¹⁴⁹

¹³³ Eyer, [That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law](#) (2012) 96 Minnesota L.R. 1275, 1276.

¹³⁴ Myrick et al., *Race and Representation*, *supra*, at fn. 126, pp. 707-08.

¹³⁵ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 310.

¹³⁶ Jones, *American Work*, *supra*, at fn. 14, pp. 222-232.

¹³⁷ Reedy, *Brief History of the American Labor Movement* (1951) p. 1.

¹³⁸ *Id.* at p. 3.

¹³⁹ *Id.* at p. 29.

¹⁴⁰ *Id.* at p. 30.

¹⁴¹ Jones, *American Work*, *supra*, at fn. 14, pp. 221-22; Jones, *Labor of Love*, *supra*, at fn. 34, p. 56.

¹⁴² Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 310.

¹⁴³ Jones, *Labor of Love*, *supra*, at fn. 34, p. 148.

¹⁴⁴ Cassedy, [African Americans and the American Labor Movement](#) (Summer 1997) Prologue Magazine.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Rothstein, *The Color of Law: A Forgotten History of How our Government Segregated America* (2017) p. 155.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

Segregation made contact between Black and white workers almost impossible, and reflected and intensified racial tension between workers.¹⁵⁰ Legal segregation not only held down the wages of Black working-class Americans, it also prevented working class white workers from demanding higher pay, as long as Black workers could always be forced to work for less.¹⁵¹ The American Federation of Labor, founded in 1886 and survived today by the AFL-CIO, initially strived for racial equality¹⁵² as leaders recognized the value of a united working class¹⁵³ However, legal segregation in the South proved to be too influential and federation leadership allowed local affiliates to exclude Black workers.¹⁵⁴

Black workers protested exclusion throughout the 1920s¹⁵⁵ and 1930s.¹⁵⁶ Federation's leaders' formal response was that the Federation did not discriminate, "human nature cannot be altered," and Black individuals ought to be grateful for what the Federation had done for them.¹⁵⁷

Scholars have argued that legal segregation discouraged white and Black workers from working together for better working conditions by pitting Black workers against white workers.¹⁵⁸ For example, beginning in the 1880s, Black and white tenant farmers and sharecroppers began to join biracial political parties to challenge the political and business elite of the South.¹⁵⁹ Scholars such as Jacqueline Jones, who testified before the Task Force, have argued that legal segregation and private racial discrimination were used to disrupt this burgeoning biracial political force.¹⁶⁰

For example, before the Civil War, Black women, men, and children worked in the South. After the war, southern textile-mill owners reserved those jobs for white families, and advertised hazardous mill work as a welcome escape from sharecropping.¹⁶¹ This drove a wedge between the Black and white rural poor.¹⁶²

G. Use of Occupational Licensure Requirements to Exclude Black Workers

Unions also played a part in how states excluded Black workers from skilled, higher paying jobs through what eventually became state licensure laws. A license from a state entity is required to practice some professions and trades, like electricians and doctors.¹⁶³ State, and sometimes local, governments, have designed these

¹⁵⁰ Reich, *A Working People*, *supra*, at fn. 36, pp. 58-59.

¹⁵¹ Wilkerson, *The Warmth of Other Suns*, *supra*, at fn. 21, p. 310.

¹⁵² Kersten, *Labor's Home Front: The American Federation of Labor During World War II* (2006) p. 77; Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917* (2006) p. 19.

¹⁵³ Greene, *Pure and Simple Politics*, *supra*, at fn. 152, p. 39.

¹⁵⁴ Kersten, *Labor's Home Front*, *supra*, at fn. 152, 78.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Id.* at p. 79.

¹⁵⁸ Reich, *A Working People*, *supra*, at fn. 36, pp. 58-59.

¹⁵⁹ Jones, *American Work*, *supra*, at fn. 14, pp. 222-232.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ See, e.g., Little Hoover Com., [Jobs for Californians: Strategies to Ease Occupational Licensing Barriers](#) (2016) p. 15 (as of Apr. 9, 2022); Dept. Treas. Off. Economic Policy et al., [Occupational Licensing: A Framework for Policymakers](#) (2015) p. 6 (as of Apr. 9, 2022).

licensing requirements so that Black workers are less likely to qualify, which has intensified the impact of private discrimination by private employers and unions.¹⁶⁴

State licensure systems worked in parallel to exclusion by unions and professional societies¹⁶⁵ in a way that has been described by scholars as “particularly effective” in excluding Black workers from skilled, higher paid jobs.¹⁶⁶ White craft unions implemented unfair tests, conducted exclusively by white examiners to exclude qualified Black workers.¹⁶⁷

For example, across the country from the late 1890s through the late 1930s, state laws allowed local mayors or city councils to appoint the members of the licensing board for plumbers.¹⁶⁸ This meant that the local plumbers’ unions could exert significant influence over who sat on the licensing board.¹⁶⁹ From there, the boards erected barriers to avoid licensing Black plumbers, such as requiring a union apprenticeship—from which Black individuals were banned—before an applicant could even qualify to take a licensing exam.¹⁷⁰ Other barriers included a high school diploma, which was more difficult for Black workers due to education discrimination (as discussed in Chapter 6), passing a personal interview conducted by a white person, or sometimes, even false test scores.¹⁷¹

These methods, which were used by other professions as well,¹⁷² did not ban Black workers outright. Because these statutes were outwardly neutral, courts have repeatedly found that they were constitutional without questioning the discriminatory motives and impact.¹⁷³ A few courts recognized the dangers of allowing licensing boards to control entry into the profession, but not enough to stem the tide.¹⁷⁴

Government support made the discrimination worse. In Virginia, a white plumber explained his state’s law requiring members of the plumber’s union be part of the licensing board: [T]he Negro is a factor in this section,

¹⁶⁴ Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment* in Occupational Licensure and Regulation (Rottenberg edit., 1980) p. 165, 166; Dept. Treas. Off. Economic Policy et al., Occupational Licensing, *supra*, at fn. 163, p. 41 (noting that “licensing policy falls in the purview of individual States”).

¹⁶⁵ Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans* (1994) 31 San Diego L. Rev. 89, 90.

¹⁶⁶ Klein et al., *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks* (2012) 9 Econ J. Watch 210, 222-23, citing Williams, *The State Against Blacks* (1982) pp. 90-91.

¹⁶⁷ Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, *supra*, at fn. 164, p. 166, quoting Greene & Woodson, *The Negro Wage Force* (1969) p. 192.

¹⁶⁸ Bernstein, *Licensing Laws*, *supra*, at fn. 165, p. 94-97.

¹⁶⁹ *Id.* at p. 94.

¹⁷⁰ *Id.* at p. 94, fn. 29, citing Bloch, *Craft Unions and the Negro in Historical Perspective* (1958) 43 J. Negro Hist. 10, 23.

¹⁷¹ *Id.* at p. 94, fn. 29, citing Williams, *The State Against Blacks* (1982) p. 94-95.

¹⁷² See generally Bernstein, *Licensing Laws*, *supra*, at fn. 165 (describing the efforts to exclude Black workers from professions including medicine and barbering); Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, *supra*, at fn. 164, p. 166 (describing the efforts in Georgia to exclude Black workers from becoming firemen on locomotives by way of licensure); Crawford & Das, D.C. Fiscal Policy Inst., *Black Workers Matter: How The District’s History of Exploitation & Discrimination Continues to Harm Black Workers* (2020) p. 3 (as of Apr. 9, 2022) (describing occupational licensing bans written into Black Codes that prevented Black workers from working in any trade other than driving carts or carriages).

¹⁷³ Bernstein, *Licensing Laws*, *supra*, at fn. 165, p. 92 (noting that “lower courts universally accepted the general proposition that licensing statutes were constitutional”).

¹⁷⁴ *Id.* at p. 97.

and I believe the enclosed Virginia state plumbing law will entirely eliminate him and the impostor from following our craft.”¹⁷⁵ By 1924, 24 states and Puerto Rico had similar laws in place.¹⁷⁶

And these laws were effective.¹⁷⁷ In 1973, Montgomery County, Alabama had only one licensed Black plumber, who, despite having spent four years studying the trade, was told he failed the local exam each time he took it. He was not allowed to see his exam papers or told what his score was. He was finally able to obtain a local license after passing the state master plumber’s exam.¹⁷⁸

Charlotte, North Carolina, similarly had only one Black plumber in 1968, and in Maryland in 1953, only two of the 3,200 licensed plumbers were Black.¹⁷⁹ The impact of these exclusionary efforts is still felt today: In 2021, the Bureau of Labor Statistics estimated that 87.2 percent of plumbers are white and only 7.1 percent are Black.¹⁸⁰

The use of licensure to regulate jobs increased dramatically after the 1950s, when only five percent of professions required licensure in the United States.¹⁸¹ In 2018, roughly 21.8 percent of professions required licensure.¹⁸² Some of the reasons for this increase include trying to professionalize and legitimize certain jobs and an overall growth of fields that have historically required licensure.¹⁸³

Regardless of the reason, one result of the growth is that discriminatory licensing standards have become more widespread. Even if these standards did not intend to exclude Black workers, the result was exclusion. One such method today is the bans on licensure for people with criminal records.

As discussed in Chapter 12, state and federal governments have criminalized Black Americans throughout our nation’s history. As a result, Black Americans are more likely to have criminal records, even though they do not commit crimes at higher rates than other races or ethnicities.¹⁸⁴

It is difficult for people with criminal records, who are disproportionately Black, to find jobs, even if their records are old or have little to do with the job, or if they have demonstrated rehabilitation.¹⁸⁵ When a license is required those challenges can become insurmountable. One 2016 study showed that there were 27,254 state

¹⁷⁵ *Id.* at pp. 96-97.

¹⁷⁶ *Id.* at p. 97.

¹⁷⁷ *Id.* at p. 98.

¹⁷⁸ Williams, *Race and Economics: How Much Can Be Blamed on Discrimination* (2011) p. 94, citing Shimberg et al., *Occupational Licensing* (1973) pp. 112-13.

¹⁷⁹ Bernstein, *Licensing Laws*, *supra*, at fn. 165, p. 98.

¹⁸⁰ U.S. Bur. Lab. Statistics, [Labor Force Statistics from the Current Population Survey](#) (2021) (as of Apr. 9, 2022).

¹⁸¹ Decker, [Occupational Licensing as a Barrier for People with Criminal Records: Proposals to Improve Anti-Discrimination Law to Address Adverse Employment Impacts from the Criminal Legal System](#) (2021) 49 *Fordham Urban L.J.* 189, 197.

¹⁸² *Ibid.*

¹⁸³ See Dept. Treas. Off. Economic Policy et al., *Occupational Licensing*, *supra*, at fn. 163, pp. 19-22; Decker, *Occupational Licensing*, *supra*, at fn. 181, p. 197.

¹⁸⁴ See, e.g., Equal Employment Opportunity Commission, [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act](#) (2012) pt. V(A)(2).

¹⁸⁵ For example, while people with criminal records are half as likely to get a callback to get an interview than those without a record, Black men with records are one-third as likely to get a callback as those without records. Natividad Rodriguez & Avery, *Nat. Employment L. Project*, [Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records](#) (2016) p. 8.

occupational licensing restrictions against people with criminal records nationwide, 12,669 of which involve restrictions on licensure for people with any type of felony conviction and 6,372 of which involve restrictions for people with misdemeanor convictions.¹⁸⁶ 19,786 licensure restrictions were lifetime bans and 11,338 were mandatory and allowed no discretion by the board.¹⁸⁷ In some instances, upon release, formerly incarcerated persons cannot work in the very professions for which prison job rehabilitation programs trained them.¹⁸⁸ For example, while many prisons provide training programs on barbering, laws in every state prevent a formerly incarcerated person from working as a barber.¹⁸⁹

Recently, efforts have begun to reform these criminal record exclusions.¹⁹⁰ Several states have now passed laws to revise licensing restrictions related to people's criminal records.¹⁹¹ But thousands of restrictions still remain. A database funded by the United States Department of Justice shows that there are currently 12,989 consequences of having a criminal record for various licenses nationwide.¹⁹²

H. Discrimination in Promotion and Pay

During the World War I, Black workers began to make headway in previously white workplaces and industries. Black men took blue collar jobs previously held by immigrants who had shifted employment to the war effort; Black women took jobs previously held by white women and boys.¹⁹³ Black workers might earn four times more doing industrial labor in the North than they earned doing agricultural labor in the South.¹⁹⁴ As discussed in Chapter 1 and 5, these job opportunities in the North and West led approximately three million Black Americans to migrate from the South between World War I and World War II, and another five million to move between 1940 and 1980.¹⁹⁵

Wherever they landed in the North, the Midwest, or the West, Black Americans found more discrimination, which translated into racial job ceilings, pay differentials, and segregation by job type.¹⁹⁶ For example, Ford Motor Company refused to employ Black workers at a level above general labor outside of the Detroit area, and in the Chicago stockyards Black workers were excluded from jobs as foremen, as they were not permitted to

¹⁸⁶ *Id.* at pp. 1, 5 fn. 12, 10.

¹⁸⁷ *Id.* at pp. 1, 5 fn. 14.

¹⁸⁸ Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003) p. 114.

¹⁸⁹ Ewald, *Barbers, Caregivers, and the "Disciplinary Subject": Occupational Licensure for People with Criminal Justice Backgrounds in the United States* (2019) 46 *Fordham Urban L.J.* 719, 733.

¹⁹⁰ See generally Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012) pp. 140-177; Natividad Rodriguez & Avery, *Unlicensed & Untapped*, *supra*, at fn. 185; Dept. Treas. Off. Economic Policy et al., *Occupational Licensing*, *supra*, at fn. 163, pp. 35-37.

¹⁹¹ Nerbovig, *License to Clip* (Jul. 10, 2018) *The Marshall Project*; see also Love & Schlüssel, *Collateral Consequences Resource Center, From Reentry to Reintegration: Criminal Records Reform in 2021* (2022) pp. 8-11 (describing legislative efforts in 2021 to reform licensure schemes).

¹⁹² A search of the National Inventory of Collateral Consequences of Conviction database for "Business licensure and participation" in the "Consequence Type" field yielded 12,989 consequences. See Nat. Reentry Resource Center, [Nat. Inventory of Collateral Consequences of Conviction](#) (as of Apr. 9, 2022).

¹⁹³ Jones, *American Work*, *supra*, at fn. 14, p. 319.

¹⁹⁴ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 78.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Id.* at p. 86.

supervise white workers.¹⁹⁷

Black workers were categorized in lower-level jobs “helping” white workers, who would simply supervise work while taking home the higher wage.¹⁹⁸ One Black employee at the Firestone Company’s Memphis plant described how: “You’d be classified as a ‘helper,’ but you’d be doing all the work. The white man would get the high wage . . . [but] he’d just be sittin’ there watchin.”¹⁹⁹ As a result, Black workers were penalized both with lower wages and fewer advancement opportunities.

Black workers were often only hired in jobs that were far more physically dangerous.²⁰⁰ For example, Ford Motor Company’s foundry, where many Black workers were employed, had a lack of safety equipment, poor ventilation, and management-induced speed-ups that lead to worker injury and death.²⁰¹ One foundry worker described others finished a shift “so matted and covered with oil and dirt that no skin showed. . . . we could [only] tell a friend by his voice.”²⁰²

This pattern continued across manufacturing sectors for decades. Black workers were limited to lower-paying categories, barred from supervisory roles, and denied opportunities for advancement. For example, by 1970, one-fifth of autoworkers in Detroit were Black, but Black workers remained all but completely excluded from higher-level positions.²⁰³ In 1968, Black autoworkers formed the Dodge Revolutionary Union Movement to protest racism at the plant. A writer in the organization’s newsletter laid out the stark segregation and discrimination then present at the plant: “(1) 95% of all foremen in the plants are white; (2) 99% of all the general foremen are white; (3) 100% of all plant superintendents are white; (4) 90% of all skilled tradesmen are white; (5) 90% of all apprentices are white . . . systematically all of the easier jobs are held by whites; (7) Whenever whites are on harder jobs they have helpers; (8) When black workers miss a day they are required to bring 3 doctors’ excuses as to why they missed work; (9) . . . seniority is also a racist concept, since black workers were systematically denied employment for years at the plant.”²⁰⁴

This trend was not limited to manufacturing. In 1950, salaries of college-educated workers, in both the North and South, were significantly lower for Black Americans across industries. For example, Black managers averaged an annual salary of around \$1,400, while white managers averaged closer to \$3,500.²⁰⁵ In today’s dollars, this translates to an annual salary of approximately \$16,750 for Black managers and \$41,870 for white managers.²⁰⁶ Discrepancies like this existed in professional, teaching, farming, clerical, sales, and skilled technician occupations as well.²⁰⁷

¹⁹⁷ *Id.* at p. 87.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Id.* at p. 88.

²⁰⁰ Thomas, *Life for Us is What We Make it: Building Black Community in Detroit, 1915-1945* (1992) pp. 106-107.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Jones, *American Work*, *supra*, at fn. 14, p. 367.

²⁰⁴ Gewschwender, *Class, Race, and Worker Insurgency: The League of Revolutionary Black Workers* (1977) p. 91.

²⁰⁵ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of William Spriggs, Meeting Materials – Part 3, p. 359.

²⁰⁶ U.S. Bur. Labor Statistics, [Consumer Price Index Inflation Calculator](#) (comparing Jan. 1950 dollars with Jan. 2022 dollars) (as of Apr. 9, 2022).

²⁰⁷ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of William Spriggs, Meeting Materials – Part 3, p. 359.

I. Exclusion from New Deal Protections

In the 1930s, the federal government under President Franklin D. Roosevelt sought to remake the relationship between employer and employees.²⁰⁸ The New Deal transformed American society and set in motion the creation of the middle class—but only for white Americans.²⁰⁹ The New Deal reshaped the role of the federal government in providing for American citizens.²¹⁰ Programs funded under the New Deal infused a huge amount of capital into the economy. Two researchers have estimated that the federal government spent almost \$27 billion on various New Deal public works programs between 1933 and 1943.²¹¹

Southern Democrats, who rose to power by preventing Black Americans from voting through a combination of violence and voter suppression laws, forced President Roosevelt essentially to exclude Black Americans from New Deal programs and legislation.²¹² While northern liberals at the time would not support explicitly racist language in the programs and statutes, the Southern Democrats' racist aim was accomplished in the structure of the programs themselves.²¹³ In order to pass numerous New Deal laws, President Roosevelt compromised with the Southern Democrats to ensure their votes by largely excluding jobs mostly held by Black Americans from the New Deal's protections like unemployment insurance, minimum wages, equalized bargaining power, or anti-child labor laws.²¹⁴ Agricultural and domestic-service workers, and anyone with seasonal or part-time jobs, were excluded from these benefits.²¹⁵ Approximately 85 percent of all Black workers in the United States at the time were excluded,²¹⁶ although some historians disagree that federal lawmakers intended to discriminate against Black Americans.²¹⁷

Congress also compromised to allow New Deal programs to be administered at the local level.²¹⁸ By the design of the Southern Democrats in Congress, southern local white government officials were in control of local relief efforts, individuals who argued that Black Americans should not receive relief if white southerners had laundry to be done or cotton to be picked.²¹⁹ While Black northerners received some governmental jobs and assistance, Black southerners did not.²²⁰

The following is a non-exhaustive list of labor-related New Deal laws and programs and the ways in which they have discriminated against Black Americans. Many of the New Deal laws created the foundational structures

²⁰⁸ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

²⁰⁹ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 101.

²¹⁰ Walker & Brechin, *The Living New Deal: The Unsung Benefits of the New Deal for the United States and California*, IRLE Working Paper No. 220-10 (2010) Inst. Research on Labor & Employment, pp. 23-28.

²¹¹ *Id.* at pp. 16-17.

²¹² Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 101; Perea, *The Echoes of Slavery*, *supra*, at fn. 35, pp. 102-03.

²¹³ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, pp. 103-04; Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

²¹⁴ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, pp. 102-03; 120-21.

²¹⁵ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

²¹⁶ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones; see also Jones, *American Work*, *supra*, at fn. 14, p. 342.

²¹⁷ See, e.g., DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the Social Security Act* (2010) 70 Soc. Sec. Bull.

²¹⁸ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 104.

²¹⁹ Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

²²⁰ *Ibid.*

that continue to provide Americans with a social safety net today.

1. National Industrial Recovery Act of 1933

The National Industrial Recovery Act created the National Recovery Agency, which established industry-specific minimum wages and employment protections. The National Recovery Agency eventually enacted over 540 codes providing for minimum wages and maximum hours in different industries.²²¹

Many employers advocated for explicitly racist codes before the agency—one argued that Black workers made “a much better workman and a much better citizen, insofar as the South is concerned, when he is not paid the highest wage.”²²² While explicit race-based codes were not adopted, the structure of geographic and occupational classifications in the codes often accomplished the same goal. An industry code would classify a state as either “Northern” or “Southern” for the purpose of setting a minimum wage, with “Southern” states often having a lower minimum.²²³ And different occupations, governed by different codes, had different minimum wages. One example demonstrates how the government used both geographic and occupational classifications and exclusions to pay Black workers less and provide them fewer protections. Delaware was classified as being “Northern”—and thus subject to a higher minimum wage—for 449 industry codes, but was classified as being “Southern”—and thus subject to a lower minimum wage—for the fertilizer industry, where Black workers made up 90 percent of the industry.²²⁴ John P. Davis, in a speech to the 25th Annual Conference of the National Association for the Advancement of Colored People in 1934 stated: “[T]he one common denominator in all these variations is the presence or absence of Negro labor. Where most workers in a given industry are Negro, that section is called South and inflicted with low wage rates. Where Negroes are negligible, the procedure is reversed.”²²⁵

The purpose of the occupational and geographic differentials in the wage codes was clear to those involved in implementing the National Industrial Recovery Act at the time. The Executive Director of the National Recovery Agency’s Labor Advisory Board wrote in 1934: “[T]o the degree the Southern rate is a rate for Negroes, it is a relic of slavery and should be eliminated.”²²⁶ That same year, Ira De A. Reid, of the National Urban League, wrote in the newspaper the Chicago Defender: “the Negro’s initial attitude towards the national recovery act is best reflected in the interpretation of initials given by one observer who called it ‘Negro Riddance Act.’”²²⁷

2. National Labor Relations Act of 1935 (Wagner Act)

The National Labor Relations Act of 1935 (NLRA or Wagner Act), proposed by Senator Robert Wagner,

²²¹ Social Welfare History Project, [The National Industrial Recovery Act of 1933](#) (2011) Va. Commonwealth Univ. (as of Apr. 9, 2022).

²²² Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 104.

²²³ *Id.* at p. 106.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Dubal, [The New Racial Wage Code](#), UC Hastings Research Paper Forthcoming (May 28, 2021) Harvard L. & Policy Rev., pp. 15-16.

²²⁷ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 107, citing Caldwell, *What the NRA is Doing to the Race!*, Chi. Defender (May 26, 1934) p. 10.

dramatically increased the power of organized labor by allowing officially certified unions in certain sectors the right to negotiate on behalf of *all* employees, if supported by a majority of workers.²²⁸ The National Labor Relations Board, the agency designated to administer the law, was able to hold hearings and resolve disputes involving union representation.

The NLRA harmed Black Americans by purposefully allowing unions to discriminate based on race and by failing to cover sectors of the economy that mostly employed Black Americans.²²⁹ This undermined the bargaining power of Black workers and their ability to participate in the newly-recovering economy for decades.²³⁰

Labor unions have played a critical role in the development of American society and the day-to-day experience of the American worker. During and after the New Deal, workers' and employers' power was uniquely balanced, which enabled an unprecedented improvement in the condition of the working class in America, the benefits of which continue to be seen today.²³¹ For example, workers with strong unions have been able to set industry standards for wages and benefits that help all workers, both union and nonunion.²³² "Union workers are more likely to be covered by employer-provided health insurance. More than nine in 10 workers covered by a union contract (94%) have access to employer-sponsored health benefits, compared with just 68 percent of nonunion workers."²³³ As another example, union workers also have greater access to paid sick days. Nine in 10 workers covered by a union contract (91 percent) have access to paid sick days, compared with 73 percent of nonunion workers.²³⁴

While Black leaders proposed amendments to the NLRA to prohibit government certification of a union that did not allow Black workers to join and have all rights, the American Federation of Labor, the principal white-dominated federation of craft unions, opposed this protection due to its desire to eliminate competition from Black workers.²³⁵ The American Federation of Labor and Southern Democrats won, and the final law protected the bargaining rights of unions with racist membership policies. This gave white labor organizers the power to exclude Black workers from contract negotiations and implement their racist views in the union contracts protected by the federal government.²³⁶

The final law also excluded agricultural and domestic workers, another compromise to the Southern Democrats.²³⁷

Federal law essentially allowed unions to ignore Black workers by maintaining segregated unions, segregating Black workers into less-skilled jobs, locking them out of contract negotiations, and using collective bargaining

²²⁸ Rothstein, *The Color of Law*, *supra*, at fn. 147, p. 158.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Walker & Brechin, *The Living New Deal*, *supra*, at fn. 210, p. 33.

²³² McNicholas et al., Economic Policy Inst., [Why Unions Are Good for Workers—Especially in a Crisis Like COVID-19](#) (Aug. 25, 2020) (as of Apr. 9, 2022).

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, pp. 123-24.

²³⁶ Jones, *American Work*, *supra*, at fn. 14, p. 343.

²³⁷ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 122.

rights to force employers to replace Black workers with white workers.²³⁸ For example, the NLRB-certified Building Service Employees Union in New York forced Manhattan hotels, restaurants, and offices to replace Black elevator operators and restaurant workers with white employees.²³⁹ The federal agency took no action in response.

In 1944, the U.S. Supreme Court held that unions were obligated to represent their members without discriminating on the basis of race, but did not require them to eliminate racial segregation in their membership or provide Black union members with a mechanism for enforcing their civil rights.²⁴⁰

Only in 1964 did the federal agency finally decide that it could revoke a union's government certificate due to its racial segregation.²⁴¹ Even then, individual Black workers still had limited recourse against racist union leadership. Employees subject to a racist union could not deal directly with their employer instead.²⁴²

3. Social Security Act of 1935

The Social Security Act of 1935 created old-age and unemployment benefits to help seniors and those out of work. This landmark law followed the same pattern as the rest of the New Deal legislation in limiting how its benefits applied to Black Americans through occupational carve outs for agricultural and domestic labor, and allowing local rather than federal administration,²⁴³ although some historians dispute the allegation that Congress acted with racist intent in making these carve outs.²⁴⁴ The Social Security Act created several programs that continue to be foundational to the government's provision of stability to its citizens, including retirement insurance, unemployment insurance, and Aid to Families with Dependent Children programs.²⁴⁵

During the debate over the Social Security Act, Congress acknowledged the preponderance of Black workers in the agricultural and domestic labor sectors, but excluded these occupations despite accusations of racism.²⁴⁶ Charles H. Houston testified on behalf of the NAACP: "In these States, where your Negro population is heaviest, you will find the majority of Negroes engaged either in farming or else in domestic service, so that, unless we have some provisions which will expressly extend the provisions of the bill to include domestic

²³⁸ Rothstein, *The Color of Law*, *supra*, at fn. 147, p. 158.

²³⁹ *Ibid.*

²⁴⁰ *Steele v. Louisville & Nashville R.R. Co.* (1944) 323 U.S. 192; Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?* (1974) 42 U. Chi. L. Rev. 1, 4; Jones, *Race, Economic Class, and Employment Opportunity* (2009) 72 L. & Contemporary Problems 57, 78.

²⁴¹ *Independent Metal Workers Local 1 (Hughes Tool Co.)* (1964) 147 N.L.R.B. 1573; Meltzer, *The National Labor Relations Act and Racial Discrimination*, *supra*, at fn. 240, pp. 5-6.

²⁴² *Emporium Capwell Co. v. Western Addition Community Organization* (1975) 420 U.S. 50; Jones, *Race, Economic Class, and Employment Opportunity*, *supra*, at fn. 240, p. 78.

²⁴³ Section 210(b) of the Social Security Act excludes agricultural service and domestic labor in a private home from old-age benefits; and Section 907(c) defines "employment" to exclude agricultural labor and domestic service in a private home for purposes of unemployment benefits. See [Social Security Act](#) (Aug. 14, 1935) Chap. 531, tit. II, § 210(b)(1)-(2), 49 Stat. 620, 625; Chap. 531, tit. IX, § 907(c)(1)-(2), 49 Stat. 620, 643.

²⁴⁴ See DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the Social Security Act*, *supra*, at fn. 217.

²⁴⁵ Martin & Weaver, [Social Security: A Program and Policy History](#) (2005) 66 Soc. Sec. Bull.

²⁴⁶ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, 111-12.

servants and agricultural workers, I submit that the bill is inadequate”²⁴⁷

Black Americans advocated for a nondiscrimination provision in the statute as protection from the racist local administration of previous New Deal relief statutes. For example, one activist pointed out that in the local administration of past emergency measures “there ha[d] been repeated, widespread, and continued discrimination on account of race or color as a result of which Negro men, women, and children did not share equitably and fairly in the distribution of the benefits accruing from the expenditure of such Federal Funds.”²⁴⁸ Congress did not include any such provision in order to secure the support of Southern Democrats.

Charles H. Houston expressed the view of many Black Americans: “If we follow the history of the workmen’s compensation acts, we know that two great classes of workers who will be excluded from the benefit of unemployment insurance; they are agricultural workers and domestic workers. Again, 3 out of every 5 Negro workers drop through the holes of the sieve.”²⁴⁹

4. Fair Labor Standards Act of 1938

The Fair Labor Standards Act of 1938 (FLSA), which is still in force today, provides the federal minimum wage, the maximum number of working hours before overtime pay is required, and the limits on child labor. Like other New Deal laws, in order to appease Southern Democrats, the law purposefully excluded certain occupational categories, like agriculture and domestic services, that prevented the majority of Black Americans from benefiting from the law’s protections.²⁵⁰ Because of these exclusions, the FLSA essentially outlawed child labor in industrial settings, where most white children worked at the time, and allowed child labor in agricultural and domestic work, where most Black children worked.²⁵¹

Members of Congress were clear about the racist intent. For example, Florida Representative J. Mark Wilcox explicitly stated: “You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.”²⁵² Congressman Cox of Georgia specifically objected to the possibility of equal wages because of the impact it would have on relieving the economic subjugation of Black Americans central to the social organization of the South, stating the FLSA “will, in destroying State sovereignty and local self-determination, render easier the elimination and disappearance of racial and social distinctions.”²⁵³ As with other New Deal legislation, President Roosevelt and Congress included the agricultural and domestic service exemptions in order to secure the support from

²⁴⁷ Economic Security Act, [Hearings before House Com. on Ways & Means on H.R. No. 4120](#), 74th Cong., 1st Sess., at p. 798 (1935), testimony of Charles H. Houston, NAACP.

²⁴⁸ Economic Security Act Hearings, *supra*, at fn. 247, p. 598, testimony of George Haynes, Federal Council of Churches of Christ in America.

²⁴⁹ Economic Security Act, [Hearings before Sen. Com. on Finance on Sen. No. 1130](#), 74th Cong., 1st Sess., at p. 646 (1935), statement of Charles H. Houston, NAACP.

²⁵⁰ Dubal, *The New Racial Wage Code*, *supra*, at fn. 226, p. 18.

²⁵¹ *Ibid.*

²⁵² Perea, *The Echoes of Slavery*, *supra*, at fn. 35, 115.

²⁵³ *Id.* at p. 116.

Southern Democrats needed to pass the legislation at all.²⁵⁴

Thus, when the FLSA passed without applying to agricultural or domestic workers, or to employers engaged in intrastate commerce such as service workers, it achieved the explicit aims of the drafting Congress. Like the other New Deal legislation, it accomplished the withholding of protections from many Black Americans through these “race-neutral” occupational exclusions. These carve outs remained until the 1970s, and agricultural workers are still excluded from overtime protections.²⁵⁵

As originally enacted, the FLSA did not address pay for tipped workers.²⁵⁶ While tipping prior to the Civil War had been frowned upon by many as an aristocratic, European practice incompatible with American democracy, after the war many restaurants and rail operators embraced tipping as a means of hiring newly freed Black Americans without actually paying them—these workers were forced to labor for tips alone.²⁵⁷ Tipping thus kept Black workers in an economically and socially subordinate position.²⁵⁸

Later the Supreme Court held that employers could count workers’ tips toward their wages when calculating whether a worker was receiving minimum wage.²⁵⁹ Employers did not need to pay their employees at all as long as workers’ income from tips met or exceeded the established federal minimum wage.²⁶⁰ Congress did not require a base wage for tipped employees until 1966.²⁶¹ Set then as fifty percent of the federal minimum wage, the tipped federal hourly minimum cash wage stands today at \$2.13, where it has been for more than a quarter century.²⁶² The employer must make up the difference between this amount and the federal minimum hourly wage of \$7.25 only if the employee’s tips combined with the direct wages of at least \$2.13 per hour do not equal the federal minimum hourly wage.²⁶³

Today’s tipped wage system carries the legacy of slavery. While Black workers no longer are over-represented in the tipped workforce, studies of the restaurant industry have revealed that diners consistently tip Black servers less than white servers, regardless of service quality.²⁶⁴ And 17 percent of tipped working people of color live in poverty, compared to less than 13 percent of all tip workers.²⁶⁵

5. Federal Emergency Relief Administration (1933 to 1935) and Works Progress Administration (1935 to 1941)

The Federal Emergency Relief Administration (FERA) provided funding for state and local government

²⁵⁴ *Id.* at p. 117.

²⁵⁵ Dubal, *The New Racial Wage Code*, *supra*, at fn. 226, p. 18.

²⁵⁶ Li, Economic Security & Opportunity Initiative, Georgetown L. Center on Poverty & Inequality, [A Civil Rights Issue: The Tipped Minimum Wage & Working People of Color](#) (2018) p. 1.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.* See also U.S. Dept. Labor, [Minimum Wages for Tipped Employees](#) (Jan. 1, 2022) (as of Apr. 9, 2022).

²⁶³ See U.S. Dept. Labor, [Tips](#) (as visited Apr. 9, 2022).

²⁶⁴ Li, *A Civil Rights Issue*, *supra*, at fn. 256, p. 2.

²⁶⁵ *Ibid.*

programs in public works and the arts, and provided more than 20 million jobs.²⁶⁶ But the program delegated the actual hiring to the state and local level without oversight, and those administrators used their discretion to channel the bulk of funds to white workers, refusing to hire Black workers for anything except unskilled work, and paying less than the officially stipulated wage.²⁶⁷ One local administrator stated that “he had to tailor relief . . . to accommodate the demands of southern plantation owners for cheap farm labor by curtailing [the level of] relief payments to agricultural laborers and sharecroppers.”²⁶⁸

The Works Progress Administration (WPA) replaced FERA in 1935, but continued its racist and often sexist practices. For example, a majority of projects were focused on heavy construction work, which favored hiring men over women.²⁶⁹ From 1935 to 1941 fewer than 20 percent of all WPA workers were women and only about three percent were Black women.²⁷⁰ Projects to train women in domestic skills were often explicitly limited to only white women.²⁷¹ Government officials specifically pushed Black workers out of WPA jobs when local conditions required cheap agricultural labor. In Oklahoma, a WPA official closed a Black women’s work project when there was a large cotton crop, writing to Washington, D.C.: “these women are perfectly able to do this kind of work and there is plenty of work to do.”²⁷²

6. Civilian Conservation Corps (1933 to 1942)

The Civilian Conservation Corps (CCC), a public works program focused on conservation projects, employed over 2.5 million men during its tenure—Black and white women were completely excluded—just 10 percent of whom were Black men.²⁷³ While this was somewhat similar to the percentage of Black Americans in the population at large, the conditions of the CCC replicated the racist government intervention seen in other programs, with explicitly limited participation numbers, official segregation at work camps, and limits to the least-desirable unskilled jobs.²⁷⁴ For example, in Georgia, local selection agents refused to enroll a single black applicant for almost a year, and only relented and enrolled a token number of Black Americans after federal agents threatened to withhold the state’s entire allotment of funds.²⁷⁵

7. Tennessee Valley Authority

The Tennessee Valley Authority was a public utility created by the federal government to bring jobs and development to an area hit especially hard in the Depression. The project included construction, conservation, and social service jobs, and it remains one of the largest utilities in the country today.²⁷⁶ It too continued the

²⁶⁶ Deeben, *Family Experiences and New Deal Relief: The Correspondence Files of the Federal Emergency Relief Administration, 1933–1936* (Fall 2012) Prologue Magazine.

²⁶⁷ Rothstein, *The Color of Law*, *supra*, at fn. 147, pp. 155-56.

²⁶⁸ Baradaran, *The Color of Money*, *supra*, at fn. 31, p. 102.

²⁶⁹ Jones, *Labor of Love*, *supra*, at fn. 34, p. 217.

²⁷⁰ *Ibid.*

²⁷¹ *Id.* at p. 218.

²⁷² *Id.* at pp. 219-220.

²⁷³ Hoak, *The Men in Green: African Americans and the Civilian Conservation Corps, 1933-1942*, William & Mary Theses, Dissertations, & Master Projects (2002) p. 2.

²⁷⁴ *Ibid.*; see also Rothstein, *The Color of Law*, *supra*, at fn. 147, p. 157.

²⁷⁵ Hoak, *The Men in Green*, *supra*, at fn. 273, pp. 14-15.

²⁷⁶ Reuters, *Factbox: Largest U.S. Electric Companies by Megawatts, Customers* (April 29, 2014).

pattern of the other government works programs. Black workers were assigned to work separately on construction projects, and only allowed to work at all if there were enough Black workers to make up a full segregated crew. Black workers were denied foreman or supervisory roles and were relegated to low-level unskilled—and lower-paying—positions without opportunities for advancement.²⁷⁷

8. Agricultural Adjustment Administration

The federal government created the Agricultural Adjustment Administration (AAA) in 1933 to increase agricultural prices by paying farmers to grow fewer crops.²⁷⁸ The administration of the AAA harmed Black workers in three specific ways.

First, the program reduced crop planting. For example, the agency limited the amount of land dedicated to cotton farming, but allowed each white landowner to decide *which* acres to stop cultivating, and most often they chose those worked by Black tenant farmers and sharecroppers.²⁷⁹

Second, landowners received federal payments, but the federal administration allowed white landowners to act as “trustees” for their Black tenants without oversight from the AAA.²⁸⁰ Often, landowners never paid their Black tenants, or they argued that the payment should be used to pay down the tenant families’ “debts.”²⁸¹

Third, the AAA allowed disputes over payments to be brought to local elected county committees, and not a single Black farmer served on a county committee throughout the South.²⁸² The county committees, composed of white landlords and white tenants, ruled against Black tenants and directed the vast majority of benefits for the program to white farm owners.²⁸³ In 1934, Ira De A. Reid of the National Urban League said that “[s]o far as the Negroes in the South are concerned the AAA [and other New Deal Agencies] might just as well be administered by the Ku Klux Klan.”²⁸⁴

J. Fair Employment Practices Committee

Faced with enormous activist pressure, President Roosevelt during World War II attempted to protect Black workers, but these actions were temporary and did not have serious enforcement powers. In the lead up to World War II, civil rights activists demanded desegregation of the defense industry. Following a 1941 meeting of civil rights groups from across the country, activists formed the March on Washington Movement with the aim of using mass protest to desegregate the military and industrial workplaces that were central to the war effort.²⁸⁵ Soon the movement had spread across the country, with local chapters from San Francisco to

²⁷⁷ Rothstein, *The Color of Law*, *supra*, at fn. 147, pp. 156.

²⁷⁸ Jones, *Labor of Love*, *supra*, at fn. 34, p. 201.

²⁷⁹ *Ibid.*, citing Linder, *Farm workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal* (1987) 65 *Tex. L. Rev.* 1335, 1361.

²⁸⁰ Perea, *The Echoes of Slavery*, *supra*, at fn. 35, p. 108.

²⁸¹ Jones, *Labor of Love*, *supra*, at fn. 34, p. 201.

²⁸² Perea, *The Echoes of Slavery*, *supra*, at fn. 35, pp. 108-109.

²⁸³ *Ibid.*

²⁸⁴ *Id.* at p. 107, citing Caldwell, *What the NRA is Doing to the Race!*, *Chi. Defender* (May 26, 1934) p. 10.

²⁸⁵ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 134.

Washington, D.C.²⁸⁶

By June 1941, 100,000 or more Black workers from across the country were expected to march on the nation's capital, alarming President Roosevelt at the prospect of a mass protest in Washington, D.C. on the eve of the country's entry into war.²⁸⁷ In response, he issued Executive Order 8802, which both banned discrimination on the basis of race in government employment, defense industries, and training programs and created the Fair Employment Practices Committee (FEPC) to investigate and address complaints of race discrimination.²⁸⁸ While a step forward, FEPC had power over only public-financed wartime industries, and it did not have any real enforcement power. It was only able to issue recommendations, including the cancellation of defense contracts in cases of persistent discrimination.²⁸⁹

FEPC's impact varied around the country. From March 1942 to 1944, Black employment in war-production jobs rose from under three percent to over eight percent, and some Black workers found jobs as skilled labor in manufacturing and minor managerial roles.²⁹⁰ The most progress was made in places where Black activists, progressive unions, and local civil rights organizations worked together with FEPC investigations to pressure for change. In St. Louis, a large March on Washington Movement chapter agitated to reinstate Black workers at a local arms plant, raise wages, and increase hiring of Black women. The organization used its resources to file and pursue FEPC complaints, justifying the establishment of a regional office to address the concerns of Black workers, but pursued this official action hand-in-hand with mass rallies to general grassroots support.²⁹¹

Under the weak enforcement system, other geographic areas were less successful. Both public officials and private employers in several southern cities refused to provide integrated defense employment, and the federal government did not force action.²⁹² FEPC had no mechanism to act against Alabama Governor Frank Dixon, who supported employment of Black war workers only within the bounds of the segregationist system already in place in the southern states.²⁹³ FEPC disbanded in 1946 as the war ended, thus ending a temporary attempt of limited effectiveness to address labor discrimination.²⁹⁴

K. Gains and Limitations of the Civil Rights Acts

Congress passed a series of civil rights laws in the 1960s prohibiting discrimination in employment, voting, and housing. Title VII of the Civil Rights Act of 1964 outlawed employment discrimination on the basis of race, color, religion, sex, or national origin.²⁹⁵

Title VII created strong protection for Black workers throughout the country, making it illegal for an employer

²⁸⁶ *Id.* at 135.

²⁸⁷ Jones, *American Work*, *supra*, at fn. 14, p. 351.

²⁸⁸ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 135.

²⁸⁹ Engstrom, [The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972](#) (2011) 63 *Stan. L.Rev.* 1071, 1073; Rothstein, *The Color of Law*, *supra*, at fn. 147, p. 162.

²⁹⁰ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 136.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ Chamberlain, *Victory at Home: Manpower and Race in the American South during World War II* (2003) p. 123.

²⁹⁴ Jones, *American Work*, *supra*, at fn. 14, p. 354.

²⁹⁵ 42 U.S.C. § 2000e, et. seq.

to (1) fail to hire or discriminate against a worker, or (2) limit job opportunities because of that worker’s “race, color, religion, sex, or national origin.”²⁹⁶

The law protects workers against current racial discrimination and segregation practices, but does not provide a way to right past wrongs.²⁹⁷ It exempts “bona fide” seniority systems and professionally developed ability tests.²⁹⁸ The former are also known as “last hired, first fired” systems, and the latter include tests developed as part of an application process, such as for firefighters, even though these can be employed in a discriminatory manner.²⁹⁹ Strict adherence to a seniority system means that “last hired” Black workers, who more recently moved into positions now that racist discrimination is outlawed, will be “first fired,” under the systems allowed by the law.³⁰⁰ In 1977, the Supreme Court held that Title VII did not outlaw these seniority systems even when they discriminate against Black workers, stating that a seniority policy “does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.”³⁰¹

Title VII is limited in other ways as well. The Supreme Court also drew a line between intentional and unintentional discrimination.³⁰² Currently, Title VII protects an employee if they can show that their employer intended to discriminate against them,³⁰³ which can be difficult to prove. If the employee cannot prove their employer’s racist intentions, Title VII protects them only if the challenged employment practice is not “job related” or not “consistent with business necessity.”³⁰⁴ For example, in *Griggs v. Duke Power Company*, the defendant company required a high school diploma or passing an intelligence test for certain jobs. Neither requirement was related to successful job performance, and both requirements disqualified Black applicants at a substantially higher rate than white applicants.³⁰⁵ The requirements did not fulfill a genuine business need and was thus prohibited by the Act.³⁰⁶ In 1965, Congress formed a federal agency called the Equal Opportunity Employment Commission to enforce Title VII and other employment statutes and regulations. The commission, which continues today, covers all industries, and not just wartime industries, like its predecessor, the Fair Employment Practices Committee.³⁰⁷ It also has enforcement powers to assess penalties and issue orders, instead of only making recommendations.³⁰⁸ However, the agency has been chronically underfunded, which has limited its ability to widely enforce federal protections against racial discrimination in a large number of

²⁹⁶ 42 U.S.C. § 2000e-2(a). The statute also prohibits discrimination by employment agencies, labor organizations, and training programs. 42 U.S.C. § 2000e-2(b)-(d).

²⁹⁷ Henson, *Purposes of Title VII* (2019) 33 Notre Dame J.L., Ethics, and Pub. Pol’y 221, p. 233, quoting 110 Cong. Rec. 7213 (1964).

²⁹⁸ *Id.* at pp. 233-34.

²⁹⁹ *Id.* at pp. 233-34.

³⁰⁰ Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB* (1974) 123 U. Pa. L. Rev. 158, 162-63.

³⁰¹ *Int’l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 353-54.

³⁰² *Id.* at p. 335 fn. 15.

³⁰³ *Ibid.*

³⁰⁴ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

³⁰⁵ *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 425-26, 431.

³⁰⁶ *Id.* at p. 435-36.

³⁰⁷ 42 U.S. Code §§ 2000e-2, 2000e-3, 2000e-5.

³⁰⁸ U.S. Equal Emp’t Opportunity Comm’n, *Chapter 11 Remedies* (as of Apr. 11, 2022).

cases.³⁰⁹ The agency's staff numbers decreased from 3,390 to 1,968 between 1980 and 2018 despite the U.S. population increasing by more than 44 percent in that time.³¹⁰

L. Limits of Affirmative Action

As the Civil Rights Acts were only forward-looking, between 1964 and the late 1970s, the federal government enacted affirmative action programs intended to address the effects of past racist discrimination and segregation.³¹¹ These programs increased the number of underrepresented groups in government contracting work until the Supreme Court and the Reagan Administration in the 1980s effectively brought many federal affirmative action programs to an end.

In 1965, President Lyndon B. Johnson issued Executive Order 11246, which required government contractors to employ affirmative action to expand opportunities for underrepresented groups and established the Office of Federal Contract Compliance to enforce the order.³¹² In 1972, the Nixon Administration approved the "Philadelphia Plan," which instituted numerical goals and timetables for the integration of Black and other racial minority workers into federal contracts.³¹³ In the late 1970s, President Jimmy Carter extended affirmative action requirements to state and local governments, educational institutions, and contractors—nearly every entity that did business with the federal government.³¹⁴ These executive actions, along with anti-discrimination laws improved labor market conditions for Black Americans.³¹⁵ Between 1974 and 1980, the rate of minority employment in businesses that contracted with the federal government rose by 20 percent.³¹⁶ Local government set-aside programs also had impact. A 2014 study found that these programs led to a 35 to 40 percent reduction in the Black-white gap in self-employment, which is a proxy for small business ownership, though it appeared that the gains mostly benefited those who were better educated.³¹⁷

By the late 1970s, an organized backlash had developed and a number of lawsuits challenged the constitutionality of affirmative action.³¹⁸ In response, the U.S. Supreme Court began narrowing the scope of affirmative action programs. The Court has not held that affirmative action is permissible as redress for past harms. The Court, however, did reject explicit race-based quota systems in *Bakke v. Regents of the University of California* in 1978. There, the Court held that it was permissible for government affirmative action programs—

³⁰⁹ Barnes, *Is the EEOC Protecting Workers or Discriminatory Employers?* (Sept. 4, 2019) *Forbes*; Jones, American Work, *supra*, at fn. 14, p. 362; Linderman, *At the EEOC, harassment cases can languish for years* (Apr. 9, 2018) **Error! Hyperlink reference not valid.** AP News.

³¹⁰ Gilway, *The Persistent Black-White Unemployment Gap is Built into the Labor Market* (Sept. 28, 2020) Housing Today.

³¹¹ Jones, American Work, *supra*, at fn. 14, pp. 361-62.

³¹² *Affirmative Action Policies Throughout History* (2022) Am. Ass'n for Access, Equity and Diversity.

³¹³ Jones, American Work, *supra*, at fn. 14, p. 362.

³¹⁴ Menand, *The Changing Meaning of Affirmative Action* (Jan. 13, 2020) *The New Yorker*.

³¹⁵ See, e.g., Donohue & Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks* (1991) 29 J. Econ. Lit. 1603, 1640-41, citing Leonard, *The Impact of Affirmative Action on Employment* (1984) 2 J. Lab. Econ. 439.

³¹⁶ Menand, *The Changing Meaning of Affirmative Action*, *supra*, at fn. 314.

³¹⁷ Chatterji, et al., *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment* (2014) 32 J. of Labor Economics 507, 510.

³¹⁸ Iheukwumere & Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence* (2001) 11 Temp. Policy & Civ. Rights L. Rev. 1, 7-9.

in this case, a state school—to consider an applicant’s race in order to advance the interest of diversity, but that it was unconstitutional for an affirmative action program to employ race-based quotas.³¹⁹

By the early 1980s, under President Ronald Reagan, the federal government began to restrict its enforcement of affirmative action requirements, halting the progress made during the preceding administrations.³²⁰

M. Housing Segregation Limits Black Job Opportunities

Despite the unquestionable progress made in civil and workers’ rights since the Civil Rights Acts, numerous systemic issues continue to harm Black workers.

The government and private actions described in Chapter 5 created a segregated American landscape across the country. This residential segregation created an entrenched type of employment discrimination in the second half of the 20th century.

Following World War II, white workers followed the government incentives described in Chapter 5 and moved to the suburbs.³²¹ Large industrial employers closed facilities in urban centers and followed the white workers.³²² Black workers, who could not move to the suburbs due to the barriers erected by federal and local governments, were left behind in urban centers.³²³ These barriers included discriminatory and inequitable government transportation policy decisions that limited urban Black Americans’ access to jobs,³²⁴ like the Bay Area Rapid Transit (BART) system, designed in the 1960s. In an Oakland neighborhood that is one of the most diverse in the city and one of the densest parts of the region, BART trains run nearly 3 miles without stopping, whereas BART stations are only 1.75 miles apart in suburban areas that are less than have as dense.³²⁵ As one transportation expert explained, “BART was literally designed ... to speed white suburban commuters past Black inner-city residents.”³²⁶ For an in depth discussion of transportation discrimination, please see Chapter 7.

Research has produced evidence that the phenomenon of “job suburbanization” caused significant decline in Black employment and increased Black-white labor inequality.³²⁷ Examples of the movement of jobs to the suburbs abound. For instance, the Ford Motor Company moved all engine production sited at its River Rouge plant—at the time, the largest employer of Black workers in the Detroit region—to facilities in suburban Brook Park, near Cleveland and Dearborn, outside of Detroit.³²⁸ Michigan’s *Labor Market Letter* observed the

³¹⁹ *Regents of Univ. of Calif. v. Bakke* (1978) 438 U.S. 265.

³²⁰ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 166.

³²¹ *Id.* at p. 141; Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

³²² Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 141; Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

³²³ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 141; Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

³²⁴ Spieler, *Racism Has Shaped Public Transit, and It’s Riddled with Inequities* (2020) Kinder Inst. for Urban Research, Rice University; Sánchez et al., *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities* (2003) The Civil Rights Project: Harvard U.

³²⁵ Spieler, *Racism Has Shaped Public Transit*, *supra*, at fn. 324.

³²⁶ *Ibid.*

³²⁷ Miller, *When Work Moves: Job Suburbanization and Black Employment* (2018) Nat’l Bureau of Economic Research Working Paper Series, pp. 3-4.

³²⁸ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 141.

“creation of a very large and alarmingly consistent list of long-term unemployed” Black workers in the region.³²⁹

This exodus of major employers to the suburbs also prevented Black Americans from fully taking advantage of benefits provided by unions. For example, the Communication Workers of America lost thousands of Black members when customer service call centers moved out of New York City and reopened in suburban or rural areas not easily accessible to Black Americans living in the city.³³⁰

Between 1967 and 1987, the number of industrial jobs dropped precipitously in cities with large Black populations: by 64 percent in Philadelphia, by 60 percent in Chicago, by 58 percent in New York, and by 51 percent in Detroit.³³¹ Oakland and Los Angeles also experienced a decline in manufacturing.³³² Automobile and tire companies that had been prevalent in Los Angeles shuttered or moved to the suburbs as early as the 1950.³³³ An analysis of census data for the 15 largest metropolitan areas of the time found that between 1960 and 1970, the suburbs of these areas saw a 44 percent increase in jobs while central cities saw a seven percent decline.³³⁴ Whereas nearly two thirds of jobs were in urban centers in 1960, by 1970, only 52 percent of jobs were in urban centers and in some cities, the majority of jobs were suburban.³³⁵ Corporate executives occasionally admitted that avoiding Black communities “sometimes” motivated their decisions about where to locate.³³⁶ Federal jobs in urban centers also dropped by more than 41,000 between 1966 and 1973.³³⁷

By the early 1990s, the Black urban industrial working class had nearly disappeared nationwide. The impact was broad. Between 1970 and 1993, Black Americans lost ground in nearly every economic category, with unemployment among Black Americans rising from 5.6 percent to 12.9 percent.³³⁸ If new manufacturing was built, for example, by American auto companies, studies have shown a consistent pattern of rural and suburban locations about thirty miles from the Black neighborhood.³³⁹

More recently, U.S. trade policy added to the negative impact of automation and changing technology on jobs for Black Americans.³⁴⁰ Free trade policies and the resulting job losses in the manufacturing sector hit Black men especially hard, as this sector has offered relatively higher-paying jobs for those with lower levels of educational attainment.³⁴¹ These jobs were also more likely to be unionized and afford a range of attendant

³²⁹ *Id.*

³³⁰ Reich, *A Working People*, *supra*, at fn. 36, p. 164.

³³¹ Trotter, *Workers on Arrival*, *supra*, at fn. 6, p. 162.

³³² De Graaf et al., *Seeking El Dorado*, *supra*, at fn. 21, p. 36.

³³³ *Ibid.*

³³⁴ Jack Rosenthal, *Large Suburbs Overtaking Cities in Number of Jobs They Provide* (Oct. 15, 1972) *N.Y. Times*.

³³⁵ *Ibid.*

³³⁶ Keita Cha-Jua, *The New Nadir: The Contemporary Black Racial Formation* (2010) 40 *The Black Scholar* 38, 40.

³³⁷ *Ibid.*

³³⁸ *Id.* at pp. 40-41.

³³⁹ Lusane, *Race in the Global Era: African Americans at the Millenium* (1997) p. 12, quoting _____.

³⁴⁰ Zessoules, *Trade and Race: Effects of NAFTA 2.0 and Other Low-Road Approaches to Trade on Black Communities* (July 18, 2019) **Error! Hyperlink reference not valid.** Center for Am. Progress.

³⁴¹ *Id.*; Rangel & Wallach, *Trade Discrimination: The Disproportionate, Underreported Damage to U.S. Black and Latino Workers From U.S. Trade Policies* (Jan. 8, 2021) pp. 13-15. See Chapter 6 for discussion of the discrimination that has shaped educational outcomes for Black Americans.

benefits, from health care to pensions.³⁴² Black workers were also disproportionately among those whose call center and customer service jobs were subject to offshoring. One study found that Black Americans lost 646,500 good manufacturing jobs between 1998 and 2020, a 30.4 percent decline in total Black manufacturing employment, as part of the overall loss of more than 5 million manufacturing jobs during that time period.³⁴³

Black workers who have lost their jobs have been less likely than their white counterparts to find a replacement job, and when they found new jobs, they more likely to experience pay cuts.³⁴⁴ The loss of jobs to free trade also depressed wages in the long term and intensified wealth inequality.³⁴⁵ The impact has been far reaching. One researcher found that manufacturing decline between 1960 and 2010 had disproportionately harmed Black communities in the areas of wages, employment, marriage rates, house values, poverty rates, death rates, single parenthood, teen motherhood, child poverty, and child mortality.³⁴⁶ These harms may continue. More than a quarter of all Black workers are concentrated in 30 jobs at high risk of automation, according to a 2017 finding of the Joint Center for Political and Economic Studies.³⁴⁷

N. Ongoing Discrimination

Legal segregation resulted in social separation between Black and white Americans, with lasting consequences. Employers often hire new employees by relying on their social networks, ethnic loyalties, apprenticeships, and union relationships. Legal segregation prevented Black workers from building these necessary formal and informal networks with white Americans, which barred Black workers from entering into new, mostly white workplaces or industries.³⁴⁸

Black Americans continue to experience labor discrimination today. One meta-analysis examining a 25-year period starting in 1989 found that discrimination against Black Americans in the labor force had not decreased.³⁴⁹ Black Americans receive interview callbacks for jobs at lower rates than white people. In a study where equally qualified resumes with “very white-sounding” or “very African-American sounding” names were sent out, white applicants received 36 percent more callbacks than Black applicants.³⁵⁰

³⁴² Zessoules, *Trade and Race* **Error! Hyperlink reference not valid.**, *supra*, at fn. 340; Rangel & Wallach, *Trade Discrimination*, *supra*, at fn. 341, pp. 13-15; Scott et al., [Botched Policy Responses to Globalization Have Decimated Manufacturing Employment with Often Overlooked Costs for Black, Brown, and Other Workers of Color](#) (Jan. 31, 2022) Economic Policy Inst.

³⁴³ Scott et al., *Botched Policy Responses*, *supra*, at fn. 342.

³⁴⁴ *Ibid.* The loss of manufacturing jobs has been accompanied by growth in the services industry where jobs typically come with lower pay and fewer benefits. *Ibid.*

³⁴⁵ Zessoules, *Trade and Race* **Error! Hyperlink reference not valid.**, *supra*, at fn. 340.

³⁴⁶ Rangel & Wallach, *Trade Discrimination*, *supra*, at fn. 341, p. 14, citing Gould, *Torn Apart? The Impact of Manufacturing Employment Decline on Black and White Americans*, CEPR Discussion Paper No. DP12992 (2018).

³⁴⁷ Overton, [Black to the Future: Will Robots Increase Racial Inequality?](#), State of Black Am.

³⁴⁸ Jones, *American Work*, *supra*, at fn. 14, p. 314; Reparations Task Force Meeting – October 2021, *supra*, at fn. 6, testimony of Jacqueline Jones.

³⁴⁹ Quillian et al., [Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time](#) (2017) Proceedings of the Nat. Academy of Sciences (PNAS).

³⁵⁰ *Ibid.*

Even when researchers enhanced the resumes associated with Black-sounding names to make them stronger, white candidates still received more call-backs.³⁵¹ Another study found that Black candidates had stronger odds of being called for an interview when their resumes were stripped of information conveying racial or ethnic background.³⁵²

Discrimination against job applicants with criminal history is another factor limiting work opportunities for Black Americans. As discussed above in the licensure section, this discrimination is mandated in some instances and permitted in others.³⁵³ As mass incarceration has disproportionately impacted Black Americans, they have disproportionately suffered post incarceration challenges. By 2010, people with felony convictions accounted for eight percent of all adults and 33 percent of Black adult males.³⁵⁴ Having a felony conviction is worse for formerly incarcerated Black job applicants than white applicants.³⁵⁵ One study found that Black men with no criminal history applying for entry-level jobs were less likely to receive a call back than white male applicants who had recently been incarcerated.³⁵⁶ Research has shown that even in jurisdictions with “ban the box” policies barring employers from asking about a candidate’s criminal history on a job application, Black applicants receive significantly fewer callbacks than white job applicants because employers may assume the Black applicants have a criminal history.³⁵⁷

While Black women have endured both racism and sexism and persistently had their labor devalued,³⁵⁸ Black men experience discrimination in the labor market in unique ways. This is in part due to the criminalization of Black men and boys, examined in Chapter 11, which results in societal distrust and isolation of Black men and boys.³⁵⁹ Growing emphasis on “soft skills” particularly disadvantages Black male job applicants, as many employers wrongly perceive Black men as lacking in these skills that are viewed as increasingly important.³⁶⁰ Researchers have found that employers hold false negative beliefs about the dependability, motivation, and

³⁵¹ Bertrand & Mullainathan, [Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination](#), NBER Working Paper No. 9873 (2003), Nat. Bur. of Economic Research, pp. 2-4.

³⁵² Kang et al., [Whitened Résumés: Race and Self-Presentation in the Labor Market](#) (2016) 61 Admin. Science Quarterly, pp. 22-24.

³⁵³ Segall, [Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage](#) (2011) 14 U. Pa. J. L. & Soc. Change 159, 160.

³⁵⁴ Shannon et al., [The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010](#) (2018) Demography.

³⁵⁵ Segall, *Mass Incarceration*, *supra*, at fn. 353, p. 168-70.

³⁵⁶ Jones & Schmitt, [A College Degree Is No Guarantee](#) (2013) Center for Economic & Policy Research, p. 11.

³⁵⁷ Agan & Starr, [Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment](#) (2016) Univ. of Mich. Law & Econ. Research Paper Series, p. 4.

³⁵⁸ See, e.g., Fyre, [Racism and Sexism Combine to Shortchange Working Black Women](#) (2019) Center for Am. Progress; Banks, [Black Women’s Labor Market History Reveals Deep-Seated Race and Gender Discrimination](#) (2019) Working Economics Blog; Cohen, [Black Women Were Half as Likely to Be Hired for State or Local Jobs Than White Men, a Report Says](#) (Mar. 18, 2021) N.Y. Times; Dill & Duffy, [Structural Racism And Black Women’s Employment In The US Health Care Sector](#) (2022) 41 Health Affairs 265; [Study highlights barriers Black women face in corporate America](#) (Aug. 18, 2020) Philanthropy News Digest.

³⁵⁹ [Breaking the Cycle: Overcoming Challenges Faced by Black Boys and Men](#) (Nov. 19, 2020), Webinar Materials, The Brookings Inst., pp. 10-11, 18.

³⁶⁰ Moss & Tilly, [“Soft” Skills and Race: An Investigation of Black Men’s Employment Problems](#) (1996) Work & Occupations, p. 260.

attitude of Black men, and are unlikely to change these racist beliefs during a written application or interview.³⁶¹

Racial employment gaps are worse among educated workers.³⁶² A 2014 study revealed that 12.4 percent of black college graduates aged 22 to 27 were unemployed in 2013, compared to a rate of 5.6 percent for all college graduates in the same age range. 55.9 percent of employed Black recent college graduates worked in an occupation that typically does not require a four-year college degree.³⁶³ Graduates in areas such as science, technology, math, and engineering fared better, but still experienced significantly higher unemployment and underemployment rates than white individuals with similar degrees.³⁶⁴ In 2013, Black recent college graduates majoring in nine of 12 broad categories had less than a 50 percent chance of holding a job that required their degree.³⁶⁵ Another study found that Black individuals who received MBAs from Harvard between 2007 and 2009 began their careers earning approximately \$5,000 less than their white peers, and by 2015, the racial pay gap had increased to \$100,000 annually.³⁶⁶

O. California

The historic gap in employment between Black and white individuals is seen in California. By every measure, Black Californians continue to lack access to labor markets available to white Californians and as a result continue to suffer harms that have compounded since before the founding of our country. In December 2021, for example, the most recent data available, the unemployment rate in California was 12.0 percent for Blacks and 6.8 percent for whites.³⁶⁷

1. Lack of Government Protection Supports Private Discrimination

From its earliest days of statehood, California enacted a series of laws limiting the ability of Black Americans to participate as full citizens of the state, as discussed in other chapters. These laws limited Black American's voting rights, property rights, interracial marriage, and testimony in court or serve on a jury.³⁶⁸ California barred the testimony of Black individuals in both civil and criminal proceedings.³⁶⁹ These laws left Black Californians with little protection under the law, undermining their ability to advocate for themselves in the workplace, vindicate property rights, or even bear witness to the crimes they suffered.³⁷⁰

The discovery of gold in California 1848 drew migrants from across the country and beyond.³⁷¹ Black

³⁶¹ Pager et al., [Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets](#) (2009) vol. 2009, U. Chi. Legal Forum, pp. 321-322.

³⁶² Darity & Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2020), p. 46.

³⁶³ Jones & Schmidt, *A College Degree Is No Guarantee*, *supra*, at fn. 356, p. 1.

³⁶⁴ *Id.* at pp. 1, 10-11.

³⁶⁵ *Id.* at p. 11.

³⁶⁶ Kitroeff, [Business School is Worth \\$22,000 More if You're White or Asian](#) (Jan. 7, 2016) Bloomberg.

³⁶⁷ Cal. Employment Development Dept., Labor & Workforce Dev. Agency, [California Labor Market Review, February 2022](#) (as of Apr. 11, 2022).

³⁶⁸ De Graaf et al., *Seeking El Dorado*, *supra*, at fn. 21, p. 10.

³⁶⁹ *People v. Hall* (1854) 4 Cal. 399 (quoting civil and criminal provisions barring testimony).

³⁷⁰ De Graaf et al., *Seeking El Dorado*, *supra*, at fn. 21, p. 10, citing Fisher, [The Struggle for Negro Testimony in California, 1851-1863](#) (1969) Southern Calif. Quarterly, pp. 313-324.

³⁷¹ Terrell, [African Americans and the Gold Rush](#) (Feb. 2, 2021), Inside Adams, Sci., Technology & Bus.

Americans were among them. A small group of Black individuals established one of the earliest mining claims in Sacramento County, at “Negro Bar,” near what is now Folsom, on property once owned by William Leidesdorff.³⁷² Black Americans operated several successful mines, including Horncut Mine, a prosperous quartz mine in Yuba County, and the Washington Mine, a gold mine established in 1869.³⁷³

Black miners faced a hostile environment. Because Black Americans lacked the right to testify in court during this period, Black miners were vulnerable to legal challenges and encroachments on their mining claims.³⁷⁴ Frustrated by the discrimination they faced in California, including the state’s discriminatory testimony and suffrage laws in particular, many Black miners left in the late 1850s for gold fields discovered in British Columbia, though some returned to the United States after the Civil War.³⁷⁵ To this day, derogatory names like Negro Bar and Negro Flat are still used for locales in the mining region of California.³⁷⁶ The California Department of Parks and Recreation currently operates the Negro Bar, Folsom Lake State Recreation Area.³⁷⁷ However, the department is working with local community and stakeholders to change the name.³⁷⁸

Black mill workers played a significant role in the lumber industry from 1920 to 1960.³⁷⁹ Experienced Black workers were actively recruited from the South to staff California mills.³⁸⁰ Although vital to their employers, Black workers were paid less than their white counterparts and prohibited from undertaking supervisory duties.³⁸¹

During the late 1800s and early 1900s, Black workers were recruited from the South to work farms in the San Joaquin and Imperial Valleys.³⁸² Many Black farmworkers resisted the racist treatment they faced in California, and used contracted field work as a way to establish themselves as entrepreneurs, skilled workers, or yeoman farmers.³⁸³ As a result, Californian farmers preferred to hire Mexican nationals and other nonwhite immigrants instead of Black workers.³⁸⁴ Additionally, growing towns and settlements during the time often explicitly discriminated against and worked to exclude Black Americans from living or working there. For example, fliers for the Maywood Colony, a huge development entirely surrounding the town of Corning, California, trumpeted: “GOOD PEOPLE - In most communities in California you’ll find Chinese, Japs, Dagoes, Mexicans, and Negroes mixing up and working in competition with the white folks. Not so at Maywood Colony. Employment is not given to this element.”³⁸⁵

In the early 1900s, Black workers were less likely to work in higher paying industrial jobs in the West than in

³⁷² [Key Points in Black History and the Gold Rush](#) (Apr. 8, 2022), Calif. Dep’t of Educ..

³⁷³ [A History of Black Americans in California, Industry](#) (2004) Five Views: An Ethnic History Site Survey for California.

³⁷⁴ *Ibid.*

³⁷⁵ [Key Points in Black History and the Gold Rush](#), *supra*, at fn. 372.

³⁷⁶ [A History of Black Americans in California, Industry, Farming](#), *supra*, at fn. 373.

³⁷⁷ [Negro Bar, Folsom Lake State Recreation Area](#), Calif. Dep’t of Parks and Recreation.

³⁷⁸ *Ibid.*

³⁷⁹ [A History of Black Americans in California, Industry](#), *supra*, at fn. 373.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ Loewen, *Sundown Towns: A Hidden Dimension of American Racism* (2005), p. 49.p. 49.

the North.³⁸⁶ By 1930, over 50 percent of Black men were working in the industrial sectors of the Northeast and Midwest, but no more than 30 percent in the West.³⁸⁷ While industrial jobs often had significant downsides for Black workers, they offered better pay than unskilled positions.³⁸⁸ Still, many California companies refused to hire Black workers.³⁸⁹ For example, in 1940, aviation official W. Gerald Tuttle of the Vultee Aircraft Company in southern California announced, “I regret to say that it is not the policy of this company to employ people other than the Caucasian race.”³⁹⁰

The interwar period saw a significant influx of Black workers and residents to California. As the number of Black residents increased in cities like San Francisco and Los Angeles, Black workers not only increased in number, but also began to move into professions from which they had previously been completely excluded.

1. The New Deal in California

As it did across the country, the Great Depression brought significant unemployment to the state. For example, manufacturing employment fell by 30 percent from 1929 to its lowest level in 1932, while payrolls fell by 50 percent, and unemployment among unionized workers rose to 33 percent.³⁹¹ The New Deal provided an influx of funding to the state.³⁹² For example, the Works Progress Administration employed over 100,000 workers in California.³⁹³ Between 1933 and 1939, the federal government sent \$2.2 billion to California in the form of grants and loans.³⁹⁴

California governments engaged in discriminatory practices as the rest of the country did in disbursing this federal money. Burbank and Glendale invoked city ordinances to exclude a company of Black workers organized under the Civilian Conservation Corps.³⁹⁵ White residents of Richmond objected to an interracial Civilian Conservation Corps camp in 1935 and, as a result, it was eventually replaced with an all-white company.³⁹⁶

Labor organizing has a long history in California³⁹⁷ that over time has led to some of the nation’s most worker protective laws.³⁹⁸ The state enacted first enacted its labor code in 1937, consolidating provisions then in

³⁸⁶ Trotter, *Workers on Arrival*, *supra*, at fn. **Error! Bookmark not defined.**,) pp. 80-81.

³⁸⁷ Trotter, *Workers on Arrival*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 80-81.

³⁸⁸ Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones., citing Weaver, *Negro Labor: A National Problem* (1946), p, 109.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ Walker & Brechin, *The Living New Deal: The Unsung Benefits of the New Deal for the United States and California* (2010) Inst. For Research on Labor and Emp’t Working Paper No. 220-10, p. 53..

³⁹² *Id.* at p. 47.

³⁹³ *Id.* at p. 48.

³⁹⁴ *Ibid.*

³⁹⁵ Loewen, *Sundown Towns*, *supra*, at fn. 385 pp. 100, 239-40.

³⁹⁶ *Id.* at p. 239

³⁹⁷ *Labor History Timeline: California and the United States*, Los Angeles Cmty Collge Dist.

³⁹⁸ *The Best States to Work Index: A Guide to Labor Policy in US States*, Oxfam Research Report(2018), p. 3.

existence.³⁹⁹ California has repeatedly amended its labor and employment laws since then. Like the government, however, California for decades exempted both agricultural and domestic workers from various protections. Assembly Bill 1066, signed into law in 2016, removed exemptions for agricultural employees that had been in place for hours, meal breaks, and other working conditions, including specified wage requirements, and it created phased-in overtime requirements for such workers.⁴⁰⁰ California enacted a “bill of rights” for domestic workers in 2013, extending overtime pay rights to some,⁴⁰¹ but these workers remain without certain other protections.⁴⁰²

2. Wartime Integration and Exclusion from Unions

Black workers made large advancements in the Bay Area during World War II, moving into manufacturing and industrial work in large numbers. By 1944, Black workers were employed widely in wartime industries, especially in the shipyards.⁴⁰³ For example, the City of Richmond saw a massive influx of war workers from 1940-45, when its population grew from 24,000 to 100,000, with the Black population increasing from 270 to 14,000 in those years.⁴⁰⁴

The Federal Employment Practices Committee, the federal anti-discrimination agency active during World War II, had some success in California. For example, in 1945, FEPC reported: “More than twenty-six percent of the Negro working force was engaged in shipbuilding or ship repair. Another twenty-five percent were employed in servicing water transportation, which was largely government work. These two industries alone, the report concluded, accounted for approximately 12,000 Negro workers.”⁴⁰⁵ Even so, the boilermakers union, representing shipbuilders, only allowed white workers to join the main branch of the union, and relegated Black workers to an “auxiliary union” where they were not permitted to vote or file grievances, and received limited benefits compared to white members.⁴⁰⁶ In Los Angeles, the International Longshoremen’s and Warehousemen’s Union, Local 13, for example, excluded Black workers,⁴⁰⁷ even though Black workers and organizations sued the boilermakers’ union for discrimination.⁴⁰⁸

FEPC helped reveal racist hiring practices at Los Angeles airline manufacturing plants. Hearings in 1941 demonstrated that “there were only ten black employees in Douglas Aircraft’s workforce of 33,000, only two among Bethlehem Shipbuilding’s nearly 3,000 Los Angeles employees, and only 54 among Lockheed Aircraft and Vega Airplane’s 48,000 workers.”⁴⁰⁹ Black workers’ organizations helped push against this racist hiring to

³⁹⁹ Assem. Bill No. 2100 (Jan. 22, 1937) (“An act to establish a Labor Code, thereby consolidating and revising the law relating to labor and employment relations. . .”).

⁴⁰⁰ [Assem. Bill No. 1066](#) (2015-2016 Reg. Sess.), as filed on Sept. 12, 2016).

⁴⁰¹ [Domestic Worker Bill of Rights \(AB 241\)](#), Calif. Dep’t of Indus. Relations.

⁴⁰² [Sen. Bill No. 1257](#) (2019-2020 Reg. Session).

⁴⁰³ De Graaf, et al., Seeking El Dorado, *supra*, at fn. **Error! Bookmark not defined.**, p. 198

⁴⁰⁴ Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones, citing Rothstein, The Color of Law, *supra*, at fn. **Error! Bookmark not defined.**, p. 5.

⁴⁰⁵ De Graaf, et al., Seeking El Dorado, *supra*, at fn. **Error! Bookmark not defined.**, p. 198. p. 199.

⁴⁰⁶ Rothstein, The Color of Law, *supra*, at fn. **Error! Bookmark not defined.**, p. 160.

⁴⁰⁷ Trotter, Workers on Arrival, *supra*, at fn. **Error! Bookmark not defined.**, p. 133.

⁴⁰⁸ Rothstein, The Color of Law, *supra*, at fn. **Error! Bookmark not defined.**, p. 160.

⁴⁰⁹ De Graaf, et al., Seeking El Dorado, *supra*, at fn. **Error! Bookmark not defined.**,) p. 311; Alvarez, The Power of the Zoot: Youth Culture and Resistance during World War II (2008), p. 20.

open more of these jobs for Black Americans.⁴¹⁰

Ultimately, FEPC never recommended the cancellation of any defense contracts in California.⁴¹¹ During and after the war, areas of California continued to experience job segregation.⁴¹² For example, Oakland's employment patterns continued to have Black men and women in separate, lower-skilled, and lower-paid work.⁴¹³ When the end of the war brought layoffs, Black workers were disproportionately impacted. By the end of 1946, one third of Black men and 40 percent of Black women in the Bay Area were unemployed.⁴¹⁴

Many Black Americans also migrated to California during this period to pursue farming, though they encountered setbacks similar to those in other labor sectors. Approximately 30,000 to 40,000 Black Americans travelled to the San Joaquin Valley after World War II. The majority settled in cities such as Fresno and Bakersfield, and about 7,000 settled in the Tulare Lake Basin, farmland owned by J.G. Boswell.⁴¹⁵ Still, Black field workers faced discrimination. Unlike their white counterparts, they were rarely promoted to operate machinery for higher pay, and were instead relegated to more demanding physical work for lower pay.⁴¹⁶ Moreover, like in factories, Black workers also experienced greater injury and danger from farm work.⁴¹⁷

3. Fair Employment and Housing and Short Lived Affirmative Action

Several years before the federal government enacted its version of the law, California in 1959 passed the Fair Employment and Practices Act, prohibiting employment discrimination on the basis of race by employers.⁴¹⁸ The present day version of the law is the California Fair Employment and Housing Act.⁴¹⁹ The California Department of Fair Employment and Housing currently enforces the Fair EHA, which also prohibits harassment based on several different protected categories, including race.⁴²⁰ The state agency investigates, prosecutes, and mediates complaints of discrimination.⁴²¹

California's support of the Department of Fair Employment and Housing has not been sufficient to meet the level of need. In 2013, the California Senate Office of Oversight and Outcomes reported that even though California had the strongest antidiscrimination law in the nation, the agency was funded with a "relatively miniscule allotment of resources[,]” which left the Department unable to fully enforce the law and protect workers.⁴²² The agency's investigations of employment discrimination claims "suffer[ed] from understaffing,

⁴¹⁰ Alvarez, *The Power of the Zoot*, *supra*, at fn. 409, pp. 21-22.

⁴¹¹ Rothstein, *The Color of Law*, *supra*, at fn. **Error! Bookmark not defined.**,) p. 162.

⁴¹² Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones, citing Self, *American Babylon: Race and the Struggle for Postwar Oakland* (2005), pp. 54-7, 83.

⁴¹³ *Ibid.*

⁴¹⁴ De Graaf, et al., *Seeking El Dorado*, *supra*, at fn. **Error! Bookmark not defined.**, p. 32.

⁴¹⁵ Arax & Warzmann, *The King of California: J.G. Boswell and the Making of a Secret American Empire* (2003), p. 264.

⁴¹⁶ *Id.* at pp. 117, 161, 257, 283-84.

⁴¹⁷ *Id.* at pp. 117, 161, 257, 283-84.

⁴¹⁸ [Legal Records and Reports](#) (2021) Calif. Dep't of Fair Emp't and Housing.

⁴¹⁹ [Cal. Gov. Code, § 12940](#).

⁴²⁰ Cal. Gov. Code, § 12940; [Employment Discrimination](#), Calif. Dep't of Fair Emp't and Housing, , *supra*, at fn. 418

⁴²¹ [About DFEH](#), Calif. Dep't of Fair Emp't and Housing, *supra*, at fn. 418.

⁴²² Korber & Adkisson, [Department of Fair Employment and Housing](#):

poor quality, intake confusion, and premature case grading.”⁴²³ The oversight Office also unearthed a secret policy that had given the Governor’s Office final say as to whether the discrimination law would be enforced against another California state agency, making it more difficult for government workers to bring a discrimination claim.⁴²⁴ In the years since this report issued, the Department’s budget has grown, but the number of complaints it receives each year has also risen.⁴²⁵

Like the federal government, government agencies in California also implemented affirmative action programs in employment. These programs produced mixed results. For example, between 1977 and 1995, the representation of Black tenured faculty members at the University of California system—which implemented affirmative action in its hiring—grew from 1.8 percent to only 2.5 percent. For community colleges’ faculty between 1984 and 1991, the proportion of Black faculty only grew from 4.9 percent to 5.7 percent.⁴²⁶

California’s affirmative action programs were banned in 1996, after voters passed Proposition 209.⁴²⁷ Proposition 209 amended the California Constitution to prohibit state institutions from considering race in hiring, contracting, and education.⁴²⁸ According to polling data, Proposition 209 was supported by a majority of white and male voters, but opposed by a majority of African American, Latino, Asian American, and female voters.⁴²⁹

The evidence regarding Proposition 209’s impact on employment opportunities is complex. In the 15-year period that followed Proposition 209 going into effect, the representation of people of color and women in public sector did not dramatically increase or decrease.⁴³⁰ Men and women of color working for the State of California continued to earn less than their white male counterparts, and remained under-represented in high-

[Underfunding and Misguided Policies Compromise Civil Rights Mission](#) (Dec. 18, 2013) California Senate Office of Oversight and Outcomes, pp. 1-2.

⁴²³ *Id.* at p. 1.

⁴²⁴ *Id.* at p. 2.

⁴²⁵ [Department of Fair Employment and Housing](#), AllGov: California; [Report to the Joint Legislative Budget Committee: March 2015](#) (Mar. 2015), Dep’t of Fair Emp’t and Housing; [2020 Annual Report](#), Dep’t of Fair Emp’t and Housing (2020).

⁴²⁶ Tierney, *Affirmative Action in California Looking Back, Looking Forward* in <https://www.jstor.org/stable/2967308?seq=1> *Public Academe* (1996) *The J. of Negro Educ.*, Vol. 65, No. 2, at p. 126.

⁴²⁷ Trotter, *Workers on Arrival*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 165-66. In order to avoid loss of federal funding to state or to run afoul of the courts, Proposition 209 included four exceptions: to keep the state or local governments eligible to receive money from the federal government; to comply with a court order in force as of the effective date of this measure (the day after the election); to comply with federal law or the United States Constitution; and to meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting. *Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities* (Nov. 1996) Legislative Analyst’s Office..

⁴²⁸ Trotter, *Workers on Arrival*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 165-66; *Proposition 209*, *supra*, at fn. 428; Bleemer, [Affirmative Action, Mismatch, And Economic Mobility After California’s Proposition 209](#) (2020) University of Calif., Berkeley, Research and Occasional Paper Series: CSHE.10.2020, pp. 6-7; Cal. Const., art. I, § 31.

⁴²⁹ Oppenheimer, [Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson’s Proposition 209 Decision](#) (2011) 13 *Berkeley J. Afr.-Am. L. & Pol’y* 101, 106 .

⁴³⁰ Sumner, et al. [Proposition 209 and Public Employment in California: Trends in Workforce Diversity](#) (2008) Thelton E. Henderson Ctr. for Soc. Justice, Berkeley Law, pp. 5-6; [Equal Opportunity: The Evidence from California](#) (2012) Thelton E. Henderson Center for Soc. Justice, Berkeley Law, p. 9.

level positions.⁴³¹

Proposition 209's impact on the procurement process was more severe, as state and local governments were forced to abandon race-conscious contracting programs. Prior to Proposition 209's passage, awards of public contracts to businesses owned by people of color and women had been rising, reaching a high of 28 percent in 1994.⁴³² By 1998, awards had fallen to less than 10 percent, and they never recovered despite the increasing diversity in California.⁴³³

One study, published in 2006, found that only 32 percent of certified "minority business enterprises" in California's 1996 transportation construction industry were still in business 10 years later, and among those that had survived, businesses owned by African Americans and women had fared less well than others.⁴³⁴ Another study published in 2015 found that Proposition 209 had led to a loss of between \$1 billion and \$1.1 billion annually for businesses owned by people of color or women.⁴³⁵ As Black employers are more likely than their white counterparts to hire Black job applicants,⁴³⁶ the Black business closing may have also hurt Black employment.

Activists in California have worked to overturn Proposition 209, but have not been successful. In 2020, voters rejected Proposition 16, which would have repealed Proposition 209.⁴³⁷

5. Occupational Licensure in California

Nearly 21 percent of workers in California must obtain a license to work in their jobs. California required workers to obtain a license for 61 percent of lower-income occupations, ranking it the third most restrictive state nationwide, following only Louisiana and Arizona.⁴³⁸

California withholds or restricts access to licenses from persons with certain criminal convictions, which is more likely to harm Black residents. For example, as discussed in chapter 11, some incarcerated Californians participate in a program to help battle wildfires.⁴³⁹ Upon release, however, program participants would not be eligible to for jobs in many fire departments, because they cannot obtain an Emergency Medical Technician (EMT) certification.⁴⁴⁰ California law specifically prohibits EMT certification for anyone who has been

⁴³¹ [Equal Opportunity: The Evidence from California](#), *supra*, at fn. 430, p. 9.

⁴³² *Id.* at p. 5.

⁴³³ *Ibid.*

⁴³⁴ Morris et al., [Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises](#) (2006) Discrimination Research Ctr., pp. 2, 20-21. .

⁴³⁵ Lohrentz, [The Impact of Proposition 209 on California's MWBEs](#) (2015)**Error! Hyperlink reference not valid.** Equal Justice Soc., p. 2.

⁴³⁶ Conrad et al., African Americans in the U.S. Economy (2005) p. 3; Stoll et al., [Why Are Black Employers More Likely than White Employers to Hire Blacks?](#) (2001) Inst. For Research on Poverty, pp.1-2..

⁴³⁷ [California Statement of Vote, General Election November 3, 2020](#), Cal. Sec. of State, p. 14

⁴³⁸ [Jobs for Californians: Strategies to Ease Occupational Licensing Barriers, Report #234](#) (Oct. 2016) Little Hoover Comm'n, pp. 15-16.

⁴³⁹ *Gurrola v. Duncan* (E.D. Cal. 2021) 519 F.Supp.3d 732, 736 ("[I]n 2017, 650 incarcerated individuals assisted in suppressing the Pocket, Tubbs, and Atlas Fires. A.B. No. 2147 § 1(c). In 2018, close to 800 incarcerated individuals assisted with the Camp Fire in Butte County. *Id.* § 1(d). And, in 2019, over 400 incarcerated individuals helped battle the Kincade Fire. *Id.* § 1(e).").

⁴⁴⁰ Romo, [California Bill Clears Path For Ex-Inmates to Become Firefighters](#) (Sept. 11, 2020) NPR.

incarcerated for a felony within the past ten years, effectively disqualifying many people who participated in fire camp.⁴⁴¹ In 2020, recent attempts to remediate these issues related to firefighting have had limited success.⁴⁴²

California has made some strides in lifting restrictions on occupational licensure in recent years, with the passage of AB 2138, which prohibits California licensing boards from denying a license for, among other things, many convictions older than seven years and dismissed or expunged convictions.⁴⁴³ While AB 2138 represents progress, other schemes remain in California which continue to have a racially discriminatory impact.⁴⁴⁴

IV. Discrimination in Government Employment

In addition to supporting legal segregation and enabling private discrimination, the federal and California governments discriminated against Black workers as employers. The federal government in civil and military service has refused to employ Black workers, segregated an integrated workforce, and relegated Black workers to lower paid, less-skilled occupations. The state and local governments in California have had similar patterns of discrimination.

A. Segregation in the Federal Civilian Service

The federal civilian service reflected and shaped the racist labor environment of private employers. For much of the federal government's history, it was almost totally white or segregated. During the 19th century there was no blanket ban on Black workers, but different officials were allowed to create a patchwork of regulations forbidding employment of Black Americans.⁴⁴⁵ The United States Postal Service was a striking example—in 1802 Black workers were banned from carrying mail.⁴⁴⁶ Black workers were almost completely excluded from federal employment until 1861—the year a Black clerk was appointed to the United States Postal Service in Boston.⁴⁴⁷

At the turn of the century, Black Americans made up about 10 percent of the federal workforce.⁴⁴⁸ Many Black

⁴⁴¹ Cal. Code Regs., tit. 22, § 100214.3(c)(6) (“The medical director shall deny or revoke an EMT [certificate] if, . . . the applicant . . . [h]as been convicted and released from incarceration for said offense during the preceding ten (10) years for any offense punishable as a felony.”) EMT certification can be denied for several other types of criminal records as well. See generally Cal. Code Regs., tit. 22, § 100214.3(c).

⁴⁴² *Gurrola*, 519 F.Supp.3d at 736-37, appeal pending at *Gurrola v. Ducan*, Case No. 21-15414 (9th Cir.).

⁴⁴³ [Assem. Bill. No. 2138](#), Licensing boards: denial of application: revocation or suspension of licensure: criminal conviction (2017-2018 Reg. Sess.); Cal Bus. & Prof. Code § 7.5 et seq..

⁴⁴⁴ See, e.g., [Assem. Bill 3039 – Dept. of Social Services Occupational Licensing - Summary](#) At least one non-profit determined that 55.5 percent of its clients seeking exemptions from the Department of Public and Social Services were Black women who were “hit especially hard by DSS’s restrictive criminal record screening rules, given the disproportionate rate of arrests and low-level criminal convictions in communities of color.” *Ibid*.

⁴⁴⁵ [Postal history: African American Postal Workers in the 20th Century](#), United States Postal Service; [Wilson and Race](#), President Wilson House.

⁴⁴⁶ *Id.* .

⁴⁴⁷ *Id.*, Jones, American Work, *supra*, at fn. **Error! Bookmark not defined.**

⁴⁴⁸ Little, [How Woodrow Wilson Tried to Reverse Black American Progress](#) (Jul. 14, 2020) History..

workers found steady, valuable jobs in urban post offices, but there was little possibility for advancement.⁴⁴⁹ President Roosevelt provided some support for threatened Black workers. In 1903, he refused to allow the town of Indianola, Mississippi, to drive out its Black postmaster, instead suspending service at the Indianola Post Office rather than accept the resignation of Postmaster Minnie Cox.⁴⁵⁰ But this lasted only until the next year, when a white Postmaster was appointed.⁴⁵¹ And the tide turned with the election of President William Howard Taft in 1908, who stated in his inaugural address: “[I]t is not the disposition or within the province of the Federal Government to interfere with the regulation by Southern States of their domestic affairs,” and that appointing African Americans to federal offices in prejudiced southern communities would do more harm than good.⁴⁵²

In 1913, President Wilson officially segregated much of the federal workforce, including the Treasury, the Post Office, the Bureau of Engraving and Prints, the Navy, the Interior, the Marine Hospital, the War Department, and the Government Printing Office.⁴⁵³ The federal government created separate offices, lunchrooms, and bathrooms for white and Black workers.⁴⁵⁴ William McAdoo, Secretary of the Treasury, argued that segregation was necessary “to remove the causes of complaint and irritation where white women have been forced unnecessarily to sit at desks with colored men.”⁴⁵⁵ The federal government fired Black supervisors, and cut off Black employees’ access to promotions and better-paying jobs, and it reserved those jobs for white employees.⁴⁵⁶

Postmaster General Albert S. Burleson segregated, demoted, or fired Black workers—all but one of the remaining workers was transferred to the dead letter office, and the remaining worker was surrounded by screens so that white workers would not be able to see him.⁴⁵⁷ Though no official government records have been found that indicate how many black postal workers were driven from their jobs, there was a clear pattern to segregate, reclassify, and discharge Black workers.⁴⁵⁸

President Wilson’s decision to segregate an integrated federal workforce resulted in lower pay for Black workers cut off from better-paying jobs,⁴⁵⁹ and demoralized workers by creating separate toilets in the Treasury and Interior Departments.⁴⁶⁰ This damaged the ability of Black Americans to build economic security. For

⁴⁴⁹ *Postal history*, *supra*, at fn. 445.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Id.* at fn 3.

⁴⁵² [William Howard Taft, Inaugural Address](#) (March 4, 1909) University of California, American Presidency Project.

⁴⁵³ Little, *How Woodrow Wilson Tried to Reverse Black American Progress*, *supra*, at fn. 448; see also Baradaran, *The Color of Money* *supra*, at fn. **Error! Bookmark not defined.**

⁴⁵⁴ Little, *How Woodrow Wilson Tried to Reverse Black American Progress*, *supra*, at fn. 448; see also Baradaran, *The Color of Money* *supra*, at fn. **Error! Bookmark not defined.**

⁴⁵⁵ Yellin, *Racism in the Nation’s Service: Government Workers and the Color Line in Woodrow Wilson’s America* (2013), p. 135; [On this Day, Apr. 11, 1913, President Wilson Authorizes Segregation Within Federal Government](#), Equal Justice Initiative.

⁴⁵⁶ Little, *How Woodrow Wilson Tried to Reverse Black American Progress*, *supra*, at fn. 448; see also Baradaran, *The Color of Money* *supra*, at fn. **Error! Bookmark not defined.**

⁴⁵⁷ MacLaury, [The Federal Government and Negro Workers Under President Woodrow Wilson](#) (2000), United States Dep’t of Labor.

⁴⁵⁸ [The Post Office Department and Jim Crow](#) (Dec. 31, 2005) The American Postal Worker Magazine, Am. Postal Workers Union..

⁴⁵⁹ Aneja & Xu, [The Costs of Employment Segregation: Evidence from the Federal Government under Woodrow Wilson](#) (Sept. 2020) Nat’l Bureau of Econ. Research, Working Paper 27798, pp. 2, 11-12.

⁴⁶⁰ Lehr, [The Racist Legacy of Woodrow Wilson](#) (Nov. 27, 2015) The Atlantic.

example, in Washington, D.C., home of many federal jobs, Black homeownership fell after President Wilson's actions, in part because Black federal employees no longer had access to those better jobs and salaries.⁴⁶¹

In 1979, the U.S. General Accounting Office found that exams administered by the Office of Personnel Management to screen applicants for federal jobs disqualified Black candidates at higher rates than white candidates, "offer[ing] no real opportunity for Black job seekers to be fairly assessed for federal jobs."⁴⁶² Few Black applicants received scores high enough to have a "realistic chance" of being considered for employment.⁴⁶³

A later study, commissioned by the U.S. Office of Personnel Management, examined the cases of all 11,920 federal workers fired in 1992, excluding the Postal Service and uniformed military services, and found that 39 percent of those fired were Black, even though Black workers comprised only 17 percent of the workforce at the time.⁴⁶⁴ While federal personnel officials believed that Black employees were fired more often because they tended to be less experienced, less educated, and concentrated in lower-level jobs that experienced more turnover, the study found that, after every measurable factor was discounted, Black workers were still more likely to be fired at nearly every pay grade, from the lower rungs to the senior executive level.⁴⁶⁵

Despite the federal government's history of racism against Black workers, Black workers currently make up more of the federal civil service at over 18 percent than in the general population at 14 percent.⁴⁶⁶ However, for the Senior Executive Service, the elite corps of experienced civil servants responsible for leading the federal workforce, only 10 percent are Black.⁴⁶⁷

B. Segregation in Military Service

The military reflected the rest of the federal government and American society in enacting racist and segregationist policies for much of its history. While Black Americans have consistently served in the military since the very beginning of the country, the military has historically paid Black soldiers less than white soldiers and often deemed Black Americans unfit for service until the military needed them to fight.⁴⁶⁸ The military officially remained segregated until 1950.⁴⁶⁹ Black soldiers consistently failed to be recognized for their contributions, and the government failed to follow through on promises of greater opportunities in exchange for service. While military service has provided an avenue for Black Americans to achieve a measure of economic stability, it has consistently been a place of racial discrimination and segregation, particularly in the highest

⁴⁶¹ Little, *How Woodrow Wilson Tried to Reverse Black American Progress*, *supra*, at fn. 448.

⁴⁶² [Race in America](#), U.S. Government Accountability Office..

⁴⁶³ [Federal Employment Examinations: Do They Achieve Equal Opportunity And Merit Principle Goals?](#) (May 15, 1979) Report to the Congress by the Comptroller of the United States, p. 24.

⁴⁶⁴ Frank Greve, [Federal Study Confirms Link of Race, Firings](#) (Oct. 20, 1994), Seattle Times, Knight-Ridder Newspapers.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ [Executive Branch Employment by Gender and Race/National Origin](#), Policy, Data, Oversight: Data, Analysis & Documentation, United States Office of Personnel Mgmt; [QuickFacts, United States](#), United States Census Bureau..

⁴⁶⁷ [Senior Executive Service, Fiscal Year 2014-2018, United States Office of Personnel Mgmt., Office of Strategy and Innovation Data Analysis Group](#) at p.7

⁴⁶⁸ [The Army and Diversity](#), United States Army Ctr. of Military History.

⁴⁶⁹ *Ibid.*

ranks. Today, there continues to be a limited number of Black Americans in leadership roles.

1. The Revolution and the War of 1812

Black Americans' military service predates the republic itself, as do the government's actions discriminating against Black soldiers and failing to honor promises in exchange for their service. Both free and enslaved Black soldiers, from all 13 colonies, fought with the Continental Army and state militias in the American Revolution.⁴⁷⁰ During the American siege of Yorktown in 1781, British troops expelled all Black volunteer soldiers they had recruited with promises of freedom, with one British officer stating: "We had used them to good advantage, and set them free, and now, with fear and trembling, they had to face the reward of their cruel masters."⁴⁷¹ While Joseph Ranger, a free Black man from Virginia served in the Navy of Virginia and received wages, a land grant, and later a life pension from the U.S. Government, David Baker, an enslaved man on the Isle of Wight, was forced to join the American navy as a substitute for his enslaver, and was re-enslaved after the war.⁴⁷²

After the republic was established, the Second U.S. Congress passed the Militia Law of 1792 allowing only "free able-bodied white male citizen[s]" to serve in the national militia, which became the National Guard.⁴⁷³ In 1796, James McHenry, the Secretary of War, declared, "No Negro, Mulatto, or Indian is to be recruited [in the Marine Corps]."⁴⁷⁴ The U.S. Marine Corps continued this ban on Black Americans for the next 167 years.

During the War of 1812, regardless of the fact that Black soldiers were legally not allowed to serve, Black soldiers made up a significant portion of U.S. Navy forces, and approximately one-quarter of U.S. soldiers at the Battle of Lake Erie were Black.⁴⁷⁵ While many volunteer Black soldiers were explicitly promised freedom or equal opportunities in the future in exchange for their service by the state or federal government, these promises never fully materialized.⁴⁷⁶

Like they had done during the Revolutionary War, British troops recruited Black soldiers by promising freedom and land in exchange for service, but they largely failed to deliver. In fact, Francis Scott Key's "The Star-Spangled Banner"—the national anthem—contains a little-known but controversial verse understood by some scholars to have been intended as a threat or admonition to Black soldiers who might have escaped slavery and joined the British cause in a bid for freedom and the means for self-support:

No refuge could save the hireling and slave
From the terror of flight or the gloom of the grave,

⁴⁷⁰ [Timeline: from the Beginning](#), Black Am. in the U.S. Army; Jones, American Work, *supra*, at fn. **Error! Bookmark not defined.**, pp. 103-04.

⁴⁷¹ Hine & Jenkins, *A Question of Manhood, Volume 1: A Reader in U.S. Black Men's History and Masculinity, "Manhood Rights": The Construction of Black Male History and Manhood, 1750-1870* (1999), pp. 197-98, quoting Hessian captain Johann Ewald.

⁴⁷² Jones, American Work, *supra*, at fn. **Error! Bookmark not defined.**, p. 104.

⁴⁷³ [The Militia Act of 1792](#), Second Congress, Session I. Chapter XXVIII; [About the Guard, How We Began](#), Nat'l Guard.

⁴⁷⁴ [African Americans in the United States Marine Corps Timeline](#), The Nat'l Museum of the Marine Corps.

⁴⁷⁵ [War of 1812 Facts: What roles did African Americans Play in the War of 1812?](#), American Battlefield Trust.

⁴⁷⁶ Smith, [Wedged Between Slavery and Freedom: African American Equality Deferred](#) (Aug. 14, 2017) Nat'l Park Service.

And the star-spangled banner in triumph doth wave

O'er the land of the free and the home of the brave.⁴⁷⁷

2. The Civil War

In the time of the Civil War, Black Americans again attempted to join the war effort, notwithstanding the army's racist treatment and failures to follow through on promises. Congress amended the Militia Law of 1792 to permit Black Americans to enlist in the Union Army in 1862, but initially, only in menial construction and camp services roles.⁴⁷⁸ Black women labored in refugee camps as servants for Union officers and as laundresses for Union troops.⁴⁷⁹ Black Americans were finally admitted to military service in the Union following the Emancipation Proclamation in 1863.⁴⁸⁰ Eventually, nearly 200,000 Black soldiers, roughly half of whom were formerly enslaved southerners, served in the Union Army.⁴⁸¹

Once again, Black soldiers failed to receive equal treatment, pay, or medical care in their military service. Black soldiers had few opportunities for advancement to officer rank, received lower pay, and faced far more severe disciplinary measures.⁴⁸² Second Lieutenant R. H. Isabelle, the target during a purge of Black officers, resigned in disillusionment in 1863, stating that he “joined the United States army . . . with the sole object of laboring for the good of the union supposing that all past prejudice would be suspended for the good of the Country and that all native born Americans would unite together to sacrifice their blood for the cause as our fathers did in 1812 & 1815,” but he found that “the same prejudice still exist[s].”⁴⁸³

During the Civil War, Black soldiers took home net pay of \$7 per month, compared to \$13 per month for white soldiers.⁴⁸⁴ And Black soldiers faced a higher mortality rate than their white counterparts, largely due to racist differences in medical care on the battlefield.⁴⁸⁵ One soldier lamented: “Wee [sic] are said to be U.S. Soldiers and behold wee [sic] are U.S. Slaves.”⁴⁸⁶

In fact, a small number of Black soldiers did not serve willingly in the Civil War.⁴⁸⁷ Starting in 1863, some Union officials used tactics similar to enslavers, press gangs, and man-stealers to grow the ranks of the Union Army.⁴⁸⁸ One army engineer in 1863 stated that of men forced into service: “My men, Colonel, have not been

⁴⁷⁷ Brockell, [The Ugly Reason ‘The Star-Spangled Banner’ Didn’t Become our National Anthem for a Century](#) (Oct. 18, 2020) Washington Post.

⁴⁷⁸ Trotter, *Workers on Arrival*, *supra*, at fn. **Error! Bookmark not defined.**, p. 48.

⁴⁷⁹ Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones.

⁴⁸⁰ Trotter, *Workers on Arrival*, *supra*, at fn. **Error! Bookmark not defined.**, p. 49.

⁴⁸¹ [Timeline: from the Beginning](#), *supra*, at fn. 470.

⁴⁸² Jones, *American Work*, *supra*, at fn. **Error! Bookmark not defined.**, p. 288.

⁴⁸³ Jones, *American Work*, *supra*, at fn. **Error! Bookmark not defined.**, pp. 286-87. .

⁴⁸⁴ Freeman, et al., [The Fight for Equal Rights: A Recruiting Poster for Black Soldiers in the Civil War](#) (1992) 56 *Social Education* 2, pp. 118-120.

⁴⁸⁵ [The Civil War by the Numbers](#), Am. Experience, PBS; Lee, [Socioeconomic Differences in the Health of Black Union Army Soldiers](#) (2009) *Soc. Sci. History*, p. 427-57.

⁴⁸⁶ Berlin, et al, *Freedom: A Documentary History of Emancipation, 1861-1867, Series II: The Black Military Experience* (1982) p. 725, citing an Anonymous Virginia Black Soldier to an Unidentified Washington Official, December 1865.

⁴⁸⁷ Jones, *American Work*, *supra*, at fn. **Error! Bookmark not defined.**, p. 51.

⁴⁸⁸ *Id.* at p. 288-89.

drafted. They have been kidnapped in the night.”⁴⁸⁹ Despite President Lincoln declaring in 1865 that “without the military help of the black freedmen, the war against the south could not have been won,”⁴⁹⁰ Black soldiers were not treated on equal footing, and suffered economic and social hardship as a direct result of the government’s actions during the war.

3. World Wars I and II

Following the Civil War, Black soldiers in the 9th and 10th Cavalries and the 24th and 25th Infantries became known as “Buffalo Soldiers.”⁴⁹¹ With a few exceptions—West Point graduates Henry O. Flipper, John Hanks Alexander, and Charles Young—these all-Black regiments were led by white U.S. Army officers.⁴⁹² Buffalo Soldiers aided in the nation’s westward expansion by building roads and participating in military actions that included the Red River War (1874-1875) and the Battle of San Juan Hill during the Spanish American War (1898).⁴⁹³ These men were also some of the first national park rangers.⁴⁹⁴

However, the legacy of the Buffalo Soldiers is complex. These Black soldiers fought for their rightful citizenship rights by fighting for a white-led government in government in wars to take the Southwest and Great Plains from Native Americans.⁴⁹⁵ Between 1870 and 1890, 18 Black Buffalo Soldiers earned Medals of Honor while fighting Native Americans.⁴⁹⁶ Despite their service, Buffalo Soldiers faced discrimination.⁴⁹⁷ Some were able to access higher education, secure better jobs, and own property, but others returned from service only to be lynched.⁴⁹⁸

While opportunity expanded in the military during the period after the Civil War and more Black Americans joined the service, Black soldiers continued to serve in the armed forces under segregated and unequal conditions. But increased military needs prevailed and, by World War I, there were 380,000 Black soldiers out of the four million total soldiers, a proportion similar to that of Black men in the general population.⁴⁹⁹

During World War I, Black men volunteered to serve in eight all-Black army regiments but remained strictly segregated from white soldiers.⁵⁰⁰ Black soldiers were subject to humiliations including wearing discarded Civil War uniforms, or performing for the amusement of white soldiers.⁵⁰¹ One Black soldier at the time lamented that “The spirit of Saint-Nazaire [Army station in France] is the spirit of the South.”⁵⁰² This played out in the numbers: only 11 percent of Black soldiers saw combat in World War I, while the vast majority were relegated

⁴⁸⁹ Berlin, et al, *Freedom: A documentary History of Emancipation, 1861-1867*, *supra*, at fn. 486, Army Engineer to the Headquarters of the Department of the South, p. 56.

⁴⁹⁰ [Lincoln’s proclamation to establish a “Bureau of Colored Troops”](#), Afr. Am Civil War Memorial, Nat’l Park Serv.

⁴⁹¹ [Buffalo Soliders, Legend and Legacy](#), Nat’l Museum of Afr. Am. History & Culture.

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ *Id.*; [Buffalo Soldiers](#), Nat’l Park Serv.

⁴⁹⁵ [Buffalo Soliders, Legend and Legacy](#), *supra*, at fn. 491.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Jones, American Work, *supra*, at fn. **Error! Bookmark not defined.**, p. 320.

⁵⁰⁰ Jones, American Work, *supra*, at fn. **Error! Bookmark not defined.**, p. 320.

⁵⁰¹ *Ibid.*

⁵⁰² Jack D. Foner, Blacks and the Military in American History: A New Perspective (1974) p. 121, quoting a black officer.

to menial labor.⁵⁰³ This segregation reflected the larger condition of the American economy in that Black soldiers were prevented from moving up in ranks to supervisory positions, and high paying positions were blocked altogether.⁵⁰⁴

This pattern continued in the interwar years and in World War II, when Black Americans continued to serve in the military service despite segregation and other racist policies.⁵⁰⁵ For example, in 1941, the U.S. Army established the 78th Tank Battalion, the first black armor unit. It was made up of Black enlisted men and white officers, but without opportunity for the Black soldiers to advance.⁵⁰⁶

Author James Baldwin remarked that the “treatment accorded the Negro during the Second World War [marked] a turning point in the Negro’s relation to America.... A certain hope died.”⁵⁰⁷

This pattern extended to the Congressional actions aimed at helping soldiers returning from fighting in World War II. In 1944, the Congress passed the Serviceman’s Readjustment Act of 1944, commonly known as the “GI Bill.” The GI Bill included provisions to provide financial assistance for homeownership, opening small businesses, and education, but, like the New Deal legislation before it, it left implementation largely to racist state and local governments and contributed to housing discrimination.⁵⁰⁸ As a result, its benefits were not fully realized for returning Black soldiers. For discussion of the role of the Veterans Administration in implementing and maintaining housing segregation, see Chapter 5. For a discussion of the VA’s role in education discrimination, see the Chapter 6.

4. Post-World War II to the Present

In 1941, President Roosevelt issued Executive Order 8802 stating, “I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin....” The Marine Corps received its first Black recruits, but continued to segregate. “Even though we were all Marines we were kept separate. We didn't have barracks, we lived in huts, built from cardboard, painted green. Camp Lejeune had barracks but we had huts. It was located in the back woods, amid water snakes and bears,” said Marine Sergeant Carrel Reavis.⁵⁰⁹

In 1948, President Harry S. Truman issued Executive Order 9981 to desegregate the military.⁵¹⁰ But, while the military formally integrated, serious racial discrimination persisted. For example, the army did not begin in earnest to integrate its forces until the Korean War, when demand for additional troops meant that the army had no choice but to send Black troops to replace white troops killed or injured in battle. Segregated all-Black army

⁵⁰³ Jones, *American Work*, *supra*, at fn. **Error! Bookmark not defined.**, p. 321.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ [Timeline: from the Beginning](#), *supra*, at fn. 470.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Dalfiume, [The “Forgotten Years” of the Negro Revolution](#), 55 *The J. of Am. History*, 90, 90, quoting James Baldwin as quoted in Yinger, *A Minority Group in American Society* (1965). (

⁵⁰⁸ Brown, *The Whiteness of Wealth: how the Tax System Impoverishes Black Americans—And How We Can Fix It* (2021), pp. 15-16; Callahan, *How the GI Bill Left Out African Americans* (Nov. 11, 2013), Demos.

⁵⁰⁹ [African Americans in the United States Marine Corps Timeline](#), *supra*, at fn.494 474.

⁵¹⁰ [Executive Order 9981](#), Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services.

units persisted until 1954. In the Marines, full integration did not occur until 1960.⁵¹¹

Despite discrimination by the federal government, Black soldiers served and died for their country and have historically used it as a mode of upward mobility out of the South.⁵¹²

The highest proportion of Black individuals ever to serve in an American war came in the Vietnam War.⁵¹³ Young Black men were disproportionately drafted during the Vietnam War years due to education and occupation deferments that were unavailable to Black men due to a centuries of education segregation and discrimination.⁵¹⁴

In the Vietnam War, the American military no longer believed that Black men were not fit for combat.⁵¹⁵ Black men had a much greater chance of being on the front-line and suffered a much higher casualty rate.⁵¹⁶ In 1965 alone, Black soldiers were almost 25 percent of those killed in action.⁵¹⁷

As the United States moved to an all-volunteer military following the Vietnam War and the end to conscription, Black soldiers enlisted at a much higher rate than white individuals, leading Black representation in the military to be roughly twice their representation in the U.S. population at large.⁵¹⁸

Today, racial disparities in the military continue. Even as lower-level troops were integrated, leadership remained almost exclusively white. As late as 2020, of the 41 officials holding four-star rank, only two were Black Americans.⁵¹⁹ Based on government data received through the Freedom of information Act, researchers have found evidence that Black service members have been substantially more likely than white service members to face military justice or disciplinary action.⁵²⁰ Anecdotal news reports have presented a deep-rooted culture of racism and discrimination in all branches of the armed services.⁵²¹ On January 6, 2021, insurgents stormed the U.S. Capitol, carried a confederate flag inside the Capitol building,⁵²² and displayed a noose and gallows in front of it.⁵²³ Of the more than 700 individuals charged in the January 6 insurrection, 81 people have ties to the military.⁵²⁴

C. California

⁵¹¹ Korb, [History of Integration in the U.S. Armed Services](#) (Jul. 13, 2021), MilitaryTime.

⁵¹² Conde, [For many Black families, military service is a chance at upward mobility](#) (Nov. 11, 2021) NBC News; Wilcox, et al., [Black Men Making it in America: The Engines of Economic Success for Black Men in America](#), Inst. for Family Studies, at p. 16.

⁵¹³ [African-Americans in Combat](#), History Detectives, PBS..

⁵¹⁴ Murray, *Blacks and the Draft: A History of Institutional Racism* (1971) 2 J. of Black Studies 57, 69-70.

⁵¹⁵ [African-Americans in Combat](#), *supra*, at fn. 513.

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ Cooper, [African-Americans Are Highly Visible in the Military, but Almost Invisible at the Top](#) (May 25, 2020;) Washington Post.

⁵²⁰ Christensen & Tsilker, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System*, Protect Our Defenders, pp. 1, 15.

⁵²¹ Stafford, et al., [Deep-rooted racism, discrimination permeate US military](#) (May 27, 2021) AP News.

⁵²² Cramer, [Confederate Flag an Unnerving Sight in Capitol](#) (Jan. 9, 2021) N.Y. Times.

⁵²³

⁵²⁴ Romey, [Decoding the hate symbols seen at the Capitol insurrection](#) (Jan. 12, 2021), Nat'l Geographic.

Although Black Americans were present in California going back to the Spanish conquest era, they made up only around one percent or less of the population of California until 1920, and under two percent until the 1940s.⁵²⁵ Still, the pattern seen in the federal civilian service and military service persisted in California at both the state and local levels. Black workers faced segregation and racial discrimination in state and local employment. Even when progress was made, governments failed to meaningfully address past discrimination, and Black workers remained largely shut out of the higher-paid leadership roles—a trend that still exists in the present.

Up until World War II, Black workers were absent from many public and private sector jobs in San Francisco. For example, no Black worker was employed as a public school teacher, police officer, firefighter, or streetcar conductor nor as a bank teller or bus or cab driver in the city before 1940.⁵²⁶ There were no Black streetcar workers until 1942—with poet Maya Angelou being one of the first—though this was not due to a lack of available skilled workforce in the area, as evidenced by the fact that within two years there were over 700 Black platform operators.⁵²⁷

When Bay Area Rapid Transit (BART) system was built in 1967, no skilled Black workers were hired. The National Labor Relations Board-certified unions did not admit Black members, and BART, though a government agency, refused to use its power to insist on non-discrimination policies by the unions.⁵²⁸ And it was a similar story when Oakland built a new central post office during the same period—not a single black plumber, operating engineer, sheet metal worker, or other skilled laborer was hired for construction of the government building.⁵²⁹

The City of Pasadena in Southern California similarly employed almost no Black Americans in government jobs prior to World War II. For example, Ruby McKnight Williams, the first Black woman to be employed by the city in a professional capacity in the 1940s, stated: “In Pasadena they told me they don’t hire black teachers.... I found out ... that no [black] men were employed by the city except garbage men and two or three men who swept City Hall. As for [black] women, even the attendants in the restrooms at the Rose Bowl had never been colored.”⁵³⁰

⁵²⁵ Gibson & Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* (Sept. 2002) U.S. Census Bureau, Population Division: Working Paper No. 56, Table 19, at p. 47; *A History of Black Americans in California*, Introduction *supra*, at fn. 373.

⁵²⁶ De Graaf, et al., *Seeking El Dorado*, *supra*, at fn. **Error! Bookmark not defined.**, p. 198.

⁵²⁷ Rothstein, *The Color of Law*, *supra*, at fn. **Error! Bookmark not defined.**, p. 16.

⁵²⁸ *Id.* at pp. 168-69.

⁵²⁹ *Id.* at p. 168.

⁵³⁰ Hudson, *West of Jim Crow: The Fight Against California’s Color Line* (2020) p. 234, quoting Ruby Williams; see also Rampersad, *Jackie Robinson: A Biography* (1997) p. 22 [“By 1940, a year before Jack Robinson’s departure from Pasadena, the city had not yet hired, as one editorial indignantly put it, ‘a single [black] policeman, fireman, regular day-time school teacher, meter-reader, or any other type of employee for the utilities; no, not even a janitor or an elevator boy in the City Hall.’ Pasadena employed some blacks in the part, street, and refuse departments, and then only as laborers, never as clerks. At some point, the post office began to hire blacks, and a county office gingerly broke the Jim Crow rule; but most businesses did not, and all trade unions scorned blacks as members. The result was chronic unemployment and a growing despair. In 1924, after the city rebuffed a petition to appoint a black policeman (by then Los Angeles had a black detective and several black patrolmen and firemen), the *Eagle* summed up its concern: ‘The condition of affairs surrounding the racial issues in Pasadena is nothing less than nauseating.’”].

Other types of government actions enforced racist and segregationist policies on Black Californians in different parts of the state. For example, in 1970 Pasadena became the first city outside of the South under a federal court order to desegregate its schools. In its ruling on the matter, the district court concluded that the Pasadena school district had discriminated both in its placement of students and in its allocation of teachers. As the court observed, the district’s failures to comply with its own integration policies had occurred “in connection with the teacher assignment, hiring, and promotion policies and practices of the District, its construction policies and practices, and its assignment of students.”⁵³¹

Some segments of the public sector like law enforcement and firefighting continued to discriminate against Black Californians. When they hired Black Californians, hostile work environments sometimes followed.⁵³² The San Francisco Fire Department, for example, had no Black firefighters before 1955, and by 1970, when Black residents made up 14 percent of the city’s population, only four of the Department’s 1,800 uniformed firefighters were Black.⁵³³

Public-sector employers have provided significant opportunities to Black workers, as compared to their private-sector counterparts—including in California. Even still, Black workers continue to encounter barriers to career advancement and higher pay.⁵³⁴ As of 2018, Black workers account for 9.8 percent of California’s state civil service, compared to 5.3 percent of the state’s labor force and 5.5 percent of the population. However, that 9.8 percent share has been disproportionately concentrated in lower salary ranges; Black civil servants represented 12.6 percent of employees earning \$40,000 or less but only 5.7 percent of workers earning more than \$130,000.⁵³⁵

V. Effects Today

The cumulative impacts of the federal, state, and local governments’ racial discrimination and segregation continue to harm Black Americans today. In 2019, the median Black household earned 61 cents for every dollar earned by the median white household.⁵³⁶ This is a slight increase from 2016, when Black households earned 56 cents to the dollar, a figure *lower* than it had been in 1968, after the passage of the Civil Rights Act in 1964.⁵³⁷

As a result of their higher unemployment rate and the persist wage gap, Black Americans experience higher levels of poverty.⁵³⁸ In 2020, 19.8 percent of Black Americans were living in poverty, compared to 8.3 percent of white Americans.⁵³⁹ Due to a combination of racism and sexism, women have always had a higher rate of

⁵³¹ *Spangler v. Pasadena City Board of Educ.* (C.D. Cal. 1970) 311 F. Supp. 501, 504.

⁵³² [AB 3121 Meeting Materials](#), pp. 258-259; Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones.

⁵³³ *United States v. City and County of San Francisco* (N.D. Cal. 1988) 696 F. Supp. 1287, 1290.

⁵³⁴ Madowitz, et al., [Public Work Provides Economic Security for Black Families and Communities](#) (Oct. 2020) Ctr. For Am. Progress.

⁵³⁵ [2018 Annual Census of Employees in State Civil Service: Report to the Governor and Legislature](#) (Mar. 2020) Calif. Dep’t of Human Res., pp. 10, 19.

⁵³⁶ Semega, [Income and Poverty in the United States: 2019](#) (Sept. 15, 2020) United States Census.

⁵³⁷ Manduca, [Income Inequality and the Persistence of Racial Economic Disparities](#) (2018) 5 *Sociological Science* 182, pp. 182, 190.

⁵³⁸ Darity & Mullen, *From Here to Equality*, *supra*, at fn. **Error! Bookmark not defined.**, p. 44.

⁵³⁹ [Poverty Rate by Race/Ethnicity \(CPS\)](#) (2020) Kaiser Family Found., State Health Facts.

poverty than men.⁵⁴⁰ Twelve percent of white women are impoverished, compared to 23 percent of Black women.⁵⁴¹ Black families are more likely than white families to have family members who are impoverished.⁵⁴² This has a destabilizing effect during periods of emergency. A 2020 study found that 36 percent of white families had enough savings to cover six months of expenses, versus 14 percent of Black families.⁵⁴³ Another recent survey also found that 36 percent of Black respondents said that they had no money at all set aside for emergencies, compared to 24 percent of white respondents.⁵⁴⁴ Without a safety net of savings, Black Americans can be more vulnerable to upheavals in the labor market and are more likely to experience homelessness, as discussed in Chapter 5. During the COVID-19 pandemic, Black Americans were more likely to hold jobs that exposed them to the novel coronavirus, and more likely to lose their jobs at the same time. They were more likely to see their savings shrink and more likely to not have enough to eat. As was the case after the 2008 recession, they are experiencing the slowest recovery.⁵⁴⁵

While Black Americans have made significant advances into occupations and job categories that used to be subject to explicit segregation, or kept Black workers at the margins, there has been a limit to this progress. In 2021, an analysis of the 50 most valuable public companies demonstrated that only eight percent of “C-suite” executives—the highest corporate leaders, usually those that report to the Chief Executive Officer—are Black.⁵⁴⁶ At least eight companies list no Black executives among their leadership team, as of December 2021.⁵⁴⁷ Moreover, much of the gains that Black Americans have made in employment and wages have been offset by the intensifying income inequality in the country as a whole.⁵⁴⁸

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The numbers are similar for California. In 2019, the Public Policy Institute of California reported that about 17.4 percent of Black Californians were poor or near poor, compared to 12.1 percent of white people.⁵⁴⁹ In 2020, the poverty rate was 14.6 percent among Black Californians and 7.9 percent among white residents.⁵⁵⁰

⁵⁴⁰ Mason, *Moments of Disparate Peaks: Race-Gender Wage Gaps Among Mature Persons, 1965-2007* (2011) Rev. of Black Political Econ. 38, p. 1-25.

⁵⁴¹ Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones.

⁵⁴² Whitehead, *Support from Family Does Not Replace the Social Safety Net* (Apr. 2016) Ctr for Poverty Research, Univ. Cal. Davis

⁵⁴³ Bhutta, et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (2020) *FEDS, Board of Governors of the Federal Reserve System*.

⁵⁴⁴ Akabas, et al., *New BPC Survey Shows Americans Need Better Ways to Save for Emergencies* (Feb. 25, 2021) Bipartisan Policy Ctr.

⁵⁴⁵ Bohn, et al., *Black Californians Struggle within a Challenging Job Market* (Feb. 24, 2021), Pub. Policy Inst. of Calif.; Smart, *COVID-19 Job Market Wreaks Havoc on Black Women* (Apr. 15, 2021), U.S. News & World Report; Goldman et al., *Racial and ethnic differentials in COVID-19-related job exposures by occupational standing in the US* (Sept. 1, 2021), medRxiv : the preprint server for health sciences; Gould & Wilson, *Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality* (June 1, 2020) Econ. Policy Inst.; *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships* (Sept. 23, 2021) Ctr. on Budget and Policy Priorities; Williams, *Laid Off More, Hired Less: Black Workers in the Covid-19 Recession* (Sept. 29, 2020) **Error! Hyperlink reference not valid.** Rand Corp., the Rand Blog.

⁵⁴⁶ Jan, *The Striking Race Gap in Corporate America* (Dec. 15, 2021) *Washington Post*.

⁵⁴⁷ *Ibid.* These companies are Walmart, Nvidia, Cisco, Pfizer, T-Mobile, Costco, Honeywell and Qualcomm.

⁵⁴⁸ Reed, *The Surprising Cross-Racial Saga of Modern Wealth Inequality* (Jun. 29, 2020) *The New Republic*.

⁵⁴⁹ Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of Jacqueline Jones, citing Bohn, et al., *Poverty in California* (July 2021) Pub. Policy Inst. of Calif.

⁵⁵⁰ Poverty Rate by Race/Ethnicity (CPS), *supra*, at fn. 539..

Prior to the COVID-19 pandemic, Black families in California were nearly twice as likely to be in the bottom tier of income distribution than would be expected for their share of the population.⁵⁵¹ Factors that lead to Black Americans often being first to suffer economic downturn and last to recover also persist in California. During the COVID-19 pandemic, sixty-eight percent of surveyed Black workers in Southern California who had lost their jobs reported that they were still looking for work a year after the start of the pandemic.⁵⁵²

Black Americans are also under-represented in California's two major industries: Hollywood and Silicon Valley. In Hollywood, for example, in films released between 2015 and 2019, Black actors were less likely to be in lead roles than white actors, and Black actors were often funneled into race-related projects, which are typically less well funded.⁵⁵³ Emerging Black actors received six leading role opportunities early in their careers, compared with nine for white actors.⁵⁵⁴ Black talent is even more underrepresented in positions of creative control—Black American directors directed six percent of films released between 2015 and 2019, Black American producers produced six percent of those films, and Black American screenwriters wrote four percent of those films.⁵⁵⁵ In 2020, the *Los Angeles Times* conducted a study of diversity in Hollywood studios and reported that of 230 senior corporate executives, division heads, and other senior leaders in entertainment companies analyzed by the *Times*, 10 percent were Black Americans.⁵⁵⁶ Ninety-two percent of film industry C-suite executives were white, making the industry more homogenous than the energy and finance industries.⁵⁵⁷

The disparities are worse in Silicon Valley. Although between 2004 to 2014, Black college students were more likely to major in computer science than white students,⁵⁵⁸ a 2018 report revealed that in large tech firms in Silicon Valley, Black Americans made up only 4.4 percent of all employees. 1.4 percent were executives, 2.5 percent were managers, and 2.9 percent were professionals.⁵⁵⁹ A recent report also found that for every Black individual who is a direct employee of a tech company, there are 1.4 Black contract workers, who generally earn 75 cents for every dollar made by a direct employee and are far less likely to receive health benefits or paid time off.⁵⁶⁰

VI. Conclusion

Enslavement was the nation's original disregard for Black lives and theft of Black labor. After it formally ended, the nation found new ways, from the Black Codes to Jim Crow, to keep Black Americans tethered to the lowest rungs of work. Discrimination, exclusion, and devaluation never ceased. For more than 150 years since the formal end of slavery, Black Americans have been denied opportunity and pathways to higher wages and

⁵⁵¹ Bohn, et al., [Black Californians Struggle within a Challenging Job Market](#), *supra*, at fn. 545. /.

⁵⁵² Kaplan & Hoff, [Almost 70% of Black workers in Southern California who lost their jobs said they were still looking for work a year after the start of the pandemic](#) (Mar. 2, 2022) Business Insider; *Essential Stories: Black Worker COVID-19 Economic Health Impact Survey* (Feb. 2022) UCLA Ctr. for the Advancement of Racial Equality at Work, pp. 18-19.

⁵⁵³ Dunn et al., [Black Representation in Film and TV: The Challenges and Impact of Increasing Diversity](#) (March 11, 2021) McKinsey.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Faughnder & James, [Hollywood's C-suites are overwhelmingly white. What are studios doing about it?](#), (July 1, 2020) Los Angeles Times.

⁵⁵⁷ Dunn et al., [Black Representation in Film and TV: The Challenges and Impact of Increasing Diversity](#), *supra*, at fn. 553.

⁵⁵⁸ Reparations Task Force Meeting – October 2021, *supra*, at fn. **Error! Bookmark not defined.**, testimony of William E. Spriggs.

⁵⁵⁹ [Is Silicon Valley Tech Diversity Possible Now?](#) (Jun. 26, 2019) Ctr for Emp't Equity, Univ. Mass-Amherst.

⁵⁶⁰ [Shining a Light on Tech's Shadow Workforce](#), Contract Worker Disparity Project.

been shunted into the lowest paying, least protected, and oft times most dangerous work, or they have been denied work altogether.

The few instances of affirmative effort to remedy or at least neutralize discrimination were inadequate and short-lived. Severe employment and wage disparities and attendant socioeconomic gaps never closed because the root causes of discrimination, exclusion, and subjugation were never been addressed and have been sanctioned by the government and allowed to persist and entrench. Centuries of government-supported and government-protected racism have produced a labor market that is so solidly and structurally anti-Black that it can now stand on its own. It cannot and will not come undone without an affirmative dismantling and concentrated investment in creating opportunity for full participation by Black Americans and full valuation of their work.

DRAFT

Chapter 11. An Unjust Legal System

I. Introduction

As discussed in the previous chapters, throughout history, the American government at all levels has treated Black Americans as criminals for the purposes of social control, and to maintain an economy based on exploited Black labor. This criminalization of Black Americans is an enduring legacy of slavery. These persisting effects of slavery have resulted in the over-policing of Black neighborhoods, the mass incarceration of Black Americans, and other inequities in nearly every corner of the American legal system.

This long history of criminalization began with enslavement and has created what some describe as a caste-like system in America where Black Americans are in the lowest caste of America's racial hierarchy.¹ As the following chapter will show, this criminalization of Black Americans has resulted in a criminal justice system that, overall, physically harms, imprisons, and murders Black 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 Black Americans, the inequities that remain are so significant that some scholars have argued that, as it relates to Black Americans, U.S. society has replaced Jim Crow with the criminal justice system.⁴ Black Americans are more likely than white Americans to be arrested, convicted, and to serve lengthy prison sentences.⁵ Black American adults are 5.9 times as likely to be incarcerated than white people.⁶ The experiences of Black Americans with the criminal justice system also result in a general mistrust of the civil justice system⁷ where Black Americans also face barriers to accessing justice such as obtaining a lawyer.⁸

In California, the history of the inequities Black Americans experience is similar to the rest of the country's history. Although enslavement did not exist on the same scale in California that it did in southern states, California has contributed to the inequities Black Americans have experienced and continue to experience. For example, California law once prohibited Blacks Americans from testifying in court cases involving white people.⁹ More recently, California's punitive criminal justice policies, such as the state's three-strikes law, have resulted in large numbers of Black Americans in prisons and jails.¹⁰ Although there is very little scholarship on

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

² See, e.g., U.S. Const., 13th, 14th, and 15th Amends.1.

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, and The Fair Housing Act

⁴ See, e.g., Alexander, *The New Jim Crow* (2020).

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 November 5, 2021).

⁶ *Ibid.*

⁷ Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67; DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts* (2021) 13 Geo. J. L. & Mod. Critical Race Persp. 1.

⁸ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2020) 24 Lewis & Clark L. Rev. 53.

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. (2013) 1, 37–71 (as of July 29, 2021).

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

Section III will discuss the historical criminalization of Black Americans. Section IV will discuss implicit bias. Section V will discuss discrimination in policing. Section VI will discuss discrimination in trial and sentencing. Section VII will discuss discrimination in incarceration. Section VIII will discuss the effects of contact with the criminal justice system. Last, section IX will discuss the experience of Black Americans in the civil legal system.

II. Criminalization of Black Americans

It is well-established in the historical scholarship that American society has criminalized Black Americans starting with enslavement.¹³ Federal, state, and local governments, in order to subjugate Black Americans and maintain their enslaved status, criminalized Black Americans as a way to control Black Americans. This system survived the abolition of slavery and the Civil War, and, as some scholars argue, intensified during legal segregation. Once enslavement ended, white Americans created a new legal and social system to continue to socially control and exploit approximately four million Black Americans.¹⁴

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

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

A. The Slave Codes and the Fugitive Slave Act

The American legal system's early criminalization of Black Americans through legalized social control and punitive laws stretches back to the colonial era and became more punitive over time as discussed in Chapter 2,

¹¹ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2020) 24 Lewis & Clark L. Rev. 53.

¹² Death Penalty Clinic, Berkeley Law, [Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors](#) (June 2020) (as of Apr. 9, 2021).

¹³ See generally Hinton and Cook, [The Mass Criminalization of Black Americans: A Historical Overview](#) (2021) 4 Ann. Rev. Criminology 261-286 (as of Dec. 27, 2021).

¹⁴ U.S. Census, [Map Showing the Distribution of the Slave Population of the Southern States of the United States Compiled from the Census of the 1860](#) (as of Dec. 7, 2021); see generally Office of Coast Survey, National Oceanic and Atmospheric Administration, [Mapping Slavery in the Nineteenth Century](#) (as of Dec. 7, 2021).

Enslavement. Oppression of Black Americans began with cases in the first American colony of Virginia.¹⁵ In the 1640 case of John Punch, which was one of the first documented court cases involving the rights of Black Americans, the courts punished three servants running away from their employer.¹⁶ Two of the servants were white and the third was Black, but they all committed the same crime.¹⁷ The court ordered whippings for all three, but ordered that white servants serve their employer for three more years¹⁸ while it ordered the Black servant, John Punch, to serve his enslaver for the rest of his life.¹⁹

The first laws also treated Black Americans more harshly than whites. For example, Virginia passed the Casual Killing Act of 1669, which declared that if an enslaved person died while resisting their enslaver, the enslaver would not be considered to have acted with malice, which effectively made it legal for enslavers to kill the people they enslaved.²⁰ According to one scholar, the most major slave codes were from 1680 to 1682 as they marshalled previous piecemeal legislation into one code. In 1705, Virginia passed “An act concerning Servants and Slaves,” which combined older laws regarding forced labor in Virginia. This law prohibited Black Americans from engaging in activity that white people were free to do such as resisting a white person,²¹ holding weapons,²² and leaving their plantation without permission.²³ The laws in Virginia became a model for other southern states throughout the slavery era.²⁴

Much like Virginia, other colonies adopted their own slave codes and ensured that the law subjected Black Americans to criminal penalties more harshly than white people. Eventually, every enslaving state had its own slave code. Slave codes, in territories like the District of Columbia,²⁵ and states like Alabama²⁶ and North Carolina,²⁷ all fundamentally treated Black Americans as inferior to white people.

Although Americans frequently believe that the North was not segregated, this was not the case in reality. In 1849 the Massachusetts Supreme Court held that segregated schools were permissible under the state’s

¹⁵ See generally Higginbotham, [Virginia Led The Way in Legal Oppression](#), The Washington Post (May 21, 1978) (as of Dec. 21, 2021); see also Newby-Alexander, [The “Twenty and Odd”: The Silences of Africans in Early Virginia Revealed](#) (2020) 57 Phylon 25–36 (as of Dec. 21, 2021).

¹⁶ The court’s sentence suggests that he was not already a slave as it would be nonsensical to sentence an already enslaved person to a sentence in which they must serve as a slave for the rest of their life.

¹⁷ [General Court, Minutes of the Council and General Court of Colonial Virginia](#), July 22, 1640 p. 466 (as of Dec. 21, 2021).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Commonwealth of Virginia Legislature, Act I. [An act about the casual \[sic\] killing of slaves](#), (1669) Act I. (as of Dec. 21, 2021).

²¹ [An act concerning Servants and Slaves XXXIV](#) (1705), Records of the American Colonies, p. 448 (as of Dec. 21, 2021).

²² [An act concerning Servants and Slaves XXXV](#) (1705), Records of the American Colonies, p. 448 (as of Dec. 21, 2021).

²³ *Ibid.*

²⁴ Higginbotham Jr., [Virginia Led The Way in Legal Oppression](#), The Washington Post (May 21, 1978) (as of Dec. 21, 2021)

²⁵ A Member of the Washington Bar, [The Slavery Code of The District Columbia Together with Notes and Judicial Decisions Explanatory of the Same](#) (1862) (as of Dec. 21, 2021).

²⁶ [Slaves, \[sic\] and Free Persons of Color](#) (1833) A Digest of the Laws of the State of Alabama (as of Dec. 22, 2021).

²⁷ North Carolina General Assembly, [An Act Concerning Slaves and Free Persons of Color](#) (1831) (as of Dec. 22, 2021)]; Philadelphia Female Anti-Slavery Society, [Extracts from the American Slave Code](#) (compiling extracts from slave codes in Louisiana, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Tennessee, Arkansas, Missouri, Kentucky, Virginia, Maryland, Delaware, and the District of Columbia) (as of Dec. 22, 2021).

constitution.²⁸ Similarly, the Michigan Supreme Court held in 1855 that a steamboat company could refuse to sell an overnight cabin to Black abolitionist William Howard Day.²⁹ Courts in southern states even cited to this case—which was in a northern state—when ruling against Black Americans in other cases involving segregation in schools, streetcars, and public accommodations. Some also required judges to punish Black Americans more harshly than white Americans when found guilty of the same crimes.³⁰

Federal laws and court decisions criminalized Black Americans for asserting their human right to be free. The Fugitive Slave Acts of 1793³¹ and 1850³² 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 Black 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.³³ There are many documented examples of court laws, court decisions, and associated documents³⁴ during this time that demonstrated that the American legal system treated Black Americans as inferior, with fewer rights, who were therefore subject to more punitive treatment under the law.

After the Emancipation Proclamation and the end of the Civil War, Congress made several efforts to safeguard the rights of Black Americans. For example, Congress passed the Thirteenth Amendment, which outlawed slavery.³⁵ Congress also passed the Civil Rights Act of 1866, which defined Black Americans as citizens in order to protect the civil rights of newly freed people.³⁶ To primarily protect their physical safety, Congress passed the Ku Klux Klan Act to eliminate extralegal violence against formerly enslaved people.³⁷ Congress also created the Freedmen’s Bureau in order to provide food, clothing, fuel, and other forms of assistance to destitute formerly enslaved people.³⁸

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.

²⁸ *Roberts v. City of Boston*, (Mass. 1849) 5 Cush. 198.

²⁹ *Day v. Owen*, (Mich. 1858) 5 Mich. 520.

³⁰ *Forever Free*, *supra*, at pp. 95 – 96.

³¹ [An Act respecting fugitives from justice, and persons escaping the service of their masters](#), Extracts From the American Slave Code (as of Dec. 29, 2021).

³² [An Act to amend, and supplementary to, the Act entitled “An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters.”](#) Extracts From the American Slave Code[(as of Dec. 29, 2021).

³³ *Dred Scott v. Sandford* (1857) 60 U.S. 393.

³⁴ U.S. Library of Congress, [Collection: Slaves and the Courts, 1740 to 1860](#) (as of Dec. 21, 2021).

³⁵ U.S. Const., 13th Amend.

³⁶ Berwanger, [Negrophobia in Northern Proslavery and Antislavery Thought](#) (1972) 33 *Phylon* 266–75. (as of Dec. 12, 2021).

³⁷ [An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes](#), Pub. L. No. 42-22 (Mar. 4, 1871) 17 Stat. 13 (as of Dec. 29, 2021).

³⁸ Everly, [Freedmen’s Bureau Records: An Overview](#) (Summer 1997) National Archives and Records Administration’s Prologue Magazine (as of Apr. 8, 2021).

B. The Black Codes and Legal Segregation

Southern states passed the Black Codes and vagrancy laws to criminalize, socially control, and maintain formerly enslaved Black Americans in a lower social caste and as a source of exploited, free labor.³⁹ Though often confused with Jim Crow laws, the Black Codes existed to criminalize the everyday activities of Black Americans in southern states during the years immediately after the end of slavery until the Reconstruction Act of 1867.⁴⁰ If arrested and convicted of violations, Black Americans again had little to no control over their own lives. This provided an opportunity for white Americans in economic and political power to continue using Black labor to support the southern economy. 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 Black Americans, enabling their economic exploitation.

Enforcing the Black Codes, local authorities arrested Black Americans for actions that were legal for white Americans. During slavery, white Americans generally believed that free Black Americans were suspicious, as white Americans saw free Black Americans as “masterless” and therefore unhoused or vagrant, and most likely fleeing from the law.⁴¹ In some states, police arrested Black Americans if they could not prove that they worked for a white employer.⁴² They could not change employers without permission.⁴³ Black Americans could not sign labor contracts without a discharge paper from their previous employer.⁴⁴ This placed all the power in employers, much like slavery placed all the power in enslavers, and left Black Americans with little control over their ability to find other work.

Other Black Codes supported the forced labor of Black children, as discussed in Chapter 8, Pathologizing the Black Family. As part of the Black Codes, states passed vagrancy laws that declared Black Americans who were unemployed and without a permanent residence as vagrants and therefore subject to fines or imprisonment, which criminalized and controlled Black Americans.

While the Black Codes ended in the 1860s, ex-Confederate states revived vagrancy laws after the end of Reconstruction. All former states in the confederacy except Tennessee passed vagrancy laws between 1890 and 1909. After the police arrested Black Americans for minor infractions, they leased them to a private company or a white private citizen who would pay the fine in exchange for the person’s forced labor.⁴⁵ Under this system,

³⁹ Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 Va. J. Soc. Pol’y & L. 65, 66; Whitehouse, *Modern Prison Labor: A Reemergence of Convict Leasing Under the Guise of Rehabilitation and Private Enterprises* (2017) 18 Loy. J. Pub. Int. L. 89, 90.

⁴⁰ See generally Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 Va. J. Soc. Pol’y & L. 65, 66.

⁴¹ Johnson, [African Americans and Homelessness: Moving Through History](#) (2010) 40 Journal of Black Studies (583–605 (as of July 23, 2021)).

⁴² See generally Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008)

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

incarcerated people could often never earn enough to repay the plantation owner to their satisfaction, and allowed the plantation owner to continue exploiting his Black workers for many years.⁴⁶

C. Forced Labor under the “Convict Leasing” System

In a system known as “convict leasing,” laws and the U.S. Constitution allowed private entities to force formerly enslaved people and descendants of enslaved people into doing the same work, on the same land, and even for the same people as Black Americans would have when they were enslaved. The convict leasing system was legal because the Thirteenth Amendment allowed forced labor for people who had been convicted of a crime.⁴⁷ 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.”⁴⁸

In some instances, the private citizens who benefitted from this system were former enslavers or even former Confederate soldiers, such as the owner of the Angola State Penitentiary land, which was formerly a plantation, as discussed below in the incarceration section of this chapter.

The conditions under which incarcerated people worked in the convict leasing system were oppressive. Unlike in the slavery era, lessees had no incentives to keep incarcerated people healthy or alive so the convict leasing system was “worse than slavery.”⁴⁹ Working and living conditions for incarcerated people were dangerous, unhealthy, and violent.⁵⁰

For example, archaeologists recently discovered a mass grave of incarcerated people’s remains in Sugar Land, Texas at the Bullhead Camp Cemetery that was once part of the Central State Prison Farm owned by the State of Texas.⁵¹ 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 Black Americans and were participants in the state-sanctioned convict leasing system, which existed in Texas between 1871 and 1911.⁵²

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.⁵³ Further, the incarcerated individuals had occupational injuries and wounds from gunshots and corporal punishment.⁵⁴ Convict leasing

⁴⁶ Alexander, *The New Jim Crow* (2011) 9 Ohio St. J. Crim. L. 7, 11.

⁴⁷ U.S. Const., 13th Amend.; see generally Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account* (2019) 94 N.Y.U. L. Rev. 1465, 1467.

⁴⁸ See, e.g., *Ruffin v. Commonwealth* (Va. 1871) 21 Gratt.790, 796.

⁴⁹ Oshinsk, *Worse Than Slavery* (1996).

⁵⁰ *Ibid*; See also Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008); Cardon, *‘Less Than Mayhem’: Louisiana’s Convict Lease, 1865-1901* (2017) 58 Louisiana History: The Journal of the Louisiana Historical Association 417– (as of July 23, 2021).

⁵¹ Clark, Goshawk Environmental Consulting, Inc. *Back to Bondage Forced Labor in Post Reconstruction Era Texas: Forced Labor in post Reconstruction Era Texas*, (August 2020) (as of Dec. 27, 2021).

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

such as what occurred in Sugar Land, Texas existed throughout the American South.⁵⁵ Further, a variety of individuals and businesses used convict leasing,⁵⁶ such as Tennessee Coal, Iron & Railroad Co., which U.S. Steel owned, during this era.⁵⁷ Scholars indicate that convict leasing gradually ended by around the 1940s,⁵⁸ as each state stopped leasing convict labor to private individuals and business.

D. Legal Segregation and Racial Terror

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

In addition, as Chapter 3, Racial Terror discusses, government actors and private citizens routinely punished Black 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. As discussed in Chapter 3, lynching also contributed to the popular belief among Americans that Black people were assumed to be guilty.⁵⁹ White lynch mobs murdered Black suspects who were later found to be innocent.⁶⁰ Sometimes these murders occurred for no reason at all, and even targeted Black children.⁶¹ White mobs often framed the lynching as a method of self-defense against Black Americans who were portrayed as dangerous criminals who posed a threat to white society.⁶²

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.⁶³

Although Americans often associate segregation laws as a southern phenomenon, the northern legal system also discriminated against Black Americans and treated them as inferior after the Civil War through court cases and laws. This discrimination is particularly apparent in a line of cases involving the rights of Black Americans on

⁵⁵ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

⁵⁶ Crouch, *One Dies Get Another: Convict Leasing in the American South, 1866-1928* (1996); see generally Mancini, [Race, Economics, and the Abandonment of Convict Leasing](#) (1978) 63 *The Journal of Negro History* 339–352 (as of July 27, 2021); Ledbetter, [The Long Struggle to End Convict Leasing in Arkansas](#) (1993) 52 *The Arkansas Historical Quarterly* 1–27 (as of Dec. 28, 2021)

⁵⁷ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).

⁵⁸ Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) p. 247.

⁵⁹ *Coffin v. United States* (1895 156 U.S. 432, 453); see also EJI 2015, *supra*, at p. 20.

⁶⁰ Jordan, *supra*, at p. 588-589.

⁶¹ Jordan, *supra*, at p. 588-589.

⁶² EJI 2015, *supra*, at p. 21.

⁶³ Alexander, *The New Jim Crow* (2010) pp. 40-44.

railroad cars. For example, in 1867, the Pennsylvania Supreme Court ruled against Mary Miles who refused to sit in the colored-only section of a streetcar.⁶⁴ Courts in southern states, such as the Florida Supreme Court⁶⁵ and the Tennessee Supreme Court,⁶⁶ later cited the *Miles* case in other cases in which the courts decided against Black Americans who sought to sit in the whites-only sections of streetcars.⁶⁷ It is also well-established that, from the 1880s to 1960s, northern states had laws that allowed segregation in schools and public accommodations.⁶⁸

E. Tough on Crime Era and the War on Drugs

The civil rights movement ended legal segregation and made explicit discrimination against Black Americans in the text of court cases and statutes illegal. However, scholars argue that legalized social control continues today in the race legal system despite existing civil rights laws and regulations.⁶⁹ These scholars argue that the incarceration of Black Americans, particularly Black men, occurs in our legal system in two stages.⁷⁰

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.⁷¹ During this first stage, the implicit bias—which the previously described history of America’s criminalization of Black Americans created—affects decision makers and results in high numbers of Black Americans in prison. Second, as discussed below, several court cases prevent legal challenges to racial discrimination.⁷²

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 Black Americans in prison than white Americans. 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 sale, distribution, possession, and use—to gain support from voters. John Ehrlichman, who had been Nixon’s domestic policy advisor, explained:

“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes,

⁶⁴ *West Chester & Phil. R.R. Co. v. Miles* (Pa. 1867) 55 . 209.

⁶⁵ See e.g., *Patterson v. Taylor* (Fla. 1906) 51 Fla. 275.

⁶⁶ *Morrison v. State* (Tenn. 1906) 116 Tenn. 534.

⁶⁷ *Plessy v. Ferguson* (1896) 163 U.S. 537, 548.

⁶⁸ See generally, Jim Crow Museum, *Examples of Jim Crow Laws - Oct. 1960 – Civil Rights* (2001) (as of Dec. 22, 2021)].

⁶⁹ Alexander, *The New Jim Crow* (2010), Small, [The War on Drugs Is a War on Racial Justice](#) (2001) 68 Social Research 896–903 (as of Dec. 29, 2021).

⁷⁰ *Id.* at 130.

⁷¹ *Id.* at 130.

⁷² *Id.* at 130.

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.⁷³”

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.⁷⁴ Democratic politicians such as President Bill Clinton also ran on tough on crime platforms during his campaigns and supported punitive laws once in office.

These political campaigns often relied on the negative stereotypes of Black American as criminals built by the previous three centuries of American law and order. For example, George H.W. Bush produced a series of advertisements for his 1988 presidential campaign against Democratic nominee Michael Dukakis that featured a Black man named Willie Horton. These advertisements exploit the stereotype of Black 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.”⁷⁵ 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.⁷⁶ Thousands of incarcerated individuals safely took advantage of furlough programs in the nation, and William Horton was the rare tale of a disaster.⁷⁷

Once politicians entered office, racist political campaigns morphed into racist policies. In 1971, President Nixon declared a “War on Drugs.”⁷⁸ In the speech on it, he described drug abuse as “Public Enemy Number One.”⁷⁹ 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.⁸⁰ Rather than treat drug use as a public health issue, the American government chose to treat illegal drug use as a criminal justice issue.⁸¹ Federal and state governments chose to punish drug users rather than offer medical

⁷³ Baum, [Legalize It All](#) (April 2016) Harper’s Magazine, atp. 22. (as of Dec. 28, 2021).

⁷⁴ Primuth, [Ronald Reagan’s Use of Race in the 1976 and 1980 Presidential Elections](#) (2016) 100 The Georgia Historical Quarterly 36–66 (as of Dec. 29, 2021)

⁷⁵ Schwartzapfel and Keller, [Willie Horton Revisited](#), The Marshall Project (May 13, 2015) as of February 9, 2022).

⁷⁶ Schwartzapfel and Keller, [Willie Horton Revisited](#), The Marshall Project (May 13, 2015) < (as of February 9, 2022)].

⁷⁷ Schwartzapfel and Keller, [Willie Horton Revisited](#), The Marshall Project (May 13, 2015) < (as of February 9, 2022);

⁷⁸ President Richard M. Nixon, [Remarks About an Intensified Program for Drug Abuse Prevention](#) (June 17, 1971) (as of Dec. 29, 2021).

⁷⁹ Id.

⁸⁰ Gorman, “[War On Drugs” Continues In United States Under New Leadership](#) (1993) 307 BMJ: British Medical J.369–371 (as of July 30, 2021); See also Reuter, [Why Has US \[sic\] Drug Policy Changed So Little over 30 Years?](#) (2013) 42 Crime and Just. 75–140 (as of July 30, 2021).

⁸¹ See generally Feldman, [Public Health and the Policing of Black Lives](#) (2015) 7 Harvard Pub. Health Rev. 1–3. (as of Dec. 29, 2021); American Public Health Association, [Policy Statement: Defining and Implementing a Public Health Response to Drug Use and Misuse](#) (Nov. 5, 2013) (as of Jan. 3, 2022).

help. The war on drugs, which continues today,⁸² is a cause for the high numbers of imprisoned Black Americans, as evidence exists to suggest that Black Americans use drugs⁸³ and engage in violent crime at the same rate as white Americans.⁸⁴

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.⁸⁵

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),⁸⁶ even though there is no scientific difference between these forms of the drug.⁸⁷ The law established a 100 to 1 disparity in the punishment created for the distribution of crack and powdered cocaine.⁸⁸ For example, distribution of only five grams of crack resulted in a minimum five-year federal prison sentence.⁸⁹ Meanwhile, distribution of 500 grams of powder cocaine resulted in the same sentence.⁹⁰

In 1988, Congress added even harsher penalties to the law.⁹¹ 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 premises and eliminated many federal benefits, such as student loans, for anyone convicted of a drug offense.⁹² 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.⁹³ Scholars have argued that these policies perpetuate residential segregation.⁹⁴

The law also expanded the use of the death penalty for serious drug-related offenses and imposed new mandatory minimums for drug offenses.⁹⁵ This Anti-Drug Abuse Act has had a disproportionate effect on Black

⁸² See, e.g., Hudak, [Biden should end America's longest war: The War on Drugs](#) (Sep. 2021) (as of Dec. 29, 2021); see also Farber, [The War on Drugs turns 50 today. It's time to make peace](#), Washington Post (June 17, 2021) (as of Dec. 29, 2021).

⁸³ See McCabe, [Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students](#) (2007) 6 J. Ethn Substance Abuse)75-95 (as of Dec. 29, 2021); Institutes of Health, National Institute of Drug Abuse, U.S. Department of Health and Human Services, [Drug Use Among Racial/Ethnic Minorities \(Revised\)](#) (2003) (as of Dec. 29, 2021).

⁸⁴ D'Alessio & Stolzenberg, [Race and the Probability of Arrest](#) (2003) 81 Soc. Forces 1381-97. (as of Dec. 29, 2021).

⁸⁵ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, (Oct. 27, 1986) 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 et seq).

⁸⁶ *Ibid.*

⁸⁷ Vagins and McCurdy, American Civil Liberties Union, [Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law](#) (Oct. 2006) pp. ii (as of Feb. 9, 2022).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ 21 U.S.C. § 801

⁹² *Ibid.*

⁹³ Silva, [Collateral Damage: A Public Housing Consequence of the War on Drugs](#) (2015) 5 U.C. Irvine L. Rev. 783 (as of April 7, 2022)

⁹⁴ Williams, [Fair Housing's Drug Problem: Combatting the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform](#) (2016) 54 Harvard Civ. Rts.-Civ. Liberties L. Rev. 769, 779 (as of April 7, 2022).

⁹⁵ *Ibid.*

Americans because Black Americans have more commonly used crack cocaine rather than powdered cocaine.⁹⁶ 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 1986.⁹⁷ Another showed that close to one third of individuals arrested for drug possession in the U.S. are Black adults.⁹⁸

Some scholars argue that other laws passed during this time intensified drug law enforcement by incentivizing local law enforcement to stop, search, prosecute, and/or incarcerate large numbers of people. For example, during the presidency of President Bill Clinton, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 or “The 1994 Crime Bill,” which made several changes to the law, such as increased federal penalties for many crimes; made a variety of offenses federal crimes; and provided federal funding in ways that encouraged the growth of a more punitive criminal justice system.⁹⁹

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.¹⁰⁰ To name another example, Congress passed the Comprehensive Forfeiture Act of 1984, which as some scholars argue, incentivizes police to engage in over-policing because it allows them to keep assets of people engaging in criminal activity.¹⁰¹ Numerous studies around the country have found that the police are more likely to seize money and property from Black defendants.¹⁰²

F. Implicit Bias

As federal, state, and local governments intentionally and methodically criminalized Black Americans, Americans, regardless of race, began to associate Black Americans with crime. This enduring legacy of slavery

⁹⁶ Sklansky, *Cocaine, Race, and Equal Protection* (1995) 47 Stan. L. Rev. 1283–1322.

⁹⁷ Tolani Britton, Berkeley Institute for Research on Labor and Employment, [Does Locked Up Mean Locked Out? The Effects of the Anti-Drug Abuse Act of 1986 on Black Male Students' College Enrollment](#), (April 9, 2019, updated November 2020) (p. 22 (as of April 7, 2022)).

⁹⁸ Tess Borden, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use In The United States* Human Rights Watch & Am. Civil Liberties Union, (2016) (p. 6).

⁹⁹ 34 U.S.C. 12631§ 1210112631 et seq; see generally Lauren-Brooke Eisen, [The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System](#) (Sept. 9, 2019) Brennan Center (as of Feb. 9, 2022).

¹⁰⁰ Eisen et al., *Undoing the 1994 Crime Bill* in *Democracy & Justice: Collected Writings*, (2019), pp. 71–72 <<https://www.jstor.org/stable/resrep28415.27>> [as of July 30, 2021].

¹⁰¹ Blumenson & Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda* (1998) 65 U. Chi. L. Rev. 35, 51-52, 82; Rainbolt, *Crime, Property, and Justice Revisited (The Civil Asset Forfeiture Reform Act of 2000)* (2003) *Public Affairs Quarterly*, vol. 17, no. 3, pp. 219–239 <www.jstor.org/stable/40441355> as of July 30, 2021]; *U.S. v. Reese* (9th Cir. 1993) 2 F.3d 870, 878, 880 [involving police officers who used excessive force and were at least partly incentivized by keeping seized drug money];

¹⁰² See, e.g., American Civil Liberties Union, [Half of People Facing Civil Forfeiture in Montgomery County are African-American](#), (October 19, 2015) <<https://www.aclu.org/press-releases/half-people-facing-civil-forfeiture-montgomery-county-are-african-american>>; (as of April 8, 2022); Fritz, *Timbs v. Indiana: Civil Forfeiture, Racism, and the War on Drugs* (May 14, 2021) *Denver Law Review* <<https://www.denverlawreview.org/dlr-online-article/timbs>> (as of April 8, 2022); Lee et. al., *Taken: How Police Departments Make Millions By Seizing Property* (April 22, 2020) <<https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002/>> (as of April 8, 2022).

has resulted in an American society that is biased against Black Americans. Psychologists have found that the stereotype of Black Americans as violent and criminal has persisted for almost 60 years.¹⁰³ This association is not only strong, it is also automatic and unconscious.¹⁰⁴ 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.¹⁰⁵

A new but growing body of scholarship shows that police officers are frequently biased against Black Americans.¹⁰⁶ New policing technologies may perpetuate how police treat Black Americans because they use algorithms that replicate human biases.¹⁰⁷

G. California

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

In 1874, the California Supreme Court upheld school segregation in San Francisco.¹⁰⁸ In 1919, the California Supreme Court decided a case *against* a Black couple, the Garys, who fought to keep their Los Angeles property against a racially restrictive covenant.¹⁰⁹ These cases show that California courts were actively involved in legitimizing discrimination against Black Americans.

In addition to court cases, California also passed discriminatory laws. As discussed in other chapters, in 1850, the state prohibited marriage between Black and white Americans¹¹⁰ and prohibited Black Americans from testifying in civil and¹¹¹ criminal court cases that involved white people.¹¹² The California Supreme Court upheld this law prohibiting testimony from Black Americans.¹¹³ Like other states and the federal government,

¹⁰³ Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, The Journal of Personality and Social Psychology Vol. 87, No. 6 (2004) <<https://web.stanford.edu/~eberhard/downloads/2004-SeeingBlackRaceCrimeandVisualProcessing.pdf>> p. 876 [as of May 16, 2021].

¹⁰⁴ *Ibid.*

¹⁰⁵ Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* Psychological Science (2006) <https://www.scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1040&context=lsrp_papers> [as of May 17, 2021].

¹⁰⁶ See generally Weir, Policing in black & white, American Psychological Association, Monitor on Psychology (December 2016) Vol. 47, No. 11 at p. 36 <<https://www.apa.org/monitor/2016/12/cover-policing>> [as of Jan. 2, 2021].

¹⁰⁷ Moy, A Taxonomy of Police

Technology'sTechnology'sTechnology'sTechnology'sTechnology'sTechnology'sTechnology'sTechnology's Racial Inequity Problems (2021) 2021] U. Ill. L. Rev. 139; see generally Okidegbe, When They Hear Us: Race, Algorithms and the Practice of Criminal Law (2020) 29-SUM Kan. J.L. & Pub. Pol'y, 329; Selbst, Disparate Impact in Big Data Policing (2017) 52 Ga. L. Rev. 109; Richardson et al., Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice (2019) 94 N.Y.U. L. Rev. Online 192.

¹⁰⁸ *Ward v. Flood* (1874) 48 Cal. 36, 52.

¹⁰⁹ *Los Angeles Inv. Co. v. Gary* (1919) 181 Cal. 680, 684.

¹¹⁰ Stats. 1850, ch. 140, p. 424.

¹¹¹ The Civil Practice Act, Stats. 1851, ch. 1, § 394, p. 113.

¹¹² The Criminal Act of 1850, Stats. 1850, ch. 99, § 14, p. 230.

¹¹³ *People v. Howard* (1860) 17 Cal. 63, 65.

California also passed its own Fugitive Slave Law in 1852.¹¹⁴ Much like southern states, California also had vagrancy laws.¹¹⁵

More recently, California passed the Mulford Act on July 28, 1967, which made it a misdemeanor to carry loaded firearms in public in California.¹¹⁶ 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 Black Americans.¹¹⁷ In February 1967, 20 armed Panthers escorted Malcom X's widow Betty Shabazz to the Malcom X Memorial in San Francisco.¹¹⁸ In April 1967, 12 armed Panthers led a protest against a Contra Costa County Sheriff who killed a young Black American man.¹¹⁹ It was against this backdrop that state Assemblyman Donald Mulford introduced legislation to ban the carrying of firearms in public places.¹²⁰ In response to the proposed legislation, a group of Panthers walked inside the Assembly chamber at the California Capitol while carrying firearms to protest.¹²¹ 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.¹²²

California has also imprisoned Black 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.¹²³ 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 County Deputy District Attorney argued against Pratt's parole stating, "he is still a revolutionary man."¹²⁴ While Fitzgerald remained in prison for over 51 years until his death at age 71, 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.¹²⁵ Advocates argue that other Black political activists currently imprisoned

¹¹⁴ An Act Respecting Fugitives from Labor, and Slaves Brought to This State Prior to Her Admission into the Union, Chap. XXXIII, April 15, 1852; see generally Smith, [Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California](#) in Pacific Historical Review vol. 80, No. 1 (2011) pp. 28-63 (as of Nov. 18, 2021).

¹¹⁵ Berger, [Surveying the Golden State \(1850-2020\) Vagrancy, Racial Exclusion, Sit-Lie, and the Right to Exist in Public in California](#) Legal History Vol. 16 (2021) pp. 212-16 (as of Mar. 15, 2022).

¹¹⁶ Leonardatos, *California's Attempts to Disarm the Black Panthers* (1999) 36 San Diego L. Rev. 947, 970, 978.

¹¹⁷ Leonardatos, *California's Attempts to Disarm the Black Panthers* (1999) 36 San Diego L. Rev. 947, 967-70, 986; King, *Heller as Popular Constitutionalism? The Overlooked Narrative of Armed Black Self-Defense* (2018) 20 U. Pa. Const. L. 1237, 1256-57.

¹¹⁸ Leonardatos, *California's Attempts to Disarm the Black Panthers* (1999) 36 San Diego L. Rev. at 968 967.

¹¹⁹ *h36Ibid.*

¹²⁰ *Id.* at 970; see also Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties* (2020) 106 Iowa L. Rev. 229, 255 and Riley, *Indians and Guns* (2012) 100 Geo. L.J. 1675, 1712.

¹²¹ Leonardatos, *California's Attempts to Disarm the Black Panthers* (1999) 36 San Diego L. Rev. 947, 969-71.

¹²² Leonardatos, *California's Attempts to Disarm the Black Panthers* (1999) 36 San Diego L. Rev. 947, 987.

¹²³ Churchill, [A Not So Friendly Fascism?: Political Prisons and Prisoners in the United States](#) (2006) *CR: The New Centennial Review* vol. 6, no. 1, pp.1-54 (as of Mar, 8 2022).

¹²⁴ Churchill, *supra*.

¹²⁵ Churchill, [A Not So Friendly Fascism?: Political Prisons and Prisoners in the United States](#) (2006) *CR: The New Centennial Review* vol. 6, no. 1, pp.1-54 (as of Mar, 8 2022); Autodidact 17, *Black Panther Chip Fitzgerald joins ancestors* (April 15, 2021) New York Amsterdam News <<https://tinyurl.com/46669juj>> (as of March 8, 2022)

in California should be considered political prisoners because they have been denied parole as a result of their political affiliations.¹²⁶

III. Policing

Police have harassed, brutalized, and killed Black 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 Black Americans in the American public at large and in our police force. Due to implicit bias in policing, and the effects of residential segregation, Black communities are paradoxically both under- and over-policed depending on the type of crime.¹²⁷ The police and the American public see Black Americans not as victims, but as criminals. The legacy of slavery continues to devalue Black lives today as police are more likely to stop, arrest, and kill Black Americans than white Americans.

A. Slave Patrols

Slavery era “slave patrols” were an early form of policing and first began in the Carolina colony in the early 1700s.¹²⁸ Slave patrols were made up of ordinary citizens, like farmers, hotelkeepers, and brick makers,¹²⁹ who banded together to catch, return, and discipline freedom seekers and prevent revolts.¹³⁰ Some slave patrol members were community leaders and the enslavers who enslaved large numbers of people in the region.¹³¹ Some slave patrols had written patrol enforcement instructions, member rosters, and correspondence.¹³² Others were more informal and simply consisted of all able-bodied white men in a community.¹³³ Every enslaving state had slave patrols by the end of the 18th century.

Slave patrols had many similarities with modern police departments. Much like current police departments, some slave patrols had hierarchical organization structures that mimicked military units with ranks such as captain. Slave patrols also used dogs to attack enslaved people by biting them but also to instill fear, and used bloodhounds to track down enslaved people.¹³⁴ 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.¹³⁵

¹²⁶ Martin, *Elmer G. Pratt, Jailed Panther Leader, Dies at 63* (June 3, 2011) New York Times (as of March 9, 2022)

¹²⁷ Chalfin et al., *Police Force Size and Civilian Race Working Paper 28202*, National Bureau of Economic Research (as of Nov. 29, 2021).

¹²⁸ Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (2001).

¹²⁹ Russ, *Slave Patrol Ordinances of St. Tammany Parish, Louisiana, 1835-1838* (1972) Louisiana History: The Journal of the Louisiana Historical Association vol. 13, no. 4, pp. 399–412 as of July 22, 2021); Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (2001).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities* (2016) *Phylon* (1960-) vol. 53, no. 1, 2016, pp. 42–66 <<https://www.jstor.org/stable/phylon1960.53.1.42>> [as of July 22, 2021].

¹³⁵ Narrative of Walter Rimm, Image 254 of Federal Writers’ Project: Slave Narrative Project, Vol. 16, Texas, part 3, Lewis-Ryles, 1936 <<https://www.loc.gov/resource/mesn.163/?sp=253>> [as of Jan. 2, 2022]; see also U.S. Library of Congress, Collection: Born in Slavery: Slave Narratives from the Federal Writers’ Project, 1936 to 1938 <<https://www.loc.gov/collections/slave-narratives-from-the-federal-writers-project-1936-to-1938/articles-and-essays/voices-and-faces-from-the-collection/>>

Much like slave patrols, police have continued to use dogs against Black Americans in the 20th century through the present. Police used dogs against demonstrators during the civil rights movement.¹³⁶ 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.¹³⁷

B. Targeting and Harassment of Black Political Leaders

Law enforcement agencies have not only targeted Black Americans and physically hurt them, but the federal government has targeted Black 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.¹³⁸ The Mississippi Sovereignty Commission openly discussed murdering civil rights activists and were implicated in false convictions of activists.¹³⁹ The FBI has continued surveillance action today against Black Lives Matter organizers.¹⁴⁰

C. Over-Policing

A majority of Black Americans live in communities where there are higher rates of violent crime. As described in Chapter 5, The Root of Many Evils, Housing Segregation, due to government-sanctioned residential segregation, Black Americans are far more likely than white Americans to live in impoverished neighborhoods with higher rates of violent crime.¹⁴¹ Sixty-two percent of Black Americans live in highly segregated, inner-city neighborhoods that experience a high degree of violent crime, while the majority of white Americans live in “highly advantaged” neighborhoods where there is little violent crime.¹⁴² 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 Black Americans.¹⁴³

Studies suggest that police treat Black Americans differently than white Americans. Some scholars believe that police arrest large numbers of Black Americans for relatively minor crimes, such as loitering, drug possession,

¹³⁶ See generally Parry, *Police Dogs and Anti-Black Violence* Black Perspectives <<https://www.aaihs.org/police-dogs-and-anti-black-violence/>> [as of Dec. 16, 2021]; Stephens, Police Wanted “A Dog That Would Bite A Black Person” The Marshall Project <<https://www.themarshallproject.org/2020/10/29/police-wanted-a-dog-that-would-bite-a-black-person>> [as of Jan. 2, 2022].

¹³⁷ Stole & Toohey, The City Where Police Unleash Dogs on Black Teens, October 12, 2021 The Marshall Project <<https://www.themarshallproject.org/2021/02/12/the-city-where-police-unleash-dogs-on-black-teens>> [as of Jan. 2, 2022].

¹³⁸ *Id.* at p. v.

¹³⁹ *Id.* at p. v.

¹⁴⁰ German, *The FBI has a history of targeting black activists. That’s still true today.* *The Guardian*, June 26, 2020 <<https://www.theguardian.com/commentisfree/2020/jun/26/fbi-black-activism-protests-history>> [as of Jan. 3, 2022].

¹⁴¹ Krivo & Peterson, *Extremely disadvantaged neighborhoods and urban crime* (1996) *Social Forces* 75(2): pp. 619-647 <<https://www.faculty.washington.edu/matsueda/courses/587/readings/Krivo%20Peterson%201996.pdf>> [as of July 29, 2021].

¹⁴² Krivo et al., Segregation, racial structure, and neighborhood violent crime (2009) *American Journal of Sociology* vol. 114, no. 6 pp. 1765–1802 <www.jstor.org/stable/10.1086/597285> [as of July 29, 2021].

¹⁴³ California Task Force to Study and Develop Reparation Proposals for African Americans (December 7, 2021), Testimony of Bruce Appleyard, <<https://oag.ca.gov/ab3121/meetings>> [as of Jan. 27, 2022].

and driving infractions. In 2019, Black Americans comprised 26 percent of all arrests yet they only made up 13.4 percent of the population.¹⁴⁴ According to a recent large-scale analysis of racial disparities in over 60 million state patrol police stops in 20 states, including California, researchers found that police officers stop Black Americans more often than white drivers relative to their share of the driving-age population.¹⁴⁵ Drivers—after controlling for age, gender, time, and location—are more likely to be ticketed, searched, and arrested when they are Black than when they are white.¹⁴⁶ The bar for searching Black American drivers is lower than for searching white Americans.¹⁴⁷ 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.¹⁴⁸ Another study shows that police use more force against Black and Latino suspects in the beginning stages of interactions.¹⁴⁹

Some early data also indicates that police may have arrested a large number of Black Americans, relative to their proportion of the population, for violating social distancing rules during the COVID-19 pandemic.¹⁵⁰

Some research indicates that American society views Black Americans so differently than the rest of the population that marketing professionals have identified and potentially exploited this trend.¹⁵¹ Marketing has targeted Black Americans for consumer products to defy racism and project a middle class identity.¹⁵² For example, respondents in one study indicated that being well groomed is a way to defy racism by showing worthiness.¹⁵³

The daily ongoing fear of racial profiling has an enduring effect on Black Americans. Former First Lady Michelle Obama discussed her fears about her daughters becoming the victims of racial profiling:¹⁵⁴ “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[.]” Obama said.¹⁵⁵

¹⁴⁴ U.S. Census Bureau, Quick Facts: U.S. <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> [as of July 22, 2021].

¹⁴⁵ Pierson et al., *A large scale analysis of racial disparities in police stops across the United States* (2017) *Nature Human Behavior* 4, 736–745 (2020) <<https://www.nature.com/articles/s41562-020-0858-1>> [as of July 27, 2021].

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Goncalves and Mello, *A Few Bad Apples? Racial Bias in Policing* vol. 111, No. 5,] *American Economic Rev.* 1406-41 (as of Apr. 8, 2022).

¹⁴⁹ Kahn et al., *How Suspect Race Affects Police Use of Force in an Interaction Over Time* (2017) vol. 41, No. 2, *How Suspect Race Affects Police Use of Force in an Interaction Over Time* (2017) *Law and Human Behavior* 117-126 (as of Apr. 8, 2022).

¹⁵⁰ Engel et al., *Racial Disparities and COVID-19*, National Commission on COVID-19 and Criminal Justice, Council on Criminal Justice, <<https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Racial-Disparities-and-COVID-19-Report.pdf>> (Nov. 2020) p. 9 (as of Apr. 8, 2022).> [as of Nov. 20, 2021].

¹⁵¹ Lamont and Molnár, *How Blacks Use Consumption to Shape Their Collective Identity* (2001) vol. 1, No. 1, *How Blacks Use Consumption to Shape Their Collective Identity* (2001) *Journal of Consumer Culture* (as of]. Apr. 8, 2022).].

¹⁵² *Ibid.*

¹⁵³ *Id.* at p. 37.

¹⁵⁴ Columbia Broadcasting System (CBS) *This Morning* ([interview with Michelle Obama, former First Lady of the United States](#)) CBS (May 7) Interview of Michelle Obama (CBS 2021) (as of Apr. 8, 2022).

¹⁵⁵ *Ibid.*

Policing in Black 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.”¹⁵⁶ A 2017 study of officer-worn body camera footage showed police officers speaking significantly less respectfully to Black Americans than to white Americans in everyday traffic stops, even after controlling for officer race, infraction severity, stop location, and stop outcome.¹⁵⁷

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” is an aggressive crime prevention strategy, which emphasizes arrests of many people for committing both major and minor offenses, was first implemented in New York City in the 1990s.¹⁵⁸ It resulted in arrests of disproportionate numbers of Latino and Black youth.¹⁵⁹

D. Rejection of Black Victimhood and Under-Policing

In addition to perceiving Black Americans as more dangerous, Americans and police officers are also less likely to view Black Americans as victims of crimes, particularly in areas of violence against women and girls, and mass shootings. Evidence of 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 Black American women, girls, and children.

Although Black women experience more sexual violence, Black American women have historically not received the same level of attention as white women following sexual assaults.¹⁶⁰ 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.”¹⁶¹ Black American women and girls are disproportionately more likely to be victims of sex trafficking in the United States than women and girls of other races.¹⁶²

¹⁵⁶ Butler, [Stop and Frisk and Torture-Lite: Police Terror of Minority Communities](#) (2014) 12 Ohio St J. Crim. L. 57, 57 (as of Apr. 8, 2022).

¹⁵⁷ Voigt et al., [Language from police body camera footage shows racial disparities in officer respect](#) (2017) vol. 114, No. 25, Proceedings of the National Academy of Sciences (as of Apr. 8, 2022).

¹⁵⁸ Kamalu & Onyeozili, [A Critical Analysis of the ‘Broken Windows’ Policing in New York City and Its Impact: Implications for the Criminal Justice System and the African American Community](#) (2018) vol. 11, No. 1, Afr.African J. of Criminology and Just. Stud.Studies 71 (Apr. 8, 2022).

¹⁵⁹ *Ibid.*

¹⁶⁰ Sood, [Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of the Rape of Black Women](#) (2018) vol. 18, No. 2, U. Md. L.J. Race, Religion, Gender & Class 405, 413 (as of Apr. 8, 2022) (Sood).

¹⁶¹ Sood, *supra*, at pp. 405-407.

¹⁶² See generally Davey, [Snapshot on the State of Black Women and Girls: Sex Trafficking in the U.S.](#) (2020) (as of Apr. 8, 2022).

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.¹⁶³

This trend also extends to crimes against Black children. Black children on average remain missing longer than non-Black children.¹⁶⁴ Black women and girls, in particular, go missing in numbers larger than their proportion of the population.¹⁶⁵ Not only the police but also the media¹⁶⁶ typically pay them less attention compared to missing white women and girls.¹⁶⁷ Police and prosecutors sometimes have also improperly handled these cases.¹⁶⁸ In Atlanta, Georgia, during the late 1970s and early 1980s, a serial killer murdered approximately two dozen children, many of whom were Black boys.¹⁶⁹ 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.¹⁷⁰ In fact, prosecutors have never obtained a conviction for the murders of all the missing children.¹⁷¹

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.¹⁷² Part of the reason is due to the fact that the definition of “mass shootings” is different, 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.¹⁷³

E. Employment Discrimination

Employment discrimination in police departments against Black applicants may exacerbate discrimination and police brutality against Black 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.¹⁷⁴ The United States Equal Employment Opportunity

¹⁶³ See generally University of Michigan College of Literature, Science, and the Arts, [The Celia Project](#), (as of Apr. 8, 2022).

¹⁶⁴ See, e.g., van de Rijt, et al., [Racial and gender differences in missing children’s recover chances](#), vol. 13, No. 12 (December 31, 2018) (as of Apr. 8, 2022).

¹⁶⁵ U.S. Department of Justice, Federal Bureau of Investigation, [NCIC Missing Person and Unidentified Person Statistics](#) (2020) (as of Apr. 8, 2022).

¹⁶⁶ Sommers, [Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons](#) (2016), vol. 106, No. 2 *The J. of Crim. L. and Criminology* 275–314 (as of Apr. 8, 2022).

¹⁶⁷ See generally, [Our Black Girls](#) (as of Apr. 8, 2022); see also [Black Coalition Fighting Back Serial Murders](#), (as of Apr. 8, 2022).

¹⁶⁸ See, e.g., Burch, [Who Killed Atlanta’s Children?](#), *N.Y. Times* (Apr. 30, 2019) (As of Apr. 8, 2022). > [As of Jan. 27, 2022].

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Barton et al., Barton et al, [Mass Shootings Are Soaring, with Black Neighborhoods Hit Hardest](#) (September 3, 2020) (as of Apr. 8, 2022).

¹⁷³ *Ibid.*

¹⁷⁴ U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission, [Advancing Diversity in Law Enforcement](#) (Oct. 2016) (as of Aug. 16, 2021).

Commission has identified problems with hiring, retention, harassment, and promotion of Black American police officers.¹⁷⁵ Police officers have publicly complained in news outlets throughout the country about issues around discrimination and harassment against Black police officers and correctional officers.¹⁷⁶ These conditions have resulted in many departments that have very few Black police officers. Some scholars have argued that this lack of diversity in police departments contributes to discrimination and police brutality against Black Americans.

F. Extrajudicial Police Killings

There is a very long history of police officers killings of Black 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 Black Americans are far more likely than other groups to be the victims of police violence.¹⁷⁷ According to a nongovernmental database, Black Americans comprised 28 percent of the people killed by police in 2020, despite the fact that they only make up 13 percent of the population.¹⁷⁸ Police killed Black Americans at higher rates than white people in 47 of the 50 states.¹⁷⁹ Black Americans are three times more likely to be killed by police.¹⁸⁰ They are also 1.3 times more likely to be unarmed than white people when they are killed by the police.¹⁸¹ 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.¹⁸²

There are many well-publicized examples of police killing Black Americans such as: George Floyd (Minneapolis, Minnesota) and Breonna Taylor (Louisville, Kentucky).¹⁸³ Some have died while in police custody, like Sandra Bland in Waller County, Texas. Others have likely died because of police neglect, such as

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ The Washington Post, [Police shootings database 2015-2021](#), (as of Nov. 29, 2021).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Campaign Zero, Mapping Police Violence Database <[Mapping Police Violence Databasehttps://www.mappingpoliceviolence.org/](https://www.mappingpoliceviolence.org/) (as of Apr. 8, 2022).> [as of May 17, 2021].

¹⁸² Sharara, et al., *Fatal police violence by race and state in the USA, 1980-2019*, The Lancet [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01609-3/fulltext#articleInformation](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01609-3/fulltext#articleInformation) (Oct. 2, 2021) 398 The Lancet 1239 (as of Apr. 8, 2022). > [as of Jan. 6, 2022].

¹⁸³ See, e.g., Say Their Names Memorial, <<https://www.saytheirnamesmemorials.com/names>> (as of Apr. 8, 2022); [Stanford Green Library Exhibit](#) (as of Apr. 8, 2022); [#Say Their Names](#) (as of Apr. 8, 2022). > [as of Dec. 15, 2021]; Stanford Green Library Exhibit, <<https://exhibits.stanford.edu/saytheirnames/feature/green-library-exhibit>> [as of Dec. 15, 2021]; [#Say Their Names](#) <<https://sayevery.name/>> [as of Dec. 15, 2021].

Mitrice Richardson who disappeared in Malibu, California in 2009. The Washington Post maintains a database of police killings.¹⁸⁴

G. California

Police violence against Black Americans is similar in California.¹⁸⁵ For example, statistics from California's Racial and Identity Profiling Advisory Board's 2022 report, drawing on data from 18 law enforcement agencies, including California's 15 largest agencies, shows that police stopped a higher percentage of people perceived to be Black for reasonable suspicion that the person was engaged in criminal activity than any other racial group.¹⁸⁶

In 2020, Black Americans made up about seven percent of the population, but those perceived to be Black made up 17 percent of people police stopped,¹⁸⁷ and 18 percent of the people police have shot or seriously injured,¹⁸⁸ and 20 percent of those killed by police.¹⁸⁹

Officers searched, detained, handcuffed, and removed from vehicles more people who the officers perceived as Black than individuals they perceived as white.¹⁹⁰ Search discovery rate analysis showed that individuals who police perceived as Black had the highest search rate.¹⁹¹ People perceived to be Black were also more likely to have police use force against them compared to people perceived as white.¹⁹² Police officers also reported ultimately taking no action during a stop most frequently when stopping a person they perceived to be Black, suggesting there may have been no legitimate basis for the stop.¹⁹³

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."¹⁹⁴ As one California

¹⁸⁴ The Washington Post, Police shootings database 2015-2021, <[Police https://www.washingtonpost.com/graphics/investigations/police-shootings-database-2015-2021/](https://www.washingtonpost.com/graphics/investigations/police-shootings-database-2015-2021/)>>>>> (as of Apr. 8, 2022).> [as of Nov. 29, 2021].

¹⁸⁵ See Rosenhall, [California's attempt to reduce police shootings, explained](#) (July 18, 2019) (as of Apr. 8, 2022)2021 [summarizing data from government and scholarly sources].

¹⁸⁶ Cal. Department of Justice, [Racial and Identity Profiling Advisory Board Annual Report 2022](#) p. 6-8 (as of Apr. 8, 2022).

¹⁸⁷ *Id.* at p. 8.

¹⁸⁸ Mendelson, [Police Use Force on Black Angelenos at Dramatically Higher Rates, Data Shows Rates](#) (July 7, 2020) (as of Apr. 8, 2022) [summarizing data from the California Department of Justice and American Community Survey].

¹⁸⁹ Cal. Department of Justice, [Use of Force Incident Reporting 2016-2020](#) (as of Apr. 8, 2022).

¹⁹⁰ RIPA 2022, *supra* note 191, at p. 8.

¹⁹¹ RIPA 2022, *supra* note 191, at p. 8.

¹⁹² RIPA 2022, *supra* note 191, at p. 9.

¹⁹³ RIPA 2022, *supra* note 191, at p. 8.

¹⁹⁴ Gross & Barnes, [Road Work: Racial Profiling and Drug Interdiction on the Highway](#) (2002) 101 Mich. L. Rev. 651. [internal citation omitted].

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.” 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.¹⁹⁵ In 1999, the American Civil Liberties Union sued the California Highway Patrol and alleged that Operation Pipeline taught officers to stop Black and Latino male drivers for little or no reason.¹⁹⁶ 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.¹⁹⁷

Relatedly, an analysis of data from 2000 to 2008 in California showed that Black Americans were significantly more likely than white people to be arrested for a marijuana offense.¹⁹⁸ 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.¹⁹⁹ For an in depth discussion of discrimination in licensure, see Chapter 10, Stolen Labor and Hindered Opportunity.

Black Americans are also increasingly victims of hate crimes both nationwide and in California. According to the Federal Bureau of Investigation, 48.5 percent of single-bias hate crime incidents were motivated by anti-Black bias.²⁰⁰ 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.²⁰¹ Anti-Black bias events were the most prevalent of all types of hate crimes and increased 88 percent from 2019 to 2020.²⁰²

There are numerous high-profile incidents of police killing Black 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.²⁰³

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

¹⁹⁵ Webb, [Driving While Black: Tracking Unspoken Law-Enforcement Racism](#) (January 9, 2007) Esquire (as of Apr. 8, 2022).

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¹⁹⁷ Zamora, [CHP stops more minorities / Agency admits law-abiding blacks, Latinos run greater risk of being pulled over](#) (Apr. 20, 2001), SF Gate (as of Apr. 7, 2022).

¹⁹⁸ *Ibid.*; White and Holman, [Marijuana Prohibition in California: Racial Prejudice and Selective-Arrests](#) (2012) 19 Race, Gender and Class J. 75 (as of Apr. 7, 2022).

¹⁹⁹ Krupnick, [‘A farce of social equity’: California is failing its Black cannabis businesses](#) (Nov. 4, 2021), The Guardian (as of Jan. 3, 2022); see also Major, [Five Years After Recreational Legalization, California is Failing its Black Cannabis Business Owners](#) (Nov. 9, 2021), Black Enterprise (as of Apr. 7, 2022) Five Years After Recreational Legalization, California is Failing its Black Cannabis Owners, Black Enterprise

²⁰⁰ U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, [Hate Crime Statistics 2019 Hate Crime Statistics](#) (as of Nov. 29, 2021).

²⁰¹ Cal. Department of Justice, [Hate Crime in California](#) (2020) p. 8 (as of Apr. 8, 2021).

²⁰² *Id.* at p. 31.

²⁰³ Rickford, [Black Lives Matter](#) (2016) 25 New Labor Forum 34 (as of Mar. 16, 2021).

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 Black Americans moved to the city, the time period between the 1920s to the 1960s was characterized by police brutality against Black 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 Black American suspects as “dog biscuits.”²⁰⁴ 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 Black Americans and Latinos.²⁰⁵ In 2013, the Special Counsel to the Los Angeles County Sheriff’s Department, which is the largest sheriff’s department in California and the country, found that Black Americans and Latinos comprised 89 percent of the total individuals who were bitten by the department’s dogs from 2004 to 2012. During the same time, the Special Counsel found that the number of Black Americans that police dogs bit increased 33 percent.²⁰⁶

Often, such incidents of police brutality led to community protests that, in turn, sometimes continue brutality by police.²⁰⁷ The beating of Rodney King by the LAPD is one such example.²⁰⁸ On March 3, 1991, Rodney King stopped his car after leading LAPD officers on a pursuit.²⁰⁹ Officers beat Rodney King and were captured on video.²¹⁰ The officers were charged but, despite strong video evidence against the officers, were ultimately acquitted.²¹¹

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 policing²¹²—such as those alleged in the Los Angeles County Sheriff’s Department, have

²⁰⁴ Newton, [L.A. Finds Mixed Results in Curbing Police Dog Bites](#) (Mar. 1, 1996), Los Angeles Times (as of Jan. 2, 2022).

²⁰⁵ [Lawson v. Gates](#) (Cal. Lawson v. Gates (Super. Ct.. L.A. County of Los Angeles, Mar. 27, 1995) No. BC 91-31232).

²⁰⁶ U.S. Department of Justice, Civil Rights Division, [Investigation of the Ferguson Police Department](#), March 4, 2015 (as of Jan. 2, 2022).

²⁰⁷ See generally Roussell and Gascón, [Defining ‘Policeability’: Cooperation, Control, and Resistance in South Los Angeles Community-Police Meetings](#) (2014) 61 Social Problems 237 (as of July 29, 2021).

²⁰⁸ See generally Meyer, [Police Shootings at Minorities: The Case of Los Angeles](#) (1980) 452 The Annals of the American Academy of Political and Social Science 98 (as of July 29, 2021); Knight, [Justifiable Homicide, Police Brutality, or Governmental Repression? The 1962 Los Angeles Police Shooting of Seven Members of the Nation of Islam](#) (1994) 79 The Journal of Negro History 182 (as of July 29, 2021); Herbert, [Morality in Law Enforcement: Chasing ‘Bad Guys’ with the Los Angeles Police Department](#) (1996) 30 Law & Society Rev. 799 (as of July 29, 2021); Stuart, [Constructing Police Abuse after Rodney King: How Skid Row Residents and the Los Angeles Police Department Contest Video Evidence](#) (2011) 36 Law & Social Inquiry 327 (as of July 28, 2021).

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Cal. Pen. Code. § 13670, subd. (a)(2).

exacerbated the brutalization of Black Americans by law enforcement in California.²¹³ For example, in 1990, at least 75 Lynwood resident filed a class action lawsuit alleging that the sheriff's department allowed the "Vikings," a sheriff's department deputy gang, to carry out racially motivated violence in the community.²¹⁴

In Los Angeles County, which is the state and country's most populous county,²¹⁵ as of April 2022, police have killed 963 people since 2001, 24 percent of whom were Black American even though Black Americans comprised only eight percent of the population during that time.²¹⁶ Los Angeles police have also historically appeared to ignore the disappearance of Black women.²¹⁷ For example, Lonnie David Franklin Jr. was believed to have murdered several Black women and girls in the Los Angeles area.²¹⁸ He was not arrested and convicted until 2016 due to what activists believe was police neglect.²¹⁹

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 Black Americans from the police during the 1960s.²²⁰ Two young activists, Huey Newton and Bobby Seale, saw brutality against civil rights protestors as part of a long history of police violence.²²¹ 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.²²² 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.²²³ 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.²²⁴

Discrimination by Californian police against Black Americans is not limited to large police departments like the Los Angeles Police Department and the Los Angeles County Sheriff's Department. For example, according to analysis of traffic stops by the San Diego Police Department from 2014 to 2015, officers are more likely to

²¹³ Center for Juvenile Law and Policy, Loyola Marymount University Loyola Law School, [50 Years of Deputy Gangs in the Los Angeles County Sheriff's Department: Identifying Root Causes and Effects to Advocate for Meaningful Reform](#) (Jan. 2021) (as of Apr. 7, 2022).

²¹⁴ *Id.* at p. 24.

²¹⁵ U.S. Census Bureau, [2020 Population and Housing State Data](#) (as of Dec. 30, 2021).

²¹⁶ Los Angeles Times Staff, [Police Have Killed 963 People in L.A. County Since 2000](#) (Apr. 5, 2022) Los Angeles Times (Apr. 7, 2022).

²¹⁷ Branson-Potts, [Grim Sleeper's victims were vulnerable, young, and at times ignored](#) (May 5, 2016), Los Angeles Times (as of Jan. 27, 2022).

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ See generally Murch, *Living for the City: Migration, Education, and the Rise of the Black Panther Party in Oakland, California* (2010); Street, [The Historiography of the Black Panther Party](#) (2010) 44 J. Journal of American Studies 351 < (as of July 28, 2021).

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Alderman and Inwood, [How Black Cartographers Put Racism on the Map](#) (Feb. 24, 2021), *How Black Cartographers Put Racism on the Map*, Next City (as of Jan. 26, 2022).

²²⁴ Peele, et al., [Exclusive: Blacks are only 7% of the Bay Area, but 27% of those killed by police](#) (Sept. 2, 2020), Bay Area News Group (as of Apr. 7, 2022).

search and question Black American drivers than white drivers even though officers were less likely to find them with contraband.²²⁵ An evaluation of 2016 to 2018 data showed that both the San Diego Police Department and Sheriff's Department were more likely to stop, search, and use force against Black Americans and people with disabilities than other groups.²²⁶ Further, Black Americans were 4.3 times more likely than white people to be arrested by the police department for drug possession even though research shows that Black and white people use and sell drugs at similar rates.²²⁷ The police department also stopped Black Americans at a rate three times higher than white people.²²⁸ Both agencies used higher levels of force against Black Americans compared to other groups.²²⁹ Both agencies used more severe levels of force against Black Americans than white people at every level of alleged resistance.²³⁰

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.²³¹

In California's rural and suburban regions, the California Attorney General has investigated²³² and secured a judgment²³³ 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 investigated²³⁴ the Bakersfield Police Department, and secured a judgment for the police department to strengthen its engagement with the community.²³⁵ The Attorney General is also reviewing the practices of the Torrance Police Department amidst serious allegations of racist text messages, some of which contained disparaging comments about Black Americans, and other discriminatory conduct.²³⁶

As a result of community activism and increased nationwide public awareness of police brutality against Black Americans in 2020 in particular, California has recently taken steps to attempt to address the numerous concerns with policing in the state. For example, Assembly Bill 89 raises the minimum qualifying age to be a

²²⁵ Chanin, et al., [Traffic enforcement in San Diego, California: An analysis of SDPD vehicle stops in 2014 and 2015](#) (Nov. 2016) p. 71 (as of Jan. 6, 2022).

²²⁶ Campaign Zero, [We evaluated policing in San Diego. Here's what we found](#) (as of Jan. 6, 2022).

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Cal. Department of Justice, [Sacramento Police Department Report & Recommendations 2019](#) (as of Nov. 29, 2021); Cal. Dept. of Justice, [Review of Sacramento Police Department Report & Recommendations Phase II 2020](#) (as of Nov. 29, 2021).

²³² Complaint for Injunctive Relief, [People ex re. v. County of Kern](#) (Cal. Super. Ct. County of Kern, Dec. 22, 2020) No. BCV-20-102971.

²³³ Stipulated Judgment, [People ex rel. Becerra v. County of Kern](#) (Cal. Super. Ct., County of Kern, Dec. 22, 2020) No. BCV-20-102971.

²³⁴ Complaint for Injunctive Relief, [People ex rel. Bonta v. City of Bakersfield](#) (Cal. Super. Ct., County of Kern, Aug. 23, 2021) No. BCV-21-101928.

²³⁵ Stipulation for Entry of Final Judgment and Permanent Injunction, [People ex rel. Bonta v. City of Bakersfield](#) (Cal. Super. Ct., County of Kern, Aug. 23, 2021) No. BCV-21-101928 Stipulated Judgment.

²³⁶ Cal. Dept. of Justice, [Attorney General Bonta Launches Independent Review of Torrance Police Department](#), (as of Dec. 15, 2021).

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.²³⁷ 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.²³⁸ 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.²³⁹ 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.²⁴⁰ California was one of only four states without that power.²⁴¹ Assembly Bill 118 creates pilot programs to allow community organizations to respond to 911 calls rather than police.²⁴² 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.²⁴³ But these reforms do not alone address the many years of discrimination Black Americans have experienced at the hands of the criminal justice system.

IV. Trial and Sentencing

A. History

During the slavery era, most states denied Black Americans the right to service on juries, as most states linked the ability to serve on juries to the ability to vote.²⁴⁴ As discussed in Chapter 3, Racial Terror, Black Americans were not allowed to vote in most states during this time. Most states also denied Black Americans the right and protections of a jury trial, leaving Black Americans vulnerable to unjust convictions.²⁴⁵

After the Civil War, the Civil Rights Act of 1875 outlawed race based discrimination in jury selection.²⁴⁶ As discussed in Chapter 4, Political Disenfranchisement, the 14th and 15th Amendments guaranteed Black men the right to vote and serve on juries.²⁴⁷ In some states, racially integrated juries protected the rights of Black defendants and prosecuted white perpetrators of racial violence.²⁴⁸

²³⁷ [Assem. Bill No. 89](#) (2021-2022 Reg. Sess.).

²³⁸ [Assem. Bill No. 750](#) (2021-2022 Reg. Sess.).

²³⁹ [Assem. Bill No. 1506](#) (2019-2020 Reg. Sess.).

²⁴⁰ [Sen. Bill No. 2](#) (2021-2022 Reg. Sess.).

²⁴¹ *Id.* at § 2, subd. (b).

²⁴² [Assem. Bill No. 118](#) (2021-2022 Reg. Sess.).

²⁴³ [Assem. Bill No. 26](#) (2021-2022 Reg. Sess.).

²⁴⁴ See Federal Judiciary Act of 1789, § 29, 1 Stat. 73, 88 (1789) (“[J]urors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens....”)

²⁴⁵ Equal Justice Initiative, [Race and the Jury: Illegal Racial Discrimination in Jury Selection](#) (2021) (as of Apr. 8, 2022).

²⁴⁶ 18 U.S.C. § 243 (1948) (“No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.”).

²⁴⁷ U.S. Const., 14th & 15th amend.

²⁴⁸ Equal Justice Initiative, [Race and the Jury: Illegal Discrimination in Jury Selection](#), *supra*.

In the South after Reconstruction until the 1960s, numerous allegations of crimes involving Black defendants and white victims never made it to trial.²⁴⁹ Instead, the Black American accused was lynched.²⁵⁰ As discussed in Chapter 3, Racial Terror, prosecutors rarely tried or convicted the white Americans who tortured and murdered Black Americans through race massacres and lynchings. The same all-white juries who did not indict white perpetrators of violence convicted Black defendants, imposed harsh sentences for minor crimes, often with little evidence.²⁵¹ 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.”²⁵²

The U.S. Supreme Court did not decide until 1935 that excluding Black Americans from juries because of race was unconstitutional.²⁵³ In *Norris v. Alabama*, eight Black 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.²⁵⁴ No Black American had served on a jury in Scottsboro in living memory.²⁵⁵

After *Norris v. Alabama*, many jurisdictions continued to exclude Black Americans from jurors by using preemptory strikes or other pretexts.²⁵⁶

B. Systemic Racial Bias Today

Today, system problems in the criminal justice system continue to discriminate against Black Americans. Courts throughout the country have and continue to be underfunded, which can result in barriers in accessing justice, such as case delays.²⁵⁷ Although courts in California are now required to take into account an individual’s ability to pay when setting bail,²⁵⁸ 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

²⁴⁹ Grimsley, [African American Wrongful Convictions Throughout History](#) (Feb. 28, 2013), Innocence Project (as of Apr. 8, 2022).

²⁵⁰ Equal Justice Initiative, [Lynching in America: Confronting the Legacy of Racial Terror](#) (3rd ed. 2017) p. 32 (as of Apr. 8, 2022).

²⁵¹ Equal Justice Initiative, [Race and the Jury: Illegal Discrimination in Jury Selection](#), *supra*.

²⁵² Report on the Alleged Outrages in the Southern States by the Select Committee of the Senate (Washington, D.C.: 1871), 179 (quoting Judge Daniel Russell of North Carolina); Cong. Globe, 42d Cong., 1st Sess. 158 (1871) (statement of Senator Sherman quoting the report).

²⁵³ *Norris v. Alabama* (1935) 294 U.S. 587.

²⁵⁴ *Id.* at p. 588.

²⁵⁵ *Id.* at p. 591.

²⁵⁶ Equal Justice Initiative, [Race and the Jury: Illegal Discrimination in Jury Selection](#), *supra*.

²⁵⁷ Graetz, [Trusting the Courts: Redressing the State Court Funding Crisis](#) (2014) 143 Daedalus 96 (as of July 29, 2021); Archer, [Tackling Tough Issues: Scrutiny of State Court Funding, Sentencing Guidelines Aims to Improve the System](#) (2004) 90 ABA Journal 8 (as of July 29, 2021); Podgers, [In Defense of the Courts: A Symposium Finds Consensus on the Need, but No Easy Path to Restoring Court Funding](#) (2011) 97 ABA Journal 56 (as of July 29, 2021).

²⁵⁸ *In re Humphrey* (2021) 11 Cal.5th 135, 142142142152142; see also Sen. Bill 262 (2021-2022 Reg. Sess.) §§ 3, 4, 5 (amending Penal Code section 1269b, and adding sections 1269d, and 1302.5...).

attempts to reform the cash bail system nationwide.²⁵⁹ As discussed in the civil legal system discussion of this chapter, lack of diversity in the legal profession may also exacerbate the discrimination Black Americans face in the criminal justice system.²⁶⁰ Scholars argue that racial bias against Black defendants results in discriminatory choices by prosecutors, although empirical evidence exists of such bias only in certain types of crimes.^{261 262}

Discrimination against Black 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 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.²⁶³ Lack of diversity on juries continues to be a nationwide problem.²⁶⁴ A study in North Carolina showing that qualified Black jurors were struck from juries at more than twice the rate of qualified white jurors.²⁶⁵ Scholars have identified the following as factors contributing to underrepresentation on juries: “racial discrimination in jury selection,” socioeconomic barriers preventing participation by Black Americans, “judicial discrimination that allows racially demarcated jury representation,” institutional racism, and “bureaucratic discrimination in perpetuating judicial inequality.”²⁶⁶

One scholar has shown that study participants remembered and misremembered legally relevant facts in racially biased ways.²⁶⁷ 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.²⁶⁸ A lack of jury diversity can also harm Black Americans in family courts and the child welfare system, which the Chapter 8, Pathologizing, the Black Family, discusses in more detail.

²⁵⁹ See generally Brunt, [Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next](#) (2018) vol. 108, No. 4, *J. of Crim. L. and Criminology* 701, 709–738.

²⁶⁰ Boyd, [Representation on the Courts? The Effects of Trial Judges' Sex and Race](#) (2016) vol. 69, No. 4, *Political Res. Q.* 788–799.

²⁶¹ Compare Sloan, [Racial Bias by Prosecutors: Evidence from Random Assignment](#) (June 14, 2019) U. of Notre Dame, Dept. of Econ. (as of April 7, 2022).

²⁶² See generally Barkow, [Prosecutorial Administration: Prosecutor Bias and the Department of Justice](#) (2013) 99 *Va. L.Rev.* 271, 271–342.

²⁶³ Edlund, [Eyewitness Racial Attitudes and Perpetrator Identification: The Lineup Method Matters](#) (2008) vol. 10, No. 1, *North Am. J. of Psychol.* 15, 25, 28. Perpetrator Identification: The Lineup Method Matters

²⁶⁴ Joshi and Kline, [Lack of Jury Diversity: A National Problem with Individual Consequences](#) (September 1, 2015) *Am. Bar. Assn.* (as of April 8, 2022).

²⁶⁵ Coleman, [The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond](#) *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond* (2018) 42-JUN *Champion* 28, 32, fn. 31 (citing a study by Michigan State University College of Law), fn. 32 (citing Kotch & Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina* (2010) 88 *N.C. L.Rev.* 2031, 2110–2111, fn n. 356), fn. 33 (citing a study conducted at the Wake Forest University School of Law).]

²⁶⁶ Fukurai et al., [Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection](#) (1991) vol. 22, No. 2, *J. of Black Studies* 196–215.

²⁶⁷ Levinson, [Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering](#) (2007) 57 *Duke L.J.* 345, 398–407.

²⁶⁸ *Id.* at p. 345.

The lack of diversity in juries can result in poor trial and sentencing outcomes for Black Americans.²⁶⁹ According to a 2017 report from the United States Sentencing Commission, Black men who commit the same crimes as white men are given prison sentences that are 20% longer, even after controlling for factors like weapons possession and prior criminal history.²⁷⁰ Black Americans are more likely than white Americans to be serving sentences of life, life without parole, or sentences of 50 years or more.²⁷¹

C. 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 of Court has acknowledged that the death penalty has a discriminatory effect on Black 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 penalty²⁷² and that a Black American would be more likely to get the death penalty when convicted for rape when compared to white American.²⁷³ Regardless, the Supreme Court still decided that the death penalty is constitutional in some circumstances.²⁷⁴ Currently, 27 states have the death penalty while 23 states and the District of Columbia do not.²⁷⁵ Three states, such as California, currently have a gubernatorial moratorium on executions.²⁷⁶

In the states where executions still occur, Black men are overrepresented among people federal and state governments execute.²⁷⁷ A 2015 meta-analysis of 30 studies showing that those responsible for the murders of white people were more likely than those responsible for the murders of Black people to face a capital prosecution.²⁷⁸

D. California

Historically, California barred Black Americans from serving on juries.²⁷⁹ 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.²⁸⁰ The report found that California prosecutors’ use of

²⁶⁹ Sommers, Sommers, Sommers, See generally Sommers, [On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations](#) (2006) vol. 90, No. 4, J. of Personality and Social Psychol. 597–612.

²⁷⁰ Schmitt et al., [Demographic Differences in Sentencing: An Update to the 2012 Booker Report](#) (Nov. 2017) U.S. Sentencing Com. (as of April 8, 2022), p. 17.

²⁷¹ Sawyer, [Visualizing the Racial Disparities in Mass Incarceration](#) (July 27, 2020) Prison Policy Initiative (as of April 8, 2022).

²⁷² *Furman v. Georgia* (1972) 408 U.S. 238, 251.

²⁷³ *Ibid.*

²⁷⁴ *Id.* at p. 239.

²⁷⁵ Death Penalty Information Center, [State by State](#), (as of April 8, 2022).

²⁷⁶ *Ibid.*

²⁷⁷ Ndulue, [Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty](#) (Sept. 2020) Death Penalty Information Center (as of April 8, 2022), pp. 28–29.

²⁷⁸ Baumgartner et al., [#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976-2013](#) (2015) Politics, Groups, and Identities (as of April 8, 2022), p. 4.

²⁷⁹ The California Civil Practice Act, Stats. 1851, ch. 1, § 394, p. 113; The California Criminal Act of 1850, Stats. 1850, ch. 99, § 14, p. 230.

²⁸⁰ Semel et al., [Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors](#) (June 2020) Berkeley Law Death Penalty Clinic (as of April 8, 2022).

peremptory challenges to exclude Black Americans from juries is still pervasive.²⁸¹ In the last 30 years, the California Supreme Court has reviewed 142 cases involving *Batson* claims, which is the process by which a party can object to a peremptory challenge because of a juror's race, and found a violation only three times. In fact, from 2006 to 2018, California courts held that there was a *Batson* error in just 18 out of 683 cases.²⁸² It has been over 30 years since the California Supreme Court held that there was a *Batson* violation involving a Black American juror.²⁸³

Prosecutorial misconduct, which is generally when a prosecutor violates their duty to refrain from improper methods calculated to produce a wrongful conviction,²⁸⁴ 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.²⁸⁵

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,²⁸⁶ 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.²⁸⁷ In 1982, Andrade committed three residential burglaries during the same day while unarmed and when nobody was in the homes he burglarized.²⁸⁸ Then, in 1995, he stole five videotapes, which were worth \$84.70 and was arrested for shoplifting.²⁸⁹ Later that same year, he stole four videotapes, which were worth \$68.84 and was arrested for shoplifting.²⁹⁰ 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.²⁹¹ As a result, he received a sentence of 50 years to life.²⁹²

²⁸¹ *Id.* at p. v.

²⁸² *Id.* at p. viii.

²⁸³ *Id.* at p. 23.

²⁸⁴ *Id.* at p. 2.

²⁸⁵ Ridolfi and Possley, [Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009](#) (Oct. 1, 2010) Northern Cal. Innocence Project, Santa Clara Univ. School of Law (as of April 8, 2022), p. 2.

²⁸⁶ Couzens and Bigelow, [The Amendment of the Three Strikes Sentencing Law](#) (May 2017) California's Three Strikes Sentencing Law, California Courts (as of April 8, 2022), p. 5; see also Stanford Law School, [Three Strikes Basics](#), (as of April 8, 2022).

²⁸⁷ *Lockyer v. Andrade* (2003) 538 U.S. 63.

²⁸⁸ *Ibid. Ibid. Ibid. Id.* at p. 66; Chemerinsky, [Cruel and Unusual: The Story of Leandro Andrade](#) (2003) 52 Drake L.Rev 1, 2. *Ibid.*

²⁸⁹ *Ibid. Ibid. Ibid. Lockyer v. Andrade, supra*, 538 U.S. at p. 66. *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Id.* at p. 67.

²⁹² *Id.* at pp. 68, 69.

These policies have increased the number of Black Americans in California correctional facilities.²⁹³ Recent reforms in California, which this chapter discusses below, have offered alternatives to incarceration for some individuals, but many Black Americans still served excessive prison sentences for years.²⁹⁴

V. Incarceration

A. History

The history of criminalization of Black Americans since slavery and the inequities in policing, trials, and sentencing have resulted in an overrepresentation of Black Americans in jails and prisons, a phenomenon known as mass incarceration. As this chapter has described, American society began to criminalize Black Americans starting from the era of slavery through Black Codes, vagrancy laws, and Jim Crow laws. Further, “law and order” or “tough on crime” political campaigns in the 20th century resulted in particularly punitive sentencing and parole systems, which have led to the imprisonment of large numbers of Black Americans. Although correctional authorities did not always uniformly collect data on the race of prisoners, there is evidence from the U.S. Department of Justice showing that Black Americans have comprised a percentage of prisoners exceeding their percentage of the population outside of correctional facilities, from at least 1926 to 1986.²⁹⁵

The percentage of prisoners admitted to state and federal institutions who are Black has consistently grown, and which general population trends cannot explain.²⁹⁶ Although the imprisonment rate of Black Americans has generally decreased since 2006,²⁹⁷ Black Americans continue to be overrepresented both nationwide and in California in adult incarceration, solitary confinement, capital punishment, and juvenile incarceration.

B. 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.²⁹⁸ Numerous academics, activists, and politicians to call for an end to mass incarceration, and there have been reforms in several states such as Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio.²⁹⁹

²⁹³ Sutton, [Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing](#) (2013) vol. 47, No. 1, *Law & Society Rev.* 37–71.

²⁹⁴ Gius, [The Unintended Consequences of the Three Strikes Laws: The Impact of Long Term Imprisonments on Family Structures](#) (2017) vol. 43, Nos. 1-2, *Internat. J. of Sociology of the Family* 17–24.

²⁹⁵ Langan, [Race of Prisoners Admitted to State and Federal Institutions, 1926-86](#) (1991) U.S. Department of Justice, Office of Justice Programs (as of April 8, 2022), pp. 1–54.

²⁹⁶ *Id.* at p. 5.

²⁹⁷ *Ibid.* ; Gramlich, [Black imprisonment rate in the U.S. has fallen by a third since 2006](#) (May 6, 2020) Pew Research Center (as of April 8, 2022).

²⁹⁸ Widra and Herring, [States of Incarceration: The Global Context 2021](#) (Sept. 2021) Prison Policy Initiative (as of April 8, 2022).

²⁹⁹ American Civil Liberties Union, (ACLU), [Smart Reform is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities](#) (Aug. 2011) ACLU (as of April 8, 2022), pp. 6, 9.

These reforms largely focus on reducing excessive prison sentences. However, advocates argue that these efforts are not sufficient to undo decades of prison expansion. One study estimates that at current rates, it will take 72 years to cut the U.S. prison population in half.³⁰⁰ Despite reforms, Black Americans continue to be overrepresented in prisons nationwide: 20 percent of prisoners in federal and state correctional facilities were Black Americans even though they made up just 13.4 percent of the population in 2019.³⁰¹ In 2021, Black Americans comprise 38.5 percent of inmates in federal prisons across the country.³⁰²

In addition to overrepresentation of Black Americans in correctional facilities, federal and state officials continue to use the labor of incarcerated people.³⁰³ In fact, some present-day prisons where incarcerated people still perform labor are on land that was once a plantation where enslaved people worked before the Civil War and where southern states similarly enslaved Black Americans after the Civil War through convict leasing. For example, Angola Louisiana State Penitentiary shows how, in some ways, the American correctional system continues the legacy of slavery.³⁰⁴

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.³⁰⁵ 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.³⁰⁶ Under this lease, James subleased the majority of black inmates to land owners to replace slaves while other continued to work on levees, railroads, and road construction while others were given clerical and craftsmanship work.³⁰⁷ Later, there were also attempts to industrialize prison labor by forcing incarcerated people to make shoes and clothing.³⁰⁸ 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.³⁰⁹ More recently, incarcerated people in Angola continue to engage in production to sell goods such as growing

³⁰⁰ Ghandnoosh, [U.S. Prison Population Trends: Massive Buildup and Modest Decline](#) (Sept. 17, 2019) The Sentencing Project (as of April 8, 2022).

³⁰¹ U.S. , Office of Justice Programs, Bureau of Justice Statistics, DOJ, [Prisoners in 2019](#) (Oct. 2020) (as of April 8, 2022), pp. 1, 16., *Prisoners in 2019*

³⁰² Federal Bureau of Prisons, [Inmate Race](#), (last visited Dec. 16, 2021).

³⁰³ Federal Bureau of Prisons, Federal Bureau of Prisons, Federal Bureau of Prisons, Federal Bureau of Prisons, [UNICOR \(trade name for Federal Prison Industries\): Program Details](#) Federal Prison Industries Program Details(as of April 8, 2022).

³⁰⁴ See generally Selby, [How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended](#) (Sept. 17, 2021) (as of April 8, 2022).

³⁰⁵ Angola Museum at the Louisiana State Penitentiary, [History of Angola](#) (as of April 8, 2022) History of Angola; see also Cardon, [“Less Than Mayhem”: Louisiana’s Convict Lease, 1865-1901](#), (2017) vol. 58, No. 4, La. History: The J. of the La. Historical Assn. 417–441.

³⁰⁶ Angola Museum at the Louisiana State Penitentiary, [History of Angola](#) (as of April 8, 2022); see also Cardon, [“Less Than Mayhem”: Louisiana’s Convict Lease, 1865-1901](#) (2017) vol. 58, No. 4, La. History: The J. of the La. Historical Assn. 419.

³⁰⁷ Angola Museum at the Louisiana State Penitentiary, [History of Angola](#) (as of April 8, 2022)

³⁰⁸ Angola Museum at the Louisiana State Penitentiary, [History of Angola](#) (as of April 8, 2022); see also Cardon, [“Less Than Mayhem”: Louisiana’s Convict Lease, 1865-1901](#) (2017) vol. 58, No. 4, La. History: The J. of the La. Historical Assn. 423, 439.

³⁰⁹ *Ibid. Ibid. Ibid.* Angola Museum at the Louisiana State Penitentiary, [History of Angola](#) (as of April 8, 2022). *Ibid.*

crops like wheat, corn, soybeans, cotton, milo,³¹⁰ sugar cane,³¹¹ and even producing art.³¹² To this day, approximately 75 percent of incarcerated people in Angola are Black Americans.³¹³

Correctional facilities, such as the Federal Prisons Industries of the Federal Bureau of Prisons, argue that these programs teach marketable job skills.³¹⁴ But some academics argue that these work programs are not beneficial.³¹⁵

C. Correctional Discipline

Black Americans also experience discrimination in the correctional disciplinary system. At least one study has found that while Black and white incarcerated people were equally likely to break rules, correctional authorities were more likely to report infractions by Black people.³¹⁶

There is an overrepresentation of Black 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.³¹⁷ A 2018 study showed that both federal and state correctional facilities placed large numbers of Black males in solitary confinement. Black males in prison made up approximately 42.5 percent of the prison population but comprised 46.1 percent of the people in solitary confinement.

D. Juvenile Incarceration

Black Americans are also overrepresented in the juvenile justice system. As discussed in Chapter 8, Pathologizing the Black Family, American culture tends to see Black children not as children, but as adults. Black students are subject to discipline at a higher rate than other groups in schools nationwide. In 43 states and the District of Columbia, Black students are arrested at higher levels relative to their percentage of the

³¹⁰ Prison Enterprises, [Agriculture](#) (as of April 8, 2022).Agriculture

³¹¹ Hardy, [Angola inmates make sugar cane syrup the old-fashioned way](#) (Dec. 23, 2014), The Advocate (as of Dec. 15, 2021).

³¹² Schrift, [Angola Prison Art: Captivity, Creativity, and Consumerism](#) (2006)*Angola Prison Art: Captivity, Creativity, and Consumerism* The Journal of American Folklore, Vol. 119, no. 473):, pp.): 257–74 (as of Dec. 17, 2021).

³¹³ Louisiana Dept. of Corrections, [https://doc.louisiana.gov/demographic-dashboard/Population Count, Facility Breakout \(LSP\)](https://doc.louisiana.gov/demographic-dashboard/Population%20Count,%20Facility%20Breakout%20(LSP)) (<https://doc.louisiana.gov/demographic-dashboard/>> as of Apr. 8, 2022).

³¹⁴ Federal Bureau of Prisons, [Federal Prison Industries Program Details](#) (as of July 27, 2021). Federal Bureau of Prisons, Federal Prison Industries Program Details, (as of July 27, 2021).

³¹⁵ See generally Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 Va. J. Social Policy & the Law Soc. Pol'y & L. 65, 66.

³¹⁶ Poole & Regoli, [Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison](#) (1980)*Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison* Law & Society Review Vol. 14, no. 4, pp. 931–946. (. <www.jstor.org/stable/3053215>as of August 15, 2021).

³¹⁷ Association of State Correctional Administrators and the Liman Center for Public Interest Law at Yale Law School, https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdfhttps://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf*Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* (2018) (https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf> as of September 25, 2021).

population.³¹⁸ There is also evidence that these racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias.³¹⁹ This sort of disciplinary actions and bias contribute to how Black Americans are eventually pushed to incarceration through the school-to-prison pipeline, as described in Chapter 6, Separate and Unequal Education and Chapter 8, Pathologizing the Black Family.

Black youth comprise 41 percent of youth in juvenile facilities even though they make up 15 percent of all youth in America.³²⁰ Black youth are more than four times as likely to be detained or committed in juvenile facilities as their white peers.³²¹ Black youth are more likely to be in custody than white youth in every state except Hawaii.³²²

As a result of their experiences with the juvenile justice system, many Black Americans distrust the system.³²³ This report further discusses the enduring impact of the juvenile justice system on Black American families in Chapter 8, Pathologizing the Black Family, on Black American families.

E. California

The previously described history of the criminal justice system in America, such as California three-strikes laws and similar policies that have affected large numbers of Black Americans, has led to several conditions that have caused California to lead the way in expansion of prisons in the United States until recent reforms. That history, particularly from the 1980s to present, has contributed to what has been described as “the biggest prison building project in the history of the world” here in California.³²⁴ The City of Los Angeles imprisons more people than any other American city.³²⁵ According to one scholar, law enforcement officials often arrested, incarcerated, and/or instructed Black Americans to leave Los Angeles during the 1920s and 1930s.³²⁶

Black Americans are overrepresented in correctional facilities. Approximately 28.3 percent of California’s prisoners were Black, when they make up about 6 percent of the population.³²⁷ Further, Black people who are

³¹⁸ Black Students More Likely to Be Arrested at School, <<https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01>> [as of Nov. 27, 2021]. Blad & Harwin, <https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01> Black Students More Likely to Be Arrested at School (Jan. 24, 2017), EducationWeek (<https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01>) as of Nov. 27, 2021).

³¹⁹ Riddle & Sinclair, *Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias* (April 2, 2019), Proceedings of the National Academy of Sciences (as of Nov. 27, 2021).

³²⁰ National Center for Juvenile Justice, <https://www.ojjdp.gov/ojstatbb/ezapop><https://www.ojjdp.gov/ojstatbb/ezapop> Easy Access to Juvenile Populations: 1990-2019 (2020) (<https://www.ojjdp.gov/ojstatbb/ezapop>) as of Nov. 27, 2021).

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Pennington, *Engaging Parents As A Legitimacy-Building Approach in Juvenile Delinquency Court* (2012) 16 U.C. Davis J. Juv L. & Pol’y 481, 486.

³²⁴ Gilore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (2007).

³²⁵ Hernandez, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles 1771-1965* (2017).

³²⁶ *Id.* at pp. 172-173.

³²⁷ U.S. Census Bureau, [Quick Facts: California](#) (as of July 22, 2021).

incarcerated in California correctional facilities also experience forms of segregation from the moment they enter a facility.³²⁸

California has a history of extremely poor conditions in its numerous prisons, which disproportionately harms Black 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 punishment. Since the decision in 2011, California has been required to decrease the number of people in state correctional facilities.³²⁹ 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.

³²⁸ See generally Goodman, <http://www.jstor.org/stable/29734153><http://www.jstor.org/stable/29734153> "*It's Just Black, White, or Hispanic*": An Observational Study of Racializing Moves in California's Segregated Prison Reception Centers (2008) *Law & Society Rev.* Vol. 42, no. 4, pp. 735–70 (<http://www.jstor.org/stable/29734153>) as of Nov. 29, 2021); see also Goodman, *Race in California's Prison Fire Camps for Men: Prison Politics, Space, and the Racialization of Everyday Life* (2014) *Race in California's Prison Fire Camps for Men: Prison Politics, Space, and the Racialization of Everyday Life* *American Journal of Sociology* Vol. 120, no. 2, pp. 352–94 (as of Jan. 5, 2022).

³²⁹ See generally Bachrach et al., *The End of Mass Incarceration in California: What Comes Next?* (2016) *The End of Mass Incarceration in California: What Comes Next?* *Journal of California Studies* Vol. 6, no. 2 pp. 4–7 (as of July 23, 2021).

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- 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 decisions and systemic issues in the state's criminal justice system, which have made it nearly impossible for criminal defendants to challenge racial bias.³³⁰

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

While individuals serve their prison sentences, the State of California uses their labor in many ways. The California Prison Industrial Authority produces products such as clothing, textiles, furniture, cleaning products, office supplies, signs, and food for sale.³³¹ People who are incarcerated also work in the prison's laundry, kitchen, and general maintenance.

As of October 2020, the California Department of Forestry and Fire Protection typically employs around 1,800 incarcerated individuals every year to fight forest fires. As previously discussed, some 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.³³²

Although California has attempted to reform its juvenile justice system in recent years, it has a well-documented and troubled history of juvenile incarceration.³³³ The number of incarcerated youth reached unprecedented heights in the 1990s.³³⁴ California housed over 10,000 youth in 11 facilities throughout the state in 1996.³³⁵ 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.³³⁶

³³⁰ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2542 Assem. Bill No. 2542 (2019-20 Reg. Sess.) (as of Apr. 8, 2022); see also Office of Governor Gavin Newsom, <https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-landmark-legislation-to-advance-racial-justice-and-californias-fight-against-systemic-racism-bias-in-our-legal-system/> Governor Newsom Signs Landmark Legislation to Advance Racial Justice and California's Fight Against Systemic Racism & Bias in Our Legal System (Sept. 30, 2020) (as of Apr. 8, 2022).

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2542; see also <https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-landmark-legislation-to-advance-racial-justice-and-californias-fight-against-systemic-racism-bias-in-our-legal-system/>

³³¹ Cal. Prison Industrial Authority, [https://catalog.calpia.ca.gov/https://catalog.calpia.ca.gov/CALPIA Store](https://catalog.calpia.ca.gov/https://catalog.calpia.ca.gov/CALPIA%20Store) (<https://catalog.calpia.ca.gov/>> as of Nov. 24, 2021).

³³² See, e.g. Stygar, *Thinking Outside the Box: A Point-Based System of Reintegration for California's Inmate Firefighters* (2020) 56 Cal. Western L.Rev. 455, 456.

³³³ Macallair, *After the Doors Were Locked: A History of Youth Corrections in California and the Origins of the Twenty-First-Century Reform* (2013).

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Ibid.*

There have also been recent attempts to decentralize the juvenile justice system and provide localized services for juveniles who are accused of crimes.³³⁷ 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.³³⁸

But many racial inequities for young Black Americans remain. Currently, in California, Black youth are 31.3 times more likely to be committed to imprisonment in the state's juvenile justice system than white youths. As of June 2020, of the total 782 youth in California juvenile detention facilities, 227 were Black. In that same time, Black youth made up 36 percent of those committed to a juvenile detention facility even though they comprised only 14 percent of the population in California.

The treatment of Black youth as criminals in California begins at an early age when they are in school. School administrators, teachers, and school police, often treat young Black students as criminals. For example, as Jacob Jackson testified at the October 12, 2021 Task Force hearing, he was targeted by his teacher and school police when he was a student at Crenshaw High School in Los Angeles. More information on the juvenile justice system in California is available in Chapter 8, Pathologizing the Black Family.

VI. The Effects of Contact with the Criminal Justice System

The lingering negative impact of contact with the criminal justice system are wide-ranging and far-reaching. Black 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 vote³³⁹, or serving on juries.³⁴⁰ Just observing the effects of the criminal justice system can negatively affect the mental health of Black Americans,³⁴¹ and lead to

³³⁷ *Ibid.*

³³⁸ [Sen. Bill No. 823 \(2019-2020 Reg. Sess.\) Senate, Bill No. 823 \(2019-2020 Reg. Sess.\)](#).

³³⁹ The Sentencing Project, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* (Oct. 3, 2020) (as of Apr. 9, 2021). The Sentencing Project, *Locked out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* (October 3, 2020) <<https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>> [as of Apr. 9, 2021].

³⁴⁰ See generally American Bar Association, <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/> <<https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/>> [as of Apr. 9, 2021]; Jackson-Gleich, <https://www.prisonpolicy.org/reports/juryexclusion.html> <<https://www.prisonpolicy.org/reports/juryexclusion.html>> *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records* (Feb. 18, 2021), Prison Policy Initiative <<https://www.prisonpolicy.org/reports/juryexclusion.html>> as of July 29, 2021).

³⁴¹ Bor et al., [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31130-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31130-9/fulltext) <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31130-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31130-9/fulltext)> *Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study* (June 21, 2018), The Lancet <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31130-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31130-9/fulltext)> as of May 16, 2021).

mistrust of the legal system.³⁴² 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 Black Americans have experienced.

Devon Simmons, who served 15 years in prison for crimes he committed as a teenager in Harlem, explained:³⁴³

“You’ve got to find a way to reinvent yourself and promote yourself to the world. But there’s a stigma. For a long time, for example any application for school, housing, a job, you needed to check the box saying you’re formerly incarcerated. The disenfranchisement pushes a lot of people into the informal market—selling drugs, for example.”³⁴⁴

A. Discrimination in Housing, Employment, and Political Participation

Black Americans who have been incarcerated experience problems finding a permanent place to live. As discussed in the Chapter 5, *The Root of Many Evils: Housing Segregation*, Black Americans have experienced homelessness dating back to slavery,³⁴⁵ regardless of whether they have participated in the criminal justice system.

Black Americans who have been incarcerated experience significant levels of housing instability soon after they leave prison.³⁴⁶ The Prison Policy Initiative estimates that returning citizens are almost 10 times more likely to be unhoused than the general public,³⁴⁷ and the problem among Black returning citizens is worse than other racial groups.³⁴⁸ 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 Black children than white children.³⁴⁹

³⁴² See e.g., Burks, <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11369&context=dissertations>> [as of Nov. 24, 2021]. [https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11369&context=dissertationsAfrican American Men’s Negative Personal Experiences with and Trust in Police](https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11369&context=dissertationsAfrican%20American%20Men's%20Negative%20Personal%20Experiences%20with%20and%20Trust%20in%20Police) (2021)

(<https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=11369&context=dissertations>> as of Nov. 24, 2021).

³⁴³ Colin, <https://www.nytimes.com/2021/12/07/us/prison-college-graduate-devon-simmons.html>> [as of Jan. 6, 2022]. <https://www.nytimes.com/2021/12/07/us/prison-college-graduate-devon-simmons.html> *It’s Never Too Late to Go to College and Rewrite Your Story* (Dec. 7, 2021), *The New York Times* (<https://www.nytimes.com/2021/12/07/us/prison-college-graduate-devon-simmons.html>> as of Jan. 6, 2022).

³⁴⁴ *Ibid.*

³⁴⁵ Johnson, www.jstor.org/stable/40648529 *African Americans and Homelessness: Moving Through History* (2010) *J. of Black Studies* Vol. 40, no. 4 pp. 583–605 (583–605 <www.jstor.org/stable/40648529> as of July 23, 2021).

³⁴⁶ Western et al., *Stress and Hardship after Prison* (2015) *American J. of Sociology* Vol. vol. 120, no. 5 pp. 1525–1528 <<(www.jstor.org/stable/10.1086/681301> as of July 23, 2021).

³⁴⁷ Couloute, [Nowhere to Go: Homelessness among Formerly Incarcerated People](https://www.jstor.org/stable/10.1086/681301) (Aug. 1, 2018) (as of July, 23 2021).

³⁴⁸ *Ibid.*

³⁴⁹ Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment* (2014) *The Annals of the American Academy of Political and Social Science*, Vol. 651, pp.74–96 (as of Dec. 10, 2021).

Finding jobs is also difficult for Black returning citizens.³⁵⁰ 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 Black families contribute to the Black-white wealth gap.³⁵¹ Although the Civil Rights Act of 1964 prohibits consideration of a job applicant's criminal history if it negatively impacts Black 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 Black men because they are more likely to have criminal histories.³⁵²

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 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 Black returning citizens experienced when looking for work throughout American history.

Laws that deprive people with convictions of the right to serve on a jury also disproportionately harm Black Americans. Some states exclude people from serving on juries when they commit misdemeanors, although reliable nationwide statistics on the number of Black people who cannot serve on juries is unavailable because no national database exists to track such data. Because Black 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.³⁵³

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.³⁵⁴ Depriving people who have convictions diminishes the political power of Black

³⁵⁰ Couloute et al., *Out of Prison & Out of Work: Unemployment among Formerly Incarcerated People* (Jul. 1, 2018), Prison Policy Initiative [summarizing and analyzing data from the Bureau of Justice Statistics and scholarly sources]; Gurusami, *Working for Redemption: Formerly Incarcerated Black Women and Punishment in the Labor Market* (2017) Vol. 31, no. 4, pp. 433–56 < (as of Apr. 8, 2022).

³⁵¹ Sykes & Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1996 to 2011* (2016) The Russell Sage Foundation, *Journal of the Social Sciences* Vol. 2, pp. 129–152 << (<www.jstor.org/stable/10.7758/rsf.2016.2.6.07> as of Apr. 8, 2022).

³⁵² U.S. Equal Employment Opportunity Com., *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012) (Sept., 2021).

³⁵³ See generally American Bar Association, *Lack of Jury Diversity: A National Problem with Individual Consequences* (Sept. 1, 2015) (as of Apr. 9, 2021) See generally ; Jackson-Gleich, *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records* (Feb. 18, 2021), Prison Policy Initiative (as of July 29, 2021).9, 2021];

³⁵⁴ Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002* <http://users.cla.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf> [as of Nov. 15, 2021].

Americans.³⁵⁵ The Sentencing Project estimates that approximately 1.3 million Black Americans of voting age cannot vote because of past convictions, which is a rate 3.7 times greater than that of non-Black Americans.³⁵⁶ In fact, over 6.2 percent of the Black American population cannot vote because of past convictions compared to 1.7 percent of the non-Black American population.³⁵⁷

Contact with the criminal justice system through incarceration affects the mental health of Black Americans. Studies show that incarceration was associated with perceived discrimination, depressive symptoms, and psychological distress³⁵⁸, and the impact is long lasting.³⁵⁹ Incarceration negatively affects the overall physical health of Black people after they leave prisons and jails as discussed in Chapter 12, Harm and Neglect: Mental, Physical, and Public Health. Similarly, as discussed in Chapter 8, Pathologizing the Black Family, there is also evidence that mass incarceration negatively impacts family members of Black Americans who have been incarcerated both during and after their incarceration.

Even for Black Americans who have not had direct contact with the criminal justice system, just observing the effects of the criminal justice system takes a toll on Black American's mental health. A 2018 study found that a police murder of an unarmed Black American triggered days of poor mental health for Black Americans living in the state where that murder occurred.³⁶⁰ This total number of painful days over a year was comparable to the rate diabetics experienced.³⁶¹

These negative experiences with the criminal justice system have caused many Black Americans, and Black men in particular,³⁶² to distrust police.³⁶³ As a result, Black Americans are less likely to call the police than Latinos and white people.³⁶⁴ This distrust likely leads to an underutilization of police and government services in general, such as the civil legal system, as discussed below. As the Kerner Commission noted in 1968, "To

³⁵⁵ Uggen & Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States* (2002); Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look* (1994) 142 Univ. of Pa. L. Rev. 1145-89 (as of Apr. 8, 2022).

³⁵⁶ The Sentencing Project, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* (Oct. 3, 2020) (as of Apr. 9, 2021).

³⁵⁷ *Ibid.*

³⁵⁸ Assari et al., *Discrimination Fully Mediates the Effects of Incarceration History on Depressive Symptoms and Psychological Distress Among African American Men*, *Journal of Racial and Ethnic Health Disparities* Assari et al.,(2018) pp. 243-252 (as of Nov. 15, 2021).

³⁵⁹ Office of the Assistant Secretary for Planning and Evaluation, The U.S. Department of Health and Human Services, <https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0><https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0>From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities (Dec. 2001) (<https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0>) as of September 25, 2021).

³⁶⁰ Bor et al., *Police killings and their spillover effects on the mental health of black Americans: a population-based, quasi-experimental study* (June 21, 2018), *The Lancet* (as of May 16, 2021). Bor et al.,

³⁶¹ *Ibid.*

³⁶² See, e.g., Burks, *African American Men's Negative Personal Experiences with and Trust in Police* (Feb. 2021), (as of Nov. 24, 2021).

³⁶³ Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities* (2004) 56 Stan. L. Rev. 1271, 1287.

³⁶⁴ U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics, Durose and Langton, Requests for Police Assistance, (2011) p. 4 <<https://bjs.ojp.gov/content/pub/pdf/rpa11.pdf>> [as of Nov. 24, 2021].

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.”³⁶⁵

B. California

In California, as discussed earlier, courts also contributed to the growing body of law that discriminated against Black 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.³⁶⁶ Free Black activists, who were enslaved people’s greatest allies, could not be witness in any court proceedings.³⁶⁷

Currently, there is some evidence that Black Americans experience discrimination in the civil legal system. The civil legal system is the system through which Black Americans can obtain remedies, such as money, for the discrimination they experience in nearly every area of their life as identified in the chapters on labor, education, housing, racial terror, and wealth. But Black Americans with low incomes face several systemic problems in the underfunded court systems both nationwide and in California when attempting to access justice such as obtaining a lawyer.

There appears appear to be very little scholarship on Black Americans’ distrust of the legal system as a whole and how that affects their underutilization of the civil law system,³⁶⁸ but some evidence does indicate that their contact with the criminal justice system negatively affects trust in the civil legal system. For example, the California Judicial Council Advisory Committee on Racial and Ethnic Bias provided some helpful insight when it studied the treatment of minorities in state courts and public perceptions of fairness in 1997.³⁶⁹

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.”³⁷⁰

³⁶⁵ National Advisory Commission on Civil Disorders, Report of The National Advisory Commission on Civil Disorders (1968) <https://belonging.berkeley.edu/sites/default/files/kerner_commission_full_report.pdf?file=1&force=1> [as of Dec. 7, 2021].)

³⁶⁶ The Civil Practice Act, Stats.1851, ch. 1, § 394, p. 113.

³⁶⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (September 23, 2021), Testimony of Stacey Smith, <<https://oag.ca.gov/ab3121/meetings>> [as of Nov. 22, 2021] [citing Smith, *Freedom’s Frontier* (2014) p. 71-72].

³⁶⁸ Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67; DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts* (2021) 13 Geo. J. L. & Mod. Critical Race Persp. 1.

³⁶⁹ Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, Final Report on the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts January (1997) <<https://www.courts.ca.gov/documents/rebias.pdf>> [as of November 9, 2021].

³⁷⁰ Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, Final Report on the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts January (1997) p. 4 <<https://www.courts.ca.gov/documents/rebias.pdf>> [as of

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.³⁷¹ As a result, Black 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 state³⁷² 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;³⁷³
- 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;³⁷⁴
- 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;³⁷⁵
- 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;³⁷⁶
- 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;³⁷⁷
- 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 Black Americans suffered before California passed these laws.

VII. Discrimination in the Civil Justice System

November 9, 2021]; see also Judicial Council of Cal., Advisory Com. on Racial and Ethnic Bias, Fairness in the California State Courts: A Survey of the Public, Attorneys, and Court Personnel (1993) <<https://www.courts.ca.gov/documents/12-93.pdf>> [as of November 9, 2021].

³⁷¹ Gov. Code § § 12264-12271; see also Assembly Bill No. 1241 (“Ban the Box Housing Act”), (2021-2022 Reg. Sess.) (Mar. 25, 2021.), which may change the law <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1241> [as of Nov. 26, 2021].

³⁷² See generally Judicial Council of Cal., Clean Your Record, <<https://www.courts.ca.gov/1070.htm?rdeLocaleAttr=en>> [as of Nov. 26, 2021].

³⁷³ Pen. Code § 1170.18.

³⁷⁴ Cal. Const., art. 1, § 32.

³⁷⁵ Pen. Code § 851.93, § 1203.045.

³⁷⁶ Gov. Code § 12952.

³⁷⁷ Pen. Code § 851.91.

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.³⁷⁸ 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, Black 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 Black 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*. Black 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.

A. Systemic Barriers

The U.S. Supreme Court notoriously held in *Dred Scott v. Sandford* that Black 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.³⁷⁹ After slavery ended, many federal civil decisions harmed Black Americans, such as cases that legalized segregation,³⁸⁰ that prevented the federal government from outlawing racial discrimination by private citizens,³⁸¹ and that protected the economic liberties of white Americans over the civil rights of Black Americans.³⁸² Further, in many states throughout the country Black Americans could not testify in a case in which a white person was a party.³⁸³ These government actions that occurred after slavery ensured Black Americans remained in the lowest caste of the American racial hierarchy.

Evidence exists that Black Americans' negative past experiences with the criminal justice system contribute to resistance to seeking help from the civil legal system.³⁸⁴ One study has shown that Black claimants are underrepresented in federal court cases and white claimants are overrepresented.³⁸⁵

³⁷⁸ Pew Charitable Trusts, Rickard, [Many U.S. Families Faced Civil Legal Issues in 2018](#) (2019) (as of Sep. 26, 2021).

³⁷⁹ *Dred Scott v. Sandford* (1856) 60 U.S. 393.

³⁸⁰ *Plessy v. Ferguson* (1896) 163 U.S. 537.

³⁸¹ *The Civil Rights Cases* (1883) 109 U.S. 3.

³⁸² *The Slaughter-House Cases* (1873) 83 U.S. 36.

³⁸³ See, e.g., The Civil Practice Act, Stats.1851, ch. 1, § 394, p. 113; The Criminal Act of 1850, Stats.1850, ch. 99, § 14, p. 230.

³⁸⁴ Greene, *Race, Class, and Access to Civil Justice* (2016) 101 Iowa L. Rev. 1263, 1266–67.

³⁸⁵ DeVito, *Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation from U.S. Civil Courts* (2021) 13 Geo. J. L. & Mod. Critical Race Persp. 1, 3.

Members of historically marginalized communities, including Black Americans, have long faced difficulties accessing justice due to systemic problems like underfunding.³⁸⁶ 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 Black.

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 Black in 2016.³⁸⁷ 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.³⁸⁸ Americans with low incomes received inadequate or no legal help for 86 percent of their civil legal problems in 2016.³⁸⁹

B. Lack of Diversity in the Legal Profession

Historically, law schools and bar associations have discriminated against Black Americans by preventing their entry into law schools and the profession.³⁹⁰ As discussed in Chapter 6, Separate and Unequal Education, predominately white graduate schools like law schools routinely excluded Black Americans until the 1960s.³⁹¹ The American Bar Association, the main profession association of attorneys in the United States prohibited Black Americans from joining until 1943.³⁹² Black lawyers founded the National Bar Association instead.³⁹³ Chapter 10, Stolen Labor and Hindered Opportunity, provides an in depth discussion of racial discrimination against Black Americans by professional guilds and licensure process. The American Bar Association initially rescinded the membership of William H. Lewis in 1912, the first black assistant U.S. attorney general and two other Black men because leaders determined that they had elected him “in ignorance

³⁸⁶ See generally Podgers, *in Defense of the Courts: A Symposium Finds Consensus on the Need, but No Easy Path to Restoring Court Funding* (2011) ABA Journal 97, no. 11): 56–57 <<http://www.jstor.org/stable/23034160>> [as of Nov. 22, 2021]; Greenberg & McGovern. “State Court Funding.” In *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?*, 5–12. RAND Corporation, 2012 <<http://www.jstor.org/stable/10.7249/j.ctt3fh0gv.9>> [as of Nov. 22, 2021]; Graetz, Trusting the Courts: Redressing the State Court Funding Crisis. *Daedalus*, 143(3), 96–104 <<http://www.jstor.org/stable/43298046>> [as of Nov. 22, 2021].

³⁸⁷ Legal Services Corporation, The Justice Gap: Measuring the Unmet Legal Needs of Low-income Americans p. 60 <<https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74>> [as of Nov. 25, 2021].

³⁸⁸ *Id.* at 21.

³⁸⁹ *Id.* at 30.

³⁹⁰ See generally Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools* (2008) 18 Temp. Pol. & Civ. Rts. L. Rev. 177; Weatherspoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers* (2010) 80 Miss. L.J. 259, 264.

³⁹¹ See, e.g., *Pearson v. Murray* (1936) 169 Md. 478; *State of Missouri ex rel. Gaines v. Canada* (1938) 305 U.S. 337; *Sweatt v. Painter* (1950) 339 U.S. 629.

³⁹² American Bar Association, ABA1912- ABA Restricts Membership to White Lawyers <https://www.americanbar.org/about_the_aba/timeline/1912/> [as of Nov. 19, 2021].

³⁹³ National Bar Association, History of the National Bar Association, <https://www.nationalbar.org/NBAR/about/history/NBAR/content/history.aspx?hkey=dc876c1f-5004-418b-a8c9-25cee1c69668> [as of Apr. 8, 2022]. <https://www.nationalbar.org/NBAR/about/history/NBAR/content/history.aspx?hkey=dc876c1f-5004-418b-a8c9-25cee1c69668>

of material facts” and that “the settled practice of the Association has been to elect only white men as members.”³⁹⁴

Today, scholars argue that the Law School Admissions Test, the and law school accreditation continues this discrimination.³⁹⁵ Scholars also argue that the bar exam, the licensure exam for lawyers, is culturally biased against and designed to exclude historically marginalized groups, like Black Americans. Nationwide, in 2020, Black Americans comprised eight percent of students in law schools, but only about 5 percent of lawyers³⁹⁶, even though they were 13.4 percent of the country’s population.³⁹⁷ Only 66 percent of Black Americans passed the 2020 bar examination on their first attempt nationwide, which is the lowest passage rate when compared to other racial groups.³⁹⁸

As a result, Black Americans are underrepresented in the national legal profession and federal judiciary. These statistics have remained almost unchanged since 2011.³⁹⁹ Nationwide, in 2020, Black Americans comprised 9.8 percent of federal judges even though Black Americans make up 13.4 percent of the population.⁴⁰⁰

In general, lawyers in the legal system are particularly important as they “play a vital role in the preservation of society”⁴⁰¹ and “an officer of the legal system and a public citizen have special responsibilities for the quality of justice.”⁴⁰² Scholars argue that a law degree is a spring board to lucrative and powerful careers, which are

³⁹⁴ American Bar Association ABA, 1912- ABA Restricts Membership to White Lawyers <https://www.americanbar.org/about_the_aba/timeline/1912/> [as of Nov. 19, 2021]; see also Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools* *Journal* (Mar. 5, 2001) 53 *J. Legal Educ.* 103 <<http://www.jstor.org/stable/42893789>> [as of Nov. 19, 2021].

³⁹⁵ Taylor, *The Marginalization of Black Aspiring Lawyers* Vol.(2019) Florida International University L. Rev. Vol.Vol. 13 No. 3 <<https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1350&context=lawreview#page=1&zoom=auto,-20,802>> [as of Nov. 22, 2021]; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=263211.

³⁹⁶ American Bar Association, ABA National Lawyer Population Survey (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf

³⁹⁷ American Bar Association, ABA Profile of the Legal Profession (2020) <<https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>> [as of Nov. 22, 2021].

³⁹⁸ American Bar Association, Summary Bar Pass Data: Race, Ethnicity, and Gender 2020 and 2021 Bar Passage Questionnaire https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/20210621-bpq-national-summary-data-race-ethnicity-gender.pdf> [as of Nov. 22, 2021].

³⁹⁹ *Ibid.*

⁴⁰⁰ U.S. Census Bureau, Quick Facts: U.S. <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> [as of July 22, 2021].

⁴⁰¹ American Bar Association, ABA Model Rules Prof. Conduct: Preamble: A Lawyer’s Responsibilities <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/> [as of Nov. 19, 2021].

⁴⁰² Rules Prof. Conduct, rule 1.0, comment 5 <https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.0-Exec_Summary-Redline.pdf> [as of Nov. 19, 2021].

closed off to many Black Americans.⁴⁰³ Advocates argue that Black attorneys provide Black litigants and defendants with much needed and effective culturally appropriate legal services.⁴⁰⁴

C. California

These same issues exist in California. For example, much like California criminal courts, the state's civil courts have been historically underfunded,⁴⁰⁵ which leads to many conditions that resulted in inadequate resources for the public such as limited services for self-represented litigants, decrepit facilities, and limited court staff.

As a result of underfunded courts, civil cases move 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.⁴⁰⁶ Approximately 55 percent of Californians experience at least one civil legal problem in their household each year.⁴⁰⁷ But according to the State Bar of California, Californians received no or inadequate legal help for 85 percent of their problems.⁴⁰⁸ People with low incomes, many of whom are Black, struggle with problems related to housing, health, finances, employment, family law issues, disability benefits, and many other civil law issues.⁴⁰⁹

California has passed laws that provide for counsel in certain civil cases, like those involving family law issues.⁴¹⁰ But, overall, in the vast majority of civil cases, there is no right to counsel both nationwide and in California. Some studies show that Black Americans, in particular, face unique impediments in obtaining access

⁴⁰³ See 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 <<http://www.jstor.org/stable/42893789>> [as of Nov. 19, 2021].

⁴⁰⁴ King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys* (2008) 18 Cornell L. Rev. 1, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1279&context=cjlp>.

⁴⁰⁵ See generally Judicial Council of Ca., *The Road to Independence: A History of Trial Court Funding California Courts Review* (Winter 2009) <https://www.courts.ca.gov/documents/CCR_09Winter.pdf> [as of Nov. 11, 2021]; Judicial Council of Cal., *Special Rep.: Trial Court Funding* <<https://www.courts.ca.gov/documents/tcfnews.pdf>> [as of Nov. 12, 2021]; Trial Court Presiding Judges Advisory Committee, *Memorandum on Impacts of Trial Court Presiding Judges' Advisory Committee's "Instant Survey"* (March 11, 2013) <<https://www.courts.ca.gov/partners/documents/20130312-PJ-Instant-Survey-Impacts.pdf>> [as of Nov. 12, 2021].

⁴⁰⁶ Judicial Council of Cal., *Judicial Branch Budget Com. Rep.: COVID-19 Backlog Funding Data, Materials for January 5, 2021 Meeting, Judicial Branch Budget Committee* <<https://www.courts.ca.gov/documents/jbbc-20210105-materials.pdf>> [as of Nov. 12, 2021].

⁴⁰⁷ The State Bar of Cal., *2019 California Justice Study Gap, Executive Report*, p. 6 <<https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf>> [as of Apr. 8, 2022].

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ See generally American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Directory of Law Governing Appointment of Counsel in State Civil Proceedings: California*, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_judges_manual_ca.pdf (as of Apr. 8, 2022).

to a lawyer.⁴¹¹ For example, 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.⁴¹²

Although Black Americans are not underrepresented in the California judiciary they are underrepresented in the statewide legal profession. In 2020, eight percent of judges were Black.⁴¹³ In California, during 2019, Black Americans comprised four percent of lawyers even though they comprise 6 percent of the population in the state.⁴¹⁴ These numbers have “remained stagnant” in the last 30 years.⁴¹⁵

While this lack of diversity presents a problem for creating trust in both the criminal and civil legal system, it is especially problematic for Black Americans because it is the system through which they can address the discrimination they continue to experience as this report discusses in the across all of its chapters.

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VIII. Conclusion

Rooted in the tools to maintain slavery, social control of Black Americans continued through American history as the Black codes and legal segregation known as Jim Crow. Federal and state governments continue the legacy of slavery by criminalizing Black Americans today. California court cases and statutes contributed to a national body of law that explicitly discriminated against Black Americans. As a result of legalized discrimination against Black Americans, the American general public developed and perpetuated biases and stereotypes against Black Americans. American politicians capitalized on these racist stereotypes to win office and implement more laws and policies that have imprisoned more Black Americans than white Americans compared to their shares in the population. This ensured that Black 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 Black Americans to experience significant inequities. Black 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.

⁴¹¹ Libgober, *Getting a Lawyer While Black: A Field Experiment* (2020) 24 Lewis & Clark L. Rev. 53.

⁴¹² *Ibid.* at p. 76.

⁴¹³ Judicial Council of Cal., *Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identify/Sexual Orientation* (Gov. Code, § 12011.5 (n)) [sic] *As of December 31, 2020* [sic], <https://www.courts.ca.gov/documents/2021-JO-Demographic-Data.pdf> (as of Apr. 8, 2022)

⁴¹⁴ State Bar of California, *First Annual Report Card on the Diversity of California’s Legal Profession* (2020), Appendix Table 1,) <https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf> (as of Apr. 8, 2022)

⁴¹⁵ *Ibid.* at p. 7.

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

I. Introduction

Scholars have stated that Europeans developed a racial hierarchy in which Black people were relegated to the bottom of humanity, and often placed outside of it altogether, in order to justify the enslavement of African people.¹ The United States is no exception to this global reality. This chapter will describe how federal, state, and local governments subjected enslaved people and their descendants to brutal and dehumanizing conditions, policies, and practices. The United States has treated Black Americans as subhuman and engaged in practices harmful to the health of Black Americans through forced labor, racial terror, oppression, torture, sexual violence, abusive medical experimentation, discrimination, harmful neglect, and more, as will be explained throughout this chapter. Scholars have stated that racism and enslavement are, at least in part, responsible for the fact that Black Americans have had the worst healthcare, health status, and health outcomes of any racial or ethnic group in the United States.²

During enslavement, enslaved people were treated like animals, and physicians provided healthcare only to the extent necessary to profit from enslaved peoples' bodies.³ After the end of slavery in 1865 and a short-lived period of reconstruction, federal, state, and local government officials worked with private citizens to segregate Black American communities—damaging Black health, creating unequal healthcare services for Black people; depriving Black American communities of safe sanitation and adequate sewage systems; and sacrificing Black health for medical experiments.⁴ During the 20th century, federal and state sponsored corporatization of healthcare resulted in rising healthcare costs, the separation of Black doctors from Black patients, and further inequality between white and Black Americans.⁵

Centuries of exposure to racism has contributed to a serious decline in Black American physical and mental health.⁶ Black Americans die at disproportionately higher rates from preventable health problems.⁷ Doctors are more likely to misdiagnose Black Americans, leading to disparate outcomes in mental health.⁸ Black American women face high rates of maternal death and adverse birth outcomes—even Black women with the highest

¹ Grills et al., *African Psychology and the Global Movement for Freedom from the Lie of Black Inferiority* (2020) 27 *Alternation* 170, 172, 170-206.

² Byrd & Clayton, *Race, Medicine, and Health Care in the United States: A Historical Survey* (2001) 93 *J. of the Nat. Medical Assn.* 11, 11-34 (Byrd & Clayton 2001).

³ *Id.* at p. 19.

⁴ See generally McBride, *Caring for Equality: A History of African American Health and Healthcare* (2018).

⁵ See generally *Ibid.*

⁶ Byrd & Clayton 2001, *supra*, at p. 24; Goosby & Heidbrink, *Transgenerational Consequences of Racial Discrimination for African American Health* (2013) 7 *Sociology Compass* 630, 630-643.

⁷ Forde et al., *The Weathering Hypothesis as an Explanation for Racial Disparities in Health: A Systematic Review* (2019) 33 *Annals of Epidemiology* 1, 1-18.

⁸ Woods et al., [“WE AIN’T CRAZY! Just Coping With a Crazy System”: Pathways into the Black Population for Eliminating Mental Health Disparities](#) (May 2012) *Cal. Reducing Disparities Project*, pp. 28-30 (as of Mar. 16, 2022).

education attainment have the worst birth outcomes across *all* women in America.⁹ Black American children face poverty, malnutrition, and worse health than that of white American children.¹⁰ The mismanagement of public health crises by county, state, and federal governments has resulted in an undue burden of disease and death in Black American communities—particularly during the COVID-19 pandemic.¹¹ Despite this, in the face of overwhelming oppression, Black American healthcare providers, patients, and community members, nonetheless, have worked to build healthy communities and fight for a more equitable healthcare system.¹²

Section III of this chapter discusses the racist theories developed and perpetuated by doctors and scientists about Black Americans. Section IV describes the health conditions of Black Americans during enslavement. Sections V, VI, and VII discuss how systemic discrimination and segregation was established and how it continues in the American health care system. Sections VIII and IX describe the history of medical experimentation on Black bodies throughout American history, and how medical research and technologies harm Black Americans. Section X describes the history of racism in mental health and the effects of 400 years of racial oppression on the mental health of Black Americans. Sections XI and XII discuss reproductive, gender identity-responsive healthcare, and child health. Section XIII discusses public health crises. Section XIV describes the effects of racial oppression on the physical health of Black Americans.

II. Pseudoscientific Racism as Foundation of Healthcare

During the enslavement era, scientific racism defined race as an innate biological and genetic trait.¹³ Pseudoscientific definitions of Blackness were based on differences in skin color, facial features, hair texture, lip size, and false beliefs about “brain size” and immunity to diseases.¹⁴ Pseudoscientists invented “phrenology”—the baseless “science” of measuring the size of the skull as evidence of intelligence in different races.¹⁵ This pseudoscience was influential across the United States throughout the 1800s.¹⁶ During the slavery era, medical researchers tried to prove that Black people were biologically suited to slavery.¹⁷

In the 1880s and 1890s, the decades following Reconstruction, false medical theories explained the poverty that Black Americans experienced as justified by their “inherent inferiority,” instead of as the result of almost three

⁹ Smith et al., *Fighting at Birth: Eradicating the Black-White Infant Mortality Gap* (Mar. 2018) Duke University’s Samuel DuBois Cook Center on Social Equity and Insight Center for Community Economic Development, p. 4 (as of Mar. 9, 2022).

¹⁰ See Heard-Garris et al., *Structuring Poverty: How Racism Shapes Child Poverty and Child and Adolescent Health* (2021), 21 *Academics Pediatrics* 108, 108-115.

¹¹ See generally Grills, et al., *Applying Culturalist Methodologies to Discern COVID-19’s Impact on Communities of Color* (Jan. 31 2022) *J. of Community Psychology* (as of Mar. 29, 2022); see generally McBride, *supra*.

¹² See generally McBride, *supra*.

¹³ Bailey et al., *How Structural Racism Works — Racist Policies as a Root Cause of U.S. Racial Health Inequities* (Feb. 25, 2021) 384 *New England J. of Medicine* 768.

¹⁴ See Morton, *Crania Americana* (1839).

¹⁵ See Greenblatt, *Phrenology in the Science and Culture of the 19th Century* (1995) 37 *Neurosurgery* 790, 790-804.

¹⁶ *Ibid*.

¹⁷ Roberts, *The Most Shocking and Inhumane Inequality: Thinking Structurally About Persistent Poverty and Racial Health Inequities* (2018) 49 *University of Memphis L. Rev.* 167, 178 (Roberts 2018).

centuries of enslavement.¹⁸ Doctors published influential studies stating that Black Americans’ “immorality” was responsible for the syphilis and tuberculosis they suffered.¹⁹ In 1880, the New Orleans public health agency claimed that Black Americans’ naturally weaker immune system and “irregular habits,” were the reason that so many Black Americans died, rather than inadequate access to sanitation, drinking water, food, and overcrowded uninhabitable housing due to racial segregation.²⁰ During Congressional debates over the establishment of the Freedmen’s Bureau, a program which included government-funded healthcare for newly freed Americans, white legislators argued that healthcare assistance to free Black people would result in dependence.²¹ Consequently, federal and state governments relied on racist theories to justify slavery and racist neglect in public policy.²²

In the 20th century, the federal and state governments supported the eugenics movement, which sought to eliminate nonwhite populations, considered to have undesirable traits.²³ Eugenics is based upon the white supremacist ideology that white Anglo-Saxon people are an inherently superior race.²⁴ Eugenacists enacted laws resulting in the forced sterilization of undesirable “races,” including Black people, to create and maintain a white supremacist nation.²⁵ By 1931, 30 states had eugenics laws that targeted vulnerable groups across the nation for involuntary sterilization in federally-funded programs.²⁶ It was not until 1979 that federal sterilization regulations required voluntary consent of the person being sterilized.²⁷

Today, studies have found that a significant number of white medical students and residents hold false beliefs about biological differences between Black Americans and white Americans, such as the belief that Black Americans have a higher pain threshold than white Americans.²⁸ Black patients are especially vulnerable to harmful biases and stereotypes, including the undertreatment of their pain.²⁹ Physicians widely hold racist beliefs that Black Americans feel less pain or exaggerate their pain.³⁰ These beliefs result in racial bias in pain perception and treatment.³¹ Consequently, anti-Black pseudo-scientific racism that justified enslavement continues to adversely affect Black health today, as a vestige of enslavement. Despite centuries of

¹⁸ McBride, *supra*, at pp. 21-22.

¹⁹ *Id.* at p. 23.

²⁰ *Id.* at pp. 22-23.

²¹ Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment* (1985) 71 Va. L. Rev. 753, 763-764; Interlandi, [Why Doesn't the United States have Universal Health Care?](#) (Aug. 14, 2019) N.Y. Times (as of Mar. 8, 2022).

²² See generally McBride, *supra*, at pp. 20-24; Interlandi, *supra*.

²³ McBride, *supra*, at pp. 57-58; see generally Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom* (1997), 13 J. Contemp. Health L. & Pol'y 1.

²⁴ McBride, *supra*, at pp. 57-58; see Bouche & Rivard, [America's Hidden History: The Eugenics Movement](#) (Sept. 18, 2014) Nature (as of Mar. 9, 2022).

²⁵ McBride, *supra*, at 57-58.

²⁶ Raine, [Federal Sterilization Policy: Unintended Consequences](#) (2012) 14 Am. Med. Ass. J. of Ethics 152 (as of Mar. 9, 2022).

²⁷ *Ibid.*

²⁸ Sabin, [How We Fail Black Patients in Pain](#) (Jan. 6, 2020), Assn. Of Am. Medical Colleges (as of Mar. 8, 2022).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

pseudoscientific racism and anti-Blackness in the healthcare system, Black doctors, nurses, and healthcare workers have worked tirelessly to provide anti-racist culturally responsive healthcare to Black communities.³²

A. California

California civic leaders were some of the most influential proponents of eugenics in the nation and around the world—including in Nazi Germany.³³ They played a key role in popularizing the eugenics movement.³⁴ The Human Betterment Foundation was a private think tank based in Pasadena, California that promoted sterilization from 1926 to 1943.³⁵ The Human Betterment Foundation shaped public policy in California by working with state officials, representing the eugenics movement to the public, and collecting data on sterilizations nationwide.³⁶ The foundation hoped that public support would result in state legislation that would increase the number of sterilizations performed each year.³⁷ The foundation's members included many prominent leaders of Californian institutions such as David Starr Jordan, Stanford University's first president; *Los Angeles Times* publisher Harry Chandler; Nobel Prize-winning physicist and head of the California Institute of Technology, Robert A. Millikan; and University of Southern California President Rufus B. von KleinSmid.³⁸

Thousands of mental health patients were forcibly sterilized across California due to the eugenicist efforts of the Human Betterment Foundation.³⁹ Black patients were more likely to be sterilized than white patients.⁴⁰ Paul Popenoe, a self-trained biologist hired by the Human Betterment Foundation, stated that this was not surprising because “studies show that the rate of mental disease among Negroes is high.”⁴¹ Hundreds of thousands of studies, pamphlets, and books written by the Human Betterment foundation were distributed to policymakers, schools, and libraries.⁴² In 1937, one of Nazi Germany's leading eugenicists wrote to Ezra S. Gosney, the financier who started the Human Betterment Foundation, saying, “You were so kind to send ... new information about the sterilization particulars in California. These practical experiences are also very valuable for us in Germany. For this I thank you.”⁴³

³² See McBride, *supra*, at pp. 17-36.

³³ Stern, *From Legislation to Lived Experience: Eugenic Sterilization in California and Indiana, 1907-79* (2011) A Century of Eugenics in America: From the Indiana Experiment to the Human Genome Era, p. 110; Anton, [Forced Sterilization Once Seen as Path to a Better World](#) (July 16, 2003) L.A. Times (as of Mar. 8, 2022).

³⁴ Stern, *supra*, at p. 110.

³⁵ Spicer, “A Nation of Imbeciles”: The Human Betterment Foundation's Propaganda for Eugenics Practices in California (2015) 7 *Voces Novae: Chapman University Historical Rev.* 109, 109, 124.

³⁶ Spicer, *supra*, at pp. 112-114, 117, 124; Anton, *supra*.

³⁷ Spicer, *supra*, at p. 109.

³⁸ Spicer, *supra*, at p. 114; Anton, *supra*.

³⁹ Spicer, *supra*, at p. 112.

⁴⁰ Kaelber, [Eugenics: Compulsory Sterilization in 50 American States—California](#) (2010), Univ. of Vermont (as of Mar. 8, 2022); Anton, *supra*.

⁴¹ Anton, *supra*.

⁴² Spicer, *supra*, at p. 120; Anton, *supra*.

⁴³ Anton, *supra*.

III. Health and Healthcare during Enslavement

Scholars have stated that the institution of slavery has had a lasting legacy in the discriminatory healthcare system that would later emerge in the United States.⁴⁴ During the enslavement era, enslavers kept enslaved people in overcrowded, dilapidated living areas, which contributed to the spread of infectious and parasitic diseases.⁴⁵ Enslaved people were not treated in hospitals and were denied access to mental healthcare.⁴⁶ Enslavers freely and openly tortured enslaved people, raped and abused women, and trafficked children with no legal consequence.⁴⁷ Physicians used enslaved people for dangerous experimental surgeries and procedures without repercussion.⁴⁸ Federal, state, and local governments used the law to further damage the health of enslaved people and dehumanize them, while neglecting to provide public health and healthcare services.⁴⁹ Dr. Carolyn Roberts stated during a hearing before the California Task Force to Study and Develop Reparation Proposals for African Americans that, “[t]his was a form of healthcare where medical violence against African and African descended people became an acceptable, normative, and institutionalized practice.”⁵⁰

A. Physical Health

Slavery had disastrous health consequences for enslaved people due to lack of public health regulations and harsh working conditions that led to widespread infectious and nutritional diseases.⁵¹ Infectious and parasitic diseases thrive in poor living conditions and overcrowding.⁵² So, they were among the major causes of illness and death for enslaved people.⁵³ Worm infections were common among enslaved people due to contact with polluted food and soil.⁵⁴ Hookworm infestation resulted in low birth weights and high infant mortality.⁵⁵ Contagious respiratory diseases were prevalent in the winter months due to the overcrowded quarters and uninhabitable living conditions.⁵⁶ Malaria led to low birth weights and high infant mortality.⁵⁷

The lack of federal or state public health regulations resulted in contaminated food and water, nonexistent

⁴⁴ Byrd & Clayton 2001, *supra*, at p. 25.

⁴⁵ See generally Savitt, *Medicine and Slavery: The Diseases and Health Care of Blacks in Antebellum Virginia* (2002), pp. 49-82 (Savitt 2002).

⁴⁶ See generally Gonaver, *The Peculiar Institution and the Making of Modern Psychiatry 1840-1880* (2019), pp. 1-18.

⁴⁷ See generally Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (1997), pp. 22-55 (Roberts 1997).

⁴⁸ See generally Savitt, *The Use of Blacks for Medical Experimentation and Demonstration in the Old South* (1982) 48 *J. of Southern History*, 331, 331-348 (Savitt 1982).

⁴⁹ See generally McBride, *supra*, at pp. 1-16; Roberts 1997, *supra*, at pp. 22-55.

⁵⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022) Testimony of Carolyn Roberts <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁵¹ McBride, *supra*, at pp. 1-3.

⁵² Savitt 2002, *supra*, at pp. 37, 50.

⁵³ Savitt 2002, *supra*, at p. 49.

⁵⁴ Savitt 2002, *supra*, at p. 71.

⁵⁵ McGuire & Coelho, *Slavery and Diseases in the Antebellum American South* (Apr. 8, 2020) Parasites, Pathogens, and Progress (as of Mar. 8, 2022).

⁵⁶ Savitt 2002, *supra*, at p. 37.

⁵⁷ McGuire & Coelho, *supra*.

sanitary facilities or sewage disposal, wastewater leakage, and poor garbage disposal, which contributed to diseases and infections that were more likely to affect enslaved people.⁵⁸ There was no government-funded healthcare, or regulations regarding water treatment, sewage disposal, or vaccination and the prevention of disease.⁵⁹ Sexually transmitted infections were major public health problems affecting the lives of enslaved people disproportionately due to forced breeding, overcrowded quarters, and lack of access to treatment.⁶⁰ Diseases, like pellagra, caused by a lack of nutrition in the diet, weakened the immune systems of enslaved people.⁶¹

The health of enslaved people was worse than that of white people, because there were hardly any hospitals where they could be treated for disease.⁶² With few exceptions, enslaved people and free Black people were not allowed to access hospitals, almshouses, and facilities for the deaf and blind.⁶³ The welfare of enslaved people was left to enslavers, while free Black people were forced to fend for themselves.⁶⁴ In 1798, Congress established a loose network of marine hospitals to care for sick and disabled seamen, but explicitly banned enslaved people from them.⁶⁵

White enslavers tortured enslaved people openly, inflicting cruel punishment upon them without any legal consequences and often permanently damaged their health.⁶⁶ Enslavers deprived enslaved people of food and water, whipped them to inflict serious pain, and abused them.⁶⁷ The brutal violence of enslavers and the harsh labor conditions they imposed resulted in branding, dog bites, assaults with fists and rods, burns, lacerations, mutilated body parts, and bone fractures for enslaved people.⁶⁸ Gashes from chains and iron restraints resulted in injuries, infections, and permanent disability for enslaved people.⁶⁹ Enslaved people were routinely murdered by white enslavers and white people who stabbed, shot, and whipped them to death with impunity.⁷⁰ The lack of protections from extreme climates, in addition to harsh laboring conditions, resulted in illness, injury, and disease.⁷¹

B. Mental Health

⁵⁸ Savitt 2002, *supra*, at pp. 73-83.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ McBride, *supra*, at p. 3; Savitt 2002, *supra*, at pp. 88-89.

⁶² Rabinowitz, *From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865-1890* (1974), 48 *Social Service Rev.* 327, 327-354.

⁶³ *Ibid.*

⁶⁴ Byrd & Clayton 2001, *supra*, at p. 18.

⁶⁵ Rao, *Administering Entitlement: Governance, Public Health Care, and the Early American State* (2012), 37 *Law & Social Inquiry* 627, 627-628.

⁶⁶ McBride, *supra*, at pp. 4, 11-12.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

The first public mental hospital in the United States was founded in 1773, in Williamsburg, Virginia.⁷² Eventually, a few public mental asylums opened in Maryland, Kentucky, and South Carolina during the antebellum period.⁷³ Initially, Black patients were only admitted to the asylum in Williamsburg, Virginia—the other public mental health institutions did not allow Black patients to be admitted.⁷⁴ There, free Black patients were funded by the state at much lower rates than whites, so patients received less care and services.⁷⁵ Some enslaved people were diagnosed with fictitious mental illnesses, as will be further discussed in Section X of this chapter.⁷⁶ Numerous “diseases” that allegedly affected enslaved people were invented by southern doctors, including “drapetomania,” the “irrational” desire to run away, and “dysesthesia,” a supposed laziness that caused enslaved people to mishandle enslaver property.⁷⁷ Doctors recommended torturing enslaved people as “treatment” for these false diseases.⁷⁸

Generally, antebellum mental asylums were segregated or closed to Black patients.⁷⁹ If admitted, Black patients were housed in poorer accommodations and forced to work at the asylums under harsher conditions than white patients.⁸⁰ They were assigned the dirtiest and most difficult jobs, including meal preparation, and handling the personal hygiene of ill patients.⁸¹ In “Central Lunatic Asylum” in Virginia, enslaved people were forced to labor, frequently on a plantation while being mechanically restrained.⁸² In the North, state and local governments typically denied Black Americans access to mental healthcare in asylums.⁸³ For mentally ill free Black Americans in the North, the poorhouse and the jail were the only social “welfare” institutions open to them in the antebellum era.⁸⁴ Free Black Americans did work as janitors in northern mental hospitals and medical schools, but were not allowed to work as direct caregivers.⁸⁵ Consequently, enslaved people and free Black Americans were deprived of adequate mental healthcare by federal and state governments during the slavery era.

C. Enslaved Women and Children

Enslavers held unrestrained reproductive control over enslaved women using rape and livestock breeding techniques sanctioned by law.⁸⁶ The enslaver, President Thomas Jefferson, wrote in his journal of plantation

⁷² Gonaver, *supra*, at p. 3.

⁷³ *Ibid.*

⁷⁴ *Id.* at pp. 3-7.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Id.* at p. 14.

⁸² *Id.* at p. 10.

⁸³ *Id.* at p. 5.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Roberts 1997, *supra*, at pp. 27-28

management, “I consider a woman who brings a child every two years as more profitable than the best man of the farm. [W]hat she produces is an addition to the capital.”⁸⁷ Jefferson was commenting on the enslaver’s practice of using enslaved women to reproduce, like livestock. Enslavers used a variety of tactics to induce enslaved women to bear children—such as punishing and selling women who did not bear children, committing sexual assault, manipulating the marital choices of enslaved people, and forced breeding.⁸⁸ State laws stated that children born to enslaved mothers and white men were legally considered to be enslaved, leading enslaved women to be vulnerable to sexual violence inflicted by white men.⁸⁹ Furthermore, state laws did not recognize the rape of enslaved women as a crime.⁹⁰

White enslavers were legally allowed to economically profit from raping enslaved women because rape generated a larger workforce of enslaved people—and enslavers could rape freely, without consequence.⁹¹ White women married to enslavers often whipped and tortured enslaved women after they were sexually assaulted by white men.⁹² Enslavers inflicted psychological and physical punishment on enslaved women if they did not bear children.⁹³ Enslavers forced enslaved women to submit to being raped by men and castrated enslaved men who were not fit for “breeding.”⁹⁴

The health of enslaved mothers and their babies was greatly damaged due to the treatment of enslaved women as objects to be raped, bred, or abused.⁹⁵ On average, enslaved women became mothers earlier than white women due to pressure to reproduce.⁹⁶ Enslavers treated enslaved women who did not bear children as “damaged goods”—pawning them off on other enslavers.⁹⁷ Southern courts even established rules for sellers of enslaved women who misrepresented their fertility, which were akin to rules governing the sale of commodities—i.e., imposing some sort of fine or consequence for misrepresenting their “merchandise.”⁹⁸ Mother-child bonding was shattered as white enslavers trafficked children for labor to other plantations or sold them.⁹⁹ Records show that expectant mothers only received work relief after the fifth month of pregnancy and often returned to heavy labor within the first month of the infant’s life.¹⁰⁰ Enslaved mothers were forced to

⁸⁷ Jefferson, [Extract from Thomas Jefferson to John Wayles Eppes Monticello](#) (June 30, 1820), Jefferson Quotes & Family Letters, Thomas Jefferson Foundation (as of Mar. 11, 2022).

⁸⁸ Owens, *Medical Bondage: Race, Gender, and the Origins of American Gynecology* (2017), pp. 43, 74 (Owens 2017); Roberts, *supra*, at pp. 25-31.

⁸⁹ Roberts 1997, *supra*, at pp. 29, 33-34.

⁹⁰ *Id.* at pp. 25-31.

⁹¹ *Ibid.*

⁹² Owens 2017, *supra*, at p. 74; Roberts 1997, *supra*, at p. 33.

⁹³ Roberts 1997, *supra*, at p. 26.

⁹⁴ *Id.* at pp. 27-28.

⁹⁵ *Id.* at p. 23.

⁹⁶ *Id.* at pp. 26-27.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

labor in fields and to breastfeed white children, while neglecting their own.¹⁰¹

Pregnant enslaved women were whipped routinely by white enslavers.¹⁰² Enslavers dug holes in the ground, forced women to lie face down so that their stomachs would fit inside the holes, and whipped their backs.¹⁰³ This was done to punish enslaved women without damaging the fetus, which was legally considered to be the enslaver's future property.¹⁰⁴ Women became pregnant during winter months when labor was reduced, consequently giving birth during the summer—the time of highest labor demand and greatest sickness—leading to high infant mortality rates.¹⁰⁵ Enslaved women had rich cultural knowledge of natural birth control from their indigenous cultures, which they were forced to conceal from enslavers.¹⁰⁶ Black midwives assisted pregnant enslaved women with inducing and hiding abortions.¹⁰⁷

Children born into slavery suffered from mortality rates that were double the free population, consumed contaminated and less nutritious food, and experienced stunted growth and health problems throughout childhood.¹⁰⁸ Two-thirds of infants died within their first month of life—due in part to the hard labor enslaved mothers were forced to do.¹⁰⁹ Children were forced to work by the time they turned seven or eight years old.¹¹⁰

D. Medical Experimentation

Courts neglected to protect the health and safety rights of enslaved people, who were rendered legally invisible under the institution of slavery.¹¹¹ In most hiring contracts concerning enslaved people, references to medical care of enslaved people were omitted.¹¹² In legal disputes concerning enslaved people hired out to others, state courts ruled that the hirers need not provide medical care to the enslaved people.¹¹³ Because enslavers wished to avoid paying medical expenses, enslavers often only called physicians as a last resort, when the enslaved person was nearly dead.¹¹⁴ Physicians actively exploited enslaved people—practicing dangerous experimental procedures on them and using their cadavers for dissection without consent.¹¹⁵

White southern doctors were hired by enslavers and insurance companies to accurately determine the market

¹⁰¹ *Id.* at p. 282.

¹⁰² *Id.* at pp. 39-41.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Id.* at pp. 41-42.

¹⁰⁶ *Id.* at p. 47.

¹⁰⁷ *Ibid.*

¹⁰⁸ Lambert, [Infectious Disease Among Enslaved African Americans at Eaton's Estate, Warren County, North Carolina, ca. 1830-1850](#) (Dec. 2006), 101 *Memorias do Instituto Oswaldo Cruz* 107, 107-109; see generally Steckel, *A Peculiar Population: The Nutrition, Health, and Mortality of American Slaves from Childhood to Maturity* (1986), 46 *J. of Economic History* 721.

¹⁰⁹ Lambert, *supra*, at p. 109.

¹¹⁰ Williams, [How Slavery Affected African American Families](#), National Humanities Center (as of Mar. 11, 2022) (NHC).

¹¹¹ Savitt 2002, *supra*, at pp. 188-90; Savitt 1982, *supra*, at pp. 332, 337.

¹¹² Savitt 2002, *supra*, at pp. 188-90.

¹¹³ Savitt 2002, *supra*, at pp. 188-90.

¹¹⁴ McBride, *supra*, at pp. 5, 10-11.

¹¹⁵ Savitt 1982, *supra*, at pp. 331, 337-339, 345-346.

value of Black bodies.¹¹⁶ Physicians used slavery for economic security and experimented on Black people using dangerous procedures that harmed them, but furthered the physician’s professional advancement.¹¹⁷ Black bodies filled dissecting tables, operating theaters, and experimental facilities.¹¹⁸ An enslaved person named Sam was experimented on by multiple doctors, who had his lower jaw bone removed without anesthesia for medical research.¹¹⁹

James Marion Sims, the “founder of modern gynecology,” and an enslaver, experimented upon enslaved women and performed vaginal surgeries upon them against their will.¹²⁰ Sims used enslaved women’s bodies to perfect surgical instruments and advance his professional status.¹²¹ Sims’ enslaved patients worked as his enslaved nurses and surgical assistants, though they did not receive recognition for doing so.¹²² After being experimented upon by Sims, the enslaved patients were returned to their owners.¹²³ After it was perfected through medical experimentation upon enslaved women, Sims received numerous invitations to perform the vaginal procedure for European royalty.¹²⁴

Enslaved people were used to test experimental caesarean sections and vaccines.¹²⁵ Surgeons often used enslaved people for surgical experiments and experimentation in medication and dosages.¹²⁶ Enslaved people’s bodies were dissected after death to advance medical knowledge and their remains were found at Virginia Commonwealth University in 1994—findings such as these have occurred in numerous medical schools across the country.¹²⁷

E. California

During the period of enslavement, white southerners flocked to California with hundreds of enslaved Black people when the Gold Rush began in 1848, forcing them to toil in gold mines and hiring them to cook, serve, and perform manual labor.¹²⁸ Some enslaved people were forced to work in the gold fields to make money for their enslavers, despite illness—and if they could not do so, would lose their chance at freedom.¹²⁹ Black

¹¹⁶ Owens & Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery* (Oct. 2019) 109 Am. J. of Pub. Health 1342.

¹¹⁷ Savitt 1982, *supra*, at pp. 342-44.

¹¹⁸ Savitt 1982, *supra*, at p. 331.

¹¹⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Carolyn Roberts <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

¹²⁰ Owens 2017, *supra*, at pp. 1-3.

¹²¹ *Id.* at p. 80.

¹²² *Id.* at p. 2.

¹²³ *Id.* at pp. 1-3.

¹²⁴ *Id.* at p. 6.

¹²⁵ *Id.* at pp. 25-26.

¹²⁶ Savitt 1982, *supra*, 341-42.

¹²⁷ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Carolyn Roberts <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

¹²⁸ Anderson, *California, A “Free State” Sanctioned Slavery* (April 2, 2020), Cal. Historical Society (as of Mar. 11, 2022).

¹²⁹ Lapp, *Blacks in Gold Rush California* (1977), pp. 72-73.

newspapers described brawls between enslaved people and white enslavers across California.¹³⁰

In 1851, the U.S. Congress created a U.S. Marine Hospital in San Francisco, which was completed in 1853.¹³¹ Marine hospitals were set up to care for sick and disabled seamen by the U.S. Treasury Department.¹³² The Treasury Department distributed strict guidelines specifying that the “Negro slaves” could not receive treatment at these hospitals.¹³³ Black Americans were relegated to the segregated sections of state hospitals in San Francisco and Sacramento.¹³⁴

In the 1850s, Biddy Mason, moved to California with her enslaver.¹³⁵ She lived for five years in California as an enslaved woman, until she challenged her enslaver for her freedom in court.¹³⁶ She later became a midwife and nurse, running her own midwifery business and saving enough money to purchase land and establish a church.¹³⁷ She donated to many charities, helped feed and shelter the poor, and founded an elementary school for Black children.¹³⁸

IV. Discriminatory Healthcare Systems (1865 to 1870)

The Civil War resulted in large-scale death, destruction, and casualties for formerly enslaved people—30,000 formerly enslaved people died from infectious diseases.¹³⁹ Sick Black soldiers died five times more often than their white counterparts.¹⁴⁰ After the war, Black Americans lived in large, segregated refugee camps called “contraband camps” because there was nowhere else for them to go.¹⁴¹ Hospitals, dispensaries, and military camps were unable to serve the masses of enslaved people, Black soldiers, and other refugees who entered the North due to the Civil War.¹⁴² Escaped and abandoned formerly enslaved people settled near or within the Union Army’s military camps and battle lines.¹⁴³ The camps did not have adequate sanitation, nutrition, or medical care.¹⁴⁴ One out of every four Black Americans who lived in the camps died.¹⁴⁵

Following the Civil War, due to segregation, Black Americans were forced to live in overcrowded, unventilated

¹³⁰ Anderson, *supra*.

¹³¹ University of California San Francisco, [A History of UCSF: 1868-1898 The Origins of the University of California and Affiliated Colleges](#) (as of Mar. 11, 2022).

¹³² Rao, *supra*, at p. 627.

¹³³ *Id.* at p. 648.

¹³⁴ San Joaquin Republican, [Advertisements](#) (Jan. 31, 1861), p. 2 (as of Mar. 11, 2022); Sacramento Daily Union, [State Hospital](#) (June 13, 1851), p. 2 (as of Mar. 11, 2022).

¹³⁵ Nat. Park Service, [Bridget “Biddy” Mason](#) (Feb. 7, 2021) (as of Mar. 8, 2022).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*; see also Am. Civil Liberties Union of Northern Cal., [From Enslaved to Entrepreneur](#) (2019) (as of Mar. 8, 2022).

¹³⁸ Nat. Park Service, *supra*.

¹³⁹ McBride, *supra*, at pp. 35-36.

¹⁴⁰ Foster, *The Limitations of Federal Health Care for Freedmen, 1862-1868* (1982) 48 J. of Southern History, 349, 351.

¹⁴¹ McBride, *supra*, at pp. 18-19.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Foster, *supra*, at pp. 356-57.

¹⁴⁵ *Id.* at p. 356.

tenements and unsanitary shacks.¹⁴⁶ Excessive mortality rates in Black communities were caused by poor living conditions, lack of access to nutritious food, and lack of access to healthcare.¹⁴⁷ Epidemics such as cholera and smallpox broke out often where Black Americans lived.¹⁴⁸

From 1865 to 1868, Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as the “Freedmen’s Bureau,” to provide for the welfare of formerly enslaved Black Americans, including through “issues of provisions, clothing, and fuel, as [necessary] for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children,” according to the statute.¹⁴⁹ The Freedmen’s Bureau included a short-lived attempt to provide medical aid to formerly enslaved people in need.¹⁵⁰ The Bureau was hampered by cities and counties that focused on the health of white people and refused to provide healthcare for formerly enslaved people.¹⁵¹ The Freedmen’s Bureau was poorly equipped to provide mental health services to formerly enslaved people.¹⁵²

The Freedmen’s Bureau dispensaries did provide thousands with annual treatment and prescriptions.¹⁵³ However, many of the white physicians affiliated with the bureau were racist to their Black patients, and sometimes refused to treat them.¹⁵⁴ After two years of operation, with southern legislators claiming the costs were too high, Congress ended the Freedmen’s Bureau medical services—just as demand for services was increasing.¹⁵⁵ When the Bureau’s medical services ended, formerly enslaved people continued to suffer from illness, destitution, and racial discrimination from physicians and were left with little to no access to medical care.¹⁵⁶ The Freedmen’s Bureau failed to provide for the health and welfare of newly-freed Black Americans, despite the promises made by the federal government.¹⁵⁷

V. Segregation and Discrimination in Medical Care (1870 to 1964)

Following the Freedmen’s Bureau’s failed attempts to provide healthcare to Black Americans, the Jim Crow era of racial segregation and discrimination greatly degraded the health of Black communities. White hospitals discriminated against Black doctors and nurses and treated Black patients only in “colored wings.”¹⁵⁸ Black hospitals suffered from underfunding and resource constraints, such as struggles with licensing accreditation,

¹⁴⁶ McBride, *supra*, at p. 22

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ An Act to Establish a Bureau for the Relief of Freedmen and Refugees (Freedmen Bureau Act), Ch. 90, 13 Stat. 507 (Mar. 3, 1865).

¹⁵⁰ Pearson, “*There Are Many Sick, Feeble, and Suffering Freedmen*”: *The Freedmen’s Bureau Healthcare Activities during Reconstruction in North Carolina, 1865-1868* (2002), 79 *North Carolina Rev.* 141, 141-142.

¹⁵¹ *Id.* at p. 142.

¹⁵² *Id.* at pp. 173-75

¹⁵³ McBride, *supra*, at p. 20.

¹⁵⁴ Pearson, *supra*, at pp. 147, 150-151.

¹⁵⁵ *Id.* at pp. 177-181

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ McBride, *supra*, at pp. 51-52.

and developing links with municipal hospitals.¹⁵⁹ In 1946, Congress passed the Hill-Burton Act, which provided federal funding to segregated healthcare facilities—further entrenching discrimination and segregation in the healthcare system.¹⁶⁰ The racial segregation of the Jim Crow era was a vestige of enslavement during which Black Americans suffered dire health consequences.¹⁶¹

A. Black Patients and Medical Professionals

During the Jim Crow era, Black hospitals and segregated units within predominantly white hospitals were the only viable sources for medical services for Black Americans, due to pervasive racial discrimination, poverty, and lack of geographic accessibility.¹⁶² Some white hospitals operated small wards for Black patients, but they were in the worst areas of hospitals—in basements or crowded “colored wings.”¹⁶³ These white hospitals did not hire Black doctors, and white doctors often treated Black patients with disdain.¹⁶⁴

During World War I and after, millions of Black Americans living in southern states migrated to the urban Northeast and Midwest in the Great Migration.¹⁶⁵ During this time, underfunded and under-resourced Black hospitals were not able to provide care for local Black Americans and newly arriving migrants.¹⁶⁶ In northern cities, Black patients who sought treatment in large city hospitals were forced to compete for healthcare resources with poor European immigrants.¹⁶⁷ Private doctors were unaffordable for most Black Americans.¹⁶⁸

From the 1880s to 1964, southern states segregated Black people from white Americans in every aspect of life, including healthcare.¹⁶⁹ The Hill-Burton Act allocated separate funds for Black and white hospitals, resulting in a staggering disparity in hospital beds available for Black patients.¹⁷⁰ Black women often could not afford to have physicians deliver babies in hospitals, and were instead treated by Black midwives in the rural regions of the South.¹⁷¹ White patients refused to be treated next to Black patients and by Black doctors or nurses.¹⁷² Most poor Black Americans could not afford hospital care.¹⁷³ Some Black doctors could have their Black patients admitted to white hospitals—however, the Black doctors themselves were barred from working as physicians at

¹⁵⁹ *Ibid.*

¹⁶⁰ *Id.* at pp. 77-78.

¹⁶¹ See generally *id.* at pp. 21, 64-65; Krieger et al., *Jim Crow and Estrogen-Receptor-Negative Breast Cancer: US-Born Black and White Non-Hispanic Women, 1992-2012* (2017) 28 *Cancer Causes Control* 49.

¹⁶² McBride, *supra*, at p. 49.

¹⁶³ McBride, *supra*, at pp. 51-52.

¹⁶⁴ *Ibid.*

¹⁶⁵ McBride, *supra* at pp. 44-46.

¹⁶⁶ *Ibid.*

¹⁶⁷ McBride, *supra* at p. 51.

¹⁶⁸ *Ibid.*

¹⁶⁹ McBride, *supra*, at p. 21; see generally Georgetown Law Library, [Civil Rights in the United States, A Brief History](#) (as of Mar. 13, 2022); see also Thomas, *Deluxe Jim Crow: Civil Rights and American Health Policy, 1935-1954* (2011), p. 73.

¹⁷⁰ Greenberg, *To Ask for an Equal Chance: African Americans in the Great Depression* (2009) p. 94.

¹⁷¹ McBride, *supra*, at pp. 55-56.

¹⁷² *Id.* at p. 51

¹⁷³ *Ibid.*

those white hospitals.¹⁷⁴

White doctors refused to treat Black patients—like the son of scholar W.E.B. Du Bois, Burghardt, who suffered from diphtheria.¹⁷⁵ Du Bois tried in vain to find a Black physician, but his son died when he was about one and a half years old.¹⁷⁶ Baby Burghardt’s death mirrored the many deaths of enslaved children from the same disease.¹⁷⁷ While white public health leaders and professionals ignored the needs of the Black community, Black physicians and health leaders traveled to churches, schools, and community meetings to give healthcare education presentations.¹⁷⁸

Because Black Americans were denied medical education, they founded their own medical schools. The first Black medical school, Howard University Medical Department, was founded in 1867.¹⁷⁹ It was the first of 14 Black medical schools founded between 1868 and 1900.¹⁸⁰ In 1910, the Carnegie Foundation commissioned a report to evaluate every medical school in the U.S. and Canada.¹⁸¹ In the wake of the report, most Black medical schools closed.¹⁸² By 1915, five of the eight Black medical schools established in the 1880s and 1990s had closed.¹⁸³ By 1923, only two training sites were left for black doctors and other medical professionals—Howard University in Washington, D.C. and Meharry Medical College in Tennessee.¹⁸⁴

At the time, there was intense pressure in the medical field to modernize and redesign medical facilities with higher clinical and operational standards.¹⁸⁵ Black hospitals thus faced greater problems—adhering to these new modernized standards without the funds or institutional support of major industrialists, premier academic institutions, and political leaders, while also caring for growing healthcare needs of Black Americans in the Jim Crow era.¹⁸⁶ Due partly to racism, Black medical schools were not able to link with modernized hospitals to train their students.¹⁸⁷ Without a means of training students, and a lack of teaching and funding resources, Black medical schools were no longer viable institutions for a medical education.¹⁸⁸ From 1900 to 1980, only about

¹⁷⁴ *Ibid.*

¹⁷⁵ Du Bois, *The Souls of Black Folk* (Oxford 2008) p. 219.

¹⁷⁶ *Ibid.*

¹⁷⁷ Kiple & Kiple, *The African Connection: Slavery, Disease and Racism* (1980), 41 *Phylon* 211, 213.

¹⁷⁸ McBride, *supra*, at pp. 38-41

¹⁷⁹ McBride, *supra*, at p. 29.

¹⁸⁰ *Id.* at p. 160.

¹⁸¹ Harley, *The Forgotten History of Defunct Black Medical Schools in the 19th and 20th Centuries and the Impact of the Flexner Report* (2006), 98 *J. of the Nat. Medical Assn.* 1426, 1426.

¹⁸² *Id.* at p. 1428.

¹⁸³ *Id.* at pp. 43-44.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Id.* at p. 49-51.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Id.* at pp. 43-44.

¹⁸⁸ *Ibid.*

two percent of medical professionals were Black.¹⁸⁹ As of 2018, just five percent of physicians were Black.¹⁹⁰ Consequently, Black medical schools shut down, in part, due to systemic racial discrimination and lack of government support—resulting in the underrepresentation of Black Americans in the medical field.

Black professionals experienced constant racial discrimination and exclusion from medical institutions and professional associations during legal segregation.¹⁹¹ Black doctors were not allowed to treat Black patients in some white southern hospitals.¹⁹² Black interns, residents, and registered nursing personnel were excluded from white hospitals in the South.¹⁹³ Black pharmacists were limited to employment in “colored drugstores.”¹⁹⁴ Many Black women who entered the nursing profession were discriminated against and not allowed to enter the nation’s major government and charitable health agencies.¹⁹⁵

Black hospitals were the only viable sources for healthcare for Black Americans because many white hospitals did not admit Black patients or provided discriminatory care.¹⁹⁶ As late as 1945, Chicago only had one hospital operated by Black healthcare providers that served roughly 270,000 Black residents.¹⁹⁷ Philadelphia had two Black hospitals.¹⁹⁸ Southern Black women relied on private physicians and hospitals for maternity care.¹⁹⁹ Even in 1949, when an increasing number of white women were assisted by physicians during birth, most Black women had no physician present for birth.²⁰⁰

Until 1954, when the Veterans Administration announced the end of segregation in agency hospitals, Black veterans received worse treatment than white veterans due to separate and unequal facilities.²⁰¹ White hospitals received public and private funds to establish models of care based on the newest scientific developments, while Black hospitals had to rely on their own small community of patients for funding.²⁰² Black hospitals were forced to open in older, outdated hospital structures that were abandoned by prior white founders.²⁰³

The American Medical Association (AMA) is the most powerful umbrella organization for physician advocacy

¹⁸⁹ Byrd & Clayton, *An American Health Dilemma: A Medical History of African Americans and the Problem of Race* (2000), p. 205 (Byrd & Clayton 2000).

¹⁹⁰ Assn. of Am. Medical Colleges, *Diversity in Medicine: Facts and Figures 2019* (as of Mar. 14, 2022).

¹⁹¹ McBride, *supra*, at pp. 28-29, 51.

¹⁹² *Id.* at pp. 49-51.

¹⁹³ *Ibid.*

¹⁹⁴ *Id.* at p. 31

¹⁹⁵ *Id.* at p. 33.

¹⁹⁶ *Id.* at pp. 49-51.

¹⁹⁷ *Id.* at pp. 68-70.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Id.* at p. 72-73.

²⁰² *Id.* at pp. 49-51.

²⁰³ *Ibid.*

and lobbying in the United States.²⁰⁴ The AMA actively discriminated against Black medical professionals and supported state-sanctioned discrimination.²⁰⁵ From about 1846 to 1888, the AMA did not allow Black doctors to join.²⁰⁶ This policy of tolerating racial exclusion was pivotal in creating a two-tier system of medicine in the United States.²⁰⁷ In response to the AMA’s racial discrimination, in 1895, Black physicians formed their own professional association, the National Medical Association.²⁰⁸

From the 1870s through the late 1960s, the AMA excluded and discriminated against Black physicians, hindering their professional advancement, and creating discriminatory barriers to adequate healthcare for Black patients.²⁰⁹ During this period, the AMA was made up of local physician societies.²¹⁰ Societies that were in segregationist states freely denied Black physicians entry, yet remained part of the national AMA.²¹¹ Consequently, Black physicians were denied membership in state, county, and municipal medical societies throughout the South and in many border states.²¹² Exclusion from these medical societies restricted access to training and limited professional contacts.²¹³ Since membership in a state medical society was required by most southern hospitals, this policy resulted in the denial of admitting privileges, which meant that Black physicians could not admit Black patients to southern hospitals.²¹⁴ This, in turn, created barriers to healthcare for Black Americans and barriers to professional advancement for Black physicians.²¹⁵ Furthermore, the AMA was silent in debates over the Civil Rights Act of 1964 and did not support efforts to amend the “separate but equal” provision of the Hill-Burton Act.²¹⁶

B. The Hill-Burton Act (1946)

In 1946, Congress passed the Hill-Burton Act, which provided federal construction grants and loans to states that needed health care facilities.²¹⁷ However, the Hill-Burton Act allowed “separate but equal” healthcare facilities.²¹⁸ In congressional debates, northern Senators William Langer and Harold Burton called for nondiscrimination in the use of federal funds.²¹⁹ Southern Senators, such as Lister Hill from Alabama, claimed

²⁰⁴ Carr, [Why Doctors are Fighting Their Professional Organization over Medicare for All](#) (Feb. 26, 2020) *The Nation* (as of Mar. 14, 2022).

²⁰⁵ Baker, [The American Medical Association and Race](#) (Jun. 2014) 16 *Am. Medical Assn. J. of Ethics* 479 (as of Mar. 14, 2022).

²⁰⁶ Am. Medical Assn., [African American Physicians and Organized Medicine, 1846-1968](#) (as of Mar. 14, 2022).

²⁰⁷ Baker, *supra*.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*; see also McBride, *supra*, at p. 73.

²¹⁶ Baker, *supra*.

²¹⁷ Editorial, [The Hospital Survey and Construction Act](#) (Sept. 21, 1946), 132 *J. of the Am. Medical Assn.* 148.

²¹⁸ Largent, [Public Health, Racism, and the Lasting Impact of Hospital Segregation](#) (2018), 133 *Pub. Health Reps.* 715, 715 (as of Mar. 14, 2022).

²¹⁹ *Ibid.*

that state legislatures and local hospital authorities had the right to set policy without federal interference.²²⁰ Ultimately, Congress included the “separate but equal” provision in the Hill-Burton Act to appease the southern states.²²¹

Southern states received a significant portion of the federal funds allotted through the Hill-Burton Act.²²² Because Hill-Burton Act funds were disbursed through regional, state, and local offices, states that were highly segregated continued to engage in racial exclusion.²²³ By 1962, 98 hospitals in the South banned Black patients outright, while others only allowed Black patients in segregated areas.²²⁴ The Hill-Burton Act allowed patients to be denied admittance into hospitals on account of race.²²⁵ The Hill-Burton Act thus permitted racial segregation and discrimination in healthcare, a legacy of the racism that existed during slavery and continued through the Jim Crow era.

C. Healthcare in the Jim Crow Era

Due to discrimination and segregation instituted and allowed by federal and state governments during the Jim Crow era, Black Americans suffered from inadequate care.²²⁶ Studies conducted on the Black community in the mid-20th century, revealed high rates of syphilis, tuberculosis, maternal and infant mortality, and disparities in life expectancy—healthcare concerns that continue.²²⁷ Communicable childhood diseases such as whooping cough, measles, meningitis, diphtheria, and scarlet fever were twice as frequent among Black children than white children—reflecting inadequate access to modern medical treatment.²²⁸ The infant death rate for Black children was twice that of white children in the late 1950s.²²⁹ The Black maternal mortality rate was four times greater than the white maternal mortality rate.²³⁰ Compared to white Americans, Black Americans died at earlier ages of heart disease and respiratory cancer.²³¹

A contributing factor to premature death for Black Americans was that the federal government prohibited Black Americans from accessing antipoverty programs.²³² As a result, they could not afford or access quality healthcare.²³³ Government-sanctioned racial segregation and discrimination extended the legacy of slavery,

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ Reynolds, *Hospitals and Civil Rights, 1945-1963: The Case of Simkins v Moses H. Cone Memorial Hospital* (1997) 126 *Annals of Internal Medicine* 898, 898-899; Quadagno, *Promoting Civil Rights through the Welfare State: How Medicare Integrated Southern Hospitals* (2000) 47 *Soc. Problems* 68, 74.

²²⁴ McBride, *supra*, at p. 81.

²²⁵ U.S. Com. on Civil Rights, *Equal Opportunity in Hospitals and Health Facilities* (Mar. 1965), p.6.

²²⁶ McBride, *supra*, at p. 65.

²²⁷ *Id.* at p 64.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Id.* at p. 89.

²³³ *Ibid.*

impacting the healthcare system far into the 20th century and until today.

D. California

In the late 1940s, Fresno lost its only Black doctor, Dr. Henry C. Wallace.²³⁴ At the time, young Earl Meyers, a Black teenager in Fresno, was impressed by Dr. Wallace.²³⁵ “Dr. Wallace inspired him ... He was Earl’s mother’s doctor and he healed her,” Mattie Meyers, Earl Meyers’ former wife, said. “At that time, there weren’t any black doctors here. Dr. Wallace was Earl’s mentor,” she said. Earl Meyers then left Fresno to receive his medical degree at Tennessee’s Meharry Medical College—one of the only Black medical schools left in the United States.²³⁶

Many of the Black residents of Fresno described the difficulty they had in getting medical care from white doctors and asked Dr. Meyers to return to his hometown.²³⁷ Dr. Meyers did return home to Fresno, where he established a medical clinic.²³⁸ He also established a dispensary and made prescriptions available at wholesale cost—often refusing to charge impoverished patients for his services.²³⁹

Hospitals in California that received Hill-Burton Act funds²⁴⁰ discriminated against Black patients and physicians. From 1947 to 1971, Hill-Burton Act funds contributed to 427 projects at 284 facilities in 165 communities in California.²⁴¹ A 1950 survey of Los Angeles hospitals found that 11 of the 17 hospitals racially segregated patients.²⁴² A separate, 1956 study found that only 24.8 percent of Black physicians in Los Angeles served at predominately white hospitals.²⁴³ The legacy of this discrimination carries through today. In 2022, a nonpartisan health organization found that Los Angeles tied Atlanta for the highest number of “least inclusive hospitals.”²⁴⁴ Consequently, California has a history of healthcare discrimination against Black Californians, due to the segregation of hospitals in California and the inadequacy of access to healthcare for Black Californians, which is a legacy of slavery that carries through to today.

VI. Systemic Anti-Black Discrimination in Healthcare (1964 to Present)

The Civil Rights Act brought marked improvements in addressing healthcare discrimination.²⁴⁵ However, the

²³⁴ Eryn Baldrice-Guy, [Physician Earl Meyers Known as Father of Black Medicine in Fresno](#) (Oct. 15, 2014) Merced Sun-Star (as of Mar. 14, 2022).

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ U.S. Dept. of Health, Education and Welfare, Hill-Burton Progress Report (1972), p. 72.

²⁴¹ *Ibid.*

²⁴² Byrd & Clayton 2000, *supra*, at p. 253.

²⁴³ *Id.* at p. 254.

²⁴⁴ Toleos, [Racial Segregation is Common in Urban Hospital Markets, Analysis Reveals](#) (May 25, 2021) Lown Institute (as of Jul. 19, 2021).

²⁴⁵ McBride, *supra*, at p. 98.

United States healthcare system was built upon a foundation of enslavement and segregation, which has never been dismantled. Scholars have stated that the legacy of enslavement and segregation persists in the legal barriers to medical education for Black Americans, the anti-Black discrimination in the healthcare profession, and the transformation of hospitals and healthcare into a high profit industry that has neglected to provide care for Black Americans.²⁴⁶ This legacy of enslavement continues to harm Black Americans today, as some scholars have stated, resulting in continued inequities in medical treatment and health outcomes.²⁴⁷

A. Medical Education

The U.S. Supreme Court's ban on race-based quotas in affirmative-action programs for medical schools led to a dearth of Black doctors.²⁴⁸ In the 1960s, white medical and dental schools began efforts to increase Black enrollment through affirmative action programs to recruit and graduate higher numbers of Black medical students.²⁴⁹ Affirmative action programs increased the number of Black medical school students from 783—or 2.2 percent of all medical students in 1969—to 3,456—or 7.5 percent of all medical students by 1975.²⁵⁰ Of all those who treated Black communities and patient populations, Black physicians provided the most care.²⁵¹

The University of California, Davis opened a medical school with an affirmative action program in 1966.²⁵² However, in 1978, the U.S. Supreme Court ruled that the racial quotas used in this program were unconstitutional in *Regents of the University of California v. Bakke*.²⁵³ This ruling reduced the number of Black students admitted in the nation's medical schools—particularly middle- and lower-ranked schools, where the percentage of Black students admitted dropped to miniscule levels.²⁵⁴ There were fewer Black men in U.S. medical schools in 2014 than in 1978.²⁵⁵ Medical education began to use a “colorblind” model of selecting and training Black professionals based upon the *Bakke* ruling, which has contributed to racial health disparities that exist today.²⁵⁶

Major growth of the medical sector eventually led the bulk of the nation's hospitals to be operated by the government, large corporations, and not-for-profit healthcare businesses.²⁵⁷ Due to the transformation of healthcare from a largely government provided service to a for-profit industry, Black physicians were separated

²⁴⁶ Johns Hopkins Urban Health Institute Blog, [400 Years Later, The Legacy of Slavery on Health Equity](#) (Dec. 23, 2019) (as of Mar. 15, 2022).

²⁴⁷ Jones, *Bakke at 40: Remediating Black Health Disparities Through Affirmative Action in Medical School Admissions* (2019) 66 UCLA L. Rev 522, 533-534.

²⁴⁸ McBride, *supra*, at p. 118.

²⁴⁹ *Id.* at pp. 98-99.

²⁵⁰ *Id.* at pp. 117-120.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Gallegos, [AAMC Report Shows Decline of Black Males in Medicine](#) (Sept. 27, 2016), Assn. of Am. Med. Colleges (as of Mar. 15, 2022).

²⁵⁶ Jones, *supra*, at pp. 522, 557-558.

²⁵⁷ McBride, *supra*, at pp. 118-19.

from Black patient populations.²⁵⁸ Black hospitals were closed and taken over by large corporate entities.²⁵⁹ Black hospitals were not funded by government, corporate, and non-profit economic circles and consequently could not afford to remain open.²⁶⁰ They closed, merged into larger hospital systems, or were renovated into nursing homes by the mid-1980s.²⁶¹ The mainstream medical establishment was vast and spread out geographically.²⁶² Black doctors who used to serve Black patients concentrated in Black geographic areas were consequently also scattered and unable to continue serving Black patient populations in clinics and hospitals.²⁶³

Research has shown that diversity among physicians leads to better outcomes for Black patients.²⁶⁴ Non-Black medical students' explicit racist attitudes are associated with decreased intent to practice with underserved or minority populations.²⁶⁵ One study found that Black patients assigned to a Black doctor increased their demand for preventive care, brought up more medical issues, and were more likely to seek medical advice.²⁶⁶

Racism by white doctors has led to unconscious bias that has resulted in Black Americans receiving inferior medical care as compared to white Americans.²⁶⁷ Higher implicit bias scores among physicians are associated with biased treatment recommendations for the care of Black patients.²⁶⁸ Providers' implicit bias affects their nonverbal behavior, which is associated with poorer quality of patient-provider communication.²⁶⁹ Across virtually every type of diagnostic and treatment intervention, Black Americans receive fewer procedures and poorer-quality medical care than do white Americans.²⁷⁰

B. Discrimination in Healthcare

Barriers to equality in care for Black patients remained after the Civil Rights Act of 1964.²⁷¹ Before the Civil Rights Act, federally-funded hospitals refused to provide care to Black patients.²⁷² Due to insufficient government-funded healthcare services, as well as the disempowerment and neglect of Black patients by healthcare institutions, Black communities suffered major gaps in healthcare delivery in the impoverished

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ Huerto, [Minority Patients Benefit From Having Minority Doctors, But That's a Hard Match to Make](#) (Mar. 31, 2020), Univ. of Mich. Health Lab (as of Mar. 16, 2022).

²⁶⁵ Phelan et al., *The Effects of Racism in Medical Education on Students' Decisions to Practice in Underserved or Minority Communities* (2019) 94 *Academic Medicine* 1178, 1178.

²⁶⁶ See generally Alsan et al., [The Effects of Racism in Medical Education on Students' Decisions to Practice in Underserved or Minority Communities](#) (2019) Nat. Bureau of Economic Research (as of Mar. 16, 2022).

²⁶⁷ Williams et al., [Racism and Health: Evidence and Needed Research](#) (2019) 40 *Annual Rev. of Pub. Health* 105 (as of Mar. 16, 2022); Nelson, *Body and Soul: The Black Panther Party and the Fight against Medical Discrimination* (2011) p. 78.

²⁶⁸ Williams et al., *supra*.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ McBride, *supra*, at p. 88.

²⁷² *Id.* at p. 83.

neighborhoods where they lived.²⁷³ Black residents who lived in urban poverty received medical care from crowded emergency rooms and outpatient services at overburdened public hospitals, or at small practices of private Black physicians.²⁷⁴

In 1960, there was only one Black doctor for every 5,000 Black patients, compared to the national average of one doctor for every 670 Americans.²⁷⁵ Poor Black women could not afford safe abortions through private doctors and could not receive adequate care at the hospitals and clinics in their communities.²⁷⁶ Hospitals in Black neighborhoods were older than public general hospitals.²⁷⁷ They were usually administered by nonprofit bodies and funded by voluntary contributions and paying patients.²⁷⁸ They were insufficiently staffed and were in too poor of a physical condition to provide the medical services needed by the Black communities around them.²⁷⁹

As a result, between 1950 to 1970, life expectancy for Black Americans remained almost a decade shorter than that of white Americans.²⁸⁰ Death rates from pneumonia, influenza, and tuberculosis were two to three times higher for Black Americans than white Americans due to lack of access to hospital care.²⁸¹ Similarly, maternal mortality rates for Black mothers remained four times higher than that of white mothers.²⁸² Black mortality from sexually transmitted infections and tuberculosis remained much higher than that of white Americans.²⁸³ Black Americans also continued to suffer from chronic illness at higher rates than white people.²⁸⁴

In the 1950s and 1960s, the National Association for the Advancement of Colored People brought several lawsuits to force government funded hospitals to hire Black doctors, treat Black patients, and desegregate facilities.²⁸⁵ The federal government filed a brief in support of Black patients in *Simkins v. Moses H. Cone Memorial Hospital*; however, the government did not always strictly enforce the Civil Rights Act against medical segregation, sometimes leaving Black medical professionals to fight case by case in the courts for desegregation.²⁸⁶

C. Health Insurance

²⁷³ *Id.* at p. 92.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Id.* at pp. 103-106.

²⁷⁷ *Id.* at pp. 92-95.

²⁷⁸ *Ibid.*

²⁷⁹ Nelson, *supra*, at pp. 59-60.

²⁸⁰ McBride, *supra*, at p. 88.

²⁸¹ *Id.* at p. 83.

²⁸² *Id.* at pp. 88-89.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ Largent, *supra*, at pp. 715-718.

²⁸⁶ *Id.* at pp. 718-719.

Insurance status predicts the quality of care a patient will receive.²⁸⁷ Health insurance is necessary to pay for healthcare procedures, such as preventive care, screenings, disease management, and prescription drugs.²⁸⁸ In the United States, health insurance is dependent upon employment.²⁸⁹ In 1942, during World War II, rising prices and competing wages led the federal government to put a cap on wages.²⁹⁰ Health insurance was an exception to that wage cap and employer contributions to health insurance premiums were tax-free.²⁹¹ Employers began paying for health insurance to lure employees.²⁹² Eventually, this led employees with higher-paying jobs to receive more benefits from their health coverage than those with lower incomes.²⁹³ Healthcare became a privilege for those with good jobs, rather than a right for all.²⁹⁴ As discussed in Chapter 10, Black Americans have historically not been able to access jobs that provide medical insurance through employers due to barriers to education, employment, and discrimination.²⁹⁵ Due to employment discrimination, private, job-based, health care systems excluded Black Americans.²⁹⁶ Consequently, as of 2018, only 46 percent of Black Americans are covered by employer-sponsored health insurance.²⁹⁷

In the 1960s, President Lyndon B. Johnson's Great Society legislation and the Civil Rights Act and Voting Rights Act contained the seeds for creating a nationwide health care system for all citizens.²⁹⁸ However, the Medicaid and Medicare programs did not eliminate racial inequality in healthcare.²⁹⁹ Medicare and Medicaid are health insurance programs paid for by the federal government.³⁰⁰ Medicare serves people with disabilities and people who are 65 years or older.³⁰¹ Medicaid serves people who are low-income.³⁰²

Before Medicaid and Medicare, southern states were resistant to a nationwide health insurance system for all, due to desegregation brought about by the civil rights legislation.³⁰³ They wanted limited federal involvement

²⁸⁷ Bittker, [Racial and Ethnic Disparities in Employer-Sponsored Health Coverage](#) (Sept. 7, 2020) Am. Bar Assn. (as of Mar. 16, 2022).

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ See Anderson & Bulatao, [Understanding Racial and Ethnic Differences in Health in Late Life: A Research Agenda](#) (2004) Nat. Research Council (as of Mar. 16, 2022).

²⁹⁶ Bittker, *supra*.

²⁹⁷ *Ibid.*

²⁹⁸ McBride, *supra*, at p. 87.

²⁹⁹ *Id.* at p. 91.

³⁰⁰ U.S. Centers for Medicare & Medicaid Services, [History](#) (2021) (as of Mar. 16, 2022) (CMS); U.S. Dept. of Health and Human Services, [What is the Difference between Medicare and Medicaid](#) (as of Mar. 16, 2022) (HHS).

³⁰¹ CMS, *supra*; HHS, *supra*.

³⁰² CMS, *supra*; HHS, *supra*.

³⁰³ Nolen, [How Foundational Moments In Medicaid's History Reinforced Rather Than Eliminated Racial Health Disparities](#) (Sept. 1, 2020) Health Affairs (as of Mar. 16, 2022).

while continuing to run their own health programs for low-income residents.³⁰⁴ Before Medicaid’s enactment, states had control over federal health insurance programs for low-income residents, which disproportionately included Black Americans.³⁰⁵ These programs were underfunded, and states with large populations of Black Americans—Texas, Arkansas, Louisiana, Tennessee, Mississippi, Alabama, Florida, Georgia, South Carolina, and North Carolina, referred to as the “Black Belt” states—refused to participate in federal health insurance programs.³⁰⁶ A state-run Medicaid program would limit federal involvement while allowing states to determine eligibility for health insurance programs on their own.³⁰⁷

The enactment of Medicaid as a program implemented by state government allowed states to disproportionately exclude Black, low-income populations who previously qualified for state-funded healthcare programs.³⁰⁸ Medicaid provided insurance to low-income and unemployed people—about one-fifth of the Black population was considered poor enough to qualify for Medicaid.³⁰⁹ Consequently, in the 1970s, 25 percent of the Black American population was uninsured, while only 12 percent of the general population was uninsured.³¹⁰

However, in the 1990s, the Black Belt states changed their income criteria, lowering the threshold income for Medicaid so much that many poor Black families were not considered poor enough to qualify for Medicaid.³¹¹ Reimbursement policies established by government and health insurance regulators limited hospitals and physicians in the type and number of patients they could treat.³¹² Consequently, private physicians and hospitals preferred not to treat Medicaid recipients, who lacked the funds to access care in a wide range of hospitals.³¹³ Due to this, throughout the 1990s, about 20 percent of the nation’s Black population lacked health insurance, while 17 percent of all Americans lacked health insurance.³¹⁴

The Affordable Care Act, passed in 2010, greatly reduced the number of uninsured people in the United States.³¹⁵ Three million Black people previously uninsured obtained insurance.³¹⁶ However, the U.S. Supreme Court made expansion of Medicaid eligibility under the Affordable Care Act optional to states rather than mandatory.³¹⁷ The expansion of Medicaid eligibility would have increased access to screening and preventive

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ McBride, *supra*, at p. 113; Nolen, *supra*.

³⁰⁹ McBride, *supra*, at p. 91; Nolen, *supra*.

³¹⁰ McBride, *supra*, at p. 91; Cohen et al., [Health Insurance Coverage Trends, 1959–2007: Estimates from the National Health Interview Survey](#) (2009) U.S. Dept of Health and Human Services, p. 5 (as of Apr. 4, 2022).

³¹¹ McBride, *supra*, at p. 113; Nolen, *supra*.

³¹² McBride, *supra*, at pp. 142-143.

³¹³ *Ibid.*

³¹⁴ *Ibid.*; Cohen et al., *supra*, at p. 5.

³¹⁵ McBride, *supra*, at ppx. 152-153.

³¹⁶ *Ibid.*

³¹⁷ Nolen, *supra*.

care, resulted in earlier diagnosis of chronic conditions, and improved mental health.³¹⁸ However, the states that chose not to expand Medicaid were primarily the Black Belt states—Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Texas.³¹⁹ Black Americans are among the most likely to be uninsured compared to other populations, further inhibiting Black Americans from accessing quality healthcare.³²⁰

Medicare does not cover all healthcare services that an individual may need, and often supplemental coverage is needed.³²¹ This coverage is sold by private insurance companies, or may be provided by employer-sponsored retiree benefits.³²² However, due to the low levels of employer-sponsored health coverage for Black Americans and the expense of private insurance, older Black Americans are far more likely than white Americans to rely solely on the Medicare program, or may supplement it with Medicaid.³²³ About a quarter of Black Americans lack supplemental coverage, while only 10 percent of white Americans lack supplemental coverage.³²⁴ The lack of supplemental insurance exposes Black Americans to higher out of pocket costs and delayed medical care.³²⁵ Discrimination in Medicare extends to the quality of medical services. Ten percent of Black Americans receiving Medicare report unwanted delays in getting an appointment and problems finding a new specialist, while only six percent of white Americans report similar problems.³²⁶ Consequently, the discriminatory health insurance system has resulted in worse health for older Black Americans who rely on Medicare.

D. California

To address the lack of healthcare services and medical discrimination experienced by Black Californians, the Black Panther Party attempted to provide free healthcare clinics to administer basic healthcare services.³²⁷ In early 1970, the Black Panther Party published in its newspaper an account of “the disrespectful, unprofessional, and even authoritarian encounters between physicians and their patients at San Francisco General.”³²⁸ Shortly after, the Black Panther Party established a few free, community-based clinics, known as People’s Free Medical Clinics.³²⁹ At the clinics, medical professionals trained health workers to administer basic services.³³⁰

However, local governments retaliated against the Black Panther Party’s clinics. The Oakland Police

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*; see also Kaiser Family Foundation, [Status of State Action on the Medicaid Expansion Decision](#) (Feb. 24, 2022) (as of Mar. 16, 2022).

³²⁰ Nolen, *supra*.

³²¹ U.S. Centers for Medicare and Medicaid Services, [What’s Medicare Supplement Insurance \(Medigap\)?](#) (as of Mar. 16, 2022).

³²² *Ibid.*

³²³ Kaiser Family Foundation, [Medicare and Minority Americans](#), pp. 2-3 (as of Mar. 16, 2022).

³²⁴ *Id.* at p. 2.

³²⁵ *Id.* at p. 3.

³²⁶ Ochieng et al., [Racial and Ethnic Health Inequities and Medicare](#) (Feb. 2021), Kaiser Family Foundation, p. 17 (as of Mar. 1, 2022).

³²⁷ Nelson, *supra*, at pp. 77-78.

³²⁸ *Id.* at pp. 75-76.

³²⁹ *Id.* at pp. 76-77.

³³⁰ *Id.* at p. 79.

Department, on the order of the Federal Bureau of Investigation, hounded the Black Panther Party for soliciting clinic funds without proper permits.³³¹ In 1969, police in Los Angeles raided the local Black Panther Party chapter's headquarters, where the party was planning to open the Bunchy Carter People's Free Medical Clinic.³³² The raid severely damaged the clinic building enough that its forthcoming opening was postponed.³³³

Today, discrimination against Black Californians in healthcare is exacerbated by the fact that there are not enough Black physicians in California to meet the needs of California's Black population. In California, Black physicians are less than three percent of the entire medical profession, despite Black Americans making up six percent of the state's population.³³⁴ The passage of Proposition 209 in 1996 in California, prohibited the consideration of race, ethnicity, or national origin in public education, employment, and contracting.³³⁵ As a result, in California's private medical schools, the proportion of Black students matriculating fell from six percent in 1990 to five percent in 2019.³³⁶

Black physicians in California have alleged that the Medical Board of California disciplines Black doctors more than white doctors.³³⁷ Research shows that Black physicians in California were more likely to receive complaints and have their complaints escalated to investigations than white physicians, but these investigations were not more likely to result in disciplinary action.³³⁸ Black physicians have been historically underrepresented in California's medical field and continue to be underrepresented and discriminated against today.

Black Californians continue to face discrimination in healthcare and disparities in health outcomes.³³⁹ In 1965, in the Watts neighborhood of Los Angeles, an area with a large Black population, only 106 doctors were serving over 250,000 residents—a doctor to patient ratio of one to 2,377.³⁴⁰ The United States today has a doctor to patient ratio of about one doctor per 384 patients.³⁴¹ Today, Black Californians experience racism in their interactions with the healthcare system and many have wanted more access to Black physicians.³⁴² In a study conducted in 2021 where 100 Black Californians were interviewed, some recounted experiences of

³³¹ *Id.* at p. 113.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ Woods et al., *supra*, at p. 87; U.S. Census Bureau, [Race](#) (2020) (as of Nov. 3, 2021).

³³⁵ Pfeffinger et al., [Recovery with Limited Progress: Impact of California Proposition 209 on Racial/Ethnic Diversity of California Medical School Matriculants, 1990 to 2019](#) (Dec. 9, 2020), Healthforce Center at Univ. of Cal. San Francisco (as of Mar. 16, 2022).

³³⁶ *Ibid.*

³³⁷ Rogers et al., [Demographics of Disciplinary Action by the Medical Board of California \(2003-2013\)](#) (2017), Cal. State Library, pp. 2-3 (as of Mar. 1, 2022).

³³⁸ *Id.* at pp. 13-15.

³³⁹ Thomas et al., [Health Disparities by Race and Ethnicity in California: Pattern of Inequity](#) (Oct. 2021), Cal. Health Care Foundation, p. 2 (as of Mar. 16, 2021).

³⁴⁰ McBride, *supra*, at p. 92.

³⁴¹ The World Bank, [Physicians \(per 1,000 people\)](#) (as of Apr. 4, 2022).

³⁴² Cummings, [In Their Own Words: Black Californians on Racism and Health Care](#) (Jan. 2022) Cal. Health Care Foundation, p. 4 (as of Mar. 16, 2022).

delayed or missed diagnoses due to inattentive healthcare providers.³⁴³ One Black man from the Central Valley said, “I couldn’t hold down any food. I couldn’t walk. I couldn’t eat, do anything. So, I went to a clinic and I told them what was wrong. And they prescribed naproxen, which is generic for Midol and Advil. [So] I went to the hospital and had dual kidney infections... I just don’t think they take me seriously...I don’t think they take me as seriously as they would a white man or a white woman.”³⁴⁴

VII. Medical Experimentation

Federal and state governments have allowed doctors and scientists to experiment on the bodies of Black Americans and have at times conducted dangerous medical experiments on Black Americans. In 1932, the U.S. Public Health Service began its study of syphilis, known as the Tuskegee Syphilis Study, which promised free medical care to hundreds of poor Black sharecroppers in Alabama.³⁴⁵ Over the course of 40 years, the government did not treat the subjects, though treatment was available, and sought to ensure that the subjects of the study did not receive treatment from other sources.³⁴⁶ Forty of the wives of the Black sharecroppers and at least 19 children contracted syphilis during the study.³⁴⁷ The government did not prosecute anyone for the deaths and injuries that were caused.³⁴⁸

Black American bodies have been used for major medical advancements and experimentation, without any compensation given to those who were involved, or to their families. For instance, scientists at Johns Hopkins University were treating Henrietta Lacks, a Black woman, for cervical cancer in the 1950s.³⁴⁹ Without compensation to her family or permission from them, her cells were used extensively in scientific research to develop modern vaccines, cancer treatments, in vitro fertilization techniques, among other medical advancements.³⁵⁰ Doctors and scientists repeatedly failed to ask her family for consent as they revealed her name publicly and gave her medical records to the media.³⁵¹ Like so many enslaved people, Lacks’ body was used for medical experimentation and sold as property without her consent and without compensation.

The U.S. Food and Drug Administration approved contraceptives, such as Norplant, which were disproportionately distributed to poor Black women and young girls in schools.³⁵² States offered poor women

³⁴³ *Id.* at p. 15.

³⁴⁴ *Ibid.*

³⁴⁵ Brandt, *Racism and Research: The Case of the Tuskegee Syphilis Study* (1978) 8 *The Hastings Center Report* 21, 22-24.

³⁴⁶ *Id.* at p. 25.

³⁴⁷ McVean, *40 Years of Human Experimentation in America: The Tuskegee Study* (Jan. 25, 2019) McGill University Office for Science and Society (as of Mar. 17, 2022).

³⁴⁸ Equal Justice Initiative, *Tuskegee Syphilis Experiment* (Oct. 31, 2020) (as of Mar. 17, 2022).

³⁴⁹ Johns Hopkins Medicine, *The Legacy of Henrietta Lacks* (as of Mar. 17, 2022).

³⁵⁰ Nat. Institutes of Health, *NIH, Lacks Family Reach Understanding to Share Genomic Data of HeLa Cells* (Aug. 7, 2013) U.S. Dept of Health and Human Services (as of Mar. 17, 2022).

³⁵¹ *Nature*, *Henrietta Lacks: Science Must Right a Historical Wrong* (Sept. 3, 2020), 585 *Nature* 7 (as of Mar. 17, 2022).

³⁵² Glantz et al., *Norplant Use Among Urban Minority Women in the United States* (2000) 61 *Contraception* 83; Jekanowski, *Voluntarily, for the Good of Society: Norplant, Coercive Policy, and Reproductive Justice* (2018) *Berkeley Pub. Policy J.* (as of Mar. 17, 2022); Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood* (1995) 5 *UCLA Women’s Law J.* 401, 401-404, 439-443.

financial incentives for using Norplant—however, due to concerns about complications and effectiveness, Norplant’s distributor eventually discontinued it in 2002.³⁵³ Similarly, in 1973, many Black women had filed lawsuits alleging that they were coerced into sterilization, often under the threat that their welfare benefits would be taken away if they did not submit to the procedure.³⁵⁴ The coercive use of contraception and sterilization by the legal system and welfare system has forced Black women to choose between financial freedom or prison time.³⁵⁵

Black Americans have also been subjected to harmful experiments conducted, facilitated, or allowed by the government. In the 1950s, the Central Intelligence Agency reportedly attempted to test biological weapons by breeding millions of mosquitos and releasing them in Black housing developments in Florida and Georgia.³⁵⁶ Residents living in these areas showed symptoms of dengue fever and yellow fever and some died from these illnesses.³⁵⁷ In Pennsylvania’s Holmesburg Prison, Dr. Albert M. Kligman conducted numerous experiments on mostly Black incarcerated Americans throughout the 1960s.³⁵⁸ Incarcerated individuals filed lawsuits for their injuries due to this abusive experimentation.³⁵⁹ Dr. Kligman was temporarily banned from experimentation by the Food and Drug Administration in 1966, however, clinical research on incarcerated people was not banned by the government until decades later.³⁶⁰ In the 1990s, the New York State Psychiatric Institute and Columbia University conducted experiments on Black boys by giving them doses of the now-banned drug fenfluramine to test a theory that violent or criminal behavior may be predicted by levels of certain brain chemicals.³⁶¹ Consequently, federal and state governments allowed or participated in abusive experimentation on Black children and incarcerated people throughout the nation.

A. California

Home to an extensive eugenics movement, California had the highest number of sterilizations in the United States—one third of all sterilizations nationwide.³⁶² In the 1920s Black people constituted just over one percent of California’s population, but they accounted for four percent of total sterilizations by the State of California.³⁶³ By 1964, the State of California sterilized over 20,000 people—one-third of all sterilizations in

³⁵³ Kaiser Family Foundation, [Contraceptive Implants](#) (Oct. 1, 2019) (as of Mar. 17, 2022); Gold, [Guarding Against Coercion While Ensuring Access: A Delicate Balance](#) (Sept. 2, 2014), 17 *Guttmacher Policy Rev.* 8 (as of Mar. 17, 2022).

³⁵⁴ Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California* (2005) 95 *Am. J. of Pub. Health* 1128, 1134 (Stern 2005).

³⁵⁵ Burrell, *supra*, at pp. 425, 438.

³⁵⁶ Bullard & Wright, *The Wrong Complexion for Protection: How the Government Response to Disaster Endangers African American Communities* (2012), pp. 186-87.

³⁵⁷ *Ibid.*

³⁵⁸ Hornblum, *Acres of Skin: Human Experiments at Holmesburg Prison* (1998), pp. 167, 195.

³⁵⁹ *Id.* at pp. 180-181.

³⁶⁰ *Id.* at pp. 114, 189.

³⁶¹ Hiltz, [Experiments on Children are Reviewed](#) (Apr. 15, 1998) *N.Y. Times* (as of Mar. 17, 2022).

³⁶² Kaelber, *supra*.

³⁶³ Stern 2005, *supra*, at p. 1131.

the U.S. and more than any other state.³⁶⁴ The sterilizations were performed in state institutions, hospitals, and prisons.³⁶⁵

Dr. Leo Stanley, a eugenicist, performed forced sterilizations at San Quentin State Prison and was responsible for further segregation of the prison medical facilities.³⁶⁶ He also used the testicular glands of an executed Black man for his experiments, without obtaining the consent of the man's family because his body was not "claimed."³⁶⁷ In 2018, the California Department of Corrections and Rehabilitation glowingly described Dr. Stanley as a doctor who "push[ed] prison medicine into [the] 20th century."³⁶⁸

Between 2006 and 2010, almost 150 people imprisoned in California's women's prisons were sterilized without proper authorization while giving birth.³⁶⁹ Many of the women subjected to forced sterilization were Black and Latina.³⁷⁰ Kelli Dillon was forcibly sterilized while incarcerated at the Central California women's facility in Chowchilla when she was told she needed a surgery to treat an ovarian cyst.³⁷¹ She was not aware of the sterilization until she requested her medical records with the help of a lawyer.³⁷² Dillon said, "It was like my life wasn't worth anything," she said. "Somebody felt I had nothing to contribute to the point where they had to find this sneaky and diabolical way to take my ability to have children."³⁷³ After her release from prison, Dillon founded Back to Basics, an organization fighting for justice for survivors of forced sterilizations in California.³⁷⁴ In 2021, California became the third state to offer reparations payments, setting aside \$7.5 million for victims of forced sterilization.³⁷⁵

In the State of California, Elmer Allen was illegally injected with plutonium at the University of California, San Francisco medical hospital in San Francisco—he was likely never informed of the consequences of this.³⁷⁶ The university later acknowledged that the injection was not of therapeutic benefit to him, which was a requirement for medical experiments on people.³⁷⁷ The federal government created a committee to investigate the

³⁶⁴ Kaelber, *supra*.

³⁶⁵ *Ibid*.

³⁶⁶ Blue, [The Strange Career of Leo Stanley: Remaking Manhood and Medicine at San Quentin State Penitentiary 1913-1951](#) (2009) 78 Pac. Historical Rev. 210, 216, 220-221, 232, 235.

³⁶⁷ *Id.* at p. 232.

³⁶⁸ Chaddock, [Early San Quentin Doctor Pushes Prison Medicine into 20th Century](#) (Nov. 18, 2018) Cal. Dept. of Corrections and Rehabilitation (as of Mar. 17, 2022).

³⁶⁹ Johnson, [Female Inmates Sterilized in California Prisons Without Approval](#) (July 7, 2013) Reveal (as of Mar. 17, 2022).

³⁷⁰ McCormick, [Survivors of California's Forced Sterilizations: 'It's Like My Life wasn't Worth Anything'](#) (July 19, 2021) The Guardian (as of Mar. 17, 2022).

³⁷¹ Jindia, [Belly of the Beast: California's Dark History of Forced Sterilizations](#) (June 30, 2020) The Guardian (as of Mar. 17, 2022).

³⁷² McCormick, *supra*.

³⁷³ *Ibid*.

³⁷⁴ Jindia, *supra*.

³⁷⁵ Foster, [California to Pay Reparations to Victims of Forced Sterilization](#) (July 8, 2021) U.S. News & World Report (as of Mar. 17, 2022).

³⁷⁶ Advisory Com. on Human Radiation Experiments, [Chapter 5: Human Experimentation Continues](#) (1994) U.S. Dept of Energy (as of Mar. 17, 2022).

³⁷⁷ *Ibid*.

government-sponsored radiation experiments, after which President Clinton issued an apology.³⁷⁸

VIII. Emerging Science, Medical Therapies, and Technology

The history of medical experimentation and discrimination, combined with the fact that Black Americans have been excluded from modern clinical trials and research—has resulted in continuing health disparities that harm Black Americans.³⁷⁹ Prior to modern research, there has been a long history of Black bodies being stolen for dissection and anatomical investigation without informed consent.³⁸⁰ The Freedman’s Cemetery in Dallas, excavated in the 1990s, contained the remains of Black Americans, which were illegally used for dissection or stolen.³⁸¹ Today, Black Americans are less likely to be in clinical trials for the development of medication, vaccines, or other treatment, which can exacerbate health disparities.³⁸² For example, although sickle cell disease primarily affects Black Americans, there is a great disparity in research funding and attention paid to this genetic condition.³⁸³

Algorithms are widely used in U.S. hospitals to refer people to health programs that improve a patient’s care—however, at least one widely-used algorithm was found to systematically discriminate against Black patients.³⁸⁴ This algorithm led to Black patients receiving less referrals for programs that provided personalized care—despite being just as sick as white patients.³⁸⁵

Black Americans are less likely to be treated for skin diseases due to the lack of medical research and training for diagnosing skin conditions for those with darker skin.³⁸⁶ Most medical textbooks and journals that assist dermatologists in diagnosing skin disorders do not include images of skin conditions as they appear on Black Americans.³⁸⁷ Images of darker skin with skin conditions caused by COVID-19, skin cancer, psoriasis, rosacea, and melanoma often do not appear in medical textbooks and journals.³⁸⁸ Doctors routinely miss these diagnoses for Black patients because they are not trained to identify or treat skin conditions for Black patients.³⁸⁹ Consequently, discriminatory medical research and technology has resulted in worsening health disparities that

³⁷⁸ Lee, [Clinton Apologizes for U.S. Radiation Tests, Praises Panel Report](#) (Oct. 4, 1995) Wash. Post (as of Mar. 17, 2022).

³⁷⁹ See generally Scharff, et al., *More than Tuskegee: Understanding Mistrust About Research Participation* (2010) 21 J. of Health Care for the Poor and Underserved 879.

³⁸⁰ Meier, [Grave Robbing, Black Cemeteries, and the American Medical School](#) (Aug. 24, 2018) JSTOR Daily (as of Mar. 17, 2022).

³⁸¹ Davidson, “Resurrection Men” in Dallas: *The Illegal Use of Black Bodies as Medical Cadavers (1900–1907)* (2007) 11 Internat. J. of Historical Archaeology 193, 193.

³⁸² Scharff, *supra*, at p. 879.

³⁸³ Power-Hays & McGann, [When Actions Speak Louder Than Words — Racism and Sickle Cell Disease](#) (2020) 383 New England J. of Medicine 1902 (as of Mar. 17, 2022).

³⁸⁴ Ledford, [Millions of Black People Affected by Racial Bias in Health-Care Algorithms](#) (2019) 574 Nature 608 (as of Mar. 17, 2022).

³⁸⁵ Obermeyer et al., [Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations](#) (2019) 366 Science 447 (as of Mar. 17, 2022).

³⁸⁶ Rabin, [Dermatology Has a Problem with Skin Color](#) (Aug. 30, 2020) N.Y. Times (as of Mar. 17, 2022).

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

harm Black Americans.

IX. Mental Health

Steve Biko, the South African anti-apartheid activist observed that “the most potent weapon in the hands of the oppressor is the mind of the oppressed.”³⁹⁰ Historically, the dehumanization of Black Americans has grown into structural, institutional, and individual racism today.³⁹¹ Poor mental health among Black youth and adults must be understood in the context of historical race-based exclusion from access to resources.³⁹² The harsh impact of multigenerational racism on Black mental health and inherent racism within the discipline of psychology has contributed to disastrous mental health consequences for Black Americans.

A. History of Racism in Mental Health

The federal government and state governments, including the State of California, have historically discriminated against Black Americans in the provision of mental healthcare. Established in 1773, the Public Hospital for Persons of Insane and Disordered Minds in Williamsburg, Virginia, was the first public psychiatric hospital in the United States.³⁹³ However, the asylum prioritized white people over enslaved people for admission.³⁹⁴ The asylum used enslaved labor to operate and accepted enslaved people as payment for care and treatment of white people.³⁹⁵

Psychiatric hospitals in the first half of the 19th century were some of the United States’ first officially segregated institutions.³⁹⁶ One of the American Psychiatric Association’s founding members refused to admit Black patients to his mental hospital.³⁹⁷ He influenced the design of the Government Hospital for the Insane in Washington, D.C., which housed Black patients in a separate building—far away from the better facilities for the white patients.³⁹⁸ Before 1861, Black patients were rarely admitted into southern asylums because they supposedly did not suffer from severe mental illness.³⁹⁹ The racist notion that only white people suffered from mental illness was written into the law in Virginia.⁴⁰⁰ Black patients experienced outright denial of services, and when they were admitted, they were housed in worse circumstances than white patients.⁴⁰¹

In the 1960s and 1970s, federally-funded community health centers provided little treatment for Black patients. Black Americans were left with a mental health system that proved ineffective at addressing the root causes of

³⁹⁰ Biko, *I Write What I Like* (1978), p. 68.

³⁹¹ Mental Health America, [Black and African American Communities and Mental Health](#) (2022) (as of Mar. 18, 2022).

³⁹² *Ibid.*

³⁹³ Gonaver, *supra*, at p. 3.

³⁹⁴ Geller, [Structural Racism in American Psychiatry and APA: Part 1](#) (June 23, 2020) *Psychiatric News* (as of Mar. 18, 2022).

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ Schiele, *Social Welfare Policy: Regulation and Resistance Among People of Color* (2011), p. 66.

⁴⁰¹ Geller, *supra*.

mental illness—such as racism and poverty.⁴⁰² In 1970, Black Americans were 52 percent more of the population in mental health institutions than white Americans.⁴⁰³ However, there were nine times more Black Americans than white Americans in correctional settings.⁴⁰⁴

White mental health staff at federally-funded clinics and hospitals often diagnosed Black patients as schizophrenic, when they should have been diagnosed with depression.⁴⁰⁵ In the 1970s, due to systemic racism, psychiatrists were taught that clinical depression was nonexistent among Black Americans.⁴⁰⁶ Black military personnel under conditions of intense racial discrimination received higher rates of severe mental illness diagnoses, such as paranoid schizophrenia.⁴⁰⁷ Studies of the diagnoses of Black patients at Veterans Affairs facilities have also shown that misdiagnosis has remained a problem for Black communities due to clinicians' prejudice and misinterpretation of Black patients' behaviors.⁴⁰⁸

B. The American Psychological Association and the Discipline of Psychology

The American Psychological Association (APA), in conjunction with federal and state governments, played a significant role in the ongoing oppression of Black Americans.⁴⁰⁹ In 2020, the APA issued an apology for its role in promoting, perpetuating, and failing to challenge racism in the U.S.⁴¹⁰ The APA helped establish racist scientific theories, opposition to inter-racial marriage, and support of segregation and forced sterilization.⁴¹¹ The APA also promoted the idea that racial difference is biologically-based, created discriminatory psychological tests, and failed to take action to end racist testing practices.⁴¹² For centuries, the APA has failed to represent the approaches, practices, voices, and concerns of Black Americans within the field of psychology and within society.⁴¹³

Throughout American history, the field of psychology has also influenced federal and state eugenics policies.⁴¹⁴ In 1895, an article published in an APA journal argued that white people had a superior, more evolved intelligence.⁴¹⁵ In 1913, a study reported the inferiority of school performance among Black children in

⁴⁰² Neighbors, *Improving the Mental Health of Black Americans: Lessons from the Community Mental Health Movement* (1987) 65 The Milbank Quarterly 348, 349-350.

⁴⁰³ Cannon et al., *Being Black Is Detrimental to One's Mental Health: Myth or Reality?* (1977) 38 *Phylon* 408, 410.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Id.* at pp. 423-425.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ McBride, *supra*, at p. 65.

⁴⁰⁸ Baker et al., [Issues in the Psychiatric Treatment of African Americans](#) (Mar. 1, 1999) Psychiatry Online (as of Mar. 18, 2022).

⁴⁰⁹ Am. Psychological Assn., [Apology to People of Color for APA's Role in Promoting, Perpetuating, and Failing to Challenge Racism, Racial Discrimination, and Human Hierarchy in U.S.](#) (Oct. 29, 2021) (as of Mar. 18, 2022).

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ Am. Psychological Assn., [Historical Chronology: Examining Psychology's Contributions to the Belief in Racial Hierarchy and Perpetuation of Inequality for People of Color in U.S.](#) (2022) (as of Mar. 18, 2022) (APA Chronology).

⁴¹⁵ *Ibid.*

integrated schools in New York.⁴¹⁶ Racial difference was used to argue against improved schooling opportunities for Black children.⁴¹⁷ One psychologist, Raymond Cattell, argued that race-mixing was dangerous and would lead to a society of “lower intelligence” through the early 1990s.⁴¹⁸

In 1917, the federal government conducted psychological tests on nearly two million soldiers.⁴¹⁹ Due to culturally-biased questions, the study labeled 89 percent of Black recruits as “morons.”⁴²⁰ Throughout the 1930s, Black psychologists conducted studies countering the racist findings of white psychologists.⁴²¹ Their studies suggested that environment plays a central role in shaping intelligence scores and outlined the impact white examiners have on the test scores of Black test takers.⁴²² However, these studies were often dismissed.⁴²³ The APA continued to support the use of testing to validate theories about innate racial hierarchy.⁴²⁴

From the 1950s on, psychologists received funding from white supremacist organizations to support segregation and other racist projects.⁴²⁵ In 1952, former APA president, Henry E. Garrett, testified in support of segregation in *Davis v. County School Board*, one of five federal court cases combined into *Brown v. Board of Education*.⁴²⁶ He testified that segregation would not harm Black students, and the three-judge panel that ruled in favor of segregation agreed.⁴²⁷ Garrett also testified before Congress in opposition to the passage of the Civil Rights Act of 1968.⁴²⁸ He argued that Black Americans could not reach the intelligence levels of white Americans.⁴²⁹ Garrett promoted the idea of an innate racial hierarchy and worked with racial extremist and neo-Nazi groups.⁴³⁰

In 1968, 75 Black psychologists left the APA in protest and formed the Association of Black Psychologists.⁴³¹ However, published articles in top psychological journals continued to be overtly racist and neglect issues and topics beneficial to Black Americans. Between 1970 and 1989, just 3.6 percent of published articles focused on Black Americans.⁴³² Most of the work is focused on standardized testing and none on healthy personality development and the competent intellectual functioning of Black Americans.⁴³³ As late as 1985, white

⁴¹⁶ *Ibid.*
⁴¹⁷ *Ibid.*
⁴¹⁸ *Ibid.*
⁴¹⁹ *Ibid.*
⁴²⁰ *Ibid.*
⁴²¹ *Ibid.*
⁴²² *Ibid.*
⁴²³ *Ibid.*
⁴²⁴ *Ibid.*
⁴²⁵ *Ibid.*
⁴²⁶ *Ibid.*
⁴²⁷ *Ibid.*
⁴²⁸ *Ibid.*
⁴²⁹ *Ibid.*
⁴³⁰ *Ibid.*
⁴³¹ *Ibid.*
⁴³² *Ibid.*
⁴³³ *Ibid.*

psychologists published articles arguing that Black Americans evolved to have lower intelligence, have more children, care for them poorly, and commit more crime.⁴³⁴ The legacy of the discriminatory practices of the APA and the discipline of psychology is evident in the underrepresentation of Black Americans in the psychology workforce, as will be discussed in the next subsection.

C. Racism in Mental Health Today

Structural racism continues to be embedded in the mental health system. Studies document continued and consistent patterns of misdiagnosis, mistreatment, and disparities in quality of and access to mental healthcare for Black Americans.⁴³⁵ Black patients are more likely to receive higher doses of antipsychotics despite evidence that they have more adverse side effects.⁴³⁶

There is a dearth of Black psychologists and culturally appropriate treatment for Black Americans.⁴³⁷ As of 2014, only four percent of the psychology workforce in the United States is Black.⁴³⁸ White psychology curriculums dominate higher education—and seven percent of psychology doctoral students are Black, though 14 percent of Americans are Black.⁴³⁹

Black clients' experiences of microaggressions from white therapists have negatively impacted their satisfaction with both counselors and counseling in general.⁴⁴⁰ Many Black Americans feel worse after their counseling experiences.⁴⁴¹ Racial bias and stereotypes by clinicians have led to misdiagnoses of Black Americans in some cases.⁴⁴² This leads to further disparities in quality of mental healthcare for Black patients due to the implicit biases of mental health providers.⁴⁴³

Black Americans face barriers to accessing mental healthcare today.⁴⁴⁴ These barriers include stigma from mental health professionals, unavailability of treatment, overdiagnosis and misdiagnosis, being unable to afford

⁴³⁴ *Ibid.*

⁴³⁵ Woods et al., *supra*, at pp. 28-30.

⁴³⁶ *Id.* at p. 88.

⁴³⁷ Johnson, [Underrepresented: The Undeniable Link Between Race and Diagnosis, Treatment, and Wellness](#) (Feb. 24, 2022), Psycom (as of Mar. 18, 2022).

⁴³⁸ *Ibid.*

⁴³⁹ Page et al., [Understanding the Diversity of Students and Faculty in Health Service Psychology Doctoral Programs](#) (2017) Behavioral Health Workforce Research Center, p. 6 (as of Mar. 18, 2022); Tamir, [Facts About the U.S. Black Population](#) (Mar. 25, 2021) Pew Research Center (as of Mar. 19, 2022).

⁴⁴⁰ Constantine, *Racial Microaggressions against African American Clients in Cross-Racial Counseling Relationships* (2007) 54 *J. of Counseling Psychology* 1.

⁴⁴¹ *Ibid.*

⁴⁴² Neighbors et al., *Racial Differences in DSM Diagnosis Using a Semi-Structured Instrument: The Importance of Clinical Judgment in the Diagnosis of African Americans* (2003) 44 *J. of Health and Social Behavior* 237; Whaley, *Ethnicity/Race, Paranoia, and Hospitalization for Mental Health Problems Among Men* (2004) 94 *Am. J. Public Health* 78.

⁴⁴³ See generally Hall et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review* (2015) 105 *Am J Public Health* 60.

⁴⁴⁴ Dept. of Nursing, [Understanding Barriers to Minority Mental Health Care](#) (May 10, 2018) Univ. of Southern Cal. (as of Mar. 19, 2022).

the cost of healthcare, lacking insurance, and being unable to access transportation.⁴⁴⁵ Due to these barriers, Black men who are depressed underutilize mental health treatment and have depression that is more persistent, disabling, and resistant to treatment than white men.⁴⁴⁶ This extends to youth. Mental health problems among Black youth often result in school punishment or incarceration, rather than mental healthcare.⁴⁴⁷ Overall, Black Americans are less likely to receive care than white Americans for mood and anxiety disorders, which may contribute to chronic mental health issues.⁴⁴⁸ Consequently, Black Americans face institutional and individual racism in the mental health system, which is the legacy of historical anti-Black discrimination, and is especially harmful to Black mental health today.

D. Impact of Anti-Black Racism on Black Mental Health

For centuries, nearly every institution of the Western world has—explicitly and implicitly—reinforced the message that Black Americans are to be devalued.⁴⁴⁹ Within this context, it is inevitable that Black American mental health and well-being has suffered.⁴⁵⁰ The psychic effects of this anti-Black narrative include cultural trauma, cultural imperialism, and internalized racism.⁴⁵¹ Cultural trauma is “a dramatic loss of identity and meaning, a tear in the social fabric affecting a group of people that has achieved some degree of cohesion[.]”⁴⁵² Cultural imperialism is when the culture of one society is forced onto another society or group of people.⁴⁵³ Internalized racism is “the process of accepting the racial stereotypes of the oppressor.”⁴⁵⁴

Anti-Black racism leads to racial stress, which causes adverse psychological effects.⁴⁵⁵ This can profoundly

⁴⁴⁵ *Ibid.*; see also Hankerson et al., *Treatment Disparities among African American Men with Depression: Implications for Clinical Practice* (2015) 26 *J. of Health Care for Poor and Underserved* 21.

⁴⁴⁶ Hankerson, *supra*.

⁴⁴⁷ Marrast et al., *Racial and Ethnic Disparities in Mental Health Care for Children and Young Adults: A National Study* (2016) 46 *Internat. J. of Health Services* 810.

⁴⁴⁸ LeCook et al., *Comparing Methods of Racial and Ethnic Disparities Measurement across Different Settings of Mental Health Care* (2010) 45 *Health Services Research* 825, 826.

⁴⁴⁹ See generally Grills, et al., *Breathe, Baby, Breathe: Clearing the Way for the Emotional Emancipation of Black People* (2016) 16 *Cultural Studies ↔ Critical Methodologies* 333 (Grills 2016).

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

⁴⁵² *Id.* at p. 336.

⁴⁵³ *Id.* at p. 339.

⁴⁵⁴ *Id.* at p. 337.

⁴⁵⁵ Sellers et al., *Racial Identity Matters: The Relationship between Racial Discrimination and Psychological Functioning in African American Adolescents* (2006) 16 *J. of Research on Adolescence* 187; Fisher et al., *Discrimination Distress During Adolescence* (2000) 29 *J. of Youth and Adolescence* 679.

affect Black children by undermining their emotional and physical well-being and their academic success.⁴⁵⁶ Black American women identify racial discrimination as a persistent stressor occurring throughout their lives.⁴⁵⁷ These experiences having long-lasting effects on their identities and on how they perceive encounters with others, particularly white Americans.⁴⁵⁸ Many Black women describe ruminating on past experiences, developing defense mechanisms in anticipation of future threats, and feeling the need to overcompensate for negative stereotypes.⁴⁵⁹ They may work harder to prove themselves, suppress emotions, and code switch.⁴⁶⁰ Black American women may feel an obligation to present an image of strength, suppress emotions, resist being vulnerable or dependent on others, determined to succeed despite limited resources, and feel an obligation to help others.⁴⁶¹ This may lead to chronic psychological distress, which is associated with physiological processes, such as chronic inflammation, abdominal obesity, and heart disease.⁴⁶²

The overwhelming amount of racial stress caused by racism can result in trauma.⁴⁶³ Racial trauma, a form of race-based stress, is defined by psychologists as persistent psychological injury caused by racism.⁴⁶⁴ This trauma may produce mental illnesses or psychological wounds tied to historical traumatic experiences, like slavery.⁴⁶⁵ Studies have shown that racial and ethnic discrimination may play an important role in the development of Post-Traumatic Stress Disorder (PTSD) for Black people.⁴⁶⁶ Racial trauma can cause symptoms similar to PTSD, including hypervigilance, flashbacks, nightmares, avoidance, suspiciousness, and physical symptoms such as headaches, heart palpitations, and other such symptoms.⁴⁶⁷ Studies have also shown that public racial discrimination against Black Americans is linked to an increase in depressive symptoms.⁴⁶⁸

Historical trauma is the legacy of numerous traumatic events inflicted on a group of people and experienced

⁴⁵⁶ Chavous et al., *Gender Matters, Too: The Influences of School Racial Discrimination and Racial Identity on Academic Engagement Outcomes among African American Adolescents* (2008) 44 *Developmental Psychology* 637; Neblett et al., *African American Adolescents' Discrimination Experiences and Academic Achievement: Racial Socialization as a Cultural Compensatory and Protective Factor* (2006) 32 *J. of Black Psychology* 199; Smalls et al., *Racial Ideological Beliefs and Racial Discrimination Experiences as Predictors of Academic Engagement Among African American Adolescents* (2007) 33 *J. of Black Psychology* 299; Wong et al., *The Influence of Ethnic Discrimination and Ethnic Identification on African American Adolescents' School and Socioemotional Adjustment* (2004) 71 *J. of Personality* 1197.

⁴⁵⁷ Allen et al., *Racial Discrimination, The Superwoman Schema, and Allostatic Load: Exploring an Integrative Stress-Coping Model Among African American Women* (2019) 1457 *Annals of the N.Y. Academy of Sciences* 104.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ Comas-Díaz et al., *Racial Trauma: Theory, Research, and Healing: Introduction to the Special Issue* (2019) 74 *Am. Psychologist* 1.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Sibrava et al., *Posttraumatic Stress Disorder in African American and Latinx Adults: Clinical Course and the Role of Racial and Ethnic Discrimination* (2019) 74 *Am. Psychologist* 101.

⁴⁶⁷ Comas-Díaz, *supra*.

⁴⁶⁸ Seaton & Iida, *Racial Discrimination and Racial Identity: Daily Moderation Among Black Youth* (2019) 74 *Am. Psychologist* 117.

over generations.⁴⁶⁹ The health consequences of historical racism and discrimination can be passed down psychologically, socially, and emotionally from one generation to the next resulting in intergenerational harm to Black mental health due to racism.⁴⁷⁰ Long-term adverse health impacts linked to Jim Crow laws illustrate the long reach of institutional racism.⁴⁷¹ Historical trauma studies show that children of Black parents who have been affected by trauma, also exhibit symptoms of PTSD, or “historical trauma response.”⁴⁷²

Traumatization can occur at a community level as well. Highly publicized police killings of unarmed Black Americans affect the mental health of Black Americans in the region where the killing occurs.⁴⁷³ In one study, the impact was felt for months afterwards, whereas no negative effects were found for white Americans in those same localities.⁴⁷⁴ A 2013-2016 study on the mental impacts of killings of Black Americans in certain states found that Black Americans had more poor mental health days, whereas white people were not affected in the same way.⁴⁷⁵

E. California

Psychological institutions have contributed to overincarceration, forced sterilization, and denial of educational opportunities for Black Californians. In 1915, psychologists leading the California Bureau of Juvenile Research at Whittier State School oversaw some of the earliest eugenics projects, examining family trees and conducting psychological testing of boys confined at the institution.⁴⁷⁶ The results of this project harmed Black youth in California by increasing incarceration rates and promoting sterilization.⁴⁷⁷ Psychological tests were used by the state’s public education system to block educational and economic opportunities for Black youth in California.⁴⁷⁸ In 1979, the Federal District Court of Northern California ruled in favor of five Black students who had been placed in special education classes due to their performance on psychological tests.⁴⁷⁹

The mental health system in California has discriminated against Black Californians through inaccurate diagnoses, use of involuntary force, high cost, and a lack of culturally-competent services.⁴⁸⁰ In comparison to other racial and ethnic groups, it takes longer for Black Californians to be removed from inpatient mental health

⁴⁶⁹ Grills 2016, *supra*, at p. 336.

⁴⁷⁰ Goosby & Heidbrink, *supra*.

⁴⁷¹ Krieger et al., *Jim Crow and Premature Mortality Among the US Black and White Population, 1960–2009: An Age–Period–Cohort Analysis* (2014) 25 *Epidemiology* 494.

⁴⁷² Sotero, *A Conceptual Model of Historical Trauma: Implications for Public Health Practice and Research* *Historical Trauma* (2006) 1 *J. of Health Disparities, Research, and Practice* 93, 96.

⁴⁷³ Bor et al., *Police Killings and their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study* (2018) 392 *The Lancet* 302.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (January 28, 2022), Testimony of Kristee Haggins <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁴⁷⁶ APA Chronology, *supra*.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Woods et al., *supra*, at p. 6.

care settings to a less restrictive level of care.⁴⁸¹ Despite higher rates of inpatient treatment, over 50 percent of Black Californians must wait more than eight days to step down from an inpatient setting to a lower level of care.⁴⁸² It takes twice as long for Black Californians than it does for most other racial or ethnic groups, despite no evidence of less need.⁴⁸³ These racial disparities also exist in California's small counties, despite fewer numbers of people from nonwhite communities.⁴⁸⁴

Many Black Californians suffer from high rates of serious psychological distress, depression, suicidal ideation, dual diagnoses, and other mental health issues.⁴⁸⁵ Unmet mental health needs are higher among Black Californians, as compared with white Californians.⁴⁸⁶ This includes being unable to access mental healthcare and substance abuse services.⁴⁸⁷ Across racial groups, the highest percentage of serious psychological distress and attempted suicide was found among Black Californians.⁴⁸⁸ Black Californians had the highest percentage of missed days of days of work and daily activities due to mental health concerns.⁴⁸⁹ Black people are over-represented in vulnerable groups at risk for mental illness, such as unhoused people; current and formerly incarcerated people; children in foster care; and veterans.⁴⁹⁰ These groups have an increased risk for developing Post-Traumatic Stress Disorder.⁴⁹¹

California budget cuts in funding for indigent care have disproportionately affected Black communities, who are more likely to be indigent and in need of mental health services.⁴⁹² The lack of recruitment and retention of Black psychiatrists in Los Angeles has negatively affected Black Californians, who are more likely to seek services from someone with the same racial background.⁴⁹³ Black mentally ill incarcerated Californians are overrepresented in Los Angeles County jails.⁴⁹⁴ Records indicate that they receive more mental health services while incarcerated than while they are out in the community, which is illustrative of how poor community mental health services are for Black Californians.⁴⁹⁵

Black Californians represent only 11 percent of Alameda County's population, but make up 47 percent of the county's unhoused population, 48 percent of the jail system's population, and 53 percent of people who cycle in

⁴⁸¹ Valle, [Existing Disparities in California's System of Specialty Mental Health Care](#) (May 24, 2019) Cal. Pan-Ethnic Health Network (as of Mar. 19, 2022).

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Woods et al., *supra*, at p. 6.

⁴⁸⁶ Eberhart, [Monitoring Californians' Mental Health: Population Surveillance Reveals Gender, Racial/Ethnic, Age, and Regional Disparities](#) (2018) Rand Corporation, at pp. 3-8 (as of Mar. 19, 2022).

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Woods et al., *supra*, at p. 18.

⁴⁹¹ *Ibid.*

⁴⁹² *Id.* at p. 49.

⁴⁹³ *Id.* at pp. 49-50.

⁴⁹⁴ *Id.* at pp. 50-51.

⁴⁹⁵ *Ibid.*

and out of both the criminal and hospital systems.⁴⁹⁶ The State of California has repeatedly awarded state and county contracts to agencies that continually fail to meet a minimum level of culturally relevant care for Black Americans.⁴⁹⁷

X. Reproductive, Sexual, and Gender Identity Responsive Health

The federal and state governments have historically policed the childbearing practices of Black American women and denied reproductive rights and healthcare.⁴⁹⁸ Black women have been used as tools of reproduction for capitalist profit—or forcibly sterilized and denied reproductive freedom.⁴⁹⁹ Black Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Americans experience discrimination in healthcare and lack access to gender-affirming care.⁵⁰⁰ As a result, Black women and LGBTQ Americans have suffered, in part, due to the legacy of enslavement.

A. Maternal Health

Black women were denied autonomy over their reproduction during the slavery era and denied their rights as mothers.⁵⁰¹ State and federal governments forcibly sterilized Black women in 19th and 20th centuries.⁵⁰² Later, state policies included plans to distribute experimental birth control, like Norplant, in Black communities.⁵⁰³ States criminalized and sterilized Black women for giving birth if traces of controlled substances were found in them or their babies.⁵⁰⁴ Coercive welfare policies mandated long-term contraceptive insertion, with harmful health consequences, as a condition for receiving welfare benefits.⁵⁰⁵

Historically, state and federal governments have refused to subsidize reproductive care, such as abortion for poor women.⁵⁰⁶ This especially harms Black women's access to reproductive care. Black women rely on publicly funded clinics in higher numbers, due to lack of access to private health insurance or income for a private physician.⁵⁰⁷ Black women are also less likely to have access to information about informed consent, sterilization, and side effects of contraceptives.⁵⁰⁸ Forced sterilization, mentioned earlier, was used in conjunction with these policies, to deny Black women autonomy over their own bodies and their reproductive

⁴⁹⁶ Hosseini, [Alameda County Violates Rights of Mental Health Patients, Inmates, Feds Say](#) (Apr. 22, 2021) San Francisco Chronicle (as of Mar. 19, 2022).

⁴⁹⁷ Woods et al., *supra*, at p. at 78.

⁴⁹⁸ Roberts 1997, *supra*, at pp. 1-7.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Choi et al., [Black LGBT Adults in the US: LGBT Well-Being at the Intersection of Race](#) (Jan. 2021) UCLA School of Law: Williams Institute (as of Jan. 19, 2021).

⁵⁰¹ Roberts 1997, *supra*, at pp. 6-7.

⁵⁰² *Id.* at pp. 4-5.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Id.* at pp. xii-xiv.

⁵⁰⁷ *Id.* at p. 233.

⁵⁰⁸ *Id.* at p. 97.

health.⁵⁰⁹

Studies show that Black women suffer from disproportionate infertility in comparison to other groups.⁵¹⁰ This disparity stems from untreated sexually transmitted infections, nutritional deficiencies, complications from childbirth and abortion, and environmental hazards.⁵¹¹ Black women are treated as infertile by doctors who underdiagnose endometriosis in Black women.⁵¹² Many reproductive technologies are unaffordable or inaccessible to Black women experiencing fertility issues.⁵¹³

One of the most harmful legacies of slavery is the disproportionate maternal and infant death of Black women and children today due to lack of access to adequate reproductive healthcare.⁵¹⁴ Black women experience disproportionate racial discrimination in access to and quality of prenatal care.⁵¹⁵ Expecting and new Black mothers often find that their reports of painful symptoms are overlooked or minimized by medical practitioners.⁵¹⁶ Black women must wait longer for prenatal appointments and are ignored, scolded, demeaned, and bullied into having C-sections.⁵¹⁷ Even wealthier Black women suffer the racist disregard of medical providers.⁵¹⁸ Serena Williams, the renowned tennis champion, was ignored by medical providers who dismissed her concern regarding a post-pregnancy blood clot.⁵¹⁹ After insistence by Williams that she undergo a CT scan, doctors found a clot in her lungs.⁵²⁰

Black women disproportionately experience adverse birth outcomes and adverse maternal health.⁵²¹ Researchers have found evidence that this may be influenced by the uniquely high level of racism-induced stress experienced by Black women, as discussed above.⁵²² Structural racism is a stressor that harms Black women at both physiological and genetic levels.⁵²³ Structural racism contributes to maternal and infant death disparities. In the United States, pregnancy-related mortality is three to four times higher among Black women

⁵⁰⁹ *Id.* at pp. 6-7.

⁵¹⁰ Wellons et al., *Racial Differences in Self-Reported Infertility and Risk Factors for Infertility in a Cohort of Black and White Women: The CARDIA Women's Study* (2008) 90 *Fertil Steril* 1640.

⁵¹¹ Roberts 1997, *supra*, at p. 252.

⁵¹² *Id.* at p. 255.

⁵¹³ *Id.* at p. 288.

⁵¹⁴ Owens & Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery* (2019) 109 *Am. J. of Pub. Health* 1342 (Owens 2019).

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ Villarosa, [Why America's Black Mothers and Babies Are in a Life-or-Death Crisis](#) (Apr. 11, 2018) *N.Y. Times Magazine* (as of Mar. 19, 2022).

⁵¹⁸ Salam, [For Serena Williams, Childbirth Was a Harrowing Ordeal. She's Not Alone](#) (Jan. 11, 2018) *N.Y. Times* (as of Mar. 19, 2022).

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ Villarosa, *supra*.

⁵²² *Ibid.*

⁵²³ Owens 2019, *supra*.

than among white women.⁵²⁴ Adequate prenatal care does not reduce racial disparities for Black American women, who are still at elevated risk for preterm birth.⁵²⁵ Hypertension, which has been linked to the stress of living in a racist society, contributes to racial disparities in pregnancy-related complications, such as eclampsia.⁵²⁶ Black mothers are less likely to breastfeed their babies than white mothers due to numerous historical factors including discriminatory hospital practices and predatory marketing practices.⁵²⁷ Lower breastfeeding rates are associated with higher risk of medical issues before and after childbirth, and maternal mental health issues.⁵²⁸

B. Health of Black LGBTQ Americans

Black Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Americans experience discrimination in healthcare.⁵²⁹ They are also more likely to be uninsured.⁵³⁰ For Black transgender Americans, this results in difficulties in seeing healthcare providers and receiving gender-affirming care due to cost.⁵³¹ Studies have indicated that Black LGBTQ Americans experience assumptions, judgment, stigma, and discrimination in the healthcare system.⁵³² It is difficult for them to establish a personal bond, trust, and familiarity with providers, who do not often meet their needs with respect to their sexual and gender identities.⁵³³

Black LGBTQ Americans suffer from especially poor health outcomes. Black LGBTQ people who identify as women have higher diagnoses of hypertension, stroke, and diabetes.⁵³⁴ Many Black LGBTQ Americans are at higher risk for HIV when compared with white cisgender, heterosexual Americans.⁵³⁵ As of 2015, Black transgender women had HIV at the rate of 19 percent, while 1.4 percent of the transgender population at large had HIV.⁵³⁶ Black LGBTQ Americans have also been found to have higher rates of asthma, heart attacks, and cancer.⁵³⁷

⁵²⁴ *Ibid.*

⁵²⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (January 28, 2022), Testimony of Joan Kaufman <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁵²⁶ Villarosa, *supra*; Fingar, *Delivery Hospitalizations Involving Preeclampsia and Eclampsia, 2005–2014* (2017) Healthcare Cost and Utilization Project, p. 1-2 (as of Mar. 19, 2022).

⁵²⁷ Johnson et al., *Enhancing Breastfeeding Rates Among African American Women: A Systematic Review of Current Psychosocial Interventions* (2015) 10 *Breastfeeding Medicine* 45.

⁵²⁸ *Ibid.*

⁵²⁹ Choi et al., *supra*, at p. 5.

⁵³⁰ Lassiter et al., *A Systematic Review of Black American Same Sex Couples Research: Laying the Groundwork for Culturally-Specific Research and Interventions* (Aug. 30, 2021) *The J. of Sex Research* (as of Jan. 19, 2021).

⁵³¹ James et al., *The Report of the 2015 U.S. Transgender Survey* (2016) Nat. Center for Transgender Equality, p. 98 (as of Mar. 19, 2022).

⁵³² Salerno et al., *Health Care Experiences of Black Transgender Women and Men Who Have Sex with Men: A Qualitative Study* (2020) 31 *J. of the Assn. of Nurses in AIDS Care* 466.

⁵³³ *Ibid.*

⁵³⁴ Lassiter et al., *supra*.

⁵³⁵ Salerno, *supra*.

⁵³⁶ James et al., *supra*, at p. 4.

⁵³⁷ Choi et al., *supra*, at p. 5.

A large proportion of Black LGBTQ Americans have suffered verbal insults or abuse, threats of violence, physical or sexual assault, and robbery or property destruction.⁵³⁸ Black LGBTQ Americans are almost twice as likely to report a diagnosis of depression compared to Black American non-LGBT adults.⁵³⁹ Researchers posit that such physical health and mental outcomes are linked to a combination of anti-Black racial discrimination, and anti-LGBTQ prejudice.⁵⁴⁰ Stigma and discrimination can create a stressful social environment that may lead to mental and physical health problems for Black Americans in the LGBTQ community.⁵⁴¹

C. California

In California, as well as nationally, Black women are substantially more likely than white women to suffer severe health complications during pregnancy, give premature birth, die in childbirth, and lose their babies.⁵⁴² From 2014 to 2016, the pregnancy-related mortality ratio for Black women in California was four to six times greater than the mortality ratio for other ethnic groups.⁵⁴³ In fact, Black women were overrepresented for pregnancy-related deaths for all causes, but most notably for deaths during pregnancy or during hospitalization post-delivery.⁵⁴⁴ Over the past decade, Black babies died at almost five times the rate of white babies in San Francisco.⁵⁴⁵ In a comprehensive study of 1.8 million hospital births, it was found that when a Black doctor is the primary charge on these cases, the infant mortality rate is cut in half.⁵⁴⁶

The high rates of preterm birth and maternal mortality for Black women are due, in part, to complications from underestimated or undiagnosed health conditions.⁵⁴⁷ In 2006, Bettye Jean Ford gave preterm birth to a baby who did not survive in Los Angeles.⁵⁴⁸ “Giving birth was horrible,” she said. “It was just an awful experience emotionally, physically.”⁵⁴⁹ Even after delivery, Black people giving birth experience the highest rates of postpartum depression and mortality during childbirth.⁵⁵⁰ California passed the Dignity in Pregnancy and

⁵³⁸ *Ibid.*

⁵³⁹ *Id.* at p. 4.

⁵⁴⁰ Lassiter et al., *supra*.

⁵⁴¹ Choi et al., *supra*, at p. 25.

⁵⁴² Watson, [A Black Mother Told Not to Scream in Labor Asks: Can California Fix Racism in Maternity Care?](#) (Jul. 11, 2019) Cal Matters (as of Apr. 5, 2022).

⁵⁴³ Maternal Child and Adolescent Health Division, [California Pregnancy Mortality Surveillance System: California Pregnancy-Related Deaths, 2008-2016](#) (2021) Cal. Dept. of Pub. Health, p. 7 (as of Mar. 19, 2022) (Cal. Dept. of Pub. Health Pregnancy Mortality Report); Cal. Maternal Quality Care Collaborative, [CA-PAMR Background](#) (as of Mar. 19, 2022).

⁵⁴⁴ Maternal Child and Adolescent Health Division, *supra*, at p. 7.

⁵⁴⁵ San Francisco Dept. of Pub. Health, [Maternal Child Adolescent Health Vital Statistics in San Francisco: Infant Deaths](#) (Feb. 15, 2017) City and County of San Francisco Dept. of Pub. Health (as of Mar. 19, 2022).

⁵⁴⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁵⁴⁷ Watson, *supra*.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ Cal. Health Care Foundation, [Health Disparities by Race and Ethnicity in California: Pattern of Inequity](#) (Oct. 2021), pp. 43-44 (as of Mar. 19, 2022).

Childbirth Act in 2019, which aims to address implicit bias in healthcare and collect data on maternal health.⁵⁵¹ However, experts state that the bill is difficult to enforce, since physicians contract with hospitals and are not subject to the same oversight as ordinary employees.⁵⁵² It is left to healthcare facilities to implement practices to address implicit bias—which is not likely to occur.⁵⁵³

A survey in California found that Black women disproportionately reported unfair treatment, harsh language, and rough handling during their hospital stay, as compared to white women.⁵⁵⁴ Doulas are trained professionals who provide physical, emotional, and informational support to mothers.⁵⁵⁵ Doulas have been shown to ameliorate health disparities in maternal and child health.⁵⁵⁶ Evidence shows that women who had the support of doulas were less likely to have C-sections and have healthier babies.⁵⁵⁷ Doulas play an important role as advocates for Black women in the medical system when medical providers do not believe Black women or address their needs.⁵⁵⁸ However, during the COVID-19 pandemic, the California state legislature failed to pass an initiative to provide doula care for pregnant and postpartum people in the 14 California counties with the highest birth disparities.⁵⁵⁹

In the American West, Black LGBTQ Americans are more likely to be uninsured, diagnosed with depression, and diagnosed with asthma, diabetes, high blood pressure, high cholesterol, heart disease, and cancer.⁵⁶⁰ A 2021 study of transgender women in the San Francisco Bay Area revealed that Black transgender women are at a higher risk for suffering from hate crimes because of the intersectional effects of racism and transphobia.⁵⁶¹ Black transgender women had a higher tendency to be the victim of battery with a weapon, a potentially fatal form of violence, compared to white transgender women who participated in the study.⁵⁶²

XI. Child and Youth Health

Some scholars have stated that the legacy of slavery, and the segregation and racial terror that occurred in the years after, has resulted in high rates of infant mortality and damaged health.⁵⁶³ Discriminatory care has

⁵⁵¹ Health & Safety Code, § 123630.1.

⁵⁵² Watson, *supra*.

⁵⁵³ *Ibid*.

⁵⁵⁴ Sakala, [Listening to Mothers in California: A Population-Based Survey of Women's Childbearing Experiences](#) (2018) Nat. Partnership for Women and Families, p. 12 (as of Mar. 19, 2021).

⁵⁵⁵ Nat. Health Law Program, [How Can Doulas Help Address Racial Disparities in Care](#) (as of Mar. 19, 2022).

⁵⁵⁶ Nat. Health Law Program, [California Doula Push Shifts Focus Due to COVID-19 Pandemic](#) (Apr. 30, 2020) (as of Mar. 19, 2022) (NHLP 2020).

⁵⁵⁷ *Ibid*.

⁵⁵⁸ Villarosa, *supra*.

⁵⁵⁹ NHLP 2020, *supra*.

⁵⁶⁰ Choi et al., *supra*, at p. 38.

⁵⁶¹ Gyamerah et al., [Experiences and Factors Associated with Transphobic Hate Crimes Among Transgender Women in the San Francisco Bay Area: Comparisons Across Race](#) (June 2, 2021) BMC Public Health (as of Jan. 19, 2021).

⁵⁶² *Ibid*.

⁵⁶³ Owens 2019, *supra*.

continued through the centuries—resulting in lasting health disparities affecting Black children and youth.⁵⁶⁴ As will be discussed in this section, the public school, foster care, and carceral systems further damage the health of Black youth due to the discriminatory and violent treatment Black youth receive at the hands of state and local officials.

A. Pediatric Care

Racial segregation in hospitals has resulted in lower quality care for Black babies, contributing, in part to low birth weight and premature birth for Black infants.⁵⁶⁵ The infant death rate for Black babies is the highest in the nation.⁵⁶⁶ Black infants are twice as likely to die as white infants—11.3 per 1,000 Black babies die, compared with 4.9 per 1,000 white babies.⁵⁶⁷ This racial disparity is wider than that of 1850, when Black Americans were enslaved.⁵⁶⁸ Studies show that education does not mitigate this problem. Black women with advanced degrees are more likely to lose their babies than white women with less than an eighth-grade education.⁵⁶⁹ Federal and state governments have not addressed this problem, since, as of March 2022, only nine states investigate racial disparities when conducting reviews of pregnancy-related deaths.⁵⁷⁰ Racial disparities in infant mortality and low birth weight have been associated with racial discrimination and maternal stress.⁵⁷¹ Studies show that Black physician care of Black newborns significantly reduces the Black infant death rate; however, Black physicians are disproportionately underrepresented in the field of medicine.⁵⁷²

The American Academy of Pediatrics has stated that racism is a social determinant of health which has a profound impact on the health of children.⁵⁷³ Black American children experience worse health outcomes than white American children, due to unequal access to care, in part, because of parental unemployment and lower household net worth.⁵⁷⁴ (See Chapter 13 on the Wealth Gap.) The impact of racism has been linked to birth disparities and health problems in Black children and adolescents.⁵⁷⁵ Chronic stress leads to increased and prolonged levels of exposure to stress hormones, which lead to inflammatory reactions that predispose children to chronic disease.⁵⁷⁶ Increased stress related to racial discrimination experienced by Black children has been

⁵⁶⁴ *Ibid.*

⁵⁶⁵ Horbar et al., *Racial Segregation and Inequality in the Neonatal Intensive Care Unit for Very Low-Birth-Weight and Very Preterm Infants* (2019) 173 *JAMA Pediatrics* 455.

⁵⁶⁶ Woods et al., *supra*, at p. 55.

⁵⁶⁷ Villarosa, *supra*; Reeves, [6 Charts Showing Race Gaps within the American Middle Class](#) (Oct. 21, 2016) Brookings Institution (as of Mar. 19, 2022).

⁵⁶⁸ Villarosa, *supra*; Owens 2019, *supra*.

⁵⁶⁹ Reeves, *supra*.

⁵⁷⁰ Guttmacher Institute, [Maternal Mortality Review Committees](#) (as of Mar. 19, 2022).

⁵⁷¹ Trent et al., [The Impact of Racism on Child and Adolescent Health](#) (2019) 144 *Pediatrics* 1 (as of Mar. 19, 2022).

⁵⁷² Greenwood, [Physician–Patient Racial Concordance and Disparities in Birthing Mortality for Newborns](#) (2020) 117 *Proceedings of the Nat. Academy of Sciences* 21,194 (as of Mar. 19, 2022).

⁵⁷³ Trent et al., *supra*.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*

associated with increased asthma risk and severity.⁵⁷⁷ Black American children are more likely to die from asthma.⁵⁷⁸ Children’s exposure to discrimination has also been linked with higher rates of attention deficit hyperactivity disorder, anxiety, depression, and decreased general health.⁵⁷⁹

Black youth disproportionately suffer from obesity and being overweight due to social and environmental circumstances that produce psychological stress—including less access to education and more exposure to racial discrimination.⁵⁸⁰ Black children are referred less quickly for kidney transplants than white children.⁵⁸¹ They are also more likely to die following surgery.⁵⁸² The underdiagnosing of Black children is linked to the lack of Black pediatricians, which has resulted in inadequate access to pediatric care for Black children.⁵⁸³

B. Health in School, Foster Care, and Carceral Systems

Black youth are overrepresented in the foster care system and suffer disproportionately worse health outcomes in the system.⁵⁸⁴ Black youth suffer from greater rates of child abuse and neglect as well as negative impacts on mental health in state-run foster care systems.⁵⁸⁵ They may be placed on psychotropic drugs which alter behavior patterns and increase the risk for suicide and illness.⁵⁸⁶

Black students experience disparate health outcomes and discrimination in public school systems.⁵⁸⁷ Racial disparities in educational access and attainment, along with racism experienced in schools, affect the trajectory of academic achievement for Black youth and ultimately harm their health.⁵⁸⁸ (See Chapter 6 on Separate and Unequal Education.) Black students are 2.9 times more likely to be labeled with a disability than white students, resulting in disproportionate placement of Black students in special education, where they are less likely than white students to return to regular instruction and are prescribed unnecessary psychotropic medications.⁵⁸⁹

In public schools, despite health screenings and low academic scores that indicate mental illness, a learning

⁵⁷⁷ Jones et al., [Chronic Stress Exposure Among Young African American Children with Asthma](#) (2019) 123 *Annals of Allergy, Asthma, and Immunology* 507 (as of Mar. 19, 2022).

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Am. Academy of Pediatrics, [Study Finds Exposure to Racism Harms Children’s Health](#) (May 4, 2017) (as of Mar. 19, 2022).

⁵⁸⁰ Allport et al., [Influence of Parent Stressors on Adolescent Obesity in African American Youth](#) (2019) 2019 *J. of Obesity* 1 (as of Mar. 19, 2022).

⁵⁸¹ Amaral et al., *Disparities, Race/Ethnicity and Access to Pediatric Kidney Transplantation* (2013) 22 *Current Opinion in Nephrology and Hypertension* 336.

⁵⁸² Nafiu et al., [Race, Postoperative Complications, and Death in Apparently Healthy Children](#) (2020) 146 *Pediatrics* 1 (as of Mar. 19, 2022).

⁵⁸³ Pawlowski, [Why Racism Can Have Long-Term Effects on Children’s Health](#) (July 17, 2020) *Today* (as of Apr. 5, 2022).

⁵⁸⁴ Children’s Bureau, [Child Welfare Practice to Address Racial Disproportionality and Disparity](#) (2021) U.S. Dept. of Health and Human Services, pp. 2-3 (as of Mar. 19, 2022).

⁵⁸⁵ Rufa & Fowler, *Kinship Foster Care among African American Youth: Interaction Effects at Multiple Contextual Levels* (2016) 42 *J. of Social Service Research* 26.

⁵⁸⁶ Woods et al., *supra*, at p. 88.

⁵⁸⁷ *Id.* at pp. 90-91.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

disability, or developmental delay—Black children are still neglected by school health workers.⁵⁹⁰ Black youth are over-diagnosed for conduct disorder and under-diagnosed for depression.⁵⁹¹ The closure of public schools during the COVID-19 pandemic resulted in missed meals, negatively impacting Black children’s health, nutrition, and food security because Black students are more likely to be eligible for free or reduced-price meals.⁵⁹²

Black youth are overrepresented at every level of the juvenile justice system, from initial contact with law enforcement to sentencing and incarceration, which has led to worsening health.⁵⁹³ Among youth who are arrested, Black youth are three times as likely to be incarcerated in the juvenile justice system and less likely to be diverted to non-carceral settings than white youth.⁵⁹⁴ Black American youth involved in the carceral system have worse mental and physical health, during and after incarceration.⁵⁹⁵ This is due to communicable diseases, which spread in juvenile facilities, physical and sexual trauma, as well as erosion of mental health.⁵⁹⁶ Black youth are overprescribed psychotropic medication and misdiagnosed by the carceral system, when compared with white youth.⁵⁹⁷ Within juvenile justice settings, Black American boys are 40 percent more likely to be diagnosed with conduct disorder than white youth, while Black American girls are 54 percent more likely—even when controlling for trauma, behavioral indicators, and criminal offense charges.⁵⁹⁸

C. California

Malnutrition rates are higher for Black children in California, when compared with other racial groups.⁵⁹⁹ For instance, 20.2 percent of Black Californian households reported having children who did not have enough to eat, which is higher than the 15.9 percent of all Californian households that reported not having enough food to eat.⁶⁰⁰ According to data from 2018, almost three times as many Black Californian children live in poverty when compared with white children.⁶⁰¹ Poverty results in worse cognitive, socio-emotional, and physical health.⁶⁰² This is particularly prevalent for Black children in California, due to their overrepresentation among

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

⁵⁹² Kinsey, [School Closures During COVID-19: Opportunities for Innovation in Meal Service](#) (2020) 110 Am. J. of Pub. Health 1635 (as of Mar. 19, 2022).

⁵⁹³ Voisin et al., *Involvement in the Juvenile Justice System for African American Adolescents: Examining Associations with Behavioral Health Problems* (2017) 43 J. of Social Service Research 129.

⁵⁹⁴ Cancio et al., [The Landscape of Traumatic Justice: Youth of Color in Conflict with the Law](#) (2019) Alliance of Nat. Psychological Assns. for Racial and Ethnic Equity, p. 20 (as of Mar. 19, 2020).

⁵⁹⁵ Barnert, [How Does Incarcerating Young People Affect Their Adult Health Outcomes?](#) (2017) 139 Pediatrics (as of Mar. 19, 2022).

⁵⁹⁶ Voisin et al., *supra*; Cancio et al., *supra*, at pp. 9, 31.

⁵⁹⁷ Cancio et al., *supra*, at pp. 17-18.

⁵⁹⁸ *Id.* at p. 20

⁵⁹⁹ Ramos-Yamamoto, [Not Enough to Eat: California Black & Latinx Children Need Policy Action](#) (Sept. 2020) Cal. Budget & Policy Center (as of Mar. 19, 2022).

⁶⁰⁰ *Ibid.*

⁶⁰¹ KidsData, [Children in Poverty, by Race/Ethnicity](#) (2018) Population Reference Bureau (as of Mar. 19, 2022).

⁶⁰² Blair et al., *Poverty, Stress, and Brain Development: New Directions for Prevention and Intervention* (2016) 16 Academic Pediatrics 30.

poor children at large.⁶⁰³

In California, Black youth are more likely to be incarcerated than their white peers, and have likely had prior exposure to toxic stress.⁶⁰⁴ The poor living conditions among incarcerated youth intensify health problems.⁶⁰⁵ The carceral system inadequately serves the health needs of Black incarcerated youth.⁶⁰⁶ Tanisha Denard, a Black teenager, was in high school when she violated her probation due to unpaid truancy tickets and was sent to juvenile hall.⁶⁰⁷ Her time in juvenile hall severely harmed her mental health.⁶⁰⁸ “Being locked down make you feel that you are worthless to society,” she said. “You start to think about any way to escape, even if it means suicide.”⁶⁰⁹ While incarcerated she was subjected to solitary confinement, not allowed to use the restroom, and forced to sleep on bedsheets stained with urine, blood, and feces.⁶¹⁰ The juvenile justice system lacks policies, practices, and interventions specific to serving Black youth like Denard.⁶¹¹

XII. Public Health Crises

Scholars have theorized that the federal and state governments’ racist public health practices, along with centuries of slavery, segregation, and white oppression have resulted in entrenched systemic racism, which has harmed Black American health.⁶¹² The public health crises described in this section are not an exhaustive list of the mismanagement of health crises; rather, they are selected illustrative examples. Today, Black Americans continue to be at the highest risk for negative health impacts from public health crises.⁶¹³

A. Infectious Diseases

In 1793, anti-Black racism on the part of state officials in Pennsylvania resulted in the death of hundreds of Black Americans during the yellow fever epidemic.⁶¹⁴ At the time, medical historians and prominent white leaders, assuming Black people were immune to the disease, encouraged Black Americans to assist with managing the epidemic.⁶¹⁵ Many Black residents remained in the city, instead of fleeing, participating in the epidemic relief effort, caring for the ill and burying the dead.⁶¹⁶ In the end, hundreds of Black Americans died

⁶⁰³ KidsData, *supra*.

⁶⁰⁴ Council on Criminal Justice and Behavioral Health, [Juvenile Justice Factsheet](#) (2020) (as of Mar. 19, 2022); Campio, *supra*, at p. 25.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Campio, *supra*, at p. 20.

⁶⁰⁷ Cancio et al., *supra*, at pp. 12-13.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ *Ibid.*

⁶¹² Feagin & Bennefield, *Systemic Racism and U.S. Health Care* (2013) 103 *Social Science & Medicine* 7, 7.

⁶¹³ See, e.g., Foundation for Aids Research, [COVID-19 Racial and Ethnic Disparities in U.S. Counties](#) (as of Mar. 19, 2022) (AmfAR).

⁶¹⁴ McBride, *supra*, at pp. 8-10

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid.*

from yellow fever.⁶¹⁷

In the post-Reconstruction era, tuberculosis was a deadly health problem for Black Americans.⁶¹⁸ In 1900, there were large disparities in tuberculosis rates between white and Black populations because segregated Black neighborhoods were impoverished, had congested housing, and could not access basic healthcare information.⁶¹⁹ In the early 1900s, state and local public health agencies, hospitals, and physicians portrayed Black people as a hazardous population to the white public.⁶²⁰

In 1964, Black tuberculosis rates were two to three times higher than for white Americans.⁶²¹ Substandard and segregated housing, in addition to concentrated poverty, contributed to high HIV and tuberculosis rates in the 1980s and 1990s.⁶²² The disease spread widely in prisons, hospitals, cramped housing, and homeless shelters, leading tuberculosis rates to increase among Black Americans.⁶²³ Due to a combination of government neglect and systemic racism, Black Americans have been harmed by the spread of infectious diseases.

B. Drug Addiction

Internationally, public health officials have recognized that drug addiction should be treated as a health disorder and not as a criminal behavior.⁶²⁴ The federal government has chosen to respond to rising drug addiction as a criminal justice issue, instead of as a public health issue.⁶²⁵ This has resulted in state action against Black people in need of substance abuse services.⁶²⁶ According to healthcare providers and experts, the government should treat drug addiction as a public health issue.⁶²⁷ Drug addiction is a medical condition, not a flaw in character.⁶²⁸ Punishment for substance abuse disorders does not treat addiction—it leads to higher risk of drug overdose.⁶²⁹

By the 1980s, the government embarked upon a rigorous crackdown on the usage of crack, a crystalized type of cocaine which is highly addictive and relatively cheap.⁶³⁰ During the 1970s, hospital emergency rooms began testing pregnant women for suspected drug use and reporting them to police authorities.⁶³¹ In many cases,

⁶¹⁷ *Ibid.*

⁶¹⁸ *Id.* at p. 38.

⁶¹⁹ *Id.* at pp. 23-24.

⁶²⁰ *Ibid.*

⁶²¹ *Id.* at p. 83.

⁶²² *Id.* at pp. 126-130.

⁶²³ *Ibid.*

⁶²⁴ Volkow, [Addiction Should be Treated, Not Penalized](#) (Apr. 27, 2021) Health Affairs (as of Mar. 19, 2022) (Volkow 2021); Volkow et al., *Drug Use Disorders: Impact of a Public Health Rather than a Criminal Justice Approach* (2017) 16 World Psychiatry 213 (Volkow 2017).

⁶²⁵ Volkow 2021, *supra*.

⁶²⁶ *Ibid.*

⁶²⁷ Volkow 2017, *supra*.

⁶²⁸ Volkow 2021, *supra*.

⁶²⁹ *Ibid.*

⁶³⁰ McBride, *supra*, at pp. 124-126.

⁶³¹ *Ibid.*

hospitals imprisoned women, shackled them while they gave birth, or took temporary or permanent custody of their children.⁶³² Hospitals reported Black pregnant women 10 times more frequently to government health authorities than white women.⁶³³

State policy leaders did not address the need for increasing preventive mental illness and rehabilitation resources.⁶³⁴ Nor did they address the psychosocial origins for the demand for crack.⁶³⁵ Police crackdowns and incarceration for drug possession did not relieve the social conditions that spawned the crack cocaine epidemic, but rather created harmful consequences for Black Americans.⁶³⁶ State actions exacerbated them by treating drug addiction as a crime, as opposed to a public health issue.⁶³⁷ By the year 2000, over 80 percent of those charged with crack-related crimes were Black, while less than six percent were white.⁶³⁸ Throughout the course of the crack epidemic, sentencing disparities caused Black Americans to receive excessive sentences in prison, and many continue to serve such excessive sentences today.⁶³⁹

C. HIV/AIDS

During the 1980s, AIDS harmed Black communities severely, especially LGBTQ Black populations and intravenous Black drug users, who were overrepresented among AIDS victims.⁶⁴⁰ Today, the prevalence of HIV is especially high within the Black American LGBTQ community.⁶⁴¹ Black gay and bisexual men are infected by HIV more than any other group in the United States today and have the highest HIV death rate.⁶⁴² Between 2010 and 2019, the number of HIV infections among white gay men decreased significantly while the number of infections among Black American gay men did not decrease.⁶⁴³ Longstanding inequities in access to and delivery of healthcare to Black Americans has led to this disparity.⁶⁴⁴ Black women accounted for the largest share of women living with an HIV diagnosis in 2017.⁶⁴⁵

Due to the lack of federal or state-funded healthcare resources for the AIDS epidemic, Black healthcare leaders

⁶³² Roberts 1997, *supra*, at pp. 3-5, 159, 178.

⁶³³ McBride, *supra*, at pp. 124-126.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*

⁶³⁶ Wallace, *Crack, Policy, and Advocacy: A Case Analysis Illustrating the Need to Monitor Emergent Public Health-Related Policy and Engage in Persistent Evidence-Based Advocacy* (2014) 3 J. of Equity in Health 139, 142.

⁶³⁷ *Id.* at p. 149

⁶³⁸ *Id.* at p. 146.

⁶³⁹ *Id.* at p. 153.

⁶⁴⁰ McBride, *supra*, at pp. 133, 146.

⁶⁴¹ Pitasi et al., [Vital Signs: HIV Infection, Diagnosis, Treatment and Prevention Among Gay, Bisexual, and Other Men Who Have Sex with Men — United States, 2010–2019](#) (Dec. 3, 2021) Centers for Disease Control and Prevention, p. 1669 (as of Mar. 19, 2022).

⁶⁴² Centers for Disease Control and Prevention, [African American Gay and Bisexual Men](#) (Jan. 11, 2022) (as of Mar. 19, 2022); Kaiser Family Foundation, [Black Americans and HIV/AIDS: The Basics](#) (Feb. 7, 2020) (as of Mar. 19, 2022) (KFF 2020).

⁶⁴³ Pitasi et al., *supra*, at p. 1669.

⁶⁴⁴ *Id.* at p. 1672.

⁶⁴⁵ KFF 2020, *supra*.

and organizers worked to connect AIDS victims to medical services, benefits, and health education.⁶⁴⁶ Churches and community organizations formed to educate Black Americans about sexual health and AIDS prevention.⁶⁴⁷ They worked with Black LGBTQ populations to educate them about safe sex practices and to provide outreach and health services to people with AIDS.⁶⁴⁸ Despite this work by Black American communities, the Centers for Disease Control and Prevention planned to cut funding from dozens of groups operating AIDS services.⁶⁴⁹

D. Nutrition

Black Americans are more likely to live in food deserts—areas with limited access to healthy, affordable food.⁶⁵⁰ (See Chapter 7 on Racism in Environment and Infrastructure.) Tobacco products, such as menthol cigarettes, have been historically marketed to Black communities by tobacco companies at higher rates than white communities.⁶⁵¹ Despite regulating and banning other products, the federal government did not consider banning menthol flavored tobacco products until 2021.⁶⁵² Additionally, the overconcentration of liquor stores in Black American neighborhoods is correlated to Black American health problems.⁶⁵³

The makers of sugar sweetened beverages, fast foods, and other products also often target Black communities in marketing schemes.⁶⁵⁴ These food products contribute to overconsumption, leading to diabetes, obesity, and other health problems.⁶⁵⁵ Between 2005 and 2008, Black adults consumed nearly nine percent of their daily calories from sugar drinks, compared to about five percent for white adults.⁶⁵⁶ Black children and teens see more than twice as many ads for certain sugar drinks than their white peers.⁶⁵⁷ Lower-income Black neighborhoods have disproportionately more outdoor ads on billboards, bus benches, sidewalk signs, murals, and store window posters for sugar drinks.⁶⁵⁸ Sugar has had disproportionately negative consequences for Black

⁶⁴⁶ McBride, *supra*, at pp. 135-141.

⁶⁴⁷ *Id.* at pp. 138-141.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Dutko et al., [Characteristics and Influential Factors of Food Deserts](#) (2012) U.S. Dept. of Agriculture, pp. 1, 11 (as of Mar. 19, 2022).

⁶⁵¹ Division of Cancer Control & Population Sciences, [Themes and Targets of Tobacco Advertising and Promotion](#), Nat. Cancer Institute, p. 160 (as of Mar. 19, 2022).

⁶⁵² Erickson, [Biden Administration Announces It Intends to Ban Menthol Cigarettes and Flavored Cigars](#) (Apr. 29, 2021) CBS News (as of Mar. 19, 2022).

⁶⁵³ LaVeist & Wallace, Jr., *Health Risk and Inequitable Distribution of Liquor Stores in African American Neighborhoods* (2000) 51 *Social Science & Medicine* 613.

⁶⁵⁴ DiSantis et al., *Sensitizing Black Adult and Youth Consumers to Targeted Food Marketing Tactics in Their Environments* (2017) 14 *Internat. J. of Environmental Research and Pub. Health* 1316.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ Ogden, [Consumption of Sugar Drinks in the United States, 2005-2008](#) (2011) Centers for Disease Control and Prevention (as of Mar. 19, 2022).

⁶⁵⁷ Fleming-Milici et al., [Examples of Social Media Campaigns Targeted to Teens and Hispanic and Black Youth](#) (2020) Univ. of Conn. Rudd Center for Food Policy & Obesity (as of Mar. 20, 2022).

⁶⁵⁸ Lucan et al., *Unhealthy Food-and-Beverage Advertising in Subway Stations: Targeted Marketing, Vulnerable Groups, Dietary Intake, and Poor Health* (2017) 94 *J. Urban Health* 220.

people, and is linked to diabetes, obesity, and hypertension.⁶⁵⁹ Marketing companies are protected by law under the First Amendment, while Black youth are not protected from the harmful consequences of their actions.⁶⁶⁰

E. Natural Disasters

The federal government has engaged in the racist mismanagement of natural disasters like hurricanes—a prime example is Hurricane Katrina. Racial health disparities among Black communities in New Orleans existed prior to Hurricane Katrina.⁶⁶¹ This was due to lack of health insurance for low-income residents, high levels of infant mortality, and high levels of chronic disease.⁶⁶² The State of Louisiana did not address any of the causes of health disparities.⁶⁶³ Charity Hospital, a state hospital in New Orleans, had been the center of hospital care for poor Black Americans prior to Hurricane Katrina.⁶⁶⁴ Three quarters of its patients were Black, with incomes below \$20,000.⁶⁶⁵ The hospital provided care for HIV/AIDS, drug abuse, psychiatric care, and trauma care.⁶⁶⁶ After the hurricane, the state did not reopen Charity Hospital—leaving poor Black Americans in New Orleans without medical care.⁶⁶⁷

Following Hurricane Katrina, Black communities received diminished medical care that amplified health disparities, while white communities were restored to even better conditions than they had lived in before the hurricane hit.⁶⁶⁸ By 2010, 34 percent of the Black population in New Orleans was living in poverty, compared to 14 percent of white people.⁶⁶⁹ Black youth in New Orleans were four times more likely to die from any cause than their white counterparts.⁶⁷⁰ There were increased death rates for Black Americans from kidney disease and HIV.⁶⁷¹ From 2009 to 2011, one-third of Black residents lacked health insurance, double that of white Americans.⁶⁷² The federal government directed funding to repair the buildings, bridges, and streets of New Orleans.⁶⁷³ However, the government did not address the rampant poverty and health disparities among Black people that had been exacerbated by Hurricane Katrina.⁶⁷⁴

F. COVID-19

⁶⁵⁹ *Ibid.*

⁶⁶⁰ DiSantis et al., *supra*.

⁶⁶¹ McBride, *supra*, at pp. 149-151.

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Rivlin, [White New Orleans Has Recovered from Hurricane Katrina. Black New Orleans Has Not](#) (Aug. 29, 2016) Talk Poverty (as of Mar. 20, 2022).

⁶⁶⁹ McBride, *supra*, at pp. 149-152

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

Today, Black Americans are disproportionately at risk for COVID-19 infection and death due to structural factors such as healthcare access, density of households, employment, and pervasive discrimination.⁶⁷⁵ As of March 2022, Black Americans are 1.1 times more likely to contract COVID-19, 2.4 times more likely to be hospitalized due to COVID-19, and 1.7 times more likely to die from COVID-19 than white Americans.⁶⁷⁶ The federal government suggests that long standing racial inequities contribute to worse COVID-19 outcomes for Black people.⁶⁷⁷ Factors that increase COVID-19 risk for Black Americans include: unaffordable housing, lack of healthy food, environmental pollution, poor quality healthcare, poor health insurance, essential worker jobs, lower incomes, greater debt, and poorer access to high quality education.⁶⁷⁸ All of these factors disproportionately harm Black Americans due to systemic racism.

G. California

The State of California has also engaged in the mismanagement of public crises in ways that have harmed Black Americans. In California, the criminal justice system excessively targeted Black Americans during the crack cocaine epidemic. In Los Angeles, Black Californians would receive up to a 10-year federal sentence, while white Americans prosecuted in state court faced a maximum of five years and often received no more than a year in jail.⁶⁷⁹ From 1987 to 1992, a University of California Los Angeles study found there were no white Americans among the 71 defendants prosecuted federally by the U.S. attorney's office in Los Angeles.⁶⁸⁰ This discriminatory prosecution occurred even though studies showed that white Americans accounted for the majority of people who used crack cocaine in Los Angeles.⁶⁸¹

As of 2017, California incarcerated Black American men at 10 times the rates of white American men, resulting in devastating health impacts for the Black American community.⁶⁸² Black women are imprisoned at a rate that is more than five times that of white women in California.⁶⁸³ Black Californians are also overrepresented among California's unhoused.⁶⁸⁴ The overrepresentation of Black Californians among the unhoused and incarcerated populations, both of which are vulnerable to COVID-19, means that Black Californians are

⁶⁷⁵ AmfAR, *supra*.

⁶⁷⁶ Centers for Disease Control and Prevention, [Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity](#) (updated Mar. 10, 2021) (as of Mar. 19, 2022).

⁶⁷⁷ Centers for Disease Control and Prevention, [Introduction to COVID-19 Racial and Ethnic Health Disparities](#) (updated Dec. 10, 2020) (as of Mar. 20, 2022) (CDC 2020).

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Weikel, [War on Crack Targets Minorities Over Whites : Cocaine: Records Show Federal Officials Almost Solely Prosecute Nonwhites. U.S. Attorney Denies Race is a Factor](#) (May 21, 1995) LA Times (as of Mar. 20, 2022).

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Ibid.*

⁶⁸² Hayes et al., [California's Prison Population](#) (July 2019), Pub. Policy Institute of Cal. (as of Mar. 20, 2022).

⁶⁸³ *Ibid.*

⁶⁸⁴ Cimini, [Black People Disproportionately Homeless in California](#) (Feb. 27, 2021) Cal Matters (as of Mar. 20, 2022).

consequently at higher risk of contracting COVID-19 and other illnesses.⁶⁸⁵

California is also home to many food deserts that harm Black American health. In South Los Angeles, many Black Californians do not have enough grocery stores, access to organic produce, thriving small businesses, affordable housing, or medical services.⁶⁸⁶ In View Park area, a majority Black South Los Angeles neighborhood, the nearest grocery store is an Albertsons more than a mile away.⁶⁸⁷ Black residents have been forced to engage in urban micro-farming, building community gardens, and mini markets to compensate for the lack of healthy available food.⁶⁸⁸

The trifecta of liquor stores, smoke shops, and marijuana dispensaries in Black neighborhoods in California has resulted in inadequate access to healthy foods.⁶⁸⁹ Maria Rutledge, a Black resident of South Los Angeles, said, “We are in desperate need of a real grocery market in the area that is welcoming to families, provides healthy food choices, and that supports a safer environment.”⁶⁹⁰ In addition to the lack of grocery stores, there is an overabundance of liquor stores.⁶⁹¹ During the early 1990s, there were 728 liquor stores in a 54-square-mile radius encompassing South Los Angeles.⁶⁹² While that number has decreased, South Los Angeles communities are still overrun by liquor stores, with approximately 8.5 liquor stores per square mile compared to 1.97 liquor stores per square mile in West Los Angeles, a majority white neighborhood.⁶⁹³ The trifecta of liquor stores, smoke shops, and marijuana dispensaries in Black neighborhoods have indirectly resulted in sexual harassment, violence, and a climate of fear—leading to poor mental and physical health for Black Californians.⁶⁹⁴

In California, COVID-19 infections disproportionately affect Black Americans. As of March 2022, the death rate for Black Californians due to COVID-19 is 18 percent higher than the COVID-19 death rate for all Californians.⁶⁹⁵ According to a survey conducted by the Association of Black Psychologists, about 40% of Black Californians wished they had more support during the COVID-19 Pandemic.⁶⁹⁶

XIII. Impact of Anti-Black Racism on Black Health

⁶⁸⁵ Harris & Hayes, [The Past, Present, and Future of COVID-19 in California Prisons](#) (July 15, 2021) Pub. Policy Institute of Cal. (as of Mar. 20, 2022); Bishari, [As COVID Cases Surge Among SF’s Homeless, Shelter Options Narrow](#) (Aug. 18, 2021) San Francisco Public Press (as of Mar. 20, 2022).

⁶⁸⁶ Mitchell, [Liquor Stores, Dispensaries and Smoke Shops: Our Neighborhood Is Killing Us](#) (Dec. 8, 2020), KCET (as of Mar. 20, 2022).

⁶⁸⁷ Ramsey, [‘Microfarms’ Come to South L.A. Frontyards, Bringing Fresh Produce to Food Deserts](#) (May 13, 2021) L.A. Times (as of Mar. 20, 2022).

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Mitchell, *supra*.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid.*

⁶⁹⁵ Cal. Dept. of Pub. Health, [California’s Commitment to Health Equity](#) (March 16, 2022) (as of Mar. 20, 2022).

⁶⁹⁶ Ass. of Black Psychologists, [Mental Health Among Black California](#) (July 27, 2021), at p. 3.

Systemic racism has culminated over centuries in severely damaged physiological health for Black Americans.⁶⁹⁷ Some scholars have argued that medical discrimination in the United States against Black Americans is so severe that it is a form of biological terrorism.⁶⁹⁸ Low life expectancy, lack of access to healthcare, and high rates of disease have resulted in great physiological harm to Black Americans.⁶⁹⁹ State-sanctioned systemic racism has led to environmental racism, urban poverty, and over-incarceration—all of which have harmed the health of Black Americans.⁷⁰⁰ The cumulative effect of institutional racism by federal and state governments has led to racial trauma that has had intergenerational impacts on the mental health of Black Americans.⁷⁰¹

A. Health Outcomes

Black Americans have higher rates of morbidity and mortality than white Americans for almost all health outcomes in the United States, an inequality that increases with age.⁷⁰² Black Americans suffer disproportionately from cardiovascular disease relative to white people.⁷⁰³ In surveys of hospitals across the country, Black patients with heart disease receive older, cheaper, and more conservative treatments than their white counterparts.⁷⁰⁴ They also suffer from higher rates of diabetes, hypertension, hyperlipidemia, and obesity.⁷⁰⁵ These are all risk factors for cardiovascular disease.⁷⁰⁶

This is linked to the fact that Black Americans suffer from weathering—constant stress from chronic exposure to social and economic disadvantage, which leads to accelerated decline in physical health.⁷⁰⁷ Social environments that pose a persistent threat of hostility, denigration, and disrespect lead to chronically high levels of inflammation.⁷⁰⁸ Studies have shown that Black youth who are exposed to discrimination and segregation have worse cases of adult inflammation due to race-related stressors.⁷⁰⁹ In fact, race-related stress has a greater

⁶⁹⁷ Feagin & Bennefield, *supra*, at pp. 7-10.

⁶⁹⁸ See Oeur, *Fever Dreams: WEB Du Bois and the Racial Trauma of COVID-19 and Lynching* (2021) 44 *Ethnic and Racial Studies* 735; Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict* (2016) 34 *Sociological Theory* 335; W.E.B. Du Bois, *The Health and Physique of the Negro American* (2003) 93 *Am. J. of Pub. Health* 272.

⁶⁹⁹ Office of Minority Health, [Profile: Black/African Americans](#) (Oct. 12, 2021) U.S. Dept. of Health and Human Services (as of Mar. 20, 2022).

⁷⁰⁰ See Heard-Garris et al., *Structuring Poverty: How Racism Shapes Child Poverty and Child and Adolescent Health* (2021) 21 *Academics Pediatrics* 108.

⁷⁰¹ Goosby & Heidbrink, *supra*.

⁷⁰² Forde et al., *supra*.

⁷⁰³ Brewer & Cooper, *Race, Discrimination, and Cardiovascular Disease* (June 2014) 16 *Am. Medical Assn. J. of Ethics* 455 (as of Mar. 20, 2022).

⁷⁰⁴ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁷⁰⁵ Brewer & Cooper, *supra*.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Forde et al., *supra*.

⁷⁰⁸ Simons et al., *Discrimination, Segregation, and Chronic Inflammation: Testing the Weathering Explanation for the Poor Health of Black Americans* (2018) 54 *Developmental Psychology* 1993.

⁷⁰⁹ *Ibid.*

impact on health among Black Americans than their diet, exercise, smoking, or being low income.⁷¹⁰ Cortisol, which is a stress hormone, locates itself in bodies in response to racism—consequently Black American adults have higher rates of cortisol than their white counterparts, and this is linked to cardiovascular disease.⁷¹¹ Therefore, exposure to racism as a child or adolescent lays the foundation for inflammation and subsequent health disparities. Even middle- and upper-class Black Americans manifest high rates of chronic illness and disability.⁷¹²

Discriminatory attitudes and behaviors by healthcare professionals may also contribute to misdiagnosis and mismanagement of cardiovascular disease among Black patients. Black Americans disproportionately lack access to renal transplants due to racial bias exhibited by physicians, as well as institutionalized racism.⁷¹³ Black Americans are less likely to be identified as transplant candidates, referred for evaluation, be put on the kidney transplant waitlist, receive a kidney transplant, and receive a higher-quality kidney from a living donor.⁷¹⁴ Black patients with sickle cell disease are discriminated against by medical providers who display racist attitudes and accuse people with sickle cell disease of faking their pain.⁷¹⁵ This results in inadequate treatment.⁷¹⁶ There are many reports of Black children with sickle cell disease who do not receive screening tests and treatment necessary to prevent strokes that can occur due to the disease.⁷¹⁷

Racial disparities in Black health outcomes occur today as a culmination of historical racial inequality, discriminatory health policy, and persistent racial discrimination in many sectors of life in the United States.⁷¹⁸ Discriminatory health systems and healthcare providers contribute to racial and ethnic disparities in healthcare.⁷¹⁹ The U.S. Office for Civil Rights within the U.S. Department of Health and Human Services is charged with enforcing several relevant federal statutes and regulations that prohibit discrimination in healthcare, such as Title VI of the 1964 Civil Rights Act.⁷²⁰ However, the agency is under-resourced and has not been proactive in investigating healthcare related complaints from the public, conducting compliance

⁷¹⁰ *Ibid.*

⁷¹¹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Melissa Jones <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁷¹² Simons et al., *supra*; Geronimus et al., *Black/White Differences in the Relationship of Maternal Age to Birthweight: A Population-Based test of the Weathering Hypothesis* (1996), 42 *Social Science & Medicine* 589; Geronimus et al., *Differences in Hypertension Prevalence Among United-States Black-and-White Women of Childbearing Age* (1991) 106 *Pub. Health Report* 393.

⁷¹³ Arriola, *Race, Racism, and Access to Renal Transplantation among African Americans* (2017) 28 *J. of Health Care for the Poor and Underserved* 30.

⁷¹⁴ *Ibid.*

⁷¹⁵ Power-Hays & McGann, *supra*.

⁷¹⁶ *Ibid.*

⁷¹⁷ Kolata, [*These Sisters With Sickle Cell Had Devastating, and Preventable, Strokes*](#) (May 29, 2021) *N.Y. Times* (as of Mar. 20, 2022).

⁷¹⁸ Smedley et al., [*Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*](#) (2003) (as of Mar. 20, 2022).

⁷¹⁹ *Ibid.*

⁷²⁰ Chandra et al., [*Challenges To Reducing Discrimination And Health Inequity Through Existing Civil Rights Laws*](#) (2017) 36 *Health Affairs* 1041 (as of Mar. 20, 2022).

reviews of healthcare facilities, or initiating enforcement proceedings for civil rights violators.⁷²¹ For example, the Office for Civil Rights could bring more Title VI suits against hospital systems that provide more resources for hospitals located in majority-white areas rather than majority-black areas. Civil rights enforcement in healthcare seems to have been relegated to low-priority status.

B. Policing and Incarceration

Policing and incarceration have clear adverse consequences for the health of Black Americans. Racial inequality and racial bias occur in all aspects of the criminal legal system, with federal and state governments overincarcerating and disproportionately punishing Black Americans.⁷²² (See Chapter 11 on An Unjust Legal System.) Police violence kills hundreds of Black Americans and injures thousands each year.⁷²³ Incarcerated people—who are disproportionately Black—face a high risk of death after they are released from prisons and jails due to poor health as a result of incarceration.⁷²⁴ Prisons and jails have been major sites of disease transmission.⁷²⁵ The churn in and out of incarceration can result in community spread of sexually transmitted infections or other infectious diseases.⁷²⁶

Black Americans are overrepresented in state carceral facilities, are less likely to receive the latest psychiatric medications, and have greater difficulty in achieving successful community integration once they leave carceral facilities—further harming their mental health.⁷²⁷ State and federal prisons often force incarcerated Black Americans into solitary confinement at higher rates.⁷²⁸ Solitary confinement has serious documented harmful mental health effects.⁷²⁹

Anti-Black government action harms the mental health of Black communities. Police violence can harm mental and physical health for Black communities through constant surveillance and threats of violence.⁷³⁰ Studies have shown that Black Americans who view material depicting harassment by police officers experience an increase in blood pressure.⁷³¹ Scientific evidence shows that police killings of unarmed Black Americans have adverse effects on mental health among Black adults in the general population.⁷³² Mental health screening tools

⁷²¹ *Ibid.*; Bereikneyi, [Stopping Discrimination Before it Starts: The Impact of Civil Rights Laws on Health Care Disparities - A Medical School Curriculum](#), U.S. Dept. of Health and Human Services, at p. 44 (as of Mar. 20, 2022).

⁷²² Bailey et al., *supra*, at p. 769-770.

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ Cuellar et al., [Criminal Records of Persons Served in the Public Mental Health System](#) (2007) 58 Psychiatry Online 114 (as of Mar. 20, 2022).

⁷²⁸ Kaba et al., [Disparities in Mental Health Referral and Diagnosis in the New York City Jail Mental Health Service](#) (2015) 105 Am. J. of Pub. Health 1911.

⁷²⁹ Haney, [Restricting the Use of Solitary Confinement](#) (2017) 1 Annual Review of Criminology 285 (as of Mar. 20, 2022).

⁷³⁰ Bailey et al., *supra*, at p. 770.

⁷³¹ Harrell et al., [Physiological Responses to Racism and Discrimination: An Assessment of the Evidence](#) (2003) 93 Am. J. of Pub. Health 243.

⁷³² Bor et al., *supra*.

used in state and federal carceral facilities reproduce racial disparities, resulting in fewer Black Americans screening positive for mental illness.⁷³³ Thus, Black Americans remain under-referred and undetected in the jail population.⁷³⁴

C. Environment

State and federal underfunding of medical resources combined with unhealthy physical environments, unemployment, and poverty in Black communities has led to a public health crisis.⁷³⁵ Urban neighborhoods have the highest rates of preventable diseases, and lack health insurance and adequate housing.⁷³⁶ Urban neighborhoods are where 60 percent of the nation's Black population lives due to redlining and historical housing segregation.⁷³⁷ Black communities continue to experience disproportionately high rates of chronic diseases linked to environmental racism.⁷³⁸ (See Chapter 7 on Racism in Environment and Infrastructure.) Built-up pollution from abandoned industrial and commercial work sites resides in soil, water, structures, and air.⁷³⁹ Asthma, cancer, and childhood disorders that affect Black communities are linked to polluted environmental conditions such as toxic waste exposure and lead poisoning.⁷⁴⁰

Segregation adversely affects the availability and affordability of care—creating a lack of access to high-quality primary and specialty care, as well as pharmacy services.⁷⁴¹ A review of nearly 50 empirical studies generally found that government facilitated segregation was associated with poorer health.⁷⁴² The state-perpetrated discriminatory practice of redlining officially ended in 1968, but it created residential segregation, which continues today.⁷⁴³ Segregation has been found to be positively associated with later-stage diagnosis, elevated mortality, and lower survival rates for both breast and lung cancers for Black people.⁷⁴⁴

Housing segregation excessively exposes Black communities to pollution and isolates Black Americans from healthcare resources, including pharmacies, clinics, hospitals, and healthy food stores.⁷⁴⁵ Disparities in life expectancies between Black and white people are rooted in policies that oppressed and segregated Black Americans.⁷⁴⁶ Evidence shows that gaps between white and Black life expectancy are dependent on zip codes

⁷³³ Prins et al., *Exploring Racial Disparities in The Brief Jail Mental Health Screen* (2012) 39 *Criminal Justice and Behavior* 635.

⁷³⁴ *Ibid.*

⁷³⁵ McBride, *supra*, at pp. 112-113, 139-140.

⁷³⁶ *Id.* at pp. 113-117.

⁷³⁷ *Ibid.*

⁷³⁸ *Id.* at pp. 132-134.

⁷³⁹ *Ibid.*

⁷⁴⁰ *Id.* at pp. 140.

⁷⁴¹ Williams et al., *supra*.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

⁷⁴⁵ Menendian et al., [*The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*](#) (June 30, 2021) Othering & Belonging Institute (as of Mar. 20, 2022).

⁷⁴⁶ *Ibid.*

and housing segregation.⁷⁴⁷

There are likely other cumulative negative effects of institutional and systemic racism which have yet to be studied by scientists. A public health study conducted in 2021, for example, revealed that repeated use of chemical irritants for crowd-control by local and federal law enforcement during racial justice protests in the U.S. likely harmed people's mental and physical health.⁷⁴⁸

D. California

Black Californians experience the shortest life expectancy than any other race or ethnicity.⁷⁴⁹ In the San Francisco Bay Area, life expectancy is more than five years greater in white neighborhoods (84 years) than highly segregated Black neighborhoods (79 years).⁷⁵⁰ Black Californians have the highest mortality rate in nine out of the top ten causes of death in San Francisco.⁷⁵¹ A high number of Black Californians live in Southwest Fresno, an area with lower life expectancy than the affluent neighborhoods of Fresno.⁷⁵² Black Californians suffer from the highest cancer rates among all races in colorectal, prostate, and lung cancer.⁷⁵³ Black men are dying of prostate cancer at almost five times the rate of white men in California.⁷⁵⁴ In 2015, Black Californians had the highest rate of preventable hospitalizations for diabetes, heart disease, asthma, and angina.⁷⁵⁵ Black youth suffer from the highest number of asthma cases in California.⁷⁵⁶ Black children in California tend to live in areas with higher levels of traffic related pollution, which contributes to higher levels of asthma.⁷⁵⁷ Historically redlined census tracts in California have significantly higher rates of emergency department visits due to asthma.⁷⁵⁸ This evidence suggests that redlining might be contributing to racial and ethnic asthma health disparities.⁷⁵⁹

Black Californians are the most disproportionately affected by the HIV epidemic due to racism, in part.⁷⁶⁰ In 2018, Black Californians were approximately six percent of California's population, but they were 18 percent of

⁷⁴⁷ *Ibid.*

⁷⁴⁸ Torgrimson-Ojerio, *Health Issues and Healthcare Utilization among Adults who Reported Exposure to Tear Gas During 2020 Portland (OR) Protests: A Cross-Sectional Survey* (2021) 21 BMC Public Health 803.

⁷⁴⁹ Cal. Health Care Foundation, [California Health Care Almanac](#) (Oct. 2019), p. 7 (as of July 12, 2021) (CHCF 2019).

⁷⁵⁰ Menendian et al., [Racial Segregation in the San Francisco Bay Area, Part 4](#) (Oct. 31, 2019) Othering & Belonging Institute (as of Apr. 5, 2022).

⁷⁵¹ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Brett Andrews <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁷⁵² Werner et al., [Unequal Neighborhoods: Fresno](#) (2018) Central Valley Health Policy Institute (as of Mar. 20, 2022).

⁷⁵³ CHCF 2019, *supra*, at p. 25.

⁷⁵⁴ California Task Force to Study and Develop Reparation Proposals for African Americans (January 27, 2022), Testimony of Tina Sacks <<https://oag.ca.gov/ab3121/meetings/012022>> (as of February 8, 2022).

⁷⁵⁵ CHCF 2019, *supra*, at p. 18.

⁷⁵⁶ *Id.* at p. 17.

⁷⁵⁷ Cal. Air Resources Board, [Asthma & Air Pollution](#) (as of Mar. 20, 2022).

⁷⁵⁸ Nardone et al., *Associations Between Historical Residential Redlining and Current Age-Adjusted Rates of Emergency Department Visits Due to Asthma Across Eight Cities in California: An Ecological Study* (2020) 4 Lancet Planet Health 24.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ Orange County Health Care Agency, [HIV/AIDS Health Disparities](#) (2020), p. 13 (as of Mar. 20, 2022).

California's HIV positive population.⁷⁶¹ Among women newly diagnosed with HIV, 31 percent were Black Californians.⁷⁶² Black transgender people were for 14 percent of those who were newly diagnosed with HIV.⁷⁶³ Consequently, Black Californians are overrepresented among the HIV population.

Police violence and incarceration have greatly damaged the health of Black Californians. Black Californians account for 20 percent of serious injuries and fatalities due to police use of force, even though they are only six percent of the population.⁷⁶⁴ More than four in 10 Californians shot by police were identified as suffering from a mental health condition, having an alcohol- or drug-related disorder, or both, according to hospital data.⁷⁶⁵ In *Brown v. Plata*, the Ninth Circuit Court of Appeals ordered the State of California to reduce overcrowding in its prison population due to inadequate healthcare for incarcerated people.⁷⁶⁶ Black Californians in Los Angeles' jails who have mental health conditions report receiving harsher sentences and less alternative treatment programs than their white counterparts.⁷⁶⁷ Due to the overrepresentation of Black Californians in the prison and jail systems, inadequate prison healthcare greatly diminishes the overall health of Black Californians.⁷⁶⁸

XIV. Conclusion

The legacy of slavery has destroyed the health of Black communities through slavery, segregation, racial terror, abusive experimentation, systemic racist oppression, and harmful racist neglect. Today, Black Americans face racial discrimination from healthcare providers across the entire healthcare system, which has contributed to the overall destruction of Black American health.⁷⁶⁹ Black Americans suffer from low life expectancy and high mortality rates across virtually every category of health.⁷⁷⁰ Due to historical and contemporary traumatization from racist violence, racist microaggressions, and institutional racism, Black Americans often suffer from serious psychological distress.⁷⁷¹ The mismanagement of public health crises by state and federal governments has resulted in additional adverse health consequences and deaths in Black communities—most recently during the COVID-19 pandemic.⁷⁷² In some cases, the racial health disparities between Black and white Americans are worse today than they were during the period of enslavement.⁷⁷³

The racist dehumanization of Black Americans in the United States began with the institution of enslavement

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*

⁷⁶⁴ Premkumar et al., [Police Use of Force and Misconduct in California](#) (Oct. 2021) Pub. Policy Institute of Cal. (as of Mar. 20, 2022).

⁷⁶⁵ *Ibid.*

⁷⁶⁶ Committee on Causes and Consequences of High Rates of Incarceration et al., [Health and Incarceration: A Workshop Summary](#) (2013) (as of Mar. 20, 2022).

⁷⁶⁷ Dignity and Power Now, [Impact of Disproportionate Incarceration of and Violence Against Black People with Mental Health Conditions In the World's Largest Jail System](#) (Aug. 2014), United Nations Committee on the Elimination of Racial Discrimination, p. 3 (as of Mar. 19, 2022).

⁷⁶⁸ Graves, [Racial Disparities in California's State Prisons Remain Large Despite Justice System Reforms](#) (2021) Cal. Budget & Policy Center, p. 12 (as of Mar. 20, 2022).

⁷⁶⁹ Feagin & Bennefield, *supra*, at pp. 10-12.

⁷⁷⁰ *Ibid.*

⁷⁷¹ Goosby & Heidbrink, *supra*.

⁷⁷² CDC 2020, *supra*.

⁷⁷³ Owens 2019, *supra*.

and its degradation of Black American health. Since then, this dehumanization has been sustained by a healthcare system that destroys Black health through overt and covert discrimination by medical providers, public policies that neglect Black Americans' health needs, hospitals that continue to be segregated, medical schools that systematically exclude Black Americans, and a health insurance system designed to be inaccessible to poor Black Americans. The United States' healthcare system was designed during the time of enslavement to keep enslaved people alive for profit, not to take care of their health. After slavery was abolished in name, this healthcare system continued to operate in the same manner—segregating, excluding, harming, abusing, experimenting upon, and degrading Black American health. To atone for the violence of slavery and its destructive impact on Black health, health-based reparations must be awarded to Black Americans.

DRAFT

Chapter 13. The Wealth Gap

I. Introduction

Wealth—what you own minus what you owe—is the key to economic security.¹ It is what enables families to build a better future.² For a family, wealth functions in many ways. It provides economic stability during lean times. It opens doors to improving quality of life. It is a dam against the floodwaters of economic catastrophes. It provides access to political power. And it allows us to live and retire with dignity. Wealth can also be passed down through generations, allowing children to live better lives than their parents and grandparents. It allows parents to pay for their children’s college education. It allows grandparents to help a young family buy their first home. Throughout American history, government policies at all levels have helped white families accumulate these tools while preventing or undermining Black Americans’ ability to do the same.

As a result, the wealth gap between Black and white Americans is enormous, and roughly the same today as it had been two years before the Civil Rights Act was passed in 1964.³ In 2019, the median Black household had a net worth of \$24,100, less than 13 percent of the median net worth of white households at \$188,200.⁴ This wealth gap persists regardless of education level and family structure.⁵ For example, at the median, single Black women over the age of 60 with a college degree— at \$11,000—have less than three percent of the wealth of single white women over the age of 60 with a college degree— at \$384,000.⁶ In short, for every dollar owned by a college educated older white woman, a similarly-situated Black woman has three cents.

Single white parents have more than double the wealth (\$35,000), at the median, than married black parents (\$16,000).⁷ The wealth gap also is present across all income levels. In 2016, estimates drawn from the Survey of Consumer Finances indicate the median white household in the bottom fifth of incomes, or the poorest “quintile” of white households, had a net worth of \$21,700, which is greater than the median net worth of \$18,601 for *all* black households.⁸ Black households in the bottom fifth of incomes had a median net worth of \$2,700, less than one eighth as much as the poorest quintile of white households.⁹

The trend is the same across social class. White households with working class breadwinners typically have two to three times the wealth of black households with professional-managerial class breadwinners. For example, in 2019, the median white working-class household had a net worth of \$114,270, while the median black professional-managerial household had a net worth of \$38,800. In the same year, white professional-managerial

¹ Hicks et al., *Still Running Up the Down Escalator: How Narratives Shape Our Understanding of Racial Wealth Inequality* (2021), https://socialequity.duke.edu/wp-content/uploads/2021/09/INSIGHT_Still-Running-Up-Down-Escalators_vF.pdf (as of Mar. 18, 2022).

² Ibid.

³ Fed. Reserve Bank of Cleveland, *What is Behind the Persistence of the Racial Wealth Gap?* (Feb. 28, 2019), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap.aspx> (as of Mar. 18, 2022).

⁴ U.S. Federal Reserve, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

⁵ Darity Jr. and Mullen, *From Here to Equality: Reparations for Black Americans in the 21st Century* (2020) pp. 35-38 (hereafter *From Here to Equality*).

⁶ Id. at p. 36.

⁷ Ibid.

⁸ Darity Jr. et al, *A Subaltern Middle Class: The Case of the Missing Black Bourgeoisie* in *Contemporary Economic Policy* (Jul. 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/coep.12476>, p. 499.

⁹ Ibid.

households—at \$276,000—had a median net worth that was eight times the median black professional-managerial household and *19 times* the median black working-class household.¹⁰

The discrimination Black Americans experience, as described in the previous 12 chapters, has resulted in this racial wealth gap.¹¹ The American government at the federal, state, and local levels has systematically prevented Black American communities from building, maintaining, and passing on wealth. These harms cascade over a lifetime and compound over generations.

The historical causes of the wealth gap extend back from enslavement, legal segregation, and subordination, through ongoing racial inequality and racism today. They include direct government creation of white wealth and destruction of Black wealth through the support of racial terror, disenfranchisement, land theft, mass incarceration, exclusion of Black Americans from government benefits, and banking discrimination. Unequal homeownership, fewer assets, and lower business ownership continue to drive the wealth gap today. This has resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crises, and homelessness.

Section III discusses estimates of the contemporary racial wealth gap for the nation as whole, for California, by gender, and for descendants of Africans enslaved in the United States. Section IV describes historical causes of the racial wealth gap during enslavement and post-enslavement, including racial terror, land theft, mass incarceration, and discrimination in government benefits, the labor market, and banking. Section V discusses the drivers of the contemporary wealth gap today include unequal homeownership, Black Americans' holding fewer assets, and lower business ownership. Section VI discusses the harmful effects of the wealth gap, which cascades across generations, have resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crisis, and homelessness.

II. The Contemporary Racial Wealth Gap

This section discusses estimates of the contemporary racial wealth gap for the nation as whole, for California, by gender, and by immigration and migration patterns.

A. National and California Estimates

Significant research on the contemporary wealth gap in recent decades and literature on Black wealth gaps in the immediate decades after emancipation, demonstrate that white Americans have long had a higher net worth than Black Americans. And there is research underway about the much lesser-known historical evolution of the racial wealth gap.¹² The gap has changed little since 1989, when the median white household wealth was \$143,000, and the median Black household wealth was \$9,000. At that time, Black household wealth was approximately 94 percent less than white household wealth.¹³ The wealth gap was roughly the same in 2016 as

¹⁰ Fenaba et al., *Disparate Recoveries: Wealth, Race, and the Working Class After the Great Recession* in *Annals of the American Academy of Political and Social Science* (May 2021), <https://journals.sagepub.com/doi/full/10.1177/00027162211028822>, p. 182.

¹¹ Williamson, *Closing the racial wealth gap requires heavy progressive taxation of wealth* (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/> (as of Mar. 18, 2022).

¹² Dereroncourt, et al. *The racial wealth gap, 1860-2020* (Mar. 8, 2021), <https://www.russellsage.org/sites/default/files/Dereroncourt.Proposal.pdf> (as of Mar. 18, 2022).

¹³ Kent, et al., *Has Wealth Inequality in America Changed over Time? Here are Key Statistics* (Dec. 2, 2020), Federal Reserve Bank of St. Louis, <https://tinyurl.com/44anuuf3> (as of January 19, 2022).

it was in 1962,¹⁴ two years before the Civil Rights Act. Preliminary research suggests that, despite rapid accumulation of wealth by Black Americans in the decades after slavery and sharp episodes of income convergence during World War II and the Civil Rights era, racial wealth convergence halted by the mid-20th century with racial wealth gaps slightly worsening over the last several decades.¹⁵ Indeed, due to the impact of the Great Recession, the wealth gap has widened. From 2005 to 2019, an interval that captures much of the impact of the Great Recession, median household wealth—, i.e., all assets minus all debt, the latter including mortgages, credit card balances, and other loans—among Black Americans actually fell 53 percent, compared with a drop of 16 percent among white Americans.¹⁶

An asset is anything you own that adds financial value, as opposed to a liability, which is money you owe.¹⁷ Examples of personal assets include: a home or other property, such as a rental house or commercial property; a checking or savings account; cars; financial and retirement accounts; gold, jewelry, and coins; collectibles and art; and life insurance policies.¹⁸ Wealth estimates can be demonstrated in median and mean figures, both of which are provided in this chapter. A median figure shows the worth of the middle household in each community.¹⁹ A mean figure shows the worth of the average household in the community.²⁰ Some researchers suggest that the median is a more useful measure for calculating typical differences in wealth between Black and white people because it is not affected by exceptions like small numbers of extremely rich individuals who would skew the average higher than is representative.²¹ However, researchers also suggest that the mean is the appropriate target measure for calculating the sum required to eliminate the racial wealth gap.²² Policymakers have usually focused on the median gap in wealth, which some researchers argue is not representative of what is happening to the average Black or white person in reality.²³ Comparing Black and white wealth at the mean—for the average household in each community—shows a far larger wealth gap.²⁴

Today, white American households continue to be far more likely to hold assets, and the types of assets they hold are worth, on average, more than that of Black American households.²⁵ In 2019, the most recent year for which data is available, the total financial assets of white households is nine times higher than Black American households.²⁶ The median Black American household wealth was approximately \$24,100, while median white household wealth was approximately \$188,200—a difference of \$164,100.²⁷

¹⁴ Fed. Reserve Bank of Cleveland, *What is Behind the Persistence of the Racial Wealth Gap?*, *supra*.

¹⁵ Dereroncourt, et al., *The racial wealth gap 1860-1820*, *supra*, pp. 1-2.

¹⁶ From Here to Equality, *supra*, p. 36; Kocchar and Fry, *Wealth inequality has widened along racial, ethnic lines, since the end of the Great Recession* (Dec. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> (as of Mar. 18, 2022).

¹⁷ Maddox, *What are assets? The building blocks of wealth for individuals and profits for businesses* (Nov. 7, 2021), <https://www.businessinsider.com/what-are-assets> (as of Mar. 18, 2022).

¹⁸ *Ibid.*

¹⁹ Darity, Jr., *The True Cost of Closing the Racial Wealth Gap*. The New York Times (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/business/racial-wealth-gap.html> (as of Mar. 18, 2022).

²⁰ *Ibid.*

²¹ From Here to Equality, *supra*, p. 257.

²² *Ibid.*

²³ Darity Jr., *The True Cost of Closing the Racial Wealth Gap*, *supra*.

²⁴ *Ibid.*

²⁵ Hicks et al. *Still Running Up the Down Escalator*, *supra*.

²⁶ *Id.* at p.8.

²⁷ *Id.* at p.6.

This wealth disparity cannot be explained by lack of personal motivation and effort, lack of financial literacy, family instability, lack of education, lack of homeownership, or lack of entrepreneurship on the part of Black Americans.²⁸ For instance, there is very little, if any, evidence to support the claim that Black saving behavior is the source of the enormous racial wealth gap.²⁹ There is no significant difference in savings between Black and white families with similar income levels, nor a difference in rates of return on their personal investments.³⁰ In fact, in some income categories, Black people display a higher rate of savings.³¹ And though Black Americans have more family obligations on their income than white Americans because their relatives are more likely to have need than white Americans, the savings rate among Black people is comparable to the savings rate at each level of household income among white people.³² Differences in family structure also do not explain the racial wealth gap.³³ Single white women with children have as higher a median net worth as compared to black women with no children.³⁴ At the media, single white parents have more than two times the wealth— at \$35,000—of married black parents—at \$16,000.³⁵ The supposed economic benefits of having the “ideal” family type do not translate into closure of the racial wealth gap.³⁶ Being a “stable,” married, two-parent Black family far from evens Black and white wealth levels.³⁷ For comparable levels of family socioeconomic status, Black youth obtain more years of schooling and credentials, including college degrees, than white youth.³⁸

The extent of the Black-white wealth gap and its causes in California and the nation is an under-studied area. Available scholarship has concluded that the racial wealth gap in California is comparable or worse than at the national level. Some studies, unsatisfactorily, extrapolate California’s racial wealth gap from national estimates.³⁹ Direct California estimates of the racial wealth gap are only available in a single metropolitan area, Los Angeles.⁴⁰ In 2016, while the median net worth of white Angelino households (assets minus debts) was

²⁸ Darity Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap* (Apr. 2018), Samuel Dubois Cook Center on Social Equity, <https://socialequity.duke.edu/wp-content/uploads/2020/01/what-we-get-wrong.pdf> (as of Mar. 18, 2022); From Here to Equality, *supra*, pp. 33-34.

²⁹ *Ibid.*

³⁰ From Here to Equality, *supra*, p. 36.

³¹ *Ibid.*

³² For the most recent studies that present documentation about the absence of any significant difference in black and white saving behavior after controlling for household income, see Borgo, *Ethnic and Racial Disparities in Saving Behavior* in *Journal of Economic Inequality*, no. 17 (2019) pp. 253–83; and Traub et al., *The Asset Value of Whiteness: Understanding the Racial Wealth Gap* (Feb. 6, 2017), http://www.demos.org/sites/default/files/publications/Asset%20Value%20of%20Whiteness_0.pdf. See also Gittleman and Wolff, *Racial Differences in Patterns of Wealth Accumulation* in *Journal of Human Resources* 39, no. 1 (2004) pp. 193–227; and Chiteji and Hamilton, *Family Connections and the Black-White Wealth Gap among Middle-Class Families* in *Review of Black Political Economy* 30, no. 1 (2002) pp. 9–28.

³³ *What We Get Wrong About Closing the Racial Wealth Gap, supra.*

³⁴ *Ibid.*

³⁵ Traub et al., *Asset Value of Whiteness, supra*, pp. 7–8.

³⁶ *What We Get Wrong About Closing the Racial Wealth Gap, supra.*

³⁷ *Asset Value of Whiteness, supra*, pp. 7–8.

³⁸ See Mason, *Race, Culture, and Skill: Interracial Wage Differentials among African Americans, Latinos, and Whites* in *Review of Black Political Economy* 25, no. 3 (1997) pp. 5–39; Mangino, *Race to College: The ‘Reverse Gap’* in *Race and Social Problems*, no. 2 (Dec, 2010) pp. 164–78; Mangino, *Why Do Whites and the Rich Have Less Need for Education?* in *American Journal of Economics and Sociology* 71, no. 3 (Jul. 2012) pp. 562–602; Mangino, *The Negative Effects of Privilege on Educational Attainment: Gender, Race, Class, and the Bachelor’s Degree* in *Social Science Quarterly* 95, no. 3 (Sept. 2014) pp. 760–84.

³⁹ *Ibid.*

⁴⁰ *An Equity Profile of the Los Angeles Region* (2017), Policy Link and the Program for Environmental and Regional Equity, https://dornsife.usc.edu/assets/sites/242/docs/EquityProfile_LA_Region_2017_Full_Final_Web.pdf (as of Mar. 18, 2022); De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles* (2016), Fed. Reserve Bank of San Francisco, <https://www.frbsf.org/wp-content/uploads/sites/3/color-of-wealth-in-los-angeles.pdf> (as of Mar. 18, 2022); Ong, et al., *Race, Ethnicity, And Income Segregation*

\$355,000, median net worth of native-born Black Angelino households was \$4,000.⁴¹ The average Black household in Los Angeles had only just had one percent of the median wealth of the average white household, far worse than the national average of 10 to 15 percent.⁴²

B. Gender-Specific Estimates

The wealth gap between Black men and women, which is small,⁴³ functions differently than the wealth gap between white men and women, which is much larger. In terms of numbers, Black men and women have similarly low wealth, although for slightly different reasons.⁴⁴

The wealth gap between white men and women is largely because white men have traditionally had access to jobs that provide retirement accounts and other benefits available to careers not traditionally available to women.⁴⁵ These factors do not exist between Black men and women, as Black Americans of all genders historically have been excluded from these benefits due to the effects of government action and private labor discrimination, as discussed in Chapter [xx].

The median wealth for single Black women is a mere \$200, while the median wealth of single Black men is only \$300.⁴⁶ Studies that show a greater wealth gap between Black women and men do not appear to take into account the effects of mass incarceration, as Black men are deprived of their ability to build wealth for themselves and their family during a prison sentence.⁴⁷ Indeed, because incarcerated people are not included in most survey data, statistics that seemed to indicate a narrowing black-white racial gap—on educational attainment, work force participation, and earnings—instead fail to capture persistent racial, economic, and social disadvantage among African Americans.⁴⁸ Federal statistical agencies, including the U.S. Census Bureau, collect little information about people who are incarcerated, and they are excluded from household samples in national surveys.⁴⁹ As a result, these individuals are invisible to most mainstream social institutions, lawmakers, and nearly all social science research not directly related to crime or criminal justice.⁵⁰ And since Black Americans are six times more likely to be incarcerated than white Americans and twice as likely as Latino Americans, this has the effect of making it appear that Black Americans are better off financially than they

in *Los Angeles* (Jun. 24, 2016), UCLA Center for Neighborhood Knowledge, https://knowledge.luskin.ucla.edu/wp-content/uploads/2018/01/Race-Ethnicity-and-Income-Segregation-Ziman_2016.pdf (as of Mar. 18, 2022).

⁴¹ Ibid.

⁴² De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles*, *supra*, p.40.

⁴³ See *Racial Wealth Divide Snapshot: Women and the Racial Wealth Divide* (Mar. 29, 2018), Prosperity Now, <https://prosperitynow.org/blog/racial-wealth-divide-snapshot-women-and-racial-wealth-divide> (as of Mar. 18, 2022).

⁴⁴ Ibid.

⁴⁵ [citation needed]

⁴⁶ *Racial Wealth Divide Snapshot*, *supra*.

⁴⁷ See, e.g., Struyven, *Black Womenomics: Investing in the Underinvested* (Mar. 9, 2021), Goldman Sachs, <https://tinyurl.com/4d9rm59t>, p. 27 (as of Jan. 19, 2022); Pettit, review of McDermott, *Mass Incarceration and the Myth of Black Progress* (2012), <https://www.journals.uchicago.edu/doi/abs/10.1086/672363?journalCode=ajs> (as of Mar. 18, 2022).

⁴⁸ Ibid.

⁴⁹ Ibid. See also Kop, *Why the U.S. underreports the economic gaps between white and black Americans* (Jun. 3, 2020) <https://qz.com/1863507/the-us-distorts-the-economic-gaps-between-white-and-black-americans/> (as of Mar. 18, 2022).

⁵⁰ Pettit, review of McDermott, *Mass Incarceration and the Myth of Black Progress*, *supra*.

really are.⁵¹ As discussed below in section IV, criminal convictions also create numerous barriers to wealth building even after the sentence ends.

Still, Black women face barriers to wealth building due to the combination of racism and sexism. As a result, there are vast differences in wealth between Black women and both white men and white women.⁵² One study reports that, in 2019, single Black women's median net wealth was \$7,000, while median net wealth for white women was \$85,000, and \$92,000 for single white men.⁵³ While white men's median wealth was \$28,900 in 2015, Black women's median wealth was \$200, less than one cent on every dollar of white men's median wealth.⁵⁴

The large wealth gap faced by single Black women is particularly important because Black women are more and increasingly likely to be single and breadwinner mothers.⁵⁵ The marriage rate of Americans aged 25 to 54 has declined since the early 1960s across all groups, but especially for Black women for whom it has halved to less than 40 percent.⁵⁶ One-third of Black women aged 25 to 54 are single with children in the household.⁵⁷ Among Black mothers, more than 80 percent are breadwinners compared to 50 percent of white mothers.⁵⁸ At least half of nonmarried Black American women have zero or negative assets.⁵⁹ On average, Black American women do not accumulate net worth approaching retirement; they have no financial assets at age 50 and do not accumulate any more as they age.⁶⁰

Black men also face a stark wealth gap with white women and men. One study reports that, in 2015, median net wealth for Black men was 15 percent of the median net wealth for white men and 16 percent of the wealth of white women.⁶¹ While white men's median wealth was \$28,900 in 2015, Black men's median was \$300, about one cent on every dollar of white men's wealth.⁶² As detailed below, mass incarceration in particular has devastating effects on wealth accumulation for Black men, impacting Black household wealth overall.

There does not appear to be extensive scholarship on wealth gap estimates for Black LGBTQ populations.

⁵¹ Gramlich, *The gap between the number of blacks and whites in prison is shrinking* (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> (as of Mar. 18, 2022)./

⁵² Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*.

⁵³ Struyven, *Black Womenomics: Investing in the Underinvested* (Mar. 9, 2021), Goldman Sachs, p.6, <https://tinyurl.com/4d9rm59t> (as of Jan. 19, 2022)

⁵⁴ *Racial Wealth Divide Snapshot: Women and the Racial Wealth Divide*, *supra*.

⁵⁵ Struyven, *Black Womenomics: Investing in the Underinvested*, *supra*; Richard, *The Wealth Gap for Women of Color* (2014), Center for Global Policy Solutions Fact Sheet, <http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf> (as of Mar. 18, 2022).

⁵⁶ *Black Womenomics: Investing in the Underinvested*, *supra*.

⁵⁷ *Ibid*,

⁵⁸ *Ibid*.

⁵⁹ Richard, *The Wealth Gap for Women of Color*, *supra*.

⁶⁰ Brown, *The Intersection and Accumulation of Racial and Gender Inequality: Black Women's Wealth Trajectories* (Jun. 2011) in *The Review of Black Political Economy*, https://www.researchgate.net/publication/257770555_The_Intersection_and_Accumulation_of_Racial_and_Gender_Inequality_Black_Women's_Wealth_Trajectories (as of Mar. 18, 2022).

⁶¹ *Racial Wealth Divide Snapshot: Women and the Racial Wealth Divide*, *supra*.

⁶² *Ibid*.

C. Estimates Based on Immigration and Migration Patterns

Today, approximately 41.1 million Black people live in the United States, according to the 2020 census.⁶³ Of those 41.1 million Black individuals, academics and other experts differ on the number who are the descendants of Black people enslaved in the United States. Name changes, destruction of culture, inaccurate records, forced family separation, and other consequences of 400 years of racial oppression make it extremely difficult to trace which Black individuals living today are American descendants of people who were enslaved. On the other hand, about 12 percent of Black people in America were born in a foreign country.⁶⁴ Nine percent of Black Americans have at least one foreign-born parent.⁶⁵ By 2060, the Black foreign-born population is projected to make up about one-third of the U.S. Black population.⁶⁶ Fifty-eight percent of Black immigrants arrived in the United States after 2000.⁶⁷ Of the current 2.8 million Black Californians, 244,969 are foreign born, according to the U.S. Census Bureau.⁶⁸ And every U.S. census conducted since 1970 has found that Black immigrants earn more, are more likely to be employed than U.S.-born Black Americans, are more likely to hold more financial assets,⁶⁹ are more likely to own their home,⁷⁰ and most are more likely to be healthy than U.S.-born Black Americans.⁷¹

There appears to be no data at the national and state level and limited scholarship at the city level describing the wealth gap between descendants of Black people enslaved in the United States, recent Black immigrants, and white Americans.⁷² Very few of the city level studies present findings on the wealth gap that disaggregates the racial category of Black by national origin.⁷³ Some scholars argue that the effects of systemic racism have had unique and exceptional harms to Black American descendants of slavery when compared to Black immigrants who do not have the same experience of systemic racial discrimination in the United States.⁷⁴

⁶³ *Race: Total Population*. Explore census data. (n.d.). Retrieved February 22, 2022, from <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

⁶⁴ Tamir, *Key Findings About Black Immigrants in the U.S.* (Jan. 27, 2022), Pew Research Center, <https://www.pewresearch.org/fact-tank/2022/01/27/key-findings-about-black-immigrants-in-the-u-s/> (as of Mar. 18, 2022).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Place of Birth for the Foreign-Born Population in California*, Explore census data, (n.d.), Retrieved March 18, 2022, from <https://data.census.gov/cedsci/table?q=Black%20foreign%20born%20population%20in%20California%20&g=0400000US06&tid=ACSDT5YSPT2015.B05006>.

⁶⁹ Hicks et al. *Still Running Up the Down Escalator*, *supra*.

⁷⁰ Hamilton, *Immigration and the Remaking of Black America* (May 2019).

⁷¹ *Ibid.*

⁷² De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles*, *supra*. Aja, et al, *The Color of Wealth in Miami* (Feb. 2019), **Error! Hyperlink reference not valid.** <https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Miami-Metro.pdf> (as of Mar. 18, 2022). Munoz, et al., *The Color of Wealth in Boston*, Fed. Reserve of Boston, <https://socialequity.duke.edu/wp-content/uploads/2019/10/The-Color-of-Wealth-in-Boston.pdf> (as of Mar. 18, 2022); Kijakazi, et al, *The Color of Wealth in the Nation's Capital* (Nov. 2016), https://www.researchgate.net/publication/310425115_The_Color_of_Wealth_in_the_Nation%27s_Capital#fullTextFileContent (as of Mar 18, 2022).

⁷³ *Ibid.*

⁷⁴ Roderick Graham, "Reflections on the ADOS Movement," *Medium*, March 3, 2019, <https://medium.com/@roderickshawngraham/reflections-on-the-ados-movement-a8f0355c7275> (as of Mar. 18, 2022).

One study, “*The Color of Wealth in Los Angeles*,” included separate data for descendants of Black people enslaved in the United States and recent African Black immigrants.⁷⁵ National origin and race were both self-reported in this study.⁷⁶ On average, white Angelinos were far more likely to hold assets in stocks, mutual funds, and investment trusts than both U.S. and African Black Angelinos.⁷⁷ But, African Black Angelinos were likely to hold more assets than U.S. Black Angelinos. For example, 87 percent of African Black Angelinos owned liquid assets versus 62 percent of Black Angelinos born in the United States.⁷⁸ Eighty percent of African Black Angelinos had a checking account versus 68 percent of U.S. Black Americans.⁷⁹ Eighty percent of African Black Angelinos had a savings account versus 56 percent of U.S. Black Angelinos.⁸⁰ Such studies in other cities reflect comparable wealth gaps between descendants of Black people enslaved in the United States and recent African Black immigrants.⁸¹

III. Historical Causes of the Racial Wealth Gap

The modern racial wealth gap between Black Americans and other racial groups began with enslavement. But scholars debate whether enslavement should be the basis for reparations given that today’s wealth differential captures the cumulative effects of racism on living Black descendants of American enslavement.⁸² This section describes historical causes of the racial wealth gap during and post-enslavement, including racial terror, land theft, mass incarceration, and discrimination in government benefits, the labor market, and banking.

A. Enslavement

Several scholars have estimated the slavery bill for Black reparations.⁸³ Most of these estimates require a calculation in today’s dollars for unpaid wages, the purchase prices of the human property, or the land promised to the formerly enslaved.⁸⁴ These estimates are generated by multiplying earlier values by a compound interest rate.⁸⁵ For example, Thomas Craemer’s calculations for unpaid wages owed to enslaved people amounts to \$19.4 trillion in today’s dollars.⁸⁶ He arrives at this number by multiplying the prevailing average market wage by the number of hours “worked” for each 24-hour day by those enslaved over the interval of 1776 to 1865 and applies a three percent interest rate.⁸⁷ Merely doubling the interest rate to the more realistic six percent would exponentially blow up the total estimate to \$6.6 quadrillion in 2019 dollars.⁸⁸

Similar to Craemer’s estimates is James Marketti’s bill for reparations from enslavement using the idea of income diverted from enslaved persons.⁸⁹ He derived a cumulative figure of \$2.1 trillion as of 1983. Using a six

⁷⁵ De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles*, *supra*.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² From Here to Equality, *supra*, p. 258.

⁸³ *Id.* at pp. 253-258.

⁸⁴ *Id.* at p. 253.

⁸⁵ *Ibid.*

⁸⁶ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Thomas Craemer, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

⁸⁷ Craemer, *Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies* in *Social Science Quarterly* 96, no. 2 (June 2015), pp. 639–55.

⁸⁸ *Ibid.*

⁸⁹ Marketti, *Estimated Present Value of Income Directed during Slavery in America*, *Wealth of Races*, pp. 107–24.

percent interest rate; the 2018 value would amount to \$17.1 trillion.⁹⁰ Another estimate is reached by calculating the value in today's dollars of the wealth held in the property in enslaved persons. For example, Judah P. Benjamin, a critical member of Jefferson Davis's Confederate Cabinet proclaimed the value of enslaved persons in 1860 to be four billion dollars, which compounds to \$42.2 trillion by 2019 at a six percent interest rate.⁹¹ Other scholars argue that as large as such estimates seem, they are in fact, underestimates because they do not account for the physical and emotional harms of enslavement, the coercive nature of the system, the denial of the ability to acquire property and some degree of autonomy, or the denial of control over one's own family life.⁹²

B. Post-Enslavement

The case for reparation extends beyond slavery to Jim Crow, the near-century-long era of legal segregation and terror, and the atrocities that continue today: mass incarceration; police killings of unarmed Black Americans; sustained credit, housing, and employment discrimination; and the immense Black-white wealth disparity.⁹³ Post-enslavement American history can be divided into five overlapping phases of federal government policies, which created the modern racial wealth gap. They involve white wealth creation through government land grants, Black wealth destruction through racial terror, white wealth creation through mortgage subsidies, Black wealth destruction through eminent domain, and Black wealth destruction through mass incarceration.

1. White Wealth Creation through Government Land Grants

The first phase lasted from 1862 to 1976. This phase was characterized by the federal government transferring massive amounts of land mostly to white families. Some scholars have named this phase the Wagon Train phase, after the covered-wagon caravans romanticized by 1950s television shows, which carried white families to seek their fortunes in the West.⁹⁴ In 1862, the federal government established the Homestead Act under which land distributions took place until 1980, although more occasionally after the 1920s.⁹⁵ The Homestead Act encouraged western migration by providing American citizens—and immigrants soon to be citizens—up to 160 acres of public lands, which was increased to 320 acres in 1909—for \$0 if they continuously lived on the property for five years and paid a small \$10 filing fee.⁹⁶ After six months, homesteaders also had the option of getting around the five-year residency requirement if they paid \$1.25 per acre and lived on the property for six months.⁹⁷ While the language of the act did not exclude people based on race, Black Americans were unable to secure land allocations under the act for four years until the Civil Rights Act of 1866 clarified that they were

⁹⁰ From Here to Equality, *supra*, p. 254.

⁹¹ *Id.* at p. 255.

⁹² *Ibid.*

⁹³ *Id.* at pp. 255-56.

⁹⁴ *Ibid.*

⁹⁵ Allen, *Homesteading and Property Rights; or, 'How the West Was Really Won'* in *The Journal of Law and Economics* 34, no. 1, (1991).

⁹⁶ *Ibid.*

⁹⁷ Library of Congress, *Homestead Act: Primary Documents in American History* (n.d.), <https://guides.loc.gov/homestead-act> (as of Mar. 18, 2022).

citizens.⁹⁸ California's homestead laws similarly excluded Black Americans before 1900 because they required a homesteader to be a white citizen.⁹⁹

Though Black homesteaders were able to secure land allocations under the Act after 1866, which enabled Black migration out of the South to areas such as California and the Great Plains after Reconstruction, they were few in comparison to the multitudes of white settlers and had to settle for the least desirable land.¹⁰⁰ During the 124-year life of the legislation, the federal government gave 270 million acres of land essentially for free to mostly white, native-born and immigrant Americans—the landmass of California and Texas combined.¹⁰¹ More than 1.5 million white families received land patents, and today as many as 46 million of their living descendants reap the wealth benefits, approximately one-quarter of the adult population of the United States.¹⁰² Approximately 3,500 Black claimants succeeded in obtaining their patents from the General Land Office in the Great Plains, granting them ownership of approximately 650,000 acres of prairie land.¹⁰³ In California, Black homesteaders can be traced back to 1900, when agricultural settlements were promoted at various times after the turn of the century in Yolo, San Bernardino, Tulare, and Fresno counties.¹⁰⁴ At least two different efforts at colonization occurred in San Bernardino County between 1900 and 1910, including solicitation of families to homestead government land in the Sidewinder Valley, desert land near Victorville.¹⁰⁵ Black homesteaders also established an agricultural settlement in 1908 in the town of Allensworth in Tulare County, which ultimately was depleted of a water supply necessary to sustain the settlement.¹⁰⁶ And despite the homesteading context that Black homesteaders shared with white Americans, they also faced racial challenges.¹⁰⁷ The racial climate around Black American colonies ranged from welcoming or neutral to hostile, although none have been reported to experience the kind of everyday violence and intimidation Black Americans regularly experienced in the South.¹⁰⁸

The federal government undermined other efforts to allocate land to the formerly enslaved. Another estimate of reparations to Black Americans can be made by calculating the value in today's dollars of the unfulfilled land distribution of "forty acres and a mule" promised to the formerly enslaved beginning in 1865.¹⁰⁹ On January 16, 1865, upon seizing the coastline from Charleston, South Carolina to St. John's River, Florida,¹¹⁰ General Sherman issued Special Field Orders No. 15 that established the provision "of not more than (40) forty acres of tillable ground" designated "for the settlement of the negroes now made free by the acts of war and the

⁹⁸ University of Nebraska-Lincoln - Center for Great Plains Studies, *Homesteading* (n.d.), <https://www.unl.edu/plains/homesteading-research> (as of Mar. 18, 2022).

⁹⁹ National Park Service, *A History of Black Americans in California: Farming* (n.d.) https://www.nps.gov/parkhistory/online_books/5views/5views2d.htm (as of Mar. 18, 2022).

¹⁰⁰ *Ibid.*; National Park Service, *African American Homesteaders in the Great Plains*, <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm> (as of Mar. 18, 2022).

¹⁰¹ National Park Service, *African American Homesteaders in the Great Plains*, *supra*.

¹⁰² Merritt, *Land and the roots of African-American Poverty* (Mar. 11, 2016), AEON, <https://aeon.co/ideas/land-and-the-roots-of-african-american-poverty> (as of Mar. 18, 2022).

¹⁰³ National Park Service, *African American Homesteaders in the Great Plains*, *supra*.

¹⁰⁴ *Ibid.*; National Park Service, *A History of Black Americans in California: Farming*, *supra*.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ National Park Service, *African American Homesteaders in the Great Plains*, *supra*.

¹⁰⁸ *Ibid.*

¹⁰⁹ From Here to Equality, *supra*, p. 255; Darity, Jr., *Forty Acres and a Mule in the 21st Century* in *Social Science Quarterly* 89, No. 3 (Sept. 2008), https://projects.iq.harvard.edu/files/lancet-reparations/files/darity_w_forty_acres_2008.pdf (as of Mar. 18, 2022).

¹¹⁰ Brown, *Forty Acres and a Mule: How the First Reparations for Slavery Ended in Betrayal* (Apr. 15, 2021), <https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations/> (as of Mar. 18, 2022).

proclamation of the President of the United States.”¹¹¹ The order carved out 400,000 acres of land confiscated or abandoned by Confederates. Each family of formerly enslaved Black people would get up to 40 acres.¹¹² The Army would lend them mules no longer in use.¹¹³ Further, the Freedmen’s Bureau Act of March 3, 1865, had an explicit racial land redistribution provision that specified that “not more than 40 acres” of land was to be provided to refugee or freed male citizens at three years’ annual rent not exceeding six percent of the value of the land based on appraisal of the state tax authorities in 1860.¹¹⁴ At the end of three years of occupying the land, they could purchase it and receive title.¹¹⁵ Similar provisions were included in the postwar Southern Homestead Act of 1866. Freedmen were to receive land in the southern states at a price of \$5 for 80 acres.¹¹⁶

Neither of these acts were effectively implemented on behalf of the formerly enslaved, given President Andrew Johnson’s intense opposition.¹¹⁷ By the end of 1865, Johnson also had ordered the removal of thousands of formerly enslaved persons from the lands they had settled under Sherman’s Special Field Orders No. 15,¹¹⁸ which were ultimately given back to former enslavers.¹¹⁹ With the exception of a small number who had legal land titles, freed Black people were removed from the land as a result of President Johnson’s “restoration” program.¹²⁰ Thousands of Black Americans left without land were eventually forced into sharecropping and peonage.¹²¹

If four million enslaved persons had gained emancipation by 1865, and the land allocation rule meant that roughly 40 acres would go to families of four, each formerly enslaved individual would have been allocated about 10 acres. This implies a total distribution of at least 40 million acres of land. Using a conservative estimate of \$10 per acre, the total value of the projected distribution of land to the “freedmen” would have been \$400 million in 1865.¹²² The value in today’s dollars at a six percent interest rate would be \$1.3 trillion. This number would be much higher if the conditions of the Southern Homestead Act, which provided for 80 acres of land to be sold to freedman at \$5 total were treated as a debt to be paid to the descendants of the formerly enslaved.¹²³ And if as some scholars interpret, *each* freedman was eligible to receive 40 acres of land, it would have led to a much higher total value of the land to be distributed to freedmen after the war—amounting to \$1.6 billion in 1865 and compounding to \$12.6 trillion at a six percent interest rate in 2019.¹²⁴

2. Black Wealth Destruction through Racial Terror

The second phase has lasted from 1865 to the present, and has been characterized by federal and local government dereliction of duty as government actors refused to protect Black Americans during periods of

¹¹¹ Darity Jr., *Forty Acres and a Mule in the 21st Century*, *supra*.

¹¹² Brown, *Forty Acres and a Mule: How the First Reparations for Slavery Ended in Betrayal*, *supra*.

¹¹³ *Ibid*.

¹¹⁴ Darity Jr., *Forty Acres and a Mule in the 21st Century*, *supra*.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ Brown, *Forty Acres and a Mule: How the First Reparations for Slavery Ended in Betrayal*, *supra*.

¹¹⁹ Darity Jr., *Forty Acres and a Mule in the 21st Century*, *supra*.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

¹²² Darity Jr., *Forty Acres and a Mule in the 21st Century*, *supra*.

¹²³ *Ibid*.

¹²⁴ From Here to Equality, *supra*, p. 256.

racial terror and land theft. Sometimes, government actors joined, led, or supported the violence.¹²⁵ As detailed in Chapter 3 on racial terror, white federal, state, and local government officials, working jointly with private citizens, terrorized Black Americans to prevent them from accumulating political and economic power.¹²⁶ White mobs destroyed thriving Black communities in racial massacres nationwide, whether in Louisiana, North Carolina, Michigan, Delaware, Nebraska, Florida, Illinois, Oklahoma, Texas, or elsewhere.¹²⁷ The most well-known was the destruction of the Greenwood district in Tulsa, Oklahoma. The Greenwood district was known popularly as “Black Wall Street.”¹²⁸ Scholars estimate that the present value of destroyed Black property in Tulsa is at least \$611 million.¹²⁹ The 1919 massacre in Elaine, Arkansas destroyed \$10 million of Black wealth.¹³⁰ Plus, there is evidence that murders of Black Americans continue to be driven by underlying economic incentives.¹³¹ Police killings of unarmed Black Americans frequently occur in neighborhoods undergoing white gentrification.¹³²

3. White Wealth Creation through Mortgage Subsidies

In the 19th century, a third phase of federal programs were designed to promote asset accumulation centered on the acquisition of land. This phase is characterized by federal, state, and local governments passing laws and implementing practices which heavily subsidized the creation of the white middle class while substantively crippling the ability of Black people to do the same.¹³³ Federal policies, implemented by private citizens focused on helping mostly white Americans buy single family homes.¹³⁴ As discussed in Chapter 5 on housing, the Veterans Administration, the Federal Housing Administration, and the Home Owner’s Loan Corporation subsidized white families’ purchase of single family homes in the suburbs while preventing Black families from doing the same.¹³⁵

Beginning in the 1930s and 1940s, the federal government created programs that subsidized low-cost loans opening up home ownership to millions of average Americans for the first time.¹³⁶ At the same time, government underwriters introduced a national appraisal system, tying property value and loan eligibility in part

¹²⁵ Darity Jr. and Mullen, *William A. Darity and Kristen Mullen on Direct Payments to Close the Racial Wealth Gap* (May 18, 2021), <https://www.economist.com/by-invitation/2021/05/18/william-darity-and-a-kirsten-mullen-on-direct-payments-to-close-the-racial-wealth-gap> (as of Mar. 18, 2022).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ The Tulsa estimate is provided in a pictorial section of the June 2021 issue of National Geographic with a detailed description of how the estimate was reached.

¹³⁰ Logan and Darity Jr., *Look What Has Been Taken from Black Americans* (Sept. 9, 2021),

<https://www.bloomberg.com/opinion/articles/2020-09-21/calculating-reparations-look-what-s-been-taken-from-black-americans> as of Mar. 18, 2022).

¹³¹ Taylor Jr., *Breonna Taylor’s death and racist police violence highlight the danger of gentrification* (Jul. 22, 2020),

<https://www.nbcnews.com/think/opinion/breonna-taylor-s-death-racist-police-violence-highlight-danger-gentrification-ncna1234472> (as of Mar. 18, 2022); Maharawal, *Gentrification and the Security State* (2017),

<https://journals.sagepub.com/doi/pdf/10.1177/1463499617732501>(as of Mar. 18, 2022); Fayyad, *The Criminalization of Gentrifying Neighborhoods* (2017), *The Atlantic*, <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/> (as of Mar. 18, 2022).

¹³² Darity Jr. and Mullen, *William A. Darity and Kristen Mullen on Direct Payments to Close the Racial Wealth Gap*, *supra*.

¹³³ *Ibid.*

¹³⁴ Public Broadcasting Service, *Go Deeper: Where Race Lives* (n.d.), https://www.pbs.org/race/000_About/002_06_a-godeeper.htm (as of Mar. 18, 2022) (PBS).

¹³⁵ Housing Chapter [xx]

¹³⁶ PBS, *supra*.

to racial composition, which designated predominantly nonwhite neighborhoods as hazardous and coloring these areas red—a process known as redlining.¹³⁷ Consequently, all-white communities received the highest ratings and benefited from low-cost, government backed loans. Minority and mixed neighborhoods—and especially Black neighborhoods—received the lowest ratings and were denied these loans.¹³⁸ This functionally concentrated Black Americans into impoverished neighborhoods in America’s urban centers.¹³⁹ Of the \$120 billion worth of new housing subsidized between 1934 and 1962, less than two percent went to nonwhite families—virtually locking them out of homeownership.¹⁴⁰ Today, approximately three in four neighborhoods—74 percent—that the federal government deemed “hazardous” in the 1930s remain low- to moderate-income, and more than 60 percent are predominantly nonwhite.¹⁴¹ In short, while federal intervention and investment helped expand homeownership and affordable housing for countless white families, it has undermined wealth building in Black communities.¹⁴²

4. Black Wealth Destruction through Disenfranchisement and Land Theft

The fourth phase began in 1956, with the passage of the National Highway Act. Like the second phase, this phase is also one of government theft and destruction.¹⁴³ As described in Chapter 5 on housing, during this phase, the federal government passed the National Highway Act and urban renewal legislation.¹⁴⁴ Funded by the federal government, state and local officials used eminent domain to destroy countless thriving Black communities in the name of highway and park construction, and urban renewal, erasing generations of accumulated Black wealth.¹⁴⁵ Black American business districts were cleaved by the highways, and never recovered.¹⁴⁶

For instance, in the mid-20th century, the federal United States Department of Agriculture’s policies displaced Black farmers from their land and discriminated against them at the height of the civil rights era.¹⁴⁷ During the civil rights era, federal anti-discrimination statutes that applied to the USDA were diluted by the time they reached the local level, and did not provide protection for Black farmers.¹⁴⁸ White USDA administrators gave millions of dollars in funding to all-white Southern local agricultural committees.¹⁴⁹ These powerful committees were county arms of the USDA and did not want Black farmers on their boards, so they would prevent their election by splitting the Black vote or through voter intimidation tactics.¹⁵⁰ These boards made decisions on loan recipients, acreage allotments, appropriate crop yields, hardship adjustments, and preferred farming methods, benefitting white farmers.¹⁵¹

¹³⁷ Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

¹³⁸ Center for American Progress, *Systematic Inequality, Displacement, Exclusion, and Segregation* (Aug. 7, 2019), <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/> (as of Mar. 18, 2022) (Center for American Progress).

¹³⁹ Darity Jr. and Mullen, *William A. Darity and Kristen Mullen on Direct Payments to Close the Racial Wealth Gap*, *supra*.

¹⁴⁰ PBS, *supra*.

¹⁴¹ Center for American Progress, *supra*.

¹⁴² *Ibid.*

¹⁴³ Darity Jr. and Mullen, *William A. Darity and Kristen Mullen on Direct Payments to Close the Racial Wealth Gap*, *supra*.

¹⁴⁴ Housing Chapter [xx]

¹⁴⁵ Darity Jr. and Mullen, *William A. Darity and Kristen Mullen on Direct Payments to Close the Racial Wealth Gap*, *supra*.

¹⁴⁶ *Ibid.*

¹⁴⁷ Daniel, *Dispossession: Discrimination against African American Farmers in the Age of Civil Rights* (2015), pp. 3-5.

¹⁴⁸ *Id.* at p. 34.

¹⁴⁹ *Id.* at p. 28.

¹⁵⁰ *Id.* at pp. 23, 124, 130.

¹⁵¹ *Id.* at p. 28.

The Farmers Home Administration was another agency that discriminated against and displaced Black farmers.¹⁵² The agency offered loans and credit to poor farmers for home construction and improvement.¹⁵³ But instead of going to badly-needed rural housing in the South, FHA loans went to segregated swimming pools, picnic areas, tennis courts, and golf courses in white communities.¹⁵⁴ Loan requirements were stringent and often subjective, such as whether an applicant was a good citizen.¹⁵⁵ Loans went to the white and wealthy while Black farmers were turned down.¹⁵⁶ Even if a Black farmer received a loan, agency administrators would seek to get rid of them by luring them into debt and then foreclosing and auctioning off their machinery.¹⁵⁷ As a result, Black farmers were pushed off their land.¹⁵⁸ Lawrence Lucas, President Emeritus of the United States Department of Agriculture Coalition of Minority Employees says that the USDA's programs continue to discriminate against Black farmers and that "a culture of systemic racism at the USDA that denies black farmers their dignity, that denies black farmers a right to farm, denies black farmers the right to the same programs and services that white farmers get in this country" is still present today."¹⁵⁹ In 1910, Black farmers owned 16 million acres of land. In 2007, they owned 3.2 million acres, an 80% loss.¹⁶⁰ In 1999, Black farmers filed a class action lawsuit against the USDA for unlawful discrimination against them in denying their farm loan applications.¹⁶¹ The lawsuit, *Pigford v. Glickman*, ultimately settled for money damages, but no policy changes at the USDA.¹⁶² While many claims have been paid, the USDA nonetheless has been slow to pay out all the claims, and has spent extensive resources in fighting claims.¹⁶³ In the 2021 coronavirus relief bill, \$4 billion was set aside for debt relief for socially disadvantaged farmers, including Black farmers, but payments have been stopped do to an ongoing lawsuit alleging it is reverse-racism and a "windfall" for some farmers.¹⁶⁴

5. Black Wealth Destruction through Mass Incarceration

The fifth phase began in the late 1980s as mass incarceration, mainly of Black men, and the war on drugs continued the American government's historical criminalization of Black Americans.¹⁶⁵ As discussed in Chapter 11 on the legal system, Black Americans have experienced marginalization, physical harm, and death, at the hands of the American criminal justice system at both the federal and state level beginning during slavery and continuing to today.¹⁶⁶

¹⁵² Id. at p. 220.

¹⁵³ Id. at p. 216.

¹⁵⁴ Id. at p. 216.

¹⁵⁵ Id. at p. 217.

¹⁵⁶ Id. at pp. 218, 229.

¹⁵⁷ Id. at pp. 219, 229.

¹⁵⁸ Id. at p. 232.

¹⁵⁹ California Task Force to Study and Develop Reparation Proposals for African Americans (October 13, 2021), Testimony of Lawrence Lucas, <https://oag.ca.gov/ab3121/meetings/102021> (as of February 10, 2022).

¹⁶⁰ Moore, *Plight of Black Farmers in the Context of USDA Farm Loan Programs: A Research Agenda for the Future* (December 16, 2013), Professional Agriculture Workers Journal, <https://tinyurl.com/yckr3rpa> (as of February 10, 2022)

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Healy, A Windfall for Minority Farmers Divides Rural America (May 22, 2021) The New York Times <https://tinyurl.com/kt6dtphn> (as of February 10, 2022)

¹⁶⁵ Darity Jr. and Mullen, *William A. Darity and Kristen Mullen on Direct Payments to Close the Racial Wealth Gap*, *supra*.

¹⁶⁶ Legal System Chapter [xx]

During the slavery era, federal and state governments criminalized Black Americans for existing as a method of establishing, maintaining, and socially controlling Black Americans as a lower class of human being than white Americans.¹⁶⁷ From 1865 to the 1950s, immediately after the abolition of slavery, state officials enacted “Black Codes” and legal segregation laws to continue controlling Black Americans.¹⁶⁸ For example, some of these laws criminalized activities like selling crops without permission from a white person. Other laws criminalized Black people for being too close to a white person in public, walking “without purpose,” walking next to railroad tracks, or assembling after dark.¹⁶⁹ California court cases and laws during these times show that the state contributed to the growing body of law that explicitly discriminated against Black Americans.¹⁷⁰

Mass incarceration picked up where enslavement left off, separating families and dehumanizing the descendants of enslaved Black people.¹⁷¹ In the 156 years since slavery was abolished, Black people in the United States have gone from being considered less than human under the law to being treated as less than human by a criminal legal system that still punishes them more harshly than white people at every stage.¹⁷² In systems such as “convict leasing,” laws and the U.S. Constitution allowed private entities to force formerly enslaved people and descendants of enslaved people into doing the same work, on the same land, and even for the same people as Black Americans would have when they were enslaved.¹⁷³ People who were “leased” were regularly treated even more brutally than enslaved people because plantation owners had a financial incentive to keep enslaved people alive.¹⁷⁴ Working and living conditions for incarcerated people were dangerous, unhealthy, and violent.¹⁷⁵ Most incarcerated people who were leased for labor did not even survive to complete 10-year sentences.¹⁷⁶ Until the mid-1950s, states routinely forced chain gangs of imprisoned people to do public works projects while wearing chains weighing as much as 20 pounds.¹⁷⁷

As a result of this legalized discrimination against Black Americans, Americans became further biased against Black Americans.¹⁷⁸ From the 1950s to present, American politicians ran on “law and order” or “tough on crime” platforms leading to laws and policies that punished Black Americans more than white Americans, often for similar crimes, resulting in mass incarceration and overrepresentation of Black Americans in the criminal justice system to present day, nationwide and in California.¹⁷⁹ Nearly 70 percent of young black men will be

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Matos and Hodge, *The Chains of Slavery Still Exist in Mass Incarceration* (Jun. 17, 2021), Vera Institute for Justice, <https://www.vera.org/blog/the-chains-of-slavery-still-exist-in-mass-incarceration> (as of Mar. 18, 2022).

¹⁷² Ibid.

¹⁷³ See generally Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account* (2019) 94 N.Y.U. L. Rev. 1465, 1467.

¹⁷⁴ Oshinsky, *Worse Than Slavery* (Apr. 28, 1996), <https://archive.nytimes.com/www.nytimes.com/books/97/05/25/nnp/19465.html> (as of Mar. 18, 2022).

¹⁷⁵ Ibid.; see also Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008); Cardon, “*Less Than Mayhem*”: *Louisiana’s Convict Lease, 1865-1901* (2017) *Louisiana History: The Journal of the Louisiana Historical Association* vol. 58, no. 4 pp. 417–441 <www.jstor.org/stable/26290931> (as of July 23, 2021).

¹⁷⁶ Hinton and Cook, *The Mass Criminalization of Black Americans: A Historical Overview* in *Annual Review of Criminology* (Jan. 2021), https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-060520-033306#_i4 (as of Mar. 18, 2022) (citing Oshinsky, *supra*).

¹⁷⁷ Ibid.

¹⁷⁸ Legal System Chapter [xx]

¹⁷⁹ Ibid.

imprisoned at some point in their lives, and poor black men with low levels of education make up a disproportionate share of incarcerated Americans.¹⁸⁰

Mass incarceration creates a vicious cycle in relation to wealth. Studies have shown that lower wealth increases the likelihood of incarceration and incarceration decreases the ability to build or maintain wealth.¹⁸¹ Black Americans, who have low family wealth compared to white Americans,¹⁸² are especially vulnerable to incarceration.¹⁸³ Growing up with less family wealth means living in poorer neighborhoods with lower-quality education and a greater exposure to high “street” crime and high imprisonment areas. Sixty-two percent of Black Americans live in highly segregated, inner-city neighborhoods where socioeconomic vulnerabilities contribute to higher rates of violent crime,¹⁸⁴ while the majority of white Americans live in “highly advantaged” neighborhoods where there is little violent crime.¹⁸⁵

In 2019, Black Americans comprised 26 percent of all arrests yet they only made up 13.4 percent of the population.¹⁸⁶ According to a recent large-scale analysis of racial disparities in over 60 million state patrol police stops in 20 states, including California, researchers found that police officers stop Black Americans more often than white drivers relative to their share of the driving-age population.¹⁸⁷ Further, these researchers found that, after controlling for age, gender, time, and location, police are more likely to ticket, search, and arrest Black American drivers than white Americans.¹⁸⁸ And the bar for searching Black American drivers is lower than for searching white Americans.¹⁸⁹ Low family wealth can also mean being unable to afford additional education and delaying entering the labor market, leading to higher risks of incarceration.¹⁹⁰ Once a person is a criminal defendant, low family wealth makes it hard to post bond or to hire lawyers to help navigate the criminal justice system, making incarceration more likely.¹⁹¹

Mass incarceration has been catastrophic to the ability of Black families to build and maintain wealth by reducing household assets and income, and lowering homeownership rates. In 2009, Black Americans made up less than 13 percent of the U.S. population, but comprised over a third of all the people in prison.¹⁹² And as explained in Chapter 11 on the legal system, Black Americans are also more likely to be convicted and

¹⁸⁰Pettit, *Mass Incarceration and the Myth of Black Progress*, *supra*.

¹⁸¹ Harper et al., *Debt, Incarceration, and Re-entry: A Scoping Review* (Aug. 11, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7417202/#CR47> (as of Mar. 18, 2022).

¹⁸² Kent, *Has Wealth Inequality in America Changed over Time? Here are Key Statistics* (December 02, 2020) Federal Reserve Bank of St. Louis <https://tinyurl.com/44anuuf3> (as of January 19, 2022)

¹⁸³ Zaw et al., *Race, Wealth and Incarceration: Results from the Longitudinal Survey of Youth* (Feb. 15, 2016), <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf> (as of Mar. 18, 2022).

¹⁸⁴ Krivo & Peterson, *Extremely disadvantaged neighborhoods and urban crime* (1996) *Social Forces* 75(2): pp. 619-647 <<https://www.faculty.washington.edu/matsueda/courses/587/readings/Krivo%20Peterson%201996.pdf>> [as of July 29, 2021].

¹⁸⁵ Krivo et al., *Segregation, racial structure, and neighborhood violent crime* (2009) *American Journal of Sociology* vol. 114, no. 6 pp. 1765–1802 <www.jstor.org/stable/10.1086/597285> (as of July 29, 2021).

¹⁸⁶ U.S. Census Bureau, *Quick Facts: U.S.* <<https://www.census.gov/quickfacts/fact/table/US/POP010220>> (as of July 22, 2021).

¹⁸⁷ Pierson et al., *A large scale analysis of racial disparities in police stops across the United States* (2017) *Nature Human Behavior* 4, 736–745 (2020) <<https://www.nature.com/articles/s41562-020-0858-1>> (as of July 27, 2021).

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Zaw et al., *Race, Wealth and Incarceration*, *supra*.

¹⁹¹ *Ibid.*

¹⁹² Harper et al., *Debt, Incarceration, and Re-entry: A Scoping Review*, *supra*.

experience lengthy prison sentences.¹⁹³ Involvement in the criminal justice system increases legal debt.¹⁹⁴ Incarceration means loss of income and may lead to missed mortgage payments and other debts.¹⁹⁵ This increases interest obligations and penalties, which in turn can send an incarcerated individual's credit score plummeting.¹⁹⁶ Incarceration also means household instability, placing an additional burden on the capacity to build assets.¹⁹⁷

And as Chapter 11 explains, federal and state officials continue to exploit the labor of predominantly Black incarcerated people.¹⁹⁸ While convict-leasing as an official practice has ended, unresolved is the issue of incarcerated labor, which is grossly underpaid or not paid at all.¹⁹⁹ For example, in-house prison labor, the most common type of prison labor, typically refers to prison maintenance jobs including kitchen duty, cleaning, or groundskeeping.²⁰⁰ Workers can be punished and even sent to solitary confinement for taking a sick day, even in the eight states where in-house labor is unpaid.²⁰¹ In states where in-house prison labor is paid, the average rates across the U.S. for in-house labor range from just 14 to 63 cents per hour. These are the rates before wage garnishment, which can account for up to half of one's earnings although some argue that wage garnishment may have worthy uses such as victims' restitution.²⁰² Not only do incarcerated people receive pennies compared to the rest of the workforce, but they also lack access to labor protections.²⁰³

In addition, incarcerated people provide underpaid and unprotected industry labor, which refers to non-prison-related jobs performed by incarcerated people, including phone banking, packaging, and textile work.²⁰⁴ At the federal level, these jobs are regulated through the Prison Industry Enhancement Certification Program, now called UNICOR.²⁰⁵ Most states have similar state-level organizations.²⁰⁶ While participating companies are required to pay minimum wage, wage garnishment is practiced in industry jobs as well, even for room and board on prison cells.²⁰⁷ Data collected by the Prison Policy Initiative for each state does not appear to account for deductions or additional costs such as stamps, paper, toiletries, supplementary food, or phone

¹⁹³ Legal System Chapter [xx]

¹⁹⁴ Western and Wildeman, *The Black Family and Mass Incarceration* in the *The Annals of the American Academy of Political and Social Science*. 2009;621(1):221–242. doi: 10.1177/0002716208324850.

¹⁹⁵ Ibid.

¹⁹⁶ Zaw, et al., *Race, Wealth and Incarceration*, *supra*.

¹⁹⁷ Ibid.

¹⁹⁸ Federal Bureau of Prisons, Federal Prison Industries Program Details,

<https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp#:~:text=UNICOR%20contributes%20significantly%20to%20the,o f%20staff%20and%20other%20inmates> (as of July 27, 2021).

¹⁹⁹ Hoffer, *Involuntary Servitude: How Prison Labor is Modern Day Slavery* (Feb. 3, 2022), Harvard Political Review, <https://harvardpolitics.com/involuntary-servitude-how-prison-labor-is-modern-day-slavery/> (as of Mar. 18, 2022) (Hoffer).

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Hoffer, *supra*; see also Stygar, *Thinking Outside the Box: A Point-Based System of Reintegration for California's Inmate Firefighters* (2020) 56 Cal. Western L.Rev. 455, 456 (Stygar).

²⁰⁴ Hoffer, *Involuntary Servitude: How Prison Labor is Modern Day Slavery*, *supra*.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

calls, which means that incarcerated people receive a lot less than what they are earning.²⁰⁸ Some argue that such costs are not fairly calculated and that the American criminal justice system is filled with fees that shift the financial burden of incarceration not only to the charged and convicted, but also their families.²⁰⁹

California uses the industry labor of incarcerated people in a wide variety of contexts. For example, the California Prison Industrial Authority produces myriad products such as clothing, textiles, furniture, cleaning products, office supplies, signs, and food.²¹⁰ Incarcerated people also perform a wide range of duties in areas such as laundry, kitchen, and general maintenance.²¹¹ The California Department of Forestry and Fire Protection employs around 1,800 incarcerated individuals every year to fight forest fires.²¹² Some have challenged the value of these programs because they do not necessarily provide incarcerated people with marketable job skills because they are often tasked with low skill work and obtaining a job as a firefighter can be particularly difficult, even for people without criminal records.²¹³ California's prison-firefighter program puts incarcerated peoples' lives on the line to fight fires for as little as \$1.45 a day, and then does not allow them to become firefighters when they are released.²¹⁴

Once released from incarceration, criminal convictions make it harder to find and maintain jobs, find leases, and be approved for mortgages.²¹⁵ As mentioned, work programs in incarceration are generally not beneficial to incarcerated people when they seek work after their incarceration.²¹⁶ A record of previous incarceration also has wide-ranging immediate and future consequences that affect asset building capability over the lifetime, and acts as a barrier to employment, thereby lowering earnings.²¹⁷ Furthermore, the criminal "credential" associated with incarceration impedes wealth accumulation through stigmatization, poor credit access, and lack of access to supportive social institutions.²¹⁸

C. Government Benefits Exclude or Discriminate Against Black Americans

Black Americans have consistently been excluded from numerous major categories of government benefits, which have generally benefited white Americans. Government benefits refer to assistance programs that provide either cash assistance or in-kind benefits to individuals and families from any governmental entity. There are two major types of government benefit programs: social welfare programs and social insurance programs.

Benefits received from social welfare programs are usually based on low income means-tested eligibility criteria. Benefits received from social insurance programs are usually based on eligibility criteria, such as age, employment status, or being a veteran. Some of the major federal, state, and local social insurance programs

²⁰⁸ Prison Policy Initiative, *State and federal prison wage policies and sourcing information* (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html (as of Mar. 18, 2022); Salay, *When in prison, the costs are steep and the pay close to nothing*, <https://www.marketplace.org/2017/08/21/when-prison-costs-are-steep-and-pay-close-nothing/> (as of Mar. 18, 2022).

²⁰⁹ Bennis, *American Slavery, Reinvented* (Sept. 21, 2015), *The Atlantic*, <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> (as of Mar. 24, 2022).

²¹⁰ Cal. Prison Industrial Authority, Catalogue <<https://catalog.calpia.ca.gov/>> (as of Nov. 24, 2021).

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Stygar, *supra*.

²¹⁴ *Ibid.*

²¹⁵ Zaw et al., *Race, Wealth and Incarceration*, *supra*.

²¹⁶ See generally Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities* (2019) 26 *Va. J. Soc. Pol'y & L.* 65, 66.

²¹⁷ Zaw et al., *Race, Wealth and Incarceration*, *supra*.

²¹⁸ *Ibid.*

are: Social Security, Department of Veterans' Affairs benefits, unemployment insurance compensation, and workers' compensation.

Social insurance programs can also provide important support in times of crisis. Unemployment insurance, a state level program, helps protect against unexpected drops in income by paying cash benefits to unemployed workers who have lost jobs through no fault of their own.²¹⁹ The federal Supplemental Nutrition Assistance Program (SNAP), also known as food stamps, gives money to low-income families to buy food, and expands to provide important support when people lose their jobs. A one percentage point increase in the unemployment rate is associated with two to three million additional participants.²²⁰ Recipients have improved food security, health, and reduced healthcare expenses.²²¹

Particular crises can also generate new government programs to meet urgent needs. During the COVID-19 pandemic, most households received several stimulus checks from the federal government. Studies have found that these payments were “likely crucial” to help households that lost jobs pay their expenses.²²² The federal government also supplemented state payments with up to \$600/week for unemployed workers, extended the duration of benefits, and gave benefits to workers traditionally left out of unemployment insurance programs.²²³ The federal government also instituted the Paycheck Protection Program to provide loans that enable businesses suffering from COVID-19’s economic shocks to pay their employees and other costs.²²⁴

Historically, federal policy decisions dealing with welfare, work, and war in the 1930s and 1940s excluded or discriminated against the vast majority of African Americans.²²⁵ Because of the legislation southern representatives passed with the complicity of other congressional colleagues, Black Americans became even more significantly disadvantaged with the development of the American middle class during and after World War II.²²⁶

Among other things, southern legislators prevented Congress from including anti-discrimination provisions in an expansive range of social welfare programs, such as community health services, school lunches, and hospital construction grants—all the programs that distributed funds to the south.²²⁷ As a result, when an expansive range of federal public policies was providing most white Americans with valuable tools to advance their social

²¹⁹ Bivens et al., *Reforming Unemployment Insurance: Stabilizing a System in Crisis and Laying the Foundation for Equity* (June 2021), Economic Policy Inst., <https://files.epi.org/uploads/Reforming-Unemployment-Insurance.pdf> (as of Apr. 2, 2022) (Bivens et al.).

²²⁰ U.S. Dep’t. of Agriculture, *Economic Linkages: Supplemental Nutrition Assistance Program (SNAP) Linkages with the General Economy* (Aug. 20, 2019) Economic Research Service, <<https://www.ers.usda.gov/topics/food-nutrition-assistance/supplemental-nutrition-assistance-program-snap/economic-linkages/#SNAPcaseloads>> (as of Aug. 19, 2021).

²²¹ Brantley et al., Association of Work Requirements with Supplemental Nutrition Assistance Program Participation by Race/Ethnicity and Disability Status, 2013-2017 (June 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7320297/> (as of Mar. 18, 2022), pp. 7-8.

²²² Chen, Center for Retirement Research, Boston College, Did the Stimulus Checks Help People with Unexpected Expenses? (Aug. 2021), <https://crr.bc.edu/briefs/did-the-stimulus-checks-help-people-with-unexpected-expenses/#:~:text=While%20the%20final%20impact%20of,savings%20or%20pay%20off%20off%20debt> (as of Mar. 18, 2022) p. 3.

²²³ Bivens, et al., *supra*.

²²⁴ U.S. Dep’t of the Treasury, *Paycheck Protection Program*, <<https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program>> (as of Aug. 19, 2021).

²²⁵ Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2005), p. 23 (When Affirmative Action Was White).

²²⁶ *Ibid.*

²²⁷ *Ibid.*,

welfare—insure their old age, get good jobs, acquire economic security, build assets, and gain middle-class status—most Black Americans were left behind or left out.²²⁸

Social Security, passed and signed by President Roosevelt in 1935, left out most Black Americans and was characterized “by a form of policy apartheid” for the first quarter century of its existence.²²⁹ Southern congressional representatives heavily influenced the Social Security Act with devastating results.²³⁰ As a result, the federal government left power to control benefit levels, eligibility, and administration of such programs in the hands of the states and excluded occupations mostly held by Black Americans.²³¹ Sixty-five percent of African Americans fell outside of eligibility for the Social Security program—and between 70 and 80 percent fell outside eligibility requirements in different parts of the South.²³²

For example, in 1940, the year Social Security payments for seniors began after a sufficient fund had been received, the Social Security Board identified nearly 2.3 million Black workers as eligible for old age insurance.²³³ The majority of Blacks people still were left out because they were farmworkers or domestic workers, and people in those categories did not qualify.²³⁴ This exclusion also left most Black workers out of unemployment insurance under the act.²³⁵ Even when they worked in covered industrial and commercial jobs, they often were left out because they lacked a history of regular, stable employment.²³⁶ And even when they received benefits, the benefits tended to be meager as compared to those received by white workers.²³⁷

In addition to the federal government’s direct transfer of land through the Homestead Act, and the federal government provided mortgage subsidies to mostly white families through various federal agencies, as discussed in Chapter [XX]. The federal government has also supported the creation and maintenance of the white middle class through other statutes of the New Deal. The New Deal was a collection of government programs developed by President Franklin D. Roosevelt to provide aid to the American people with the goal of lifting America out of the economic depression triggered by the stock market crash of October 1929, commonly referred to as the Great depression.²³⁸ Chapter [XX] discusses in detail how the New Deal programs excluded Black Americans.

In 1944, the federal government enacted the Serviceman’s Readjustment Act of 1944, also known as the GI Bill, which was reinforced in 1948 with the Integration of the Armed Forces Act. Through these laws, the federal government offered unprecedented benefits to mostly white veterans, including mortgages to buy homes, job placement services, money for vocational and university education, and loans for small

²²⁸ Ibid.

²²⁹ Id. at p. 42-43.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Trotter, Jr., *From a Raw Deal to a New Deal?: 1929-1945 (The Young Oxford History of African Americans)* (Apr. 5, 1996); *To Make Our World Anew Volume Two: A History of African Americans since 1880* (2005), edited by Robin D.G. Kelley and Earl Lewis, New York: Oxford University Press, 2005, p. 131.

businesses.²³⁹ But, these laws also included key features of administrative decentralization that sharply disadvantaged southern Black veterans.²⁴⁰

For example, according to a Brookings Institution report, white World War II veterans “were afforded the opportunity to build wealth by sending themselves and their children to college and by obtaining housing and small business grants”—but “Black veterans could not redeem their post-war benefits like their white peers.”²⁴¹ Part of this stemmed from earlier discrimination in the military. Black soldiers were disproportionately issued neutral and dishonorable discharges, which were then used to exclude Black veterans from GI Bill benefits.²⁴² Ira Katznelson explains that: “severe discrimination” affected the home loan, business loan, and higher education programs offered under the GI Bill; the home mortgage, small business, and farm loan programs were especially vulnerable to racist administration, leading to the relative absence of Black veterans in these programs; and Black veterans “were significantly underrepresented” in the GI Bill’s loan programs, including business loans.²⁴³

Some scholars repeatedly refers to the difficulty Black veterans faced when trying to secure loans under the GI Bill, without focusing on a particular type of loan, or includes business loans when enumerating the types of loans provided, showing that business loans were part of the inequitable administration of GI Bill benefits.²⁴⁴ He quotes Harry Wright, a field agent of the Southern Regional Council: “To Negro veterans in Mississippi getting a G.I. loan is similar to seeking ‘The Holy Grail.’”²⁴⁵

Today, Black American families continue to have trouble accessing government benefits. Although race-neutral on their face, welfare programs are embedded in a racist labor market and criminal justice system, which exacerbates the various ways of curtailing access to welfare benefits, such as work requirements, family caps, drug testing, and resource limits like exclusions for home ownership.²⁴⁶ Because welfare programs are often administered at the state and local levels, state and especially local governments have been able to introduce racial bias into welfare administration, contributing to racially disparate outcomes.²⁴⁷ States have been significantly more likely to both adopt and impose welfare sanctions if they have higher proportions of nonwhite welfare recipients.²⁴⁸ States with higher Black populations—generally in the South—tend to provide

²³⁹ Onkst, *First a Negro . . . Incidentally a Veteran: Black World War Two Veterans and the G.I. Bill of Rights in the Deep South, 1944-1948* (Spring 1998) 31(3) in *Journal of Social History* 517, 518 (Onkst); Knutson, *Legislation to Resolve GI Bill Racial Inequities Introduced by Democrats* (Nov. 11, 2021) Axios, <https://www.axios.com/democrats-resolving-gi-bill-racial-inequities-bill-341303e3-fe1e-43a7-9930-b7682100f5cb.html> (as of Jan. 18, 2022); Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (Mar. 1, 2013), p. 368 (Fear Itself).

²⁴⁰ Fear Itself, *supra*, pp. 368, 620; see also *When Affirmative Action Was White*, *supra*, pp. 113–41; Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (New York: Oxford University Press, 2007); Frydl, *The G.I. Bill* (Cambridge: Cambridge University Press, 2011).

²⁴¹ Ray & Perry, *Why We Need Reparations for Black Americans* (Apr. 2020) Brookings Institution <https://www.ptcondo.com/wp-content/uploads/2021/01/Brookings-Institute.pdf> (as of Jan. 18, 2022) p. 3.

²⁴² Onkst, *supra*, p. 520; Rothenberg, *Race, Class, and Gender in the United States: An Integrated Study* (2007) p. 46.

²⁴³ Katznelson & Mettler, *On Race and Policy History: A Dialogue About the G.I. Bill* (Sept. 2008) 6(3) *American Political Science Association* 519, pp. 521, 522, 530, available at <http://urban.hunter.cuny.edu/~schram/mettlerkatznelson.pdf> (as of Jan. 18, 2022).

²⁴⁴ Onkst, *supra*, pp. 519, 522, 532.

²⁴⁵ *Id.* at p. 523.

²⁴⁶ Allen, *Racism in Public Benefit Programs: Where Do We Go from Here?* (July 23, 2020) Center for Law and Social Policy, <https://www.clasp.org/blog/racism-public-benefit-programs-where-do-we-go-here> (as of Jan. 24, 2022) (Allen).

²⁴⁷ Fording et al., *Race and the Local Politics of Punishment in the New World of Welfare* (March 2011) 116(5) *American Journal of Sociology* 1610, 1614, 1650 (Fording et al.). (available on JSTOR: <https://www.jstor.org/stable/10.1086/657525>)

²⁴⁸ *Id.* at p. 1614.

fewer unemployment payments for a shorter time.²⁴⁹ Additionally, in many places, part-time workers—who are disproportionately Black—are not eligible for unemployment payments.²⁵⁰ Despite having higher unemployment rates in general, Black workers receive unemployment benefits at lower rates.²⁵¹ A report by the Government Accountability Office found that 73 percent of Black unemployment applicants received unemployment payments during the pandemic versus 80.2 percent of white applicants.²⁵² Although governments have waived work requirements for certain SNAP beneficiaries during certain national crises—e.g., the Great Recession and the COVID-19 pandemic—studies have found that work requirements disproportionately cut off Black adults from SNAP benefits, which may be partially due to discrimination in the labor market making the job search more difficult for Black people.²⁵³

During the pandemic, white households also received their COVID-19 stimulus checks faster than Black households: 68.6 percent of eligible Black adults received their first stimulus payments by late May 2020 versus 73.7 percent of white households.²⁵⁴ This was likely due to the Internal Revenue Service-focused structure of the program, which made receiving the payment more complicated for unbanked families and families who did not file taxes. Black people are more likely to be among both groups.²⁵⁵

Studies of pandemic-era federal loans have found that 29 percent of Black American applicants were successful in obtaining loans for their businesses versus 60 percent of white applicants. And only 1.6 percent of federal loan dollars were disbursed to self-identified Black-owned businesses versus 13.6 percent to white-owned businesses.²⁵⁶ Businesses in majority-Black American neighborhoods were also more likely to receive federal loans later than businesses in majority-white neighborhoods. Because federal money was paid out through large banks, Black American business owners may have been less likely to obtain them—despite being more likely than white business owners to have at risk or distressed businesses even before the pandemic²⁵⁷—due to poor relationships with banks and systematic exclusion from banking services historically.²⁵⁸ Inadequate pandemic relief put the brunt of pandemic-related economic hardship disproportionately on Black Americans, who were more likely to hold the types of jobs most severely impacted by the pandemic.²⁵⁹

²⁴⁹ Bivens et al, *supra*, pp. 2, 10.

²⁵⁰ *Id.* at p. 22.

²⁵¹ *Id.* at p. 10.

²⁵² Costa, Government Accountability Office, *Management Report: Preliminary Information on Potential Racial and Ethnic Disparities in the Receipt of Unemployment Insurance Benefits during the COVID-19 Pandemic* (June 17, 2021), Management Report: Preliminary Information on Potential Racial and Ethnic Disparities in the Receipt of Unemployment Insurance Benefits during the COVID-19 Pandemic (as of Apr. 4, 2022) p. 3 (GAO Report), p. 3.

²⁵³ Brantley et al., *supra*, pp. 7-8.

²⁵⁴ Holtzblatt & Karpman, Tax Policy Center, Urban Inst., *Who Did Not Get the Economic Impact Payments by Mid-to-Late May, and Why?* (July 2020) https://www.urban.org/sites/default/files/publication/102565/who-did-not-get-the-economic-impact-payments-by-mid-to-late-may-and-why_1.pdf (as of Apr. 2, 2022) p. 2.

²⁵⁵ Price & Pugh, *The Next Pandemic Stimulus Bill Must be Race-Conscious* (Sept. 4, 2020), Time, <https://time.com/5886002/next-stimulus-bill-race-conscious/> (as of Aug. 19, 2021).

²⁵⁶ 78.6% of loan dollars went to businesses who did not report the owner's race. Plerhoples, *Correcting Past Mistakes: PPP Loans and Black-Owned Small Businesses* (Feb. 25, 2021) Am. Const. Society <<https://www.acslaw.org/expertforum/correcting-past-mistakes-ppp-loans-and-black-owned-small-businesses/>> (as of Aug. 19, 2021).

²⁵⁷ Mills & Battisto, Federal Reserve Bank of New York, *Double Jeopardy: Covid-19's Concentrated Health and Wealth Effects in Black Communities* (Aug. 2020) < https://cameonetwork.org/wp-content/uploads/2020/08/DoubleJeopardy_COVID19andBlackOwnedBusinesses-3.pdf > p. 5-6.

²⁵⁸ *Id.*; Plerhoples, *supra*.

²⁵⁹ Trisi & Saenz, Center on Budget and Policy Priorities, *Economic Security Programs Reduce Overall Poverty, Racial and Ethnic Inequities* (July 1, 2021) <https://www.cbpp.org/sites/default/files/atoms/files/1-28-21pov.pdf>.

D. Education Segregation and Debt

Higher education for Black Americans can have a positive effect on their income, but does not translate into a reduction in wealth disparities.²⁶⁰ Differences in parental wealth and the racial disparities in wealth are a big part of why even affluent Black households with incomes above \$75,000 live in more under-resourced neighborhoods with less access to quality school resources than their white counterparts that undermines equal education opportunity and upward mobility starting from childhood.²⁶¹ College degrees do little to close the racial wealth gap.²⁶² For example, college-educated Black American households have 30 to 33 percent less wealth at the median than non-college educated white households. Average wealth for white Americans in this category is \$180,500, while the Black American average is \$23,400.²⁶³

Education increases debt in part because of higher student loan rates for Black students who see “unequal returns” on investment in a college education.²⁶⁴ Rucker C. Johnson, Ph.D. points out that, historically, school funding mechanisms have been implicitly tied to long-standing assumptions about which communities and students are deserving of adequate educational investment.²⁶⁵ The median difference between Black and white American student loan interest rates is 0.63 percent.²⁶⁶ The mean difference is 1.09 percent.²⁶⁷ This means that Black American students have higher interest rates, and that more than half of Black American students have interest rates 3/5 to 1 and 1/10 times higher than white students.²⁶⁸

Black American students also incur more educational debt because their families have so little wealth.²⁶⁹ For example, these higher levels of debt are reflected in the wealth of young women. Twenty- to 29-year-old single white women who have completed college have a median net worth of \$3,400. Single black women of a similar age and level of education have a median net worth of negative \$11,000.²⁷⁰

The costs of higher education are a larger burden for Black Californians.²⁷¹ Generally, white people are twice as likely as Black Americans to receive financial assistance from home for higher education.²⁷² Only 16 percent of very low-income Black Californian students receive a CalGrant award.²⁷³ The state financial aid Black

²⁶⁰ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Rucker C. Johnson, Ph.D, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²⁶¹ Ibid.

²⁶² From Here to Equality, *supra*, p. 37.

²⁶³ Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*.

²⁶⁴ Herring and Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap* (Feb. 2016), <http://ippsr.msu.edu/research/wealth-inequality-black-and-white-cultural-and-structural-sources-racial-wealth-gap> (as of Mar. 18, 2022) (Herring and Henderson) p. 6.

²⁶⁵ California Task Force to Study and Develop Reparation Proposals for African Americans (October 12, 2021), Testimony of Rucker C. Johnson, Ph.D, <<https://oag.ca.gov/ab3121/meetings>> (as of October 25, 2021).

²⁶⁶ Chiteji, *The Racial Wealth Gap and the Borrower's Dilemma*, <https://www.jstor.org/stable/25780781> p. 356.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Zaw, et al., *Women, Race and Wealth* (Durham, N.C.: Samuel DuBois Cook Center on Social Equity, Duke University; Oakland, Calif.: Insight Center for Community Economic Development, 2017), https://www.insightccd.org/wp-content/uploads/2017/01/January2017_ResearchBriefSeries_WomenRaceWealth-Volume1-Pages-1.pdf.

²⁷¹ Hutchful, *The Racial Wealth Gap: What California Can Do About a Long-Standing Obstacle to Shared Prosperity*, California Budget & Policy Center (2018), <https://calbudgetcenter.org/app/uploads/2018/12/Report_The-Racial-Wealth-Gap_12.2018.pdf> p. 8.

²⁷² Ibid.

²⁷³ Ibid.

Americans do receive is often insufficient, especially with respect to housing.²⁷⁴ Fifteen percent of white households in Los Angeles had student loan debt, in contrast with 20.5 percent of households headed by Black Americans.²⁷⁵

E. Labor Market Discrimination

Income is different from wealth. Income represents how much a person earns in a lifetime, both from work and from a yearly return on their investments.²⁷⁶ Wealth represents a person's total net worth calculated from assets minus debts.²⁷⁷ While income plays a modest role in the ability to generate wealth, as lower income translates to reduced capacity for savings or investments, income does not explain massive Black-white wealth disparities in the United States. Without savings or wealth of some form, which can be passed from generation to generation, economic stability quickly falls apart when income is cut or disrupted through job loss, reduced work hours or reduced wages, or if families suffer from an unexpected health emergency.²⁷⁸ In fact, the intergenerational transfer and impact of wealth is one of the reasons why racial wealth inequities have become entrenched.²⁷⁹

As detailed in Chapter 10 on labor, labor market discrimination significantly contributes to the wealth gap.²⁸⁰ Some scholars including, Bernadette Chachere and Gerald Udinsky, base their estimates for a reparations bill on more recent economic injustices such as labor market discrimination.²⁸¹ For example, Bernadette Chachere and Gerald Udinsky estimated the monetary benefits that white workers gained from employment discrimination between 1929 and 1969.²⁸² They concluded that by the mid-1980s, white workers gained in \$1.6 trillion from employment discrimination at the expense of Black workers, assuming that 40 percent of the Black-white income gap was because of labor market discrimination.²⁸³ Further, David Swinton concludes that even if one subtracted the total cost of government benefits programs including Social Security, Medicare, Medicaid, unemployment insurance, and other welfare programs—which are often argued to be reparations—over the same time span from the Chachere and Udinsky estimate, there would be still be a \$500 billion net benefit to white people from labor market discrimination by the mid-1980s.²⁸⁴

But, income alone cannot alone explain the racial wealth gap. A reduction in racial differences in income would leave as much as three-fourths of the wealth gap unaddressed.²⁸⁵ “Equal achievements” lead to “unequal wealth rewards” for Black Americans.²⁸⁶ For example, between 1984 and 2009, every dollar increase in average income for white households added \$5.19 in wealth. The same increase in average incomes for Black American households added only \$0.69 in wealth.²⁸⁷ In the 1990s, the Black-white ratio of median household income was

²⁷⁴ Ibid.

²⁷⁵ De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles* (2016), *supra*.

²⁷⁶ Pat S., *Income vs. Wealth – What's the Difference?* (Sept. 24, 2021), Money Crasher, LLC, <https://www.moneycrashers.com/wealth-and-income-difference/> (as of Mar. 18, 2022).

²⁷⁷ Ibid.

²⁷⁸ Zaw, et al., *Women, Race and Wealth*, *supra*.

²⁷⁹ Ibid.

²⁸⁰ Labor Chapter [xx]

²⁸¹ From Here to Equality, *supra*, p. 256.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Swinton, “*Racial Inequality and Reparations*,” in *America, Wealth of Races* (1990), pp. 153–62.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

0.62, but the ratio of median wealth far less at 0.08.²⁸⁸ In fact, the racial wealth gap increases as income increases. The wealth gap between Black Americans and whites in the bottom fifth of income levels is \$7400, but the wealth gap between comparable African Americans and whites in the top fifth of income levels is \$264,700.²⁸⁹ And, while white households have five to 10 times the net worth of Black American households, they only earn twice as much as Black American households.²⁹⁰ Within the same income brackets, Black American wealth is less than one-half that of white people.²⁹¹ White people in the bottom fifth of the income distribution have more than 10 times the median wealth of Black Americans in the bottom fifth.²⁹² Lower incomes for Black Americans because of labor market discrimination affect wealth only to the extent that it reduces capacity for savings that can be passed across generations. There is no evidence that Black Americans have a lower savings rate than white Americans once household income is taken into account.²⁹³ One study found that once income is taken into account, if anything, Black American families actually have a slightly higher savings rate than their white counterparts.²⁹⁴ In fact, white households spend 1.3 times as much as Black American households with similar incomes.²⁹⁵ At high income levels, Black Americans save more than white people who tend to invest.²⁹⁶ In addition to savings from income or “active savings,” a family’s wealth also can increase because of “passive savings” or when the value of a family’s assets rises or appreciates. Data collected before the predatory subprime mortgage market crisis shows that there is no significant racial advantage in “passive savings” for white families with positive assets after family income is taken into account.²⁹⁷

F. Discrimination in Banking

Black Americans have historically faced systemic discrimination in banking which has impacted their ability to accumulate wealth. Banks established by the federal government discriminated against Black Americans and deprived them of wealth. The Freedmen’s Fund, Free Labor and Union Army Military Banks, and the Freedman’s Bank were three banking institutions established by federal government agents and Congress in the early to mid-1860s, which provided recently emancipated Black Americans with the means to save the money they earned.²⁹⁸ But, paternalistic attitudes towards Black Americans ultimately impacted their ability to accumulate wealth and invest their wealth how they saw fit.²⁹⁹ Improper investing of savings deposited into the

²⁸⁸ Oliver and Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, Routledge (1995) (Oliver and Shapiro).

²⁸⁹ Herring and Henderson, *supra*.

²⁹⁰ Barsky et al., *Accounting for the Black-White Wealth Gap: A Nonparametric Approach* (Sep. 2002) in *Journal of the American Statistical Association* Vol. 97, No. 459, pp. 663-673.

²⁹¹ *Ibid*.

²⁹² *Ibid*.

²⁹³ Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*.

²⁹⁴ *Ibid*.

²⁹⁵ Blau and Graham, *Black/White Differences in Wealth and Asset Composition* (Mar. 1989), available at https://www.nber.org/system/files/working_papers/w2898/w2898.pdf (as of Mar. 24, 2022) (Blau and Graham) ; Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*; From Here to Equality, *supra*; Herring and Henderson, *supra*.

²⁹⁶ Darity Jr. *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*, p. 22.

²⁹⁷ Blau and Graham, *supra*; Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*; From Here to Equality, *supra*; Herring and Henderson, *supra*.

²⁹⁸ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (2017), Cambridge, Harvard University Press (Baradaran) p. 30.

²⁹⁹ *Ibid*.

Freedman’s Bank led to the loss of approximately \$2.9 million or \$63 million in 2017 dollars, impacting the savings and wealth accumulation of “Freedmen” and their descendants for generations to come.³⁰⁰

One of the earliest experiments to manage wages from freedmen’s labor was the exploitative Freedmen’s Fund created in 1862 by Union army chaplain John Eaton, Jr. who controlled contraband camps in the Mississippi Valley.³⁰¹ The fund served as a central depository for the wages of formerly enslaved Black Americans who self-emancipated by escaping to Union lines or “contrabands” captured by Union troops who worked for and under the direction of the Union army.³⁰² But, freedmen had no access to their individual wages or savings, nor did they have any say in how their own wages or the money that was donated for their benefit would be used.³⁰³ Instead, Eaton pooled the wages in the fund to use them provide food, shelter, and other needs for freedmen collectively, essentially treating freedmen as contract laborers.³⁰⁴ In addition to depositing freedmen’s wages in the fund, he also took all their wealth. Soldiers confiscated horses, wagons, money, and other valuables that self-emancipated Black Americans brought with them to the Union lines.³⁰⁵ Eaton took for the fund anything that the soldiers and quartermasters did not steal for themselves. Near the end of the Civil War, Eaton controlled contraband camps throughout the Mississippi Valley.³⁰⁶ By 1864, he had formalized his contract labor system to negotiate contracts for and hired out Black workers on abandoned plantations the federal government leased to northerners and to some southerners who supported the Union.³⁰⁷ Any profits from the cash crops that Black workers grew and harvested were placed in the Freedmen’s Fund.³⁰⁸ All the while, Eaton further commandeered the fund for other expenses along with providing for freedmen.³⁰⁹ In one year alone, Eaton stole \$103,000 or \$1.6 million in 2017 dollars from Black depositors to pay for the Union Army’s incidental expenses; \$5,000 in medical expenses; the salaries of all hospital stewards and medical assistants; in addition to food, clothing, housing, and labor supplies for Black Americans.³¹⁰

The Free Labor and Union Army Military Banks first established in 1864 used an exploitative model of contracting Black people’s labor similar to Eaton’s freedmen’s fund. But, they also allowed Black soldiers and workers more control over their own income, letting them decide how much to save and how much to keep for personal expenses, and build up their individual wealth rather than contribute to collective expenses.³¹¹ Army quartermasters issued them passbooks that soldiers and civilian workers used to keep records of their deposits.³¹² Still, the army limited a soldier’s single deposit to \$5, which significantly limited individuals who wanted to save more. Soldiers could also not withdraw funds until their enlistment ended, which limited how they could use their own savings, and their accounts did not earn interest.³¹³ The army also did not provide

³⁰⁰ Garrett-Scott, *Banking on Freedom: Black Women in U.S. Finance before the New Deal* (2019), Columbia University Press, New York (Garrett-Scott) pp. 13, 31.

³⁰¹ *Ibid.*, p. 15-18.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Id.* at 18-20.-

³¹² *Ibid.*

³¹³ *Ibid.*

fiduciary oversight to protect soldiers' deposit from loss, with quartermasters sometimes mismanaging and stealing soldiers' savings.³¹⁴

In 1865, Congress created the Freedman's Bank and Trust Company, also known as the Freedman's Savings Bank, seeding the bank with unclaimed deposits from the free labor and military banks.³¹⁵ The initial charter designated an all-white board of trustees with broad discretion to oversee the bank, and intended to hold only the deposits of the survivors of enslavement and their descendants.³¹⁶ Despite this nominal limitation, the bank welcomed customers of all races and regardless of whether they were formerly enslaved, though formerly enslaved people made up the vast majority of bank customers.³¹⁷ And though the charter made clear that its purpose was to invest the deposits in low-risk treasury notes and conservative U.S. securities, it vaguely stated that a third of the deposits, called "available funds," could be invested anywhere leaving an opening for abuse.³¹⁸

The Freedman's Bank used a number of aggressive methods and tactics to solicit deposits and to convince Black patrons that their money was safe and that they could grow wealth.³¹⁹ Passbooks and other bank literature contained numerous slogans and poems on the ways of thrift and savings.³²⁰ Bank advertisements often included the names of prominent government officials, such as Abraham Lincoln and Oliver Otis Howard, misleading customers and the public into believing that the federal government protected and guaranteed their deposits.³²¹ Depositors were reminded during public meetings and other bank-sponsored gatherings that the bank was under Congressional charter, and thus under its complete protection.³²² With such assurances that their deposits were safe, Black Americans from a wide variety of backgrounds and occupations, many excited to be receiving a wage for their services for the first time in their lives, opened accounts with the Freedman's Bank between 1868 and 1874 at an extraordinary rate. And within 10 years, 75,000 depositors—who were virtually all Black Americans—trusted the bank by depositing more than \$75 million, approximately \$1.5 billion in today's dollars.³²³ Most of these deposits were being saved to buy land and other productive goods such as tools or agricultural supplies as depositors were told to do.³²⁴

But the bank was a façade turning quickly turned from a savings bank to a highly risky private investment bank with a small minority of trustees remaining in control.³²⁵ Against the bank's original Congressional charter and without the knowledge of the Black customers, who were largely unable to secure loans from the bank, the bank deceptively invested the money in risky railroad and real estate holdings to the benefit of white businessmen and corrupt bank managers.³²⁶ When the bank headed toward failure because of self-dealing and fraud closed on

³¹⁴ Ibid.; Davis, *Bankless in Beaufort: A Reexamination of the 1873 Failure of the Freedman's Savings Branch at Beaufort, South Carolina* in *South Carolina Historical Magazine* 104, no. 1 (2003), 25–55, pp. 29–31.

³¹⁵ Washington, U.S. National Archive, *The Freedman Savings and Trust Company* in *Federal Records and African American History* Summer 1997, Vol. 29, No. 2, <https://www.archives.gov/publications/prologue/1997/summer/freedmans-savings-and-trust.html> (as of Apr. 2, 2022) (Washington).

³¹⁶ Ibid.

³¹⁷ Garrett-Scott, *supra*, p. 25

³¹⁸ Baradaran, *supra*, p. 25.

³¹⁹ Washington, *supra*; Garrett-Scott, *supra*, p. 25; Baradaran, *supra*, pp. 25-26.

³²⁰ Washington, *supra*.

³²¹ Ibid.; Garrett-Scott, *supra*, p. 25

³²² Washington, *supra*.

³²³ Baradaran, *supra*, p. 25-26.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Id. at p. 30.

June 29, 1874, 61,131 mostly Black depositors lost about \$2.9 million or \$63 million in 2017 dollars, and had only \$32,089.35 in assets.³²⁷ More than half of accumulated Black wealth disappeared through the mismanagement of the Freedman's Savings Bank.³²⁸ Because the bank had represented much more than just a place to store money, its failure cost the Black American population more than just their deposits—it cost them trust in the federal government, which ultimately bore responsibility for the bank's misdeeds and they lost faith in banks in general.³²⁹

Black depositors protested to get the bank and the federal government to refund their money.³³⁰ Congress authorized refunds that, according to their claims, amounted to \$1.7 million of the \$2.9 million that was lost.³³¹ Refunds were dispersed in five payments between 1874 and 1914, but the process for obtaining refunds was difficult and placed a burden on account holders and heirs to prove that they had a rightful claim to a refund.³³² One study provides a comparative analysis of the average amount owed to depositors across 71 bank failures of federally chartered banks between 1865 to 1933.³³³ The Freedman's Savings Bank ranked third for the largest amount owed to depositors at the time of bank failure.³³⁴

State and private banks following emancipation refused to serve the credit needs of freedmen during the late 19th century, which meant that they had to rely on more expensive and exploitive credit systems.³³⁵ General stores became an important means of accessing short-term credit.³³⁶ Prices were at the discretion of the merchant.³³⁷ One price for goods purchased with cash and a different, often at least 25 percent higher, price for

³²⁷ Ibid.; Garrett-Scott, *supra*, pp. 13, 31; U.S. Senate 43rd Congress, 2nd Session (1874); Du Bois, *Black Reconstruction in America 1860-1880* (1998), New York: Simon and Schuster, p. 600; Gilbert, *The Comptroller of the Currency and the Freedman Savings Bank* in *The Journal of Negro History* Vol. LVII No. 2, <https://www.journals.uchicago.edu/doi/abs/10.2307/2717217?journalCode=jnh> (as of Apr. 2, 2022) p. 131 (Gilbert); and the U.S. Treasury *The Freedman's Savings Bank: Good Intentions Were Not Not Enough, A Noble Experiment Goes Awry*, <https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html> (as of Apr. 2, 2022) state that the number of depositors were 61,144 at the time of its closing state that the number of depositors were 61,144 at the time of its closing; Nier III, *The Shadow of Credit: The Historical Origins of Facial Predatory Lending and ITS Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131 (2008), <https://scholarship.law.upenn.edu/jlasc/vol11/iss2/1> (as of Apr. 2, 2022) (Nier III) p. 151-152 **Error! Hyperlink reference not valid.**

³²⁸ Baradaran, *supra*, p. 30; “[H]alf the depositors [in the Freedmen's Bank] received compensation—an average of \$18.51 per person, or about three-fifths the value of their accounts.” Foner, *Reconstruction Updated Edition: America's Unfinished Revolution* (2014), p. 532.

³²⁹ Harmon et al., *Negro as a Business Man*, p. 54; Baradaran, *supra*, p. 296; Seder and Burrell, *Getting It Together*, 9.

³³⁰ Ibid., p. 146.

³³¹ Garrett-Scott, *supra*, p. 31.

³³² Id. at p. 32-40.

³³³ Célérier and Tak, *The Impact of Financial Inclusion on Minorities: Evidence from the Freedman's Savings Bank* (Aug. 1, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825143 (as of Mar. 18, 2022) p. 32.

³³⁴ Baradaran, *supra*, p. 30; Garrett-Scott, *supra* note 302, p. 13; p. 31; U.S. Senate 43rd Congress, 2nd Session (1874); Du Bois, *Black Reconstruction in America 1860-1880*, New York: Simon and Schuster, 1998, p. 600; Gilbert, “The Comptroller of the Currency,” p. 131; and the U.S. Treasury *The Freedman's Savings Bank: Good Intentions Were Not Not Enough, A Noble Experiment Goes Awry*, <https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html> (as of Apr. 2, 2022) state that the number of depositors were 61,144 at the time of its closing.

³³⁵ Nier III, “The Shadow of Credit,” p. 151-152.

³³⁶ Id., p. 154.

³³⁷ Ibid.

goods purchased with credit.³³⁸ Goods purchased on credit were charged interest of eight to 15 percent, with the rate determined in part by creditworthiness of the borrower.³³⁹ The amount of interest to charge was determined by the merchant.³⁴⁰

Black-owned banks, which evolved from mutual aid or fraternal societies post-Reconstruction,³⁴¹ were established to provide banking services to Black American communities.³⁴² Approximately 130 Black-owned banks were established between 1900 and 1934. Fifty savings and loans and credit unions were also established during this period. Only eight banks survived the Great Depression out of 130 Black-owned banks.³⁴³ Today, there are only 21 Black-owned banks nationwide, and 32 Black-owned financial institutions overall, including credit unions.³⁴⁴

The federal government prevented the success of Black-owned banks by excluding them from full participation in the banking market.³⁴⁵ Black bank deposits were smaller and were more frequently withdrawn than white bank deposits, which made them more risky.³⁴⁶ Most Black depositors had no wealth to invest in the bank and were just depositing money from their wages while keeping small amounts to live on.³⁴⁷ They put their money into Black-owned banks not only for safekeeping, but also as rainy-day funds during bad times that came often.³⁴⁸ Because their deposits experienced high risk, Black-owned banks had to keep more cash as reserves or invest in other more liquid assets such as government securities, which were safer than loans.³⁴⁹ They needed to make sure they always had enough cash at the bank to pay out to depositors. Black-owned banks also held very high capital ratios to offset this risk.³⁵⁰ For example, in 1920, the mean capital ratio for white banks was 18 percent, while Black banks had an average capital ratio of 32.9 percent.³⁵¹ This meant that the Black bank owners invested more of their own money and earnings in the bank to keep it secure, but this severely lessened their ability to make a profit or lend money.³⁵²

Another source of vulnerability for Black banks was their assets or loan portfolios.³⁵³ The fate of Black banks was tied up with the fate of Black businesses, and the precarious state of the latter meant that Black banks lacked the healthy diversity required for sound banking.³⁵⁴ Most thriving banks preferred to hold a mix of

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Baradaran, *supra*, p. 40.

³⁴² Ammons, *The Evolution of Black-Owned Banks in the United States between the 1880s and 1990s* in *Journal of Black Studies* 26, no. 4 (1996), <https://doi.org/10.1177/002193479602600406>, p. 471; Neal and Walsh, *The Potential and Limit of Black-Owned Banks* (Mar. 18, 2020), Urban Institute, https://www.urban.org/sites/default/files/publication/101849/the20potential20and20limits20of20black-owned20banks_0_0.pdf (as of Mar. 18, 2022).

³⁴³ Baradaran, *supra*, p. 87.

³⁴⁴ Wangman and Wooldridge, *32 Black-owned banks and credit unions, sorted by state* (Feb 1, 2022), Business Insider, <https://www.businessinsider.com/personal-finance/black-owned-banks-credit-unions> (as of Mar. 18, 2022).

³⁴⁵ Ibid.

³⁴⁶ Baradaran, *supra*, pp. 88-89

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

commercial and real estate loans, because a diversified portfolio is safer and more profitable.³⁵⁵ But Black-owned banks made loans almost exclusively on residential real estate because the vast majority of Black businesses were small service operations with no need of bank financing.³⁵⁶

As a result, portfolios at Black-owned banks were largely home loans.³⁵⁷ As described in Chapter 5 on housing, the federal government generally labeled Black homeowners and Black neighborhoods as being at higher risk of default, and white-owned banks generally refused to issue mortgages to Black homeowners. Black-owned banks often met the need and provided home loans to Black American homebuyers.³⁵⁸ Since homes owned by Black Americans were undervalued due to government redlining, the property held for collateral during the term of the loan immediately diminished in value, upholding the perception that these loans were inherently risky investments.³⁵⁹ Therefore, there was no market for mortgages held by Black Americans because of the devaluation of property owned by Black Americans and the assumption that loans held by Black Americans were inherently risky.³⁶⁰ This in turn meant that it was difficult for Black-owned banks to earn a profit from an investment portfolio that was largely composed of home loans to Black American homebuyers.³⁶¹

G. California

Many of these structural racial disparities regarding access to unemployment insurance, food stamps, and COVID-19 federal loans in a crisis, and benefits for businesses are also visible in California. From March through June 2020, 84.9 percent of California's Black labor force filed for unemployment benefits, compared to 39.1 percent of the state's white labor force.³⁶² Black Californians who received unemployment insurance during the pandemic received \$293.90, the smallest median weekly benefit of any racial group, versus white claimants who received \$394.90.³⁶³

California's version of food stamps, CalFresh, generally maintains the same work requirements that disproportionately cut Black adults off from food assistance at the federal level.³⁶⁴ In 2016, California enrolled only 72 percent of eligible residents in CalFresh, the fifth lowest rate in the nation.³⁶⁵ It is also one of 10 states that manage food assistance programs at the county level, which tends to be more expensive and variable than administering the program at the state level.³⁶⁶ Black Californians make up 6.5 percent of the state's population, but 14.7 percent of participating CalFresh households.³⁶⁷ During the pandemic, one survey found that 20.2

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Housing Chapter [xx]

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Lindsay, *The Negro in Banking* (Apr. 1929) in *The Journal of Negro History*, The University of Chicago Press on behalf of the Association for the Study of African American Life and History, p. 195.

³⁶¹ Ibid.

³⁶² Bell et al., Cal. Policy Lab, *An Analysis of Unemployment Insurance Claims in California During the COVID-19 Pandemic* (Dec. 2020) p. 10, <https://www.capolicylab.org/wp-content/uploads/2021/02/Dec-21st-Analysis-of-CA-UI-Claims-during-the-COVID-19-Pandemic.pdf>.

³⁶³ Id. at 22.

³⁶⁴ CalFresh, *The Able-Bodied Adults Without Dependents Time Limit*, Cal. Dept. Social Services, <https://www.cdss.ca.gov/inforesources/calfresh/abawd> (as of Aug. 19, 2021).

³⁶⁵ Botts & Rodriguez-Delgado, *Getting Food Stamps to Poor Californians is Surprisingly Difficult* (Sept. 2, 2019) CalMatters <https://calmatters.org/california-divide/2019/09/california-food-stamp-participation-counties-challenges/> (as of Aug. 19, 2021).

³⁶⁶ Ibid.

³⁶⁷ Tan & Danielson, *The CalFresh Food Assistance Program* (Sept. 2020) Public Policy Inst. Cal. <https://www.ppic.org/publication/the-calfresh-food-assistance-program/> (as of Aug. 19, 2021).

percent of Black households with children sometimes or often did not have enough to eat in a four week period spanning June and July, compared to 8.8 percent of white households with children.³⁶⁸

In California, an analysis of the distribution of federal loans found disparate distribution by race: Black American neighborhoods received \$445 per resident, while white neighborhoods received \$666 per resident, partially due to lower concentration of small businesses or small business employees in Black American neighborhoods.³⁶⁹ However, another analysis revealed that in most major metro areas in the country—including Los Angeles, San Francisco, and San Diego—businesses in majority-white areas also received federal loans at a greater rate than businesses in majority-Black American areas.³⁷⁰

Proposition 209 has also disadvantaged Black-owned businesses in the state seeking public contracts with the State of California and local governments. Passed in November 1996, Proposition 209 caused the state and local governments to end their race-conscious contracting programs, resulting in a loss of \$1 billion to \$1.1 billion annually for minority and women-owned business enterprises (MWBE).³⁷¹ The largest loss in contracts for MWBEs was with the State of California, in which up to \$823 million has been lost each year since Proposition 209.³⁷² In fiscal year 1994-95, before Proposition 209 passed, \$519 million was contracted to MWBEs, the equivalent of \$823 million in October 2014 dollars. When the state ended its MWBE program, only a few MWBEs regained their contracts with the state.³⁷³ Some MWBE's never recovered.³⁷⁴ There was only a negligible increase in Small Business Enterprise procurement with the state following Proposition 209, which is the main route to state contracts that would still be available for many of these minority- or women-owned businesses.³⁷⁵ The City and County of San Francisco lost about \$200 million per year in MWBE contracts.³⁷⁶ Some of this loss materialized immediately after Proposition 209 and additional losses followed the 2004 Coral Construction case, which definitively ended San Francisco's race-conscious procurement program. Proposition 209 also resulted in the loss of about \$30 million per year in MWBE contracts with the City of Oakland, and an estimated \$20 million per year in MWBE contracts with the City of San Jose following the 2000 Hi-Voltage Wire Works case, which definitively ended San Jose's race-conscious contracting program.³⁷⁷

IV. Drivers of the Wealth Gap Today

The primary drivers of the contemporary wealth gap today include unequal homeownership, Black Americans' holding fewer assets, and lower business ownership, which has resulted in racial differences in the capacity of

³⁶⁸ Ramos-Yamamoto, *Not Enough to Eat: California Black and Latinx Children Need Policymakers to Act* (Sept. 2020) Cal. Budget & Policy Center < <https://calbudgetcenter.org/resources/not-enough-to-eat-california-black-latinx-children-need-policy-action/> > (as of Aug. 19, 2021).

³⁶⁹ Ong et al., Latino Policy & Politics Initiative, Univ. Cal. Los Angeles, *Disparities in the Distribution of Paycheck Protection Program Funds Between Majority-White Neighborhoods and Neighborhoods of Color in California* (Dec. 2020) p. 5. <<https://escholarship.org/uc/item/9pz896kh>> (as of Apr. 9, 2022).

³⁷⁰ Morel et al., *Rampant Racial Disparities Plagued How Billions of Dollars in PPP Loans Were Distributed in the U.S.* (May 1, 2021) <https://revealnews.org/article/rampant-racial-disparities-plagued-how-billions-of-dollars-in-ppp-loans-were-distributed-in-the-us/> (as of Aug. 19, 2021).

³⁷¹ Lohrentz, *The Impact of Proposition 209 on California's MWBE's* (Jan. 2015), Equal Justice Society, <https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes.pdf> (as of Mar. 18, 2022), p.2.

³⁷² Ibid.

³⁷³ Ibid. **Error! Hyperlink reference not valid.**

³⁷⁴ Id. at 2-3.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Id. at 3.

Black Americans to transmit resources across generations, lower financial resilience during crisis, and homelessness.

A. Unequal Homeownership

Because of racial discrimination in housing and mortgage markets over many decades, a reliance on homeownership in the U.S. during most of the 20th century for wealth-building continues to exacerbate the wealth gap between Black and white families.³⁷⁸ Homes are one of the most important wealth assets that households can possess.³⁷⁹ People who own homes can use them to borrow money to pay for expenses or pay off high-interest debt in times of crisis.³⁸⁰ Homeowners are able to generate wealth through home equity, so long as their home increases or appreciates in value. Homeownership is also believed to be more beneficial than renting because owners build equity, and obtain additional tax benefits.³⁸¹ Homeowners may also face less housing instability than renters—partially because they tend to be more well-off in general—especially during a crisis, and may therefore be less likely to lose their housing.³⁸² Housing affordability problems—where an occupant must pay more than 30 percent of gross income for housing costs, including utilities³⁸³—are more than twice as common among renters than homeowners.³⁸⁴

Historically, governmental and institutional barriers to homeownership have impaired the ability of Black Americans to purchase real estate, gain wealth through real estate, and transfer that wealth to successive generations.³⁸⁵ Broad-based homeownership in the United States as a means to achieve economic security was brought about through public policy reforms, starting with New Deal legislation.³⁸⁶ The New Deal created relatively sound long-term mortgage markets and down payment capital finance. It also reduced down payment requirements for homeownership. This transformed the housing landscape, allowing many working-class households to move from the rental lifestyle to obtaining a piece of the American dream—owning a home.³⁸⁷ Yet, as described above and in Chapter 5 on housing, the path to homeownership has been riddled with entrenched racism, as the Federal Housing Administration systematically refused loan applications to Black families through redlining.³⁸⁸

Today, Black Americans are in a worse position than white Americans to have homes as assets to aid them in a crisis. The racial homeownership gap was 19 percent in 1940, and grew to 28 percent in 2009. As of the second quarter of 2020, out of \$30.8 trillion in real estate assets in the U.S., five percent was held by Black American

³⁷⁸ Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap* (Dec. 9, 2020), Brookings, <https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/> (as of Apr. 2, 2022).

³⁷⁹ See, e.g., Bowser, *The Black Middle Class: Social Mobility – And Vulnerability* (2006) p. 120.

³⁸⁰ Bortz, *How to Unlock the Equity in Your Home* (Aug. 10, 2021), N.Y. Times, <https://www.nytimes.com/2021/08/10/realestate/tapping-home-equity.html> (as of Aug. 18, 2021).

³⁸¹ Killewald and Bryan, “Does Your Home Make You Wealthy?” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 2, no. 6, 2016, <https://www.jstor.org/stable/pdf/10.7758/rsf.2016.2.6.06.pdf> (Killewald and Bryan) p. 111.

³⁸² *Ibid.*

³⁸³ U.S. Dep’t of Housing and Urban Development, *Glossary of Terms to Affordable Housing*, <https://archives.hud.gov/local/nv/goodstories/2006-04-06glos.cfm> (as of Apr. 2, 2022).

³⁸⁴ Killewald and Bryan, *supra*, p. 111.

³⁸⁵ *Ibid.*

³⁸⁶ Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*, p. 13.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

households and 78 percent was held by white households.³⁸⁹ In 2019, 42.8 percent of Black Americans owned homes versus 73.3 percent of white Americans, and are more likely to face affordability issues in securing capital to purchase and sustain housing at 30 percent of their gross income, including utilities.³⁹⁰ In the same year, researchers for the National Bureau of Economic Research also found that Black mortgage borrowers were charged higher interest rates than white borrowers and were denied mortgages that would have been approved for white applicants.³⁹¹

Black Americans who own homes have a greater reliance on the house as a source of wealth than white households.³⁹² For example, in 2014, home equity accounted for 92 percent of Black Americans' net worth.³⁹³ This is because Black American homes are typically the largest investment a Black American household has, while white households have a larger variety of investments, i.e., a more diversified portfolio.³⁹⁴ In addition, white people become homeowners and begin accumulating home equity an average of eight years earlier than Black American families—linked to inheritance or intergenerational wealth transfers.³⁹⁵ Home equity for Black American homeowners has not increased at the same rate as it has for white homeowners largely because home values in the neighborhoods to which Black people have been systematically restricted, have been slow to recover since the housing crisis.³⁹⁶ Consequently, they also have generated lower returns on mortgage debt.³⁹⁷

There is a gap between the appreciation of a home owned by a white family and the appreciation of a similar home owned by a Black American family.³⁹⁸ When Black Americans do own homes, they tend to be appraised for less than comparable white homes, limiting the amount of money that can be taken out of their home equity. Race affects the rate of return on home asset.³⁹⁹ Black American home-owning households have an average of \$140,000 less in net worth than their white counterparts.⁴⁰⁰ In 2019, the typical Black American homeowner had a home value of \$150,000.⁴⁰¹ The typical white homeowner had a home value of \$230,000. Black American homeowners had a median home equity of \$66,800 in 2019.⁴⁰² White homeowners had a median

³⁸⁹ Moss et al., *The Black-White Wealth Gap Left Black Households More Vulnerable* (2020), Brookings, <https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/>.

³⁹⁰ CFPB Report, *supra* note 33, at 5.

³⁹¹ Flitter, *This is What Racism Sounds Like in the Banking Industry* (Dec. 11, 2019), N.Y. Times, <https://www.nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html> (as of Apr. 2, 2022), Bartlett et al., *Consumer Lending Discrimination in the Fintech Era* (Jun. 2019), Nat. Bureau of Econ. Research, <https://www.nber.org/papers/w25943.pdf> (as of Apr. 2, 2022).

³⁹² From Here to Equality, *supra*, p. 35.

³⁹³ Tippet et al., Center for Global Policy Solutions, *Beyond Broke: Why Closing the Racial Wealth Gap is a Priority for National Economic Security* (May 2014), https://globalpolicysolutions.org/wp-content/uploads/2014/04/BeyondBroke_Exec_Summary.pdf (as of Mar. 18, 2022) p. 4.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ Darity Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*, p. 29-30.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Id.* at p. 11.

⁴⁰¹ Bhutta, et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (2020), *FEDS Notes* 2020-09-28-2, Board of Governors of the Federal Reserve System (U.S.) (Bhutta et al.)

<https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> (as of Apr. 10, 2022).

⁴⁰² *Ibid.*

home equity of \$130,000 in the same year.⁴⁰³ Residential segregation could also be pushing down the value of houses in Black American neighborhoods.⁴⁰⁴ The depreciation of home value is due to residential segregation and concentrated neighborhood poverty attributable to “structural conditions.”⁴⁰⁵ Black American homeowners also tend to own homes appraised for less in neighborhoods deemed less valuable,⁴⁰⁶ which decreases their available equity relative to white homeowners.⁴⁰⁷ Even controlling for factors like neighborhood or home quality, a study has found systemic undervaluation of homes in Black American neighborhoods attributable to anti-Black bias.⁴⁰⁸ Major companies offering real estate insurance have been accused of targeting inner city neighborhoods where Black families live by denying claims as fraudulent.⁴⁰⁹

Black Americans have more difficulty accessing home equity due to factors linked to systemic discrimination in mortgage lending.⁴¹⁰ All of this limits Black Americans’ access to the benefits of home equity in a crisis.⁴¹¹ Black Americans also experience significant housing cost burdens.⁴¹² Without sufficient wealth in the first place, Black American households have limited means to invest in homeownership.⁴¹³ In 2019, 43 percent of Black American households spent more than 30 percent of their income on housing—compared with 25 percent of white households.⁴¹⁴ Systemic discrimination in mortgage lending may also make it more difficult for Black American homeowners to access their home equity through cash-out refinancing,⁴¹⁵ a means of accessing home equity that has been increasingly popular during the pandemic.⁴¹⁶ Between April 2020 and January 2021, less than a quarter of Black American homeowners who could have saved \$200 a month by refinancing did so, compared to 40 percent of similarly situated white homeowners.⁴¹⁷

Black Californians are much more likely to be renters and much more likely to be housing cost-burdened. For instance, 58.4 percent of Black Californians are renters versus 34.1 percent for white Californians, and much

⁴⁰³ Ibid.

⁴⁰⁴ Herring and Henderson, *supra*, p. 15.

⁴⁰⁵ Id. at p. 1546.

⁴⁰⁶ Manhertz, *Home Value Disparities Between Races are Shrinking, but Remain Very Wide* (Dec. 19, 2020) Zillow <https://bit.ly/3jbhrxT> (as of Aug. 18, 2020); Perry et al., Brookings Inst., *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property* (Nov. 2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf (as of Apr. 2, 2022) pp. 13-15.

⁴⁰⁷ See Redfin, *Black Homeowners Earned \$59,000 in Home Equity in 2020, Compared with \$50,000 for White Homeowners* (Mar. 9, 2021) PR Newswire <<https://www.prnewswire.com/news-releases/black-homeowners-earned-59-000-in-home-equity-in-2020--compared-with-50-000-for-white-homeowners-301243130.html>> (as of Aug. 18, 2021).

⁴⁰⁸ Perry et al., *supra*, p. 3.

⁴⁰⁹ Flitter, *Where State Farm Sees “a Lot Of Fraud” Black Customers See Discrimination* (Mar. 18, 2022) N.Y. Times, <https://www.nytimes.com/2022/03/18/business/state-farm-fraud-black-customers.html?referringSource=articleShare> (as of Apr. 2, 2022).

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² The State of The Nation’s Housing 2020 (2020), Joint Center for Housing Studies of Harvard University, https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revision_120720.pdf (as of Apr. 2, 2022) (The State of the Nation’s Housing 2020) p. 26.

⁴¹³ Darity, Jr., *What We Get Wrong About Closing the Racial Wealth Gap*, *supra*, p. 14.

⁴¹⁴ The State of the Nation’s Housing 2020, *supra*, p. 5.

⁴¹⁵ Murillo, *Black Homeowners Are Being Left out of the Mortgage Refinance Boom* (June 9, 2021) Money <<https://money.com/mortgage-refinance-rate-race-gap/>> (as of Aug. 18, 2021) (Murillo).

⁴¹⁶ Campisi, *Pandemic Remodeling Boom Looming? Cash-Out Refinancing Hits 13-Year High* (Dec. 4, 2020) Forbes <<https://www.forbes.com/advisor/mortgages/cash-out-refinancing-hits-13-year-high/>> (as of Aug 18, 2021).

⁴¹⁷ Murillo, *supra*.

more likely to be housing cost-burdened.⁴¹⁸ Black Californians are thus disproportionately less likely to have access to the credit and housing stability that a home can provide in a crisis.⁴¹⁹ Among those who do own homes, Black American families in many California cities are much more likely to own homes in formerly redlined neighborhoods, where median home equity is much lower.⁴²⁰ Anecdotal evidence from California also suggests outright racial discrimination in the valuation of Black-owned homes.⁴²¹ This reduces the amount of money Black Californian homeowners can borrow against the value of their homes in a crisis, or the value of cash-out refinancing, relative to white homeowners.⁴²²

In California, Black Americans experience continuing difficulties affording homes and face outsized rent burdens.⁴²³ Two-thirds of the individuals paying more than 30 percent of their income on rent are people of color.⁴²⁴ Homeownership for Black Californians lags behind the nationwide Black American homeownership rate—33.3 percent versus 44 percent nationally in 2019.⁴²⁵ The homeownership rate for white families is 28.4 percent higher than Black families in California.⁴²⁶ And homeownership rates for Black American households have fallen every decade for the last 30 years, both unconditionally and after controlling for income and demographics.⁴²⁷ Sixty-three percent of white Californians own their homes, while only 33 percent of Black Californians do.⁴²⁸ In addition, home ownership for Black American households has declined by more than 20 percent since 1980.⁴²⁹ Black Californians are involved in a “very different mortgage market” than white Americans, which leads to them facing challenges such as higher price loans, more predatory lending, and more risk.⁴³⁰ In October 2008, 6.3 percent of Black American homeowners were in default on their home purchase loans, though Black American homeowners are only 1.3 percent more likely to be in default than white people.⁴³¹ Further, during the housing crisis of the 2000s, California had the country’s highest foreclosure rates, with Los Angeles leading the state.⁴³² Black American household foreclosure rates were 1.9 times that of white

⁴¹⁸ Davalos et al., Cal. Budget & Policy Center, California’s 17 Million Renters Face Housing Instability and Inequity Before and After COVID-19 (Jan. 2021) pp. 6-7, <https://calbudgetcenter.org/app/uploads/2021/01/IB-Renters-Remediated.pdf> (as of Apr. 10, 2022).

⁴¹⁹ Ibid.

⁴²⁰ Anderson, *Redlining’s Legacy of Inequality: \$212,000 Less Home Equity, Low Homeownership Rates for Black Families* (June 11, 2020) Redfin <https://www.redfin.com/news/redlining-real-estate-racial-wealth-gap/> (as of Aug. 20, 2021).

⁴²¹ E.g., Glover, *Black California Couple Lowballed by \$500K in Home Appraisal, Believe Race was a Factor* (Feb. 12, 2021) ABC7 <https://abc7news.com/black-homeowner-problems-sf-bay-area-housing-discrimination-minority-homeownership-anti-black-policy/10331076/> (as of Aug. 20, 2021).

⁴²² Ibid.

⁴²³ Hutchful, *supra*, at pp.6-7.

⁴²⁴ Ibid.

⁴²⁵ Id; Passy, *Black Homeownership Rate Hits Lowest Level Since the 1960s – That’s Unlikely to Change in Pandemic Year 2* (Mar. 10, 2021) MarketWatch <<https://www.marketwatch.com/story/most-black-americans-arent-homeowners-how-can-we-change-that-11615431459>> (as of Aug. 20, 2021).

⁴²⁶ Hutchful, *supra*, at p. 6.

⁴²⁷ Shapiro et al., Institute on Assets and Social Policy, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide* (Feb. 2013), p.3-4, <https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf> (as of Apr. 11, 2022).

⁴²⁸ Hutchful, *supra*, at 6.

⁴²⁹ Reid & Laderman, *The Untold Costs of Subprime Lending: Examining the Links Among Higher Priced Lending, Foreclosures and Race in California*, Federal Reserve Bank of San Francisco (Nov. 2009).

⁴³⁰ Ibid.

⁴³¹ Id. at p. 13, 17.

⁴³² Ong. et al, *supra*.

Americans, likely due to increased targeting of minority communities for predatory lending as discussed above.⁴³³

But closing the homeownership gap alone will not close the racial wealth gap; the homeownership gap alone does not explain the racial wealth gap. Among Black and white American households who do not own a home, white households still have 31 times more wealth than Black American households.⁴³⁴

B. Fewer Assets

Black American households hold less assets than white households overall, but Black Americans have a higher proportion of assets in auto and home, and less in net liquid and net business assets.⁴³⁵ Black American households are also generally less likely to hold financial assets.⁴³⁶ Black Americans have “substantially” fewer assets than white people at every income level, including bank deposits, stocks, bonds, and loans.⁴³⁷

Black Americans tend to have fewer investments. Some studies argue that Black American investment patterns generally show risk aversion and lack of education on stocks and investments.⁴³⁸ They argue that wealthier Black Americans tend to save more and invest less⁴³⁹ compared to wealthier white Americans, and that white Americans are more likely than Black Americans to invest in high-risk, high-reward assets.⁴⁴⁰ For example, in 2004, Black American families were less likely than white families to have investment accounts and retirement accounts. Only 44 percent of Black Americans have retirement savings accounts, with a typical balance of around \$20,000, compared to 65 percent of white Americans, who have an average balance of \$50,000, according to the Federal Reserve.⁴⁴¹ And only 34 percent of African Americans own any stocks or mutual funds, compared to more than half of white people.⁴⁴² Some studies claim that this can be attributed to familial influence—Black American families are less likely to have investment accounts if their parents didn’t have any.⁴⁴³ Other studies argue that Black Americans are not significantly more risk averse or less financially literate than white people with similar levels of income and wealth. Further, Black Americans engage in entrepreneurship, which presents inherent risk, at higher rates than white Americans with similar levels of

⁴³³ Id. at 4.

⁴³⁴ Id. at p. 11.

⁴³⁵ Blau and Graham, *supra*, p. 16.

⁴³⁶ Oliver and Shapiro, *supra*.

⁴³⁷ Conley, *Being Black, Living in the Red: Race, Wealth and Social Policy in America*, Berkeley, CA, University of California Press, 1999 (Conley, *Being Black*), p. 41

⁴³⁸ Brimmer, *Income, Wealth, and Investment Behavior in the Black Community*, *The American Economic Review* 78, 2, 1988, pp. 151-155.

⁴³⁹ Herring and Henderson, *supra*, p. 8.

⁴⁴⁰ Keister, *Race and Wealth Inequality: The Impact of Racial Differences in Asset Ownership on the Distribution of Household Wealth*, *Social Science Research* 29, 2000, p. 499,

https://bibbase.org/f/nKAPSYp34A9azBzJd/Keister_2000_RaceWealthInequalityImpactRacial.pdf (as of Apr. 10, 2022).

⁴⁴¹ Brooks, *The Retirement Crisis Facing Black Americans* (Dec. 11, 2020), U.S. News,

<https://money.usnews.com/money/retirement/aging/articles/the-retirement-crisis-facing-black-americans> (as of Apr. 2, 2022).

⁴⁴² *Ibid.*

⁴⁴³ Devaney, et al., *Asset Ownership by Black and White Families* in *Financial Counseling and Planning* 18, 1, 2007, p. 33-45, https://www.researchgate.net/publication/228352534_Asset_Ownership_by_Black_and_White_Families (as of April 10, 2022).

income and wealth. Low wealth, lack of financial inclusion, and financial constraints on choice often forces Black borrowers to use predatory and abusive alternative financial services rather than financial illiteracy.⁴⁴⁴

Black Americans have less liquid assets. Liquid assets accessible as cash in times of crisis include cash savings, checking accounts, savings accounts, money market funds, certificates of deposit, and government bonds.⁴⁴⁵ Access to liquid assets is important in a crisis, as it enables people to continue to pay bills in the event of a sudden loss of income, or pay for emergency expenses such as medical costs. Lack of access to liquid assets can heighten the impact of crises by making it harder to afford basic necessities.⁴⁴⁶ People may also turn to family for economic support in times of hardship.⁴⁴⁷ In addition, access to government aid such as unemployment insurance, nutrition subsidies, and crisis-specific programs, such as stimulus checks and small business loans, help people and their businesses stay afloat.⁴⁴⁸ These resources are vital for surviving economic crises. For example, liquid assets such as cash savings help people pay bills in the event of a job loss or weather emergency expenses like a medical emergency.⁴⁴⁹ Similarly, people who have homes, stocks, or retirement funds may leverage their home value for a loan,⁴⁵⁰ liquidate stocks, or borrow from or against their retirement accounts to pay for expenses during difficult economic times.⁴⁵¹

Black American households tend to disproportionately lack access to many of these resources, often due to the persistence of historical disparities and racism that continues today.⁴⁵² In 2019, while 96.8 percent of Black American families had some kind of liquid asset—such as a checking account, savings account, or pre-paid card—typical Black American families with liquid assets had \$1,500 in liquid savings, compared to \$8,100 for white families with liquid assets.⁴⁵³ Racism in the banking system today still creates barriers to liquid assets for

⁴⁴⁴ Florant, et al., *The case for accelerating financial inclusion in Black communities* (Feb. 25, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-case-for-accelerating-financial-inclusion-in-black-communities> (as of April 9, 2022).

⁴⁴⁵ De La Cruz-Viesca et al, *supra*, p. 25.

⁴⁴⁶ Akabas et al., *New BPC Survey Shows Americans Need Better Ways to Save for Emergencies* (Feb. 25, 2021) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/new-bpc-survey-shows-americans-need-better-ways-to-save-for-emergencies/>> (as of Aug. 18, 2021) (Akabas et al.); Hutchful, *supra*, p. 3

⁴⁴⁷ Mills and Zhang, Urban Inst., *Social Support Networks and their Effects on Hardship Avoidance Among Low-Income Households* (Dec. 2013), <https://www.urban.org/sites/default/files/publication/22201/412991-Social-Support-Networks-and-Their-Effects-on-Hardship-Avoidance.pdf> (as of Apr. 10, 2022).

⁴⁴⁸ Liu and Parilla, *New Data Shows Small Businesses in Communities of Color Had Unequal Access to Federal COVID-19 Relief* (Sept. 17, 2020) Brookings Inst. <<https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/>> (as of Aug. 18, 2021) (Liu and Parilla).

⁴⁴⁹ Akabas, et al., *supra*.

⁴⁵⁰ Lerner, *Accessing Home Equity in a Tight Economy Has Become Problematic* (June 11, 2020) Wash. Post <https://www.washingtonpost.com/realestate/equity-rich-but-cash-poor--what-can-a-homeowner-do/2020/06/10/1856e51e-9a0c-11ea-a282-386f56d579e6_story.html> (as of Aug. 18, 2021).

⁴⁵¹ Akabas et al., *supra*.

⁴⁵² E.g., Gladstone et al., *Racial Inequities Have Long Existed in the Economy. A New BPC Survey Shows COVID-19 Made Them Worse*. (June 22, 2020) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/racial-inequities-have-long-existed-in-the-economy-a-new-bpc-survey-shows-covid-19-made-them-worse/>> (as of Aug. 18, 2021); Hardy and Logan, Hamilton Proj., Brookings Inst., *Racial Economic Inequality Amid the Covid-19 Crisis* (Aug. 2020) p. 2; Murillo, *supra*; Choe, *Stocks are Soaring, and Most Black People are Missing Out* (Oct. 12, 2020) AP News <<https://apnews.com/article/virus-outbreak-race-and-ethnicity-business-us-news-ap-top-news-69fe836e19a8dfe89d73e8e4be6d480c>> (as of Aug. 18, 2021); Bivens et al., *supra*; Brantley et al., *supra*; Bhutta et al., *supra*; Akabas et al., *supra*; GAO Report, *supra*; Cronin, *supra*; Liu and Parilla, *supra*.

⁴⁵³ Bhutta et al., *supra*.

Black customers. Black customers are sometimes [profiled](#),⁴⁵⁴ viewed with suspicion [just for entering a bank](#),⁴⁵⁵ and [questioned](#)⁴⁵⁶ over the most basic transactions.⁴⁵⁷

Black Americans have less non-liquid assets. In general, non-liquid assets such as homes, stocks, and retirement funds can support financial security by increasing resources necessary to weather a crisis or invest in wealth-generating assets for the future.⁴⁵⁸ As discussed above, Black Americans experience myriad barriers to homeownership and the mortgage market. Stocks and mutual funds, which can be sold, and retirement funds, which can be liquidated or borrowed against, also provide potential sources of aid in a crisis.⁴⁵⁹ Black Americans are also less likely to own stocks than white Americans, and Black Americans who own stocks have less equity than white Americans do.⁴⁶⁰ While 61 percent of white households own any form of stocks, only 33.5 percent of Black American households do.⁴⁶¹ Among families who own stocks, the typical white family has access to \$50,600 they could tap in an emergency, compared to \$14,400 for the typical Black American family.⁴⁶²

While Black Americans are more likely to have access to retirement accounts than homes or other types of stocks, they are still less likely than white Americans to have them.⁴⁶³ Around 55 percent of Black American working-age families have access to an employer-sponsored retirement plan, and 45 percent participate.⁴⁶⁴ Seventy percent of white working-age families have access to an employer-sponsored retirement plan, and 60 percent of them participate.⁴⁶⁵ Among working-age white families with balances in such accounts, the typical white family has approximately \$50,000 saved, whereas the comparable Black American family has approximately \$20,000 saved.⁴⁶⁶ During the pandemic, a survey found that Black American households with retirement accounts were much more likely to report that they planned on withdrawing from or borrowing against them (48 percent and 45 percent) than white households (29 percent and 29 percent) due to relative lack of other assets.⁴⁶⁷ However, withdrawing money from retirement accounts can incur tax and other penalties.⁴⁶⁸

⁴⁵⁴ Houser, Cleveland 19 News, *Cleveland Man Alleges Racial Profiling after Bank Refuses to Cash Check, Calls 9-1-1* (Dec. 19, 2018), <https://www.cleveland19.com/2018/12/18/cleveland-man-alleges-racial-profiling-after-bank-refuses-cash-check-calls/> (as of Apr. 10, 2022).

⁴⁵⁵ Johnson, WSB-TV 2, *Doctor Says Bank Employees Called Police on Him While Trying to Open Account* (Sept. 13, 2019), <https://www.wsbtv.com/news/local/henry-county/doctor-says-bank-employees-called-police-on-him-while-trying-to-open-account/986152209/> (as of Apr. 10, 2022).

⁴⁵⁶ Shammas, Miami New Times, *Another Black South Floridian Says Wells Fargo Refused to Cash His Check, Called Cops* (Aug. 9, 2018), <https://www.miaminewtimes.com/news/wells-fargo-called-police-on-haitian-customer-trying-to-withdraw-money-lawsuit-says-10610677> (as of Apr. 10, 2022).

⁴⁵⁷ Logan, The Independent, *A Florida Bank Refused to Cash an Elderly Black Woman's Check. Then They Called the Police on Her* (July 28, 2018), <https://www.independent.co.uk/news/fargo-wells-bank-black-woman-cheque-florida-barbara-carroll-discrimination-a8467596.html> (as of Apr. 10, 2022).

⁴⁵⁸ Hutchful, *supra*, p. 2.

⁴⁵⁹ E.g., Bhutta et al., *supra*.

⁴⁶⁰ Choe, *supra*; Bhutta et al., *supra*.

⁴⁶¹ Choe, *supra*.

⁴⁶² Bhutta et al., *supra*.

⁴⁶³ *Ibid*.

⁴⁶⁴ *Ibid*.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ *Ibid*.

⁴⁶⁷ *Ibid*.

⁴⁶⁸ Akabas et al., *supra*.

Similarly, Black Californians have less non-liquid assets. Only 22 percent of Black Americans in Los Angeles own stocks, mutual funds, and/or investment trusts; only 38 percent of households own an individual retirement account or private annuity.⁴⁶⁹ Eighteen percent of Black American households in Los Angeles do not have a car.⁴⁷⁰ While Californians, in general, face long commute times, Black Californians in Los Angeles, on average, have a 7.5 percent longer commute; at the same time, only 72 percent of U.S.-born Black households in Los Angeles own a vehicle, the lowest proportion for a racial group.⁴⁷¹

C. Lower Business Ownership

Business ownership allows Black Americans to participate in local, regional, and global markets from which they have historically been excluded due to systemic racism and discrimination.⁴⁷² Equity in a business is among one of the types of assets that are more unequally distributed by race.⁴⁷³ Lower wealth for Black Americans leads to lower business ownership and self-employment.⁴⁷⁴ Studies have demonstrated the substantial wealth advantages to self-employment and have shown that those who become self-employed show much stronger gains in wealth compared to individuals who never become self-employed.⁴⁷⁵ This is especially true for Black business owners given that the median net worth for Black business owners is 12 times higher than Black nonbusiness owners.⁴⁷⁶ Further, Black business ownership is a viable path to creating wealth not only for Black business owners, but for Black communities at large.⁴⁷⁷ Most small businesses tend to hire from the community, which tends to create job opportunities for community residents.⁴⁷⁸ Therefore, the success of Black-owned businesses is a critical path for economic empowerment in Black communities.⁴⁷⁹

Despite the importance of Black business ownership, the Center for Financial Household Stability and the Federal Reserve Board of St. Louis have documented that, compared to white individuals, Black Americans own fewer of their assets in the form of business assets.⁴⁸⁰ In terms of market share, Black-owned businesses are significantly underrepresented in comparison to white and other minority-owned businesses.⁴⁸¹ In 2017, only 3.5 percent of all United States businesses were Black-owned compared to 81 percent white-owned, 9.7 percent Asian-owned, and 5.8 percent Hispanic-owned in the country.⁴⁸² In Los Angeles, 11.7 percent of white

⁴⁶⁹ De La Cruz-Viesca, et al., *supra*, pp. 29-30.

⁴⁷⁰ Ali, *supra*, p. 67.

⁴⁷¹ De La Cruz-Viesca, et al., *supra*, p. 36.

⁴⁷² Perry and Romer, *To Expand the Economy, Invest in Black Businesses* (Dec. 31, 2020) Brookings Inst. <<https://www.brookings.edu/essay/to-expand-the-economy-invest-in-black-businesses/>> (as of Apr. 10, 2022).

⁴⁷³ Sobol, *Factors Influencing Private Capital Accumulation on the 'Eve of Retirement'* (1979) in *Review of Economics and Statistics*, LXI, pp. 585-593.

⁴⁷⁴ *From Here to Equality, supra.*

⁴⁷⁵ Association for Enterprise Opportunity, *The Tapestry of Black Business Ownership in America: Untapped Opportunities for Success* (2017) (Association for Enterprise Opportunity) p. 8, https://aeoworks.org/wp-content/uploads/2019/03/AEO_Black_Owned_Business_Report_02_16_17_FOR_WEB-1.pdf (as of Apr. 10, 2022).

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Id.* at pp. 4, 8.

⁴⁷⁸ *Id.* at p. 4.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Klein, *Bridging the Divide, How Business Ownership Can Help Close the Racial Wealth Gap* (2017) FIELD at the Aspen Institute (Klein) p. 6, <https://www.aspeninstitute.org/wp-content/uploads/2017/01/Bridging-the-Divide.pdf> (as of Apr. 10, 2022).

⁴⁸¹ Howard et al., *Banks & the Black Community, What Can Major Commercial and Retail Banking Institutions Do to Better Support Black Entrepreneurs and Businesses in the U.S.?* (2020) (Howard et al.), <https://www.cbefinc.org/wp-content/uploads/2020/06/BOA-0618-REPORT-EDITS.pdf> (as of Apr. 10, 2022).

⁴⁸² *Id.* at 3.

households own a business versus 3.1 percent of Black American households.⁴⁸³ Although Black business ownership has been steadily increasing in the United States, growth has been tremendously slow.⁴⁸⁴ Several factors contribute to the racial disparity in American business ownership such as systemic barriers to securing start-up capital and the relatively small size of Black businesses.⁴⁸⁵

Black Americans face many systemic barriers when seeking the social and financial capital necessary to start their own businesses that make it increasingly difficult for Black entrepreneurs to secure the financial capital necessary to launch or grow their own businesses.⁴⁸⁶ As a result, Black business owners typically start their businesses with half the capital of white business owners despite the fact that they demonstrate a greater need for start-up financing.⁴⁸⁷ According to Pepperdine's Private Capital Access Index report, approximately 80 percent of Black businesses sought financing for planned business growth or expansions compared to only 55 percent.⁴⁸⁸ Although Black businesses demonstrate a greater desire and need to secure financing, discriminatory lending practices cause Black business owners to receive lower loan amounts at a significantly lower rate than white business owners.⁴⁸⁹ For example, the median loan amount for Black business owners who are approved for credit is less than half of the loan amounts extended to their white counterparts.⁴⁹⁰

Another barrier to the growth and development of Black businesses is the fact that, on average, the businesses owned by Black Americans are smaller than those owned by white Americans.⁴⁹¹ A key factor for measuring the size of a business is whether the business has employees and statistics show that Black-owned businesses are much less likely to have employees than white-owned businesses.⁴⁹² In 2012, for example, 23.9 percent of businesses owned by white men had employees whereas only six percent of businesses owned by Black men had employees.⁴⁹³ Although the size of a business has a significant influence on the profitability of a business, even Black-owned businesses with employees tend to be much less profitable than white-owned businesses with employees.⁴⁹⁴ In 2014, 63.4 percent of white-owned businesses with employees indicated that they were profitable compared to the reported profitability of only 45.6 percent of Black-owned businesses with employees.⁴⁹⁵ In addition, the top 100 Black-owned businesses earned less than \$30 billion in 2014. Walmart earned \$482 billion, or sixteen times that.⁴⁹⁶

The challenges faced by Black business owners were further exacerbated by the economic hardships caused by the COVID-19 pandemic.⁴⁹⁷ The Federal Reserve Bank of New York reports that about 58 percent of Black-owned businesses were at risk of financial distress before the pandemic, compared to approximately 27 percent

⁴⁸³ De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles*, *supra*, p. 41.

⁴⁸⁴ Howard et al., *supra*, pp. 1-3.

⁴⁸⁵ *Id.* at p. 3.

⁴⁸⁶ Association for Enterprise Opportunity, *supra*, pp. 24-28.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ Klein, *supra*, p. 7.

⁴⁹² *Id.* at p. 8.

⁴⁹³ *Ibid.*

⁴⁹⁴ *Id.* at p. 9.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ From Here to Equality, *supra*, p.41.

⁴⁹⁷ Perry and Romer, *supra*.

of white-owned businesses.⁴⁹⁸ The financial instability experienced by Black-owned businesses made these businesses particularly vulnerable at the onset of the pandemic.⁴⁹⁹ According to a report by the House Committee on Small Business, Black business ownership declined approximately 40 percent, more than any other racial group, during the first few months of the pandemic.⁵⁰⁰ Black business owners such as Richard Anderson, the owner of Kinfolk Brass Band and Music Group, experienced significant economic distress as a result of the pandemic.⁵⁰¹ Before the pandemic, Kinfolk Brass Band was one of the most popular bands in New Orleans and frequently performed at weddings and music festivals around the world.⁵⁰² However, lockdown measures enacted to reduce the spread of COVID-19 forced all large events and gatherings to cease.⁵⁰³ Without any events to perform at, Kinfolk Brass Band and its band members, including owner Richard Anderson, suffered a significant loss of income in 2020.⁵⁰⁴

V. Effects of Wealth Gap

The harmful effects of the wealth gap, which cascade across generations, have resulted in racial differences in the capacity of Black Americans to transmit resources across generations, lower financial resilience during crisis, and homelessness.

A. Fewer Intergenerational Wealth Transfers

Lower assets of Black Americans means that intergenerational wealth transfers are less likely and tend to be smaller. Inheritance, intergenerational wealth transfers, or parental wealth are primary sources of the capacity for sustained wealth building.⁵⁰⁵ Wealth, more than income, can be used to invest in appreciating assets for offspring, such as a college education, an unpaid internship in a high rent city, a new business, a property in a better residential neighborhood, or a job in the family firm.⁵⁰⁶ Without wealth transfers, regardless of income, these assets are harder to attain.⁵⁰⁷ The fewer resources the older generation has to transfer to the next, the lower the wealth position attained by the younger generation.⁵⁰⁸ At least 26 percent of an adult's wealth position is directly due to inheritance or gift money—a conservative estimate. The true effect could be as high as 50 percent.⁵⁰⁹ Greater familial assistance contributes to white families' greater ability to buy better housing and get better deals on mortgages earlier in life, further compounding the homeownership and wealth gap and giving

⁴⁹⁸ Washington, *Covid-19 Has Had a Disproportionate Impact on Black Small Businesses* (June 3, 2021) Forbes <<https://www.forbes.com/advisor/personal-finance/covid19-financial-impact-on-black-businesses/>>.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² Ibid.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ Blau and Graham, *supra*, Conley, *supra*; Killewald, *Return to Being Black, Living in the Red: A Race Gap in Wealth That Goes Beyond Social Origins* (2013) in *Demography* 50 (Killewald); Weller et al., *Simulating How Large Policy Proposal Affect the Black-White Wealth Gap* (2021) in *Journal of Economics, Race and Policy*, p. 2.

⁵⁰⁶ Toney & Robertson, *Intergenerational Economic Mobility and the Racial Wealth Gap*, American Economic Association Papers & Proceedings, Vol. 111 (May, 2021), pp. 206-10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698814 (as of Apr. 11, 2022).

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Dalton Conley, *Decomposing the Black-White Wealth Gap: The Role of Parental Resources, Inheritance, and Investment Dynamics* (2001) in *Sociological Inquiry* 71, 1 (Conley, *Decomposing*), pp. 39-66.; Herring and Henderson, *supra*; Weller et al., *supra*.

white families better security in crisis.⁵¹⁰ An Urban Institute study estimates that the shortfall in large gifts and inheritances accounts for 12 percent of the Black-white wealth gap.⁵¹¹

The devastating impact of fewer intergenerational transfers is reflected in the stark wealth gap between Black and white American millennials. While the typical white millennial family has about \$88,000 in wealth, the typical Black millennial family has only about \$5,000 in wealth. Further, white millennial families made huge strides between 2016 and 2019, and they now lag previous generations of white families by only about five percent.⁵¹² Between 2007 and 2019, however, Black millennials fell further and further behind—not just compared with white millennials, but compared with previous generations of Black Americans.⁵¹³ While white millennials trail the wealth of previous generations of white Americans by only five percent, Black millennials trail previous generations of Black Americans by 52 percent.⁵¹⁴ The typical Black millennial has \$5,700 less in net worth than counterparts in previous generations.⁵¹⁵

There are several reasons for these deep disparities between Black and white millennials.⁵¹⁶ First, white millennials are more likely to benefit from having wealthy parents. Greater familial assistance contributes to white families' greater ability to buy better housing and get better deals on mortgages earlier in life, further compounding the homeownership and wealth gap and giving white families better security in crisis.⁵¹⁷ Their parents have more resources, for example, to help them with down payments on their first house or to help them pay off their student loans.⁵¹⁸ About 80 percent of Black millennials with at least a bachelor's degree still have student loan debt, compared with about half of white millennials. White millennials are also more likely to own assets like stocks and homes, which have ballooned in value in recent years.⁵¹⁹ While about two-thirds of white millennials own homes, less than a third of Black millennials own homes.⁵²⁰

B. Lower Financial Resilience during Crisis

Support from family networks can provide a “private safety net” to aid with cash transfers, housing, or childcare in times of material hardship.⁵²¹ Cash transfers can provide additional income, multigenerational housing can provide shelter, and family-provided childcare can permit a parent to work and earn income as well as avoid

⁵¹⁰ Blau and Graham, *supra*; Conley, *Being Black, supra*; Killewald, *supra*; Weller et al., *supra*,

⁵¹¹ McKernan, et al., *Private Transfers, Race, and Wealth* (2012), The Urban Institute, Report 5, p.11, <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412371-Private-Transfers-Race-and-Wealth.pdf> (as of Apr. 2, 2022).

⁵¹² Rosalsky, NPR Planet Money, *There is Growing Segregation in Millennial Wealth* (Apr. 27, 2021), <https://www.npr.org/sections/money/2021/04/27/990770599/there-is-growing-segregation-in-millennial-wealth> (as of Apr. 11, 2022).

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ Blau and Graham, *supra*, Conley, *Being Black, supra*; Killewald, *Return to Being Black, Living in the Red: A Race Gap in Wealth That Goes Beyond Social Origins* (2013) in *Demography* 50 (Killewald), <https://scholar.harvard.edu/files/akillewald/files/art3a10.10072fs13524-012-0190-0.pdf> (as of Apr. 11, 2022); Weller et al., *Simulating How Large Policy Proposal Affect the Black-White Wealth Gap* (2021) in *Journal of Economics, Race and Policy*, p. 2, <https://link.springer.com/content/pdf/10.1007/s41996-020-00077-8.pdf> (as of Apr. 11, 2022).

⁵¹⁸ Rosalsky, *supra*.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ Whitehead, Center for Poverty Research, Univ. Cal. Davis, *Support from Family Does Not Replace the Social Safety Net* (Apr. 2016) (Whitehead) p. 1, <https://poverty.ucdavis.edu/policy-brief/support-family-does-not-replace-social-safety-net> (as of Apr. 11, 2022).

childcare expenses.⁵²² For example, during the COVID-19 pandemic, almost a quarter of renters borrowed money from friends or family.⁵²³

While Black Americans receive assistance from family members at high rates, their overall tendency to lack resources may reduce the available quantity of such assistance, and may result in economic harm to the giver.⁵²⁴ Black American families are more likely than white families to have high-poverty family networks and more likely to make repeated cash transfers, which hinders their ability to accumulate wealth.⁵²⁵ For example, in 2019, 71.9 percent of white families expected that they could get \$3,000 from friends or family during a crisis, versus less than 40.9 percent of Black American families.⁵²⁶ While new Black American mothers are more likely to live in a relative's home, host a family member, and give or receive money than white mothers, helping family members in poverty may have negative consequences for struggling families.⁵²⁷

A pre-pandemic study found that while 29.1 percent of white households are liquid-asset poor (meaning that they could not use their savings to live for three months at the federal poverty rate), 58.2 percent of Black American households are.⁵²⁸ And a 2020 study found that 36 percent of white families had enough savings to cover six months of expenses, versus 14 percent of Black American families.⁵²⁹ In one February 2021 survey of "disadvantaged workers," 42 percent of white households reported that they could not pay for a \$400 emergency expense without taking on additional debt, drawing down retirement accounts, or selling items, compared to 59 percent of Black American households.⁵³⁰ The survey also found that 36 percent of Black American respondents said that they had no money at all set aside for emergencies, compared to 24 percent of white respondents. As a result, Black American families may be hit harder by crises because they have considerably lower access to liquid assets than white families.⁵³¹

Black Americans are more likely to suffer from economic crises such as the COVID-19 pandemic. For example, one June 2020 survey found that while only 27 percent of white households had experienced financial hardship as a result of the pandemic, 40 percent of Black American households had.⁵³² In addition, lack of access to liquid assets can also force people into financially risky options during a crisis, such as taking out predatory payday loans or high-interest credit card debt.⁵³³ Lack of access to liquid assets can also make it harder to afford food and rent.⁵³⁴ June 2020 census data showed that, among households where a job was lost during the COVID-19 pandemic, 31 percent of Black American households lacked sufficient food in the prior week (a 12 point increase), compared to 12 percent of white households (a five point increase).⁵³⁵ The data also showed

⁵²² Ibid.

⁵²³ Harvard Report, *supra* note 32, at 29.

⁵²⁴ Whitehead, *supra*, p. 1.

⁵²⁵ Id. at p. 2.

⁵²⁶ Bhutta et al., *supra*.

⁵²⁷ Hutchful, *supra*, at p. 2.

⁵²⁸ Gladstone et al., *supra*; Sims & Weisman, *Prosperity Now Scorecard: Main Findings* (Jan. 2020) Prosperity Now <<https://scorecard.prosperitynow.org/main-findings#takeaways>> (as of Aug. 18, 2021).

⁵²⁹ Bhutta et al., *supra*.

⁵³⁰ Akabas et al., *supra*.

⁵³¹ Ibid.

⁵³² Gladstone et al., *supra*.

⁵³³ Watkins and Akabas, *The Savings Gap for Americans is A Key Component of Economic Stability – Here's what we Can Do About it* (July 1, 2020) Bipartisan Policy Center <<https://bipartisanpolicy.org/blog/the-savings-gap-for-americans-is-a-key-component-of-economic-stability-heres-what-we-can-do-about-it/>> (as of Aug. 18, 2021).

⁵³⁴ Ibid.

⁵³⁵ Gladstone et al., *supra*.

that, compared to white renters, Black American renters were less likely to have paid their rent in the previous month and more likely to predict that they would not be able to make their next rent payment.⁵³⁶ In a May 2020 survey, Black American respondents were more than twice as likely as white respondents to report missing a credit card, utility, internet, rent, mortgage, or other “important payment” since the beginning of the pandemic.⁵³⁷ Black American families with liquid assets also use them up more rapidly than white families during a crisis.⁵³⁸ Black American families with emergency savings at the start of the pandemic were twice as likely as white households to have needed to use them by May, and more than twice as likely to have already spent at least a quarter of their savings.⁵³⁹

C. Racially Discriminatory Tax Structures

More than 50 years after the passage of the Civil Rights Act, many wealth-building policies still continue to heavily favor households that do not need help building wealth—mostly wealthy, predominantly white households—while doing little or nothing for low-wealth Black American households, among other households of color.⁵⁴⁰ The largest and most powerful of these programs operate through the U.S. tax code.⁵⁴¹ These federal tax programs overwhelmingly favor building the wealth of those at the top, contributing to the extreme rise in overall wealth inequality over the past several decades.⁵⁴² Tax policies have drastically different impacts on Black and white families and many were created during a time when Black families paid into the system without having the same legal rights to live, work, marry, vote, or receive an education as their white peers.⁵⁴³ The modern income tax system traces its roots to the Revenue Act of 1913, which instituted a “progressive” income tax system where tax rates increase as income increases and did not envision Black Americans as taxpayers at all.⁵⁴⁴ Even as Black Americans eventually paid into the tax system after amendments and several new laws, they were unable to reap its benefits.⁵⁴⁵ Today, Black Americans of all income levels are still invisible when it comes to shaping policy but are paying more in taxes than their white peers because U.S. tax laws were designed with white Americans in mind.⁵⁴⁶

In the past 20 years, the federal government has spent more than \$8 trillion through tax programs to help families build long-term wealth by helping them save for retirement, purchase a home, start a business or access higher education.⁵⁴⁷ Since 1994, the federal government’s massive wealth-building spending has more than tripled, going from a little over \$200 billion to \$660 billion in 2015.⁵⁴⁸ Unfortunately, the result of this spending today is that the typical millionaire receives about \$145,000 in public tax benefits to grow their wealth, while

⁵³⁶ Ibid.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ Asante-Muhammad, et al, Corporation for Economic Development, *The Ever-Growing Gap: Without Change, African-American and Latino Families Won’t Match White Wealth for Centuries* (Aug. 2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf (as of Apr. 11, 2022).

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Brown, *The Whiteness of Wealth* (2021) p. 16.

⁵⁴⁴ Id. at p. 12.

⁵⁴⁵ Id. at pp. 14-15.

⁵⁴⁶ Id. at p. 21.

⁵⁴⁷ Asante-Muhammad, et al, **Error! Hyperlink reference not valid.** *supra*, p.17.

⁵⁴⁸ Ibid.

working families get a grand total of \$174 on average.⁵⁴⁹ These tax programs are not only adding to the rise in extreme wealth inequality, they are also making the racial wealth gap worse. Although the Internal Revenue Service (IRS) does not collect race or ethnicity data, recent research has found that an overwhelming amount of the spending done through the tax code goes to white households at all income levels.⁵⁵⁰ More specifically, if we look at households in the highest fifth of incomes or those earning \$103,466 or more, white people accounted for 79 percent of those respective filers, while Black people made up only six percent.⁵⁵¹ Filers in the top fifth of incomes were also found to take greater advantage of high-value tax benefits, which cost the government hundreds of billions of dollars each year. For example, in 2012 that white people made up 83 percent of the residents in the ZIP codes with the highest percentage of tax returns reporting capital gains and mortgage interest deductions.⁵⁵² By comparison, Black Americans made up just three percent of residents in the ZIP codes reporting the highest rates of capital gains income and six percent of residents in ZIP codes reporting the highest rates of mortgage interest deductions. During that year, these two tax programs collectively cost the government over \$100 billion.⁵⁵³

D. California

In California, Los Angeles provides a stark version of nationwide racial disparities in liquid assets accessible during a crisis.⁵⁵⁴ A 2014 study of the Los Angeles metro area found that the median value of liquid assets for native born Black American households was \$200, compared to \$110,000 for white households.⁵⁵⁵ While 91.6 percent of white households had some kind of liquid asset, only 62.3 percent of native-born Black American households did. Further, 90.1 percent of white households had a checking account, versus 68.1 percent of native-born Black American households.⁵⁵⁶ In addition, 71.9 percent of white households had a savings account, versus 55.5 percent of native-born Black American households.⁵⁵⁷ While 40.7 percent of white households had stocks, mutual funds, or investment trusts, only 21.5 percent of native-born Black American households did.⁵⁵⁸ Finally, 63.6 percent of white households had an individual retirement account or private annuity, versus 37.9 percent of native-born Black American households.⁵⁵⁹

In California, many current state tax policies privilege Californians with higher incomes and wealth, and ultimately widen existing racial inequities.⁵⁶⁰ Many tax breaks in California benefit people with higher incomes—predominantly white and Asian Californians—and give little to no benefits to other Californians, including Black Californians.⁵⁶¹ For example, many tax benefits are only available to those who opt to “itemize” their tax deductions, and people who itemize tend to have higher incomes. California’s four largest

⁵⁴⁹ Ibid.

⁵⁵⁰ Id. at 18.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ De La Cruz-Viesca et al., *The Color of Wealth in Los Angeles*, *supra*.

⁵⁵⁵ Id. at p. 38.

⁵⁵⁶ Id. at p.25.

⁵⁵⁷ Ibid.

⁵⁵⁸ Id. at p. 6.

⁵⁵⁹ Id. at pp. 6-7.

⁵⁶⁰ Kitson, California Budget and Policy Center, *Promoting Racial Equity Through California’s Tax and Revenue Policies* (Apr. 2021), <https://calbudgetcenter.org/app/uploads/2021/04/5F-FP-Taxes--Racial-Equity.pdf> (as of Apr. 11, 2022).

⁵⁶¹ Ibid.

personal income tax deductions provide more than three-quarters of their benefits to families with incomes over \$100,000, who are generally the richest 20 percent of families, while providing nearly no benefits to those with incomes below \$20,000.⁵⁶² Black Californians are more likely to have low incomes, so they are less likely to benefit from these tax breaks.⁵⁶³ California's several tax benefits for homeowners, including the deductions for mortgage interest and property taxes, are also unlikely to benefit Black Californians who have been blocked from homeownership through racist policies and practices, often lack funds for a down payment to purchase a home in the first place, and have lower value homes due to residential segregation and racially biased appraisal practices.⁵⁶⁴

VI. Conclusion

The legacy of enslavement continues to reach into the lives of Black Americans today. For hundreds of years, the American government at the federal, state, and local levels has systematically prevented Black American communities from building, maintaining, and passing on wealth due to the racial hierarchy established to maintain enslavement. Segregation, racial terror, harmful racist neglect, and other atrocities in nearly every sector of civil society have inflicted harms, which cascade over a lifetime and compound over generations. As a result, Black Americans today experience a large and persistent wealth gap when compared to white Americans. Addressing this persistent racial wealth gap means undoing long-standing institutional arrangements that have kept Black American households from building and growing wealth at the same rate as white households to the present day.

⁵⁶² Id. at 4.

⁵⁶³ Ibid.

⁵⁶⁴ Id. at 5.

Report 1: Chair Kamilah Moore Edits

- ▶ Change Black American(s) to African American(s)
 - ▶ Add discussion that African American is not a race, it's a distinct group or historical signifier for a distinct lineage (used since the 1700s by African Americans); can be used interchangeably with American Freedmen.
- ▶ Change references from 'race/racism' to 'caste', casteism/casteist
 - ▶ Change title of Chapter 3. "Racial terror seems like an inappropriate euphemism and doesn't account for caste. I propose title and reference to racial terror are changed to 'white supremacist' and/or "casteist terror"

Member Holder Feedback for Report

I would like to interrogate the term "Black immigrants" used throughout the report and in Kamila's proposed Intro. I offer more precise, measured, and methodologically sound terms in lieu of "black immigrant" as follows 1) "African Americans not descended from U.S. slavery and African immigrants" or 2) "African Americans descended from diasporic enslaved people and African immigrants or 3) diasporic African Americans and recent African immigrants. Any of these three terms is more precise and thus preferable to the generic term "black immigrants".

The relevant legal frameworks for "citizenship" should serve as the underpinning for the lexicon we employ in the Report. Moreover, precise language is critical to our endeavor to educate and bring to the public a truthful narrative about the history of oppressed people of African descended people in the United States. The terms I identify are not simply interchangeable or semantic within this truth telling construct. Finally, the terms I suggest are evidence-based and methodologically sound. Based on the evidence the Task Force (with the help of our DOJ partners) has marshaled from expert witnesses and the scholarship undergirding the report, we know that non-ADOS diasporic Africans emigrated to the U.S. in waves beginning at the Turn of the 19th century to the present and are mostly, in point of fact, U.S. citizens as defined by immigration law.

Specifically, more than half of those African diasporic people came to the U.S. from the Caribbean and South America during the 20th Century in three migration waves- beginning circa 1900, then in the 1940's, and then in the 1960s. This population descended from enslaved people too, except their lineage is traced to enslaved people in the Americas and not the United States. As black people of this Caribbean enslaved lineage came in migration waves in the early 1900s, the 1940s and the 1960s, the people descended from this group have been in the United States for generations. Today, most black people of this lineage are natural born citizens of the United States and the elders of this group are likely naturalized U.S. citizens. Moreover, most of this population has exclusive U.S. citizenship as the laws preclude them from dual citizenship status with the Caribbean nations. Therefore, it is inaccurate to use the term immigrant for 1st, 2nd 3rd generation U.S. citizens of this line. We do not use the term immigrant to describe 1st, 2nd, 3rd generation U.S. citizens whose lineage traces to Italy or Ireland, and we should not use the term immigrant for Black U.S. citizens with remote "legal" ties to their ancestral home.

There are also Black people who have migrated more recently to the U.S. since 2000. Those people are primarily born on the African continent. Notably although this group does not trace their lineage to slavery, they too have experienced oppression in the form of colonization. A small percentage (less than 5%) of black people in the U.S. are of this pedigree. Many in this group may be in point of fact non-citizen, green card holders. Thus it may be more accurate to use the term black immigrant for this isolated population.

Our methodology will be more sound if it is uniform and consistent. The TF in last month's vote chose to disaggregate black people based on lineage. Since that is the chosen framework we should employ it precisely and across the board..not just for ADOS but for all black people.

Ultimately, It is anathema to our truth telling mission to lump these aforementioned distinct groups indiscriminately into the "black immigrant" category which connotes that all people in that are non-ADOS are recent arrivals to the U.S. as opposed to natural born citizens and 2nd, 3rd, 4th generation Americans. Indeed, to use this imprecise language obscures the true history and lived experience of these groups. It is another form of erasure visited upon a people who have dealt with centuries of erasure. We must be precise, disciplined and procedurally fair in our wording in order to abate oppression and fulfill the guarantee of non repetition implicit to the reparations framework.

AGENDA ITEM 20

POTENTIAL ACTION ITEM:
SCHEDULE OF FUTURE MEETING

During the December 2021 hearing, the California Reparations Task Force voted to create an advisory committee tasked with reconceptualizing the remainder of the public hearings. The advisory committee consists of Chair Moore and Member Scott Lewis. See below for the proposed public hearing schedule:

January 2022 (Virtual)

Technology and Health

Discuss anti-black discrimination in technology

Discuss anti-blackness in health sectors (i.e. public health, mental health, physical health)

Feb 2022 (Virtual)

Black History Month Commemoration

Honor current and past reparations advocates/movements (i.e. Callie House, Queen Mother Moore, John Conyers, Tulsa/Rosewood, Charles Henry/Damario Solomon Simmons, Cochran/Ogletree/Farmer-Paellman etc.)

Report 1 Update

March 2022 (Virtual)

Criminal Legal System, War On Drugs, and Mass Incarceration

Discuss history of policing, and the War On Drugs

Discuss criminal legal system, mass incarceration (including juvenile justice), prisons/policing and the impact on Black Californians

April 2022 (In Person) (1) San Francisco

Education, Final Report Approval and Educating the CA Public (Comms)

Education (K-12; College; Post Grad)

Discuss Report 1; Final Report Approval

Discuss how to educate the CA Public on findings

Planning Session

COMMUNITY ENGAGEMENT PUSH (MAY – AUGUST 2022)

June 1 2022 → REPORT RELEASED

August 15 2022 (3) Allensworth (Bakersfield)

Forms of Reparations and Comparative Models

Discuss comparative reparations models (domestic and international)

Discuss how recommendations must comport with international standards of remedy for wrongs and injuries caused by the state, that include full reparations and special measures, as understood by various relevant international protocols, laws, and findings.

October 2022 (4) Sacramento

Reparation and Restitution/Restoration

Discuss how to provide appropriate policies, programs, projects, and recommendations for the purpose of reversing the injuries.

Discuss how, in consideration of the Task Force's findings and recommendations, any other forms of rehabilitation or restitution to African descendants are warranted and what form and scope those measures should take.

December 2023 (5) San Diego

Reparation and Compensation

Discuss how in consideration of the Task Force's findings and recommendations, any form of compensation to African Americans, with a special consideration for African Americans who are descendants of persons enslaved in the United States, is calculated.

What form of compensation should be awarded, through what instrumentalities, and who should be eligible for such compensation.

February 2023 (6) Oakland

Reparations Recommendations Part 1

Recommend appropriate remedies in consideration of the Task Force's Findings and recommendations.

Discuss how the State of California will provide other forms of reparations in the form of guarantees of non-repetition.

April 2023 (7) Inglewood

Reparations Recommendations Part 2

Recommend appropriate remedies in consideration of the Task Force's findings.

How the State of California will offer a formal apology on behalf of the people of California for the perpetration of gross human rights violations and crimes against humanity on African slaves and their descendants.

How the State of California will provide other forms of satisfaction or other symbolic reparative justice measures.

Approve preliminary report.

June 2023 (8) Sacramento

Final Meeting

Presentation and Approval of Second Report

July 1 2023 → Sunset of CA Reparations Task Force

AGENDA ITEM 21

ACTION ITEM:
AGENDA FOR NEXT MEETING

**AB 3121 TASK FORCE TO STUDY AND DEVELOP REPARATIONS PROPOSALS FOR
AFRICAN AMERICANS**

MEETING NOTICE AND AGENDA

<https://oag.ca.gov/ab3121>

Meeting Locations, Date, and Time:

_____ 2022, at 9:00 a.m. and _____, 2022, at 9:00 a.m. (PST)

Los Angeles, CA

All Task Force meetings are open to the public. This notice/agenda can be found on the AB 3121 Task Force website at <https://oag.ca.gov/ab3121/meetings>. A call-in number and instructions will also be posted to this website in order to facilitate public participation during the public comment period. The meeting will also be livestreamed through the California Department of Justice's website. The AB 3121 Task Force is not responsible for unforeseen technical difficulties that may occur and we apologize in advance should this occur. Additionally, the AB 3121 Task Force is under no obligation to postpone or delay its meeting in the event such technical difficulties occur during or before the meeting. Documents that will be reviewed during the meeting will be available on the Task Force's website at: <https://oag.ca.gov/ab3121/meetings> in advance of the meeting. Recordings of the Task Force meetings will be available at: <https://oag.ca.gov/ab3121/meetings>.

Please note all times are approximate and are provided for convenience only. All items may be heard in a different order than how they are listed on the agenda on any day of the noticed meeting. The order of business may be changed without notice. Witnesses are subject to change without notice.

For any questions about the Task Force meeting, please contact DOJ at ReparationsTaskforce@doj.ca.gov or (213) 519-0504. If you need information or assistance with accommodation requests, please contact DOJ at least five calendar days before the scheduled meeting.

July (Day 1), 2022

Celebration of Report and Eligibility

1. **Call to Order, Roll Call to Establish a Quorum and Welcome 9:00 a.m. – 9:05 a.m.**
2. **Public Comment 9:05 a.m. – 10:05 a.m.**
3. **Action Item: Approval of April Meeting Minutes 10:05 a.m. – 10:10 a.m.**
4. **Discussion and Potential Action Item: Celebration of Report and Discussion of Report Findings 10:10 a.m. – 12:00 p.m.** [Task Force Members speak on the publication of Report 1, and on the findings of the report]
5. **Lunch 12:00 p.m. – 1:00 p.m.**
6. **Discussion and Potential Action Item: 1:00 pm. – 3:00 p.m. Preliminary Recommendations** DOJ present summary of recommendations contained in report 1 and Task Force members discuss preliminary recommendations or areas for exploration in determining potential forms of reparations based on harms set forth in Report 1]
7. **Break 3:00 p.m. – 3:15 p.m.**
8. **Discussion and Potential Action Item: 3:15 p.m. – 4:30 p.m. Public Education Regarding the Work of the Task Force and Community Engagement Plan Update: Member Grills**
9. **Discussion and Potential Action Item: Department of Justice Updates 4:30 p.m. – 5:00 p.m.**
10. **Recess Meeting Until Next Day, 2022, at 9:00 a.m.**

July (Day Two), 2022

Celebration of Report and Eligibility

11. **Call to Order, Roll Call to Establish a Quorum and Welcome 9:00 a.m. – 9:05 a.m.**
12. **Public Comment 9:05 a.m. – 10:05 a.m.**
13. **Discussion and Potential Action Item: Community of Eligibility and Experts' Scope of Work 10:05 a.m. – 1:00 p.m.** [Task Force Discuss and Begin to Conclude Terms of Eligibility]
14. **Lunch 1:00 p.m. – 2:00 p.m.**
15. **Discussion and Potential Action Item: 2:00 p.m. - 3:00 p.m. Subpoena Update: Members Tamaki and Holder**
16. **Break 3:00 – 3:15 p.m.**
17. **Potential Action Item: Schedule of Future Meetings: Members Moore and Lewis 3:15 p.m. – 3:45 p.m.**
18. **Action Item: Agenda for Next Meeting 3:45 p.m. – 4:15 p.m.**
19. **Potential Action Item: Unfinished Business 4:15 p.m. - 5:00 p.m.**
20. **Meeting Adjourn 5:00 p.m.**

PHONE MESSAGE SUMMARIES

Reparations Task Force Phone Summaries

Caller: Mary Comb

Date: Tuesday, March 29, 9:16 a.m.

Mary Comb states that she has been in contact with the Task Force for some time now but has been missing the meetings. She will be sending an e-mail because she is very upset: she does not understand why these meetings continue despite the facts being known. Mary expresses her tiredness as these reparations have been convoluted. To her, it is not about who was a slave but rather what was done to her ancestors and what continues being done to her in this country.

Mary is tired of waiting because some people are selfish and greedy. Africans and immigrants have no business asking for reparations. There has to be a time limit. She states that though her statements may sound like racism, she does not think it is. It would be a lie for someone to claim reparations based on race and give what actual racists want (i.e., wrecking the system). Mary adds that anyone who was biracial was counted as a slave. To her this is not about race. She states that there were no white women or children who were enslaved back then. Mary states that people are tired of waiting and that further prolonging the study would be foolishness. She questions if we will be studying Ukraine and illegal immigrants now.

Mary then states that she will try to get on earlier for the next meeting. She expresses again that reparations has been prolonged to the point where some have died waiting for it (e.g., her grandparents and her parents).

Caller: Carol Hights

Date: Tuesday, March 29, 7:03 p.m.

Carol Hights is a senior who is trying to follow the AB 3121 Task Force. Carol wonders if the funding available will look at projects identify themselves and to allow for upward mobility of the African American community. Carol uses examples such as workshops and other things could prove useful for reparations.

Carol would like to get a call back to discuss and help the Task Force.

Caller: Lawrence Walker

Date: Wednesday, March 30, 9:23 a.m.

Lawrence Walker is a shoe maker, historian, and a novelist that writes about slavery. Lawrence has studied reparations for years. Lawrence is calling to inquire when the next meeting would occur and has sent an e-mail re the possibility of being on a panel. Lawrence has a number of questions regarding the direction of the Task Force.

Lawrence expresses again that he would like to know when the next meeting is and wishes to be contacted with the possibility of helping the Task Force.

Caller:

Date: Sunday, April 3, 11:08 a.m.

Caller states that they are calling in with sensitive information regarding the shootings that have been occurring in California and why reparations is deserved. Caller states that in 1981 they were

told by a reputable community college professor about a new world order. The professor lectured that this new world order wanted the Latino, Mexican and Black community to kill each other. Caller states that someone needs to look into the shootings. Caller states that drive-by shootings involving the Black community is not random.

Caller shames those who ignore the violence that happens in Black community despite stating they are a part of it.

Caller: Lester Johnson

Date: Sunday, April 3, 6:24 p.m.

Lester Johnson would like to give his opinion regarding who should qualify for reparations. He states that you can tell who is descended from the enslaved by the person's last name. Lester uses his name as an example and explains that it originated from his ancestors being enslaved in the plantation; they are the names of the plantation owners. Lester states that proof must be tangible. Lester says that although education is very important that monetary and land reparations is needed/paramount.

Lester states that education, particularly regarding history, only teaches from a particular viewpoint. Lester restates that birth certificates and last names are ways to prove your ancestry. Reparations is necessary and long overdue. The Democratic Party is the problem and he is tired of it. As an example, he states how communities such as the Asian and Jewish communities get anti-hate bills but his own community.

Lester states that his community are the real people of Israel and the real Jews.

Caller: Kevin Kelly

Date: April 4, 2:50 p.m.

Kevin Kelly is calling regarding information resources. Kevin says that he knows his family lineage, he does not have any hard documentation. Kevin is inquiring what exactly is needed to receive funding.

Kevin provides their phone number and would like to be called back for assistance.