

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 3121 (Weber)
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AWM

SUBJECT

Task Force to Study and Develop Reparation Proposals for African Americans

DIGEST

This bill establishes a task force to study and develop proposals for reparations to African-American descendants of slaves.

EXECUTIVE SUMMARY

This bill creates an eight-member task force to study and develop proposals for reparations for African-American descendants of slaves. Specifically, the bill requires the task force to gather and synthesize the documentary evidence of slavery and its ongoing legacy, develop ways to educate Californians about its findings, and recommend appropriate remedies in a report to the Legislature.

AB 3121 does not focus on reparations for the injuries inflicted by slavery alone. Instead, this bill would charge the task force with studying all of the systematic racism that pervades U.S. history – in which California was often a willing participant – that is responsible for the myriad structural inequalities experienced by African Americans today.

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Committee on Governmental Organization.

This bill is author-sponsored and has support from a broad range of over thirty organizations and localities – including civil rights groups, businesses, unions,

agriculture groups, health care groups, and trade groups – plus thirteen individuals. It is opposed by the California Juneteenth History Committee and one individual.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provided restitution to citizens and permanent resident aliens of Japanese ancestry, and their spouses and families, who were confined to concentration camps during World War II. (50 U.S.C. §§ 4211-4220.)

Existing state law:

- 2) Requests the Regents of the University of California to assemble a colloquium of scholars to draft a research proposal to analyze the economic benefits of slavery that accrued to owners and businesses, including insurance companies. (Ed. Code, § 92615.)
- 3) Imposes reporting obligations on the Insurance Commissioner and insurers licensed and doing business in California relating to policies during the slavery era:
 - a) The Insurance Commissioner must request and obtain information from insurers licensed and doing business in this state regarding any records of slaveholder insurance policies issued by any predecessor corporation during the slavery era. (Ins. Code, § 13810.)
 - b) If the records provided by an insurer describes the name of a slaveholder or slave, the Insurance Commissioner must make that information available to the public and the Legislature. (Ins. Code, § 13811.)
 - c) An insurer licensed and doing business in the state must research and report to the Commissioner on any records or knowledge within the insurer's possession relating to policies issued to slaveholders providing coverage for damage to, or death of, slaves. (Ins. Code, § 13812.)
 - d) Entitles descendants of slaves, whose ancestors were defined as private property, dehumanized, divided from their families, forced to perform labor without appropriate compensation or benefits, and whose ancestors' owners were compensated for damages by insurers, to full disclosure. (Ins. Code, § 13813.)

This bill:

- 1) Makes findings and declarations relating to the history and institution of slavery of Africans and their descendants in the colonies and the United States, including:
 - a) More than 4,000,000 Africans and their descendants were enslaved in the United States and the colonies that became the United States from 1619 to 1865.

- b) The slavery that flourished in the United States constituted an immoral and inhumane deprivation of Africans' life, liberty, African citizenship rights, and cultural heritage and denied them the fruits of their own labor.
 - c) Following the abolition of slavery, the United States government at the federal, state, and local levels continued to perpetuate, condone, and often profit from practices that continued to brutalize and disadvantage African Americans, including sharecropping, convict leasing, Jim Crow laws, redlining, unequal education, and disproportionate treatment at the hands of the criminal justice system.
 - d) As a result of the historic and continued discrimination, African Americans continue to suffer debilitating economic, educational, and health hardships, including, but not limited to, all of the following:
 - i. Having nearly 1,000,000 Black people incarcerated.
 - ii. An unemployment rate more than twice the current white unemployment rate.
 - iii. An average of less than one-sixteenth of the wealth of white families, a disparity that has worsened, not improved, over time.
- 2) Establishes a task force to:
- a) Study and develop reparation proposals for African Americans as a result of:
 - i. The institution of slavery, including both the transatlantic and domestic "trade" that existed from 1565 in colonial Florida and from 1619 to 1865, inclusive, within the other colonies that became the United States, and that included the federal and state governments, that constitutionally and statutorily supported the institution of slavery.
 - ii. The de jure and de facto discrimination against freed slaves and their descendants from the end of the Civil War to the present, including economic, political, educational, and social discrimination.
 - iii. The lingering negative effects of the institution of slavery on living African-Americans descendants of enslaved persons, and on society in the United States.
 - iv. The manner in which instructional resources and technologies are being used to deny the inhumanity of slavery and the crime against humanity of people of African descent in California and the United States.
 - v. The role of Northern complicity in the Southern-based institution of slavery.
 - vi. The direct benefits to societal institutions, public and private, including higher education, corporate, religious, and associational.
 - b) Recommend appropriate ways to educate the California public of the task force's findings.
 - c) Recommend appropriate remedies in consideration of the task force's findings.
 - d) Submit to the Legislature the report completed pursuant to Section 8301.1, together with any recommendations.
- 3) Requires the task force to perform the following duties:

- a) Identify, compile, and synthesize the documentary record on a range of subjects relating to the institution of slavery as it existed in the United States, and the colonies that became the United States, from 1619 to 1865, as well as the post-Civil War laws and institutions that perpetuated discrimination against freed African American slaves and their descendants.
 - b) Recommend appropriate ways to educate Californians on the Task Force's findings.
 - c) Recommend appropriate remedies that consider, among other things, how any form of compensation should be awarded, through what instrumentalities, and who should be eligible for such compensation; and how to eliminate current California laws that continue to disproportionately and negatively affect African Americans.
- 4) Requires the task force to submit a written report of its findings and recommendations to the Legislature no later than one year after its first meeting.
- 5) Sets the task force membership at eight persons, to be appointed subject to the following conditions:
- a) Two members shall be appointed by the Governor, three shall be appointed by the President Pro Tempore of the Senate, and three shall be appointed by the Speaker of the Assembly. Each appointing authority shall not appoint more than two members from the same political party.
 - b) Not more than four members of the task force may be members of the Legislature, and, at a minimum, four members of the task force must represent major civil society and reparations organizations that have historically championed the cause of reparatory justice.
 - c) Members shall be drawn from diverse backgrounds to represent the interests of communities of color, have experience working to implement racial justice reform, and, to the extent possible, represent geographically diverse areas of the state.
 - d) Members shall serve for the life of the task force, with provisions for filling vacancies if they arise.
- 6) Provides that the Governor shall call the first meeting of the Task Force to occur no later than June 1, 2021; that five members shall constitute a quorum; that the Task Force shall select a chair and vice chair from among its members; and that Task Force members are entitled to per diem compensation and reimbursement of expenses, as specified and upon appropriation of the Legislature.

COMMENTS

1. Author's comment

According to the author:

People who suffer injuries and losses through the malicious or culpably negligent conduct of others have a right to redress. Reparations – making amends to right the wrongs of social injustice or war – have a long history and can take many forms. Apology is important. So is commemoration and tributes to victims, and an accurate account of the violations. AB 3121 would require an in-depth examination the impacts of slavery in California in broader scope and provide guidance on how to address the disparities born of a shameful history.

2. Background: the racist origins of the concept of race, and a brief history of systematic racism in the U.S. and California

Popular narratives relating to this country’s racist history, slavery, and the possibility of reparations, often rely on misunderstandings about the nation’s history and relationship to African-American descendants of slaves. First, many believe the end of slavery was the beginning of equal opportunity for African Americans in this country – and that, by extension, reparations would compensate only for injuries inflicted on persons who died decades ago. Many also fail to realize that the federal government, and the California government, enacted policies that exacerbated inequality between African Americans and whites; and that they did so all the way through the twentieth century and even to today. This background thus provides data to clarify the extent and duration of systematic racism, and California’s role in it.¹

a. Race is a social construct invented to justify European, then American, enslavement of persons of African descent.

There is no scientific basis for race.² In many cases, there is more genetic diversity *within* so-called racial groups than between them.³ The Western conception of “race” is, instead, an “I know it when I see it” mix of phenotypical generalizations and stereotypes, but even those are inconsistent – as the American Association of Physical Anthropologists (AAPA) explains, the visual markers widely associated with race “are not distributed across our species in a manner that maps clearly onto socially-

¹ This background section is not intended to be a comprehensive history, or even close to it. The constraints of time and space make it necessary to omit many facts, incidents, and data that the task force contemplated by this bill would likely consider. Additionally, in light of the scope of AB 3121, this analysis does not attempt to address the impact of systematic racism on other ethnic groups. Finally, this analysis uses the term “African American” to remain consistent with the language of the bill, except when directly quoting a source.

² E.g., Kolbert, *There’s No Scientific Basis for Race – It’s a Made-Up Label*, National Geographic (Mar. 12, 2018) (hereafter *There’s No Scientific Basis for Race*), <https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/> [last visited July 10, 2020]; Worrall, *Why Race Is Not a Thing, According to Genetics*, National Geographic (Oct. 14, 2017), <https://www.nationalgeographic.com/news/2017/10/genetics-history-race-neanderthal-rutherford/> [last visited July 10, 2020] (“In many ways, genetics makes a mockery of race”).

³ E.g., Goodman, “Race Is Real, But It’s Not Genetic,” *Discover* (June 25, 2020), <https://www.discovermagazine.com/planet-earth/race-is-real-but-its-not-genetic> [last visited July 15, 2020]; *There’s No Scientific Basis for Race*, *supra*, fn. 1.

recognized social groups...even for aspects of human variation that we frequently emphasize in discussions of race, such as facial features, skin color, and hair type....[H]uman populations are not – and never have been – biologically discrete, truly isolated, or fixed.”⁴

It is true that “ethnic and religious and color prejudice” existed as far back as the ancient world, but the “[c]onstrutions of *races* – White Europe, Black Africa – for instance – did not, and therefore racist ideas did not.”⁵ Instead, the concept of race dates back to the fifteenth century, when Europeans began propounding anti-Black ideas to justify the economic decision to deal exclusively in African slaves.⁶ According to the AAPA,

[T]he Western concept of race must be understood as a classification system that emerged from, and in support of, colonialism, oppression, and discrimination. It thus does not have its roots in biological reality, but in policies of discrimination. Because of that, over the last five centuries, race has become a social reality that structures societies and how we experience the world.⁷

In other words, there is no race without racism.

b. American slavery, predicated on white supremacy, was brutal, inhumane, and in California.

Around 12.5 million Africans were kidnapped and brought to the Americas by European slave traders, though around 2 million did not survive the brutal voyage.⁸ Children made up about 26 percent of the captives: governments set weight limits for slave ships, so kidnapping children allowed slave ships to carry more people while staying within their tonnage limits.⁹

⁴ American Association of Physical Anthropologists, *Executive Summary: AAPA Statement on Race and Racism* (Mar. 8, 2019), at 1 (hereafter AAPA Statement), available at <https://physanth.org/about/position-statements/aapa-statement-race-and-racism-2019/> [last visited July 15, 2020].

⁵ Kendi, *Stamped from the Beginning* (2016) at 18 (hereafter *Stamped from the Beginning*).

⁶ *Id.* at p. 23.

⁷ AAPA Statement, *supra*, fn. 4, p. 1. The first popular classification of *all* humans into races was not until the late seventeenth century (*Stamped from the Beginning*, *supra*, fn. 5, pp. 55-56), and faulty racial “science” – such as the polygenic theory that whites and Blacks did not share a common origin – gained popularity in North America in the lead-up to the Civil War because it provided a better excuse for the perpetual enslavement of Africans and their descendants (*id.* at pp. 33, 45, 48-49, 68-69, 184, 209).

⁸ Gates, *Slavery by the Numbers*, *The Root* (Feb. 10, 2014) (hereafter *Slavery by the Numbers*), <https://www.theroot.com/slavery-by-the-numbers-1790874492> [last visited July 6, 2020].

⁹ Elliott, *Four hundred years after enslaved Africans were brought to Virginia, most Americans still don't know the full story of slavery*, *New York Times* (Aug. 19, 2019) (hereafter *Four hundred years after...*), available at <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html> [last visited July 6, 2020].

Before and around the founding of the United States, slavery was common throughout all the colonies/states, not just the South.¹⁰ Whatever ambivalence (some of) the founders professed about slavery, they nevertheless codified slavery in the U.S. Constitution.¹¹

The Constitution banned the importation of persons to be enslaved in the United States as of 1808,¹² but it was a meaningless gesture in light of laws deeming the children of enslaved persons to also be slaves.¹³ The native-born slave population expanded, and by 1860, the nation's African-American slave population was 3.9 million (roughly 90 percent of the 4.4 million African Americans living in the U.S.).¹⁴ Laws permitted enslavers to subject enslaved persons to inhumane treatment as a matter of course: the "chattel" principle, which declared African-American slaves to be property, not people, was used to justify enslavers' torture, rape, mutilation, and murder of African Americans.¹⁵ About a third of slaves were children, elderly, or crippled;¹⁶ and nuclear families were routinely broken up when enslavers sold family members to other plantations.¹⁷ The horror was justified by white supremacy, created for the sole purpose of maintaining chattel slavery as an institution.¹⁸ That white supremacy demanded constant cognitive dissonance: "[i]f Blacks did not violently resist, then they were cast as naturally servile. And yet, whenever they did fight, reactionary commentators in both the North and South classified them as barbaric animals who needed to be caged in slavery."¹⁹ Variations on this catch-22 persist today.

In the decades leading up to the Civil War, much of the American legal system was dedicated to enforcing the institution of slavery and preventing descendants of African slaves – freed or enslaved – from participating in American civic life.²⁰ States across the

¹⁰ For example, New York was a major hub of the slave trade; in 1756, slaves made up about 25 percent of the populations of several New York counties. (*Slavery by the Numbers*, *supra*, fn. 8.)

¹¹ U.S. Const., art. IV, § 2, cl. 3 (the Fugitive Slave Clause), *superseded by* U.S. Const., 13th Amend.

¹² *Id.*, art. I, § 9, cl. 1.

¹³ *Four hundred years after...*, *supra*, fn. 9.

¹⁴ *Slavery by the Numbers*, *supra*, fn. 8.

¹⁵ E.g., PBS, *Africans in America, Antebellum Slavery*, Part 4: 1831-1865, <https://www.pbs.org/wgbh/aia/part4/4narr1.html> [last visited July 6, 2020].

¹⁶ *Slavery by the Numbers*, *supra*, fn. 8.

¹⁷ Coates, *The Case for Reparations*, *The Atlantic* (June 2014) (hereafter *The Case for Reparations*), available at https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/?gclid=EAJalQobChMlIf_3o5i36gIV5h-tBh0yUgN3EAAAYASAAEgJbAfD_BwE [last visited July 23, 2020] ("A slave in some parts of the [antebellum South] stood a 30 percent chance of being sold in his or her lifetime."); see Johnson, *Soul by Soul: Life Inside the Antebellum Slave Trade* (1991) at pp. 22-23 (enslavers used the threat of family separation to instill terror in slaves).

¹⁸ Du Bois, *Black Reconstruction in America, 1860-1880* (First Free Press ed. 1998), at 38-39 (hereafter *Black Reconstruction in America*) ("Never in modern times has a large section of mankind so used its combined energies to the degradation of mankind.").

¹⁹ *Stamped from the Beginning*, *supra*, fn. 5, p. 173.

²⁰ See, e.g., *The Case for Reparations*, *supra*, fn. 17, p. 182 ("The two great divisions of society are not the rich and poor, but white and black," John C. Calhoun, South Carolina's senior senator, declared on the Senate floor in 1848. "And all the former, the poor as well as the rich, belong to the upper class, and are

country – not just the South – denied African Americans the right to vote, and some states and territories attempted to ban African Americans from their borders entirely.²¹ This legal effort achieved its peak (or nadir) in the 1857 *Dred Scott* decision,²² when the United States Supreme Court held that African-American descendants of slaves were not, and could not become, citizens of the United States.²³

Because the modern historical narrative often focuses on the North/South divide, California's role in furthering slavery is often overlooked. While California did not permit slavery in its original constitution and was admitted to the United States as a "free state," evidence shows that slavery was common.²⁴ And as bill supporter ACLU of California notes:

California actively supported slavery in the state through a variety of means. These included adopting a harsh Fugitive Slave Act in 1852, creating a fraudulent "contract labor" system allowing slaveholders to hold persons in bondage, and preventing Black people from voting and testifying against whites in courts.

The California Supreme Court upheld the 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.²⁵ Additionally, California indirectly benefitted economically from slavery in other states, due to trade and financial relationships with those states.

c. After the Civil War: abolition, but not freedom.

The details of the fight over whether the United States should permit enslavers in certain states to own the descendants of Africans – as property, not as persons – are

respected and treated as equals.' "). California was admitted as a state as part of a compromise that led to the passage of a new federal Fugitive Slave Act, which required "all citizens" to aid in recapturing escaped slaves. (*Four hundred years after...*, *supra*, fn. 9.)

²¹ Forner, *Reconstruction, America's Unfinished Revolution, 1836-1877* (1988) at pp. 25-26.

²² *Scott v. Sandford* (1857) 60 U.S. 393.

²³ *Id.* at pp. 403-406 ("We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.").

²⁴ Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California*, 80 *Pacific Historical Review* 28, 29-30 (2011). The exact number of African-American enslaved persons in California in the 1850s is unknown, but estimates range from several hundred to a few thousand. (*Id.*, p. 29, fn. 2.; see also Beckner, *Slavery: California's hidden sin*, *Sacramento News & Review* (Oct. 23, 2003), available at <https://www.newsreview.com/sacramento/slavery-californias-hidden-sin/content?oid=16199> [last visited July 5, 2020] [California newspapers in the 1850s advertising slave sales].)

²⁵ *In re Perkins* (1852) 2 Cal. 424, 437-441, 454-457.

beyond the scope of this analysis. Suffice it to say, after Abraham Lincoln was elected president in 1860, several southern states attempted to secede from the United States to preserve slavery and white supremacy, resulting in the American Civil War.²⁶ The South lost, and slavery was abolished (except as a punishment for a crime) in 1865.²⁷ But, in the words of bill supporter Western Center on Law and Poverty (WCLP), “[w]hile people enslaved in America were finally officially emancipated in 1865, it would be an insult to claim they were truly freed.”

First, the question of reparations might be less urgent if the United States had compensated newly freed enslaved persons *at the time of emancipation*. African Americans “distinguished between *abolishing slavery* and *freeing people*,” explaining the U.S. “can only set us free by providing us with land to ‘till...by our own labor.’ ”²⁸ While some land was initially granted to freed African Americans and Black war refugees, virtually all that land was later re-seized and given to white people.²⁹ The result – of African Americans freed with virtually no means to support themselves – led to the rise of the sharecropper system, in which African-American families became increasingly indebted to the white landowners as a result of the landowners’ monopoly on the families’ output.³⁰ Where African Americans were able to accumulate land, white Americans often stole that land with impunity, using methods ranging from abuse of the legal system to, as discussed below, outright terrorism.³¹

Furthermore, the end of slavery was not the end of white supremacy. One observer in the South – where the majority of the African-American population lived – noted how white people “ ‘were yet unable to conceive of [freed African Americans] as possessing any rights at all. Men who are honorable in their dealings with their white neighbors, will cheat [a freed African American] without feeling a single twinge of their honor. To kill an [African American], they do not deem murder; to debauch an [African

²⁶ Stamped from the Beginning, *supra*, fn. 5, pp. 214-215; *see, e.g.*, Stephens, Cornerstone Address (Mar. 21, 1861) (“Our new Government is founded upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and moral condition”), available at <https://sourcebooks.fordham.edu/mod/1861stephens.asp> [last visited July 6, 2020]. Prior to secession, future Confederate president Jefferson Davis argued to the U.S. Senate, “ ‘This government was not founded by negroes nor for negroes,’ but ‘by white men for white men.’ ” (Kendi, *Stamped from the Beginning* (2016) at 3.)

²⁷ *See* U.S. Const., Amend. 13; *see also id.*, Amends. 14-15.

²⁸ *Stamped from the Beginning, supra*, fn. 5, p. 231.

²⁹ Blackmon, *Slavery by Another Name* (2008) at p. 18 (hereafter *Slavery by Another Name*); Black Reconstruction in America, *supra*, fn. 18, p. 393. The plots allotted by the Bureau could be no greater than forty acres, and “forty acres and a mule” became a rallying cry for troops in General Sherman’s March to the Sea. (*See id.*; Staples, *Forty Acres and a Mule*, *New York Times* (July 21, 1997), at p. A16.)

³⁰ Du Bois, *The Souls of Black Folk* (Signet ed., 2012), at pp. 128-129, 134-139.)

³¹ *The Case for Reparations, supra*, fn. 17. A 2001 investigation tracked down records of 107 land-takings in Southern and border states, showing white people stole more than 24,000 acres of property from 406 African-American landowners. (Lewan and Barclay, *When They Steal Your Land, They Steal Your Future*, *L.A. Times* (Dec. 2, 2001), available at <https://www.latimes.com/archives/la-xpm-2001-dec-02-mn-10514-story.html> [last visited July 5, 2020].)

American] woman, they do not think fornication; to take the property away from a[n African American], they do not consider robbery.’ ”³²

After the Civil War, and particularly after the formal end of Reconstruction, white supremacists conducted a reign of terror against African Americans. In the 25 years following the Emancipation Proclamation, white southerners “organized themselves into vigilante gangs and militias, undermined free elections across the region, intimidated Union agents, terrorized black leaders, and waged an extremely effective propaganda campaign to place the blame for the anarchic behavior of whites upon freed slaves.”³³ The Ku Klux Klan, founded in 1865, was one vigilante gang; one of its primary targets was successful African Americans, because they did not like to see African Americans “ ‘go ahead’ ” of whites.³⁴ White terror was also accomplished through lynchings; between 1889 and 1929, a lynching occurred, on average, every four days.³⁵ White lynchers often trumped up charges that their African-American male target had raped a white woman – playing to sexist and racist ideas about white female “purity” – yet lynchings were attended by white men, women, and children.³⁶

White supremacy was also enforced through the legal system, and laws criminalizing African-American life known as “Black Codes.”³⁷ Southern states established laws targeting every aspect of African-American life, making it virtually impossible for African Americans to comply, then used the Thirteenth Amendment’s carve-out for forced labor as a punishment for “duly convicted” criminals to force African Americans into involuntary servitude as punishment.³⁸ For example, “[e]very southern state except Arkansas and Tennessee had passed laws by the end of 1865 outlawing vagrancy and so vaguely defining it that virtually any freed slave not under the protection of a white man could be arrested for a crime.”³⁹ “In nearly all cases,” the punishment for breaking

³² Black Reconstruction in America, *supra*, fn. 18, p. 136; *see id.* at pp. 136-146.

³³ Slavery by Another Name, *supra*, fn. 29, at p. 42; *see The Case for Reparations*, *supra*, fn. 17 (white terrorism included attacks on African Americans “for not removing their hats; for refusing to hand over a whiskey flask; for disobeying church procedures; for using ‘insolent language’ for disputing labor contracts; [and] for refusing to be ‘tied like a slave.’ ”).

³⁴ Stamped from the Beginning, *supra*, fn. 5, pp. 245, 249. The KKK’s influence waned as the nineteenth century drew to a close because the South had so effectively imposed white supremacy through racist laws and terrorism as to render the KKK irrelevant. (See Southern Poverty Law Center, Report, Ku Klux Klan: A History of Racism (Mar. 2011) p. 15 (hereafter A History of Racism), available at <https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf> [last visited July 15, 2020].) But the KKK came roaring back in the twentieth century, discussed *infra*.

³⁵ Stamped from the Beginning, *supra*, fn. 5, p. 259.

³⁶ *Ibid.*

³⁷ *E.g.*, Black Reconstruction in America, *supra*, fn. 18, p. 167.

³⁸ *See* U.S. Const., 13th Amend.; Slavery by Another Name, *supra*, fn. 29, p. 53. Although these laws generally did not expressly name African Americans, “it was widely understood that these provisions would rarely if ever be enforced on whites”; and while many of the laws were struck down in court, “new statutes embracing the same strictures on black life quickly appeared to replace them.” (Slavery by Another Name, p. 53.)

³⁹ Slavery by Another Name, *supra*, fn. 29, pp. 53-54 (southern states also passed laws preventing African Americans from entering into labor contracts without a discharge paper from their previous employer,

these laws – intentionally or inadvertently – “was the prospect of being sold into forced labor.”⁴⁰ Additionally, many states’ prison labor laws allowed imprisoned African Americans to be “sold” or “leased” out to private entities, including railroads and plantations.⁴¹ African Americans were thus put in an impossible position: comply with laws designed to keep them from exercising their freedom, or break those laws and be returned slavery. It became common for African Americans to plead guilty to offenses – no matter how ludicrous – in exchange for agreeing to work for a white landowner without compensation; the devil of involuntary servitude with a known white person was better than the unknown devil of “the far more dire alternatives that [an African American defendant] knew lay in wait.”⁴² The Supreme Court refused to invalidate state convict-peonage systems in 1905, holding there was no federal jurisdiction to do so, and the federal government did not meaningfully step in to stop the practice until the 1940s.⁴³

The Supreme Court also hobbled the federal government’s ability to protect African Americans from oppression, both legal and extra-legal. In 1883, the Supreme Court interpreted the Civil Rights Act of 1875 – the federal law intended to force whites to comply with the Fourteenth and Fifteenth Amendments – so narrowly as to render the law virtually meaningless, leaving civil rights enforcement in the hands of state and local governments.⁴⁴ This case left the way clear for states to adopt (or continue to enforce) “Jim Crow” laws and legalized segregation under the guise of “separate but equal,” which the Supreme Court then upheld in *Plessy v. Ferguson* in 1890.⁴⁵ After *Plessy*, “a series of separate but (un) equal laws was instituted, segregating nearly every aspect of southern life.”⁴⁶ African Americans resisted many of these unfair laws, and in response, white lynchings of African Americans spiked in the early 1890s.⁴⁷

After the federal government refused to intervene, many states grew bolder in denying African Americans their rights. Mississippi became the first state to move from an informal campaign of suppressing the African-American vote to codifying that suppression, with a constitutional amendment imposing a “literacy test” for voters; in

and making it illegal for an African American man to change employers without permission; Black Reconstruction in America, *supra*, fn. 18, p. 167 (African Americans “must leave the old plantations and seek better terms, but if caught wandering in search of work, and thus unemployed and without a home, this was vagrancy and the victim could be whipped and sold into slavery”).

⁴⁰ *Id.* at p. 54. Many southern states also used criminal courts to settle civil debts, giving local sheriffs the power to imprison African Americans for even insignificant amounts owed. (*Id.* at pp. 63-64.)

⁴¹ Slavery by Another Name, *supra*, fn. 29, pp. 53-57, 65-67.

⁴² *Id.* at pp. 67-68.

⁴³ See *Jamison v. Wimbish* (Ga.S.D. 1905) 130 F. 351, reversed *sub nom Wimbish v. Jamison* (1905) 199 U.S. 599, 599; Slavery by Another Name, *supra*, fn. 29, pp. 377-381.)

⁴⁴ See *United States v. Stanley (Civil Rights Cases)* (1883) 109 U.S. 3, 13, 25.

⁴⁵ *Plessy v. Ferguson* (1890) 137 U.S. 537, 546-548, 550-552.

⁴⁶ Stamped from the Beginning, *supra*, fn. 5, pp. 273-274.

⁴⁷ *Id.* at p. 274. Again, the specter of white female honor was thrown out as a justification for these heinous murders, but as Ida B. Wells found in 1892, only a third of the lynching victims were even charged with rape. (*Ibid.*)

practice, the amendment was selectively enforced to deny African Americans the franchise while allowing similarly uneducated whites to vote.⁴⁸ All the former Confederate states, and several of the border states, eventually adopted facially neutral voting restriction laws that “purge[d] their voting rolls of the remaining Black (and many poor White) voters without saying a racial word.”⁴⁹

d. The first half of the twentieth century: more white terrorism, Jim Crow, and the government-driven expansion of the white middle class.

At the start of the twentieth century, Jim Crow laws continued in full force.⁵⁰ In 1900, African Americans were over 58 percent of the population in South Carolina and Mississippi, over 40 percent of the population in several other southern states, and at least 25 percent in most of the others.⁵¹ Nevertheless, southern states successfully disenfranchised African-American voters *en masse*, thereby allowing racist white voters to continue to elect racist white politicians with little or no opposition.⁵²

Disenfranchisement also prevented African Americans from voting for less racist federal candidates, and president after president endorsed white supremacy.⁵³ The first-ever movie screening at the White House, hosted by President Woodrow Wilson in 1915, was D.W. Griffith’s white-supremacist KKK hagiography, *Birth of a Nation*.⁵⁴

The popularity of *Birth of a Nation* coincided with a revival of the KKK and an increase in white terrorism in general. A combination of World-War-I-inspired nativism, paranoia about an influx of immigration from Eastern Europe, anti-Catholic and anti-Jewish sentiment, and white supremacy drove KKK membership from a few thousand in the 1910s to over 3 million in 1925.⁵⁵ And with or without KKK affiliations, white Americans increased their violent attacks on African Americans, with particular force between 1917 and 1923.⁵⁶ In 1917, white mobs went on a killing spree against African Americans in the East St. Louis Massacre.⁵⁷ Two years later, the “Red Summer of 1919”

⁴⁸ Stamped from the Beginning, *supra*, fn. 5, p. 273.

⁴⁹ *Ibid.* To avoid white voters from being disenfranchised by the laws targeting African Americans, many states adopted “grandfather clauses,” which made men eligible to vote if they were descendants of voters who had been allowed to vote prior to the abolition of slavery. (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> [last visited July 15, 2020].

⁵⁰ Stamped from the Beginning, *supra*, fn. 5, pp. 273-274.

⁵¹ Willcox, U.S. Census Bureau, *The Negro Population*, p. 20, Table VII, available at <https://libraryguides.missouri.edu/c.php?g=672281&p=4734227> [last visited July 15, 2020].

⁵² See Authors, *The Tyranny of the Minority...* 92-96, 99-100

⁵³ Stamped from the Beginning, *supra*, fn. 5, pp. 296-297, 305-306.

⁵⁴ *Id.* at pp. 305-306.

⁵⁵ *A History of Racism*, *supra*, fn. 34, pp. 17, 22.

⁵⁶ See generally, e.g., Wells-Barnett, *The Arkansas Race Riot* (CreateSpace 2013).

⁵⁷ Brown, *Remembering ‘Red Summer,’ when white mobs massacred Blacks from Tulsa to D.C.*, National Geographic (June 19, 2020) (hereafter *Remembering ‘Red Summer’*), available at <https://www.nationalgeographic.com/history/2020/06/remembering-red-summer-white-mobs-massacred-blacks-tulsa-dc/#close> [last visited July 6, 2020].

was marked with “a succession of racist pogroms against dozens of cities ranging from Longview, Texas to Chicago to Washington, D.C.”⁵⁸ In the 1920s, mobs attacked hubs of African-American wealth, such as the Greenwood neighborhood in Tulsa, Oklahoma (known as “Black Wall Street”) and Rosewood, Florida.⁵⁹ These attacks occurred in both northern and southern cities; as African Americans moved north to escape Jim Crow laws (a movement known as the “Great Migration”), northern white supremacists reacted with violence and discrimination.⁶⁰

The overt terrorism also coincided with an increase in public approval of the Confederacy: most of the Confederate iconography in this country – statutes of, and buildings named after, Confederate traitors – was erected between 1900 and 1920.⁶¹ In 1924, the Democratic Party came within one vote of adopting a KKK-endorsed anti-African American, anti-Jewish, anti-Catholic platform.⁶² The KKK’s popularity waned in the second half of the 1920s, in part because the Immigration Act of 1924, which restricted immigration on persons from all countries except Northwestern Europe, eased the eugenicist sentiments of many KKK members.⁶³

The twentieth century also saw the rise of new methods for maintaining segregation in all walks of life – including in California. For example, white people in many California cities entered into “racial covenants” – agreements among white homeowners in a neighborhood not to sell homes to African-American buyers (and, often, other people of color).⁶⁴ The California Supreme Court expressly upheld the use of covenants prohibiting “occupation of the property by anyone not of the Caucasian race” in 1919.⁶⁵

Many parts of California also had racially segregated schools – a practice upheld by the California Supreme Court in 1924.⁶⁶

⁵⁸ *The Case for Reparations*, *supra*, fn. 17.

⁵⁹ *Ibid.* Tulsa’s residents filed for \$1.8 million in property damage claims (about \$26 million today); all claims were denied except one filed by a white pawnshop owner, for ammunition taken from his shop. (Human Rights Watch, *The Case for Reparations in Tulsa, Oklahoma* (2019) at p. 11.)

⁶⁰ *Remembering ‘Red Summer,’ supra*, fn. 57; *Stamped from the Beginning*, *supra*, fn. 5, pp. 308-309.

⁶¹ Southern Poverty Law Center, Report, *Whose Heritage? Public Symbols of the Confederacy* (Rev. 2016), at pp. 11-14, available at https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf [last visited July 6, 2020]. A second, smaller wave of the dedication of Confederate monuments occurred in the 1960s in response to the Civil Rights movement. (*Id.* at p. 11.)

⁶² *Stamped from the Beginning*, *supra*, fn. 5, p. 320.

⁶³ *Id.* at pp. 320-321.

⁶⁴ E.g., Kreutz & Cave, *Sacramento is one of the most integrated cities, just not when it comes to black and white*, ABC10 (hereafter *Sacramento is one of the most integrated cities...*), <https://www.abc10.com/article/news/sacramento-is-one-of-the-most-integrated-cities-just-not-when-it-comes-to-black-and-white/103-537176848> [last visited July 7, 2020] (racial covenants in Sacramento); Simpson, *A Southern California Dream Deferred: Racial Covenants in Los Angeles*, KCET (Feb. 22, 2012) (racial covenants in Los Angeles), available at <https://www.kcet.org/history-society/a-southern-california-dream-deferred-racial-covenants-in-los-angeles> [last visited July 7, 2020]

⁶⁵ *Los Angeles Inv. Co. v. Gary* (1919) 181 Cal.60, 684.

⁶⁶ *Piper v. Big Pine School Dist.* (1924) 193 Cal. 664, 671.

The 1930s and 1940s further exacerbated the inequality between African Americans and whites. Those decades saw a bevy of government programs enacted to provide a social safety net and leg up for Americans – but in practice, these programs often excluded African Americans.

First, the New Deal was, by and large, a new deal for white people.⁶⁷ New Deal programs that excluded large numbers of African Americans include:

- Social Security. Due to the exemptions for agricultural and domestic workers, jobs often held by African Americans, 65 percent of African Americans nationally, and between 70 and 80 percent of African Americans in the south, were ineligible when the President Roosevelt signed the bill.⁶⁸
- Minimum wage. The Fair Labor Standards Act of 1938 likewise excluded agricultural and domestic workers, resulting in the de facto exclusion of a majority of African Americans.⁶⁹
- Federally secured housing loans. The Federal Housing Administration expanded home ownership by insuring private mortgages, which led to a reduction in interest rates and the necessary down payment to buy a house. In practice, however, eligibility for FHA-backed mortgages was determined by race. The FHA employed a racist rating system for granting loans: neighborhoods “ ‘without a single foreigner or Negro’ ” were rated “ ‘A’ ” or “ ‘in demand,’ ” while neighborhoods where Black people lived were rated “ ‘D’ ” and “usually considered ineligible for FHA backing.”⁷⁰ The in-demand areas were colored green, while the D-rated areas were colored red – the origin of the term “redlining.”⁷¹ Redlining then extended beyond FHA loans, resulting in African Americans being “herded into the sights of unscrupulous lenders who took them for money and for sport,” which left many unable to build up the sort of property-based generational wealth at the core of much of the white middle class (who were able to take advantage of government-backed loans).⁷² Redlining was common across California and its effects are still seen today.⁷³

⁶⁷ *The Case for Reparations*, *supra*, fn. 17. The shut-out was not absolute, however, and some African Americans, especially in the north, received more assistance from the New Deal than “they had from any other federal government program in recent memory.” (Stamped from the Beginning, *supra*, fn. 5, p. 338.)

⁶⁸ *Ibid.*

⁶⁹ Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95 (2011) 114-117.

⁷⁰ *The Case for Reparations*, *supra*, fn. 17.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ E.g., Thebault, *Fresno’s Mason-Dixon Line*, *The Atlantic* (Aug. 20, 2018) (redlining in Fresno), available at <https://www.theatlantic.com/politics/archive/2018/08/fresnos-segregation/567299/> [last visited July 7, 2020]; Reft, *Segregation in the City of Angels: A 1939 Map of Housing Inequality in L.A.*, KCET (Nov. 14, 2017) (redlining in Los Angeles), available at <https://www.kcet.org/shows/lost-la/segregation-in-the-city-of-angels-a-1939-map-of-housing-inequality-in-la> [last visited July 7, 2020]; Graff, *Here’s how San Francisco became so segregated*, S.F. Gate (Dec. 22, 2016) (redlining in San Francisco), available at <https://www.sfgate.com/bayarea/article/San-Francisco-segregated-neighborhoods-redlining->

The post-World-War-II programs designed to help veterans also, as a practical matter, excluded many African Americans from the government aid available to whites. While African-American soldiers served in the United States Armed Forces in the war (albeit in segregated units),⁷⁴ the GI Bill's ostensibly colorblind provisions were implemented in a way that set African Americans back even further as compared to white counterparts:

- Home loans. Title III of the GI Bill, intended to give veterans access to low-interest home loans, left African Americans at the mercy of racist banks that had, "for years, refused to grant mortgages to blacks....[S]o many blacks were disqualified from receiving Title III benefits 'that it is more accurate simply to say that blacks could not use this particular title.'"⁷⁵ At the same time, home loans provided by the GI Bill to white veterans allowed many whites to afford homes in newly built suburbs, giving rise to "white flight" and further widening the economic and generational wealth gaps.⁷⁶
- Vocational training. Southern administrators often refused to admit African Americans to agricultural training programs because they "were reluctant to prepare blacks for farm ownership" and "were worried there would not be enough farmers to work the land."⁷⁷ The GI Bill's on-the-job-training programs required the veteran to find an employer who would agree to the training, a requirement that "effectively barred" most African Americans from the program.⁷⁸
- Higher education. Because so few colleges and universities would accept African-American students, many African American veterans were shut out of the GI Bill's higher education program entirely.⁷⁹ The problem was exacerbated by insufficient housing available in segregated communities.⁸⁰ The overall result

10806723.php [last visited July 7, 2020]; *Sacramento is one of the most integrated cities...*, *supra*, fn. 64 (redlining in Sacramento). The University of Richmond's Digital Scholarship Lab has compiled historical redlining maps, including maps for Californian cities not listed here, at <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58> [last visited July 7, 2020].

⁷⁴ Gates, *What was Black America's Double War?*, PBS, available at <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/what-was-black-americas-double-war/> [last visited July 7, 2020]. Future-Senator Robert Byrd, when contemplating an integrated military in 1944, wrote: "I shall never submit to fight beneath that banner with a negro by my side. Rather I should die a thousand times, and see Old Glory trampled in the dirt never to rise again, than to see this beloved land of ours become degraded by race mongrels, a throw back to the blackest specimen from the wilds.'" (Coates, *Fear of a Black President*, *The Atlantic* (Sept. 2012), available at <https://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/> [last visited July 7, 2020].)

⁷⁵ *The Case for Reparations*, *supra*, fn. 17; see also Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, *History.com* (Sept. 30, 2019), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> [last visited July 7, 2020].

⁷⁶ *Stamped from the Beginning*, *supra*, fn. 5, p. 358.

⁷⁷ Katznelson, *When Affirmative Action was White* (2005), pp. 139-140.

⁷⁸ *Ibid.*

⁷⁹ *Id.* at pp. 131-132.

⁸⁰ *Id.* at p. 132.

was that the educational gap between whites and African Americans actually *widened*, as white veterans were able to take advantage of the GI Bill's educational promise while African Americans were shut out in large numbers.⁸¹

e. The second half of the twentieth century: the fight for, and against civil rights, and the rise of the carceral state.

Although the second half of the twentieth century saw gains through the Civil Rights Movement, the impact of those gains was blunted by the enduring effects of centuries of systemic racism, and backlash from those intent on preserving white supremacy.

For example, although the United States Supreme Court declared race-based segregation in public schools unconstitutional in *Brown v. Board of Education*,⁸² and subsequently ordered schools and courts to integrate public schools "with all deliberate speed,"⁸³ desegregation efforts were stymied by white-controlled school boards and state and local governments.⁸⁴ Some schools remained under *de jure* segregation regimes until the end of the 1960s.⁸⁵ Several California cities had policies deliberately intended to segregate schools based on race and requiring judicial intervention to impose integration.⁸⁶

De facto segregation also caused educational equality. Decades of racist housing policies left many cities segregated even absent express laws, which in turn caused schools in many areas to be functionally segregated.⁸⁷ Many of California's schools were so segregated as a result of a lack of diversity in housing.

In response to various busing plans to alleviate the effects of *de jure* and *de facto* school segregation, Californians voted to adopt Proposition 1, which prohibited courts from imposing desegregation plans except to remedy a violation of the Equal Protection

⁸¹ *Id.* at p. 134.

⁸² *Brown v. Board of Education* (1954) 347 U.S. 483, 495. Of course, the idea that segregated schools were "equal" was a lie—segregated public schools for African Americans were inferior to public schools for white students in virtually every category. (Margo, *Race and Schooling in the South 1880-1950: an Economic History* (1990) 6-28.)

⁸³ *Brown v. Bd. of Educ.* (1955) 349 U.S. 294, 300.

⁸⁴ 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).

⁸⁵ See *Alexander v. Holmes County Bd. of Educ.* (1969) 396 U.S. 19, 20-21.

⁸⁶ 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).

⁸⁷ 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/> [last visited July 7, 2020].

Clause of the 14th Amendment or unless a federal court would be empowered to impose the same order.⁸⁸ The law, which was upheld by the United States Supreme Court,⁸⁹ curtailed mandatory busing and limited the state's ability to combat *de facto* segregation.

As Congress passed a range of legislation aimed at enforcing other civil rights (including voting rights) and eliminating segregation in public and private spaces,⁹⁰ many Californians continued to push back. In California, the Legislature passed the Rumford Fair Housing Act of 1963, which allowed the state Fair Employment Practices Commission to intervene on behalf of potential tenant and homebuyers and take action against homeowners or landlords who refused to sell or lease on the basis of race.⁹¹ But the next year, Californians approved Proposition 14, a ballot measure invalidating the law, with 65 percent of the vote.⁹² Proposition 14 was eventually struck down,⁹³ but before that it likely contributed to the 1965 Watts uprising.⁹⁴

The new civil rights laws were likewise not enough to undo centuries of white supremacist laws and attitudes. In 1967, the Kerner Commission warned President Lyndon Johnson that "Our Nation is moving toward two societies, one black, one white – separate and unequal" *as a result of white supremacist institutions*.⁹⁵ But the Kerner Commission's warnings, and recommendations,⁹⁶ went unheeded as President Johnson declined to run for reelection and the country elected President Richard Nixon, who ran on a theme of "law and order" that played to white supremacist fears.⁹⁷

⁸⁸ See Cal. Const., art. I, § 7; School Assignment and Transportation of Pupils, California Proposition 1 (1979).

⁸⁹ *Crawford v. Bd. of Educ.* (1982) 458 U.S. 527, 535-536.

⁹⁰ E.g., the Civil Rights Act of 1964 (Pub. Law 88-352, 78 Stat. 241); the Voting Rights Act of 1965 (Pub. Law. 89-110, 79 Stat. 473); the Civil Rights Act of 1968 (Pub. Law 90-284, 82 Stat. 73).

⁹¹ Reft, *How Prop 14 Shaped California's Racial Covenants*, KCET.org (Sept. 20, 2017), <https://www.kcet.org/shows/city-rising/how-prop-14-shaped-californias-racial-covenants>; see

⁹² *Ibid.*; see Sales and Rentals of Residential Real Property, California Proposition 14 (1964), available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1671&context=ca_ballot_props [last visited July 7, 2020].

⁹³ See *Reitman v. Mulkey* (1967) 387 U.S. 369, 373-374 (affirming California Supreme Court opinion striking Proposition 14 as unconstitutional).

⁹⁴ Theoharis, *Alabama on Avalon*, in *The Black Power Movement: Rethinking the Civil Rights-Black Power Era* (Joseph, edit., 2006) p. 48

⁹⁵ U.S. National Advisory Commission on Civil Disorders, Report (1968) at pp. 1, 5-6 (hereafter Kerner Commission Report); *id.* at p. 5 ("Despite these complexities [leading to riots in the 1960s], certain fundamental matters are clear. Of these, the most fundamental is the racial attitude and behavior of white Americans toward black Americans... White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II.").

⁹⁶ See *id.* at pp. 11-13 (summary of recommendations).

⁹⁷ See Kendi, *Stamped from the Beginning*, *supra*, fn. 5, pp. 410-411; McArdle, *The 'law and order' campaign that won Richard Nixon the White House 50 years ago*, Washington Post (Nov. 5, 2018), available at <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/> [last visited July 7, 2020]. While the "law and order" slogan is most often associated with Nixon, it was in common use by both Democrats and Republicans in 1968. (See Kendi,

The subsequent decades saw the continuation of white flight to the suburbs, leaving African Americans and other people of color in urban areas, including in many California cities.⁹⁸ White supremacist terrorists used lynchings and other means to try to undo African-American gains from the 1960s.⁹⁹ The 1970s and beyond also saw the explosion of the American carceral state, with the U.S. prison population quadrupling between 1980 and 2000.¹⁰⁰ The increase in imprisonment was not due to an increase in crime, but an increase in long prison sentences and other “tough-on-crime” measures targeted at African Americans such as the 1986 Anti-Drug Abuse Act’s provision of a five-year minimum sentence for possession of *five* grams of crack cocaine (commonly associated with African-American drug users) and *five hundred* grams of powder cocaine (commonly associated with white drug users).¹⁰¹ The increase in incarceration was disproportionately targeted at African Americans:

‘Between 1983 and 1997, the number of African Americans admitted to prison for drug offenses increased more than twenty-six-fold, relative to a sevenfold increase for whites ... By 2001, there were more than twice as many African Americans as whites in state prison for drug offenses.’¹⁰²

There is no evidence suggesting that African Americans sell or use drugs at a greater rate than whites, much less at a rate that would explain the vast disparity in prison populations.¹⁰³ To the contrary, evidence shows African Americans were disproportionately targeted: for example, “[i]n 1996, when two-thirds of the crack users were White or Latina/o, 84.5 percent of the defendants convicted of crack possession were Black.”¹⁰⁴

Stamped from the Beginning, at p. 401; see also Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *Studies in American Political Development* 230, 236 (theorizing the focus on crime and crime policy was developed to “use[] the crime agenda as a vehicle to advance a racial agenda without violating norms, attaching the outcomes of old conflict (Great Society programs and civil rights legislation) to the causes of the new [perceived] problem – the breakdown of law and order”).

⁹⁸ Schneider, *Escape from Los Angeles: White Flight from Los Angeles and Its Schools, 1960-1980*, 34 *Journal of Urban History* 995, 997, 1003-1004 (Sept. 2008); Menendian & Gambhir, *Racial Segregation in the San Francisco Bay Area, Part 2: Racial Demographics, Othering & Belonging Institute* (Feb. 6, 2019), available at https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-2#footnote_dmyw6fo [last visited July 7, 2020].

⁹⁹ Stamped from the Beginning, *supra*, fn. 5, p. 431. Membership in the KKK nearly tripled between 1971 and 1980, and Nazi groups gained popularity. (*Ibid.*)

¹⁰⁰ Coates, *The Black Family in the Age of Mass Incarceration*, *The Atlantic* (Oct. 2015) (hereafter *The Black Family in the Age of Mass Incarceration*), available at <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [last visited July 7, 2020]; Stamped from the Beginning, *supra*, fn. 5, p. 435.

¹⁰¹ *Ibid.*; Stamped from the Beginning, *supra*, fn. 5, p. 435.

¹⁰² *The Black Family in the Age of Mass Incarceration*, *supra*, fn. 100

¹⁰³ Stamped from the Beginning, *supra*, fn. 5, p. 436.

¹⁰⁴ *Ibid.*

By the 1990s, both major political parties were enthusiastic proponents of mass incarceration; the Violent Crime Control and Law Enforcement Act of 1994¹⁰⁵ was passed with more Democratic than Republican support.¹⁰⁶

f. Today: the legacy of four hundred years of white supremacy.

The preceding history is not intended to suggest that African-American life in America is a hellish, Hobbesian existence, or that African Americans are helpless victims. The innumerable scientific, mathematical, artistic, historical, cultural, and other achievements, as well as African-American resistance and political movements dedicated to fighting white supremacy, are beyond the scope of this analysis. The background simply serves to explain the extent to which white supremacy, and systematic racism, did not end with slavery; and to clarify that California was an enthusiastic adopter of many of the white supremacist policies causing ongoing structural inequality for African Americans.

That structural inequality persists today in a number of ways – in the words of Ta-Nehisi Coates, it “is as though we have run up a credit card bill and, having pledged to charge no more, remain befuddled that the balance does not disappear. The effects of that balance, interest accruing daily, are all around us.”¹⁰⁷ Examples of the “balance” – the ongoing burden suffered by African Americans as a result of 400+ years of systematic racism – include:

- Wealth: As bill supporter Legal Aid Association of California notes, the average wealth of white households is approximately seven times greater than that of African-American households – a number virtually unchanged from 1962, two years before the passage of significant civil rights legislation and Great Society programs.¹⁰⁸ The current COVID-19-induced recession is likely to widen the wealth gap even further.¹⁰⁹ This difference is partly due to the generational wealth gap: as bill supporter WCLP notes, whites at all levels of education have more wealth than African-American college graduates.¹¹⁰ Twenty percent of California’s African American population lives in poverty, compared to nine percent of the

¹⁰⁵ Pub. Law 103-222, 108 Stat. 1796.

¹⁰⁶ Seelye, *The Crime Bill: Overview ; House Approves Crime Bill After Days of Bargaining Giving Victory to Clinton*, New York Times (Aug. 22, 1994) at A1.

¹⁰⁷ *The Case for Reparations*, *supra*, fn. 17.

¹⁰⁸ Economic Policy Institute, *The Racial Wealth Gap* (Feb. 13, 2017), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/> [last visited July 8, 2020].

¹⁰⁹ E.g., Singletary, *Coronavirus could widen black wealth gap*, Washington Post (June 13, 2020), available at <https://www.washingtonpost.com/business/2020/06/13/black-wealth-matters-homeownership-is-key/?arc404=true> [last visited July 5, 2020].

¹¹⁰ Oliver & Shapiro, *Disrupting the Racial Wealth Gap*, Contexts (Winter 2019), <https://journals.sagepub.com/doi/epub/10.1177/1536504219830672> [last visited July 8, 2020]. Even white high-school dropouts earn more than African-American college graduates, and white college graduates have more than seven times the wealth of African-American college graduates. (*Ibid.*)

white population and thirteen percent of the total population.¹¹¹ California also has a significant wage disparity between whites and African Americans,¹¹² partly due to ongoing discrimination in the labor market against African Americans.¹¹³

- **Housing:** The question of wealth is closely tied to the disparity in homeownership. In California, only one third of African Americans own a home, a number much lower than the national average and homeownership by whites and Asian Americans in California.¹¹⁴ And as supporter WCLP notes, African Americans also experience an alarming rate of homelessness in California: while African Americans account for 6.5 percent of the state’s population, they account for 40 percent of the state’s homeless population.
- **Health:** As bill supporter Community Clinic Association of Los Angeles County states, systematic racism is a public health crisis. African Americans generally receive a lower quality of health service than whites, including receiving fewer routine medical procedures and a lower quality of basic clinical services (including intensive care); African Americans are also less likely to be given needed care, such as appropriate cardiac medication, coronary bypass surgery, dialysis and kidney transplantation, even when variables such as insurance status, age, and comorbidities are taken into account.¹¹⁵ The maternal mortality rate for African Americans is more than three times higher than it is for whites.¹¹⁶
- **Police violence:** African Americans are shot and killed by law enforcement at more than twice the rate of white Americans.¹¹⁷ This number does not include situations when law enforcement kill African Americans by means other than firearms – such as when Minneapolis police officer Derek Chauvin killed George Floyd by kneeling on his neck for around eight minutes, ignoring Floyd’s pleas that he

¹¹¹ Henry J. Kaiser Family Foundation, *Poverty Rate by Race/Ethnicity* (Dec. 4, 2019), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [last visited July 8, 2020].

¹¹² Bliss & Pottinger, *Racial/Ethnic Wage Inequalities in California*, Public Policy Institute of California (May 7, 2003), <https://www.ppic.org/press-release/raciaethnic-wage-inequalities-persist-in-california/> [last visited July 8, 2020].

¹¹³ Quillian, et al., *Meta-analysis of field experiments shows no change in racial discrimination in hiring over time*, Proceedings of the National Academy of Sciences, Vol. 114, no. 41 (Oct. 10, 2017), p. 10870.

¹¹⁴ Hutchful, *The Racial Wealth Gap: What California Can Do About a Long-Standing Obstacle to Shared Prosperity*, California Budget & Policy Center (Dec. 2018), <https://calbudgetcenter.org/resources/the-racial-wealth-gap-what-california-can-do-about-a-long-standing-obstacle-to-shared-prosperity/> [last visited July 8, 2020].

¹¹⁵ Institute of Medicine of the National Academies, Report, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (Stedley, et al., eds., 2003) 2-3.

¹¹⁶ Pagán, et al., *Mitigating Black Maternal Mortality*, Berkeley Public Policy Journal (Spr. 2020), <https://bppj.berkeley.edu/2020/04/13/spring-2020-journal-mitigating-black-maternal-mortality/> [last visited July 7, 2020].

¹¹⁷ Washington Post, *Fatal Force*, Database (updated July 15, 2020), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [last visited July 15, 2020].

could not breathe.¹¹⁸ But it is only recently – perhaps due to the rise of cell phone videos – that the problem of police violence against African Americans has garnered widespread attention by whites.¹¹⁹

- Mass incarceration: The United States accounts for less than 5 percent of the world’s population, but has 25 percent of its incarcerated population.¹²⁰ African Americans are incarcerated at a disproportionately high rate nationally and within California: in 2018, the Public Policy Institute of California found that, although African-American males make up only 5.6 percent of the state’s population, they are 28.5 percent of the state’s male prison population.¹²¹ The disparity is driven in part due to unequal enforcement of drug laws, such as cannabis: although evidence suggests African Americans and whites use cannabis at the same rate, African Americans are nearly four times more likely to be arrested for cannabis possession.¹²² America’s policy of mass incarceration for African Americans causes harm far beyond the incarceration itself, e.g., through policies that limit post-incarceration job opportunities and voting rights, and the failure to provide any meaningful assistance with reintegrating persons after release.¹²³

3. The concept of reparations is not novel in US law today, but efforts to award reparations to African-American descendants of slaves have been unsuccessful

Awarding reparations to persons subjected to violent, inhumane treatment at the hands of the government is not a new concept in U.S. law, in theory or in practice. The U.S. government has made some payments for, and returned some, stolen land to certain Native American tribes (though the adequacy of these measures is questionable).¹²⁴ Following World War II, the United States partially funded German reparations to Holocaust victims through the Marshall Plan.¹²⁵ In 1988, the U.S. enacted a reparations

¹¹⁸ E.g., Bailey, *George Floyd warned police he thought he would die because he wouldn’t breathe, according to body camera transcripts*, Washington Post (July 8, 2020),

https://www.washingtonpost.com/nation/2020/05/30/video-timeline-george-floyd-death/?arc404=true&itid=lk_inline_manual_2 [last visited July 15, 2020].

¹¹⁹ E.g., Stafford & Fingerhut, *AP-NORC poll: Sweeping change in US views of police violence*, Associated Press (June 17, 2020),

https://apnews.com/728b414b8742129329081f7092179d1f?pnospid=0LFy_f1VWAmN1y8yvYohkoP.4Wc0UmaV42Dk3Iy [last visited July 16, 2020].

¹²⁰ *The Black Family in the Age of Mass Incarceration*, *supra*, fn. 100.

¹²¹ *Ibid.* (national numbers); Harris, et al., Public Policy Institute of California, *California’s Prison Population* (July 2019) available at <https://www.ppic.org/publication/californias-prison-population/> [last visited July 24, 2020] (California numbers).

¹²² American Civil Liberties Union, Report, *The War on Marijuana in Black and White* (June 2013) p. 9.

¹²³ *The Black Family in the Age of Mass Incarceration*, *supra*, fn. 100.

¹²⁴ See Davis, *An Historical Timeline of Reparations Payments Made From 1783 through 2020 by the United States Government, States, Cities, Religious Institutions, Colleges and Universities, and Corporations*, UMass Amherst Libraries (May 11, 2020), <https://guides.library.umass.edu/reparations#s-lg-page-section-7637977> [last visited July 8, 2020].

¹²⁵ Ray & Perry, *Why we need reparations for Black Americans*, Brookings Institute (Apr. 15, 2020) (hereafter *Why we need reparations for Black Americans*) p. 2, <https://www.brookings.edu/policy2020/bigideas/why-we-need-reparations-for-black-americans/> [last visited July 16, 2020].

program for Japanese-Americans and Japanese residents who were interned in American concentration camps during World War II.¹²⁶ And the United States currently administrates a reparations fund on behalf of France, distributing payments to former World War II prisoners who were transported to Nazi death camps on French trains.¹²⁷

Despite the precedent for reparations payments, however, the federal government has failed to move forward with reparations for African American descendants of slaves. In 1890, a Republican congressman introduced a bill to provide pensions to formerly enslaved persons, but the bill failed.¹²⁸ Starting in 1989, representatives in Congress (beginning with Representative John Conyers) began introducing House Resolution 40 (H.R. 40), which would establish a Commission to Study and Develop Reparation Proposals for African-Americans to consider the history of discrimination and slavery in the United States and recommend appropriate remedies (similar to AB 3121, but on a federal level).¹²⁹ Representative Sheila Jackson Lee, with 136 cosponsors, introduced H.R. 40 in the current session, and a House Judiciary subcommittee held hearings on the bill in 2019, but it has stalled in House Judiciary Committee.¹³⁰

In the absence of a federal reparations program, some descendants of slaves have attempted to obtain reparations through litigation. These large-scale attempts have been unsuccessful, however, largely due to procedural roadblocks. For example, a federal lawsuit seeking reparations from companies that benefitted from slavery, brought by descendants of enslaved persons, was dismissed on the ground that the plaintiffs lacked standing.¹³¹ And a federal court dismissed a lawsuit seeking reparations from the 1921 massacre in Tulsa, Oklahoma (the “Black Wall Street” massacre) on the ground that the case was barred by the statute of limitations.¹³²

Recently, state and local governments have begun to take steps to fill the vacuum. In the last two years, Texas, New York, and Vermont have considered legislation like AB 3121, to study and develop reparations proposals.¹³³ And just a few weeks ago, the city of

¹²⁶ See 50a U.S.C. §§ 1989 et seq.

¹²⁷ Shaver, *U.S. begins paying out reparations from France to Holocaust survivors and their heirs*, Washington Post (Sept. 15, 2016), available at https://www.washingtonpost.com/local/trafficandcommuting/us-begins-paying-out-french-reparations-to-holocaust-survivors-and-their-heirs/2016/09/15/87b1de56-7abb-11e6-bd86-b7bbd53d2b5d_story.html [last visited July 8, 2020].

¹²⁸ Stamped from the Beginning, *supra*, fn. 5, p. 270.

¹²⁹ H. Res. No. 40, 116th Cong., 1st Sess. (2019); Pilkington, ‘*Stain of Slavery*’: Congress debates reparations to atone for America’s original sin, *The Guardian* (Jun. 19, 2019), <https://www.theguardian.com/world/2019/jun/19/reparations-ta-nehisi-coates-cory-booker-congress-debate> [last visited July 15, 2020].

¹³⁰ See <https://www.congress.gov/bill/116th-congress/house-bill/40/cosponsors?searchResultViewType=expanded> [last visited July 8, 2020].

¹³¹ *In re African-American Slave Descendants* (7th Cir. 2006) 471 F.3d 754, 759-762.

¹³² *Alexander v. Oklahoma* (N.D.Okla., Mar. 19, 2004) 2004 U.S. Dist. Lexis 5131, 21-34, *affd* (10th Cir.) 382 F.3d 1206, 1220.

¹³³ Tex. Legis., H.C.R. 150, 86th Leg. Sess. (2019) (Texas); N.Y. Legis., AB A3080A, 2019-2020 Leg. Sess. (2019) (New York); Vt. Legis., H. 478, 2019-2020 Sess. (2019) (Vermont).

Asheville, North Carolina, voted to give reparations to its Black residents in the form of “securing investments in Black communities where residents face a number of structural barriers to healthcare, education, safety and prosperity.”¹³⁴

4. This bill establishes a task force to study, and consider proposals for, reparations for African-American descendants of slaves

AB 3121 establishes a task force comprised of legislators and non-legislators with special interest or expertise in reparations proposals. Members would be appointed by the Governor, the President pro Tempore of the Senate, and the Speaker of the Assembly. The bill’s requirements for task membership guarantee a range of opinions: appointing authorities cannot appoint more than two members of the same party; no more than four members can be legislators; the non-legislator members should be from organizations that have “historically championed the cause of reparatory justice”; and, to the extent possible, task force members should reflect the state’s demographic and geographic diversity. Finally, the bill entitles task force members to per diem compensation and reimbursement of expenses for not more than ten meetings, upon appropriation by the Legislature, and grants the task force certain administrative authority necessary to perform its mission.

AB 3121 does not grant reparations. Nor does it dictate what form reparations might take or how the state might determine eligibility for reparations. These three questions – whether, how, and to whom reparations should be given – are extremely complex. For example, with respect to how reparations could be made, possible vehicles for restitution include cash payments, tuition remission, student loan forgiveness, job training and public works projects, down payment grants, or community investment (as recently implemented in Asheville, North Carolina).¹³⁵ And the question of how to determine eligibility for reparations, in light of factors such as migration over time, requires careful study. A dedicated task force may be the only way for the state to move forward with answers to these complicated questions.

SUPPORT

ADOS California
Alameda Health Consortium
American Civil Liberties Union of California
California Climate and Agriculture Network
California Food and Farming Network
California Nurses Association
California Pan-Ethnic Health Network

¹³⁴ Branigin, *A Liberal North Carolina Town Has Unanimously Voted to Give Its Black Residents Reparations*, The Root (July 15, 2020), <https://www.theroot.com/a-liberal-north-carolina-town-has-unanimously-voted-to-1844389058> [last visited July 15, 2020].

¹³⁵ E.g., *Why we need reparations for Black Americans*, *supra*, fn. 125, pp. 4-5; *The Case for Reparations*, *supra*, fn. 17.

California Public Defenders Association
California Teachers Association
The Center for Food Safety
Ceres Community Project
City of Alameda
Community Alliance with Family Farmers
Community Clinic Association of Los Angeles County
Consumer Attorneys of California
Democratic Party of the San Fernando Valley
Disability Rights California
Earth Justice
Fibershed
Friends of the Earth
Eric Garcetti, Mayor of Los Angeles
Friends Committee on Legislation of California
Impact Brands, Inc.
Justice in Aging
Latino Coalition for a Healthy California
Legal Aid Association of California
National Association of Social Workers, California Chapter
Occidental Arts & Ecology Center
The Praxis Project
Roots of Change
Sierra Harvest
Snap, Inc.
Stonewall Democrat Club
Thirteen Individuals
UDW/AFSCME Local 3930
United Farm Workers
University of California Student Association
Voices for Progress
Western Center on Law and Poverty

OPPOSITION

California Juneteenth History Committee
One individual

RELATED LEGISLATION

Pending legislation:

AJR 21 (Gonzalez, McCarty, Weber, 2019) supports H.R. 40 in the 116th Congress and urges the President and the Congress of the United States to enact this legislation to

study the legacy of slavery and provide recommendations on redress for descendants of enslaved persons, as well as apologizes on behalf of the California Legislature for its complicity in enabling and furthering the practice of slavery in California against African Americans and Native Americans. AJR 2019 is currently in the Senate Rules Committee.

Prior legislation:

ACR 130 (Weber, Res. Ch. 176, Stats. 2019) recognized, on behalf of the California Legislature, the need to pursue avenues to implement proposed reparations for the descendants of African slaves in the United States

PRIOR VOTES:

Assembly Floor (Ayes 61, Noes 12)

Assembly Appropriations Committee (Ayes 13, Noes 4)

Assembly Judiciary Committee (Ayes 8, Noes 3)
