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Shades of Justice: Racial Profiling Then and Now

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Shades of Justice: Racial Profiling Then and Now

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SHADES OF JUSTICE: RACIAL PROFILING THEN AND NOW

F. MICHAEL HIGGINBOTHAM*

INTRODUCTION	533
I. KNOWING WHERE YOU COME FROM	534
II. THE FIRST RACIAL PROFILE.....	538
III. THE PRESUMPTION CONTINUES	541
CONCLUSION	546

INTRODUCTION

It is not easy these days to talk about race in America,¹ especially in a diverse group across racial lines. This is because

* Laurence M. Katz Professor of Law, University of Baltimore School of Law. This Essay reflects remarks made at the 30th Annual Ira C. Rothgerber Conference, entitled “Looking Back to Move Forward: Exploring the Legacy of U.S. Slavery.” I want to thank Dean Lolita Buckner Innis, Professor Suzette Malveaux, and the Byron R. White Center for the Study of American Constitutional Law for their invitation to speak and for arranging this Conference. I also want to thank all the Conference attendees for their willingness to discuss these issues. A special debt of gratitude is owed to Alexis Riep for providing research and editorial assistance.

1. Studies have shown that African American and White people are likely to differ substantially in how they conceive and define discrimination. A 1996 U.S. Merit System Protection Board found that 55 percent of African American respondents believe that African American people are subject to flagrant or obviously discriminatory practices in the federal workplace, and only 4 percent of White respondents felt the same about African American treatment. Another study by a Gallup poll found that two-thirds of non-African American respondents say they are satisfied in the treatment of African Americans people, but two-thirds of African American respondents are dissatisfied of the treatment of African American people. Two-thirds of non-Hispanic respondents were satisfied with the treatment of Hispanic people, and 51 percent of Hispanic respondents agreed. Another poll in 2003 done by Gallup found that 73 percent of White respondents said that African American people were treated the same as White people in the local community; only 39 percent of African American respondents agreed. Another difference occurred when Gallup asked whether race relations are getting better or worse. “[O]ne source of frustration amongst whites appears to be the perceived failure of blacks to acknowledge that race relations have improved.” Eighty-one percent of African American respondents reported that they still lack equal job opportunities, only 43 percent of White respondents agreed, and 52 percent of African American respondents called for new civil rights laws, where only 20 percent of White respondents agreed. Russel K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1108–10 (2008) (discussing various polls on the differences between White and African American perceptions of discrimination).

people tend to feel strongly about these controversial issues, and when they disagree, they end up calling each other bad names, and that upsets their stomachs; then, they cannot enjoy the good food and drink that often accompany such events. So many simply choose not to attend, burying their heads in the sand.

This Essay discusses several controversial aspects of the relevance of slavery law to issues of racial inequality today. Racial profiling has been a consistent policy in the United States that has allowed racial inequality, particularly in the criminal justice system, to continue. Specifically, this Essay addresses the distorted view of this country's slave history, the harm inflicted by the racial profile that created a presumption of slave status for those who looked Black, and the current racial inequities exacerbated by the continuation of this racial profile.

I. KNOWING WHERE YOU COME FROM

I have always believed that “[i]f you don’t know where you’ve come from, you don’t know where you’re going.”² When it comes to slavery history—the history of enslaved persons in the United States—too many Americans don’t know where they came from.³ They have a distorted view of the country’s slave

2. “I have great respect for the past. If you don’t know where you’ve come from, you don’t know where you’re going,” Maya Angelou. Randy Cordova, *Maya Angelou’s 2011 ‘Arizona Republic’ Interview*, AZ CENTRAL (May 28, 2014, 12:52 PM), <https://www.azcentral.com/story/entertainment/books/2014/05/28/maya-angelou-arizona-republic-interview/9682587> [<https://perma.cc/5UXK-JES3>]. “Don’t forget who you are and where you come from,” F. Scott Fitzgerald. *Top 500 F. Scott Fitzgerald Quotes*, QUOTEFANCY (2022), <https://quotefancy.com/francis-scott-fitzgerald-quotes> [<https://perma.cc/4Z8S-EATF>]. “Remember who you are and where you come from; otherwise, you don’t know where you are going,” Karolina Kurkova. *Karolina Kurkova Quotes*, QUOTEFANCY, <https://quotefancy.com/karolina-kurkova-quotes> [<https://perma.cc/DW4X-YT4Z>]. “It’s always good to remember where you come from and celebrate it. To remember where you come from is part of where you’re going,” Anthony Burgess. *Anthony Burgess Quotes*, QUOTEFANCY, <https://quotefancy.com/anthony-burgess-quotes> [<https://perma.cc/MCQ8-VKTC>].

3. For example, in her opening remarks for the Conference, Dean Inniss shared a story from her own life. On her first day as a student at Princeton University, she was sitting in the plaza when a man came up to her and told her the story of James Collins Johnson, an enslaved person who escaped and was working at Princeton when he was arrested and tried as a fugitive. Years later, after eight years of research, she turned this story into a book. Kelsey Yandura, *CU’s New Law Dean Is Ready for a Bold, New Future*, COLORADAN ALUMNI MAG. (Nov. 5, 2021), <https://www.colorado.edu/coloradan/2021/11/05/cus-new-law-dean-ready-bold-new-future> [<https://perma.cc/RFL7-N2KV>]; see LOLITA BUCKNER

history. This is because—and I know it is hard to believe—the stories our teachers told us and the material our textbooks provided were too often inaccurate, misleading, or downright false.⁴ The lies we were told gave us what I call a “Gone with the Wind/Birth of a Nation”⁵ view of our history that just is not accurate. My experience has been that telling the truth is not divisive; it is liberating. My fellow panelists at the Conference,

INNISS, THE PRINCETON FUGITIVE SLAVE: THE TRIALS OF JAMES COLLINS JOHNSON (2019).

4. See KATE SHUSTER ET AL., SOUTHERN POVERTY LAW CENTER, TEACHING HARD HISTORY: AMERICAN SLAVERY (2018), https://www.splcenter.org/sites/default/files/tt_hard_history_american_slavery.pdf [<https://perma.cc/8G5B-DUBE>]. See generally JAMES W. LOEWEN, LIES MY TEACHER TOLD ME (3d ed. 1995).

5. “The manipulative daughter of a Georgia plantation owner conducts a turbulent romance with a roguish profiteer during the American Civil War and Reconstruction periods.” *Gone with the Wind*, IMDB, <https://www.imdb.com/title/tt0031381> [<https://perma.cc/QRU7-3EM6>]; GONE WITH THE WIND (Selznick Int’l Pictures 1939). “The Stoneman family finds its friendship with the Camerons affected by the Civil War, both fighting in opposite armies. The development of the war in their lives plays through to Lincoln’s assassination and the birth of the Ku Klux Klan.” *The Birth of a Nation*, IMDB, <https://www.imdb.com/title/tt0004972> [<https://perma.cc/P2KA-3EQ3>]; BIRTH OF A NATION (Epoch Producing Corp. & David W. Griffith Corp. 1915). Both movies, and the books they were based on, represented inaccurate depictions of slavery and the Reconstruction period, and negative and demeaning characterizations of Black people. See F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 451–54 (5th ed. 2020).

Doctor Brian Mitchell⁶ and Professor Chris Mathis,⁷ gave a lot of truth;⁸ I will try to continue the liberation.

* * *

I did not grow up in “the hood”; I grew up in “the wood”: the countryside in western Pennsylvania, the suburbs of Cleveland, and Los Angeles. But countryside or suburb, I can tell you that I was racially profiled a lot as a teenager, especially by the Los Angeles Police Department (LAPD).⁹ Many have heard

6. Dr. Brian Keith Mitchell, born in New Orleans, Louisiana, taught in the history department of the University of Arkansas at Little Rock. His interests include African American Antebellum History, free Black communities, and Urban History, as well as race and ethnicity, immigration, historic preservation, and digital humanities. *Brian Keith Mitchell*, UNIV. ARK. LITTLE ROCK, <https://ualr.edu/news/expert/brian-keith-mitchell> [<https://perma.cc/2F2C-YY66>]. Dr. Brian’s publications, awards, distinctions, fellowships, and reports include the Fair Housing Equity Assessment – Central Arkansas, HUD – Sustainable Communities grant, Central Arkansas Livability Index – HUD – Sustainable Communities grant, Chancellor’s Fellowship, Ernest Chacere Fellowship, Federal Employee of the Year, and the EEOC Investigator of the Year 2008 and 2009.

7. Christopher Mathis received his BS in Mathematics from Oakwood University, received his JD from the University of South Carolina, and is a PhD candidate at the University of Virginia School of Education. Mathis is a Visiting Assistance Professor at the University of Iowa College of Law. “His scholarship explores critical race theory, access and equity within higher education, and the philosophical assumptions within legal education. More pointedly, he studies the framework and incentive structures within higher education’s environments to identify factors contributing to inequality in our nation’s colleges and universities. His research on these topics spans several legal topics, including constitutional and tort law, education law and policy, and ethics.” *Christopher Mathis: Visiting Assistant Professor of Law*, IOWA COLL. L., <https://law.uiowa.edu/people/christopher-mathis> [<https://perma.cc/53WN-923Z>].

8. Professor Mitchell’s full speech can be found at: Colorado Law, *Panel 1: Institutional Complicity in U.S. Slavery; the Role of the Judiciary and Higher Education*, YOUTUBE, at 02:21–24:34 (Apr. 12, 2022), <https://www.youtube.com/watch?v=44FhG7PY-yc> [<https://perma.cc/NY57-RGJC>]. Professor Mathis’s full speech can be found at: Colorado Law, *Panel 1: Institutional Complicity in U.S. Slavery; the Role of the Judiciary and Higher Education*, YOUTUBE, at 28:13–38:55 (Apr. 12, 2022), <https://www.youtube.com/watch?v=44FhG7PY-yc> [<https://perma.cc/NY57-RGJC>].

9. Racial profiling is defined as “any police-initiated action that relies on the race, ethnicity, or national origin, and not merely on the behavior of an individual.” Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 PHIL. & PUB. AFFS. 131, 136 (2004).

of driving while Black;¹⁰ they used to stop me for smiling while Black.¹¹

Back in the 1970s and 80s, the LAPD was known for coming up with *new and improved* law enforcement techniques. They got credit for first using the rough ride¹² and the choke hold.¹³ The LAPD did not seem to care how racist their practices were or appeared to be.¹⁴

10. That is, a type of racial profiling in which police officers routinely stop drivers based on the color of the person's skin. DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [https://perma.cc/LX53-Y4XN].

11. F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 6–7 (N.Y.U. Press 2013).

12. Rough riding is a type of police brutality in which a person is placed in the back of either a police car or van, unbuckled, but handcuffed, while the driver intentionally takes sharp turns or drives recklessly as the person is thrown around unable to protect themselves. Doug Donovan & Mark Puente, *Freddie Gray Not the First to Come out of Baltimore Police Van with Serious Injuries*, BALT. SUN (Apr. 23, 2015, 7:47 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-gray-rough-rides-20150423-story.html> [https://perma.cc/H9JN-SKNR]; Baynard Woods, *'Rough Ride': Practice Linked to Freddie Gray's Death at the Center of Latest Trial*, GUARDIAN (June 9, 2016, 6:30 AM), <https://www.theguardian.com/us-news/2016/jun/09/freddie-gray-death-trial-rough-ride-baltimore-police> [https://perma.cc/2TVD-9M4N].

13. "There are two general types of police chokeholds. In a respiratory chokehold, the officer uses their arm across the front of another person's neck, blocking their airways and making it impossible to breathe. A carotid chokehold is when the officer places an arm around the neck and puts pressure on the sides of the neck to slow the blood flowing through two large arteries to render the person unconscious. Both can and have caused the death of detainees." Lawrence J. Buckfire, *Lawsuits for Police Chokehold Deaths*, 10 NAT'L L. REV. 328 (2022), <https://www.natlawreview.com/article/lawsuits-police-chokehold-deaths> [https://perma.cc/4DZ2-QCSJ]; Tyler Wall, *The Definition of "Chokehold"*, VERSO BLOG (June 9, 2020), <https://www.versobooks.com/blogs/4745-the-definition-of-chokehold> [https://perma.cc/6L4G-QDSL] ("At least since the late 1970s and early 1980s, the Los Angeles and New York police departments used and justified chokehold techniques, while at the same time banning and sanctioning some versions of the technique.").

14. Karen G. Bates, *'It's Not Your Grandfather's LAPD'— and That's a Good Thing*, NPR (Apr. 26, 2017, 4:45 PM), <https://www.npr.org/sections/codeswitch/2017/04/26/492848045/-it-s-not-your-father-s-lapd-and-that-s-a-good-thing> [https://perma.cc/25P4-C9W2] ("For years before the '92 riots, Rice says, cops felt comfortable denigrating black and brown people over their radios. When the transcripts of those conversations were introduced in court cases, Rice says, 'they raised the veil on the subterranean culture that LAPD exposed to the black community and the poor Latino community and any community that they decided wasn't on the right side of the thin blue line.'").

My favorite comedian is Richard Pryor.¹⁵ During his stand-up act in the 1970s, Pryor would announce the LAPD has a new technique called the choke hold. Pryor would say that all the Black folks in the audience would nod and indicate, “Yeah, we know,” and all the White folks in the audience would look puzzled and say, “What are you talking about?” This duality reflected, of course, Pryor’s recognition of the racist application of this facially neutral technique.¹⁶

I thought that the LAPD came up with the racial profile until I came across the nineteenth century case of *Hudgins v. Wrights*.¹⁷

II. THE FIRST RACIAL PROFILE

While the LAPD might’ve made racial profiling famous in the 1970s, racial profiling was first instituted in American legal doctrine by a Virginia court in 1806. In *Hudgins*, a suit involving a disputed claim of freedom by an enslaved Native American family, the court created a presumption of freedom based on racial profile reasoning.¹⁸ The court stated:

Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper-colored person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a Judge upon a writ of Habeas Corpus, on the ground of false imprisonment and detention in slavery: that the only evidence which the person detaining them in his custody could produce was an authenticated bill of sale from another person, and that the parties themselves were unable to

15. Richard Pryor, born December 1, 1940, was an African American actor and comedian who was well known for his “colorful language” in his comedy shows, his fast-paced life, multiple marriages, and his battle with drug addiction. He was also known for his observational humor on African American life during the 1970s, but he was less known for his advocacy against animal cruelty. Pryor passed away on December 10, 2005. *Richard Pryor Biography*, IMDB, <https://www.imdb.com/name/nm0001640/bio?ref=nmovbiosm> [https://perma.cc/8CB2-W8ZH].

16. Netflix Is a Joke, *Richard Pryor’s 1979 Joke About Police Still Applies*, YOUTUBE (June 12, 2020), <https://www.youtube.com/watch?v=ZWulvchFpYs> [https://perma.cc/3VA4-HA2F].

17. 11 Va. (1 Hen. & M.) 134 (1806).

18. *See id.* at 139–40.

produce any evidence concerning themselves, whence they came How must a Judge act in such a case?¹⁹

According to the Virginia high court, those who look White and Native American must go free, but those who look Black must be placed in slavery because Black people, simply because of the color of their skin, the width of their nose, or the curl in their hair, are not entitled to a common presumption of freedom.²⁰

The profile detailed by the judges was not based on medical science, but rather, as Professor Adjoa A. Aiyetoro mentioned in her comments at the Conference, a social construct.²¹ They fashioned themselves as PhDs in “barberology.”²² They said:

Nature has stamp't upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of color either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these

19. *Id.* at 140.

20. *See id.*

21. Adjoa A. Aiyetoro joined the University of Arkansas at Little Rock William H. Bowen School of Law faculty in 2004. Aiyetoro currently is the Professor of Law and the Director of the Racial Disparities in the Arkansas Criminal Justice System Research Project. Before her time as a law professor, Aiyetoro was a human rights attorney and a social worker and has served as the Executive Director of the National Conference of Black Lawyers, the Director of Administration for the Congressional Black Caucus Foundation, Inc., and a consultant to the Lawyers' Committee for Civil Rights Under Law. Some of her publications and awards include the Washington University George Warren Brown School of Social Work's Distinguished Alumni Award, the Arkansas ACLU's Civil Libertarian of the Year Award. ADJOA A. AIYETORO, BLACK WOMEN AND REPARATIONS MOVEMENTS IN BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS AND ACTIONS (Jeremy I. Levitt ed., Cambridge Univ. Press 2015); Adjoa A. Aiyetoro, *Racial Disparities in Punishments and Alienation: Rebelling for Justice*, 71 NAT'L LAW. GUILD REV. 193 (2014); Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. GENDER, RACE, & JUST. 633 (2011); Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and its Antecedents*, 16 TEX. WESLEYAN L. REV. 687 (2010); Adjoa A. Aiyetoro, UNIV. ARK. LITTLE ROCK, <https://ualr.edu/law/faculty/emeritus-faculty/adjoa-a-aiyetoro> [<https://perma.cc/8WUL-ANEJ>].

22. The word “barberology” is a slang term used to reference the study of the history, technology, and culture of barbering. *See, e.g.*, BaBylissPRO, <https://babylisspro.com/barberology> [<https://perma.cc/7Y27-DDR8>].

characteristics disappears the last of all: and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans. Its operation is still more powerful where the mixture happens between persons descended equally from European and African parents. So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty clothing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burthen of proof depends.²³

That is why the judges used the language “wooly hair or inclining thereto” in the profile. The judges wanted to ensure that the profile covered the many Virginia residents or visitors of mixed African ancestry.

Such a burden, even for those who otherwise looked White or Native American but possessed hair that was “inclining thereto,” was impossible to meet for most individuals with legitimate freedom claims because of the difficulty of acquiring documentation and testimony necessary to defeat this presumption.²⁴ In general, government documentation was provided only for White Virginians. Accordingly, the presumption was almost always the determining factor, and for those twenty-thousand free Black people in Virginia in 1806,²⁵ it was a difficult burden to satisfy under the Virginia Bill of Rights.²⁶

23. *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134, 139–40 (1806).

24. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “*Yearning to Breathe Free*”: *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. Rev. 1213, 1242 (1993).

25. IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 5, 46, 90–97 (1975).

26. Higginbotham & Higginbotham, *supra* note 24, at 1242.

III. THE PRESUMPTION CONTINUES

There was a cruel saying often heard on the playground when I was a child: If you are White, you are right; if you are Brown, stick around; if you are Black, get back.²⁷ *Hudgins* incorporated into law that cruel saying that embraced a racial hierarchy with White people on top and Black people on the bottom.

What I hear so often now is, “Come on, Professor, that was a long time ago. What does all that ancient stuff have to do with what is going on today?” I ask these students to consider this: the reality is that, while we no longer have slavery, we still have presumptions based on a racial profile reminiscent of slavery.²⁸

In 1806, the profile was used to enslave free Black people. In 2022, the profile is used for stop and frisk practices,²⁹ for driving while Black,³⁰ for no knock warrants,³¹ for rough

27. The saying derived from the song written by Big Bill Broonzy. BIG BILL BROONZY, *Black, Brown and White, on TROUBLE IN MIND* (Smithsonian Folkways 2000).

28. See U.S. CONST. amend. XIII, § I. The Supreme Court has ruled that the Thirteenth Amendment bans slavery or involuntary servitude and also authorizes Congress to end any lingering badges or incidents of slavery. *Slaughter-House Cases*, 83 U.S. 36 (1872). The Court, however, has not provided any guidance as to how courts should identify the badges and incidents of slavery absent such congressional action. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1342 (2007). This has enabled the lower courts to conclude that the judiciary’s role under the Thirteenth Amendment is reduced to enforcing only the Amendment’s prohibition of literal enslavement. *Id.* at 1311. As a result of congressional inaction and the Supreme Court’s narrow interpretation, many badges and incidents of slavery continue to negatively impact Black people today. *Id.* at 1311–12.

29. A stop and frisk occurs when a police officer has stopped a person suspected of criminal activity, then interrogates him and does a pat down of the person’s outer clothing. See *Terry v. Ohio*, 392 U.S. 1, 7 (1968); *Ending Racist Stop and Frisk*, ACLU MASS. (2022), <https://www.aclum.org/en/ending-racist-stop-and-frisk> [<https://perma.cc/7QJZ-Y75G>]; Lisa Ly, *Racial Profiling: Understanding the Practice of Stop-and-Frisk in New York City*, SPECTRA UNDERGRADUATE RSCH. J., Aug. 13, 2021.

30. See HIGGINBOTHAM, *supra* note 11, at 156; HARRIS, *supra* note 10.

31. “No-knock warrants allow for officers to forcibly enter without announcing themselves or warning the inhabitants.” Mikayla Guile, *No-Knock/Quick-Knock Warrants and Drug Related Offenses: A Reform Proposal*, 9 LIBERATED ARTS 1, 1 (2022) (discussing the difference between a knock and announce warrant, a no-knock warrant, and a quick-knock warrant); Gene Grabiner, *Who Polices the Police?*, 43 SOC. JUST. 58, 61 (2016) (A recent ACLU study found out that “these paramilitary raids disproportionately impacted people of color, sending the clear message that the families being raided are the enemy. This unnecessary violence causes property damage, injury, and death.” The same study discovered that “police

rides,³² for plea bargaining,³³ for school suspensions,³⁴ for SWAT deployments,³⁵ for civil asset forfeitures,³⁶ for juror

overwhelmingly use SWAT raids not for extreme emergencies like hostage situations but to carry out basic police work as serving warrants or searching for small amount of drugs.”)

32. See generally HIGGINBOTHAM, *supra* note 11, at 156–64.

33. Plea bargains occur between a defendant and a prosecutor who come to an agreement in which the defendant will plead guilty in order to avoid a trial; the prosecutor will either drop a number of charges, reduce charges, or reduce the sentence. *Plea Bargain*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/plea_bargain [<https://perma.cc/9UW7-7JEB>].

34. African Americans are two times as likely to be suspended and almost four times as likely to be suspended out of school than White students. *K-12 Disparity Facts and Statistics*, UNCF, <https://uncf.org/pages/K-12-Disparity-Facts-and%20Stats?gclid> [<https://perma.cc/YZ6G-TZEN>]. See generally *The School to Prison Pipeline*, REHAB. ENABLES DREAMS, <https://stopprecidivism.org/blog/the-school-to-prison-pipeline> [<https://perma.cc/XY6N-DRLY>].

35. SWAT deployments, other militarized police units, and overall aggressive policing strategies have historically been used more often in African American communities and against citizens of color, which continue to preserve the race and class-based social hierarchies. Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but May Harm Police Reputation*, 115 PROC. NAT. ACAD. SCI. 9181, 9181 (2018), https://scholar.princeton.edu/sites/default/files/jmummolo/files/mummolo_pnas_final.pdf [<https://perma.cc/C3JC-CRQX>].

36. Civil asset forfeiture allows the police to take away property, money, or any assets if the government can prove by a preponderance of the evidence that it is connected to some criminal activity. 18 U.S.C. § 983(c); *Why Civil Asset Forfeiture Is Legalized Theft*, LEADERSHIP CONF. CIV. & HUM. RTS. (July 23, 2015), <https://civilrights.org/resource/why-civil-asset-forfeiture-is-legalized-theft> [<https://perma.cc/9X5Z-XTCG>]. Civil asset forfeiture practices have a disproportionate racial impact. *South Carolina Civil Forfeiture Disproportionately Targets Black Men*, EQUAL JUST. INITIATIVE (Mar. 4, 2019), <https://eji.org/news/south-carolina-civil-forfeiture-disproportionately-targets-black-men> [<https://perma.cc/23G9-8KLP>]; Sean Nicholson-Crotty et al., *Race, Representation, and Assets Forfeiture*, 24 INT'L PUB. MGMT. J. 47 (2021); N.J. ADVISORY COMM. TO THE U.S. COMM. ON C.R., CIVIL RIGHTS IMPACTS OF CIVIL AND CRIMINAL ASSET FORFEITURES IN NEW JERSEY (Oct. 2021), <https://www.usccr.gov/files/2021-10/combined-nj-forfeiture-report.pdf> [<https://perma.cc/4ZP3-6FMQ>].

selection,³⁷ for qualified immunity,³⁸ and for choke holds,³⁹ to mention just a few examples. In each of these practices, the profile allows for disproportionate treatment based on race as Black people are disproportionately singled out for more harmful treatment.

While these terms may sound neutral and uncontroversial, the night before the Rothgerber Conference, several powerful stories were discussed, including firsthand accounts of how some of these practices have destroyed Black lives. The murder of Ahmaud Arbery provides a stark reminder.

On February 25, 2020, Ahmaud Arbery, a twenty-five-year-old Black male, was out jogging in the Satilla Shores neighborhood of Brunswick, Georgia. Gregory McMichael, a fifty-eight-year-old White male and former police officer, saw Arbery and believed he resembled the profile of a suspect in a series of neighborhood home break-ins. According to McMichael, he and his son armed themselves and pursued Arbery in their pickup truck as he ran down a road. After a confrontation on the road among the three, Arbery was shot and killed.

Two local prosecutors chose not to indict McMichael or his son and recused themselves from the case, but when a thirty-six-second video surfaced of the shooting and protests began, the local chief prosecutor called for a grand jury investigation. On May 7, 2020, some two months after the murder, Georgia Department of Investigation police officers arrested Gregory and

37. See EQUAL JUST. INITIATIVE, RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION (2021), <https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf> [<https://perma.cc/77SW-4LL7>].

38. Qualified immunity limits when victims of police brutality, violence, or misconduct can hold police officers accountable. It must be proved that the conduct by the police officer was unlawful, and the officers should have known they were violating clearly established law. *Qualified Immunity*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/qualified-immunity> [<https://perma.cc/SSE2-U7ZL>] (“Even if a person can demonstrate that the police officer acted unlawfully, the officer will not be liable unless both prongs have been satisfied. The second requirement provides an especially powerful shield for officers because courts often require a nearly identical case to use as ‘clearly established’ precedent.”).

39. Many lives have been lost by African American people due to police chokeholds, including the infamous case of Eric Garner. One study found that between 1975 and 1982, police killed fifteen people with a chokehold; twelve of them were African American. Terrence McCoy & Abby Philip, *Eric Garner’s Killing and Why the Police Chokehold Is So Racially Charged*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/why-the-police-chokehold-is-so-racially-charged> [<https://perma.cc/4BUF-NZT>].

Travis McMichael on charges of murder. They were convicted and sentenced to prison.⁴⁰

The Arbery murder exemplifies how the racial profile continues to be embraced over 200 years after its creation in *Hudgins*. As was the case in 1806, the profile continues to result in the denial of due process and the devaluing of Black life, just as it did for Ahmaud Arbery in 2020 when the McMichael’s profiled him for “jogging while Black.”

So, I tell my students today:

The profile is the same—Blackness,

The rationale is the same—safety,

The impact is the same—denial of due process.

Slavery’s impact today is apparent in more than just the criminal justice system. We see it in language with sayings like “sold down the river”⁴¹ and “pork barrel spending.”⁴² We see it in economic disparities—the median wealth gap between Black families and White families is twelve cents per one dollar of

40. *Criminal Justice Reform Relies On Equal Justice, Regardless Of Race: The Case Of Ahmaud Arbery*, REHAB. ENABLES DREAMS (May 7, 2020), <https://stoprecidivism.org/blog/criminal-justice-reform-relies-on-equal-justice-regardless-of-race-the-case-of-ahmaud-arbery> [https://perma.cc/XPT9-ZP88]; Dustin Chambers, *Ahmaud Arbery Shooting: A Timeline of the Case*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-timeline.html> [https://perma.cc/G8NV-VDHT].

41. The phrase “sold down the river” referred to the Mississippi or Ohio rivers, a literal reference to being sold down the river to be transported to more southern states where work conditions were much harsher. Lakshmi Gandhi, *What Does “Sold Down the River” Really Mean? The Answer Isn’t Pretty*, NPR (Jan. 27, 2014, 7:00 AM), <https://www.npr.org/sections/codeswitch/2014/01/27/265421504/what-does-sold-down-the-river-really-mean-the-answer-isnt-pretty> [https://perma.cc/GY6D-Q5AB].

42. Pork barrel spending refers to “the use by a representative of federal funds to bring money to local projects in their district,” that is, public works projects or agricultural subsidies. *Pork Barrel Spending*, BALLOTPEdia, https://ballotpedia.org/Pork_barrel_spending [https://perma.cc/ZG7F-ZNCZ]. Some historians suggest that the phrase emanates from the feeding practices on southern slave plantations. *Where Did the Phrase “Pork Barrel” Come From?*, INVESTOPEDIA (Nov. 21, 2021), <https://www.investopedia.com/ask/answers/050615/where-did-phrase-pork-barrel-come.asp> [https://perma.cc/64PL-5KHQ]; Nick Gillespie, *Why Pork Barrel Spending Is Called Such (and Why the Term Is Couched in America’s Racist Past)*, REASON (Apr. 20, 2007, 7:15 AM), <https://reason.com/2007/04/20/why-pork-barrel-spending-is-ca> [https://perma.cc/UWV3-939B].

White wealth.⁴³ No doubt this disparity started during slavery with no compensation for labor, no reparations for wrongful enslavement, and few generational wealth transfers.⁴⁴

But there is no question for me that the worst impact is the criminal justice system's racial inequity. Just like during slavery, when slave patrols⁴⁵ were given almost complete discretion to kill runaways,⁴⁶ today, police officers (sometimes called patrolmen, a reference to the slave patrol days)⁴⁷ rarely

43. See Ana Hernández Kent & Lowell Ricketts, *Wealth Gaps Between White, Black and Hispanic Families in 2019*, FED. RSRV. ST. LOUIS (Jan. 5, 2021), <https://www.stlouisfed.org/on-the-economy/2021/january/wealth-gaps-white-black-hispanic-families-2019> [<https://perma.cc/J6N9-ZZUE>].

44. See *id.*; THOMAS SHAPIRO ET AL., *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE* (2013), <https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf> [<https://perma.cc/EJB2-FRNN>]; Trymaine Lee, *How America's Vast Racial Wealth Gap Grew: By Plunder*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html> [<https://perma.cc/T5AT-73MY>]. See generally Heather A. O'Connell, *The Impact of Slavery on Racial Inequality in Poverty in the Contemporary U.S. South*, 90 SOC. FORCES 713, 713–34 (2012) (discussing the role that slavery has on modern racial inequalities in poverty).

45. Slave patrols were a “government-sponsored force [of about 10 people] that was well organized and paid to patrol specific areas to prevent crimes and insurrection by slaves against the white community’ in the antebellum South. Without warrant or permission, slave patrols could enter the home of anyone—Black or white—suspected of sheltering escaped slaves.” Connie Hasset-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, 46 HUM. RTS. 6, 7 (2021) (discussing the role of slave patrols). See generally *The Origins of Modern Day Policing*, NAACP, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> [<https://perma.cc/J7VZ-93MX>] (“The earliest formal slave patrol was created in the Carolinas in the early 1700s with one mission: to establish a system of terror and squash slave uprisings with the capacity to pursue, apprehend, and return runaway slaves to their owners. Tactics included the use of excessive force to control and produce desired slave behavior.”).

46. See Hasset-Walker, *supra* note 45.

47. Slave patrols that eventually became police departments were designed to control minorities. The nation's first slave patrol developed in 1704 in North Carolina, which helped to maintain economic order and assist landowners in recovering and punishing enslaved people. As slavery became fully institutionalized in America, this legally sanctioned law enforcement system, with the purpose of controlling enslaved people and only protecting the interests of slave owners, is very similar to modern day American policing. African American people have long been targets of abuse and the use of patrols to return enslaved peoples who ran away is one of the precursors for formal modern police forces. Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, E. KY. U. ONLINE (Jan. 7, 2014), <https://ekuonline.eku.edu/blog/police-studies/brief-history-slavery-and-origins-american-policing> [<https://perma.cc/7WPV-VTTS>]; see also *The Origins of Modern Day Policing*, *supra* note 45; Connie Hasset-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*,

suffer serious consequences for questionable lethal and nonlethal uses of force and enforcement practices against Black victims.⁴⁸ The message is the same: Blackness is viewed with suspicion and Black life is not valued to the same degree as White life.

CONCLUSION

We see this message in so many horrendous incidents in our history: the massacre in Grant Parrish, Louisiana in 1873;⁴⁹ the

CONVERSATION (June 4, 2019, 8:42 AM), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [https://perma.cc/8857-4A63].

48. “The Bureau of Justice Statistics reports that across the nation fewer than one in 12 complaints of police misconduct result in any kind of disciplinary action.” Jill McCorkel, *Police Officers Accused of Brutal Violence Often Have a History of Complaints by Citizens*, CONVERSATION (May 31, 2020, 4:01 PM), <https://theconversation.com/police-officers-accused-of-brutal-violence-often-have-a-history-of-complaints-by-citizens-139709> [https://perma.cc/5FRJ-EHNW] (“In spite of this research, many law enforcement agencies not only fail to adequately investigate misconduct allegations, they rarely sustain citizen complaints. Disciplinary sanctions are few and reserved for the most egregious cases.”). “Over the past five years, White people in Chicago were almost seven times more likely to have their police misconduct complaints sustained than African Americans, even though Black people filed three times more complaints against police officers, according to an analysis based on a new public database.” Adeshina Emmanuel & Jonah Newman, *Police Misconduct Complaints by Whites More Likely to Be Upheld*, CHI. REP. (Nov. 10, 2015), <https://www.chicagoreporter.com/police-misconduct-complaints-by-whites-more-likely-to-be-upheld> [https://perma.cc/TKV7-LH9N]. “An NAACP survey of citizen complaints against police officers in North Charleston, S.C., between 2006 and 2016 found that complaints by white citizens were about two-thirds more likely to be sustained than complaints filed by black citizens. When the complainant alleged excessive force, white complaints were sustained seven times more often than black complaints.” Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist. Here’s the Proof.*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system> [https://perma.cc/3AFM-REYL].

49. The Colfax Massacre occurred in Colfax, Louisiana on April 13, 1873. As racial tensions were high following the 1872 governor’s race that the Republicans won, White Democrats vowed for revenge. On April 13, “more than 300 armed white men, including members of white supremacist organizations such as the Knights of White Camellia and the Ku Klux Klan, attacked the courthouse. When the militia maneuvered a cannon to fire on the courthouse, some of the sixty black defenders fled while others surrendered. When the leader of the attackers, James Hadnot, was accidentally shot by one of his own men, the white militia responded by shooting the black prisoners. Those who were wounded in the earlier battle, particularly black militia members, were singled out for execution. The indiscriminate killing spread to African Americans who had not been at the courthouse and continued into the night. All told, approximately 150 African Americans were killed, including 48 who were murdered after the battle. Only three

race riot in Wilmington, North Carolina in 1898;⁵⁰ the Elaine Massacre in Arkansas in 1919;⁵¹ the Tulsa Massacre in

whites were killed, and few were injured in the largely one-sided battle of Colfax.” Michael Stolp-Smith, *The Colfax Massacre*, BLACKPAST (Apr. 7, 2011), <https://www.blackpast.org/african-american-history/colfax-massacre-1873> [<https://perma.cc/9D9Q-FSVV>].

50. The Wilmington race riot occurred on November 10, 1898, when a mob burned down a Black-owned newspaper, the *Daily Record*, then took to the streets firing openly on Black people as they ran for their lives. The newspaper was torched, 60 people had been murdered, and the newly elected government had been brought down and replaced by White supremacists. Scott Neuman, *A North Carolina City Begins to Reckon with the Massacre in its White Supremacist Past*, NPR (Nov. 10, 2021, 5:00 AM), <https://www.npr.org/2021/11/10/1053562371/1898-wilmington-coup-massacre> [<https://perma.cc/E3MW-FY9M>]; Adrienne LaFrance & Vann R. Newkirk II, *The Lost History of an American Coup D’État*, ATLANTIC (Aug. 12, 2017), <https://www.theatlantic.com/politics/archive/2017/08/wilmington-massacre/536457> [<https://perma.cc/24XK-37WL>].

51. On September 30, 1919, African American sharecroppers gathered in a church in Elaine, Arkansas. Upset about unfair low wages and being trapped with debts, they obtained the help of attorney Ulysses Bratton to help them with their unfair treatment. Later that night a group of White men fired shots into the church, shots were returned, and one White man was killed. Rumors spread that the sharecroppers were leading an insurrection against the White residents in the county. In response, the governor called five hundred soldiers who were told, “Shoot to kill any negro who refused to surrender immediately.” Along with other local vigilantes they killed at least two hundred African American people, including men, women, and children who happened to be in the vicinity. Francine Uenuma, *The Massacre of Black Sharecroppers that Led the Supreme Court to Curb the Racial Disparities of the Justice System*, SMITHSONIAN MAG. (Aug. 2, 2018), <https://www.smithsonianmag.com/history/death-hundreds-elaine-massacre-led-supreme-court-take-major-step-toward-equal-justice-african-americans-180969863> [<https://perma.cc/GRB3-FYBU>].

Oklahoma in 1921;⁵² and, most recently, the events at the Capitol in Washington, DC on January 6, 2021.⁵³

Race-based thinking continues to plague American society. Racial profiling provides a perfect example. Racial profiling—race-dependent assessments of suspicion—often involves making decisions on the basis of a stereotype of the criminal propensities of Black people, thus resulting in racially discriminatory treatment.

Racial profiling should be prohibited for three reasons: it is harmful to the profiled person, it is an ineffective law enforcement tool, and it embraces a divisive societal message. First, racial profiling is emotionally harmful. The experience of being stopped because of one's skin color is not only

52. Greenwood, what once was a vibrant, thriving, and affluent African American community, referred to as “Black Wall Street,” was destroyed in 1921. On May 30, 1921, an incident occurred between Dick Rowland and Sarah Page: “The most common explanation is that Rowland stepped on Page’s foot as he entered the elevator, causing her to scream.” The *Tulsa Tribune*, a daily newspaper, reported that Rowland attempted to rape Page. Later that night hundreds of White people were outside the courthouse, demanding Rowland to be turned over to them. After a rumor started that the White people had stormed the courthouse, a group of armed African American individuals, who had been turned down before when they had offered the courthouse protection, went back to once again offer their help. They were again turned down, however, as they were leaving a White man tried to disarm a Black veteran, shots were fired, and the riot began. Over the next six hours, an angry White mob took to the streets, killing unarmed African American individuals. Local authorities, not only failed to do anything about the mob of White people, but “deputized former members of the lynch mob and, according to an eyewitness, instructed them to ‘get a gun and get a ni—er.’” The armed White mob continued through the night as they started looting homes and businesses of African American residents, setting them on fire, and killing unarmed African American individuals. Greenwood never truly recovered. Scott Ellsworth, *Tulsa Race Massacre*, ENCYCLOPEDIA OK. HIST. & CULTURE, <https://www.okhistory.org/publications/enc/entry.php?entry=TU013> [https://perma.cc/6N6M-DN9D]; 1921 *Tulsa Race Massacre*, TULSA HIST. SOC’Y & MUSEUM, <https://www.tulsaohistory.org/exhibit/1921-tulsa-race-massacre> [https://perma.cc/5VXC-PUVB].

53. Shortly after it was announced that Joe Biden won the 2020 election, on January 6, 2021, an attack and riot occurred on the U.S. Capitol, costing approximately \$1.5 million worth of damage. More than 725 arrests have been made. *One Year Since the Jan. 6 Attack on the Capitol*, U.S. ATTY’S OFFICE FOR D.C. (Dec. 30, 2021), <https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol> [https://perma.cc/PY9P-WZLW]. Rioters yelling racial slurs, waving the confederate flag or gallows and nooses, overtook the capitol on January 6, 2021, after former President Donald Trump urged them to retake the nation to halt the certification of the 2020 election results. Nicole Austin-Hillery & Victoria Strang, *Racism’s Prominent Role in January 6 US Capitol Attack*, HUM. RTS. WATCH (Jan. 6, 2022), <https://www.hrw.org/news/2022/01/05/racisms-prominent-role-january-6-us-capitol-attack> [https://perma.cc/KFQ6-JJ3S].

inconvenient; it is also frightening and sometimes can lead to confrontation and death.⁵⁴ Innocent individuals subjected to police or private citizen abuse feel as though they need to change their daily activities, the cars they drive, the clothes they wear, and the places they frequent.

Second, racial profiling is an ineffective law enforcement tool—it is bad practice. Not only has it led to increased distrust and animosity amongst Black people toward law enforcement personnel, but it also has increased tensions between the police and Black people, and it has impeded the effectiveness of community policing. If innocent individuals are treated like criminals, they will lose trust in officers as investigators of crime or as witnesses in court, making victims of racial profiling less likely to confide in officers and inform them of criminal activity. Such a response will allow more guilty people to go free because of a lack of cooperation.

Third, whether done consciously or unconsciously, racial profiling invokes the notion of racial hierarchy, a divisive societal message, because of its inherent implication that apparent Blackness implies guilt of a crime or dangerousness. Unlike the less significant government interests in a routine traffic stop, racial profiling may seem more justifiable where the potential for societal harm is great, such as when law enforcement profiles terrorists for national security reasons or drug traffickers for crime prevention reasons, yet it is nevertheless racially discriminatory and should be prohibited under the Equal Protection Clause of the Fourteenth

54. Ahmaud Arbery is just one example of the tragic consequence that can occur from a racial profiling incident. Over the last decade, far too many have died after initially being profiled. Among the most reported cases include Eric Garner (suspected of illegally selling loose and untaxed cigarettes on a public street corner); Michael Brown (suspected of stealing cigars from a convenience store and jaywalking); Laquan McDonald (suspected of breaking windows and slashing tires of parked automobiles); Tamir Rice (suspected of threatening bystanders while playing with a toy gun); Walter Scott (suspected of a routine traffic violation); Samuel DuBose (suspected of failing to display a front license plate on his automobile); Freddie Gray (suspected of carrying an illegal knife); Philando Castile (suspected of robbery); Breonna Taylor (suspected of involvement in illegal drug sales); and George Floyd (suspected of passing a counterfeit twenty dollar bill). See Nicole Dungca et al., *A Dozen High-Profile Fatal Encounters that Have Galvanized Protests Nationwide*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/a-dozen-high-profile-fatal-encounters-that-have-galvanized-protests-nationwide/2020/06/08/4fdbfc9c-a72f-11ea-b473-04905b1af82b_story.html [https://perma.cc/NUJ5-5VPA]. See generally *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

Amendment. Behavior-dependent assessments identifying suspicion, rather than race-dependent assessments, should be embraced by all Americans, as well as law enforcement personnel.

Eliminating the profile would help to change this message of continued racial difference and hierarchy in the criminal justice system. A focus on actual behavior rather than racial characteristics would be more consistent with our evolving notions of equality since the profile was first created in 1806, when Black people could expect, at best, only shades of justice.