Ohio Northern University Law Review

Volume 47 | Issue 3 Article 3

Race, Crime, and the Law:A Sociohistorical Analysis

Shaun L. Gabbidon PH.D.

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review

Part of the Law Commons

Recommended Citation

Gabbidon, Shaun L. PH.D. () "Race, Crime, and the Law:A Sociohistorical Analysis," *Ohio Northern University Law Review*: Vol. 47: Iss. 3, Article 3.
Available at: https://digitalcommons.onu.edu/onu_law_review/vol47/iss3/3

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

Race, Crime, and the Law: A Sociohistorical Analysis

SHAUN L. GABBIDON, PH.D.*

I. INTRODUCTION

I have been researching and teaching the topic of race and crime for more than twenty-five years. During this period, a few things have become increasingly clear: First, students and the general public are woefully ignorant of the historical and significant role racism plays in criminal justice system outcomes. Second, students and the general public are woefully ignorant as to how complicit legislation and case law have been in perpetuating systemic racism within the American Justice system. Lastly, there is very little concern or acknowledgement as to the impact of these from the larger society. This paper highlights some of the earliest legislation and case law that connected race, crime, and the law.[1]

It is well-established that BIPOC (Black, Indigenous, and People of Color) have had their challenges within the borders of the United States.[2] One can simply use the early Black and Indigenous experiences in America to understand the nature of the overt discrimination that existed during the Colonial era—that centered on stealing lands and maintaining the slave system.[3] Manifest destiny and its white supremacist roots shaped the relationship between Whites and all other groups.[4] During the European invasion of America, it is believed that the genocidal and legislative activities of the White settlers reduced the Indigenous population from "7 to 18 million [native] people north of Mexico" at the time of discovery" to "no more than 500,000 [natives] north of Mexico" by the late 1800s."[5] This reduction was the product of both direct violent encounters that targeted the Indigenous population as well as the estimated three hundred to four hundred treaties that

* Distinguished Professor of Criminal Justice, Penn State-Harrisburg-School of Public Affairs, 777 W. Harrisburg Pike Middletown, PA 17057, Email: slg13@psu.edu, Phone: (717) 948-6054.

1. *See infra* Parts IV-V.

2. *See* Jonathan Andrew Perez, *Rioting by a Different Name: The Voice of the Unheard in the Age of George Floyd, and the History of the Laws, Policies, and Legislation of Systemic Racism*, 24 J. GENDER RACE & JUST. 87 (2021).

3. *See infra* Parts IV-V.

4. ELIZABETH BROWN & GEORGE BARGANIER, RACE AND CRIME: GEOGRAPHIES OF INJUSTICE 51 (2018).

5. KIRKPATRICK SALE, THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY 316, 349 (1990).

Published by DigitalCommons@ONU,

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

were agreed upon, and which overwhelmingly favored white expansion over Indigenous concerns.[6] Even with the favorable treaty conditions, the United States government ignored many of the agreements within said treaties.[7] Presidents, such as Andrew Jackson, encouraged defiance of Supreme Court rulings in relation to certain treaties which found in favor of the Indigenous population.[8] Additionally, federal legislation, such as the Indian Removal Act of 1830 and the Dawes Act of 1887, contributed to widespread Native American death through forced migration and assimilation, and the massive loss of ancestral lands.[9]

While the Indigenous population has been the early and continuing targets of racial injustice in the United States, Black Americans have been at the epicenter of racial injustice in America since their forced arrival.[10] As one observer astutely noted, ". . . African Americans have fought more legal battles over a greater length of time. They have fought battles, for centuries, against unfathomable legal obstacles."[11] Given this history, this paper focuses on the Black experience in America—as it relates to select legislation and case law that have contributed to the current state of affairs relating to racial disparities in crime and justice.[12] More specifically, after a brief historical overview of the early Black American experience, this paper examines a few select cases and legislation from colonial times to the present that highlight how race, and especially Blackness (largely involving Black Men), has been the instigator of numerous decisions tied to the operation of the criminal justice system.[13] Finally, this paper examines how the Black Lives Matter movement has the potential to move the needle in the area of racial injustice.[14]

---

6. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).

7. *Id.*

8. JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 67 (2006) (Notably, after the Supreme Court struck down a series of Georgia laws meant to control Cherokee lands where gold was found, President Jackson famously remarked, "John Marshall has made his decision, now let him enforce it."; *see also* Worcester v. Georgia, 31 U.S. 515 (1832) (After the decision, Georgia chose to ignore the ruling, and President Johnson did not enforce it.).

9. BANNER, *supra* note 6, at 217-27, 257.

10. *See generally* GLORIA J. BROWNE-MARSHALL, RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT, at xxxvi (2d ed. 2013).

11. *Id.*

12. *See infra* Parts II-V.

13. *Id.*

14. *See infra* Part VI.

Gabbidon: Race, Crime, and the Law:A Sociohistorical Analysis

II. BLACKS IN AMERICA

While it is well established that Africans arrived in America around or near 1619,[15] the activities that produced this arrival are less known.[16] Ironically, the arrival of Blacks in America was the product of a variety of events.[17] Most notably, scholars looking at the slave trade in America have noted that because of the near elimination of the Indigenous population in the West Indies, Spanish priest Bartolome De Las Casas recommended the importation of Africans to replace them.[18] In particular, Africans were viewed as being "more robust than the natives of the West Indies Islands, [and De Las Casas] recommended that black slaves be imported to take the place of Indians in the severer tasks of the plantations and the mines."[19] This decision led to what has been referred to as "[a] terrible traffic in human flesh . . . ."[20] In short, this decision led to the African-slave trade that resulted in an untold number of Africans that died in the middle passage as well as on plantations in America.[21]

Once the slave system was firmly established in America, it became necessary to put in place a system to control Blacks in order to extract their prized commodity: free labor.[22] The reliance on legislative enactments and court decisions were strategically used to control Blacks.[23] The slave system developed the racial hierarchy that placed Whites at the top and African slaves at the bottom.[24] The White supremacist logic and greed that fueled the

---

15. *See e.g.*, LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA 30 (3d ed. 1966); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 65 (8th ed. 2000).

16. *See generally* BENNETT, JR., *supra* note 15, at 30; FRANKLIN & MOSS, JR., *supra* note 15, at 65.

17. *See generally* BENNETT, JR., *supra* note 15, at 30; FRANKLIN & MOSS, JR., *supra* note 15, at 65.

18. Bill M. Donovan, *Introduction* to BARTOLOMÉ DE LAS CASAS, THE DEVASTATION OF THE INDIES: A BRIEF ACCOUNT 20 (Herma Briffault trans., 1992) (1965) (It is notable that De Las Casas later became a notable advocate *against* the slave trade; however, he had already helped set in motion the genocidal Trans-Atlantic slave trade.); *see also* Lawrence Clayton, *Bartolomé de las Casas and the African Slave Trade*, 7 HISTORY COMPASS 1526 (2009).

19. BEN FINGER, JR., CONCISE WORLD HISTORY 716 (1959).

20. *Id.*

21. *See* JOHN HARRIS, THE LAST SLAVE SHIPS: NEW YORK AND THE END OF THE MIDDLE PASSAGE (2020); SOWANDE' M. MUSTAKEEM, SLAVERY AT SEA: TERROR, SEX, AND SICKNESS IN THE MIDDLE PASSAGE (2016).

22. *See* CLAUD ANDERSON, BLACK LABOR, WHITE WEALTH: THE SEARCH FOR POWER AND ECONOMIC JUSTICE (1994); ERIC WILLIAMS, CAPITALISM & SLAVERY (1966).

23. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD (1980) [hereinafter IN THE MATTER OF COLOR]; A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996) [hereinafter SHADES OF FREEDOM].

24. 1-5 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen Tunnicliff Catterall ed., 1998) (an excellent multi-volume set containing brief descriptions of cases from the various

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

system became intertwined with all the colonists' actions.[25] In particular, the slave codes that were enacted from 1680 to 1682 provided the tools needed to control Blacks.[26] These legislative enactments controlled every aspect of Black life.[27] In fact, the slave system flourished because these enactments were prevalent throughout the American colonies.[28] The 1700s saw numerous additional enactments related to blacks.[29] Illustrative of these were The Fugitive Slave Acts of 1793 and 1850 that required escaped slaves be returned to their masters.[30] The Dred Scott decision followed in 1857, which further instigated tensions concerning the slavery question between the industrial North and slavery-dependent South.[31] The Civil War led to the Emancipation Proclamation in 1863, that freed the more than four million

---

United States, England, Canada, and Jamaica from the time of founding up to the Civil War and Reconstruction era).

25. A. Leon Higginbotham, in his book Shades of Freedom, provides his 10 precepts of American Slavery Jurisprudence. These precepts include those concepts that Professor Higginbotham felt were at the heart of judicial rulings during the slave-era. Among the two most applicable precepts to criminal cases include Inferiority and Powerlessness. Higginbotham translates Inferiority to the notion that the Colonial courts typically operated in a fashion to "[p]resume, preserve, protect, and defend the ideal of the superiority of whites and the inferiority of Blacks." In terms of Powerlessness, he writes, "[k]eep blacks—whether slave or free—as powerless as possible so they will be submissive and dependent in every respect, not only to the master, but to whites in general. Limit blacks' accessibility to the courts and subject blacks to an inferior system of justice with lesser rights and protections and greater punishments. Utilize violence and the powers of government to ensure the submissiveness of blacks." SHADES OF FREEDOM, *supra* note 23, at 195-96.

26. IN THE MATTER OF COLOR, *supra* note 23, at 38.

27. *See* IN THE MATTER OF COLOR, *supra* note 23, at 38. (Noting conversely, "white servants were never the victims of any legislative plan to deprive them of such basic options as the right to sue one's masters for ill treatment or for one's freedom and white servants were never precluded from owning property.").

28. *See generally id.* (describing the laws passed and cases decided against Blacks in Virginia, Massachusetts, New York, South Carolina, and Pennsylvania as a representative cross-section of the actions of the nation as a whole to govern the Black population and entrench slavery in our society).

29. *See generally id.* at 14 (discussing cases and legislation in Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania).

30. Fugitive Slave Act of 1793, 1 Stat. 302; Fugitive Slave Act of 1850, 9 Stat. 462; *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 83-84 (1997) (The 1850 act allowed for deputies to work with bystanders or a posse to enforce the act. The Act also provided for monetary incentives. Additionally, U.S. Marshalls who refused or neglected to enforce the 1850 version of the Act were to be fined $1,000).

31. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The case involved a Black enslaved couple (Dred and Harriot Scott) who sued for their freedom after their master John Sanford. Scott argued that because his owner had taken him into a free state, Illinois, and then back to Missouri (a slave state), he should be considered free. When the Supreme Court finally heard the case, it was ruled that slaves were not citizens of the United States and, as a result, could not use the Courts for remedies. In his now infamous decision on behalf of the 7-2 majority, Chief Justice Roger Taney wrote: "[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Dred Scott*, 60 U.S. (19 How.) at 393, 407. This ruling and its white supremacist undertone set the stage for the continued enslavement and racial oppression of Blacks. *See also* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS (2d ed. 2017).

https://digitalcommons.onu.edu/onu_law_review/vol47/iss3/3

Gabbidon: Race, Crime, and the Law:A Sociohistorical Analysis

Black and Mulatto slaves in Southern states.[32] This was followed by the passage of the Thirteenth Amendment in 1865, which outlawed slavery throughout the United States.[33] Three decades after the *Dred Scott* decision, in 1896, *Plessy v. Ferguson*[34] created legalized segregation and ushered in the "separate but equal" era that was not overturned until sixty years later in the 1954 *Brown v. Board of Education* case.[35] Moreover, additional legislation related to Blacks would follow in the 1960s under President Lyndon B. Johnson.[36] The first was the passage of the Civil Rights Act of 1964[37] that outlawed discrimination based on race, color, religion, sex, and national origin.[38] The Voting Rights Acts of 1965 prohibited racial discrimination in voting.[39] Prior to the passage of the act, there were countless measures used to restrict Blacks from voting, including literacy tests and poll taxes.[40] The late 1960s also produced another important legislative enactment: the Fair Housing Act of 1968[41] that prohibited discrimination in the housing market.[42]

While there have certainly been significant additional historical events related to the Black experience since they arrived in Jamestown in 1619—and certainly additional crucial legislative enactments and precedent setting cases since the 1960s—the ones discussed above illustrate the ways in which legislative enactments and case law have dictated the lives of Blacks in ways no other racial group—except possibly Native Americans—has experienced. Given this history in non-criminal justice areas related to Black life, one would think that things could not get worse. Unfortunately, anyone drawing such a conclusion would be wrong.

---

32. U.S. CENSUS BUREAU, 1860 CENSUS: POPULATION OF THE UNITED STATES, INTRODUCTION, at x (1864), https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf.

33. U.S. CONST. amend. XIII.

34. 163 U.S. 537 (1896).

35. 163 U.S. 537 (1896); 347 U.S. 483 (1954).

36. *See generally* CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 2 (2014) (discussing the political and societal battles involved in the passage of the Civil Rights Act of 1964 and the subsequent Voting Rights Act of 1965).

37. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

38. This law has been referred to as "the most important piece of legislation passed by Congress in the twentieth century. It reached deep into the social fabric of the nation to refashion structures of racial order and domination that had held for almost a century—and it worked." RISEN, *supra* note 36, at 2.

39. *See* Voting Rights Act of 1965, Pub L. No. 89-110, 79 Stat. 437.

40. SHADES OF FREEDOM, *supra* note 23, at 166-68.

41. *See* Fair Housing Act of 1968, Pub L. No. 90-284, 82 Stat. 73.

42. The expansive Fair Housing Act also "prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions and homeowner insurance companies whose discriminatory practices make housing unavailable to persons because of race or color; religion; sex, national origin; familial status, or disability." DEP'T OF JUST., THE FAIR HOUSING ACT (2017), https://www.justice.gov/crt/fair-housing-act-1.

III. BLACKS AND THE CRIMINAL JUSTICE SYSTEM

There have been numerous books and articles published on the topic of race and the criminal justice system; however, the story is largely one about racial disparities tied to Black overrepresentation in the criminal justice system.[43] Certainly, there are other concerns tied to racial injustice across the racial/ethnic spectrum, but the overwhelming mystery is tied to understanding racial and ethnic disparities involving more serious offending.[44] These racial disparities have persisted since the tracking of crime statistics.[45] Today, the most recent statistics show that Blacks are arrested for 51.2% of the Homicides, 26.7% of the rapes, 52.7% of the robberies, 33.2% of the aggravated assaults, 28.8% of the burglaries, 30.2% of the larceny thefts, 28.6% of the motor vehicle thefts, and 24.7% of the arsons.[46] Considered the most serious offenses, these statistics are typically juxtaposed with Black representation in the United States population—which currently stands at 13.4%.[47] As one might expect based on the arrest data, Blacks also have high victimization rates.[48]

In addition to arrest and victimization statistics, observers typically move on to the next step in the criminal justice system—courts and corrections, where racial disparities have also persisted.[49] In the courts, there have been abundant studies which reveal that Blacks and Hispanics are at a disadvantage

---

43. *See e.g.*, BROWN & BARGANIER, *supra* note 4, at 51; SHAUN L. GABBIDON & HELEN TAYLOR GREENE, RACE AND CRIME (3d ed. 2013) [hereinafter RACE AND CRIME]; SHAUN L. GABBIDON, RACE, ETHNICITY, CRIME, AND JUSTICE: AN INTERNATIONAL DILEMMA (2010) [hereinafter RACE, ETHNICITY, CRIME, AND JUSTICE]; KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME (2d ed. 2009); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (6th ed. 2018).

44. *See e.g.*, SHAUN L. GABBIDON, CRIMINOLOGICAL PERSPECTIVES ON RACE AND CRIME (4th ed. 2020) [hereinafter CRIMINOLOGICAL PERSPECTIVES]; DARNELL F. HAWKINS ET AL., ROOTS OF AFRICAN AMERICAN VIOLENCE: ETHNOCENTRISM, CULTURAL DIVERSITY, AND RACISM (2017); JAMES D. UNNEVER & SHAUN L. GABBIDON, A THEORY OF AFRICAN AMERICAN OFFENDING: RACE, RACISM, AND CRIME (2011) [hereinafter A THEORY OF AFRICAN AMERICAN OFFENDING]; BUILDING A BLACK CRIMINOLOGY: RACE, THEORY, AND CRIME, *in* 24 ADVANCES IN CRIMINOLOGICAL THEORY (James D. Unnever et al. eds., 2019).

45. It has been asserted that the creation of crime statistics resulted in the criminalization of Blacks. Such statistics led to the development of the "criminal black man" stereotype that still persists. *See* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010)); *see also* KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME (2d ed. 2009) (providing an illuminating discussion on the "criminal black man" stereotype).

46. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, Table 43(A) (2019).

47. U.S. CENSUS BUREAU, QUICKFACTS, https://www.census.gov/quickfacts/fac%20t/table/US/RHI225219#RHI225219 (last visited June 25, 2021).

48. Recent data from the National Crime Victimization Survey (NCVS) revealed that "[t]he percentage of violent victimizations reported to police was lower for white victims (37%) than black (49%) or Hispanic victims (49%)." RACHEL E. MORGAN, PH.D. & JENNIFER L. TRUMAN, PH.D., U.S. DEP'T. OF JUST., BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION 1 (2019).

49. *See generally* Unnever et al., *supra* note 44, at 290.

during bail and pretrial release proceedings.[50] Moreover, the social science literature repeatedly shows that Blacks are more likely to require public defenders who are often overworked and underpaid.[51] These disadvantages persist throughout the court process and into sentencing.[52] The race and sentencing literature is robust, and consistently finds racial and ethnic disparities in sentencing at both the state and federal levels.[53] These disparities were particularly pronounced during the "War on Drugs," when minority populations in prisons ballooned due to draconian philosophies such as the "Tough-On-Crime" campaign that resulted in punitive sentencing guidelines.[54]

Death penalty statistics represent another area where racial disparities persist. Since the death penalty was reinstituted in 1976, there have been 1,533 executions.[55] Of those persons who were executed, Whites represented 55.7% and Blacks represented 34.2%.[56] Another revealing statistic related to the death penalty concerns the race of the victim. Here, we find that 75% of those who were executed had White victims, while only 16% involved Black victims and 7% had Hispanic victims.[57] This is despite the fact that Whites typically only represent 50% of murder victims.[58] Turning to the composition of current death row inmates, Whites represent 42% of those persons on death row, with Blacks and Hispanics representing 41% and 14%, respectively.[59]

Corrections represents the backend of the criminal justice system. Unfortunately, it represents another place where racial and ethnic disparities can be found. Recent data on prison populations do show a positive trend in

---

50. *See e.g.*, Guangya Liu et al., *Do Racial Disparities Exist During Pretrial Decisionmaking? Evidence from North Carolina* (July 22, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470182; Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, *in* THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 166-93 (Sandra M. Bucerius & Michael Tonry eds., 2014); John Wooldredge, *Distinguishing Race Effects on Pre-trial Release and Sentencing Decisions*, 29 JUST. Q. 41 (2012); John Wooldredge et al., *Ecological Contributors to Disparities in Bond Amounts and Pretrial Detention*, 63 CRIME & DELINQUENCY 1682 (2017).

51. *See e.g.*, Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Outcomes?* (July 1, 2011), http://ssrn.com/abstract=1876474; Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent"*, 3 OHIO ST. J. CRIM. L. 223 (2005); COMMONWEALTH OF PA. SUP. CT. COMM. ON RACIAL AND GENDER BIAS IN THE JUST. SYS., FINAL REPORT (2003); Kate Taylor, *System Overload: The Costs of Under-Resourcing Public Defense*, JUSTICE POLICY CENTER (July 27, 2011), https://justicepolicy.org/research/system-overload-the-costs-of-under-resourcing-public-defense/.

52. *See* Unnever et al., *supra* note 44, at 290-92.

53. *Id.*

54. *Id.* at 343.

55. *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER (May 20, 2021), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

a 3% decline in the overall imprisonment rate from 2018 to 2019.[60] It is noteworthy that from 2009 to 2019 the incarceration rate for Blacks declined by 32.2%, and 28.6% for Hispanics.[61] The White rate declined by the smallest number—14.6%.[62] Despite this positive trend, the incarceration rates for Blacks and Hispanics remains considerably higher than those for Whites.[63]

These racial and ethnic disparities are often left dangling out there without any real exploration of the sociohistorical context that contributed to the current situation.[64] Notably, the work of legal scholars have penetrated the field of criminology and criminal justice and have provided more context for not only why the justice system is the way it is, but also on the critical role of legislation and case law.[65]

IV. RACE, CRIME, AND THE LAW: THE COLONIAL PERIOD

Understanding race, crime, and the law must begin by confronting the Colonial period. To begin elsewhere, misses the crucial point of when the disparities we find today in criminal justice began. Yet, it was not simply a matter of Black slaves being arrested and convicted more than White

---

60. E. ANN CARSON, PH. D., U.S. DEP'T. OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2019, at 1 (2020).

61. *Id.* at 10.

62. *Id.*

63. *Id*. (The table shows that in 2019, the incarceration rate (per 100,000 U.S. Adults within each demographic group) was 1,446 for Blacks, 757 for Hispanics, and 263 for Whites.).

64. For recent reviews of many of the numerous social science and other theories that have been offered to provide context for these numbers, *see* CRIMINOLOGICAL PERSPECTIVES, *supra* note 44; Francis T. Cullen et al., *Beyond White Criminology*, *in* Unnever et al., *supra* note 44, at 45-75.

65. Two recent representations include the work of Michelle Alexander and James Forman, Jr. Alexander's work is more than a decade old and still reverberates through the field. She convincingly argues that the justice system and its various tentacles have produced mass incarceration that "operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race. . . . Upon release, ex-offenders are discriminated against, legally, for the rest of their lives, and most will eventually return to prison. They are members of America's new undercaste." MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13, 17 (2010). Forman's Pulitzer Prize winning book focuses on how Blacks were complicit in the development of mass incarceration. He writes that "[there were a] myriad of ways in which American racism narrowed the options available to black citizens and elected officials in their fight against crime. For example, African Americans wanted more law enforcement, but they didn't want *only* law enforcement. Many adopted what we might think of as an all-of-the-above strategy. On one hand, they supported fighting drugs and crime with every resource at the state's disposal, including police, courts, and prisons. On the other hand, they called for jobs school, and housing—what many termed "a Marshall plan for urban America." But because African Americans are a minority nationally, they needed help to win national action against poverty, joblessness, segregation, and other root causes of crime. The help never arrived." JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 12 (2017). In addition to these two works, Critical Race Theory has also moved to provide context by examining the role of the law in maintaining White supremacy. The movement was started in the 1970s under the leadership of Derrick Bell, Richard Delgado, Patricia J. Williams, Kimberle Crenshaw and others. *See* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 3d ed. 2013).

https://digitalcommons.onu.edu/onu_law_review/vol47/iss3/3

Gabbidon: Race, Crime, and the Law:A Sociohistorical Analysis

colonists, it was that there was a *separate* system of laws and justice created for the slave population. Thus, it would be natural to see racial disparities back as early as the 1600s. Drawing on one tenet of Critical Race Theory, the disparities were largely the result of the intermingling of White supremacist views and the use of the law as a tool to enforce their will on Black slaves.[66]

A. Colonial Cases Involving Blacks

The cases from the Colonial period clearly show the development of differential treatment in the rulings of the times. Using Colonial Virginia as an example, the first case to mention a black person, *Re Davis* (1630), begins to illuminate the nature of judicial decisions in Colonial times.[67] In this case, Hugh Davis was sentenced to be "soundly Whipt before an assembly of negroes and others" for the *crime* of having sex with a Black woman.[68] This would start a long line of cases that spoke to the perceived inferiority of Blacks and their position on the receiving end of decisions that produced racial disparities in criminal justice in the 1600s.[69] *Re Sweat* (1640) provides another glimpse into the nature of Colonial jurisprudence.[70] In this case, Robert Sweat, a White man, had a child with a Black slave and was punished with public penance.[71] In the case of the female slave, she was sent to the whipping post.[72] These disparate sentences are clear. They both violated the law or custom that outlawed interracial relationships—yet the Black slave was sentenced to corporal punishment while the White person was sentenced to penance at church.[73] One other consideration is that there is no indication that the relationship was consensual and, given the times, was likely not.[74] This makes the disparate sentences even more troubling.

Decided in the same year, two other cases worth mentioning that relate to Colonial justice involving Blacks include: *Re Negro John Punch* (1640)

---

66. *See generally* Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L. J. 795 (1999).
67. 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 77 (Helen Tunnicliff Catterall ed., 1998).
68. *Id.*
69. *See* In the Matter of Color, *supra* note 23, at 22-30. Data from court cases in Colonial New York (1691-1776) reveal that slaves had the highest conviction rates among the various ethnic groups. The rate of convictions was nearly 70%, while the second highest rate was among Indians at 51.6%. *See* DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK: 1691-1776 73 (1976).
70. Catterall, *supra* note 67, at 78.
71. *Id.*
72. *Id.*
73. *Id.* at 77-78.
74. *See* RACE AND CRIME, *supra* note 43, at 13.

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

and *Re Negro Emanuel* (1640).[75] *Re Negro John Punch* involved two White servants, Victor and James Gregory, and one Black servant, John Punch.[76] All three ran away from their plantation, but the punishments were drastically different.[77] The two White servants were required to serve out their indentures along with an additional year of service to their master.[78] This would be followed by three years of service to the Colony.[79] This amounted to a four-year sentence for the crime. In contrast, Punch was sentenced to "serve his said master or his assigns for the time of his natural Life here or elsewhere."[80] *Re Negro Emanuel* involved a plot by six White servants and Emanuel, a Black servant, to run away.[81] To make the journey, they stole a boat, corn, gunpowder, and guns.[82] The plan was quickly thwarted, and the conspirators were captured and arrested down the river from where they embarked.[83] The white conspirators were all sentenced to additional service to the colony, with one of them also being branded and whipped.[84] Emanuel, who was likely already in lifetime servitude, was rendered a distinctly different sentence: thirty lashes, branded with an R, and "to work in shack[les] [for] one year or more as his master shall see cause."[85]

There were innumerable cases like these involving Black slaves that were decided during the Colonial era.[86] They speak to a pattern of racial injustice in the courts that surely left an indelible mark on those Blacks—free or enslaved—that had to be tried in them during the Colonial period. During the Colonial period, there were certainly sporadic decisions made prior to the codification of the slave codes that produced some of the earliest race-based legislation that resulted in both the over surveillance of Blacks and subsequent racial disparities in punishments.[87]

---

75. Catterall, *supra* note 67, at 77.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. Catterall, *supra* note 67, at 77. Higginbotham has also noted the severity of the sentence and opined: "In many ways, the Punch case is an astonishingly harsh decision. It exemplifies the court's intent to deliberately exercise partiality in dealing with Blacks. The 1640 imposition of lifetime servitude on the black participant alone was not predicated on any previous legislative enactment or any colonial judicial precedence. Such differentiation of treatment reflected the legal process's early adoption of social values that Blacks as inferior. To make rigid the social stratifications these values called for, the court turned social biases, at will, into hard legal judgements. In the true sense of the word, the colonial judges constituted an activist court, in order to perpetuate disparate cruelty on blacks." IN THE MATTER OF COLOR, *supra* note 23, at 28.
81. Catterall, *supra* note 67, at 77.
82. *Id.*
83. *Id.*
84. *Id.* (There is no indication in the case as to why these additional punishments were added.).
85. *Id.*
86. *See generally* CATTERALL, *supra* note 24.
87. *See infra* Part IV.B.

Gabbidon: Race, Crime, and the Law:A Sociohistorical Analysis

B. Colonial Legislation Involving Blacks: The Slave Codes

Early colonial legislation that involved Blacks fell under the slave codes.[88] These codes, that were enacted from 1619 to 1865, governed every aspect of slave life.[89] In fact, the first legislative act in Virginia that mentions Blacks was passed in 1639.[90] Referred to as ACT X, the legislation simply stated: "All persons except Negroes are to be provided with arms and ammunition or be fined at the pleasure of the governor and council."[91] The clear implication here was that it was preferrable that only whites have access to guns and ammunition.[92] Two other acts in the 1650s established a colonial militia to find runaways and, when found, to "cut the hair of all such runaways close above the ears, whereby they may be with more ease discovered and apprehended."[93] In 1669, the Virginia Colony passed "An Act about the casual killing of slaves."[94] This act illustrated the low *human* vis-à-vis *economic* value that was placed on Black life as early as the 1600s.[95]

The first major slave codes appearing in the late 1600s[96] organized the disjointed laws related to slaves that had been passed up to that point.[97] The move to formalize these slave codes have caused some to wonder why "white servants were never the victims of any legislative plan to deprive them of such basic options as the right to sue one's master for ill treatment or for one's freedom and white servants were never precluded from owning property."[98] Furthermore, the differential treatment of Blacks and whites—even during the 1600s—was presumed a product of not only the perceived inferiority of blacks but their proneness to crime and violence.[99] This is ironic since much

88. RUSSELL-BROWN, *SUPRA* NOTE 45, AT 35.

89. Professor Katheryn Russell-Brown writes that "slave codes embodied the criminal law and procedure applied against enslaved Africans. . . . Though codes varied by state, they were uniform in their goal to regulate slave life from cradle to grave. The codes not only enumerated the applicable law but also prescribed the social boundaries for slaves, . . . including who could be sold as slaves, the hours slaves could be made to work, who was responsible when slaves were injured, the punishment for stealing slaves, and the reward for capturing escaped slaves. . . . [Under the codes, t]he harshest criminal penalties were reserved for actions that threatened the institution of slavery, such as slave rebellions." *Id.*

90. IN THE MATTER OF COLOR, *supra* note 23, at 32.

91. *Id.* (quoting 1 WILLIAM W. HENING, STATUTES AT LARGE OF VIRGINIA 226 (1819)).

92. *Id.*

93. *Id.* at 33 (1978) (quoting 1 WILLIAM W. HENING, STATUTES AT LARGE OF VIRGINIA 483 (1819)).

94. *Id.* at 36 (1978) (quoting 1 WILLIAM W. HENING, STATUTES AT LARGE OF VIRGINIA 270 (1819)).

95. IN THE MATTER OF COLOR, *supra* note 23, at 36.

96. RUSSELL-BROWN, *SUPRA* NOTE 45, AT 35.

97. *Id.*

98. IN THE MATTER OF COLOR, *supra* note 23, at 38.

99. In a recent work on racial profiling in retail settings, the "Black Thief Stereotype" is discussed. While the stereotype originated during the slave era, it remains prevalent in American society. *See* SHAUN L. GABBIDON & GEORGE E. HIGGINS, SHOPPING WHILE BLACK: CONSUMER RACIAL PROFILING IN AMERICA 19-21 (2020).

Published by DigitalCommons@ONU,

of the crime and violence perpetrated against Blacks was likely in response to their brutal treatment during slavery.

There would be numerous other Colonial cases that were decided to further entrench the slave system and harmed Black slaves.[100] However, the Colonial period only set the stage for additional cases and legislative enactments that impacted on the justice Blacks received in America.[101]

V. RACE, CRIME AND THE LAW: THE POST COLONIAL PERIOD

A. Post-Colonial Cases and Legislation Involving Blacks

i. Fugitive Slave Acts

After the passage of the slave codes, there continued to be additional cases and legislation that dictated black life and contributed to racial disparities in the criminal justice system and society as a whole.[102] In 1788, the United States Constitution was ratified.[103] In Article III, Section 1 of the document, the Supreme Court was created.[104] Decisions by the Court related to Black life produced additional instances of injustice.[105] Another noteworthy part of the ratified document was Article IV, Section 2 (also referred to as the "Privileges and Immunities Clause").[106] This Section provided a fugitive slave act within the Constitution.[107] In particular the section stated: "No Person held to Service or Labour in one state, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."[108] There was clearly some self-interest related to this section of the Constitution.[109] Taking into account that six of the thirteen original colonies were slave holding states, and twenty-five of the fifty-five delegates at the constitutional convention were slave holders, it was clear why the criminalization of servants or slaves seeking their freedom was written into

---

100. *See generally* Catterall, *supra* note 24.
101. *See infra* Part V.
102. *See infra* Part IV.
103. *Constitution of the United States—A History*, NATIONAL ARCHIVES, https://www.archives.gov/founding-docs/more-perfect-union (last visited July 13, 2021).
104. U.S. CONST. art. III, § 1.
105. *See generally infra* Part V.
106. U.S. CONST. art. IV, § 2.
107. *Id.*
108. *Id.*
109. *See, e.g.*, MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 258-65 (2016).

the document.[110] Even so, the clause provided no details as to the process required to ensure that slaves were returned.[111] It is apparent, however, that the clause ensured non-slaveholding states could not harbor runaways.[112]

Signed into law by President George Washington, The Fugitive Slave Act of 1793 provided the enforcement mechanism for Article IV, Section 2 of the Constitution.[113] It provided for "interstate and territorial cooperation of fugitives from justice and escaped servants and slaves."[114] This act led to the rise of bounty hunters (slave-catchers) and slave patrols.[115] Furthermore, the act "imposed a $500 fine and imprisonment for up to one year for aiding a criminal fugitive. . . . The penalty for aiding an escaped slave or servant was $500."[116] The act also allowed slaveholders and their designees to seize alleged slaves and return them to their home states.[117] Free Blacks were caught up in this system and often removed from free states to slave states because "[t]he act ignored the standard elements of due process and merely required appearance before a judge or magistrate and proof to his satisfaction through oral testimony."[118] Moreover, since there was only a $5 fine for mistakenly seizing a free person, the slave catchers were not deterred from being overly aggressive in their pursuit of escaped slaves.[119] The act was challenged in the 1842 case of *Prigg v. Pennsylvania*[120] in which the Supreme Court struck down a Pennsylvania law that "criminalized bounty hunters who captured Blacks to return to slavery."[121] Several years after the case was decided, The Fugitive Slave Act of 1850 added further enforcement power. Specifically, the Act "extended criminal punishments to the person escaping as well as those who assisted an enslaved person with an escape. Bystanders could be implicated as well. A $1,000 fine was imposed on marshals who refused to capture and return runaway slaves."[122]

---

110. *Id.*

111. *See* U.S. CONST. art. IV, § 2.

112. *See* THE U.S. CONSTITUTION & SECESSION: A DOCUMENTARY ANTHOLOGY OF SLAVERY AND WHITE SUPREMACY 9-10 (Dwight T. Pitcaithley ed., 2018).

113. *See* Fugitive Slave Act of 1793, 1 Stat. 302; U.S. CONST. art. IV, § 2.

114. E.A. Hairston, *Fugitive Slave Act of 1793*, *in* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 657 (W.R. Miller ed., 2012).

115. *Id.*

116. *Id.*

117. *See* Fugitive Slave Act of 1793 § 2, 1 Stat. 302.

118. Hairston, supra note 114, at 657.

119. E.A. Hairston, *Fugitive Slave Act of 1793*, *in* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 658-59 (W.R. Miller ed., 2012).

120. 41 U.S. 539 (1842).

121. BROWNE-MARSHALL, *supra* note 10, at 55 (referencing Prigg, 41 U.S. at 539); *see also* H. ROBERT BAKER, PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION (2012).

122. BROWNE-MARSHALL, *supra* note 10, at 55 (referencing Fugitive Slave Act of 1850, §§ 5-7, 9 Stat. 462).

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

The fugitive slave acts reveal that the economic benefits of slavery overrode basic humanity. In terms of race and crime, the acts provided further evidence that providing Blacks with justice was not of serious concern. The acts were deliberately crafted to ensure that, if caught, Blacks had no redress.[123]

ii. Thirteenth Amendment and The Civil Rights Act of 1866

The Thirteenth Amendment is brief and to the point.[124] Section 1 of the Amendment simply states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[125] Section 2 provided Congress with the authority to enforce the Amendment.[126] At the heart of the Amendment is the abolition of slavery in the United States. Despite the appearance of good intentions in the passage of the Amendment, there was certainly some other intentions when they included the clause "except as a punishment for crime whereof the party shall be duly convicted."[127] This clause made clear that there was some belief there might be an alternative labor force available. To access that labor force, Black Codes were put in place that criminalized the most basic activities of Blacks seeking a new life.[128] Vagrancy and other laws were enacted to secure the labor for the emerging conflict-lease systems that sprouted up in many southern states.[129] Whereas Whites were the primary inmates in southern prisons prior to the passage of the Thirteenth Amendment, Blacks started to rival their presence in prisons.[130]

123. *See generally* Fugitive Slave Act of 1793, 1 Stat. 302; Fugitive Slave Act of 1850, 9 Stat. 462.

124. *See* U.S. CONST. amend. XIII.

125. *Id.* at § 1.

126. *Id.* at § 2.

127. *Id.* at § 1.

128. *See infra* Part IV.B.

129. *See* MARTHA A. MYERS, RACE, LABOR, AND PUNISHMENT IN THE NEW SOUTH 7-11 (1998); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 21 (1996). Professor Browne-Marshall has noted that these new criminal laws continued the practice of slavery as long as it was punishment for a crime. She writes that "Homeless Blacks were subjected to vagrancy laws enacted to criminalize homelessness. The vagrancy laws also restricted the ability of Blacks to travel. As in slavery, Blacks were forced to produce documents, when requested by Whites, to prove that they were viably employed or had a home—or they could be charged with vagrancy or trespassing and jailed." In other words, the criminal justice system became the primary tool used to re-enslave blacks. BROWNE-MARSHALL, *supra* note 10, at 56-57.

130. W. E. Burghardt Dubois, *The Spawn of Slavery: The Convict-Lease System in the South*, 14 MISSIONARY REVIEW OF THE WORLD 737 (1901) (The famous scholar-activist examined the convict-lease system and found it to be another form of slavery. Also, when examining the revenue from prison labor—the South states had clearly profited the most. DuBois also observed that whites were shocked to see the heinous crimes committed by Blacks in response to the brutal actions that were taken to enact the convict-leases system.).

Gabbidon: Race, Crime, and the Law:A Sociohistorical Analysis

The Civil Rights Act of 1866 was passed within a year of the passage of the Thirteenth Amendment.[131] The Act provided citizenship rights to Blacks and also allowed "federal courts [to] punish persons for various violations of the rights of African-American citizens."[132] On the significance of the Civil Rights Act of 1866, Justice Noah Swayne remarked that prior to its passage "Crimes of the deepest dye were committed by White men with impunity."[133] Despite the passage of the Act, there still continued to be situations in which Black civil rights were violated with no recourse.[134] The passage of the Fourteenth Amendment, and its extension of due process rights upon the states, opened up new avenues for legal redress when Blacks felt their civil rights were violated.[135]

iii. Fourteenth Amendment and Select Criminal Justice Cases

The Fourteenth Amendment provided additional protections in a host of areas.[136] Section 1 of the amendment has become of particular relevance for Blacks trying to achieve justice in the courts.[137] The section reads,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.[138]

The last clause in the section speaks to the notion of equal justice under the law.[139] Thus, Blacks (and many subjugated classes to follow) have used this amendment in countless cases to secure justice in the courts by demanding due process and equal protection of their rights and privileges.[140]

As anticipated, there were a flurry of cases following its passage.[141] There were cases in which sharecroppers were not able to break predatory

131. SHADES OF FREEDOM, *supra* note 23, at 75.
132. *Id.* at 76.
133. *Id.* at 78.
134. *Id.* at 75-79.
135. *See* U.S. CONST. amend XIV.
136. *Id.*
137. *Id.* at § 1.
138. *Id.*
139. *Id.*
140. *See generally infra* Part V.A.III.; SHADES OF FREEDOM, *supra* note 23, at 83-93.
141. *See generally infra* Part V.A.III.; SHADES OF FREEDOM, *supra* note 23, at 83-93.

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

contracts and were criminalized if they did.[142] One victim of these practices, Alonzo Bailey, was arrested after he was unable to refund monies that were paid under a contract—but he refused to be reduced to serfdom, so he was arrested and convicted for defrauding his employer.[143] The Alabama courts upheld his conviction and Bailey appealed to the U.S. Supreme Court.[144] He argued that the Alabama statute his contract was crafted under forced him into involuntary servitude.[145] While dismissive of the role of race in the case, the Supreme Court ruled that the peonage laws of Alabama were in violation of the Thirteenth Amendment.[146]

There were additional cases tied to Blacks being able to testify against Whites in state courts.[147] Specifically, for decades, state courts continued to prohibit Black testimony against Whites in state courts.[148] This prohibition allowed brutal murderers of Blacks to go unpunished.[149] In addition to not being able to testify in courts, Blacks were not afforded the same civilities as Whites in the courtroom.[150] They were often referred to by their first names and not given the same respect as White witnesses.[151]

Another important case tied to the treatment of Blacks in the courts involved segregated seating in courtrooms.[152] In this case, Ford Johnson, Jr. refused to move from the White section of the Richmond Traffic Court.[153] Johnson's refusal to move the seating reserved for Blacks led to his arrest for contempt.[154] Upon review, the Supreme Court ruled, "State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws."[155] This decision inched Blacks closer to equitable treatment in the courts as both spectators and defendants.

Professor Higginbotham suggests that the tenure of Chief Justice Charles Evan Hughes was crucial in turning the tide of decisions related to equal

---

142. *See* Bailey v. Alabama, 219 U.S. 219 (1911).
143. *Id.* at 228-29.
144. *Id.* at 231.
145. *Id.* at 243.
146. *Id.* at 240.
147. SHADES OF FREEDOM, *supra* note 23, at 77-80.
148. *Id.*
149. Blyew v. United States, 80 U.S. (13 Wall.) 581, 591 (1872). This case involved two white men who murdered four black family members with an axe. There were witnesses of the crime who were Black. At the time, Kentucky was one of the states that prohibited Blacks from testifying against whites in courts. The state also did not allow Blacks to serve on juries.
150. SHADES OF FREEDOM, *supra* note 23, at 77-80.
151. Hamilton v. Alabama, 376 U.S. 650 (1964). In this case, Mary Hamilton refused to respond to a prosecutor who referred to her as Mary, not Miss Hamilton. In the end, she was held in contempt and received a five-day sentence. Upon review, the Supreme Court reversed the decision. *See also* Ex parte Hamilton, 275 Ala. 574, 156 So. 2d 926 (1963).
152. Johnson v. Virginia, 373 U.S. 61 (1963).
153. *Id.*
154. *Id.*
155. Johnson v. Virginia, 373 U.S. 61, 62 (1963).

justice in the courts.[156] Important due process decisions were made throughout the first half of the 20th century including ones that: required states to conduct fair proceedings;[157] required states to provide counsel to indigent defendants in capital cases;[158] precluded the systematic exclusion of all African-American citizens from the jury rolls of one Alabama county;[159] and ruled that brutal involuntary confessions were inadmissible.[160] There are countless more cases that have involved Black plaintiffs trying to secure justice during police encounters, during their incarceration within prisons, and during capital cases.[161] One area that has been particularly egregious is the racist practices in jury selection.[162] High-profile cases such as those involving the Scottsboro boys and Emmett Till highlighted the way in which Whites used jury selection to their advantage when they wanted to convict Blacks and escape conviction themselves.[163]

In particular, the courts have gone back and forth with what is permissible during the voir dire process.[164] Therefore, while they initially said that it was permissible to use race to remove all Black jurors,[165] they have now prohibited the use of race during the peremptory challenge phase of jury selection.[166] Even so, the research literature consistently shows that race is still being used under the guise of race-neutral strikes.[167] In addition, some states have also used so-called "backstrikes" to eliminate jurors.[168] While

---

156. Higginbotham attributed this to Chief Justice Hughes being the son of an abolitionist minister. Hughes served as Chief Justice from 1930-1941. SHADES OF FREEDOM, *supra* note 23, at 157.

157. *See* Moore v. Dempsey, 261 U.S. 86 (1923).

158. *See* Powell v. Alabama, 287 U.S. 45 (1932).

159. *See* Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935).

160. *See* Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940).

161. SHADES OF FREEDOM, *supra* note 23, at 159-64.

162. *Id.*

163. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969); JAMES GOODMAN, STORIES OF SCOTTSBORO (1994); MAMIE TILL-MOBLEY & CHRISTOPHER BENSON, DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA (2003).

164. Kennedy, *supra* note 30, at 194-208.

165. *See* Swain v. Alabama, 380 U.S. 202 (1965).

166. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

167. Researchers have documented that Blacks continue to be removed from juries using race-neutral explanations such as: the prospective juror exhibited questionable body language, questionable mannerisms, medical issues, childcare issues, limited life experiences, and were unemployed. When appeals were filed alleging race-based peremptory challenges, the appellate court largely accepted these explanations and the plaintiffs lost in 79% of the cases. *See* Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002-2006*, 33 AMER. J. CRIM. JUST. 59 (2008). Notably, in one recent study of more than 2,500 venire members in Mississippi, Black venire members were several times more likely than whites to be removed by prosecutors using peremptory challenges. *See* Whitney DeCamp & Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. RES. CRIME & DELINQUENCY 3 (2020).

168. This procedure has been defined as follows: "A 'backstrike' is a peremptory challenge used to strike a prospective juror after the juror has been accepted onto the jury panel but before the panel has been sworn. Thus, backstrikes permit an attorney to tentatively accept a juror by declining to exercise a peremptory challenge, but then revisit that decision after additional potential jurors are questioned." Shari

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

backstrikes are only used in a few states, they show the measures in which some jurisdictions will go to eliminate Black jurors.

The post-Colonial period produced some notable positive changes to the criminal justice system. In spite of these changes, the faith among Blacks and other racial/ethnic groups in the criminal justice system continues to decline.[169] This is both a product of the long racial history of injustice in the courts and the continued instances of high-profile incidents that serve as reminders of that early history. More recently, numerous police and vigilante killings of Black citizens sparked the Black Lives Matter Movement that seeks to continue to reform the criminal justice system.[170]

VI. BLACK LIVES MATTER: MOVING THE NEEDLE

In 2013, following the acquittal of George Zimmerman for the killing of Trayvon Martin, three Black women, Alicia Garza, Patrisse Cullors, and Opal Tometi, founded #BlackLivesMatter, now referred to as the Black Lives Matter (BLM) Movement.[171] Since its humble beginnings, BLM has developed into the Black Lives Matter Global Network Foundation, Inc.[172] There are now forty BLM chapters across the globe.[173] The mission of the organization "is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by state and vigilantes."[174] One core aspect of the organization is criminal justice reform.[175] While the national story has largely been about their work to combat police misconduct towards Blacks, they have done much more.[176] Their policy proposal for defunding the police garnered national debate and international attention.[177] One of their more recent efforts has been to target

---

Seidman Diamond & Joshua Kaiser, *Race and Jury Selection: The Pernicious Effects of Backstrikes*, 59 HOWARD L.J. 705, 706 (2016) (referencing Snyder v. Louisiana, 552 U.S. 472, 475 (2008)). *See also* Bruce Hamilton, *Bias, Batson, and Backstrikes: Snyder v. Louisiana Through a Glass, Starkly*, 70 LA. L. REV. 963 (2010).

169. *See, e.g.*, John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RESEARCH CENTER (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/.

170. *See About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited June 6, 2021).

171. *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/ (last visited June 6, 2021).

172. *About*, *supra* note 170.

173. *Herstory*, *supra* note 171.

174. *About*, *supra* note 170.

175. *Id.*

176. *See Herstory*, *supra* note 171.

177. *See, e.g.*, *What Defunding the Police Really Means*, BLACK LIVES MATTER (July 6, 2020), https://blacklivesmatter.com/what-defunding-the-police-really-means/; Lissandra Villa, *Why Protestors Want to Defund Police* Departments, TIME (June 7, 2020, 11:17 AM), https://time.com/5849495/black-lives-matter-defund-police-departments/.

Gabbidon: Race, Crime, and the Law:A Sociohistorical Analysis

those public officials who have a track record of endangering Black lives.[178] Their aim is to have such persons removed or resign from their positions.[179] In Los Angeles, for example, former District Attorney Jackie Lacey was targeted for ouster by BLM.[180] Their efforts "educated the public on the role of the District Attorney, systemic racism in the justice departments, and encouraged other cities to examine their DAs as well."[181] In the end, Jackie Lacey was voted out of office. BLM efforts were also successful in campaigns against other politicians.[182] Another successful campaign involved Measure R in Los Angeles.[183] Specifically, the initiative "demanded more accountability, transparency, and fairness to the criminal justice system."[184]

BLM certainly does not have all the answers;[185] it does, however, have the profile and momentum necessary to move the needle in the right direction.[186] While federal policies and case law profiled in much of this article are among the hardest to influence, local level community organizing has the potential to be effective in reshaping local and state justice systems. This has the potential to reduce racial/ethnic disparities throughout the criminal justice system. In addition, BLM has the potential to use their platform to separate facts from fiction regarding the nature of criminal justice in America.

---

178. *See 2020 Impact Report* 34, BLACK LIVES MATTER, https://blacklivesmatter.com/2020-impact-report/ (last visited June 6, 2021).

179. *Id.*

180. *Id.*

181. *Id.*

182. Two high-profile examples include Eric Garcetti (Mayor of Los Angeles) and Pete Buttigieg (Former Mayor of South Bend). BLM LA protested when Garcetti was being considered for Secretary of Housing or Secretary of Transportation in the Biden Administration. He was not appointed to either position. During his presidential run, Buttigieg was not supported by BLM South Bend because of "how he perpetrated and was complicit in structural injustices against Black people." While Buttigieg did not have much success in the presidential run, he was confirmed as Secretary of Transportation on February 3, 2021. *Id.*

183. *2020 Impact Report*, *supra* note 178, at 34.

184. Measure R was multifaceted and "[granted] the Civilian Oversight Commission (the independent body that oversees the LA County Sheriff's Department) subpoena power to effectively and independently investigate misconduct; establish a plan to reduce jail populations; offer alternatives to incarceration; and increase access to mental health services and drug treatment services. This measure also requires at least 10% of locally controlled tax revenue to be invested in communities, like housing, mental health, youth development, job training, small business development, and alternatives to incarceration." The 10% would amount to between $600 to $900 million annually. *Id.* at 33.

185. There have also been other successful advocacy groups. *See e.g.*, THE SENT'G PROJECT, https://www.sentencingproject.org (last visited June 29, 2021); EQUAL JUSTICE INITIATIVE, https://eji.org/ (last visited June 29, 20201) (profiled in the recent movie JUST MERCY (Endeavor Content 2019)).

186. BLM has 750,000 Facebook followers, 1 million Twitter followers, 4.3 million Instagram followers. 24 million people accessed the BLM website in the second half of 2020. One quarter of BLM's online presence is international. The organization raised $90 million in 2020 and distributed $21.7 million in grants to local organizations. *2020 Impact Report*, *supra* note 178, at 6-7, 20.

Published by DigitalCommons@ONU,

Ohio Northern University Law Review, Vol. 47 [], Iss. 3, Art. 3

VII. CONCLUSION

This paper provided an overview of the early beginnings of the race, crime, and law connection involving Black Americans.[187] It shows an unmistakable pattern of early attempts to not only control slave labor through brutality but also through legislative enactments and case law.[188] This pattern would continue in the post-Colonial era.[189] It was also during these eras that the stereotypical image of the Blacks as criminals was born. These caricatures provided the impetus for the denial of basic civil rights—both inside and outside the criminal justice system. It is also when racial disparities in the justice system emerged.

Today, Blacks continue to be perceived as more criminal than other groups and this likely produces a general sense that they do not deserve basic protections in the criminal justice system.[190] To counter these perceptions and the treatment that follows it, Blacks continue to go to courts to secure justice. Unfortunately, the courts have not always been sympathetic to their plight.[191] As such, the Black Lives Matter movement represents a way to, at the very least, push back against racist practices through protest and activism. Their recent successes suggest that they are here to stay and have the potential to make strides in the pursuit of racial justice.

---

187. *See infra* Parts IV-V.

188. *Id.*

189. *See infra* Part V.

190. In a recent study of Pennsylvanians, the authors found that blacks were perceived to be the racial/ethnic group arrested for the largest share of the most serious crimes. In addition, respondents had more trepidation walking through a low-income predominantly Black neighborhood than similar White and Hispanic neighborhoods. See Shaun L. Gabbidon, Ph.D. & Eileen M. Ahlin, Ph.D., *Pennsylvanians' Racial and Ethnic Expectations of Arrestees and Neighborhood Safety*, PENN STATE-HARRISBURG CENTER FOR SURVEY RESEARCH (Dec. 2020).

191. *See infra* Part V.

https://digitalcommons.onu.edu/onu_law_review/vol47/iss3/3