

## 112 Ky. L.J. 113

Kentucky Law Journal

2023-2024

Article

Nicole Tuchinda<sup>a1</sup>

Copyright © 2023 by University of Kentucky J. David Rosenberg College of Law; Nicole Tuchinda

## DISPROPORTIONATE SCHOOL BRUTALITY UPON BLACK CHILDREN

Table of Contents	113
Abstract	114
Introduction	114
I. The Harmful Disproportionality of School Brutality Upon Black Children	122
<i>A. The General Harm of School Brutality</i>	122
<i>B. Statistics on the Disproportionality</i>	125
<i>C. The Racial Health Injustice</i>	130
II. Understanding the Disproportionality	132
<i>A. The Legacy of Slavery</i>	133
<i>B. The Legacy of Jim Crow</i>	138
<i>C. Violence in Response to Desegregation</i>	142
<i>D. Racism in Public Schools Today</i>	146
III. The Dearth of Legal Structures Preventing Racially Discriminatory School Brutality	153
<i>A. Constitutional and Federal Legal Structures</i>	153
<i>B. State Legal Structures</i>	156
<i>C. Laws Enabling School Brutality and Protecting Adults</i>	157
IV. Legal Solutions	158
Conclusion	160

**\*114 Abstract**

Similar to the way that Black adults experience disproportionate police brutality, Black children experience multiple times the level of school brutality that White children experience. School brutality is the excessive use of physical force by governmental employees upon K-12 public school students, and it includes assaults, solitary confinement, and inappropriate handcuffing and arrests. Such brutality regularly injures, traumatizes, and kills children. It is a form of systemic discrimination because Black children are not violating school rules more than White children. Such state violence has the additional significance of perpetuating state-sanctioned traumatization and subjugation of Black children, which arose during slavery. Specifically, legalized violence and fear of such violence were the principal tools by which White supremacists subordinated and controlled Black people during slavery and the Jim Crow era. They were also the main tools for delaying desegregation of public schools. Disproportionate school brutality upon Black children thus maintains state-sanctioned, legalized physical maltreatment of Black children and the continued denial of a quality education to them. As a health justice analysis reveals, such state violence continues to harm and oppress the health and educational functioning of Black children today, denying them a fair and just opportunity to be healthy and successful. It is a health injustice and a barrier to social change. Unfortunately, few legal structures exist to stop this racialized trauma. Only when school brutality is abolished for all children will this racialized, systemic trauma and structural racism inflicted by the government end.

**Introduction**

The ways in which police officers restrained and murdered George Floyd and fatally beat Tyre Nichols are eerily similar to the ways in which state agents wrest control over the movements and sanctity of Black<sup>2</sup> **children's** bodies in public schools.<sup>3</sup> Just like police disproportionately brutalize Black bodies on American streets, police and other state agents disproportionately brutalize Black bodies behind the closed doors of K-12 public school buildings.<sup>4</sup> In public schools, government **\*115** employees inflict disproportionate and racialized injury, control, trauma, terror, and death upon Black **children** through assaults, solitary confinement, inappropriate handcuffing and arrests, and other excessive applications of physical force. As I stated in a previous article, the agents of such violence are primarily “teachers, principals, and security guards, [who are] given authorization by law to apply such force upon **children** for purposes of ‘punishing,’ ‘educating,’ ‘controlling,’ ‘disciplining,’ and ‘maintaining order’ in public schools.”<sup>5</sup>

Glimpses of the hidden crisis occasionally reach the public through the viral release of videos or brief news coverage. Examples include a video of a White school resource officer (SRO) in South Carolina knocking Shakara Murphy, a 16-year-old Black girl, and her “desk over as he grabbed her by the neck and shoulders, pulling her from her chair before throwing her across the room.”<sup>6</sup> Shakara's mistake was refusing to give her cell phone to a teacher.<sup>7</sup> In New York, a principal forced seven-year-old Hasheem Welch to the ground and then punched and kicked him in the stomach after he failed to remove his hoodie as instructed and ran from the principal.<sup>8</sup> Six-year-old Kaia Rolle threw a tantrum in a Florida classroom, causing an SRO to “handcuff her, put her into the back of his cruiser, and [drive] her to a **juvenile** detention facility.”<sup>9</sup> A principal in Seattle Public Schools repeatedly locked homeless, eight-year-old Jaleel Williams for hours and sometimes entire days in an outdoor, fenced enclosure that staff called “the cage.”<sup>10</sup> Jaleel “ate his lunch on a concrete floor, in view of other students, [who were primarily White,] who played **\*116** outside the enclosure.”<sup>11</sup> A “therapeutic hold” restraint was used upon teenage Corey Foster because he “refused to stop playing basketball,” resulting in his death.<sup>12</sup>

Rarely does the public hear about the long-term effects of such violence upon survivors. A documentary reveals that immediately after being thrown and dragged by the SRO as described above, Shakara was arrested for “disturbing school.”<sup>13</sup> The SRO's actions fractured her wrist.<sup>14</sup> It took a year before charges were dropped.<sup>15</sup> Shakara withdrew from her high school because she no longer felt safe there.<sup>16</sup> She also became “depressed and tried to commit suicide” by hanging.<sup>17</sup>

Similarly, investigation shows that before her arrest for throwing a tantrum, Kaia, described above, enjoyed singing and dancing in front of an audience and hugging strangers.<sup>18</sup> Now, she suffers from severe post-traumatic stress disorder, separation anxiety, and oppositional defiant disorder.<sup>19</sup> She seldom smiles.<sup>20</sup> People wearing police uniforms fill her with fear.<sup>21</sup> “We know she's in there,” observes her grandmother, “[w]e just don't know how to bring her out.”<sup>22</sup>

Jaleel reported feeling afraid and “trapped in a cage” when he was repeatedly locked inside the fenced enclosure at school.<sup>23</sup> He had nightmares about “the cage” afterwards.<sup>24</sup> According to his mother, Jaleel's school experiences compounded his trauma, which include experiencing abuse and witnessing domestic violence at home.<sup>25</sup> She said that the school's treatment “scarred” Jaleel and “contributed to his [recent] admittance to two psychiatric hospitals.”<sup>26</sup>

The violence experienced by each of these **children** likely felt very personal and isolating, but such violence is widespread, structural, and cultural, and it is an extension of a long history of violence upon Black **children**. These **children** are just some of tens of thousands--likely hundreds of thousands--of Black **children** violated **\*117** by adults at public schools each year.<sup>27</sup> Black **children** experience the worst consequences of policies and laws that permit the violent subordination of **children** by adults in schools.<sup>28</sup> Specifically, Black **children** bear the brunt of laws that authorize corporal punishment, seclusion, restraint, and police brutality in K-12 public schools.<sup>29</sup> As detailed in Section IB of this Article, more than 222,000 incidents of school

brutality are documented each year--an undercount--and Black **children** experience 2.5-3.66 times the level of school brutality that White **children** experience.<sup>30</sup>

As I asserted in a previous article, “[s]chool brutality is the excessive ... use of physical force by governmental employees upon schoolchildren.”<sup>31</sup> The disproportionate brutality is not a response to disproportionate misbehavior by Black **children**, however. Studies show that Black **children** do not commit more offenses than their White peers.<sup>32</sup>

School brutality has disproportionately harmed **children** of color for decades, as highlighted by viral videos,<sup>33</sup> but little has been done to stop the imbalance. Such disproportionate brutality is an example of how racial inequality persists through what Eduardo Bonilla-Silva calls the “continued existence of a racial structure” in society.<sup>34</sup> Such structures that maintain “contemporary racial oppression ‘are increasingly covert, are embedded in normal operations of institutions, avoid direct terminology, and are invisible to most Whites.’”<sup>35</sup> Accepting or continuing the status quo, however, legitimizes the interests and biases of those who perpetuate the oppression while denying the reality of its victims. Becoming desensitized to the violent experiences of Black **children** in public schools makes such reality normal, merely “banal barbarism.”<sup>36</sup> This Article seeks to end that normalization.

Sadly, disproportionate state violence upon Black **children** by the public school system is just one example of a larger, national phenomenon of disproportionate state monitoring, regulation, punishment, and traumatizing of Black Americans. Scholarship has increasingly documented how government systems, including the **child** welfare system, the prison-industrial complex, and public benefits systems, have disproportionately targeted and harmed Black individuals, families, and communities.<sup>37</sup>

This Article explores the politics of one form of state-inflicted trauma upon Black **children**. It asks: of all places, why are public schools locations where trauma upon **children**, especially Black **children**, is permitted? Is disproportionate school brutality an example of trauma that, as Staci Haines theorizes, is “deeply rooted in our culture and society, reinforced by a set of beliefs, norms, and policies that are structural and hierarchical in nature”?<sup>38</sup> How does the law provide a structure that preserves the disproportionate traumatization of Black **children** by public schools? How can Black **children** be emancipated from that structure?

Within the context of scholarship on disproportionate school discipline of Black **children**, this Article highlights what the school-to-prison pipeline lens tends not to focus upon. The school-to-prison pipeline describes education and public safety policies and practices, including zero-tolerance policies, suspension, expulsion, and arrests at school, that push primarily **children** of color and **children** with disabilities out of the classroom and into the streets, the **juvenile** system, or the **criminal** law system.<sup>39</sup> Much valuable literature describes the ways in which K-12 public schools **\*119** punish Black students more harshly than White students through practices that exclude students from the classroom.<sup>40</sup> But the pipeline lens typically does not focus upon the disproportionate *physical* mistreatment of **children** of color in public schools, a phenomenon that causes racialized trauma, pushes **children** of color towards prison, and requires more attention.

Why focus on the laws and policies that affect **children's** bodies? As Ronald L. Jackson asserts, “[B]lack bodies have become surfaces of racial representation .... [R]ace is about bodies that have been assigned social meanings.”<sup>41</sup> Similarly, Isabel Wilkerson contends that Americans are divided into a caste system on the basis of their bodies' physical appearance, where the “signal of rank” is race.<sup>42</sup>

[This caste system] embeds into our bones an unconscious ranking of human characteristics and sets forth the rules, expectations, and stereotypes that have been used to justify brutalities against entire groups within our species ....

We may mention ‘race,’ referring to people as [B]lack or [W]hite ... when what lies beneath each label is centuries of history and assigning of assumptions and values to physical features in a structure of human hierarchy.<sup>43</sup>

Analyzing laws for their risk to Black bodies is powerful because the body is concrete. Harm to the body is less disputable than harm to the mind or the soul. Injured bodies help to highlight when good intentions have failed and mistakes have been made.<sup>44</sup> Further, violence to bodies is a powerful language that communicates many things.<sup>45</sup> It communicates who does not belong and who is considered unimportant, disposable, unaccepted, dangerous, inferior, and unsightly.<sup>46</sup> It communicates lovelessness.<sup>47</sup> Such communication is so effective that violence to bodies is a primary method by which people traumatize one another, causing lasting shame--the sense that oneself is bad, wrong, stupid, or tainted; doubt; \*120 embarrassment; distrust; anxiety; depression; and other mental and physical harm.<sup>48</sup> Analysis of racial equity in education and, specifically, school discipline, is incomplete without analysis of “body politics.”<sup>49</sup>

Disproportionate school brutality demonstrates Ta Na-hesi Coates' observation that White supremacy denies Black Americans the “right to secure and govern [their] own bodies.”<sup>50</sup> Disproportionate school brutality has the unique significance of perpetuating coercive structures and racialized trauma arising from state-sanctioned slavery and Jim Crow segregation. Specifically, as described in Sections III(A) and (B), legalized violence and fear of such violence were the principal tools by which White supremacists subordinated and controlled Black people during slavery and the Jim Crow era. They were also the primary tools by which White supremacists delayed desegregation.<sup>51</sup>

These tools are now preserved and concealed by facially race-neutral laws and policies that permit school “corporal punishment, seclusion, and restraint”-- euphemisms for assault and solitary confinement--by teachers and school administrators and unrestrained aggression by law enforcement officers and security guards.<sup>52</sup> Almost no legal structures exist to stop these state agents from acting with conscious or unconscious racial bias. As a result, disproportionate state violence upon Black **children** in schools perpetuates the systemic traumatization, through legalized physical abuse, of Black **children** that originated during slavery, keeps them from receiving a quality education, and contributes to the health toll of racism.<sup>53</sup> Such violence is a barrier to social change. And it is a structure within American education that maintains a racial hierarchy that denies Black humanity.

Applying the health justice framework, this Article describes how the racialized trauma of disproportionate school brutality harms and subjugates the health and educational functioning of Black **children** today.<sup>54</sup> Disproportionate school brutality denies its victims health justice, which requires that “everyone has a fair and just opportunity to be healthy” and “everyone can attain their full potential for health and well-being.”<sup>55</sup> It contributes to the health disparities impairing the educational \*121 success and socio-economic advancement of Black **children**.<sup>56</sup> The health justice framework is a theoretical framework that recognizes the significance of the conditions in which people live, learn, work, and grow up in delineating individual and public health (called “social determinants of health”).<sup>57</sup> This framework helps to establish that disproportionate school brutality upon Black **children** is a social determinant of health that must be addressed before Black **children** can experience health justice.

School brutality is an adversity--a racialized, discriminatory form of community violence--constituting an adverse **childhood** experience (ACE), which, in turn, can be traumatic because it can cause the long-term harms of disability, disease, and early death.<sup>58</sup> As detailed in this Article, disproportionate school brutality is a form of systemic and structural racism that “expose[s] people of color to health harming conditions and that impose[s] and sustain[s] barriers to good health and well-being.”<sup>59</sup> Thus, a major reason for eliminating *all* forms of school brutality for *all* **children** is the need to end a legal and social structure that sustains racist violence and educational and health inequity for Black **children**.<sup>60</sup>

As the U.S. Supreme Court recognized in *Brown v. Board of Education*, “education is perhaps the most important function of state and local governments.”<sup>61</sup> Rather than merely replicating and reinforcing societal biases and hierarchies,<sup>62</sup> American public schools have the opportunity to maximize the achievement of all students by invalidating racial hierarchy and replacing it with a culture that values every **child** equally, seeks to heal racial trauma, and enables every **child** to experience hope, belonging, dignity, and safety.<sup>63</sup> The Supreme Court held that unequal education, such as education involving the separation of **children** of similar age and qualifications solely because of their race, “generates a feeling of inferiority as to \*122 their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>64</sup> “A sense of inferiority affects the motivation of a **child** to learn,” thereby delaying “the educational and mental development of [Black] **children** and [depriving] them of some of the benefits” of a racially equitable school system.<sup>65</sup>

Accordingly, when Black **children** are assaulted, confined, and arrested multiple times more often than White **children** at school solely because of their race, the government generates a feeling of inferiority that causes lasting educational and developmental harm and deprives Black **children** of the benefits of a racially just school system.

Unfortunately, few legal structures exist to end the disproportionate school brutality upon Black **children**, as most states authorize at least some form of school brutality in public schools.<sup>66</sup> Statutes of only a few states prohibit discriminatory school discipline, and federal and constitutional law do not sufficiently support claims of discriminatory school brutality by **children** and parents.<sup>67</sup> Only when school brutality is abolished for all **children** can this racialized, systemic trauma maintained by the government end.

## **I. The Harmful Disproportionality of School Brutality Upon Black Children**

### **A. The General Harm of School Brutality**

“I hated [corporal punishment] .... I believe it's a practice meant to keep people of less power in check.”--Rafranz Davis, educator from Texas<sup>68</sup>

“Violence is the legacy of slavery that I am most familiar with. Violence, and its consequences, hang over me and my family like a long, dark cloud reaching back through time.”--K. Ward Cummings<sup>69</sup>

Similar to police brutality, school brutality is the excessive use of force by state officials upon ordinary citizens.<sup>70</sup> Both forms of brutality have inflicted injury, terror, trauma, and death upon its victims.<sup>71</sup> By forcibly educating **children** that \*123 teachers--who are mostly White, middle-class, government employees--wield the power to hurt, silence, and coerce behavior from them, school brutality is an early training in oppression.<sup>72</sup>

School brutality typically involves the use of force to solitarily confine, immobilize, or inflict pain on a student as a means of discipline or control.<sup>73</sup> School brutality encompasses the kicking, punching, slamming, paddling with a wooden board, stuffing into bags, tasing, handcuffing, hanging on chalkboards, hitting with books, banging of heads into metal poles, locking into closets, and suffocating of **children** by public school educators, security guards, and law enforcement officers.<sup>74</sup> Such violence has been inflicted upon **children** for offenses as minor as being late and dress code violations.<sup>75</sup>

Calling corporal punishment, seclusion, restraint, and inappropriate handcuffing and arrest practices school brutality centers the developmental needs and experiences of its victims and highlights the unreasonable and traumatic nature of these practices.<sup>76</sup> Except for restraint that is necessary to prevent serious, imminent physical harm to self or others, all forms of restraint, seclusion,

and corporal punishment at school are school brutality because they are never necessary to educate a **child** or manage a **child's** behavior, and they create an unacceptable likelihood of harm.<sup>77</sup>

Despite traditional beliefs that applying physical force upon **children** will improve their behavior, decades of scientific research consistently show that such force actually worsens behavior,<sup>78</sup> the exact opposite of what its supporters claim it does. School brutality increases the likelihood that a **child** will enter the school-to-prison pipeline and become incarcerated.<sup>79</sup> It also generally worsens **\*124** educational achievement and harms **children** mentally and physically.<sup>80</sup> Meanwhile, non-coercive, evidence-based alternatives exist, including Ukeru, restorative justice practices, positive behavioral interventions and supports, and social-emotional learning.<sup>81</sup> Thus, other than when restraint is needed to prevent the imminent serious injury of a person, school brutality is never necessary and poses an unacceptable risk of harm.

As Shakara Murphy's story highlights, school brutality regularly results in physical trauma, leading to broken bones, concussions, bruising, and even blinding and death by asphyxia or gunshot.<sup>82</sup> The stories of Shakara, Kaia Rolle, and Jaleel Williams, featured at the beginning of this Article, illustrate that school brutality also results in psychological trauma. In response to such brutality, **children** have defecated and urinated on themselves, screamed, begged, committed suicide in seclusion rooms, and suffered from depression, anxiety, worse academic performance, learning and behavioral disabilities, poor physical and mental health, and heightened fears for safety at school.<sup>83</sup> As I have previously observed, “[c]hildren typically experience school brutality as violative, frightening, and overwhelming.”<sup>84</sup> Intensifying these reactions is the fact that adults often enact school brutality when they have lost their temper, are in fight or flight mode, and are without self-control.<sup>85</sup>

As a potentially traumatic ACE, school brutality deprives Black **children** of a fair and just opportunity to be healthy because a multitude of studies show that ACEs significantly increase the risk of physical and mental illness during **childhood** and adulthood, disability, and even early death.<sup>86</sup> A **child's** lifetime risk of experiencing more than forty illnesses—including ischemic heart disease, diabetes, cancer, and autoimmune diseases—increases incrementally according to the number of ACEs a **child** experiences.<sup>87</sup> Dr. Perry, interviewed by Oprah Winfrey, noted that “[c]hildhood adversity plays a major role in [approximately] 45% of all **childhood** mental health disorders and [approximately] 30% of adult mental health disorders ....”<sup>88</sup> People who experience six or more ACEs, on average, have a twenty year shorter lifespan than those who experience no ACEs.<sup>89</sup>

**\*125** If applied to adults, rather than **children**, “school brutality would ... encompass the torts of battery, assault, false arrest, false imprisonment, and intentional infliction of emotional distress.”<sup>90</sup> **Child** victims do not consent to the touching or threat of touching by state agents perpetrating school brutality, and thus school brutality violates a **child's** physical integrity, demonstrates disrespect for the **child's** dignity, and humiliates them.<sup>91</sup> School brutality also violates the trust that a **child** should have that educators will protect and care for them and support their best interests.<sup>92</sup>

Recognition of the harmful effects of applying force to **children** has led states to ban the use of corporal punishment in many settings, including “center-based **child** care settings, foster care settings, and residential care settings.”<sup>93</sup> Most states prohibit it in **youth** detention centers.<sup>94</sup> All states ban “beating ‘an animal so long or hard that’ it becomes injured.”<sup>95</sup> Nevertheless, most states allow some form of school brutality in public schools.<sup>96</sup>

Given the serious threat that school brutality poses to **children's** physical and mental health, its failure to improve behavior, and its demonstrated likelihood to worsen behavior, school brutality is neither a form of education nor discipline. It is a danger that does not belong in school. No parent should fear that their **child** will return home with broken bones, traumatized, and suicidal because their school has ignored the overwhelming evidence against school brutality.

## *B. Statistics on the Disproportionality*

School brutality remains widespread and underreported,<sup>97</sup> and Black **children** increasingly experience disproportionate rates of such brutality. Although no central database collects information about school brutality, public schools self-reported that they “corporal[ly] punished K-12 students nearly 100,000 times in the 2017-18 school year.”<sup>98</sup> They also reported restraining and/or secluding approximately 122,000 students during the 2015-16 school year, up from nearly 70,000 students during the 2013-14 school year.<sup>99</sup> Such self-reports are significant undercounts, \*126 however, and data from 2018-19 shows that in many places, incidents of restraint and seclusion continue to rise.<sup>100</sup>

Regarding the behavior of law enforcement officers in public schools, greater than 700 elementary school **children** (ages approximately eleven years old or less) were arrested in the 2017-18 school year.<sup>101</sup> A study of school-based police assaults that were featured in news media revealed that police assaulted at least 285 K-12 students between 2011 and 2021.<sup>102</sup> 45 assaults occurred during the 2021-2022 school year.<sup>103</sup> These numbers do not include students in middle and high school who are inappropriately handcuffed or arrested and those assaulted by law enforcement officers at school but whose stories are not featured in news media. In summary, the data indicates that at least 222,728 incidents of school brutality occur each year in the United States, and this is an undercount.

Across the different types of school brutality, Black **children** are typically approximately two to five times more likely than other **children** to experience such brutality. For instance, nationally, before the pandemic, Black **children** were 2.5 times more likely to be corporally punished than other **children**.<sup>104</sup> During the pandemic school year of 2020-2021, however, a Black **child** was 18 times more likely to experience corporal punishment than a White **child**.<sup>105</sup>

Before the pandemic, eighty percent of school corporal punishment occurred in seven states: Mississippi, Texas, Alabama, Arkansas, Georgia, Tennessee, and Oklahoma.<sup>106</sup> Evidencing the continued legacy of slavery and the Jim Crow era, six of these states--all of which are in the South--“account[ed] for ninety percent of the corporal punishment” of Black students in the United States: Mississippi, Alabama, Georgia, Arkansas, Texas, and Tennessee.<sup>107</sup>

School brutality in the form of corporal punishment has been particularly common in Mississippi.<sup>108</sup> In 2013-14, Mississippi alone accounted for almost a \*127 quarter of all corporal punishment in the United States; state employees subjected students to such punishment 28,000 times in 2017-18.<sup>109</sup>

Further highlighting the legacy of slavery and the Jim Crow era, racial disproportionalities in corporal punishment are concentrated in the South: “Black students are twice as likely to be struck as [W]hite students in North Carolina and Georgia; 70 percent more likely in Mississippi; 40 percent more likely in Louisiana; and 40 percent more likely in Arkansas.”<sup>110</sup> Based on existing data, in Mississippi, for every 100 students, eight Black students and five White students will be corporally punished.<sup>111</sup> Mississippi educators severely target Black girls for corporal punishment: Mississippi accounts for nearly half (43.8%) of all Black girls in the United States receiving corporal punishment.<sup>112</sup> Similarly, in Arkansas, for every 100 students, approximately six Black students and more than four White students will be corporally punished in school.<sup>113</sup> This data demonstrating profound racial disparities in school corporal punishment corresponds with studies showing that levels of implicit racial bias are elevated among White people in Southeastern states, as compared to White residents in other regions of the U.S.<sup>114</sup>

Nonetheless, many states outside of the South, which generally engage in less corporal punishment, also disproportionately hit Black **children**.<sup>115</sup> Black **children** in Maine are eight times more likely to be hit as White **children**; twice as likely in

Pennsylvania and Michigan; and 70% more likely in Colorado, Ohio, and California.<sup>116</sup> In other words, disproportionate school brutality is not just a Southern problem.

Information about geographic variations in other types of disproportionate school brutality is less available. Regarding restraints, based upon 2017-2018 national data, Black girls are 2.17 times more likely than White girls to be restrained, and Black boys are 1.58 times more likely than White boys to be restrained.<sup>117</sup>

Based on national data, during the 2020-2021 pandemic year, a non-disabled Black **child** was 5.05 times more likely to be mechanically restrained than a non-disabled White **child**, and a non-disabled Black **child** was 1.88 times more likely to be physically restrained than a non-disabled White **child**.<sup>118</sup> A disabled Black **child** was 2.58 times more likely to be mechanically restrained than a disabled White **child**.<sup>119</sup>

**\*128** As to arrests, Black students experience the worst disparities of any racial or ethnic group.<sup>120</sup> In 2017, Black students made up 15.5% of all enrolled students in the U.S., but they made up 33.4% of students arrested.<sup>121</sup> In contrast, White students made up 50.3% of all students, but they made up only 33.7% of students arrested.<sup>122</sup> Black girls are 3.01 times more likely than White girls to be referred to law enforcement and 3.66 times more likely to be arrested at school.<sup>123</sup> Similarly, Black boys are 2.15 times more likely than White boys to be referred to law enforcement and 2.44 times more likely to be arrested at school.<sup>124</sup>

The disproportionality in school arrests is even worse for young **children**. Black **children** make up 43% of five-to-nine-year-olds arrested at school, even though they comprise only approximately 15% of students in that age group.<sup>125</sup> Black elementary school students are more than five times more likely to be arrested at school than their White peers.<sup>126</sup> This means that Black **children** of eleven years or younger are five times more likely to experience the stigmatizing trauma of handcuffing, police violence, and arrest than their peers.<sup>127</sup>

Horribly, Black students comprised over 80% of victims of police assaults on students at school featured in news media between 2011 and 2021, even though Black students comprise only approximately 15% of all enrolled students.<sup>128</sup> The vast majority of police assaults occurred on students between ages thirteen and seventeen, but ten assaults occurred on **children** between ages four and eight.<sup>129</sup> Almost one-third of the victims suffered serious injury from the assault, and five students died.<sup>130</sup> Advancement Project and Alliance for Educational Justice have concluded that “the presence of police in schools actively jeopardizes the safety of Black and Latino students,” and there is “little to no evidence that school police contribute to school safety or the prevention of violence.”<sup>131</sup>

A major driver of school brutality caused by police is that Black students are more likely to be enrolled in schools with on-site law enforcement than their peers in other racial and ethnic groups.<sup>132</sup> To illustrate, among middle and high schools where more than 75% of enrolled students are Black, 54.1% had at least one **\*129** school-based law enforcement or security officer on campus.<sup>133</sup> In contrast, only 32.5% of middle and high schools where over 75% of enrolled students are White had such personnel in place.<sup>134</sup>

A recent empirical study found that the odds of a public school with a Black student population of over 50% having security guards, security personnel, or sworn law enforcement officers present ranged from two to eighteen times greater than a public school serving a Black student population that was only 0-19% of the total school population.<sup>135</sup> Another study found that “[B]lack middle and high school students are over three times more likely to attend a school with more security staff than mental health personnel ....”<sup>136</sup>



The overinvolvement of law enforcement officers in schools has caused many students to feel that school is a “prison-like environment.”<sup>137</sup> As Andrew Hairston with Texas Appleseed observed, “[M]any **children** of color feel unsafe around police because they've seen friends or relatives targeted by law enforcement. They're also well aware of the police killings of Black people like George Floyd, Tamir Rice or Philando Castile.”<sup>138</sup>

The racial disparities in school brutality are disturbing because, as mentioned above, research shows that Black students are not misbehaving more frequently or with greater severity than White **children**.<sup>139</sup> For instance, research indicates that Black and White **children** engage in the following activities at school at approximately the same rate: commit violent **crimes** or theft; possess a firearm or explosive device; and possess a knife or sharp object.<sup>140</sup> In fact, studies reveal that **\*130** Black students are at greater risk of corporal punishment even when they commit a smaller share of serious student misconduct.<sup>141</sup>

Alarming, evidence suggests that racial disparities in school brutality are worsening.<sup>142</sup> On average, between 2011 and 2014, police assaulted K-12 public school students at the rate of 10 assaults per year; that rate increased to 33.4 assaults per year between 2015 and 2020.<sup>143</sup> In the 2011-12 academic year, Black **children** were twice as likely as White **children** to be subject to corporal punishment.<sup>144</sup> That year, schools reported 42,000 incidents of Black boys hit at school and 15,000 incidents of Black girls hit at school.<sup>145</sup> During the 2013-2014 academic year, Black boys were about twice as likely to receive corporal punishment as White boys, and Black girls were three times as likely as White girls.<sup>146</sup>

### *C. The Racial Health Injustice*

Black students experience additional harm from the discriminatory nature of disproportionate school brutality than their peers. The health justice framework helps to recognize that disproportionate school brutality is harmful to the health of its direct victims and other students for whom it creates a felt lack of safety and belonging.<sup>147</sup> The health justice framework “elevates how racism, social control, bias, privilege, as well as the political and legal systems in which they are embedded, influence the social determinants of health.”<sup>148</sup> Because health justice scholarship “place[s] subordination at the center of the problem of health disparities,”<sup>149</sup> the subordination at the heart of school brutality is centered here. The framework applies to laws, **\*131** policies, and systems, such as those structuring school discipline, that may not be “previously conceptualized as public health.”<sup>150</sup>

The health justice framework highlights the mounting evidence showing that racism and racial discrimination are themselves potentially traumatic adversities--ACEs--that create psychological and physiological harm in **childhood** and contribute to long-term health problems and health disparities.<sup>151</sup> Studies show that Black **children** are aware of racial discrimination early in life, and approximately a quarter (26.9%) of Black **children** experience racism as a significant stressor in life.<sup>152</sup> Chronic exposure to race-based unfair interpersonal treatment or the threat of it can produce chronic stress, which leads to increased risks for chronic disease.<sup>153</sup> Exposure to racial discrimination is also associated with higher rates of depression, anxiety, and symptoms of depression and posttraumatic stress.<sup>154</sup> These mental health effects are associated with increased use of alcohol and marijuana and conduct problems in **youth**, such as aggression and shoplifting.<sup>155</sup> These problems, in turn, increase the risk of involvement in the **criminal** justice system, which itself increases exposure to health harming conditions, poor health outcomes, and racial health disparities.<sup>156</sup> **Children** who are subjected to systemic, structural, and interpersonal discrimination are also more likely to struggle academically, fail to graduate from high school, and suffer from heart disease and diabetes.<sup>157</sup> Accordingly, the racial discrimination inherent in disproportionate school brutality against Black **children** feeds the school-to-prison pipeline and deprives Black **children** of a quality education and a fair opportunity to experience health and well-being.

Further, when school brutality occurs within “community conditions with disproportionately high levels of stress, complex trauma, and adverse **childhood** experiences,” such as conditions of poverty and intentionally racially segregated neighborhoods,

“such experiences can amplify the cumulative influences of early-life adversities on **children's** physical and mental health in adulthood.”<sup>158</sup>

\*132 The health justice framework applies to school brutality through two steps: first, by recognizing school brutality “as a significant public health and health law problem; and second, to identify legal and policy interventions that are ‘structural ... and empowering’ to ensure that every student has an opportunity to attain their full potential free of disadvantage due to their social circumstances.”<sup>159</sup> By exposing how the structural discrimination inherent in school brutality fuels health disparities, this Article emphasizes the need to dismantle the structure of school brutality, which allows such discrimination to take place.<sup>160</sup>

## II. Understanding the Disproportionality

“[W]e need to keep the larger history of race with its multiple penetrations and reverberations in the present in mind. That history is still a part of daily processes, often in forms that are so automatic or ‘common sense’ that we aren't consciously aware of them ....”--Amanda E. Lewis and John B. Diamond<sup>161</sup>

On an institutional and systemic level, school brutality is a type of systemic trauma, which Staci Haines defines as “the repeated, ongoing violation, exploitation, dismissal of, and/or deprivation of groups of people. State institutions, economic systems, and social norms that systematically deny people access to safety, mobility, resources, food, education, dignity, positive reflections of themselves, and belonging have a traumatic impact on individuals and groups.”<sup>162</sup> A deeper understanding of the institutions, economic systems, and social norms maintaining disproportionate school brutality can be obtained through contextualizing such brutality within America's often unrecognized history of racism and racial hierarchy.<sup>163</sup>

### \*133 A. *The Legacy of Slavery*

“Unconditional submission is the duty of a slave; unlimited power is, in general, the legal right of the master ....”--The Supreme Court of Tennessee, 1842<sup>164</sup>

“Unconditional submission on the part of slaves must be exacted.”--The Supreme Court of North Carolina, 1857<sup>165</sup>

“Government neutrality conceals the racist origins of social practices that do not overtly discriminate on the basis of race.”--Dorothy Roberts, 2017<sup>166</sup>

Disproportionate school brutality against Black **children** is most understandable as a remnant of state-sanctioned slavery and the Jim Crow era. The disproportionate violence meted upon Black school **children** echoes the dehumanizing treatment of Black **children** by White enslavers during slavery. Slavery, lasting from 1619 to 1865, denied enslaved **children** basic rights and dignity,<sup>167</sup> including rights over their bodies.<sup>168</sup> **Children** constituted a large proportion of slavery's victims. During the later years of the slave trade to the United States, up to 50% of enslaved people who experienced the Middle Passage were **children**.<sup>169</sup> Enslaved **children** constituted about one-fifth of all American **children** by the end of the Eighteenth century and were a “common presence” in Southern households.<sup>170</sup> Physical punishment and fear of such punishment were the primary methods by which enslavers wielded power.<sup>171</sup>

Whipping was a main form of punishment as well as an “explicitly racialized socialization strategy intended to impress upon [enslaved people] that they were slaves.”<sup>172</sup> Enslavers whipped enslaved **children** for being late to work,<sup>173</sup> stealing \*134 fruit from their masters' gardens,<sup>174</sup> doing work imperfectly, and being careless.<sup>175</sup> They also whipped enslaved **children** for talking back, verbally defending themselves, disobedience, and other forms of “impudence.”<sup>176</sup> “Getting above oneself” was

a reason to be whipped.<sup>177</sup> **Children** today, especially Black **children**, are similarly corporally punished by teachers for doing work imperfectly and for “impudence.”<sup>178</sup>

Paddling of **child** and adult enslaved people--such as with a piece of wood of about one inch thick, three inches wide, and eighteen inches in length, with holes bored through--allowed enslavers to physically punish an enslaved person while concealing the marks.<sup>179</sup> Such concealment helped to market an enslaved person for sale.<sup>180</sup> Paddling also increased the painfulness of punishments.<sup>181</sup> Disturbingly, wooden paddles with dimensions similar to those used upon enslaved people are used today in thousands of public schools to disproportionately corporally punish Black **children**.<sup>182</sup>

Other forms of violence during slavery included punching, pinching, burning, biting, cutting off fingers, groping, raping, and killing.<sup>183</sup> Some White men forced enslaved girls to act as concubines.<sup>184</sup> Abuse often scarred enslaved bodies in multiple places, including faces.<sup>185</sup> While the reason for violence was sometimes evident, violence also occurred for no apparent reason except to fulfill a desire or convey malice or passion.<sup>186</sup>

Enslaved males, including enslaved **children**, who were deemed “unmanageable” were whipped; incarcerated in local jails; sold to enslavers who lived farther South; sent to be “broken” by “nigger breakers,” who were known for severe treatment of \*135 enslaved people; and murdered.<sup>187</sup> Enslavers reasoned that “unmanageable” enslaved people set a “dangerous example” to other enslaved people.<sup>188</sup> Some reasoned that “if one [enslaved person] refused to be corrected, and escaped with his life, the other [enslaved people] would soon copy the example; the result of which would be, the freedom of the [enslaved people], and the enslavement of the Whites.”<sup>189</sup>

Wives of enslavers whipped female enslaved **children** for disobeying and being ‘slow’ to do their work.<sup>190</sup> They also took their own jealousy and rage out on female enslaved **children** if they believed that their husbands sought the **children** for sexual purposes.<sup>191</sup> Male enslavers whipped enslaved girls if they did not submit to sex or when the enslavers were jealous of alleged sexual involvement with other men.<sup>192</sup> Enslaved people with disabilities were starved and left to die by enslavers.<sup>193</sup>

In the context of slavery, many considered the education of Black **children** unacceptable. Enslavers violently forbade enslaved people from reading and writing because they understood that those skills would make them unfit for slavery.<sup>194</sup> Reading opened enslaved people's minds to notions of freedom, and writing enabled some to obtain freedom, including through forging or using writings that provided legitimacy to traveling north.<sup>195</sup> In the early 1800s, for instance, when Frederick \*136 Douglass convened a group of other enslaved people to teach them to read through a Sunday school, enslavers used wooden sticks to disperse the group and forbade them from meeting again.<sup>196</sup> Education became a “site for Antiblackness,” writes Michael Dumas, because White enslavers “would often beat their Black [‘]property[’] for attempting to learn to read; for Black people in bondage, learning to read was understood not only as a pathway to economic mobility, but, perhaps more importantly, as assertion of their own humanity, a resistance to being propertied.”<sup>197</sup>

White supremacist beliefs in the inferiority of Black people provided justification for slavery and the killing of Black people.<sup>198</sup> Slave owners used text from the Bible and religious beliefs to support the cruel treatment of slaves.<sup>199</sup> The institution of slavery “made the degradation of the subordinate caste,” Black people, “seem normal and righteous.”<sup>200</sup> Most people who sat on top of “the [social] hierarchy grew accustomed to the unearned deference from the subjugated group and came to expect it.”<sup>201</sup> They distanced themselves from the people beneath them, believing that enslaved people--and Black people more generally--“did not feel pain or heartache,” and it was permissible to inflict atrocities upon them.<sup>202</sup> These lies dehumanized both enslaved people and the people who believed them.<sup>203</sup>

Enslaved people had no power to stop abuse or murder, as violence against an enslaved person led to no legal recourse.<sup>204</sup> In Georgia, for instance, it was not a felony to kill an enslaved person.<sup>205</sup> “[A]n owner theoretically might dispose of [his] chattel in any manner including extermination.”<sup>206</sup> Accordingly, judicial investigations of the murders of enslaved **children** did not often take place.<sup>207</sup> Enslaved people could not sue slave “owners” or third parties for harms inflicted upon them; and enslaved people were not permitted to testify against White \*137 people.<sup>208</sup> As the U.S. Supreme Court held in *Dred Scott v. Sandford* in 1857, an enslaved person, formerly enslaved person, or descendant of an enslaved person was not a citizen with constitutional rights.<sup>209</sup>

To be recognized in law, personal injury to the enslaved person had first to be translated into pecuniary loss to the slaveholder, which “distort [ed] the real party at interest.”<sup>210</sup> The effect of these many barriers was that the suffering and humiliation endured by enslaved persons was neither publicly aired nor valued by the law.<sup>211</sup>

Reinforcing the racial hierarchy, state law enabled virtually any White person to use violence to subjugate a slave who was deemed insubordinate. To begin with, the common law of slave states authorized the absolute right of masters to inflict corporal punishment upon enslaved people.<sup>212</sup> For instance, the Supreme Court of Tennessee in 1842 held that “a ready obedience to the lawful commands of the master is the duty of the slave; a failure in it justifies the master in the infliction of such reasonable chastisement as may prevent a repetition of the offence.”<sup>213</sup> In 1860, the highest state court of Mississippi reasoned that death of a disobedient enslaved person was an acceptable result of corporal punishment:

[I]f the master, in the exercise of lawful authority, in a lawful manner, be resisted by his slave, then the master may use just such force as may be requisite to reduce his slave to obedience, even to the death of the slave, if that become necessary to preserve the master's life, or to maintain his lawful authority.<sup>214</sup>

Further, as highlighted by a Supreme Court of Arkansas ruling in 1854, masters could use “whatever” physical force against an enslaved person they owned in order to “bring [them] within the pale of subordination.”<sup>215</sup> Accordingly, punishments for disobedience by enslaved people were often arbitrary and severe, drawing blood or leading to death, and overseers avoided admitting to any wrongdoing.<sup>216</sup> A similar power dynamic can be seen in public schools today between adults in charge—law enforcement officers, security guards, or school administrators—and Black students, \*138 whom they perceive to be disobedient.<sup>217</sup> Disproportionate school brutality is the natural result of this dynamic. As sociologist Guy B. Johnson observed, “[W]hite people during the long period of slavery became accustomed to the idea of ‘regulating’ Negro insolence and insubordination by force with the consent and approval of the law.”<sup>218</sup>

Generally state law did not permit enslaved people to engage in physical self-defense, and killing a master in self-defense was severely punished.<sup>219</sup> For instance, the Supreme Court of Tennessee held that an enslaved person named Jacob was supposed to have “submitted” himself to his master's desire to tie and whip him for falling behind on his work of pulling fodder.<sup>220</sup> Because Jacob had refused to submit and instead fought back with a knife, killing his master, he was guilty of murder.<sup>221</sup> The court reasoned that had Jacob not been enslaved, he would have been guilty at most of manslaughter because the provocation of being threatened with violence would have alleviated his level of wrongdoing under the law.<sup>222</sup> The court sentenced Jacob to death by hanging for killing his “owner” in self-defense.<sup>223</sup> “Savage barbarity” is how Frederick Douglass described the treatment of enslaved people by an overseer.<sup>224</sup>

## B. The Legacy of Jim Crow

“Just because slavery ended does not mean that all of the force behind it ended, too.”--Kimberly Polk<sup>225</sup>

Similar to its role during slavery, violence was the “cornerstone” of the state-supported Jim Crow era between 1870 and the 1950s.<sup>226</sup> Bigoted White Americans used it to control Black behavior, and “almost anything” could trigger it.<sup>227</sup> Failing to say “yes, sir” or “no, sir” when addressing a White man could lead to a beating.<sup>228</sup> Turning a profit while farming could lead to murder.<sup>229</sup> Appearing, as a Black male, to show sexual interest in a White woman could also lead to murder, as demonstrated by the murders and burning of Black homes and businesses in the 1921 Tulsa Race Massacre and the 1955 murder of Emmett Till.<sup>230</sup> Violence was used to \*139 suppress Black voting and drive people who sought equal rights by Black Americans from office.<sup>231</sup> Black Americans were disproportionately “arrested and incarcerated, or legally executed, with little cause and few due process rights.”<sup>232</sup>

White supremacist vigilantes and racial terror groups regularly used whippings to intimidate, punish, and displace Black people deemed to pose threats to White social, economic, and political dominance.<sup>233</sup> Whippings threatened more lethal violence, and if they failed to deter a Black person from violating social norms, then lynching was used as a punishment and method of terrorizing Black communities.<sup>234</sup>

Public lynchings “creat[ed] a spectacle designed to reinforce group boundaries and strengthen [W]hite racial solidarity.”<sup>235</sup> Lynchings maintained racial control by victimizing entire Black communities, not just the individual who was lynched.<sup>236</sup> These rituals of violence and their representation in news reports, photographs, and film imparted messages of White dominance and Black subordination and White unity and Black **criminality**.<sup>237</sup> Many lynching victims were murdered never being accused of any **crime**; “they were killed for minor social transgressions or for demanding basic rights and fair treatment.”<sup>238</sup> Overall, “Mississippi, Florida, Arkansas, and Louisiana had the highest statewide rates of lynching in the United States, and Mississippi, Georgia, and Louisiana had the highest number of lynchings.”<sup>239</sup> Lynchings spread outside of the South, however, including to Oklahoma, Missouri, and Illinois.<sup>240</sup> In total, an estimated 4,084 documented lynchings were committed in the South between 1877 and 1950, and more than 300 lynchings took place outside of the South.<sup>241</sup>

Sadly, less than 1% of all lynchings after 1900 resulted in any lyncher being convicted of any **criminal** offense.<sup>242</sup> Congress sought to pass federal anti-lynching legislation, but Southern lawmakers resisted federal intrusion into such state \*140 matters.<sup>243</sup> Southern states that passed anti-lynching laws did not enforce them.<sup>244</sup> Delayed by Southern opposition, a federal anti-lynching law only became law in the last two years, in March 2022.<sup>245</sup>

The effects of lynchings are still present today. A recent study highlighted the connection between Jim Crow lynchings and present school brutality.<sup>246</sup> It identified an increased likelihood of corporal punishment for all students in counties where higher numbers of lynchings occurred between 1865 and 1950.<sup>247</sup> And a history of numerous lynchings in a particular geographic area was found to be predictive of higher incidents of corporal punishment of Black students in the local public school.<sup>248</sup>

In the context of Jim Crow, many considered the education of Black **children** unacceptable. Immediately after slavery ended with emancipation, White supremacists argued that “ignorance, hard labor, and [W]hite domination” constituted the permanent destiny of Black Americans, and they used violence to oppose the education of Black **children**.<sup>249</sup> They burned schoolhouses and harassed and murdered teachers of Black **children** after emancipation and during Reconstruction.<sup>250</sup> White Northerners

who moved South in order to teach Black **children** were accused of indoctrinating and overeducating Black **children**, and Southern communities ostracized and subjected some of them to violence.<sup>251</sup>

By the early twentieth century, resources developed in the South to support an education for Blacks that “in no way threatened [W]hite supremacy.”<sup>252</sup> Southern White leaders embraced the argument that newly freed slaves should be taught a “proper deference for their superiors,” fidelity to contracts, respect for property, and other virtues “calculated to ensure a compliant and efficient labor force.”<sup>253</sup> The classroom was supposed to “preserve and reinforce ... [the prevailing racial] hierarchy.”<sup>254</sup>

Some Southern White leaders wanted education to keep Black Americans content with doing menial jobs rather than competing against White people for higher status \*141 and higher paid jobs.<sup>255</sup> White supremacists intended that Black Americans be taught that jobs in manual labor--such as farming, building houses, and making clothes--rather than jobs as doctors, lawyers, and preachers, would be their salvation.<sup>256</sup> Supporting this intention were (1) beliefs in the intellectual inferiority of Black people and (2) beliefs in the inability of Black people to look after themselves and their need to defer to the “superior judgment and wisdom of [White people].”<sup>257</sup> Such beliefs, however, belied deeper fears that education would make Black people unhappy with their subordinate position in society and elevate Black people to the same level of White people.<sup>258</sup>

Such effects would destabilize society, White supremacists argued.<sup>259</sup> They claimed that education could cause Black people to become “insolent,” less easily exploitable, independent, and ambitious, the opposite of the qualities (“docility, unthinking obedience, and improvidence”) that “fit” them for menial offices and a subordinate social position.<sup>260</sup> In other words, education could cause Black people to become “discontented, resentful, and dangerous” to White people.<sup>261</sup> Thus, curtailing the educational opportunities of Black people, along with segregation and disfranchisement, were essential mechanisms of racial control for White supremacists.

Such efforts were especially effective at blocking access to public high school education in Southern states, particularly rural areas. Although public secondary education emerged to educate the “masses” of White **children** between 1880 and 1930, Black Southern **children**, especially those in rural areas, generally did not receive public secondary schools until after World War II.<sup>262</sup> To illustrate, in 1915, no public high schools for Black **children** existed in most major Southern cities even though Black **children** represented approximately 39% of the total secondary school age population of those cities, and thirty-six public high schools existed to educate White students in those cities.<sup>263</sup> In 1916, only 5% of the Southern Black secondary school age population was enrolled in public school, and “the few high schools that did exist were grossly overcrowded.”<sup>264</sup> “The virtual absence of [B]lack public high schools reflected the opposition of the vast majority of [W]hite [S]outherners, particularly in the rural communities and small towns, to [B]lack secondary \*142 education.”<sup>265</sup> “[S]outhern local and state governments, though maintaining and expanding the benefits of public secondary education for [W]hite **children**, refused to provide public high school facilities for [B]lack **children**.”<sup>266</sup> Consistent with this history, by 1954, seventeen states, including all of the Southern states, had enacted “laws requiring segregation of [W]hite and [Black] students” in public schools.<sup>267</sup> In summary, during the Jim Crow era, White supremacists developed a racist ideology that justified providing an inferior education to Black people, and they maintained tight racial control in the South through violence.

### ***C. Violence in Response to Desegregation***

Because it “threatened to dislodge a cornerstone of the Southern racial caste system,”<sup>268</sup> desegregation according to *Brown v. Board of Education* inflamed racist violence during the 1950s and 1970s that targeted Black **children** and those who sought to protect them. Polls showed that up to a quarter of White Southerners “favored violence, if necessary, to prevent school desegregation.”<sup>269</sup>

Many White Americans responded to *Brown* by implementing a strategy of “massive resistance” to desegregation.<sup>270</sup> That strategy included attacking and harassing Black students, bombing and murdering civil rights activists, and **criminalizing** peaceful protesters.<sup>271</sup> For instance, integration of the first high school in the South, in Clinton, Tennessee in 1956, led to prolonged violence by White mobs.<sup>272</sup> That violence included physical attacks upon and harassment of Black students throughout the academic year, the beating of a White minister, eight dynamite explosions in the Black section of town, and, ultimately, bombing and severe damage of the high school two years after integration began.<sup>273</sup>

Violence continued in 1957, when fifteen-year-old Elizabeth Eckerd attempted to enter the Central High School in Little Rock, Arkansas, and White protesters chanted, “[k]ill her.”<sup>274</sup> Shortly after, when she and eight other Black **children** sat in the principal's office, waiting to attend classes, a rioter asked a school vice principal to send out one of the **children** for lynching.<sup>275</sup> The threat to the lives of those first nine students was so great that they had to be escorted to class by soldiers.<sup>276</sup> White **children** regularly assaulted the **children**, including by spitting on them, shooting acid at one from a water gun, and throwing a bag of padlocks at the head of another.<sup>277</sup> A **\*143** few months before one of the first Black students graduated from the high school, her home was bombed.<sup>278</sup>

Similarly, in 1960 in New Orleans, when six-year-old Ruby Bridges started first grade at all-White William Frantz Elementary School, she was greeted outside of the school by hundreds of protestors, many of whom spit at her and yelled obscenities, such as “kill them niggers.”<sup>279</sup> White parents withdrew nearly all of their **children** from Ruby's new school.<sup>280</sup> Two days into the school year, Ruby received death threats, including a threat to be poisoned.<sup>281</sup>

Historians observe that “[m]illions of White parents nationwide acted to [reject desegregation] by voting to close and defund public schools, transferring their **children** to private, [W]hite-only schools, and harassing and violently attacking Black students while their own **children** watched or participated.”<sup>282</sup> Violence was the main mode of resistance to desegregation in multiple places, most of which were in the South: “Milford, Delaware in 1954; Hoxie, Arkansas in 1955; Tuscaloosa, Alabama, Clinton, Tennessee, Mansfield, Texas, and Clay and Sturgis, Kentucky in 1956; Nashville in 1957; Clinton in 1958; New Orleans in 1960; Athens, Georgia in 1961; Oxford, Mississippi in 1962; and Birmingham in 1963.”<sup>283</sup>

White residents and government leaders ensured that the government supported those who used violence to resist desegregation. For instance, in 1956, when mobs hung “an effigy of a Black man with signs attached to each pant leg that read, ‘This Negro tried to enter a [W]hite school. This would be a terrible way to die’ and ‘Stay Away, Niggers.’ Texas Governor Allan Shivers ... sent Texas Rangers to remove any ‘[W]hite or colored students whose attendance or attempts to attend Mansfield High School would be reasonably calculated to incite violence.’”<sup>284</sup> The joint efforts of “[l]ocal residents and state officials prevented Mansfield's public schools from officially desegregating until 1965.”<sup>285</sup>

The judicial branch of government similarly followed the lead of those acting with violence. As NAACP attorney Thurgood Marshall noted in 1958, courts delayed issuing integration orders in response to violence or the threat of violence.<sup>286</sup> In these ways, violence and the threat of violence throughout the South halted desegregation across the region for years.<sup>287</sup> Ten years after the 1954 *Brown* decision, only 2.59% of Black **children** living in the Deep South were attending previously **\*144** all-White schools.<sup>288</sup> In 1967 the U.S. Commission on Civil Rights observed that “violence against Negroes continue[d] to be a deterrent to school desegregation.”<sup>289</sup>

Nonetheless, by 1970-1971, 40% of Black **children** in the South attended school with White **children**.<sup>290</sup> Southern educators, especially top school officials, however, generally supported continued segregation of public schools.<sup>291</sup> Their views found expression in the intimidation and discriminatory treatment of Black students by White teachers, administrators, and students.<sup>292</sup>

A 1971 study by the National Education Association described systematic “humiliation” suffered by Black students in desegregated schools.<sup>293</sup>

We “tread[ed] through a jungle of hatred and human torture from segregationists,”<sup>294</sup> described Melba Beals, one of the first nine students to enter Central High School in Little Rock, Arkansas. Going to White schools felt like “war,” “turmoil,” “trauma,” and “hell” to many Black students.<sup>295</sup> To begin with, “[Student] troublemakers were organized in their campaign to punish us physically,” observed Carlotta Walls LaNier, one of the first Black students at Little Rock.<sup>296</sup> Physical attacks from White students included bomb threats, spitting, kicking, sacking with scalding hot towels, pushing, and tripping.<sup>297</sup> Although some teachers disciplined attackers, most teachers “just turned the other way. It was as though they stood in their classroom doors with their eyes and ears closed.”<sup>298</sup>

In 1961, for the first thirteen Memphis Black students who attended a desegregated school with police escorts, constant reminders informed them that their mere presence was a threat to the existing social order.<sup>299</sup> “It was like being on the defensive, being at war emotionally for quite a few years,” said Menelik Fombi, “Going outside, everyone wanted to get a shot at you. You [couldn’t] pee in peace because someone is always messing with you .... I internalized a lot. I cried a lot .... I [] hate[d] going to school.”<sup>300</sup> “I was constantly looking over my shoulder. I was scared,” said Harry Williams.<sup>301</sup> “I wasn’t wanted there,” said another student.<sup>302</sup> “It was like being on the front lines of Vietnam .... It hurts getting hit,” said Clarence Williams, “I knew that I was not equal .... That’s the knowledge I gained.”<sup>303</sup>

**\*145** Lessons from White teachers had racist overtones. bell hooks [sic] made the following observations:

Bussed to [W]hite schools, we soon learned that obedience, and not a zealous will to learn, was what was expected of us. Too much eagerness to learn could easily be seen as a threat to [W]hite authority .... [W]e were always having to counter [W]hite racist assumptions that we were genetically inferior, never as capable as [W]hite peers, even unable to learn .... [B]lack students were always seen as interlopers, as not really belonging.<sup>304</sup>

In desegregated schools, Black **children** experienced racism from White peers and White teachers.<sup>305</sup> “[W]e were mainly taught by [W]hite teachers whose lessons reinforced racist stereotypes,” described bell hooks.<sup>306</sup> Black students often suffered more severe punishments for minor offenses compared to White students.<sup>307</sup>

School administrators excluded Black students who overtly resisted racist harassment. For instance, school administrators warned Black students at Central High School in Little Rock, Arkansas that they could be expelled if they retaliated in kind against such harassment.<sup>308</sup> Administrators immediately expelled one of those students when she called a girl “White trash” after the girl threw a purse containing padlocks at the student’s head in 1957.<sup>309</sup> White segregationists put the words, “1 down, 8 more to go,” onto signs shortly after.<sup>310</sup>

Police arrests of Black students also punished any form of resistance from Black students. For instance, in 1965, “a week after 17-year old Deborah Bracy and several other Black students integrated the high school in Wetumpka, Alabama, she was arrested, charged with assault, and jailed overnight for poking a White classmate with a pencil.”<sup>311</sup>

Moreover, desegregation coincided with the introduction of law enforcement officers to public schools during the mid-twentieth century to address rising racial and ethnic tensions associated with increasing populations of Black and Latinx Americans.



During that time, racist White Americans voiced the need for segregation to protect White **children** from Black students, who allegedly threatened White **children** with “behavioral **delinquency**, illegitimacy and venereal diseases” that were in large part “genetically determined.”<sup>312</sup> White, middle-class Americans blamed Black people for emerging social problems, including poverty and **crime**, and they \*146 “equated civil rights action with **crime** and **delinquency**.”<sup>313</sup> As observed by Kristin Henning, “[p]oliticians called for ‘law and order’ reforms in schools to address these problems.”<sup>314</sup> The rise of “policing in schools” during desegregation “gave school administrators a mechanism for preserving resources for White middle-class students and keeping Black **youth** in their place.”<sup>315</sup> Choosing police for this role was consistent with the view during the Civil Rights Movement of the 1960s that “police departments, which were largely restricted to White officers,” were the “defenders of racial hierarchy.”<sup>316</sup> The Equal Justice Institute observed that “[p]olice officers used violence and brutality to maintain racially biased social conditions.”<sup>317</sup>

#### ***D. Racism in Public Schools Today***

“Despite our very best intentions, racial bias is alive and well in schools.”-- Tracey A. Benson and Sarah E. Fiarman<sup>318</sup>

“African-Americans in [Denver Public Schools] are invisible, silenced and dehumanized, especially if you are passionate, vocal and unapologetically Black .... It feels a lot like being on a plantation ... there is a lot of fear and [B]lack folks are pitted against each other.”--Teacher in Denver Public Schools<sup>319</sup>

“Destruction of minds, bodies, and human rights, Stripped of bloodlines, whipped and confined ... We can't breathe.”--H.E.R.<sup>320</sup>

After justifying centuries of slavery and Jim Crow White dominance, racism persists in American public schools and structures the disproportionate school brutality of Black **children**.<sup>321</sup> News stories regularly document the use of racial slurs \*147 by some public school teachers and school administrators,<sup>322</sup> and a number of these officials remain employed at public schools.<sup>323</sup>

Most of the time, however, bias is hidden. Hidden or implicit bias includes unconscious bias, which is bias that is “past our conscious thoughts to the invisible thoughts that drive our behavior when we're not watching.”<sup>324</sup> Hidden bias also includes views that might seem so ordinary and acceptable that a person expresses them privately to friends or during a moment of frustration.<sup>325</sup>

Various observers and studies have described the hidden racism in public schools, revealing themes of White fear and suspicion of Black people; perceptions of Black **children** being older than they are; and beliefs in the intrinsic guilt and inferiority of Black **children** and the innocence of White **children**. Such biases justify the control of Black bodies. “They look at us like we don't know how to control ourselves and we just get angry quick,” a 17-year-old Black boy in North Carolina explained after being Tasered by a police officer at school, “It's not even like that. They **criminalize** us for no reason.”<sup>326</sup>

“Buried in our unconscious as Americans, we believe that [W]hite students are more worthy of probing questions, second chances, and deeper learning,” explain former public school principals Tracey Benson and Sarah Fiarman, “[and] we act in ways that are more committed to the success of White students .... [W]e're committed to treating [B]lack and [B]rown students with more suspicion, more pity, more wariness, lower expectations, and lower concern.”<sup>327</sup>

Similarly, social worker Resmaa Menakem explains:

[W]hite-body supremacy doesn't live in our thinking brains. It lives and breathes in our bodies .... The [W]hite body sees itself as fragile and vulnerable, and it looks to police bodies for its protection and safety .... It sees Black bodies as dangerously impervious to pain and needing to be controlled .... The [W]hite body often feels uncomfortable with ... Black self-management and self-agency ....

**\*148** The police body ... sees Black bodies as often dangerous and disruptive, as well as superhumanly powerful and impervious to pain. It feels charged with controlling and subduing Black bodies by any means necessary.<sup>328</sup>

Menakem asserts that, “the myth of White fragility has provided White bodies with the justification to act on their strongly felt need to dominate, control, and brutalize Black bodies.”<sup>329</sup> “White bodies *felt* that maintaining these power dynamics was essential to their survival,” he writes.<sup>330</sup> White fragility, he argues, has emboldened generations “to excuse and legitimize that harm” to Black bodies, “under the guise of providing safety for White bodies.”<sup>331</sup>

Multiple studies have described the hidden bias amongst public school employees and law enforcement officers. For instance, in 2015-2016, Denver Public Schools (DPS) commissioned a study to capture the experiences of African-American teachers.<sup>332</sup> Through interviews of 70 teachers and administrators, the study found that many teachers were “outright afraid of Black students,” and that fear promoted the disproportionate discipline of Black students.<sup>333</sup> Young White female teachers, who comprised the disproportionate majority of the DPS workforce, were particularly “fearful of Black students, which can keep them from forming meaningful relationships with many of those students.”<sup>334</sup>

“Many study participants provided examples of” White “students with similar offenses who” were “not disciplined as harshly as” Black students, researchers stated.<sup>335</sup> Study participants, for instance, recounted how a White student who threw chairs around the classroom was promoted “to a higher level math class because” educators deemed his actions to be a result of boredom, while the school suspended a Black student for simply balling his fists in the classroom.<sup>336</sup> The study also found that teachers who were “not [B]lack did not expect [B]lack students to do well in the classroom, which affect[ed] the perception and vigor with which teachers approached those students.”<sup>337</sup>

To study the mechanisms by which bias influences disciplinary and other decision-making, researchers Amanda Lewis and John Diamond spent five years gathering data and conducting interviews of students, parents, and teachers at a highly resourced, mid-western, integrated suburban school in a liberal community.<sup>338</sup> **\*149** The researchers observed that in teachers' daily interactions with students, being White “provided racial privileges not available to [B]lack students.”<sup>339</sup>

Specifically, they found the “tacit assumption that [B]lack students would misbehave and break rules more often than” White students and thus, “when students did break the rules, their behavior was interpreted differently based upon race.”<sup>340</sup> Educators perceived White students as having good intentions, and they often received a second chance to behave appropriately before receiving punishment.<sup>341</sup> White students received less punitive punishments, and they had more autonomy and control of their bodies with regards to being able to walk anywhere on campus without interruption.<sup>342</sup>

Meanwhile, teachers more actively monitored Black students, referred Black students for less serious and more subjective violations (e.g., perceived defiance), and gave Black students harsher punishments.<sup>343</sup> Campus police stopped Black students

more often than White students, and school staff commonly asked Black students “to present hall passes and punished them if they did not have them.”<sup>344</sup> School staff rarely questioned White students about hall passes.<sup>345</sup> The researchers concluded that their study revealed implicit, widespread beliefs in the inherent, threatening **criminality** of Black people, which manifested in control of the movement of Black bodies.<sup>346</sup>

Regarding gender, the researchers observed that “[B]lack girls' dress was more closely scrutinized than [W]hite girls' dress” in relation to the school discipline code.<sup>347</sup> To the researchers, this suggested that school staff assumed that “[B]lack female bodies [were] hypersexual while [W]hite female bodies [were] innocent.”<sup>348</sup> In summary, the researchers found that teachers operated with the best intentions, yet widespread cultural beliefs and racial stereotypes permeated teacher-student interactions.<sup>349</sup>

Separately, two laboratory experiments revealed similar dynamics. In one experiment, researchers asked teachers to rate the severity and appropriateness of sanctions for identical misbehaviors (classroom disturbance) from a Black boy and a White boy.<sup>350</sup> The teachers reviewed the disciplinary records of two fictional students, one with a stereotypically Black name and one with a stereotypically White name.<sup>351</sup> Teachers reported feeling more “troubled” by the offenses of the Black boy and were more likely to recommend severe punishment for that student after a \*150 second, similar infraction, compared to the White boy with the same record.<sup>352</sup> Researchers asked the teachers how certain they were of the **child's** race.<sup>353</sup> Teachers who reported being more certain were more likely to label the Black **child** as a “troublemaker” and report that that student's behavior was part of a pattern, rather than a single occurrence.<sup>354</sup>

In another laboratory experiment, researchers at Yale told early educators “to expect challenging behaviors (although none were present) while watching a video of preschoolers balanced by sex and race, engaging in typical activities.”<sup>355</sup> The researchers observed, “[t]eachers gazed longer at Black **children**, especially Black boys.”<sup>356</sup> In another task, educators “read a standardized vignette of a preschooler with challenging behavior” and were told the **child's** name, with the name randomized to imply that the **child** was either a “Black boy, Black girl, White boy, or White girl.”<sup>357</sup> The researchers noted that “[p]roviding family background information resulted in lowered severity ratings when teacher and **child** race matched, but resulted in increased severity ratings when their races did not match.”<sup>358</sup> The study suggested that White educators perceived Black **children** as being more suspicious and blameworthy of wrongdoing.<sup>359</sup>

Another study attempted to assess the extent to which bias actually influenced disciplinary decisions, compared to differences in behavior and differences between school racial and socioeconomic composition. The study followed 3,515 **children** prospectively and longitudinally from birth, collected their school records, and interviewed both parents of the **children** at birth and when each **child** was approximately 1, 3, 4, 9, and 15 years old.<sup>360</sup> Researchers collected school records and interviewed the teachers of each **child** about the **child's** behaviors and school achievement. The study documented a 21% racial gap in suspension: 28% of Black **children** in the study had been suspended versus 7% of the White **children** by the fourth grade.<sup>361</sup> Through statistical analysis, the researchers found that 46% of the racial gap in suspension was due to differences in treatment of the **children** by educators.<sup>362</sup> Twenty-one percent of the racial gap in suspension was due to differences in school racial and socioeconomic composition, and only 9% of the gap was due to differences in behavior between Black and White **children**.<sup>363</sup>

Studies involving undergraduate students and police officers also revealed implicit racial biases about the perceived innocence of Black **children**. In one study, researchers asked 123 undergraduate students to report the perceived innocence of \*151 White **children**, Black **children**, or **children** in general.<sup>364</sup> Participants completed a questionnaire asking questions such as, “how much are White 0- to 4-year-olds a danger to others?”<sup>365</sup> Researchers found that Black **children** of age 10 and older were seen as significantly less innocent than other **children**.<sup>366</sup>

Research also showed biases in perceptions of the age of Black **children**, called the “adultification” of Black **children**. For instance, a study involving 59 undergraduate students showed participants pictures of **children** of ages 10-17 who had reportedly committed a **crime**.<sup>367</sup> Participants were asked to estimate the age of the **child**.<sup>368</sup> Participants overestimated the age of Black felony suspects by 4.53 years above their actual age, meaning that Black boys were perceived as legal adults at roughly the age of 13.5, but the age of White **children** was not overestimated.<sup>369</sup> When the study was repeated with 60 police officers, researchers similarly found that police officers overestimated the age of Black **children** by 4.59 years, but they did not overestimate the age of White **children**.<sup>370</sup> Further, the older a **child** was perceived to be, the more culpable participants viewed them to be regarding the **crime** allegedly committed.<sup>371</sup> Researchers concluded that the racial disparity revealed implicit dehumanization of Black **children**, who are prematurely treated as adults.<sup>372</sup>

When researchers compared the police officer responses with personnel file data about their history of using force against **children**, they found that the implicit dehumanization of Black **children** was a significant predictor of racial disparities in the actual use of force against **child** suspects.<sup>373</sup> Specifically, the more officers implicitly viewed Black **children** as older than they were, the more they perceived such **children** to be more culpable, and the more they used force against Black **child** suspects relative to **child** suspects of other races.<sup>374</sup>

The implicit biases described by these studies are a serious threat to the well-being and education of Black **children**, and they explain racial disparities in school brutality, test scores, and graduation rates.<sup>375</sup> Such biases and the historical context of disproportionate school brutality explain why it would be naïve to think that the disproportionate school brutality faced by Black **children** is not intentional, even if the intention behind such brutality is implicit.

\*152 The fact that 80% of K-12 public school teachers are White, but more than half of students are non-White increases the gravity of the problem.<sup>376</sup> When only 7% of our nation's teachers are Black,<sup>377</sup> yet 16% of the student population is Black, the disproportionate use of violence against Black **children** sends multiple negative messages. Especially because such violence is enacted under seemingly race-neutral policies and practices, they reinforce negative stereotypes and dominant racial belief systems, and they strengthen racial hierarchies.<sup>378</sup> In particular, they amplify the view that Black **youth** are inherently suspect and dangerous while White **youth** are inherently innocent.<sup>379</sup> They also communicate that Black **children** do not belong, cannot succeed, and are not valued, respected, and cared for at school and society at large.<sup>380</sup>

Why does the legacy of slavery endure in the way that educators and police in schools treat Black **children**? As Michael Dumas theorizes, “[E]ven as slavery is no longer official state policy and practice, the slave endures in the social imagination, and also in the everyday suffering experienced by Black people.”<sup>381</sup> Although slavery has been outlawed outside of carceral environments for more than 150 years, disproportionate brutality against Black **children** persists in schools because “[t]here is no clear historical moment in which there was a break between slavery and acknowledgment of Black citizenship and Human-ness; nor is there any indication of a clear disruption of the technologies of violence--that is, the institutional structures and social processes--that maintain Black subjugation.”<sup>382</sup>

Disproportionate school brutality against Black **children** is a form of systemic racism that is “pervasively and deeply embedded in and throughout” the educational system, laws that structure interactions between educators, police, and students, “written and unwritten policies, entrenched practices, and established beliefs and attitudes that produce, condone, and perpetuate widespread unfair treatment of people of color.”<sup>383</sup> It is also a form of structural racism because it is “pervasively and deeply embedded” in and throughout public education systems and is scaffolded by the law, institutional practices and policies, and entrenched, racist norms.<sup>384</sup>

### \*153 III. The Dearth of Legal Structures Preventing Racially Discriminatory School Brutality

“The law did not protect us. And now, in your time, the law has become an excuse for ... furthering the assault on your body.”-- Ta Nehisi Coates<sup>385</sup>

#### A. Constitutional and Federal Legal Structures

Black bodies continue to be assaulted disproportionately by state agents in public schools because a dearth of legal structures exists to prevent racially discriminatory school brutality. Beginning with constitutional law, the U.S. Supreme Court has held that application of a facially race-neutral law in a way that “benefits or burdens one race more than another” does not violate the Equal Protection Clause of the Fourteenth Amendment unless such application has both a racially disproportionate impact and a racially discriminatory intent.<sup>386</sup> Disproportionality plus other evidence, such as evidence of “substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision” is required to establish a violation of the Equal Protection Clause.<sup>387</sup> The U.S. Supreme Court has concluded that an alternative approach would “render suspect” every law that treats each “class” of people differently, “however lacking in racial motivation and however otherwise rational the treatment might be.”<sup>388</sup> The court reasoned that the discriminatory impact of a facially neutral law is not a problem for courts to solve: the “calculus of effects [of a state law], the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.”<sup>389</sup>

Unfortunately, while courts have been willing to find racially disproportionate impact, they have been extremely reluctant to find racially discriminatory intent because a law “rationally may be said to serve a purpose the [g]overnment is constitutionally empowered to pursue,” as opposed to a racially discriminatory purpose.<sup>390</sup> Thus, parents and a federal agency are unlikely to win a claim alleging \*154 racially discriminatory school discipline based upon the Equal Protection Clause of the Fourteenth Amendment.<sup>391</sup>

Another potential way of addressing racial disparities in school brutality is through Title VI of the Civil Rights Act of 1964. Title VI prohibits institutions receiving federal financial assistance from discriminating against students on the basis of race, color, or national origin.<sup>392</sup> The protection extends to local educational agencies and to the entire course of the school disciplinary process.<sup>393</sup> The implementing regulation specifically prohibits a recipient of federal funding from “directly or through contractual or other arrangements, utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination” or “have the effect of defeating or substantially impairing accomplishment of the objectives of the program” on the basis of race, color, or national origin.<sup>394</sup>

The U.S. Department of Education Office for Civil Rights (OCR) amended this regulation after notice and comment in 2000 to ensure that it applied to both disparate impact discrimination and different treatment discrimination.<sup>395</sup> “Disparate impact” is criteria or methods of administration that have a significant disparate effect on individuals based on race, color, national origin, sex, disability, or age.<sup>396</sup> “Different treatment” discrimination is intentional discrimination based upon race, color, national origin, etc.<sup>397</sup>

Fortunately, OCR made clear that school districts violate Title VI when they implement facially neutral policies or practices that, “although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race.”<sup>398</sup> “Enforcement of a rule or application in a discriminatory manner is prohibited intentional discrimination,” OCR concluded, and “[w]hen similarly-situated students of different races are disciplined differently for the same offense, discrimination can be the only reasonable explanation for the \*155 different treatment.”<sup>399</sup> OCR has indicated

that intentional discrimination in the administration of student discipline can “take many forms,” and “can be proven even without the existence of a similarly-situated student.”<sup>400</sup> OCR has also asserted that if a school “contracts or arranges for other entities,” such as SROs, over which it “exercises some control, to be responsible for an aspect of a school's student safety or student discipline program, schools cannot divest themselves of responsibility for the non-discriminatory administration of school safety and student discipline.”<sup>401</sup>

This strong leadership is needed from OCR because the U.S. Supreme Court held in *Alexander v. Sandoval* that only federal agencies can enforce the implementing regulation prohibiting disparate impact discrimination.<sup>402</sup> Parents may only bring claims of racially discriminatory government action under Title VI when such claims are based upon intentional racial discrimination, and usually evidence of individual racial bias is unavailable or unrecognized as probative by factfinders.<sup>403</sup> Direct evidence of racially discriminatory intent includes derogatory comments, such as racial slurs, made by a defendant in a plaintiff's presence.<sup>404</sup>

Requiring parents to prove intentional racial discrimination when the state brutalizes Black **children** more than it brutalizes White **children** creates an unnecessary barrier to justice. Intent is often hidden, and what matters is the disproportionate harm to Black **children**. As Phillip Atiba Goff observes, “A definition [of racism] that cares more about the intentions of abusers more than the harms to the abused ... is itself racist.”<sup>405</sup> He posits that “[w]hen we change the definition of racism from attitudes to behaviors, we transform that problem from impossible to solvable.”<sup>406</sup>

OCR, with the U.S. Department of Justice (“DOJ”) Educational Opportunities Division, may bring Title VI claims that allege that a school's discipline practices have a racially disparate impact,<sup>407</sup> but OCR and DOJ lack sufficient resources to adequately enforce Title VI, and past enforcement actions have not focused upon disproportionate use of physical force upon Black **children**. The OCR website features 60 enforcement actions based on Title VI against public schools since October 11, 2012, but no actions explicitly focused upon racially discriminatory \*156 application of physical force upon Black **children**.<sup>408</sup> The only actions that related to school brutality regarded racially disproportionate arrests, issuance of law enforcement citations, and referrals to SROs at three school districts.<sup>409</sup> In summary, constitutional and federal legal structures offer little support with which parents can bring successful claims of racially discriminatory school brutality.

### ***B. State Legal Structures***

State legal structures to end racially discriminatory school brutality are virtually nonexistent. No states other than California and Hawaii have statutory law specifically protecting **children** from discriminatory school discipline or, more specifically, school brutality.<sup>410</sup> Hawaii requires the review of policies and procedures on the use of restraint, which involves reviewing data on the frequency of use for student populations characterized by race.<sup>411</sup> The review must determine whether policies for restraint are being applied consistently and with fidelity; whether they protect students; and whether they comply with state law.<sup>412</sup>

California requires its public schools to meet “an affirmative obligation to combat racism, sexism, and other forms of bias.”<sup>413</sup> California's education code makes clear that “[h]arassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity” as guaranteed by the state and U.S. constitutions.<sup>414</sup> California law allows observers and victims of discrimination to enforce rights by \*157 allowing any individual or interested third party to file a complaint with a local educational agency alleging unlawful discrimination, harassment, intimidation, or bullying.<sup>415</sup>

Local California educational agencies must investigate complaints while protecting the complainant's identity and protecting the complainant from retaliation.<sup>416</sup> After collecting evidence, a local educational agency must issue a written Decision, including

findings of fact, conclusion of law, and corrective actions, if warranted.<sup>417</sup> The complainant is given notice of the right to appeal to the California Department of Education.<sup>418</sup> Complainants may obtain direct intervention by the state department of education if they allege facts, verified by the state department of education, that he or she would suffer immediate and irreparable harm resulting from the application of an illegal, district-wide policy.<sup>419</sup> If a local educational agency is determined to have violated the law, failure of that agency to take corrective action can lead the California Department of Education to withhold state or federal fiscal support, place the agency onto probation for future fiscal support, or proceed in court for an order compelling compliance.<sup>420</sup>

Only one state, California, has statutory law prohibiting discrimination in schools. Such law requires local educational agencies to “adopt a policy that prohibits discrimination, harassment, intimidation, and bullying based [upon] race [and other] perceived characteristics,” and the policy must apply to all acts related to school activity.<sup>421</sup> California law also provides a process for receiving and investigating complaints of discrimination, harassment, intimidation, and bullying based upon race and other perceived characteristics.<sup>422</sup> Appeals of administrative decisions can be made.<sup>423</sup> California law also requires that complainants are protected from retaliation.<sup>424</sup> Thus, only California and Hawaii provide state legal structures that help to prevent the discriminatory application of school brutality.

### *C. Laws Enabling School Brutality and Protecting Adults*

Meanwhile, school brutality occurs in most states because all states allow some form of school brutality to occur, whether it is corporal punishment, seclusion, restraint when a **child** is not in danger of seriously injuring self or others, inappropriate handcuffing, or police brutality in public schools.<sup>425</sup> Specifically, twenty two states explicitly permit corporal punishment in schools, explicitly provide immunity for school employees to use corporal punishment, or do not regulate it; only four states ban seclusion and only permit restraint when a student is **\*158** “in imminent danger of physically harming themselves or others;” and only six states have statutes or regulations that function to reduce the likelihood of school brutality by law enforcement officers.<sup>426</sup> State and federal law have never sufficiently protected **children** from school brutality because “[l]ayers of legal structures protect government employees, rather than **children**, from violence and liability.”<sup>427</sup> Layers of legal structures ensure that the health and success of **children**, especially Black **children**, remain subordinate to that of adults in public schools.

These layers include continued case law support for the outdated tort privilege enabling teachers to physically punish **children**; a patchwork of inconsistent and gap-filled statutes regarding corporal punishment, seclusion, and restraint; statutory exclusions of school brutality from **child** abuse definitions; a lack of statutory law limiting police action in schools; inaccurate and incomplete reporting on school brutality incidents; qualified immunity and statutory indemnification for school corporal punishment; and weak constitutional protections.<sup>428</sup>

Unless every state effectively bans all forms of school brutality, school brutality will continue, with Black **children** bearing its brunt.<sup>429</sup>

### **III. Legal Solutions**

Solutions to disproportionate school brutality include giving Black **children** and their parents the right to bring disparate impact claims under Title VI of the Civil Rights Act of 1964; new private rights of action under laws that prohibit or regulate corporal punishment, seclusion, restraint, and police brutality in school; and expanded tort and **criminal** law protections with which they can protect themselves from discriminatory school brutality.<sup>430</sup> The best solution, however, is to effectively prohibit and

thereby end all forms of school brutality--corporal punishment, seclusion, and restraint of any **child** who is not in imminently in danger of causing serious physical harm upon self or others, inappropriate handcuffings, and other forms of police brutality--in public schools. The enormous strength of slavery's legacy in American society, described above, indicates that only when no **child** experiences school brutality will disproportionate school brutality upon Black **children** end.

Although school discipline has traditionally been a function of local and state governments,<sup>431</sup> federal legislation to end corporal punishment in all states would be **\*159** an ideal way to end the disproportionate corporal punishment of Black **children**. For instance, passage of the Protecting Our Students in Schools Act (POSSA) and the Keeping All Students Safe Act (KASSA) would significantly reduce such treatment of Black **children**.<sup>432</sup>

POSSA defines corporal punishment as “a deliberate act which causes the student to feel physical pain for the purpose of discipline, including an act of physical force.”<sup>433</sup> POSSA prohibits the corporal punishment of any student by “[school] program personnel, law enforcement officers, and school security guards under any program receiving federal financial assistance.”<sup>434</sup> It provides a private right of action to students who have experienced corporal punishment and their parents; students or parents can file a civil action in federal or state court “for attorneys' fees, expert fees, injunctive relief, and compensatory damages.”<sup>435</sup> It also authorizes the U.S. Attorney General to initiate a civil action against state agents who violate the law after receiving a complaint in writing signed by a parent.<sup>436</sup> Further, POSSA authorizes the U.S. Department of Education's Office of Civil Rights to enforce the law, including by withholding federal payments to educational programs that violate the law.<sup>437</sup> POSSA provides grants to state educational agencies to “improve school climate and culture by implementing positive behavioral interventions and supports and other non-exclusionary and aversive discipline practices.”<sup>438</sup>

KASSA prohibits the seclusion or restraint of any student by a law enforcement officer, school security guard, or any school staff in any program receiving federal financial assistance.<sup>439</sup> The only exception to the prohibition is restraint when the student's behavior poses an imminent danger of serious physical injury to the student or less restrictive interventions would be ineffective in stopping such imminent danger.<sup>440</sup> KASSA also provides a private right of action to any student who has been “subjected to unlawful seclusion or restraint” or the parent of such student.<sup>441</sup> The action would be civil and it could be brought against the program, but not any individual school staff person, under which the violation is alleged to occur.<sup>442</sup> The listed possible remedies include “compensatory relief, declaratory judgment, **\*160** injunctive relief, attorneys' fees, and expert fees.”<sup>443</sup> KASSA also requires immediate notification about a restraint to a student's parent.<sup>444</sup> Passage of KASSA and POSSA would help to save the lives of Black students and promote their educational achievement.

## Conclusion

“It does students no good to be able to go to school if their school is a place where they can be abused and traumatized with impunity by the administration.”--Mikki Kendall<sup>445</sup>

As evidenced by our nation's desensitization to it and the continued legacy of slavery that perpetuates it, disproportionate school brutality is a type of systemic racism that is “so embedded in systems that it often is assumed to reflect the natural, inevitable order of things.”<sup>446</sup> Supporting this status quo are constitutional, federal, and state law, structures, and resources to enforce those laws, including the limited resources of the DOJ to enforce Title VI of the Civil Rights Act of 1964, all of which are insufficient to stop disproportionate school brutality. Modern anti-discrimination law must move away from unduly focusing on intentional discrimination by individuals and instead address systemic racism, intentional or not, which “places people of color at a disadvantage in multiple domains affecting health in ways often more difficult to recognize than explicit interpersonal racism.”<sup>447</sup>



Disproportionate school brutality is a type of state-inflicted racial inequity that maintains the socioeconomic and health harms of “overtly discriminatory practices, policies, laws, and beliefs” established during slavery.<sup>448</sup> Disproportionate school brutality operates largely invisibly and often unconsciously because it is entrenched in historical systems and structures that still have power, including White supremacist notions of Black inferiority and the traditional belief that corporal punishment of **children** is acceptable.<sup>449</sup> This means that disproportionate school brutality will continue to subjugate Black Americans unless our society sees it as a problem and eliminates it. In particular, as public school teachers and administrators, education advocates, and lawmakers increasingly receive training to become trauma-informed,<sup>450</sup> they must remember that schools themselves can inflict racialized trauma, and such trauma must end.

\***161** As the U.S. Supreme Court held in *Wisconsin v. Yoder*, “[t]he **child** is not the mere creature of the State.”<sup>451</sup> When a state treats public school **children** in a way that is unsafe, not educational, and harms their health and development, the state unreasonably interferes with the fundamental liberty rights of parents, guaranteed by the Fourteenth Amendment’s due process clause, to direct their **children’s** upbringing and education.<sup>452</sup> It is time to liberate Black parents and their **children** from the legacy of slavery by ending fear that Black **children’s** bodies will be violated by public schools.<sup>453</sup>

#### Footnotes

<sup>a1</sup> Assistant Professor of Law and Academic Director of the Health Law Program, Loyola University New Orleans College of Law; 2021-2022 Visiting Assistant Professor, University of Memphis Cecil C. Humphreys School of Law; 2019-2020 Visiting Assistant Professor and Director of the **Juvenile** and Special Education Law Clinic at the University of the District of Columbia David A. Clarke School of Law (UDC); 2017-2019 Clinical Teaching Fellow at the Health Justice Alliance clinic at Georgetown University Law Center (GULC); LL.M., GULC; LL.M, UDC; J.D., George Washington University Law School; M.D., Johns Hopkins University School of Medicine; B.A., Yale College. The author’s ideas developed from her work in advocating for special education clients. The author would like to thank Phil Lee, Margaret Hu, Margaret Y.K. Woo, Shoba Sivaprasad Wadhia, Yael Cannon, Katy Ramsey Mason, Deborah Epstein, Emily Suski, Mitch Crusto, Matthew Fraidin, Joseph Tulman, Ronnie Gipson, and Howard Pryor for their support. This Article was presented as a work in progress at the 2021 Inaugural Workshop for Asian American Women in the Legal Academy and the 2021 **Child** Law and Rights Writers’ Workshop.

<sup>2</sup> “Black” is capitalized in this Article because, as Michael Dumas observes, “Black is ... a self-determined name of a racialized social group that shares a specific set of histories, cultural processes, and imagined and performed kinships.” Michael Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55 *Theory Into Prac.* 11, 12-13 (2016). Because White people similarly appear to claim their own racialized social group with similar characteristics, “White” is also capitalized. *But see id.* at 13.

<sup>3</sup> *See, e.g.*, Robin Stein, Alexander Cardia & Natalie Reneau, *71 Commands in 13 Minutes: Officers Gave Tyre Nichols Impossible Orders*, N.Y. Times (Jan. 29, 2023), <https://www.nytimes.com/2023/01/29/us/tyre-nichols-video-assault-cops.html> [<https://perma.cc/4RYU-86KE>] (stating, “Police officers unleashed a barrage of commands that were confusing, conflicting and sometimes impossible to obey .... When Mr. Nichols could not comply--and even when he managed to--the officers responded with escalating force.”).

<sup>4</sup> *See* Nicole Tuchinda, *Ending School Brutality*, 28 *Wm. & Mary J. of Race, Gender & Soc. Just.* 617, 622, 643 (2022) (“Similar to police brutality, school brutality is the excessive and unwarranted use of force by state officials upon ordinary citizens.”); Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 *PNAS* 16793, 16794 (2019) (finding that “Black men are about 2.5 times more likely to be killed by police over the life course than are [W]hite men.”); *1,110 people have been shot and killed by police in the past 12 months*, Wash. Post (Aug. 18, 2023, 12:45 PM), [https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk\\_inline\\_manual\\_8](https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_manual_8) [<https://perma.cc/28DY-ZS7J>] (finding that Black Americans are killed by police at more than twice the rate of White Americans).

- 5     *See* Tuchinda, *supra* note 4, at 620.
- 6     Evie Blad, *New Scrutiny for School Police After Violent Arrest of S.C. Student*, Education Week (Nov. 2, 2015), <https://www.edweek.org/leadership/new-scrutiny-for-school-police-after-violent-arrest-of-s-c-student/2015/11> [<https://perma.cc/W4JR-5ZQY>]; Cheyenne Roundtree, *School Officer Who Slammed Black Teen to Ground in Viral Video Still Thinks He's the Victim*, Daily Beast (Mar. 17, 2021), <https://www.thedailybeast.com/school-officer-who-slammed-black-teen-to-ground-in-viral-video-still-thinks-hes-the-victim> [<https://perma.cc/BBL9-86BM>].
- 7     On These Grounds (Chico Colvard, Jeff Consiglio & Ariana Garfinkel 2021) (transcript on file with Chico Colvard, Jeff Consiglio & Ariana Garfinkel) (Shakara was attempting to email her resource teacher for help on a math test using a Chromebook computer. Her math teacher thought she was using a cell phone inappropriately and he asked repeatedly for a phone, but Shakara kept saying that she did not have a cell phone. Eventually, the math teacher called an SRO to remove her from the classroom.).
- 8     Trevor Kapp & Aidan Gardiner, *Principal Arrested for Cornering 7-Year-Old Boy and Beating Him, Mom Says*, dnainfo (Apr. 19, 2017), <https://www.dnainfo.com/new-york/20170419/east-new-york/principal-assault-student-ps-202-ernest-s-jenkyns-nypd/> [<https://perma.cc/B8SK-ZWW4>]; Mary McDonnell, Ben Chapman, Thomas Tracy & Rich Schapiro, *Brooklyn Principal Charged with Assault for Punching, Kicking 7-Year-Old Student Who Slapped School Staffer*, Daily News (Apr. 19, 2017), <https://www.nydailynews.com/new-york/nyc-crime/brooklyn-principal-beats-7-year-old-student-slapped-teacher-article-1.3073806> [<https://perma.cc/4JBW-FLY9>].
- 9     Luke Darby, *Florida Police Officer Arrested and Handcuffed a 6-Year-Old Black Girl for a Tantrum in Class*, GQ (Sept. 23, 2019), <https://www.gq.com/story/six-year-old-black-girl-arrested-for-a-tantrum> [<https://perma.cc/2HZZ-XYLT>].
- 10    Joshua McNichols, *Mother of Boy Locked in 'Cage' at Seattle School Files Lawsuit*, Kuow (May 10, 2021), <https://www.kuow.org/stories/mother-of-boy-locked-in-cage-at-seattle-school-files-lawsuit> [<https://perma.cc/8QKN-Y9DN>].
- 11    *Id.*; Ann Dornfeld, *Locked in 'The Cage.' Report Finds Disturbing Discipline Measures at Seattle School*, Kuow (Dec. 5, 2020), <https://www.kuow.org/stories/locked-in-the-cage-report-finds-disturbing-discipline-measures-at-seattle-school> [<https://perma.cc/XU95-NCL7>].
- 12    Brian Ross, *Deadly Discipline? Students Hurt, Dying After Being Restrained*, ABCnews (Nov. 29, 2012), <https://abcnews.go.com/video/amp/embed?id=17843767&storyId=18892197&storyHeadline=New%20Law%20Targets%20Padded%20Rooms%20for%20Autistic%20Kids&contentType=story&placement=featured> [<https://perma.cc/T2RC-RM56>].
- 13    Roundtree, *supra* note 6.
- 14    Jenny Jarvie, *Girl Thrown from Desk Didn't Obey Because the Punishment Was Unfair, Attorney Says*, L.A. Times (Oct. 29, 2015), <https://www.latimes.com/nation/la-na-girl-thrown-punishment-unfair-20151029-story.html> [<https://perma.cc/NX6C-MPZM>]; On These Grounds, *supra* note 7.
- 15    Roundtree, *supra* note 6.
- 16    *Id.*
- 17    *Id.*; On These Grounds, *supra* note 7.

- 18 Andrea Ball, Dian Zhang & Mary Claire Molloy, *'She Looks Like a Baby': Why Do Kids As Young As 5 or 6 Still Get Arrested at Schools?*, Ctr. for Pub. Integrity (Feb. 10, 2022), <https://publicintegrity.org/education/criminalizing-kids/young-kids-arrested-at-schools/> [<https://perma.cc/L9D2-3DUH>].
- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 *Id.*
- 23 Dornfeld, *supra* note 11.
- 24 *Id.*
- 25 *Id.*
- 26 *Id.*
- 27 Tuchinda, *supra* note 4, at 639-643, 684.
- 28 *Id.* at 643.
- 29 *Id.*
- 30 *Id.* at 620; Sarah Font & Elizabeth Gershoff, *Contextual factors associated with the use of corporal punishment in U.S. public schools*, 79 **Child. & Youth** Servs. Rev. 408, 413 (2017); Rebecca Epstein, Erin Godfrey, Thalia González & Shabnam Javdani, *Data Snapshot: 2017-2018 National Data on School Discipline by Race and Gender*, Geo. L. Ctr. on Poverty & Ineq. 1, 2-3 (2020), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/12/National-Data-on-School-Discipline-by-Race-and-Gender.pdf> [<https://perma.cc/U8UG-UTLR>]; *cf.* U.S. Dep't of Educ., Off. for C.R., C.R. Data Collection, *National Data: School Discipline and School Climate*, <https://civilrightsdata.ed.gov/profile/us?surveyYear=2020> (last visited Nov. 16, 2023) (data from the 2020-2021 pandemic school year reveals that a non-disabled Black **child** was 5.05 times more likely to be mechanically restrained than a non-disabled White **children**, and a non-disabled Black **children** was 1.88 times more likely to be physically restrained than a non-disabled White **child**).
- 31 Tuchinda, *supra* note 4, at 625.
- 32 U.S. Comm'n on C.R., *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities* 10 (July 2019), <https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf> [<https://perma.cc/4PUS-ZPBW>]; U.S. Dep't of Just., C.R. Div. & U.S. Dep't of Educ., Off. of C.R., *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* 4 (Jan. 8, 2014), <https://www2.ed.gov/ocr/letters/colleague-201401-title-vi.pdf> [<https://perma.cc/PX6U-6C4W>]; Lloyd D. Johnston, Richard A. Miech, Patrick M. O'Malley, Jerald G. Bachman, John E. Schulenberg, & Megan E. Patrick, *Monitoring the Future: National Survey Results on Drug Use, 1975-20198*, Institute for Social Research, University of Mich.gan, 50 (Jan. 20, 2019), <https://files.eric.ed.gov/fulltext/ED604018.pdf> [<https://perma.cc/N8TD->

XASJ]; see Richard Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 Rev. of Educ. Rsch. 752, 760 (2018).

33 See, e.g., Roundtree, *supra* note 6.

34 Paula Braveman, Elaine Arkin, Dwayne Proctor, Tina Kauh & Nicole Holm, *Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling*, 41 Health Aff. 171, 172 (2022).

35 *Id.*

36 Cf. Charles Blow, Opinion, *Rage is the Only Language I Have Left: Society Has Become Horribly Desensitized to Police Killings of Black Men*, N.Y. Times (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/opinion/us-police-killings.html> [<https://perma.cc/YR6J-D8D2>] (describing the disproportionate killing of Black men by police, Blow writes, “Our systems of law enforcement, **criminal** justice and communal consciousness have adjusted themselves to a banal barbarism.”); G. Wayne Dowdy, *Enslavement in Memphis 11* (2021) (“The legacy of slavery, and the racism used to justify its existence, continues to weigh heavily on our society .... [O]ne of the most pernicious [reasons for this] is our refusal to accept the truth of slavery's barbarity and reconcile it with our belief that all humans are created equal.”).

37 See, e.g., Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families--and How Abolition Can Build a Safer World* (1st ed. 2022) (describing how the **child** welfare system treats Black families); Paul Butler, *Chokehold*, at 81-115 (2018) (describing law enforcement violence upon Black men); Michelle Alexander, *The New Jim Crow 185-186* (2012) (describing mass incarceration of Black people); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) (describing governmental residential segregation of Black people); Kristin Henning, *The Rage of Innocence: How America Criminalizes Black Youth* (2021) (describing the **criminalization** of Black **children**).

38 Ai-Jen Poo, *Foreword* to Staci Haines, *The Politics of Trauma*, at x (2019) (“For many of us--the events that cause trauma are deeply rooted in our culture and society, reinforced by a set of beliefs, norms, and policies that are structural and hierarchical in nature.”).

39 Nathern Okilwa, Muhammad Khalifa & Felecia Briscoe, *The School to Prison Pipeline: The Role of Culture and Discipline in School 3-4* (2017) (“STPP has come to signify the pervasive pattern of students being pushed out of the mainstream educational contexts into increased contact or involvement with the **juvenile** justice system.”).

40 See, e.g., *id.* at 8-10.

41 Ronald L. Jackson II, *Scripting the Black Masculine Body* 12 (Ronald L. Jackson II ed., 2006).

42 Isabel Wilkerson, *Caste* 18 (2020).

43 *Id.*

44 See Ta-Nehisi Coates, *Between the World and Me* 33 (2015) (“[A] great number of educators spoke of ‘personal responsibility’ in a country authored and sustained by a **criminal** irresponsibility. The point of this language of ‘intention’ and ‘personal responsibility’ is broad exoneration. Mistakes were made. Bodies were broken. People were enslaved. [But w]e meant well.”).

45 See *id.* at 30 (asserting that America's “primary language” is violence).

- 46 *Cf. id.* at 44 (2015) (asserting “the larger culture's erasure of [B]lack beauty was intimately connected to the destruction of [B]lack bodies” and stating that [B]lack history was not taught in public schools because, according to historians, “we were inferior, which is to say our bodies were inferior. And our inferior bodies could not possibly be accorded the same respect as those that built the West.”); bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* 4 (1994) (stating that desegregation placed Black students in White schools where Black students “were always seen as interlopers, as not really belonging”).
- 47 *See* Paolo Freire, *Pedagogy of the Oppressed* 45 (2018) (“lovelessness ... lies at the heart of the oppressors' violence”).
- 48 *See* Staci Haines, *The Politics of Trauma* 298-09 (2019); Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, 95 *N.Y.U. L. Rev.* 766, 794-95 (June 2020) (describing how trauma typically occurs when a person is faced with an intense, frightening event or a set of circumstances that are physically or emotionally harmful or life threatening).
- 49 Jackson II, *supra* note 41, at 12 (“[I]t is only logical that any attempt to divorce the concept of race from body politics leaves the analysis incomplete.”).
- 50 Coates, *supra* note 44, at 8.
- 51 *See generally*, *Resistance to School Desegregation*, Equal Just. Initiative (Mar. 1, 2014), <https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/> (stating that “[m]any southern communities resisted integration with protests and violence”).
- 52 Tuchinda, *supra* note 4, at 620, 622.
- 53 Racism is “the relegation of people of color to inferior status and treatment based on unfounded beliefs about innate inferiority, as well as unjust treatment and oppression of color, whether intended or not.” Braveman, Proctor, Arkin, Kauh & Holm, *supra* note 34, at 171.
- 54 *See* **Child** Slavery Before and After Emancipation: An Argument for **Child**-Centered Slavery Studies 4 (Anna M. Duane ed., 2017) (asserting, “undertheorized assumptions about **childhood** dependence and adult power have allowed structures of enslavement to persist, even as laws across the globe strictly forbid chattel slavery”).
- 55 *See* Elizabeth Tobin-Tyler & Joel B. Teitelbaum, *Essentials of Health Justice: A Primer*, at ix (2019) (stating, “Health equity means that everyone has a fair and just opportunity to be healthy.”); Yael Cannon & Nicole Tuchinda, *Critical Perspectives to Advance Educational Equity and Health Justice*, 50 *J. L. Med. & Ethics* 776, 778, 781, 782, 784 (2022).
- 56 Cannon & Tuchinda, *supra* note 55, at 781; *see* Tuchinda, *supra* note 4, at 620-21; Tuchinda, *supra* note 48, at 787-88; *How Racism Can Affect **Child** Development*, Ctr. on the Developing **Child**, Harv. Univ., <https://developingchild.harvard.edu/resources/racism-and-eed/> [<https://perma.cc/4925-EAMW>].
- 57 *See* Tobin-Tyler & Teitelbaum, *supra* note 55, at xi; Nat'l Academies of Sci., *Communities in Action: Pathways to Health Equity* 100-01 (2017).
- 58 Tuchinda, *supra* note 4, at 633-34 (indicating that community violence is recognized as an ACE); Chris Hacker, Aparna Zalani, Jose Sanchez & Stephen Stock, *Handcuffs in Hallways: Hundreds of elementary students arrested at U.S. schools*, CBS News (Dec. 9, 2022, 7:06 PM), <https://www.cbsnews.com/news/hundreds-of-elementary-students-arrested-at-us-schools/> [<https://perma.cc/FS8U-H84K>] (stating that all of the parents of elementary school **children** who had been arrested at school involved in the article said their **children** were “permanently traumatized by these experiences.”).

- 59 Braveman, Arkin, Proctor, Kauh & Holm, *supra* note 34, at 172.
- 60 See Tobin-Tyler & Teitelbaum, *supra* note 55, at ix (“[h]ealth equity means that everyone has a fair and just opportunity to be healthy.”).
- 61 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).
- 62 See Monique W. Morris, *Pushout: The Criminalization of Black Girls in Schools* 26 (The New Press, 2016) (“Sadly, many schools are dominant structures, sustaining our society’s racial and gender hierarchy.”); hooks, *supra* note 46 (describing how education at desegregated schools “merely strives to reinforce domination”).
- 63 See *Brown*, 347 U.S. at 493 (emphasis added) (stating that the opportunity of education “where the state has undertaken to provide it, is a right which must be made available to all on equal terms”).
- 64 *Id.* at 494.
- 65 *Id.*
- 66 See Tuchinda, *supra* note 4, at 663-79 (2022).
- 67 See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that only federal agencies can bring claims of racially disparate impact against state governments under Title VI of the Civil Rights Act of 1964).
- 68 Melinda D. Anderson, *Where Teachers Are Still Allowed to Spank Students*, *Atl.* (Dec. 15, 2015), <https://www.theatlantic.com/education/archive/2015/12/corporal-punishment/420420/> [<https://perma.cc/RJ5A-7USW>].
- 69 K. Ward Cummings, Op-Ed, *Slavery Left a Legacy of Corporal Punishment on Black Communities*, *Baltimore Sun* (Feb. 4, 2021), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0205-slavery-corporal-punishment-20210204-rbdsaywj5vgx3a6gansdq6tf6y-story.html> [<https://perma.cc/V8WR-QMLB>].
- 70 See Tuchinda, *supra* note 4, at 625.
- 71 *Id.* at 617, 620.
- 72 See Madeline Will, *The Teaching Profession in 2017 (in Charts)*, *Education Week* (Dec. 20, 2017), <https://www.edweek.org/leadership/the-teaching-profession-in-2017-in-charts/2017/12> [<https://perma.cc/NN98-XTFV>] (80% of K-12 public school teachers are White); U.S. Bureau of Lab. Stat., *Occupational Outlook Handbook: High School Teachers* (Jan. 10, 2023), <https://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm> (showing the average high school teacher salary is \$61,820 a year); see also Kamaron McNair, *Here’s How Much Money It Takes To Be Considered Middle Class in 20 Major U.S. Cities*, *CNBC* (Jan. 2, 2023), <https://www.cnb.com/2023/01/02/middle-class-income-in-major-us-cities.html#:~:text=Pew%20defines%20%C2%middle%20class%22%20as,technically%20in%20the%20middle%20class> (stating that American middle class salary typically ranges from \$47,189 to \$141,568); cf. Haines, *supra* note 48, at 8 (describing how the trauma of child sexual abuse is “early training” in “power-over, in victim and offender, in coercion, in silencing, and in adapting to violence and domination.” Such training is “related to all systems of oppression.”).

73 Tuchinda, *supra* note 4, at 625.

74 *See id.* at 625-27; Morris, *supra* note 62, at 3 (2016).

75 Tuchinda, *supra* note 4, at 627.

76 *Id.* at 620, 622. Definitions of euphemisms for school brutality are as follows:

Corporal punishment is typically defined as the intentional hitting or paddling or other use of force to inflict physical pain on students for purposes of discipline or control. Seclusion is the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving .... Restraint, as defined by the U.S. Department of Education, is a “personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely.”

*Id.* at 626.

77 *Id.* at 630-31.

78 *Id.* at 621, 622, 632, 635.

79 *Id.* at 635.

80 *Id.* at 622, 635.

81 *Id.* at 630. Ukeru is a restraint free “system based on receiving information through someone's actions.” *Who We Are*, uKeru, <https://www.ukerusystems.com/who-we-are/#:~:text=Ukeru%3A%C20the%C20Japanese%C20word%20meaning,information%20communicated%C20through%C20someone's%20actions>. [<https://perma.cc/2JQJ-XLYT>].

82 Tuchinda, *supra* note 4, at 625-28; Tyler Whittenberg, Russell Skiba, Britany Beauchesne & Angela Groves, Advancement Project & All. for Educ. Just., #AssaultAtSpringValley: An Analysis of Police Violence Against Black and Latine Students in Public Schools 8 (2022), <https://policefreeschools.org/wp-content/uploads/2022/12/AP-AssaultAt-Report-V4-120922.pdf> [<https://perma.cc/3QKH-C2FJ>].

83 Tuchinda, *supra* note 4, at 625-26; Tuchinda, *supra* note 48, at 770, 798-802.

84 Tuchinda, *supra* note 4, at 632; *see* Hacker, Zalani, Sanchez & Stock, *supra* note 58.

85 Tuchinda, *supra* note 4, at 632.

86 Tuchinda, *supra* note 4, at 621-22, 633-34; Tuchinda, *supra* note 48, at 770-771, 795.

87 Tuchinda, *supra* note 48, at 788.

88 Bruce Perry & Oprah Winfrey, *What Happened to You? Conversations on Trauma, Resilience & Healing* 104 (Flatiron Books 1st ed. 2021).

- 89 Tuchinda, *supra* note 48, at 789.
- 90 Tuchinda, *supra* note 4, at 644.
- 91 *See id.* at 632-33.
- 92 *Id.* at 632-33.
- 93 *Id.* at 655.
- 94 *Id.*
- 95 *Id.* at 656.
- 96 *See id.* at 671-72.
- 97 *See* Corey Mitchell, *Schools Underreport How Often Students are Restrained or Secluded, GAO Finds*, Education Week (June 18, 2019), <https://www.edweek.org/leadership/schools-underreport-how-often-students-are-restrained-or-secluded-gao-finds/2019/06> [<https://perma.cc/R55H-SZHE>] (the U.S. Government Accountability Office found that seclusion and restraint are chronically underreported); *see also* Anderson, *supra* note 68 (reporting corporal punishment incidents have declined in recent years, but the practice is still widely in use).
- 98 Mark Keierleber, *Kids Keep Getting Hit at School, Even Where Corporal Punishment is Banned*, The 74 (May 19, 2021), <https://www.the74million.org/article/kids-keep-getting-hit-at-school-even-where-corporal-punishment-is-banned/> [<https://perma.cc/J5Q8-GQ7C>].
- 99 Mitchell, *supra* note 97.
- 100 *See id.*; Geoff Ward, Nick Petersen, Aaron Kupchik & James Pratt, *Historic Lynching and Corporal Punishment in Contemporary Southern Schools*, 68 Soc. Probs. 41, 58 (Feb. 2021) (stating that incidents of corporal punishment are underreported); Keierleber, *supra* note 98 (quoting Miriam Rollin, a director at the National Center for **Youth** Law, saying that corporal punishment reports are likely significant undercounts); *see, e.g.*, Jenny Abamu & Rob Manning, *Desperation and Broken Trust When Schools Restrain Students or Lock Them in Rooms*, NPR (June 5, 2019, 5:00 AM), <https://www.npr.org/2019/06/05/726519409/desperation-and-broken-trust-when-schools-restrain-students-or-lock-them-in-room> [<https://perma.cc/S7AU-9LBA>] (reporting incidents of restraint and seclusion are on the rise in Vancouver, WA).
- 101 Hacker, Zalani, Sanchez & Stock, *supra* at note 58.
- 102 Eesha Pendharkar, *Students of Color Disproportionately Suffer from Police Assaults at School, Says Report*, Education Week (Jan. 13, 2023), <https://www.edweek.org/leadership/students-of-color-disproportionately-suffer-from-police-assaults-at-school-says-report/2023/01>.
- 103 Whittenberg, Skiba, Beauchesne & Groves, *supra* note 82, at 6.



- 104 Font & Gershoff, *supra* note 30, at 408, 413.
- 105 U.S. Dep't of Educ., Off. for C.R., C.R. Data Collection, *National Data: School Discipline and School Climate*, <https://civilrightsdata.ed.gov/profile/us?surveyYear=2020> (last visited Nov. 16, 2023).
- 106 Dick Startz, *Schools, Black Children, and Corporal Punishment*, Brookings (Jan. 14, 2016), <https://brookings.edu/blog/brown-center-chalkboard/2016/01/14/schools-Black-children-and-corporal-punishment/> [<https://perma.cc/RL5T-JLE9>].
- 107 *Id.*
- 108 Dan Losen, Amir Whitaker, Jamie Kizzire, Zoe Savitsky & Katherine Dunn, *The Striking Outlier: The Persistent, Painful, and Problematic Practice of Corporal Punishment in Schools*, S. Poverty L. Ctr. & The UCLA Ctr. For C.R. Remedies 9 (June 11, 2019), [https://www.splcenter.org/sites/default/files/com\\_corporal\\_punishment\\_final\\_web\\_0.pdf](https://www.splcenter.org/sites/default/files/com_corporal_punishment_final_web_0.pdf) [<https://perma.cc/BGA6-NJ7U>] (data from 2013-14 year).
- 109 *Id.* at 9-10; Keierleber, *supra* note 98.
- 110 Startz, *supra* note 106.
- 111 *Id.*
- 112 Losen, Whitaker, Kizzire, Savitsky & Dunn, *supra* note 108, at 9-10.
- 113 Startz, *supra* note 106.
- 114 Ward, Petersen, Kupchik & Pratt, *supra* note 100, at 41, 43-44.
- 115 Startz, *supra* note 106.
- 116 *Id.*
- 117 Epstein, Godfrey, González & Javdani, *supra* note 30, at 2.
- 118 U.S. Dep't of Educ., Off. for C.R., C.R. Data Collection, *National Data: School Discipline and School Climate*, <https://civilrightsdata.ed.gov/profile/us?surveyYear=2020> (last visited Nov. 16, 2023).
- 119 *Id.*
- 120 *U.S. Education in 2017 in 10 Charts*, Education Week, <https://www.edweek.org/leadership/u-s-education-in-2017-in-10-charts> [<https://perma.cc/Q3UD-3N96>] [hereinafter *Education Week 2017 Charts*].
- 121 *Id.*

- 122 *Id.*
- 123 Epstein, Godfrey, González & Jaydani, *supra* note 30, at 3.
- 124 *Id.*
- 125 Ball, Zhang & Molloy, *supra* note 18.
- 126 Hacker, Zalani, Sanchez & Stock, *supra* note 58.
- 127 *Id.* (“Nearly every parent [of these elementary school students who had been arrested] interviewed by CBS News ... said their **children** were permanently traumatized by these experiences.”).
- 128 Whittenberg, Skiba, Beauchesne & Groves, *supra* note 82, at 4; Education Week 2017 Charts, *supra* note 120.
- 129 Whittenberg, Skiba, Beauchesne & Groves, *supra* note 82, at 5.
- 130 *Id.* at 8.
- 131 *Id.* at 10.
- 132 *Id.* at 5; Education Week 2017 Charts, *supra* note 120.
- 133 Kirsten Harper & Deborah Temkin Cahill, *Compared to Majority White Schools, Majority Black Schools Are More Likely to Have Security Staff*, **Child** Trends (Apr. 26, 2018), <https://www.childtrends.org/blog/compared-to-majority-white-schools-majority-black-schools-are-more-likely-to-have-security-staff> (figures are based on 2015-16 data).
- 134 *Id.*
- 135 Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 Emory L.J. 765, 806, 810-811 (2017).
- 136 Harper & Temkin Cahill, *supra* note 133 (noting that 4.2% of White students and 13.1% of Black students attend schools with more security staff than mental health personnel; these figures are based on 2015-16 data).
- 137 Melinda D. Anderson, *When School Feels Like Prison*, Atl. (Sept. 12, 2016), <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/> [<https://perma.cc/W6GH-9CTX>].
- 138 Ball, Zhang & Molloy, *supra* note 18 (expressing the view of Andrew Hairston with Texas Appleseed, a **criminal** justice nonprofit).
- 139 U.S. Comm'n on C.R., *supra* note 32, at 10; U.S. Dep't of Just., C.R. Div. & U.S. Dep't of Educ., Off. of C.R., *supra* note 32; see Russell Skiba, Choong-Geun Chung, Megan Trachok, Timberly L. Baker, Adam Sheya & Robin L. Hughes, *Parsing Disciplinary Disproportionality Contributions of Infraction, Student, and School Characteristics to out-of-School Suspension and Expulsion*, 51 Am. Educ. Rsch. J. 640, 659 (2014); Welsh & Little, *supra* note 32, at 760; Lloyd D. Johnston, Richard A. Miech, Patrick M. O'Malley, Jerald G. Bachman, John E. Schulenberg & Megan E. Patrick, *Monitoring the Future: National Survey Results on Drug*

Use, 1975-2019, Inst. for Soc. Rsch., U. of Mich., 50 (Jan. 2020), <https://files.eric.ed.gov/fulltext/ED604018.pdf> [<https://perma.cc/N8TD-XASJ>].

- 140 See Melissa Diliberti, Michael Jackson, Samuel Correa & Zoe Correa, U.S. Dep't of Edu., **Crime**, Violence, Discipline, and Safety in U.S. Public Schools Findings From the School Survey on **Crime** and Safety: 2017-18, at 3, 6, A-2, A-5 (July 2019), <https://nces.ed.gov/pubs2019/2019061.pdf> [<https://perma.cc/G4S9-CNTV>] (reporting that in the 2017-18 academic year, the rate of violent **crime** per 1,000 students was 1.0 in city, suburban, and town schools; a higher percentage of schools located in towns reported an incident of theft at school (44%) than did schools located in cities (36%), suburbs (32%), and rural areas (29%); the rate of student possession of a firearm or explosive device was the same in schools with less than 5% minority enrollment as the rate at schools with 50% or more of percent minority enrollment; the rate of student possession of a knife or sharp object was the same in schools with less than 5% minority enrollment as the rate at schools with 50% or more of percent minority enrollment).
- 141 Ward, Peterson, Kupchik & Pratt, *supra* note 100 at 41, 43 (2021) (studies also show that Black students are at greater risk of corporal punishment after controlling for the severity of student misconduct); Elizabeth Gershoff & Sarah Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, 30 Soc. Pol'y Rep. 1, 10 (2016) (one Florida school district found that Black **children** were more likely than other **children** to receive corporal punishment despite committing a smaller proportion of severe offenses).
- 142 See, e.g., Wittenberg, Skiba, Beauchesne & Groves, *supra* note 82, at 6.
- 143 *Id.*
- 144 Gershoff & Font, *supra* note 141, at 10 (discussing one Florida school district's findings that Black **children** were more likely than other **children** to receive corporal punishment despite committing a smaller proportion of severe offenses).
- 145 *Id.*
- 146 U.S. Dep't of Educ., Dear Colleague Letter to Governors and State School Chiefs (Nov. 22, 2016), <https://www2.ed.gov/policy/elsec/guid/secletter/161122.html> [<https://perma.cc/39CC-BN92>].
- 147 See generally Thalia González, Alexis Etow & Cesar De La Vega, *A Health Justice Response to School Discipline and Policing*, 71 *Am. Univ. L. Rev.* 1927 (2022) (analyzing health inequities in school discipline via the health justice framework).
- 148 *Id.* at 1931.
- 149 *Id.* at 1930-31 (quoting Angela Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 *UCLA L. Rev.* 758, 806 (2020)) (internal quotation marks omitted).
- 150 *Id.* at 1931.
- 151 See *id.*; *ACEs and Toxic Stress: Frequently Asked Questions*, Ctr. on the Developing **Child**, Harv. Univ., <https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/> [<https://perma.cc/S52R-X7NH>] (“Experiencing many ACEs, as well as things like racism and community violence ... can cause what's known as toxic stress.”); Soraya Seedat, *Commentary on the Special Issue on Disproportionate Exposure to Trauma*, 34 *J. Traumatic Stress* 1061, 1063 (2021), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jts.22746> [<https://perma.cc/XV2X-TUGM>]; Yin Paradies, Jehonathan

Ben, Nida Denson, Amanuel Elias, Naomi Priest, Alex Pieterse, Arpana Gupta, Margaret Kelaher & Gilbert Gee, *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, 10 PLoS One 1, 1, 24-28 (Sept. 23, 2015).

- 152 Kathy Sanders-Phillips, Wendy Kliever, Taqi Tirmazi, Von Nebbitt, Takisha Carter & Heather Key, *Perceived Racial Discrimination, Drug Use, and Psychological Distress in African American Youth: A Pathway to Child Health Disparities*, 70 J. of Soc. Issues 279, 280-81, 286 (2014).
- 153 Braveman, Arkin, Procter, Kauh & Holm, *supra* note 34, at 175.
- 154 Sanders-Phillips, Kliever, Tirmazi, Nebbitt, Carter & Key, *supra* note 152, at 280-81, 285.
- 155 *Id.* at 286, 290.
- 156 *Id.* at 290; *see* González, Etow & De La Vega, *supra* note 147, at 1936.
- 157 González, Etow & De La Vega, *supra* note 147, at 1936.
- 158 Thalia González, Alexis Etow & Cesar De La Vega, *An Antiracist Health Equity Agenda for Education*, 50 J. L., Med. & Ethics 31, 34 (2022); Xiaoyan Zhang & Shannon Monnat, *Racial/Ethnic Differences in Clusters of Adverse Childhood Experiences and Associations with Adolescent Mental Health*, 17 SSM Population Health 1, 6 (2021) (revealing that a significant number of Black children in poverty experience significantly high numbers of ACEs); Braveman, Arkin, Procter, Kauh & Holm, *supra* note 34, at 173 (stating that “[b]ecause of segregation, Black and Latinx people are more likely than White people with similar household incomes to live in neighborhoods with concentrated disadvantage ...”).
- 159 *Cf.* González, Etow & De La Vega, *supra* note 147, at 1932 (applying the health justice framework through a two-step approach to school discipline and policing generally).
- 160 *See* Thalia González, Alexis Etow & Cesar De La Vega, *School Discipline is a Public Health Crisis*, Bill of Health (Oct. 6, 2020), <https://blog.petrieflom.law.harvard.edu/2020/10/06/school-discipline-is-a-public-health-crisis/> [<https://perma.cc/ZZ4V-E45K>] (emphasizing the need “to move simply from affirming that racism is a public health crisis, to actively exposing how structural discrimination in education has ... deepened the persistence of health inequities.”).
- 161 Amanda E. Lewis & John B. Diamond, *Despite the Best Intentions: How Racial Inequality Thrives in Good Schools* 14 (2015).
- 162 Haines, *supra* note 48, at 87.
- 163 *See, e.g.*, Dowdy, *supra* note 36, at 81 (describing how in the 1950s in Memphis, “Blacks continued to live with the disabling effects of that awful system [of slavery], while many [W]hites simply ignored the past and its present-day consequences”); *see* RaShya Ghee, *Lecture to Maryland Court Appointed Special Advocates: Postured for Transformation: Preparing for Racial Equity* (June 28, 2022) (“To improve racial equity, you have to understand the history of racism ... You can't understand the full scope of the problem without understanding the full scope of the historical context.”).
- 164 *Jacob v. State*, 22 Tenn. (3 Hum.) 493, 519 (Tenn. 1842) (enslaved party).
- 165 *State v. David*, 49 N.C. (1 Jones) 353, 358 (N.C. 1857) (enslaved party).

- 166 Dorothy Roberts, *Killing the Black Body* 295 (2nd Vintage Books ed. 2017).
- 167 National Civil Rights Museum, Tour (last visited June 3, 2021). Like Nicole Hannah-Jones and colleagues, I avoid using the word “slave” to describe persons held in bondage. “[T]he alternate term ‘enslaved person’ accurately conveys the condition without stripping the individual of his or her humanity.” The 1619 Project, at xiii (Nicole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021).
- 168 Wilkerson, *supra* note 42, at 45.
- 169 **Child** Slavery Before and After Emancipation: An Argument for **Child**-Centered Slavery StudiesS, *supra* note 54; see Mary Elliott & Jazmine Hughes, *Four Hundred Years After Enslaved Africans Were First Brought to Virginia, Most Americans Still Don't Know the Full Story of Slavery*, N.Y. Times (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html> [<https://perma.cc/J9F5-4RPM>] (stating that enslavers transporting slaves during the Middle Passage “considered **children** especially advantageous” because they could “fill the boat’s small spaces”).
- 170 Mary Ann Mason, *From Father's Property to Children's Rights* 2, 5 (1994).
- 171 See Frederick Douglass, *Narrative of the Life of Frederick Douglass* 12-14 (Philip Smith & Stanley Appelbaum eds., Dover Thrift ed. 1995) (describing “first-rate overseer,” Austin Gore, who was feared by slaves for his cruelty).
- 172 Ward, Petersen, Kupchik & Pratt, *supra* note 100, at 41, 44.
- 173 Douglass, *supra* note 171, at 6-7 (stating that regardless of age or sex, being late to work resulted in a whipping).
- 174 *Id.* at 9.
- 175 See *id.* at 10, 47.
- 176 See *id.* at 4, 13-14, 47.
- 177 See *id.* at 47 (“He is indeed presumptuous, and getting above himself, and nothing less than a flogging will do for him.”).
- 178 See, e.g., Gershoff & Font, *supra* note 141, at 2-4 (stating that **children** have been corporally punished in public schools for “being late to class, failing to turn in homework ... talking back to teachers, going to the bathroom without permission, mispronouncing words, and receiving bad grades.”); Douglass, *supra* note 171, at 47.
- 179 See Henry Bibb, *Narrative of the Life and Adventures of Henry Bibb, An American Slave, Written By Himself* 103-05 (1st electronic ed. 2000), <https://docsouth.unc.edu/neh/bibb/bibb.html> [<https://perma.cc/DLE5-TUHM>].
- 180 See *id.* (stating that slaves who did not attempt to induce spectators to buy them at auction would be severely paddled. “The object for using the paddle in the place of a lash was, to conceal the marks which would be made by the flogging .... [T]he paddle is applied to those parts of the body which would not be so likely to be seen by those who wanted to buy slaves.”).

- 181 *See, e.g.*, Dowdy, *supra* note 36, at 34 (“Peach tree switches that cracked and inflamed the whip scars and a wooden paddle to cause further pain were also used”).
- 182 *See* Gershoff & Font, *supra* note 141, at 3 (describing school paddles, such as the paddles used in Alabama, which are “approximately 24 inches in length, 3 inches wide and ½ inch thick.”).
- 183 *See* Dowdy, *supra* note 36, at 19, 24, 27, 34 (outlining examples of alternative means of punishment and violence during slavery).
- 184 *See* Dowdy, *supra* note 36, at 19 (describing a White man whose “concubine” was an enslaved person).
- 185 *Id.* at 24.
- 186 *See, e.g.*, Dowdy, *supra* note 36, at 10, 27, 30 (“Trained as a house servant, [teenage] Louis [Hughes] was often whipped ‘for nothing, just to please my mistress' fancy.’” “Mrs. [Sarah] McGee loved nothing more than to beat her slaves whenever she felt like it.”).
- 187 Douglass, *supra* note 171, at 6, 11, 14, 34; Harriot Jacobs, *Incidents in the Life of a Slave Girl* 22 (Paul Negri & Joslyn T. Pine eds., Dover Thrift ed. 2001) (describing how a young male slave named Benjamin was incarcerated for disobeying his master; refusing to be “subdued,” he was eventually sold).
- 188 *See, e.g.*, Douglass, *supra* note 171, at 14, 28 (describing bloody whippings and beatings).
- 189 *Id.* at 14.
- 190 *See id.* at 15, 21 (describing the murder of a girl of age 15 to 16 and the whipping of a girl of age 14 by mistresses for not moving quickly enough while working).
- 191 Jacobs, *supra* note 187, at 26 (“My master began to whisper foul words in my ear .... The mistress, who ought to protect the helpless victim, has no other feelings towards her but those of jealousy and rage.”).
- 192 *See* Douglass, *supra* note 171, at 4 (describing the severe, bloody whipping of a female slave for disobeying an order not to go out and for being found in the company of another man); Bibb, *supra* note 179, at 112 (“I heard the Deacon tell one of the slave girls, that he had bought her for a wife for his boy Stephen, which office he compelled her fully to perform against her will. This he enforced by a threat. At first the poor girl neglected to do this, having no sort of affection for the man--but she was finally forced to it by an application of the driver's lash, as threatened by the Deacon.”).
- 193 *See* Douglass, *supra* note 171, at 33 (describing the discarding of a **child** slave who was unable to use her hands after she was burned in a fire).
- 194 *See id.* at 20, 22, 33, 48; Dowdy, *supra* note 36, at 44 (describing how a slave was severely beaten for refusing to reveal where he learned to read and write and describing how a White man warned a slaveowner that if he did not prevent his slave from reading and writing, the slave would be “spoilt”); Carlotta Walls LaNier with Lisa Frazier Page, *A Mighty Long Way: My Journey to Justice at Little Rock Central High School* 5 (2010) (quoting former slave Hiram Holloway, who said, “If [an enslaved person] were caught with a book, they beat him to death nearly.”).
- 195 *See* Douglass, *supra* note 171, at 20, 22, 33, 48, 49, 51 (speaking of Frederick Douglass, slave owner Auld told his wife, “[I]f you teach that nigger ... how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become

unmanageable ....” Douglass forged a letter giving him permission to travel north for his first attempt at escaping slavery); Christopher Klein, *How Frederick Douglass Escaped Slavery*, History (Sept. 3, 2013), <https://www.history.com/news/frederick-douglass-escapes-slavery> [<https://perma.cc/96NZ-DS4N>] (May 5, 2020) (Douglass finally escaped through boarding a train and, when asked for proof of his freedom, produced a sailor's protection pass, which he had borrowed from a free, Black seaman); *see also*, Dowdy, *supra* note 36 at 44 (describing how an enslaved person ran away and forged a document that gave him permission to hire himself out to any employer).

196 Douglass, *supra* note 171, at 33.

197 Dumas, *supra* note 2, at 16.

198 *See* Douglass, *supra* note 171, at 14-15, 58 (quoting a White man who boasted of killing Black people, saying “we should be relieved of ‘the d--d niggers’ furthermore, it was a common saying during slavery in the early 1800s, even among little White boys, that it was worth a half-cent to kill a ‘nigger,’ and a half-cent to bury one.”); National Civil Rights Museum, Tour (last visited June 3, 2021) (“Whites believed that Africans were inferior and that this justified their enslavement as well as the laws and brutality that maintained it.”).

199 *See, e.g.*, Douglass, *supra* note 171, at 33, 46 (showing that slave owners relied upon the following Bible text: “He that knoweth his master's will, and doeth it not, shall be beaten with many stripes.”); Dowdy, *supra* note 36, at 53 (stating that the wife of an enslaver told an enslaved person, “[Y]ou darkies were made by God and ordained to wait upon us.”).

200 Wilkerson, *supra* note 42, at 47.

201 *Id.* at 51.

202 *Id.*

203 *See id.* (“[I]n dehumanizing these people whom they regarded as beasts of the field, they dehumanized themselves.”).

204 Douglass, *supra* note 171, at 14 (“killing a slave ... is not treated as a **crime**, either by the courts or the community”); Jacobs, *supra* note 187, at 26 (“[T]here is no shadow of law to protect [the slave girl] from insult, from violence, or even from death.”).

205 *Neal v. Farmer*, 9 Ga. 555 (Ga. 1851).

206 Mason, *supra* note 170, at 7.

207 *See* Douglass, *supra* note 171, at 14.

208 Martha Chamallas, *Race and Tort Law 2* (Ohio State Univ. Moritz College of L. Ctr. for Interdisc. L. & Pol’y Stud., Working Paper No. 557, 2020); *see* Douglass, *supra* note 171, at 14; National Civil Rights Museum, Tour (last visited June 3, 2021) (“By law, enslaved Africans and their descendants had no civil rights.”); *Dred Scott v. Sandford*, 60 U.S. 393, 393-394, 403, 427 (1857) (holding that because slaves had no constitutional rights, they could not sue in federal court).

209 *Dred Scott*, 60 U.S. at 393-394, 403, 427.

- 210 Chamallas, *supra* note 208, at 2.
- 211 *See id.* (“This horrific distortion of the real party at interest had the effect of simultaneously changing the nature of the legal claim and preventing a public airing of the suffering and humiliation enslaved persons endured.”).
- 212 *Jacob v. State*, 22 Tenn. (3 Hum.) 493, 497-98 (Tenn. 1842) (enslaved party).
- 213 *Id.* at 497.
- 214 *Oliver v. State*, 39 Miss. 526, 540 (Miss. 1860) (enslaved party).
- 215 *See, e.g., Austin v. State*, 14 Ark. 555, 567-8 (Ark. 1854) (holding, “when a slave is in rebellion to the lawful authority of his master, whatever force may be necessary to bring him within the pale of subordination ... invades no right of the slave ....”) (enslaved party).
- 216 *See Douglass, supra* 171, at 4, 7, 13, 21, 35, 46-47 (“It is better that a dozen slaves suffer under the lash, than that the overseer should be convicted, in the presence of slaves, of having been at fault.”).
- 217 *See, e.g., Roundtree, supra* note 6; McDonnell, Chapman, Tracy & Schapiro, *supra* note 8.
- 218 Wilkerson, *supra* note 42, at 47.
- 219 *Jacob*, 22 Tenn. (3 Hum.) at 498 (enslaved party).
- 220 *Id.*
- 221 *Id.*
- 222 *See id.* at 498-99.
- 223 *See id.* at 499.
- 224 Douglass, *supra* note 171, at 9, 13.
- 225 Statement of Kimberly Polk during Public Health Seminar, Univ. of Memphis Cecil C. Humphreys Sch. of Law (Mar. 4, 2022) (transcript of the conversation on file with author).
- 226 *See* National Civil Rights Museum, Tour: Exhibit on Jim Crow (last visited June 3, 2021).
- 227 *Id.*
- 228 *Id.*



- 229 *Id.* (economic success by Black people was considered unacceptable).
- 230 Kate Siber, *Mississippi Reckoning*, Nat'l Parks Conservation Ass'n (Winter 2019), [https://www.npca.org/articles/2020-mississippi-reckoning?s\\_src=g\\_grants\\_ads&gclid=CjwKCAiA\\_vKeBhAdEiwAFb\\_nrTJgpPH95iA5QtCUf--uGP57GE-abUhv\\_819V9q9gjJBIsz2NWeXZxoCInYQAvD\\_BwE](https://www.npca.org/articles/2020-mississippi-reckoning?s_src=g_grants_ads&gclid=CjwKCAiA_vKeBhAdEiwAFb_nrTJgpPH95iA5QtCUf--uGP57GE-abUhv_819V9q9gjJBIsz2NWeXZxoCInYQAvD_BwE) [<https://perma.cc/T2L8-KTTL>] (describing Emmett Till's murder due to allegedly whistling at a White woman at a local grocery store); *Tulsa Race Massacre*, History.com, <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre#what-caused-the-tulsa-race-massacre> [<https://perma.cc/U7EX-8HNN>] (describing the Tulsa Race Massacre: the murder of 100 to 300 people and the burning of 1,256 houses and many Black-owned businesses in Tulsa, Oklahoma began when a Black teenager named Dick Rowland “stumbled into [a White woman], or stepped on her foot,” and the woman screamed, causing some to believe she had been sexually assaulted).
- 231 Brad Epperly, Christopher Witko, Ryan Strickler & Paul White, *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 *Persps. on Pol.* 756, 759 (Sept. 2019) (resulting in Black turnout remaining at roughly 50% in some Southern states in 1892).
- 232 Amy L. Wood, *The Spectacle of Lynching: Rituals of White Supremacy in the Jim Crow South*, 77 *Am. J. Econ. & Socio.* 757, 758 (May--Sept. 2018).
- 233 Ward, Petersen, Kupchik, and Pratt, *supra* note 100, at 41, 44-45.
- 234 *Id.* at 45.
- 235 Epperly, Witko, Strickler & White, *supra* note 231, at 756, 761.
- 236 Equal Just. Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 5 (3d ed. 2017), <https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf> [<https://perma.cc/76DE-FTXV>].
- 237 Wood, *supra* note 232, at 759.
- 238 Equal Just. Initiative, *supra* note 236.
- 239 *Id.* at 4.
- 240 *Id.* at 45.
- 241 *Id.* at 44.
- 242 *Id.* at 48.
- 243 *Id.*
- 244 *Id.*
- 245 See Magdalene Zier, *State-Action Doctrine and Anti-Lynching Legislation in the Jim Crow Era*, 73 *Stan. L. Rev.* 777, 780 (2021); Gordon Bess, *Push for Federal Anti-Lynching Law Hits Another Impasse*, *Leader*

Publications (Dec. 3, 2020), [https://www.myleaderpaper.com/columns/push-for-federal-anti-lynching-law-hits-another-impasse/article\\_b20118ba-34e4-11eb-b7dd-9368903fc4de.html](https://www.myleaderpaper.com/columns/push-for-federal-anti-lynching-law-hits-another-impasse/article_b20118ba-34e4-11eb-b7dd-9368903fc4de.html) [<https://perma.cc/LY2D-48PW>]; Equal Just. Initiative, *Antilynching Act Signed into Law* (March 29, 2022), <https://eji.org/news/antilynching-act-signed-into-law/> [<https://perma.cc/MJ9D-ZFZB>].

246 See Ward, Petersen, Kupchik & Pratt, *supra* note 100.

247 *Id.* at 41, 41, 47, 59.

248 *Id.* at 50 (each additional lynching was associated with 6.4% increase in the odds of Black corporal punishment prevalence, versus a 4.2% percent increase in odds of White corporal punishment prevalence).

249 Leon F. Litwack, *The White Man's Fear of the Educated Negro: How the Negro was Fitted for His Natural and Logical Calling*, 20 J. Blacks Higher Educ. 100, 100 (Summer 1998).

250 *Id.*; Dowdy, *supra* note 36, at 72.

251 Litwack, *supra* note 249, at 100, 100-01.

252 *Id.* at 102.

253 *Id.*

254 *Id.*

255 See *id.* at 104 (“It’s a question,” a Montgomery, Alabama lawyer argued, “who will do the dirty work. In this country the White man won’t; the Negro must ... If you educate the Negroes they won’t stay where they belong ....”).

256 *Id.* at 102, 103.

257 *Id.* at 103.

258 *Id.* at 104, 105 (the *Charleston News and Observer* editorialized in 1904: “The great mass of the [W]hite people of the South have no idea of educating the Negro to be a citizen--their equal, either social or political. They want him to be the [W]hite man’s help, and if he is not willing to occupy a subordinate position in this country, the sooner he leaves it, or the southern part of it at least, the better for all concerned.”).

259 See *id.* at 105, *passim*.

260 See *id.* at 105, 108.

261 *Id.* at 106-08 (“What fed [W]hite apprehension and talk of race war were not so much perceptions of a race regressing but rather of one that was progressing.”).

262 James D. Anderson, *The Education of Blacks in the South, 1860-1935*, at 186-87, 193 (1988).

- 263 *Id.* at 193, 194-95.
- 264 *Id.* at 197.
- 265 *Id.* at 186.
- 266 *Id.* at 186, 194-95.
- 267 Rolland Dewing, *Attitudes Toward Desegregation Among Southern Educators*, *Growth & Change*, Jan. 1972, at 3, 5.
- 268 See Equal Just. Initiative, *Massive Resistance*, Segregation in America (Feb. 11, 2022), <https://segregationinamerica.eji.org/report/massive-resistance.html> [<https://perma.cc/3UVJ-3LUE>].
- 269 *Id.*
- 270 *Id.*
- 271 *Id.*
- 272 *Id.*
- 273 *Id.*
- 274 Rebecca Hoffman, Park Guide, Little Rock Cent. High Sch. Nat'l Historic Site, Guided Tour (May 10, 2022).
- 275 *Id.*
- 276 Walls LaNier with Frazier Page, *supra* note 194, at 102.
- 277 Hoffman, *supra* note 274; Walls LaNier with Frazier Page, *supra* note 194, at xiv.
- 278 Walls LaNier with Frazier Page, *supra* note 194, at xii-xiii, 174-6.
- 279 Equal Just. Initiative, *supra* note 268.
- 280 *Id.*
- 281 *Id.* (in addition, Ruby's family was banned from entering the local grocery store, her “father was fired from his job, and her grandparents were evicted from the Mississippi farm where they worked as sharecroppers.”).
- 282 *Id.*

- 283 *Id.* (footnotes omitted).
- 284 *Id.*
- 285 *Id.*
- 286 *Id.*
- 287 *See id.*
- 288 Dewing, *supra* note 267, at 3, 4.
- 289 Equal Just. Initiative, *supra* note 268.
- 290 Dewing, *supra* note 267, at 3.
- 291 *Id.* at 4.
- 292 *See id.* at 3 (a 1971 study by the National Education Association on Professional Rights and Responsibilities “cited examples of intimidation and discriminatory treatment of [B]lack students by White students, teachers, and administrators.”).
- 293 Dewing, *supra* note 267, at 3.
- 294 Melba Patillo Beals, *Warriors Don't Cry* (2007).
- 295 *See* Walls LaNier with Frazier Page, *supra* note 194, at 99, 106, 108, 140.
- 296 *Id.* at 118.
- 297 *See, e.g., id.* at 100-01, 103, 114, 116.
- 298 *Id.* at 103.
- 299 Daniel Kiel, *The Memphis 13*, Vimeo, at 12:35 (2014), <https://vimeo.com/103172930>.
- 300 *Id.* at 6:30, 12:49.
- 301 *Id.* at 14:40.
- 302 *Id.* at 16:35.
- 303 *Id.* at 29:00.

- 304 hooks, *supra* note 46, at 3, 4.
- 305 Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, *The American Historian* (Feb. 11, 2022), <https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/> [https://perma.cc/8WTL-8HGS].
- 306 hooks, *supra* note 46, at 4.
- 307 Ramsey, *supra* note 305.
- 308 Walls LaNier with Frazier Page, *supra* note 194, at 100.
- 309 Hoffman, *supra* note 274; *see* Walls LaNier with Frazier Page, *supra* note 194, at 117.
- 310 Hoffman, *supra* note 274; Walls LaNier with Frazier Page, *supra* note 194, at 117.
- 311 Equal Just. Initiative, *Beyond Brown: Opposition Intensifies*, *Segregation in America*, (Feb. 12, 2022), <https://segregationinamerica.eji.org/report/beyond-brown.html>.
- 312 *See* Stephen Lowe, *White Subversion of Public School Desegregation in South Carolina, 1963-1970*, 60 *Am. J. Legal Hist.* 223, 228 (2020).
- 313 Henning, *supra* note 37, at 126-28.
- 314 *Id.* at 129.
- 315 *Id.* at 127.
- 316 Equal Just. Initiative, *supra* note 311.
- 317 *Id.*
- 318 Tracy A. Benson & Sarah E. Fiarman, *Unconscious Bias in Schools: A Developmental Approach to Exploring Race and Racism* 3 (rev. ed. 2020).
- 319 Sharon R. Bailey, *An Examination of Student and Educator Experiences in Denver Public Schools Through the Voices of African-American Teachers and Administrators* 17 (2016), [https://celt.dpsk12.org/wp-content/uploads/sites/52/Dr.-Bailey-Report-FULL-2.pdf?fbclid=IwAR3uQ7HAxcZWPM3Q7ZkRXXwP1s6tQ5GtSSvERB\\_oTkRNSYR9K2yCuHvWfjs](https://celt.dpsk12.org/wp-content/uploads/sites/52/Dr.-Bailey-Report-FULL-2.pdf?fbclid=IwAR3uQ7HAxcZWPM3Q7ZkRXXwP1s6tQ5GtSSvERB_oTkRNSYR9K2yCuHvWfjs) [https://perma.cc/T5FD-WMGR].
- 320 H.E.R., *I Can't Breathe*, at 2:25-2:31, 4:09 (RCA 2020).
- 321 Walter S. Gilliam, Angela N. Maupin, Chin R. Reyes, Maria Accavitti & Frederick Shic, *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, Yale

Univ. **Child** Study Ctr. (Sept. 28, 2016), <https://marylandfamiliesengage.org/wp-content/uploads/2019/07/Preschool-Implicit-Bias-Policy-Brief.pdf> [<https://perma.cc/27GC-DERX>] (“Implicit bias refers to the automatic and unconscious stereotypes that drive people to behave and make decisions in certain ways.”).

322 See, e.g., Marcus Smith, ‘I was shocked.’ Students, Parents Outraged After Sacramento Teacher Uses N-Word in Class, *The Sacramento Bee* (July 11, 2021, 5:00 AM), <https://www.sacbee.com/news/equity-lab/representation/article252481443.html>; Kyle Jones, *New Haven School Principal Demoted for Using Racial Slur*, *NBC Connecticut* (June 17, 2021, 9:55 PM), <https://www.nbcconnecticut.com/news/local/new-haven-school-principal-demoted-for-using-racial-slur/2510771/> [<https://perma.cc/GPY4-YC2U>].

323 See Jones, *supra* note 322 (describing how a principal was demoted, but not fired, after using a racial slur in school).

324 Benson & Fiarman, *supra* note 318, at 29.

325 See, e.g., David Zahniser, Julia Wick, Benjamin Oreskes, Dakota Smith, Gustavo Arellano, *Racist Remarks in Leaked Audio of L.A. Council Members Spark Outrage, Disgust*, *L.A. Times* (Oct. 9, 2022), <https://www.latimes.com/california/story/2022-10-09/city-council-leaked-audio-nury-martinez-kevin-de-leon-gil-cedillo> [<https://perma.cc/7SY4-ERKS>] (describing how former Los Angeles City Council President Nury Martinez told fellow councilmembers, during a moment of frustration, that another councilmember was “raising [his misbehaving son] like a little White kid ... I was like, this kid needs a beat down, like let me ... take him around the corner and then I’ll bring him back.”).

326 Rebecca Klein, *Set to Stun*, *Huffington Post* (August 11, 2016, 9:01 AM), <https://data.huffingtonpost.com/2016/school-police/tasers> [<https://perma.cc/CW6L-CBX6>].

327 Benson & Fiarman, *supra* note 318, at 29.

328 Resmaa Menakem, *My Grandmother's Hands* 5, 27-28 (2017).

329 *Id.* at 98.

330 *Id.* at 98-9.

331 *Id.* at 99.

332 Wesley Wright, *Fear of Black Students, Unfair Treatment Rampant in Denver Schools, Black Educators Say*, *Chalkbeat* (Aug. 5, 2016, 11:09 PM EDT), <https://co.chalkbeat.org/2016/8/5/21106311/fear-of-Black-students-unfair-treatment-rampant-in-denver-schools-Black-educators-say> [<https://perma.cc/XJZ9-46MK>].

333 *Id.*; Bailey, *supra* note 319, at 10-12.

334 Wright, *supra* note 332; Bailey, *supra* note 319, at 10.

335 Bailey, *supra* note 319, at 11.

336 *Id.*

337 Wright, *supra* note 332.

338 See Lewis & Diamond, *supra* note 161, at xiii-xviii.

339 *Id.* at 47.

340 *Id.* at 48.

341 *Id.* at 48-50, 65.

342 *Id.*

343 *Id.* at 48-50, 61.

344 *Id.* at 55.

345 *Id.* at 4849, 4855.

346 See *id.* at 57.

347 *Id.* at 59-60.

348 *Id.* at 60-61.

349 See *id.* at xix.

350 Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 *Psych. Sci.* 617, 617-24 (2015).

351 *Id.* at 618.

352 *Id.* at 617-24.

353 *Id.* at 618-19.

354 *Id.* at 621.

355 Gilliam, Maupin, Reyes, Accavitti & Shic, *supra* note 321.

356 *Id.* at 2.

357 *Id.*

- 358 *Id.*
- 359 *See id.* at 2-18.
- 360 Jayanti Owens & Sara S. McLanahan, *Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion*, 98 Soc. Forces 1548, 1554 (June 2020).
- 361 *Id.* at 1570.
- 362 *Id.*
- 363 *Id.*
- 364 Phillip Atiba Goff, Matthew Christian Jackson, Carmen Marie Culotta, Brooke Allison Lewis Di Leone & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526, 529 (2014).
- 365 *See generally id.* (question inspired by questions asked in the research study, some of which are fill-in-the-blank style).
- 366 *Id.*
- 367 *Id.* at 530.
- 368 *Id.*
- 369 *Id.* at 532.
- 370 *Id.*
- 371 *Id.* at 539.
- 372 *Id.* at 532.
- 373 *Id.* at 533-35.
- 374 *Id.* at 535.
- 375 BENSON & FIARMAN, *supra* note 318, at 26-27 (rev. ed. 2020).
- 376 *See Will, supra* note 72 (providing statistic).
- 377 Ashley Griffin & Hilary Tackie, *Through Our Eyes: Perspectives and Reflections from Black Teachers*, The Education Trust, Nov. 2016, at 1, <https://edtrust.org/wp-content/uploads/2014/09/ThroughOurEyes.pdf> [<https://perma.cc/VBE4-LRUC>].



- 378 See Lewis & Diamond, *supra* note 161, at xix (indicating the surface “race-neutrality” of school policies and practices helps provide legitimacy to differential outcomes they help to produce).
- 379 See *id.* at 48-49 (2015) (stating discipline routines at schools communicate key messages to students about who is a full citizen within the school context).
- 380 See *id.* at 15-16.
- 381 Dumas, *supra* note 2, at 14.
- 382 *Id.*
- 383 See Braveman, Arkin, Proctor, Kauh & Holm, *supra* note 34, at 171 (stating that systemic racism emphasizes the involvement of whole systems in perpetuating racism).
- 384 See *id.* (stating that structural racism “emphasizes the role of the structures (laws, policies, institutional practices, and entrenched norms) that are the systems' scaffolding”).
- 385 Coates, *supra* note 44, at 17.
- 386 See *Washington v. Davis*, 426 U.S. 229, 248 (1976).
- 387 *Smith v. Texas*, 311 U.S. 128, 130 (1940) (in holding that there was racially discriminatory exclusion of Black jury members from the jury that tried plaintiff, the court concluded, “Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.”); *Davis*, 426 U.S. at 241; *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).
- 388 *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972).
- 389 *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).
- 390 See *Davis*, 426 U.S. at 246; see, e.g., *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 269 (1976); *Tasby v. Estes*, 643 F.2d 1103, 1108 (5th Cir. 1981) (regarding claims of racially disproportionate school discipline, holding that “[t]oo many legitimate non-racial factors are involved to permit an inference of discriminatory purpose from a showing of disproportionate impact, even when it occurs in the context of on-going desegregation efforts”); *Mohamed ex rel. A.M. v. Irving Indep. Sch. Dist.*, 252 F.Supp.3d 602, 616-17 (N.D. Tex. 2017); *B.E. ex rel. Stallworth v. Shelby Cnty. Bd. of Educ.*, No. 2:20-cv-00526-AKK, 2020 WL 7129891, at \*3 n. 6 (N.D. Ala. Dec. 4, 2020); *Rembert v. Monroe Twp. Bd. of Educ.*, No. 95-4818, 1997 WL 189318, at \*5 (D.N.J. Apr. 14, 1997).
- 391 See *Mohamed ex rel. A.M.*, 252 F.Supp.3d at 616-17.
- 392 Fed. Comm'n on Sch. Safety, U.S. Dep't of Educ., Final Report of the Federal Commission on School Safety 70 (Dec. 18, 2018), [https://www2.ed.gov/documents/school-safety/school-safety-report.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=\[https://perma.cc/A2C8-ML87\]](https://www2.ed.gov/documents/school-safety/school-safety-report.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=[https://perma.cc/A2C8-ML87]); see 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation

in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); 34 C.F.R. § 100.3(b).

393 Fed. Comm'n on Sch. Safety, U.S. Dep't of Educ., *supra* note 392, at 70; 42 U.S.C. § 2000d-4a(2)(B) (indicating that the prohibition applies to all of the operations of a local educational agency or other school system receiving federal financial assistance); *see also* 34 C.F.R. § 100.3(b)(2) (prohibiting a recipient of federal financial aid from directly or through contractual or other arrangements utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race or color).

394 34 C.F.R. § 100.3(b)(2).

395 65 Fed. Reg. 68051 (Nov. 13, 2000); 34 C.F.R. §§ 100, 104, 106, 110 (2022).

396 *Id.*

397 *Id.*

398 Off. for C.R., U.S. Dep't of Educ., OCR Complaint No. 11-13-1175, Letter of Resolution, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11131175-a.pdf> [<https://perma.cc/58JD-2B6U>].

399 *Id.*

400 *Id.*

401 *Id.*

402 *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

403 *See, e.g., Mohamed ex rel. A.M. v. Irving Indep. Sch. Dist.*, 252 F. Supp. 3d 602, 616-17 (N.D. Tex. 2017) (holding that plaintiff's factual allegations supporting a claim of racial discrimination were too vague and conclusory to establish intentional discrimination by an individual government employee); *Lopez v. Webster Cent. Sch. Dist.*, 682 F.Supp. 2d 274, 284 (W.D.N.Y. 2010); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998); *but see T.C. v. Valley Cent. Sch. Dist.*, 777 F.Supp. 2d 577, 595 (S.D.N.Y. 2011) (holding that plaintiffs' complaint sufficiently pled intentional discrimination regarding events of October 2008).

404 *See T.C.*, 777 F.Supp. 2d at 595.

405 Phillip Atiba Goff, *How We Can Make Racism a Solvable Problem--and Improve Policing*, Ted.com (2019), [https://www.ted.com/talks/dr\\_phillip\\_atiba\\_goff\\_how\\_we\\_can\\_make\\_racism\\_a\\_solvable\\_problem\\_and\\_improve\\_policing?language=en](https://www.ted.com/talks/dr_phillip_atiba_goff_how_we_can_make_racism_a_solvable_problem_and_improve_policing?language=en) [<https://perma.cc/8QFK-3RL7>].

406 *Id.*

407 M. Braxton Marcela, *From Injustice at School to Justice in Court: Seeking Litigation Approaches to Challenge Racial Disparities in School Discipline*, 17 Conn. Pub. Int. L.J. 87, 95 (2017).

- 408 *See Race, Color, and National Origin Discrimination (con't)*, U.S. Dep't of Educ., <https://www2.ed.gov/about/offices/list/ocr/frontpage/casesresolutions/m-race-origin-cr.html> [<https://perma.cc/5ZFQ-8L2S>] (Apr. 3, 2023); *see, e.g.*, Off. for C.R., U.S. Dep't of Educ., Case No. 09-14-5003, Letter of Resolution (Aug. 16, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09145003-a.pdf> [<https://perma.cc/MQD2-K5UE>] (alleging racially disproportionate issuance of law enforcement citations) [hereinafter Case No. 09-14-5003, Letter of Resolution]; Off. for C.R., U.S. Dep't of Educ., Case No. 09-12-500, Letter of Resolution (Sept. 27, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-a.html> [<https://perma.cc/QXF8-AK84>] (focusing on disproportionate exclusionary discipline of Black students); Off. for C.R., U.S. Dep't of Educ., Case No. 03-11-5002, Letter of Resolution (Feb. 28, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/03115002-a.html> [<https://perma.cc/9NXZ-8HH6>] (alleging racially disproportionate arrests and referrals to SROs and the county **Juvenile** Officer); Off. for C.R., U.S. Dep't of Educ., Compliance Rev. 05-12-5001, Letter of Resolution (Nov. 20, 2014), <https://www2.ed.gov/documents/press-releases/minneapolis-letter.pdf> [<https://perma.cc/4GSS-9X8B>] (alleging racially disproportionate referrals to law enforcement). Claims of disproportionate application of corporal punishment, seclusion, or restraint alleged discrimination brought by OCR have been based upon disability, rather than race. *See, e.g.*, Off. for C.R., U.S. Dep't of Educ., Compliance Rev. No. 01-19-5001, Letter of Resolution (Nov. 5, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01195001-a.pdf> [<https://perma.cc/WE8S-GVSK>].
- 409 *See* Off. for C.R., U.S. Dep't of Educ., Case No. 09-14-5003, Letter of Resolution (Aug. 16, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09145003-a.pdf> [<https://perma.cc/HZ4T-85QN>] (alleging racially discriminatory issuance of law enforcement citations); Case No. 03-11-5002, Letter of Resolution, *supra* note 408 (alleging racially disproportionate referrals to law enforcement); Off. for C.R., U.S. Dep't of Educ., OCR Compliance Rev. #05-12-5001, Letter of Resolution (Nov. 20, 2014), <https://www2.ed.gov/documents/press-releases/minneapolis-letter.pdf> [<https://perma.cc/4GSS-9X8B>].
- 410 Tuchinda, *supra* note 4, at 657.
- 411 Haw. Rev. Stat. § 302A-1141.4(j) (2022).
- 412 *Id.*
- 413 Cal. Educ. Code § 201(b) (West).
- 414 *Id.* § 201(c).
- 415 Cal. Code Regs. tit. 5, § 4600(d), (e) (2020).
- 416 *Id.* § 4621(a).
- 417 *Id.* § 4631(e)(1)-(3).
- 418 *Id.* § 4631(e)(4).
- 419 *Id.* § 4650(a)(5).
- 420 *Id.* § 4670(a).
- 421 Cal. Educ. Code § 234.1(a) (West 2022).

- 422 *Id.* § 234.1(b).
- 423 *Id.* § 234.1(b)(3).
- 424 *Id.* § 234.1(g).
- 425 *See* Tuchinda, *supra* note 4, at 655, 664, 668, 672.
- 426 *Id.* at 655, 664, 672.
- 427 *Id.* at 623.
- 428 *Id.* at 623, 624.
- 429 *Id.* at 624 (arguing that any law that permits the use of any form of physical force upon students opens the door to physical abuse upon schoolchildren).
- 430 *See id.* at 675, 680.
- 431 *See* Dave Roos, *When the Founding Fathers Settled States' vs. Federal Rights--and Saved the Nation*, History (Apr. 30, 2020), <https://www.history.com/news/federalism-constitution-founding-fathers-states-rights> [<https://perma.cc/3DM5-PE7T>] (indicating how federalism established that education was traditionally reserved as a function for local and state governments).
- 432 Press Release, Congressman Donald McEachin & Congresswoman Suzanne Bonamici, *McEachin, Bonamici Unveil Legislation to End Corporal Punishment in Schools* (Sept. 30, 2020), <https://bonamici.house.gov/media/press-releases/mceachin-bonamici-unveil-legislation-end-corporal-punishment-schools> [<https://perma.cc/GE3Y-VGGT>] (explaining the legislation would federally prohibit the practice of corporal punishment in any school that receives federal funding and establish a federal grant program to assist states and school districts in improving the climate and culture of schools); *see* Keeping All Students Safe Act, S. 1858, 117th Cong. § 101(a) (2021).
- 433 Protecting Our Students in Schools Act of 2021, S. 2029, 117th Cong. § 3(1) (2021) (examples of acts of physical force include “striking, spanking, or paddling, inflicted on a student's body, requiring a student to assume a painful physical position, or the use of chemical sprays, electroshock weapon, or stun guns on a student's body.”).
- 434 *Id.* § 101(a).
- 435 *See id.* § 101(a).
- 436 *Id.* § 102.
- 437 *Id.* § 103.
- 438 *Id.* § 202(a).

- 439 Keeping All Students Safe Act, *supra* note 432.
- 440 *Id.* § 101(e)(1)(A)-(B) (providing additional requirements regarding training of the person administering the restraint, as well as the duration and method of the restraint).
- 441 *Id.* § 101(c)(1).
- 442 *Id.* § 101(c)(1), (2).
- 443 *Id.* § 101(c)(1).
- 444 *Id.* § 101(e)(4)(A)(i).
- 445 Mikki Kendall, Hood Feminism: Notes from the Women That a Movement Forgot 203 (2020).
- 446 Braveman, Arkin, Proctor, Kuah, Holm, *supra* note 34, at 172; *see* On These Grounds, *supra* note 7 (“It’s the norm,” says a Black teenager while discussing how Shakara Murphy was brutalized).
- 447 Braveman, Arkin, Proctor, Kuah & Holm, *supra* note 34, at 172.
- 448 *See id.* at 172, 174.
- 449 *See id.*
- 450 *See, e.g., Trauma-Informed Schools*, Nat’l Educ. Ass’n, <https://www.nea.org/professional-excellence/student-engagement/trauma-informed-schools> [<https://perma.cc/PKB4-DCFA>] (stating that the National Education Association is “actively engaged in finding ways for schools and educators to address the issue of trauma”); Mitchell Hamline Sch. of L., *Trauma-Informed Advocacy Certificate Program*, <https://mitchellhamline.edu/certificates/trauma-informed-advocacy-certificate-program/> [<https://perma.cc/2HZY-9LXS>] (stating that the certificate program provides professionals with an understanding of how professionals can decrease the trauma caused in legal systems).
- 451 *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).
- 452 *See Meyer*, 262 U.S. at 399, 401 (holding that the Fourteenth Amendment due process clause guarantees parents the liberty right to bring up their **children**, which includes the power to control their education); *Cf. Yoder*, 406 U.S. at 233-34 (describing how a state requirement that all **children** attend school after age sixteen interferes unreasonably with the fundamental liberty of Amish parents to direct the upbringing and education of **children** under their control).
- 453 *See Coates*, *supra* note 44, at 20 (“Somewhere out there beyond the firmament, past the asteroid belt, there were other worlds where **children** did not regularly fear for their bodies.”).