

CRISIS AS A CATALYST FOR REBIRTH: DISRUPTING ENTRENCHED EDUCATIONAL INEQUALITY IN THE COVID ERA¹

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ABSTRACT

The public health and socio-economic crisis that has resulted from the pandemic has amplified existing social inequalities. The disparate racial impact of COVID-19 is a consequence of enduring social, economic, and political injustices that manifest in the form of health status and access, wealth, employment, and housing, all of

¹ **A Note Concerning Language and Race:** Race is a sociohistorical and legal construct that has no basis in biology. Although race is not an inherent biological trait, the benefits of whiteness have engendered a racist society with devastating economic, political, social, and health consequences for people of color. Race is not real, but racism very much is. Racism, which exists at both the interpersonal and institutional level, refers to the oppression and/or marginalization of people of color based on a socially constructed racial hierarchy that privileges white people.

Despite the falsity of biological race, race is a potent force in American society that has been reified through law and language. Ian Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). Language and the law are informed by social and cultural norms and has the effect of embedding belief systems. The use of language is evident in the construction of race as both a social construct and an important social reality. The relationship between race, language, and racism plays a key role in reflecting and defining the way human societies are structured. Alim, H. S., J. R. Rickford & A. F. Ball. (eds.), *Raciolinguistics: How Language Shapes Our Ideas about Race*, NEW YORK: OXFORD UNIVERSITY PRESS (2016). Moreover, the creation of race as a social construct has been used—and continues to be used—to facilitate the strategic misallocation of resources and forms a basis for permanent exploitation. Language, similar to identify, is neither fixed nor predetermined. Both are similarly powerful and complex. For purposes of this article, “Black” and “African American” are used interchangeably. The terms “Native American” and “Indigenous” are also used interchangeably, as many sources referenced include either or both terms. The article also relies on the terms “Hispanic,” as well as “Latinx,” which includes a person or group of people with origins in Latin America. This term “Latinx” is preferable to “Latino,” which is not gender inclusive. The author has consciously chosen not to treat “white” as a proper noun to deliberately de-center whiteness.

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which have contributed to a greater susceptibility to the virus by racially minoritized communities.

The compounding of racial inequities in all aspects of American life has logically extended to the educational sphere, where pre-pandemic educational inequities have been greatly exacerbated. In marking the passage of the 65th anniversary of *Brown v. Board of Education*, we must take stock of the current civil rights challenges of our time. This paper will examine the state of educational inequality from a racial lens both prior to and during the COVID crisis. As this paper will explain, the pandemic has further revealed the American public education system to be as inherently as unequal as it was during Jim Crow segregation. Race-neutral educational policies and funding has been exposed as little more than a thin veneer for reconceptualized, contemporary iterations of a pre-Brown system that has failed children of color and continues to do us under the modern regime.

America has a long overdue and unsettled educational and moral debt to pay to its Black and Brown children. In examining the historical conditions that have allowed for advances in racial justice, this paper will argue in favor of the possibility of ideological and systemic change amidst crisis. A structural rebirth that abandons white hegemony cannot, however, be achieved through legal reform alone. The patently unequal education afforded to non-white children, even after more than half a century of civil rights litigation, demands a renewed focus on educational equality that is centered on the needs of Black and Brown children. It necessitates the creation of a robust educational reparation programs and the desegregation of school funding that ensures that children of color are able to access a high-quality public education premised on fair funding and that abandons artificial notions of colorblindness and a far-from-achieved post-racial reality.

I. INTRODUCTION

In March 2020, confronted with a global public health crisis, the world shut down. In large parts of the United States, businesses were shuttered or required to abruptly transition to virtual work, where feasible. People self-quarantined in their homes,³ venturing into the

³ Though not the subject of this article, it bears acknowledgment that a significant number of Americans did not have the luxury of a home in which they could safely self-quarantine. For those experiencing housing insecurity and interpersonal violence, housing was yet another structural obstacle in remaining physically safe during the pandemic.

world only to secure basic essentials. Schools closed. The COVID-19 pandemic disrupted nearly every segment of society and public life. And yet, the pain of the pandemic was by no means evenly distributed.

Early data about the effects of COVID-19 suggests that social determinants of health, including population density, socioeconomic status, residential segregation, underlying chronic health conditions, and access to medical care, have resulted in disparate impacts for certain communities.⁴ National data indicates that individuals belonging to historically marginalized groups have been most impacted by the public health crisis as measured by COVID-19 exposure and death rates.⁵ COVID mortality rates spanning January 2020 through November 2021 were higher for individuals who self-identified as African American and Hispanic.⁶ During this period of the pandemic, Native Americans experienced a death rate that was 1.6 times greater than that of whites.⁷ Individuals who reported belonging to multiple racial groups were found to have the highest death rate at 1.8 times that of whites.⁸

Furthermore, the ability to access health care coverage is often connected to reliable and well-paying employment, itself a direct function of a high-quality education. Pre-pandemic data indicated that Black workers were 60% more likely to be uninsured than white workers.⁹ Economic and employment disruption spurred by the pandemic resulted in a record number of job losses in the spring of 2020, devastating Black and Latinx workers and their families.¹⁰ Historically, Black workers have experienced unemployment rates that are twice as high as those of white workers.¹¹ For workers of color who are successful at entering the job market, they earn a fraction of that of their white counterparts, as evidenced by a persistent Black-white pay gap that has continued to increase over the past two decades.¹² Relative to the earnings of white men, Black men earn 71

⁴ See Emory University COVID-19 Health Equity Dashboard, *COVID-19 National Health Equity Report: Deaths by Race & Ethnicity*, <https://covid19.emory.edu/national-report#ccvi> (last visited Nov. 15, 2021).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, ECONOMIC POLICY INSTITUTE, Jun. 1, 2020, <https://www.epi.org/publication/black-workers-covid>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

cents on the dollar and Black women¹³ are only paid 64 cents on the dollar.¹⁴ Racial privilege in the labor sector disadvantages non-white workers across all levels of education.¹⁵

The Black-white wage gap additionally translates into a substantially broader benefits gap that creates enhanced economic and physical vulnerability for non-white American workers.¹⁶ Lower earning power correlated to contemporary and historical discrimination limits the benefits and social safety net available to Black and Brown workers that takes the form of paid leave, employee-sponsored health coverage, and federal benefits that are calculated as a percentage of earned wages. According to the U.S. Bureau of Labor, Black workers are also less likely to have paid sick leave and less likely to be permitted to telework than their white colleagues.¹⁷

Expectedly, racial disparities in employment opportunities and earnings have generated equally significant gaps in median household incomes, resulting in higher poverty rates for non-white families.¹⁸ Extreme disparities in the wealth of white and non-white families is not a function of individual behavior, but rather is a well-established and logical byproduct of the structural characteristics of the American economy.¹⁹ Generations of preferential wealth accumulation by white families has generated median household incomes for whites that is 70% higher than for Black families (\$70,642 as compared to \$41,692 in 2018).²⁰ More than 96% of the wealthiest Americans continue to be white.²¹ The loss of intergenerational wealth accumulation through systemic discrimination has allowed for the emergence of a Black poverty rate that is two-and-a-half times the white poverty rate²²,

¹³ For a discussion of intersectionality and the compounded harm of gender and race in the lives of women of color, refer to the pioneering work of legal scholar, civil rights advocate, and critical race theorist, Kimberlé W. Crenshaw.

¹⁴ Gould & Wilson, *supra* note 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Job Flexibilities and Work Schedules*, U.S. Bureau of Labor Statistics, 2017 and 2018. <https://www.bls.gov/news.release/flex2.t01.htm> (last visited Nov. 15, 2021).

¹⁸ Gould & Wilson, *supra* note 9.

¹⁹ William Darity, Jr., et al., *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CENTER ON SOCIAL EQUITY AND INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT (2018), <https://socialequity.duke.edu/wp-content/uploads/2020/01/what-we-get-wrong.pdf>.

²⁰ Darity, *supra* note 19.

²¹ *Id.* at 2.

²² The poverty line is defined as being below an annual income of \$26,000 for a family of four.

which translates to one in five Black people living below the poverty line.²²

The consequence of intergenerational poverty imposed on Black and Brown families has meant that Black households are more than twice as likely to live in densely populated housing and are more likely to live in multigenerational households than white families, placing them at an appreciably higher risk of exposure to COVID-19.²³ Additionally, Black households are less likely to include multiple earners and are more likely to be headed by a single, female parent,²⁴ further reducing the availability of an adequate social safety net.

Moreover, racially minoritized populations, particularly women of color, are also disproportionately represented amongst low-wage, essential workers²⁵ and industries.²⁶ Essential workers are at dramatically higher risk of exposure to COVID-19 by virtue of the nature of the work in combination with other factors, including discrimination, healthcare access, housing, and educational and income gaps.²⁷ Further exacerbating the acute public health vulnerabilities of low-income workers and those who earn their livelihoods in essential industries is the fact that these employment sectors often do not provide paid sick leave, nor do they offer a living wage that permits workers to miss work due to illness.²⁸ Overworked, underpaid, and under protected, these workers were predictably hardest hit by the economic and health effects of the pandemic.

²² Gould & Wilson, *supra* note 9.

²³ *Id.*

²⁴ *Id.* For a comprehensive discussion of the devastation of Brown and Black families and communities engineered by racially motivated mass incarceration policies, *see generally* Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2010).

²⁵ Essential workers in frontline industries include the healthcare, childcare and social services sector; retail, food, and customer service; public transportation; and building cleaning services.

²⁶ Hye Jin Rho ET AL., *A Basic Demographic Profile of Workers in Frontline Industries*, CENTER FOR ECONOMIC AND POLICY RESEARCH, April 7, 2020, <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>; *see also* THE CENTERS FOR DISEASE CONTROL, *Health Equity Considerations and Racial and Ethnic Minority Groups*, Apr. 19, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [hereinafter CDC Healthy Equity Data]; Celine McNicholas & Margaret Poydock, *Who are essential workers? A comprehensive look at their wages, demographics, and unionization rates*, ECON. POL'Y INSTITUTE'S WORKING ECONOMICS BLOG (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-andunionization-rates>.

²⁷ CDC Healthy Equity Data, *supra* note 26.

²⁸ Gould & Wilson, *supra* note 9.

Not only have Brown and Black workers been exposed to greater health risks as a result of comprising the bulk of essential workers, but those who subsequently lost their jobs due to the pandemic-induced recession have been especially susceptible to housing insecurity. Due to what has been termed “racist and retrograde”²⁹ eviction laws, people of color are more likely to have an eviction³⁰ on their record, even in instances where they provided advance notice.³¹ Black and Brown tenants are also more likely to be negatively impacted by “crime free housing ordinances”³² because of their overrepresentation in the criminal justice system. Compounded by systemic racial inequities in education, employment, health, the acquisition of intergenerational wealth, and the devastating effects of mass incarceration, the institutionalization of poverty that has resulted from these interrelated systems have stripped Black and Brown families of a viable safety net during times of crisis.

Having been systematically denied equal access to housing, quality public education, and opportunities for economic mobility, it should be unsurprising that people of color are overrepresented amongst the homeless, with Blacks and Indigenous peoples experiencing the highest rates of homelessness.³³ According to a study produced by Supporting Partnerships for Anti-Racist Communities (SPARC), homelessness amongst American Indian/Alaskan Natives is three to eight times higher than their proportion of the general

²⁹ Rich Smith, *Washington Has Some of the Most Unfair Eviction Laws in the Country. A New Slate of Bills Will Change That*, THE STRANGER, Jan. 30, 2019, <https://www.thestranger.com/slog/2019/01/30/38447965/washington-has-some-of-the-most-unfair-eviction-laws-in-the-country-a-new-slate-of-bills-will-change-that>.

³⁰ Evictions are one of the leading causes of homelessness nationally. See also Teresa Wiltz, ‘A Pileup of Inequities’: Why People of Color Are Hit Hardest by Homelessness, THE PEW CHARITABLE TRUST, Mar. 19, 2019, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/03/29/a-pileup-of-inequities-why-people-of-color-are-hit-hardest-by-homelessness>; See also *Homelessness: Program and the People They Serve, Findings of the National Survey of Homeless Assistance Providers and Clients*, THE URBAN INSTITUTE (Dec. 1999), <https://www.urban.org/sites/default/files/publication/66286/310291-Homelessness-Programs-and-the-People-They-Serve-Findings-of-the-National-Survey-of-Homeless-Assistance-Providers-and-Clients.PDF>.

³¹ Evictions are one of the leading causes of homelessness nationally. See Wiltz, *supra* note 30. See generally Matthew Desmond, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (Crown 2016).

³² Crime-free housing ordinances are laws that exclude tenants who have had contact with the criminal system. Although purportedly race neutral, these laws facilitate racial segregation by introducing the racial disparities of the criminal justice system into the housing market. See Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

³³ *Id.*

population.³⁴ While Blacks make up only 13% of the general population, they comprise 21% of those living in poverty and 40% of those experiencing homelessness.³⁵ Moreover, half of homeless families with children are Black.³⁶

Fueled by the existing racial wealth gap in tandem with broader social inequities, income inequality has continued to worsen in recent decades, and will most certainly continue to do so in the aftermath of the pandemic absent meaningful interventions. According to research conducted by Brown University sociologist, John Logan, Black household incomes are below 60% of non-Hispanic white incomes in the average metropolitan region, whereas Hispanic household incomes are less than 70%.³⁷ Even prior to the pandemic, the average Black household held a mere one cent of wealth for every dollar held by the average white family.³⁸ The ratio of minority to white income is now larger than it was in 1990.³⁹

The racial wealth gap is the logical consequence of hundreds of years of economic exploitation and discrimination.⁴⁰ Its persistence is both explainable and predictable given the racial caste system on which our country was built and has continued to be maintained. The racial wealth gap is moreover intimately connected to the concept of white privilege, the accrual of benefits on account of whiteness for which much of the unequal distribution of status, wealth, and well-being in our society is based.⁴¹

³⁴ Supporting Partnerships for Anti-Racist Communities, Phase One Study Findings, Mar. 2018. <https://c4innovates.com/wp-content/uploads/2019/03/SPARC-Phase-1-Findings-March-2018.pdf> (last visited Dec. 14, 2021).

³⁵ Evictions are one of the leading causes of homelessness nationally. See Wiltz, *supra* note 32.

³⁶ *Id.*

³⁷ John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, US2010 Project, Jul. 2011, at 1. <https://s4.ad.brown.edu/projects/diversity/Data/Report/report0727.pdf> (last visited Dec. 16, 2021).

³⁸ Christine Percheski & Christina Gibson-Davis, *A Penny on the Dollar: Racial Inequalities in Wealth Among Households with Children*, 6 SOCIOUS 1 (2020).

³⁹ *Id.* at 2.

⁴⁰ See generally Nikole Hannah-Jones, *What Is Owed*, THE N.Y. TIMES MAGAZINE, Jun. 30, 2020, <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html>.

⁴¹ Studies have demonstrated a clear correlation between neighborhood poverty and quality of life as measured by inequalities in education, safety, public health, and environmental conditions. See, e.g., Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection Essay*, 89 GEO. L.J. 2279, at 2280 (2000); see generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); see also Robin DiAngelo,

Importantly, the racial wealth gap is not simply about poverty, nor does it have any relationship to Black financial⁴² or socioeconomic⁴³ decisions.⁴⁴ Poor white families who earn less than \$27,000 a year hold nearly the same amount of wealth as Black households who earn between \$48,000 - \$76,000 annually.⁴⁵ It is, in the starkest of terms, a modern expression of a legacy of systemic racism.

The pandemic has further exposed that opportunity, security, and overall well-being in the United States is a direct function of wealth, more specifically intergenerational wealth. The immense racial wealth gap that has resulted from the economic exploitation of racially minoritized communities, in combination with a refusal to properly compensate Blacks for the trauma, violence, discrimination, and harm that has been inflicted upon them, can only be cured with substantive systemic changes. As noted by Dr. William Darity Jr. and his colleagues at the Samuel DuBois Cook Center on Social Equity at Duke University:

“[T]he cause of the [racial wealth] gap must be found in structural characteristics of the American economy, heavily infused at every point with both an inheritance of racism and the ongoing authority of white supremacy. Blacks cannot close the racial wealth gap by changing their individual behavior (e.g., by assuming “more personal responsibility” or acquiring the portfolio management insights associated with “financial literacy”) if the structural sources of racial inequality remain unchanged. There are no actions that Black Americans can take unilaterally that will have much of an effect on reducing the racial wealth gap. For the gap to be closed, America must undergo a vast social transformation produced by the adoption of bold national

WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (Beacon Press 2018).

⁴² Although Black Americans have lower incomes, they save at a higher rate than white Americans with similar incomes. *See* Hannah-Jones, *supra* note 40.

⁴³ *Id.* Black parents, for example, have been shown to value educational attainment for their children at a higher level than white parents as demonstrated by their financial contributions to their children’s education. Socioeconomic factors such as family composition also does not favor Black families, where a typical two-parent Black household holds half the wealth as a white, single-parent family.

⁴⁴ Darity, *supra* note 19, at 3; *see also* Hannah-Jones, *supra* note 40.

⁴⁵ Hannah-Jones, *supra* note 40.

policies, policies that will forge a way forward by addressing, finally, the long-standing consequences of slavery, the Jim Crow years that followed, and ongoing racism and discrimination that exist in our society today.”⁴⁶

The immense racial economic inequities have had life and death consequences for people of color during the pandemic. Data from the Centers for Disease Control and Prevention found that the U.S. mortality rate rose by 17% in 2020, spurred primarily by COVID deaths and resulting in the most substantial drop in life expectancy in more than 75 years.⁴⁷ As compared to white people, the rise in death rates were dramatically higher for Latinx and Black populations.⁴⁸

The pandemic has further highlighted and magnified existing social and racial injustices, most prominently in the areas of public health, housing, poverty, employment, and education. The disproportionately devastating effects of COVID-19 on the economic, emotional, and physical well-being of communities of color was a predictable extension of persistent systemic disparities that have been sustained by political and economic systems that favor and reward whiteness. These underlying factors, if allowed to fester and further metastasize during the COVID crisis, will deepen existing societal inequities. Confronting entrenched educational inequality, which have long predated the pandemic and has been worsened by the crisis, provides a mechanism to alleviate engrained social inequities in health, employment, and poverty reduction.

II. THE STARK STATE OF PRE-COVID EDUCATIONAL INEQUALITY

COVID-19, with all of its many tragic impacts, has had a profound effect on the public education system and the children it is intended to serve. The pandemic, which roughly coincided with the 65th anniversary of the *Brown v. Board of Education* decision, made it depressingly and unambiguously clear that the stark state of

⁴⁶ Darity, *supra* note 19, at 3-4.

⁴⁷ Rhithu Chatterjee & Rachel Treisman *COVID sent last year's U.S. death rate soaring, especially among people of color*, NPR MORNING EDITION, Dec. 22, 2021, <https://www.npr.org/2021/12/22/1066642251/cdc-report-reveals-how-much-the-pandemic-influenced-the-u-s-2020-death-rate>.

⁴⁸ *Id.*

educational inequality in this country is both unconscionable and unsustainable.

Access to education, let alone a quality public education, has long been deliberately denied to children of color in America.⁴⁹ During slavery, Black children were considered chattel and were expected to work as young as two and three years old.⁵⁰ Enslaved children were expressly forbidden from receiving an education. Black literacy was a crime in many southern states.⁵¹ Those who dared become literate risked imprisonment or severe punishment in the form of heinous beatings and the amputation of fingers or toes.⁵² Freedmen schools were created after Emancipation during the Reconstruction Era, resulting in dramatic gains in Black literacy and academic achievement. Between 1860 and 1880, Black literacy increased from 10% to 30% and school attendance for Black children soared from 2% to 34%.⁵³ As described by Professor James M. McPherson, though these figures do not merit celebration by modern standards, in no other period of American history has the rate of Black literacy and school attendance increased as much as it did in the 15 years period after the end of the Civil War.⁵⁴

Even after Black literacy was decriminalized and Black children were permitted to attend public schools, Black students in the

⁴⁹ For a discussion of educational inequities in the United States, see JAMES ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* (UNIVERSITY OF NORTH CAROLINA 1989); see also Michael Fultz, *African American teachers in the South, 1890-1940: Powerlessness and the ironies of expectations and protests*, 35 *HIST. OF EDUC. Q.* 401 (1995); DAVID B. TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* (Harvard University Press 2007).

⁵⁰ Rebecca Epstein, et al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, CENTER ON POVERTY AND INEQUALITY, <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf> (last visited Dec. 27, 2021); see also Michael J. Dumas & Joseph Derrick Nelson, *(Re)Imagining Black Boyhood: Toward a Critical Framework for Educ. Res.*, 86 *HARV. EDUC. REV.* 27, 33 (2016).

⁵¹ North Carolina first prohibited teaching slaves to read and write in 1818. Literacy for slaves was viewed as having “a tendency to excite dissatisfaction in their minds and produce insurrection and rebellion to the manifest injury of the citizens” of the state. The text in its entirety is available through A North Carolina History Online Resource (ANCHOR) at <https://www.ncpedia.org/anchor/bill-prevent-all-persons>.

⁵² THE CORNELL UNIVERSITY LIBRARY, DIVISION OF RARE AND MANUSCRIPT COLLECTIONS, *In Their Own Words: Slave Narratives*, <https://rmc.library.cornell.edu/abolitionism/narratives.htm> (last visited Nov. 29, 2021).

⁵³ James M. McPherson, *Comparing the Two Reconstructions*, *PRINCETON ALUMNI WEEKLY* 16, 18, Feb. 26, 1979; see also Derrick Bell Jr., *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008).

⁵⁴ McPherson, *supra* note 53, at 14.

South were denied universal secondary schooling until 1968.⁵⁵ During the century separating Emancipation and the Civil Rights Movement when American's racial caste system was maintained through Jim Crow laws, Black children attended grossly underfunded schools.⁵⁶ The reconstitution of slavery in the South through the sharecropping system meant that rural Black children were often needed for farming, resulting in an academic year that spanned all of four months.⁵⁷ Most communities throughout the South failed to provide even a single public high school to Black children well through the 1930's.⁵⁸

The criminalization and weaponization of education were by no means limited to Black children. The history of educational inequality in the lives of Indigenous and Latinx children is similarly abhorrent. Mission schools, and later boarding schools, were central to a broader assimilationist policy employed against Native children in a coordinated, national strategy to "kill the Indian in order to save the man."⁵⁹ Beginning in the 1870's, the American government began forcibly relocating Native children to off-reservation boarding schools.⁶⁰ By 1900, nearly 150 boarding schools had been constructed throughout the United States, housing thousands of Indigenous children who were prevented from speaking their native languages, required to abandon their tribal identities, and were subjected to various forms of abuse. Though described as schools, the purpose of these facilities was not education, but rather the assimilation of Native

⁵⁵ Anderson, *supra* note 49; see also Gloria Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. Schools*, 35 EDUC. RESEARCHER 3 (2006).

⁵⁶ DERRICK BELL JR., *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 15 (Oxford University Press 2005) (describing the results of studies financed by the NAACP of Black schools in southern states that found that the average per-pupil expenditures in 1926 in Georgia for whites was \$36.29 and was \$4.59 for Black students. The disparities in segregated school funding extended to teacher salaries, where white Georgia teachers earned nearly twice that of their Black colleagues.).

⁵⁷ Ladson-Billings, *supra* note 55 at 5.

⁵⁸ Hannah-Jones, *supra* note 40.

⁵⁹ This quote is attributed to an 1892 speech given by Captain Richard H. Pratt, who founded the earliest "Indian schools," which he modeled on an education program that he had developed in an Indian prison. See *Official Report of the Nineteenth Annual Conference of Charities and Correction* (1892) 46–59; see also Lindsay Peterson, "Kill the Indian, Save the Man," *Americanization through Education: Richard Henry Pratt's Legacy*, COLBY COLLEGE HONORS THESIS (2013), <https://digitalcommons.colby.edu/cgi/viewcontent.cgi?article=1700&context=honorsthesis> (last visited Nov 30, 2021).

⁶⁰ Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR MORNING EDITION, May 12, 2008, <https://www.npr.org/templates/story/story.php?storyId=16516865>.

children.⁶¹ A study commissioned by the American government in the 1920's itself concluded that the conditions at federal boarding schools subjected Native children to malnourishment, harsh discipline, and a poor education.⁶²

Latinx children have also experienced educational exclusion and disinvestment, eventually prompting the courts to recognize Mexican Americans as a cognizable ethnic group for purposes of school segregation litigation who are entitled to protections under the 14th Amendment and the Civil Rights Act.⁶³ Similar to Black children, Latinx students are more now likely to enter segregated elementary schools than a generation ago.⁶⁴ Trends in intensifying residential segregation have particularly impacted Latinx children with 60% of all Latinx students now enrolled in high-poverty schools.⁶⁵

While the landmark 1954 decision of *Brown v. Board of Education* generated optimism that the history of systemic exclusion of Black and Brown children from a quality, public education would no longer be legally and socially tolerated, it has failed to yield those results. The opinion, which unanimously held that racially segregated public schools violated the Equal Protection Clause, has been heralded as one of the most important legal decisions of the twentieth century.⁶⁶ Though consisting of no more than nine pages, in its seminal decision in *Brown* the Court did more than end government-ordered racial segregation in schools. It also enshrined education as an important government function in concluding that education “is the very

⁶¹ As described in a 2008 interview by Lucy Toledo, a Navajo woman who attended the Sherman Institute in the 1950's, “It wasn't really about education.” As recounted by Toledo, the students were not taught basic concepts such as math or English, but were instead required to watch cowboy and Indian films. *Id.*

⁶² *The Meriam Report: The Problem of Indian Administration*, NATIONAL INDIAN LAW LIBRARY (1928), <https://narf.org/nill/resources/meriam.html>.

⁶³ Bell, *supra* note 56, at 730.

⁶⁴ Fuller, et al., *Worsening School Segregation for Latino Children?*, 48 EDUCATIONAL RESEARCHER 407 (2019).

⁶⁵ Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, LOS ANGELES: UCLA C.R. PROJECT (2007).

⁶⁶ Kenneth L. Karst, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 73-74 (Yale University Press 1989); see also Jeffrey D. Hockett, *Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action*, in BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT (Clare Cushman & Melvin I. Urofsky, eds. (2004)); see Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. OF AM. HIST. 81 (1994); Michael J. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 167 (Yale University Press 1982).

foundation of good citizenship.”⁶⁷ As relevant as it is today as when the Court made the pronouncement in 1954, the Court held that, “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁶⁸

Despite the legal significance of the Court’s desegregation holding in *Brown*, the Courts have proven neither capable of eradicating racism nor of producing lasting social change.⁶⁹ The longstanding complicity of the courts in the legalization and maintenance of a racial caste system was not, and could not be, eradicated by a single decision.⁷⁰ In the period immediately following *Brown*, the Court demonstrated limited support in enforcing its own racial desegregation mandate. During the 1960’s and 1970’s, hundreds of school districts were placed under court order to desegregate.⁷¹ However, legal support for school desegregation declined in the 1980’s,⁷² during which time countless school desegregation orders

⁶⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also* *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (finding that public education is critical to the success of the nation’s democracy); *Abington School District v. Schempp*, 374 U.S. 203, 374 U.S. 230 (1963) (recognizing recognized public schools as a “vital civic institution for the preservation of a democratic system of government”); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that schools instill “fundamental values necessary to the maintenance of a democratic political system” and that education is necessary to “sustain our political and cultural heritage.”).

⁶⁸ *Brown*, *supra* note 67, at 493.

⁶⁹ Gerald N. Rosenberg, *African-American Rights After Brown*, in *BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 232* (Clare Cushman & Melvin I. Urofsky, eds. 2004).

⁷⁰ *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that separate facilities for races were permissible under the Fourteenth Amendment so long as those facilities were equal); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856) (enslaved party) (holding that African American slaves were not and could not become citizens); *McCleskey v. Kemp*, 481 U.S. 279 (1986) (concluding that that racially disparities in a state’s capital-punishment system were insufficient to demonstrate unconstitutional discrimination in an individual defendant’s case); Bhargava, *infra* note 71.

⁷¹ Anurima Bhargava, *The Interdependence of Housing and School Segregation*, https://www.jchs.harvard.edu/sites/default/files/A_Shared_Future_Chapter_24_Interdependence_of_Housing_and_School_Segregation.pdf (last visited Dec. 16, 2021).

⁷² During this same period of time, there was a marked shift in state school funding away from an emphasis on achieving equal revenues neutral of property wealth in favor of identifying some benchmark for minimum educational adequacy based on testing standards. This recalculation of educational funding based on minimal adequacy standards had the effect of shifting public funding to affluent, predominantly white school districts at the expense of schools who served low-income students of color. *See* Bruce D. Baker, et al., *The Real Shame of the Nation 7*, EDUC. L. CTR.,

were terminated and districts were subsequently released from court supervision.⁷³ Consequently, school resegregation was quickly refashioned largely through residential segregation. Legal challenges over the past two decades to reverse educational resegregation have been unsuccessful and have been generally met by a hostile court.⁷⁴

As has been widely noted by legal scholars and historians, the *Brown* decision was limited in its relief and failed to outline an explicit remedy to achieve integrated education. *Brown*'s legal invalidation of racial segregation in education was not accompanied by a concrete or committed process of achieving integration or educational equality, resulting in protracted litigation that allowed for the systematic dilution of the Court's mandate.

The *Brown* case has been described by Derrick Bell, renowned former civil rights attorney, distinguished law professor, and Critical Race Theory scholar, as a "a long-running racial melodrama" that has "energized the law, encouraged most black people, enraged a great many white people, and, like so many racial policies served the nation's short-interests but not its long-term interests."⁷⁵ According to Professor Bell, who was personally involved in the NAACP Legal Defense Fund's (LDF) school segregation litigation, today *Brown* is of "little use as legal precedent, it has gained in reputation as a measure of what law and society might be."⁷⁶

The legacy of racism in public education has continued to the present day, with race-based trauma taking multiple forms, including in the criminalization of Black and Brown children.⁷⁷ Data compiled by the Department of Education's Office of Civil Rights⁷⁸ exclusionary

<https://drive.google.com/file/d/1cm6Jkm6ktUT3SQplzDFjJly3G3iLWotJ/view> (last visited Dec.27, 2021).

⁷³ Bhargava, *supra* note 71.

⁷⁴ See *Parents Involved in Community Sch. v. Seattle Sch. District No. 1*, 551 U.S. 701 (2007) (consolidated with *Meredith v. Jefferson County Board of Education*) (reversing decades of school desegregation case law by finding that the voluntary efforts of Seattle and Louisville to desegregate their public schools violated the Equal Protection Clause); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974) (restricting school desegregation remedies to only those school districts under court order to desegregate).

⁷⁵ Bell, *supra* note 56, at 4-5.

⁷⁶ *Id.* at 4.

⁷⁷ Richard Welsh & Shafiqia Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 REV. EDUC. RES. 752 (2018).

⁷⁸ In commenting on the report's troubling findings, Judith Browne Dianis, Executive Director of the Advancement Project, stated, "This data clearly shows that black students are less safe, more restrained and pushed out of school more than other students." Moriah Balingit, *Racial Disparities in school discipline are growing, federal data show*, THE WASH.

school discipline data from the 2017-18 year found that Black students were expelled at rates more than three times that of white students.⁷⁹ Black students were similarly overrepresented in the number of referrals to law enforcement, school-related arrests, and transfers to alternative schools.⁸⁰

The criminalization of children of color is an extension of pejorative perceptions that are used to justify violence and discrimination against Black and Brown students. Beginning as early as ten-years-old, Black boys are more likely to be misperceived as older, considered guilty of suspected crimes, and face police violence if accused of a crime.⁸¹ Similarly, Black girls are viewed as less innocent and in need of less support, nurturing, and protection than white girls of the same age, especially between 5-14-years-old during the formative years of education and childhood.⁸² The adultification of children of color that manifests from implicit racial bias promotes unequal rates of school discipline⁸³ that results in higher dropout rates, a disproportionate number of law enforcement referrals,⁸⁴ and an increased risk of involvement with the juvenile justice system.⁸⁵

Racial disparities in school discipline are not only a major contributor in academic failure but is also responsible for the school-to-prison pipeline. A report by the Georgetown Law Center on Poverty and Inequality found that the adultification of Black and Brown students that fuels the criminalization of children of color contributes to greater use of force, harsher penalties, and more punitive exercise of discretion by those in positions of authority⁸⁶ Harsh exclusionary

POST, (Apr. 24, 2018), https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html.

⁷⁹ U.S. EDUC. DEP'T, OFF. FOR C.R., *Civil Rights Data Collection, 2017-18 State and National Estimations*, (2021), <https://ocrdata.ed.gov/estimations/2017-2018>.

⁸⁰ *Id.*

⁸¹ Phillip Atiba Goff, et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCHOL. 526 (2014).

⁸² Blake, et al., *supra* note 50, at 1-2.

⁸³ See, e.g., Jamilia Blake, et al., *Unmasking the Inequitable Discipline Experiences of Urb. Black Girls: Implications for Urb. Educ. Stakeholders*, 43 URB. REV. 90 (2011); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juv. Just. Sys.*, 59 UCLA L. REV. 1502, 1521 (2012); Jamilia J. Blake, et al., *The Role of Colorism in Explaining African American Females' Suspension Risk*, 32 SCH. PSYCHOL. Q. 118 (2017).

⁸⁴ Blake et al., *supra* note 50, at 9.

⁸⁵ See Daniel J. Losen, et al., *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*, THE C.R. PROJECT, (Apr. 8, 2013); see also Kathryn C. Monahan, et al., *From the School Yard to the Squad Car: School Discipline, Truancy, & Arrest*, 43 J. YOUTH & ADOLESCENCE 1110 (2014).

⁸⁶ Blake et al., *supra* note 50, at 1.

discipline, which are disproportionately employed against children of color, is associated with long-term harm and major negative life outcomes, including incarceration, unemployment, and lower lifetime earnings.⁸⁷ Black students suspended for minor infractions have been found to have significantly lower grades, report less favorable academic environments, and understandably experience stronger feelings of exclusion and a general lack of belonging than their white peers.⁸⁸

Furthermore, although the racial makeup of American schools has become more diverse, the composition of public educators remains overwhelmingly white.⁸⁹ This is of particular concern because research shows that having a teacher of the same race can have positive impacts on a student's attitude and achievement⁹⁰ and, additionally, non-white teachers may have more positive expectations⁹¹ for students of color. Implicit bias influences educators' interpretation and responses to student behavior.⁹² Research published in *Psychological Science*, a journal of the Association for Psychological Science, found that teachers are more likely to label Black students as "troublemakers."⁹³ Anti-black teacher bias has significant adverse effects for students of color, contributing to larger racial disparities in test score inequalities and suspension rates.⁹⁴

⁸⁷ Jason Okonofua, et al., *A Vicious Cycle: A Social–Psychological Account of Extreme Racial Disparities in School Discipline*, 11 PERSPECT. ON PSYCHOL. SCI. 381 (2016).

⁸⁸ Juan Del Toro & Ming-Te Wang, *The Role of Suspensions for Minor Infractions and School Climate in Predicting Academic Performance Among Adolescents*, 77 AM. PSYCHOLOGIST 173 (2021), <https://www.apa.org/pubs/journals/releases/amp-ampj210060.pdf> (last visited Dec. 16, 2021).

⁸⁹ THE NAT'L CTR FOR EDUC. STATISTICS, *Spotlight A: Characteristics of Public School Teachers by Race/Ethnicity* (2019), https://nces.ed.gov/programs/raceindicators/spotlight_a.asp (last visited Dec. 16, 2021).

⁹⁰ Anna J. Egalite & Brian Kisida, *The Effects of Teacher Match on Students' Academic Perceptions and Attitudes*, 40 EDUC. EVALUATION AND POL'Y ANALYSIS 59 (2017); see also Anna J. Egalite & Brian Kisida, *Representation in the Classroom: The Effect of Own-Race Teachers on Student Achievement*, 45 ECON. OF EDUC. REV. 44 (2015).

⁹¹ Seth Gershenson, et al., *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. OF EDUC. REV. 209 (2016).

⁹² Jennifer L. Eberhardt, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (Penguin Books 2019); see also Weisbuch ET AL., *The Subtle Transmission of Race Bias Via Televised Nonverbal Behavior*, 326 SCIENCE 1711 (2009); see also Walter S. Gilliam, et al., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspension? A Research Brief*, YALE CHILD STUDY CENTER (2016).

⁹³ Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617 (2015).

⁹⁴ Mark Chin, et al., *Bias in the Air: A Nationwide Exploration of Teachers' Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566 (2020).

Educational disparities are a historical and contemporary fact deliberately created over a sustained period of *de jure* and *de facto* racial segregation that has been modernized today in the form of unequal school funding, the criminalization of non-white students, and a hyper-fixation on school testing. Consequently, little progress has been made in addressing systemic historical harms that have disadvantaged Black and Brown children. Low-income students⁹⁵ continue to be woefully underrepresented amongst top academic performers⁹⁶ and the average Black and Latinx student remains roughly two years behind their average white counterparts.⁹⁷ An economic measure of the loss in national productivity based on the persistent achievement gap has been estimated to cost the U.S. economy \$310 billion to \$525 billion a year in productivity, equating to 2%-4% of national gross domestic product (GDP).⁹⁸

Educational segregation and disparate school funding are both a function of residential racial segregation. The resegregation of schools has largely paralleled white flight as white families have self-concentrated in urban and rural areas. Residential segregation has been further maintained by zoning ordinances that limit the construction of low and moderate-income and high-density housing.⁹⁹ As school funding is primarily determined by property taxes,¹⁰⁰ residential and educational resegregation have produced schools that are both separate and grossly unequal.

Racial residential segregation, and by extension educational segregation, is arguably even more pronounced today than it was prior

⁹⁵ Black and Latinx students are more likely to live in poverty, and yet racial educational disparities exist across income levels. See Emma Dorn, et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & COMPANY (2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>.

⁹⁶ Erik Hanushek, et al., *Long-Run Trends in the U.S. SES-Achievement Gap*, NAT'L BUREAU OF ECON. RES. (2020); Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY AND THE UNCERTAIN LIFE CHANCES OF LOW-INCOME CHILDREN* (Greg Dundan & Richard Murnane, eds., 2011).

⁹⁷ Dorn, et al., *COVID-19 and Learning Loss—Disparities Grow and Students Need Help*, MCKINSEY & COMPANY, (2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help>.

⁹⁸ *Id.*

⁹⁹ Richard Rothstein, *Brown v. Board at 60: Why Have We Been So Disappointed? What Have We Learned?*, ECON. POL'Y INST. (2014), https://www.epi.org/publication/brown-at-60-why-have-we-been-so-disappointed-what-have-we-learned/#_note5.

¹⁰⁰ Bhargava, *supra* note 71.

to *Brown*.¹⁰¹ More than sixty-five years have passed since segregated schools were declared unequal and unconstitutional and yet at no point have even half of Black students attended a majority-white schools.¹⁰² Residential segregation has deep roots in American society and was facilitated through redlining and other discriminatory practices endorsed by the federal government, sanctioned by the courts, and eagerly administered by private actors.¹⁰³ Black Americans remain the most segregated group in the United States and are five times as likely to live in high-poverty neighborhoods than their white counterparts.¹⁰⁴ Despite large differences in household incomes between Black and white families, residential inequality is not explainable by income.¹⁰⁵ Data shows that Black families earning an annual income of more than \$75,000 live in poorer neighborhoods than whites who earn less than \$40,000.¹⁰⁶

With neighborhoods and school districts becoming increasingly more racially divided, children of color have found themselves isolated from the resources and opportunities that are associated with better-funded, predominantly white schools. The concentration of poverty that manifests as a result of the dual effects of the racial wealth gap and residential segregation produces extreme disparities in educational funding. Black and Brown students who attend racially segregated schools are more likely to experience inadequately funded schools with culturally limited curriculums and higher teacher turnover.¹⁰⁷ On average, high-poverty neighborhoods

¹⁰¹ Hannah-Jones, *supra* note 40; see also Gary Orfield, et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, THE C.R. PROJECT (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

¹⁰² *Id.*

¹⁰³ William Darity Jr., *Why Reparations Are Needed to Close the Racial Wealth Gap*, THE N.Y. TIMES, Sept. 24, 2021, <https://www.nytimes.com/2021/09/24/business/reparations-wealth-gap.html>; see generally Richard Rothstein, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (Liveright 2017).

¹⁰⁴ Hannah-Jones, *supra* note 40.

¹⁰⁵ John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America*, US2010 Project, Jul. 2011. <https://s4.ad.brown.edu/projects/diversity/Data/Report/report0727.pdf> (last visited Dec. 16, 2021).

¹⁰⁶ *Id.*

¹⁰⁷ RACE, EQUITY, AND EDUCATION: SIXTY YEARS FROM BROWN (Pedro Noguera, et al., eds. 2016); see also Vasquez Heilig ET AL., *The Illusion of Inclusion: A Critical Race Theory Analysis of Race and Standards*, 82 HARV. EDUC. REV. 403 (2012).

spend 15.6% less per student on schools than low-poverty neighborhoods.¹⁰⁸

Residential segregation is further exacerbated by high rates of housing instability amongst families of color, who have been denied the opportunity to accumulate intergenerational wealth and, therefore, have a limited safety net to rely upon to navigate personal, financial, and health crisis. Evictions fuel housing insecurity and chronic homelessness insomuch as it creates an eviction record that limits the acquisition of future, safe, and stable housing and confines families to high-poverty neighborhoods with poorly funded, lower quality schools.¹⁰⁹ According to data compiled by the U.S. Department of Education, the number of homeless students increased 90% *each year* between 2008 and 2014 to over 1.3 million children.¹¹⁰ That number rose to 1.5 million homeless students during the 2017-2018 school year.¹¹¹

The persistence of residential racial segregation has profound implications for educational funding and inequality,¹¹² which is both related to and preserves the racial wealth gap and residential segregation, spurring a vicious cycle. Despite the rhetoric of education as a great equalizer, in the absence of equitable funding educational attainment is a function of and a perpetuation of white privilege.¹¹³ The solution, while long-elusive, is in fact simple. A more equitable education system necessitates the desegregation of educational funding to reverse the trend of deepening disparities for economically disadvantaged students and students of color that has resulted from the allocation of school funding based largely on problematic state and local sources.¹¹⁴

¹⁰⁸ Bhargava, *supra* note 71.

¹⁰⁹ *Id.*

¹¹⁰ U.S. DEP'T OF EDUC., IDENTIFYING AND SUPPORTING STUDENTS EXPERIENCING HOMELESSNESS FROM PRE-SCHOOL TO POST-SECONDARY AGES (2020), <https://www2.ed.gov/about/inits/ed/supporting-homeless-students/index.html>.

¹¹¹ Matthew N. Atwell, et al., *Lessons from School and District Liaisons on How to Support Students Experiencing Homelessness* (2020), <https://files.eric.ed.gov/fulltext/ED607092.pdf>.

¹¹² Richard Rothstein, *Brown v. Board at 60: Why Have We Been So Disappointed? What Have We Learned?*, ECON. POL'Y INSTITUTE (2014), https://www.epi.org/publication/brown-at-60-why-have-we-been-so-disappointed-what-have-we-learned/#_note5.

¹¹³ Darity, et al., *supra* note 19.

¹¹⁴ During the 2004-2005 school year, approximately 83 cents from every dollar spent on education originated from state and local sources. See U.S. DEP'T OF EDUC., *10 Facts About K-12 Education Funding*, https://stchas.instructure.com/courses/8779/files/1168341/download?download_frd=1 (2005). Roughly 44% of school funding is generated through local property taxes. See

III. DEEPENING DISPARITIES FOR STUDENTS OF COLOR

The academic achievement gap¹¹⁵ in the United States was first identified in 1966,¹¹⁶ shortly after the Supreme Court's pronouncement in support of educational equality in the historic case of *Brown v. Board of Education*. School integration, in theory, was supposed to alleviate or at least partially address disparities in school funding and the racial achievement gap. That has not happened.

Despite civil rights advancements in the area of school desegregation and a wealth of educational research¹¹⁷ on the achievement gap, both phenomena remain very much intact. A 2016 report published by the Government Accountability Office (GAO) concluded that public schools are more segregated by race and class than at any time since 1960.¹¹⁸ According to GAO, high-poverty schools where 75-100% of the students were low-income and Black or Latinx increased from 9% in 2000 to 16% in 2013.¹¹⁹ In addition to finding that the percentage of high-poverty schools with mostly Black or Latinx students have increased over time, the GAO also determined that these schools tend to have fewer resources and disproportionately more disciplinary actions than better-funded, white schools.¹²⁰

Of notable consequence, housing insecurity, a consequence of the racial wealth gap, intimately impacts a students' ability to receive a quality education, a fact that has only become truer as schools have been required to transition to online learning. Housing instability and

Jennifer Park, *School Finance*, EDUC. WK. (2011), <https://www.edweek.org/policy-politics/school-finance/2007/12>; see also Lizeth Ramirez, TEDx Challenge Early College High School, *The Dilemma of Public Funding* (Jul. 5, 2019), <https://www.youtube.com/watch?v=8Hg5FYZ5pFU>.

¹¹⁵ The term "academic achievement gap" is most commonly used to refer to the disparities in standardized test scores between Black and white, Latinx and white, and recent immigrant and white students. The 2005 National Assessment of Educational Progress identified a gap in reading and math scores for Black and Latinx fourth and eighth graders of more than 20 points relative to white students. The achievement gap remains even when evaluating students from comparable income levels. See Ladson-Billings, *supra* note 57, at 4.

¹¹⁶ Dorn, et al., *supra* note 97; See generally Ladson-Billings, *supra* note 55.

¹¹⁷ As of 2006, American pedagogical theorist and teacher educator, Gloria Ladson-Billings, had identified over 11 million Google citations for the term "the achievement gap." Ladson-Billings, *supra* note 55.

¹¹⁸ U.S. GOV'T ACCOUNTABILITY OFF., *Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, (2016), <https://www.gao.gov/assets/gao-16-345.pdf> [hereinafter 2016 GAO Report].

¹¹⁹ *Id.* at 10, 14.

¹²⁰ *Id.* at 16.

homelessness has been shown to negatively affect student learning, educational attainment,¹²¹ and overall socio-emotional well-being.¹²² Students who experience homelessness are disproportionately exposed to a multitude of factors that makes academic progress more difficult. Housing insecure students are more likely to be suspended from school than their housed peers.¹²³ Students who lack stable housing are likely suffer from high rates of absenteeism, to be held back a grade, to have behavioral issues, and ultimately to drop out of school.¹²⁴ Consequently, students experiencing homelessness have one of the lowest high school graduation rates in the nation.¹²⁵ Individuals who lack a high school degree or GED are more than four times as likely to experience homelessness, thereby perpetuating the tragic cycle of intergenerational poverty.¹²⁶

As a result of racial discrimination, students of color are overrepresented amongst the homeless population. In Washington, for example, 62% of homeless students are children of color despite comprising only 46% of public school students.¹²⁷ Frequent evictions are both highly traumatic and disruptive to a child's education.¹²⁸ In recognition of the socio-emotional and educational disadvantages faced by impoverished children who lack stable housing, the McKinney-Vento Homeless Assistance Act¹²⁹ provides an explicit right to homeless students to immediately enroll in school and to remain in the school that they had been attending (with transportation provided) or, alternatively, to enroll in the school assigned to the area where they are temporarily residing.¹³⁰

Students who experience housing insecurity also benefit from the stability, safety, and resources that come from attending school.

¹²¹ Shana Pribesh & Douglas B. Downey, *Why Are Residential and School Moves Associated with Poor School Performance?*, 36 DEMOGRAPHY 521 (1999); see also David Wood, et al., *Impact of Family Relocation on Children's Growth, Development, School Function, and Behavior*, 270 JAMA 1334 (1993).

¹²² Gloria A. Simpson & Mary Glenn Fowler, *Geographic Mobility and Children's Emotional/Behavioral Adjustment and School Functioning*, 93 PEDIATRICS 303 (1994); see also Shigehiro Oishi, *The Psychology of Residential Mobility: Implications for the Self, Social Relationships and Well-Being*, 5 PERSPECTIVES ON PSYCHOL. SCI. 5 (2010).

¹²³ Atwell, *supra* note 111, at 13.

¹²⁴ *Id.* at 3.

¹²⁵ *Id.*

¹²⁶ *Id.* at 8.

¹²⁷ *Id.* at 15.

¹²⁸ Bhargava, *supra* note 71.

¹²⁹ 42 U.S.C. § 11431, et seq. (2016).

¹³⁰ Atwell, *supra* note 111, at 10-11.

Homeless students are automatically eligible for federal school lunch and breakfast programs, as well as summer and after-school meal programs.¹³¹ Additionally, because children experiencing homelessness are at a disproportionately high risk for disabilities and developmental delays, they are prioritized for screening and identification through the Individuals with Disabilities and Education Act (IDEA).¹³²

Given the pre-existing racial disparities in education, it is unsurprising that learning loss during the COVID crisis has been greatest amongst low-income, Black, and Brown students. A June 2020 analysis by McKinsey & Company found that persistent achievement disparities across income levels between white students and Black and Latinx students have been further compounded during the public health crisis.¹³³ Barriers to accessing technology, also referred to as the “digital divide,” is yet another area in which educational inequity has been manifestly exposed during the COVID-19 crisis. Black households are also substantially less likely to have a computer or internet access at home than white households.¹³⁴ Moreover, lower-income students are less likely to have access to a high-quality remote learning, the necessary technology to engage in online instruction, adequate parental supervision, high-speed internet, and a conducive learning environment.¹³⁵ As a result of these factors, pandemic-related learning loss for Black and Latinx students may be as great as between 9.2-10.3 months, augmenting existing racial achievement gaps by as much as 20%.¹³⁶ Learning loss disproportionately experienced by students of color is predicted to also

¹³¹ U.S. DEP’T OF EDUC., *Identifying and Supporting Students Experiencing Homelessness from Pre-School to Post-Secondary Ages*, <https://www2.ed.gov/about/inits/ed/supporting-homeless-students/index.html> (last visited Dec.17, 2021).

¹³² *Id.*

¹³³ Dorn, *supra* note 97.

¹³⁴ Gould & Wilson, *supra* note 9.

¹³⁵ Dorn, *supra* note 97; *see also* Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital ‘Homework Gap*, PEW RESEARCH (2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/>; Dana Goldstein, et al., *As School Moves Online, Many Students Stay Logged Out*, N.Y. TIMES, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/us/coronavirus-schools-attendance-absent.html>; Anna North, *The Shift to Online Learning Could Worsen Educational Inequality*, VOX, Apr. 9, 202), <https://www.vox.com/2020/4/9/21200159/coronavirus-school-digital-low-income-students-covid-new-york>.

¹³⁶ Dorn, *supra* note 97.

increase high school dropout rates by disrupting critical support systems that are essential to student success and matriculation.¹³⁷

Furthermore, the ability to access personal computer devices and high-speed broadband internet, a requirement for online learning during the pandemic, was not universally available to all students. A study of 2,600 schools conducted by Education Weekly in the spring of 2020 found that 64% of teachers and administrators based in schools with a large population of low-income students encountered technology limitations.¹³⁸ The access to online instruction has a notable racial component. During the pandemic shutdown, 40% of Black and 30% of Latinx K-12 students received *no* online instruction, as compared to 10% of white students.¹³⁹

These persistent and growing disparities, if left unaddressed, could become irreversible.¹⁴⁰ Early global estimates suggest that the cost to children in terms of lost lifetime earnings as a result of educational disruptions caused by the pandemic thus far could exceed \$17 trillion.¹⁴¹ The loss of the necessary skills to successfully participate in the economy and compete for high-wage jobs will be most acutely felt by children with the greatest difficulties in accessing remote learning, including children with disabilities, younger children, and those from poorer households.¹⁴²

IV. REPAYING OUR MORAL AND EDUCATIONAL DEBT TO CHILDREN OF COLOR

Even prior to the pandemic, the dismantling of the “separate but equal” doctrine ushered by *Brown* did nothing to allow for the collection of the longstanding education debt owed to children of color. Rather, it had the perverse effect of creating the illusion that the end to legal racial segregation cured racism, thereby shepherding in a

¹³⁷ *Id.*

¹³⁸ Benjamin Herold, *The Disparities in Remote Learning Under Coronavirus (in Charts)*, EDUC. WKLY. (2020), <https://www.edweek.org/technology/the-disparities-in-remote-learning-under-coronavirus-in-charts/2020/04>.

¹³⁹ Dorn, *supra* note 97.

¹⁴⁰ *Id.*; see also John R. Allen & Darrell M. West, *How to Address Inequality Exposed by the COVID-19 Pandemic*, BROOKINGS (2020), <https://www.brookings.edu/president/how-to-address-inequality-exposed-by-the-covid-19-pandemic/>.

¹⁴¹ Anya Kamenetz, *\$17 trillion: That's how much the pandemic could take away from today's kids*, NPR, Dec. 27, 2021, <https://www.npr.org/sections/goatsandsoda/2021/12/27/1068298117/-17-trillion-thats-how-much-the-pandemic-could-take-away-from-todays-kids>.

¹⁴² *Id.*

new America that had achieved a post-racial state. As described by Professor Michael Seidman, *Brown* brought about “transformation without change”¹⁴³ while foreclosing the legitimacy of subsequent claims for the need for further racial equality.¹⁴⁴

“Once white society was willing to make facilities legally non-separate, the demand for equality had been satisfied and Blacks no longer had just cause for complaint. The mere existence of *Brown* thus served [to] legitimate current arrangements. True, many Blacks remained poor and disempowered. But their status was no longer a result of the denial of equality. Instead, it marked a personal failure to take advantage of one’s definitionally equal status.”¹⁴⁵

Expounding upon Professor Seidman’s observations, Professor Bell noted that *Brown* did more than delegitimize future racial justice concerns. It also had the concomitant and perverse effect of fostering a fictitious narrative of racial meritocracy.¹⁴⁶ In the period proceeding *Brown*, and extending to present day, the prevailing view is that those who fail to achieve the American dream do so not because of a lack of equal opportunity, but rather due to personal failures.¹⁴⁷

Moreover, as stressed by Nikole Hannah-Jones, Pulitzer Prize-winning reporter and the inaugural Knight Chair in Race and Journalism at Howard University, “Making school segregation illegal did nothing to repay black families for the theft of their educations or make up for generations of black Americans, many of them still living, who could never go to college because white officials believed that only white students needed a high school education and so refused to operate high schools for black children.”¹⁴⁸

If indeed education is “a right which must be made available to all on equal terms”¹⁴⁹ as the Court declared in its decision in *Brown v.*

¹⁴³ Bell, *supra* note 56, at 6.

¹⁴⁴ Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 717 (1992); *see also* Bell, *supra* note 56, at 6-7.

¹⁴⁵ Seidman, *supra* note 144, at 717.

¹⁴⁶ Bell, *supra* note 56, at 7.

¹⁴⁷ The election of President Barack Obama as the first Black American President was a momentous and historical event, but one that also has been effectively exploited to advance the post-racial meritocracy myth.

¹⁴⁸ Hannah-Jones, *supra* note 40.

¹⁴⁹ *Brown v. Board of Educ.*, *supra* note 67, at 493.

Board of Education, then that can only be fully realized by through equal funding of our nation's public education. Education debt theory, pioneered by Gloria Ladson-Billings, relies on historical, economic, sociopolitical, and moral support to argue for the need for appropriate funding and investment in low income, primarily non-white schools.¹⁵⁰ According to Professor Ladson-Billings, the preoccupation on the achievement gap is misplaced.¹⁵¹ Rather, our societal focus, attention, and resources should be instead devoted to the "educational debt" that is owed to children from historically marginalized communities.¹⁵² Our country's education debt to our Black and Brown children, who have never been afforded a comparable high-quality education to their white peers, encompasses more than merely a financial obligation.¹⁵³ This educational debt encompasses a historical, economic, socio-political and moral liability that we—as a nation—owe to our children of color.¹⁵⁴

The response of white America to *Brown* in the form of white flight, unequal education funding for predominantly Black and Brown schools, and the eventual backlash to affirmative action programs has only served to compound the educational debt owed to children of color. Beginning in the 1980's, after a modest period of civil rights gains, the country forcefully embraced a disingenuous color-blind philosophy that was used to justify an aggressive attack on affirmative action, a systematic dismantling of federal and state race-remedies law, and a shredding of the social safety net by which people or color relied upon for their survival.¹⁵⁵ Declarations of equality under the law in the form of judicial opinions and federal statutes were presented as adequate to remedy hundreds of years of systemic racial exploitation and the vast material gains that had resulted from a highly efficient national project that concentrated wealth in the hands of white elites.

Educational racism in the form of the chronic underfunding of segregated, Black, and Brown schools has robbed children of color of *trillions* of dollars of investment that have resulted in permanent disadvantages in virtually every area of their lives. Between 2005 and 2017—the educational life cycle of a child—public schools in the U.S.

¹⁵⁰ Ladson-Billings, *supra* note 55.

¹⁵¹ *Id.* at 4.

¹⁵² *Id.*

¹⁵³ *Id.* See also Barbara Wolfe & Robert Haveman, *Accounting for the Social and Non-Market Benefits of Education* (2001), <https://www.oecd.org/education/innovation-education/1825109.pdf> (discussing the nonmarket effects of schooling).

¹⁵⁴ Ladson-Billings, *supra* note 55 at 4-9.

¹⁵⁵ Delgado, *supra* note 41, at 2280.

were underfunded by \$580 billion in federal dollars alone that was specifically targeted to support the most vulnerable students.¹⁵⁶ In contrast, affluent and predominantly white school districts spend thousands to tens of thousands more per pupil than impoverished school districts that serve children of color.¹⁵⁷ In some states, per pupil spending in the highest poverty districts is as much as \$16,000 below necessary spending levels.¹⁵⁸ As a result of the lack of equitable resources afforded to public schools that serve children of color, Black and Brown students are more likely to be taught in overcrowded classrooms,¹⁵⁹ attend schools with high teacher turnover¹⁶⁰ and a greater number of inexperienced teachers,¹⁶¹ and have less access to high level math and science courses¹⁶² and essential resources such as guidance counselors,¹⁶³ librarians, and adequate technology.¹⁶⁴

However, given that federal funding accounts for only 8%¹⁶⁵ of education spending, disparities in state and local educational funding sources account for the most significant source of educational inequity. Extreme variance in funding amongst state educational systems predictably yields significant disparities in student achievement outcomes.¹⁶⁶ Research by Rutgers Graduate School and the Education Law Center found that most states fall well below the funding levels

¹⁵⁶ *Confronting the Education Debt*, THE EDUC. JUST. RES. AND ORGANIZING COLLABORATIVE AT N.Y. U., http://educationdebt.reclaimourschools.org/wp-content/uploads/2018/08/Confronting-the-Education-Debt_FullReport.pdf (last visited Dec. 27, 2021). Notably, during this same period of time, the net worth of the 400 wealthiest Americans grew by \$1.57 trillion.

¹⁵⁷ Baker, *supra* note 72, at 1.

¹⁵⁸ *Id.* at 39.

¹⁵⁹ Jack Jennings, PRESIDENTS, CONGRESS AND THE PUB. SCH. (2015).

¹⁶⁰ Matthew Ronfeldt ET AL., *How Teacher Turnover Harms Student Achievement*, <https://core.ac.uk/download/pdf/6711029.pdf> (last visited Dec. 27, 2021).

¹⁶¹ 2013-2014 Civil Rights Data Collection, *A First Look*, U.S. DEP'T OF EDUC., OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> (last visited Dec. 26, 2021).

¹⁶² *Failing Brown v Board: A Continuous Struggle Against Inequity in Public Education*, JOURNEY FOR JUST. ALLIANCE, <https://www.dropbox.com/s/f60dvoxk8ottjzz/Final%20Failing%20Brown%20v%20Board%20Abridged.pdf?dl=0> (last visited Dec. 27, 2021).

¹⁶³ 2013-2014 Civil Rights Data Collection, *A First Look*, U.S. DEP'T OF EDUC., OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> (last visited Dec. 26, 2021).

¹⁶⁴ See *supra* note 163.

¹⁶⁵ *Id.* at 4.

¹⁶⁶ Baker, *supra* note 72, at 1.

necessary for their highest poverty children to achieve national average outcomes.¹⁶⁷

As argued by racial realists (also sometimes referred to as economic determinists), racism must be understood and analyzed in a manner that considers the material consequences of racist ideology.¹⁶⁸ Racism provides a means by which society allocates wealth, privilege, and status.¹⁶⁹ Consequently, racial hierarchies determines who qualifies for the most lucrative jobs, resides in the most affluent neighborhoods, is admitted into the most prestigious schools, and receives the greatest societal benefits.¹⁷⁰ Race and racism, according to Critical Race Theorist, Richard Delgado, “are not entirely like leprechauns-things that would cease to exist if we stopped thinking about them. Rather, they are more like poverty, which would continue to exist and perhaps intensify if we did not think about it at all.”¹⁷¹ In the realm of educational racism, where the systemic reallocation of funding from predominantly non-white to white schools has produced grossly inequitable outcomes, we will continue to deprive Black and Brown children of the opportunities for growth and prosperity to which they are entitled absent a commitment to repaying the moral and education debt that we collectively owe our children of color.

V. CRISIS AS A CATALYST FOR REBIRTH

Decades of civil rights litigation in the era of educational equality leads to the incontrovertible conclusion that our current educational system has been an unassailable failure for low-income and Black and Brown children.¹⁷² According to Professor Bell, the lesson of *Brown* is that we ought not to place our hopes for racial justice in the legal system:

Brown teaches that advocates of racial justice should rely less on judicial decisions and more on tactics, actions, and even attitudes that challenge the continuing assumptions of white dominance. History

¹⁶⁷ *Civil Rights Data Collection*, *supra* note 161.

¹⁶⁸ Delgado, *supra* note 41, at 2283.

¹⁶⁹ *Id.* See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

¹⁷⁰ Delgado, *supra* note 41, at 2280.

¹⁷¹ *Id.* at 2284.

¹⁷² For a depressing and uncontroverted evaluation of the public education system in the United States, review the in-depth work of Rhodes Scholar, former fourth grade teacher, and education advocate, Jonathan Kozol. See generally Jonathan Kozol, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2006); See also Jonathan Kozol, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (2012).

as well as current events call for realism in our racial dealings. Traditional statements of freedom and justice for all, the usual fare on celebratory occasions, serve to mask continuing manifestations of inequality that beset and divide people along lines of color and class. These divisions have been exploited to enable an uneasy social stability, but at a cost that is not less onerous because it is all too obvious to Blacks and all but invisible to a great many whites.¹⁷³

Imaginative action, rather than a misplaced belief in the role of the Court in addressing the racial injustices that they were complicit in creating, is what is urgently needed.

Although the Courts have consistently reiterated the importance of education, they have declined to recognize an explicit Constitutional right to education.¹⁷⁴ The establishment of education has historically and continues to be viewed as being reserved to the states under the Tenth Amendment.¹⁷⁵ Without a constitutional guarantee of the right to education, states have assumed the role of guarantor of an essential aspect of civic engagement and a functioning democracy, which has yielded grossly inequitable results for racially oppressed groups.¹⁷⁶ Because public education has been considered a state responsibility, school funding is primarily derived from state and local sources,¹⁷⁷ most notably local property taxes. The historic reliance on local control of schools has largely insulated the American education system from the structural changes needed in order to usher true educational equality irrespective of race or socioeconomic status.

One possibility that holds promise for tangible structural change is the desegregation of school funding through the creation of

¹⁷³ Bell, *supra* note 56, at 9.

¹⁷⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that public education is not a “right” granted to individuals by the Constitution); see also Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019). Professor Black convincingly argues that in applying originalist theory and reviewing the historical record, education was conceived of as a fundamental right by the Framers. A recent case that nonetheless reaffirmed the position that public education is not a constitutional right is *A.C. by Waithe v. McKee*, a case brought by Rhode Island students who sought to affirm the right to an education. *A.C. by Waithe v. McKee*, 23 F.4th 37 (1st Cir. 2022).

¹⁷⁵ See Danielle Wingfield-Smith, *The Right to Education in The Midst of a Pandemic*, NW UNIV. L. REV. (Nov. 18, 2020), <https://blog.northwesternlaw.review/?p=1939>; See also *10 Facts About K-12 Education Funding*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/overview/fed/10facts/index.html> (last visited Dec. 22, 2021).

¹⁷⁶ *Id.*

¹⁷⁷ The primary source of federal K-12 support began in 1965 with the enactment of the *Elementary and Secondary Education Act (ESEA)*. Today, only about 8% of school funding is provided by the federal government. See *supra* note 174; see also Baker, *supra* note 72.

race-conscious reparations initiatives.¹⁷⁸ Though not without significant legal and political obstacles, the desegregation of educational funding could be advanced through the creation of a robust, federal reparations program that seeks to atone and address past racial harms perpetuated by the government in direct benefit of whites. Such a program would function as a mechanism that begins to compensate historically marginalized communities for centuries of economic exploitation and disinvestment.

Reparations have both domestic and international precedent, including the repayments paid by Germany to Holocaust survivors and by the American government to interned Japanese Americans and survivors of the September 11th terrorist attacks.¹⁷⁹ The idea of offering Black Americans, specifically the descendants of formerly enslaved people, financial compensation as a form of national recognition for the harms committed against them by our nation dates back prior the Civil War.¹⁸⁰ As the Civil War was coming to a close in January 1865, General William Tecumseh Sherman issued Special Field Order 15 authorizing the redistribution of 400,000 acres of land confiscated or abandoned by the Confederates to newly freed Black people. The order would have provided for 40-acre land grants to recently freed, formerly enslaved African Americans along the Georgia, Florida, and South Carolina coasts. A mere four months after the issuance of the order, President Abraham Lincoln was assassinated and his successor, Andrew Johnson, a staunch pro-Southerner, swiftly revoked the order. Based on modern estimates, the land value of what had been promised to formerly enslaved African Americans as a modest restitution for the crimes committed against them would be approximately \$6 trillion today.¹⁸¹ To date, the only Americans who have received government restitution for slavery are white slaveowners.¹⁸² For roughly another 250 years following the Civil War, there was virtually no interest in compensating Blacks for the

¹⁷⁸ See Darity, *supra* note 19 at 4; See also Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, (Jun. 15, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (last visited Nov. 15, 2021).

¹⁷⁹ Darity, *supra* note 103.

¹⁸⁰ Bell, *supra* note 56, at 74.

¹⁸¹ Darity, *supra* note 103. In comparison, between 1868-1934, the federal government gave away nearly 10% of all of the land in the nation, equating to more than 246 million acres of land, to 1.5 million white families in the form of 160-acre land grants. Nearly 20% of Americans today descend from and benefit from these homesteads. See also Hannah-Jones, *supra* note 42.

¹⁸² *Id.*

trauma, violence, abject economic exploitation, and deprivation of basic of rights that they continued to endure.

Although proposals involving either direct or indirect reparation payments to African Americans at the federal level may be unlikely due to legal barriers¹⁸³ and extreme partisanship and political dysfunction,¹⁸⁴ local and state leaders have demonstrated a willingness and commitment to enacting racial reparations programs. At the state and local level, government leaders are exploring how reparations programs could be administered. In spring 2021, the city of Evanston, Illinois, a Chicago suburb, began distributing \$10 million in reparations in the form of housing grants to its Black residents who were personally impacted or who are related to individuals who were harmed by redlining and other forms of residential segregation¹⁸⁵¹⁸⁶

Several months after Evanston began implementing its housing reparations program, California became the first state to develop a reparations task force that will study and provide proposals to provide reparations to Black Californians for slavery and centuries of systemic discrimination.¹⁸⁷ The process, which was the result of efforts led by California Secretary of State, Shirley Weber, will be headed by a task force comprised of nine politicians, scholars and lawyers who will dedicate two years to studying the issue.¹⁸⁸

Though racial reparations initiatives were until fairly recently considered a political impossibility, public opinion of racial inequity, specifically amongst white Americans, has shifted in recent years, generating a renewed, albeit cautious optimism, that systemic change may be possible, even if only achievable on a modest scale. Public survey data has found that the number of white Americans who believe that racial and ethnic discrimination is a “big problem” increased from roughly half to three-quarters between 2015 and 2020.¹⁸⁹ The shift in

¹⁸³ Boris Bittker, *THE CASE FOR BLACK REPARATIONS* (1973); *see also* Bell, *supra* note 56, at 74.

¹⁸⁴ *See generally* Randall Robinson, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000).

¹⁸⁵ Julie Bosman, *Chicago Suburb Shapes Reparations for Black Residents: 'It Is the Start'*, *THE N.Y. TIMES* (Mar. 22, 2021), <https://www.nytimes.com/2021/03/22/us/reparations-evanston-illinois-housing.html>.

¹⁸⁶ *Id.* Admittedly, the availability of the housing grants is limited and the amount provided is nominal at no more than \$25,000.

¹⁸⁷ Jill Cowan, *California Today: Explaining the Reparations Effort*, *THE N.Y. TIMES* (Jun. 3, 2021), <https://www.nytimes.com/2021/06/03/us/california-today-explaining-the-reparations-effort.html>.

¹⁸⁸ *Id.*

¹⁸⁹ *MONMOUTH UNIVERSITY* (Jun. 2, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_US_060220/.

public attitudes towards racial inequality has been attributed to a number of COVID-induced factors, including the increased visibility of racial protests, intense public outcry in response to police brutality and killing of Black and Brown Americans with impunity, and a recognition by some parts of white America of the disproportionate effects of the pandemic on people of color.¹⁹⁰

In tandem with advocating for racial reparations in the form of enhanced education funding, ongoing efforts are needed to desegregate school funding. More equitable school funding could, for example, be achieved by pooling and targeting funding to resolve racial disparities, with a particular emphasis on raising spending levels in areas with large spending gaps and little fiscal capacity of their own to remedy those gaps.¹⁹¹ Additionally, the federal government could be more proactive in encouraging states to adopt appropriate measures to address educational inadequacies and inequities by incentivizing federal resources on prioritizing racial equity imperatives. Improving the educational opportunities for children of color will require new and meaningful investments in the form of targeted funding and support. Importantly, it must be premised on truly equitable funding and that abandons artificial notions of colorblindness and a far-from-achieve post-racial reality.

VI. CONCLUSION

America is indubitably the product of an intentionally stratified racial society whereby racism is a common cultural and political heritage that has become unconsciously embedded in our psyche, belief systems, and actions.¹⁹² Despite the prolific evidence of the benefits of whiteness in American society, white America has historically been all too eager to dismiss racial injustices as a phenomenon of the past that has been cured by a few bellwether moments of progress. Research shows that Americans have a tendency to overestimate racial economic progress and significantly misperceive the racial wealth gap, which is largely attributable to a desire to view society as fair and merit based.¹⁹³

¹⁹⁰ Hannah-Jones, *supra* note 42.

¹⁹¹ Baker, *supra* note 72, at 39.

¹⁹² Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁹³ M.W. Kraus ET AL., *The Misperception of Racial Economic Inequality*, 14 PERSPECTIVES ON PSYCHOL. SCI. 899 (2019).

We have an obligation to counter the prevailing false, post-racial narrative that racial harm is a facet of the distant past. We must confront the racial caste system that informs every aspect of our nation and that has been meticulously sustained over a period of centuries. Logic and ethics demand that a comparable degree of effort, commitment, and intentionality be dedicated to deconstructing the white supremacist origins and vestiges of our socio-political, economic, and educational structures. The persistence and magnitude of the racial achievement gap, a product of the racial wealth gap, is so significant that it requires a reparations program that is designed to cure historical harms of racism that has taken equally pernicious modern forms.¹⁹⁴ Racial and economic inequality cannot be divorced any more so than persistent racial educational disparities can be dismissed as unrelated to unequal educational funding.

If a proactive, committed, race-conscious approach to educational inequality is not timely adopted to mitigate the disproportionate educational consequences of the pandemic on students of color the educational losses experienced could have permanent, long-lasting effects. Targeted individual and structural supports for Brown and Black students must be a central element of a pandemic-oriented educational recovery plan. Measures such as expanded summer programs, individualized tutoring, and enhanced high-quality online learning, strengthened student, teacher, and community support, and the resumption of safe, in-person instruction is needed.

If there is indeed a potential for a new paradigm that may be birthed from the tragedy of the COVID crisis it will also necessitate a “racial realism”¹⁹⁵ that empowers Black voices and emphasizes their needs. As espoused by Professor Bell, reliance on law-based racial remedies have generated a misplaced belief in the ability of the legal system to cure racial injustices, thereby limiting the recognition that newly acquired legal rights offer little than facilitate the interruption of one form of discriminatory conduct for another no less discriminatory form.¹⁹⁶ Despite dramatic and hard-earned civil rights advancements, Blacks remain unequal to whites as evaluated by virtually every

¹⁹⁴ See Melvin L. Oliver & Thomas M. Shapiro, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

¹⁹⁵ Derrick Bell Jr., *Racial Realism*, 24 *CONN. L. REV.* 363 (1992); Kimberlé Crenshaw ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (New Press ed., 1995).

¹⁹⁶ *Id.* at 307.

economic, social and political measure.¹⁹⁷ Modern civil rights strategies must be based on realistic, rather than idealistic, goals for lasting socio-political change that allows for the reclaiming of Black humanity and the rejection of the “othering” that has been used to define Blackness in America.¹⁹⁸

In the midst of a global health crisis and in the recent aftermath of a national insurrection,¹⁹⁹ Chief Justice Warren’s pronouncement of the essentiality of public education to a functioning democracy cannot be overstated. This is a moment for mobilization. It must build upon past Civil Rights successes and the remarkable leaders who paved the way for *Brown*, but it must also evolve to confront the contemporary challenges of the racial justice movement. It must employ the power of the law strategically but without an expectation that the courts have the ability or desire to acknowledge the racial trauma inflicted upon Black and Brown Americans. There is no all-encompassing solution, but there is transformative potential in a racial realism envisioned by Professor Bell. Transformation demands discomfort and disruption, and that disruption can yield rebirth.

¹⁹⁷ *Id.* at 302; See also Barbara A. Fears, *Unchained, but Unchanged: In Need of a Revolution*, ABA HUMAN RIGHTS MAGAZINE (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/unchained--but-unchanged--in-need-of-a-revolution/; Richard Delgado, *Derrick Bell’s Racial Realism: A Comment on White Optimism and Black Despair* *Commentary on Racial Realism*, 24 CONN. L. REV. 527 (1991).

¹⁹⁸ *Id.*

¹⁹⁹ On Jan. 6, 2021, a violent mob broke into the United States Capitol in an unsuccessful effort to halt the certification of the electoral vote and to overturn the 2020 election in favor of Donald Trump. See *January 6th Investigation*, THE WASHINGTON POST, <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/> (last visited Dec. 26, 2021).