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Are We Still Not Saved? Race,  
Democracy, and Educational  
Inequality

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INTRODUCTION: OUR HISTORY, OUR DEMOCRACY

Thirty-four years ago, in his seminal book, *And We Are Not Saved: The Elusive Quest for Racial Justice*, Derrick Bell provided a critical view of American history and constitutional jurisprudence to illustrate the challenges the United States faces in reaching true equality. In his enlightened observations about the structure of our

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republic, Bell refers to “the American contradiction.”<sup>1</sup> To see true progress toward meaningful equality, he contends, we must reckon with the challenging truth of our history—that we are a nation founded on this “constitutional contradiction”:<sup>2</sup>

[The] contradiction . . . sacrificed the rights of some in the belief that this involuntary forfeiture [was] necessary to secure the rights [of] others in a society espousing, as its basic principle, the liberty of all. . . . [T]he Constitution, while claiming to speak in an unequivocal voice, in fact promises freedom to whites and condemn[ed] blacks to slavery.<sup>3</sup>

In his work, Professor Bell argued that this American contradiction, “shrouded by myth,” serves as a perpetual impediment to addressing historic and persistent forms of racial injustice.<sup>4</sup> This, he says, is “the root reason for the inability of black people to gain legitimacy.”<sup>5</sup> This reality of racial inequality is part of our culture and common history. It is the contradiction embedded in the ideology that formed our republic.

In a series of parables, Professor Bell outlines some of the most significant challenges in using the law as a tool for social change. His book title references Jeremiah, the Old Testament prophet who predicted the fall of Jerusalem and the captivity of Jews in Babylon: “The harvest is past, the summer is ended, and we are not saved.”<sup>6</sup> Bell posited that three decades after the Supreme Court broke the back of legal apartheid in *Brown v. Board of Education*, after the civil rights movement, the activism and deaths of great leaders, and the passage of key civil rights legislation, there was no permanent harvest of racial equality.<sup>7</sup> And yet, Bell’s work also highlights the limited role that some governmental strategies may play in offering pathways to stem the systemic inequities borne of this American contradiction.

As a child growing up in Pittsburgh, Pennsylvania, I learned of trailblazing defenders of the Constitution’s work, like NAACP Legal Defense Fund lawyer and Supreme Court Justice Thurgood Marshall. I

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<sup>1</sup> Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 4 (1985).

<sup>2</sup> See generally DERRICK BELL, *AND WE ARE NOT SAVED* 26–50 (1987) (defining and discussing the contradiction of sanctioning slavery in the nation’s founding social contract in the first chapter of Bell’s book, titled “The Real Status of Blacks Today: The Chronicle of the Constitutional Contradiction”).

<sup>3</sup> *Id.* at 36.

<sup>4</sup> Bell, *supra* note 1, at 7.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Jeremiah* 8:20 (King James).

<sup>7</sup> See generally BELL, *supra* note 2, at 3 (discussing the relevance of Jeremiah’s lament to existing intractable racial inequality).

also learned of Professor Derrick Bell, a Pittsburgh native and former Legal Defense Fund lawyer, who grew up with my mother and her family in a segregated neighborhood called the Hill District. As a young lawyer with the NAACP Legal Defense Fund, I believed deeply in the work of these “defenders of the Constitution.” And as a constitutional law professor, I continue to believe in the meaningful role that each of us plays in making real the promise of democracy and equality set forth in the words of our founding document. Throughout his life’s work, Professor Bell challenged us to unmask the more difficult parts of our constitutional history to better understand present circumstances. He used history to craft parables, and these parables served as forewarnings of future crises if we did not heed their lessons.

In this profoundly disconcerting time in our nation’s history, the work of Professor Derrick Bell seems deeply prophetic. We hear the constant refrain, “[w]e are living in extraordinary times,” through the devastation of the global health pandemic known as COVID-19; the summer of racial reckoning with the murder of George Floyd and the global protests for Black lives; and the constitutional crisis the deadly insurrection at the U.S. Capitol brought—where domestic terrorists constructed a gallows on the Capitol steps and brandished Confederate flags through its halls. The extraordinary, however, is in many ways an entirely foreseeable experience when viewed in light of our republic’s history and constitutional jurisprudence. As William Faulkner once wrote, “The past is never dead. It’s not even past.”<sup>8</sup> It is perhaps because of our failure to reckon with our history that we are here in this profoundly disconcerting time, and why if Professor Bell were here, he would certainly say, “Still, we are not saved.”

We must learn the importance of understanding our past, so we can learn to choose a different future. Perhaps ironically, one can see the most profound and meaningful lessons in the education domain, and in the experiences of our country’s most vulnerable students. The events of the last year, including the catastrophic health crisis, racial violence, and the ensuing physical, psychological, and economic trauma, have wreaked havoc on an education system already suffering deeply from widespread inequity. In schools, children learn basic skills such as reading, writing, and arithmetic. But they also learn other life skills. As Thurgood Marshall argued in the Little Rock, Arkansas, school desegregation case, *Cooper v. Aaron*, “Education is teaching of the overall citizenship, to learn, to l[ive] together with fellow citizens and

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<sup>8</sup> WILLIAM FAULKNER, REQUIEM FOR A NUN 49 (Faded Page ed. 2019) (1951) (ebook).

above all, to obey the law.”<sup>9</sup> Schools are the incubators for the next generation of knowledgeable citizens who will become actively engaged in the continual building and strengthening of our republic. For the most vulnerable students in our public schools, historic and persistent racial and economic segregation greatly shapes their access to quality education. In addition, their experiences are further shaped by both differing public investments in student access to educational opportunities and exposure to racial violence and trauma that have plagued our republic both in and out of education spaces. And the onslaught of COVID-19 both illuminates and exacerbates these entrenched educational inequalities.

At this moment, however, we are at an inflection point. The pandemic of COVID-19 not only exposes and exacerbates educational inequality but also provides an opportunity for a long overdue reckoning with the more troubling parts of our shared history and their indelible mark on access to education in the United States. We have a collective responsibility to create structural solutions to better educate children for full and robust participation in our society. But to do so, we must first examine the recent history of access to educational opportunity to understand how the pandemics of COVID-19 and racial violence shape this landscape. So, I would like to paint a picture for you that details the landscape of existing educational inequality and how COVID-19 lays this bare. It may be challenging, but it is necessary to understand how the “American contradiction” leaves an indelible mark on our institutions of learning. In doing so, through mobilizing our history and engaging legal institutions, perhaps we may forge paths to address these pandemics in education, with pragmatism and hope, and ultimately strengthen our republic.

Therefore, this discussion will proceed in four parts. In Part I, I will paint a picture of the “state of schools” today. In many ways, one could call this the first “pandemic” in education: the pandemic of racial and economic inequality in education and its effect on the life opportunities for students of color. In Part II, I will examine the role of racial violence and trauma and its effect on the opportunities for education. In Part III, I will discuss the ways in which the global health pandemic of COVID-19 has both illuminated and exacerbated the existing racial and economic fissures in American education. These pandemics have ongoing effects on students, on the communities in which they live, and

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<sup>9</sup> Transcript of Oral Argument, *Cooper v. Aaron*, 358 U.S. 29 (1958), [https://apps.oyez.org/player/#/warren6/oral\\_argument\\_audio/13495](https://apps.oyez.org/player/#/warren6/oral_argument_audio/13495) [<https://perma.cc/Z877-HMXS>].

on their futures. Ultimately, in Part IV, I will discuss how, in exposing the landscape of “pandemic education” and its antecedents, we are at a crossroads. While daunting, this exposure can be hopeful in that it allows for a true reckoning with the American contradiction Professor Bell named. In this moment, the American contradiction, by limiting educational and life opportunities, harms all children. In doing so, it weakens our society. Hopefully this reckoning forces a reimagining of structural solutions to help all children to thrive.

## I

### WHAT DO SCHOOLS LOOK LIKE TODAY?

In 2021, our nation’s public schools reflect a truly multiracial America. There is no majority racial group enrolled in United States public schools.<sup>10</sup> While white students still compose the largest racial group of students in the country, the enormous rise in the nation’s Latinx population means that more than 50% of the nation’s students of color, thirteen million, identify as Latinx.<sup>11</sup> Black students account for more than seven million of the students of color, followed by Asian, multiracial, and Native American students.<sup>12</sup>

By any measure, however, educational opportunity in the United States has a long history rooted in racial and socioeconomic inequality whose branches support today’s racially and economically inequitable educational systems. Although it has been more than six decades since the United States Supreme Court outlawed state-mandated apartheid in public education in *Brown v. Board of Education*,<sup>13</sup> subsequent Supreme Court decisions ensured such a slow trajectory for school desegregation<sup>14</sup> that schools in the Deep South remained segregated nearly a decade after the decision.<sup>15</sup> Moreover, longstanding and

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<sup>10</sup> ERICA FRANKENBERG ET AL., THE C.R. PROJECT, HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 10 (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> [<https://perma.cc/6SGL-JKVH>].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Brown v. Bd. of Educ. of Topeka (Brown I)*, 347 U.S. 483 (1954).

<sup>14</sup> *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294, 301 (1955) (“District Courts [are] to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with *all deliberate speed* the parties to these cases.”) (emphasis added).

<sup>15</sup> Ninety-eight percent of schools in the Deep South remained segregated a decade after *Brown I*. See ERICA FRANKENBERG ET AL., THE C.R. PROJECT, SOUTHERN SCHOOLS:

intractable residential segregation in the United States played an equally pernicious role in the perpetuation of racial inequality in access to schools. Policies and practices designed to perpetuate housing segregation enabled similar trends in schooling patterns in the United States.<sup>16</sup> In addition, Supreme Court and lower court decisions ensured continued patterns of neighborhood and school segregation throughout much of the North, West, and Southwest parts of the United States,<sup>17</sup> despite a growing multiracial population.

In Gadsden, Alabama, for example, a small Southern town that was under a desegregation decree<sup>18</sup> until the year 2000, the schools were slow to desegregate. After *Brown*, the school district renamed a middle school after the first imperial wizard of the Ku Klux Klan.<sup>19</sup> When a district court judge declared the school district unitary in 2000, he noted that the level of interracial cooperation in Gadsden was similar to relations between factions in “Kosovo and Northern Ireland.”<sup>20</sup> Ultimately, he noted the school board cannot “make the lion lie down with the lamb. . . .”<sup>21</sup>

Due to slow-moving and ineffectual desegregation policies<sup>22</sup> as well as deeply rooted housing segregation policies, public schools in the United States remain intensely segregated, by both race and class. In fact, a typical student in the United States attends school where the largest group of fellow classmates are of the same race as the student.<sup>23</sup>

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MORE THAN A HALF-CENTURY AFTER THE CIVIL RIGHTS REVOLUTION (May 2017), [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/southern-schools-brown-83-report/Brown63\\_South\\_052317-RELEASE-VERSION.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/southern-schools-brown-83-report/Brown63_South_052317-RELEASE-VERSION.pdf) [<https://perma.cc/Y5HY-DJC7>].

<sup>16</sup> See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

<sup>17</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (prohibiting mandatory interdistrict school desegregation plans absent evidence of interdistrict school segregation policies).

<sup>18</sup> *Miller v. Bd. of Educ. of Gadsden*, 482 F.2d 1234 (5th Cir. 1973).

<sup>19</sup> General Nathan Bedford Forrest Middle School finally closed approximately a decade ago due to a consolidation of high schools, not due to the objectionable name. Erin Edgemon, *Alabama’s Confederate Flags Down. Are School Mascots Next?*, ADVANCE LOC. (Mar. 28, 2019), [https://www.al.com/news/2015/06/is\\_it\\_time\\_to\\_rename\\_public\\_sc.html](https://www.al.com/news/2015/06/is_it_time_to_rename_public_sc.html) [<https://perma.cc/YXG6-72H5>].

<sup>20</sup> Brief of Appellant at 17, *Miller v. Bd. of Educ. of Gadsden*, No. 00-12649 (N.D. Ala. Mar. 21, 2000).

<sup>21</sup> *Id.*

<sup>22</sup> In a series of decisions in the 1990s, the Supreme Court limited or modified the requirements necessary to release a school district from government oversight of its mandatory desegregation decrees. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237 (1991).

<sup>23</sup> FRANKENBERG ET AL., *supra* note 10, at 22 (this is not true for Asian students).

This racial segregation often overlaps with economic segregation in elementary and secondary schools.<sup>24</sup> Black students, for whom segregation is increasing in all parts of the United States, also on average attend schools with much more poverty than their white peers.<sup>25</sup> This is also true of Latinx students.<sup>26</sup> This “double segregation” by race and class has long-term educational and opportunity costs for students in the segregated schools. Such segregation affects student achievement, college access and success, as well as long-term employment, income, and health indicators.<sup>27</sup>

These sobering statistics are in fact the legacy of the American contradiction Professor Bell identified and our refusal to acknowledge the continued effects on systems of education. As Justice Marshall opined in his dissenting opinion in the Detroit school case *Milliken v. Bradley*, “Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation’s childhood and adolescence are not quickly thrown aside in its middle years.”<sup>28</sup> And yet, despite such setbacks, there are opportunities for hope. If one is conscious of these patterns of segregation and inequality, carefully structured policies and programs may help to alleviate inequities, for example, by leveraging changing demographic patterns and the expansion of school choice. In instances where communities and school districts have faced the persistent effects of historic segregation, there are possibilities and success in addressing the challenges.

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<sup>24</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (Apr. 21, 2016), <https://www.gao.gov/products/GAO-16-345> [<https://perma.cc/4G7D-3B5Y>].

<sup>25</sup> THE ANNIE E. CASEY FOUND., *Children Living in High Poverty Areas by Race and Ethnicity in the United States* (Jan. 2021), <https://datacenter.kidscount.org/data/tables/7753-children-living-in-areas-of-concentrated-poverty-by-race-and-ethnicity#detailed/1/any/false/1691,1607,1572,1485,1376,1201,1074,880/10,11,9,12,1,185,13/14943,14942> [<https://perma.cc/9BGX-T34N>].

<sup>26</sup> *Id.*

<sup>27</sup> Roslyn Arlin Mickelson, NAT’L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K-12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE (2016).

<sup>28</sup> *Milliken v. Bradley*, 418 U.S. 717, 814 (1974).

## II RACIAL VIOLENCE, POLICE IN SCHOOLS, AND THE RECKONING OF 2020

### *A. The School-to-Prison Pipeline*

In addition to existing racial and economic segregation in public schools, there are myriad existing racial inequities in programs and policies that affect the life opportunities of students of color today. One of the starkest examples is the discriminatory use of school discipline policies. While we no longer have policies that sanction legal racial segregation as in the days before *Brown*, Black and Brown students are disproportionately the targets of discriminatory behavior and draconian discipline measures.<sup>29</sup> Across the nation, Black and Latinx students compose the majority of students who receive excessive disciplinary exclusion, or are “pushed out” of our nation’s schools.<sup>30</sup> Black students are three times more likely to be suspended or expelled than their classmates.<sup>31</sup> Studies overwhelmingly make clear, however, that Black and Brown students are no more likely to commit offenses worthy of such punishment than white students.<sup>32</sup>

Just last year, in Orlando, Florida, Black first-grade student Kaia Rolle entered school eager to learn, but she suffered from a lack of sleep due to a health condition.<sup>33</sup> She lost her temper and lashed out at the

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<sup>29</sup> See, e.g., Lia Epperson, *Brown’s Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the School-to-Prison Pipeline*, 49 WAKE FOREST L. REV. 687 (2014).

<sup>30</sup> *Id.*

<sup>31</sup> U.S. DEP’T OF EDUC., OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014).

<sup>32</sup> See, e.g., Thomas Rudd, *Racial Disproportionality in School Discipline: Implicit Bias Is Heavily Implicated*, THE OHIO STATE UNIV. (Feb. 5, 2014), <https://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated> [<https://perma.cc/DZ9E-LXET>]; DANIEL J. LOSEN & JONATHAN GILLESPIE, THE C.R. PROJECT, OPPORTUNITIES SUSPENDED, THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 32 (2012). (“[R]esearch on student behavior, race, and discipline has found no evidence that the over-representation of Blacks in out-of-school suspension is due to higher rates of misbehavior.”); TONY FABELO ET AL., THE COUNCIL OF STATE GOV’TS, BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW DISCIPLINE RELATES TO STUDENT SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 46 (Jul. 2011). (In analyzing Texas schools, the study found “[Black] students [are] no more likely than students of other races to commit serious offenses that mandate that a student be removed from the campus.”).

<sup>33</sup> Dawn Onley, *Heartbreaking Bodycam Video Shows 6-Year-Old Girl Being Arrested at Orlando School*, THE GRIO (Feb. 26, 2020), <https://thegrio.com/2020/02/26/bodycam-video-6-year-old-girl-arrested/> [<https://perma.cc/TH9R-BLUC>]; see also Will Cleveland, *Police Accountability Board Calls For Release of All Video in Pepper-Spraying of 9-Year-Old Girl*, ROCHESTER DEMOCRAT & CHRON. (Feb. 4, 2021), <https://www.democratand>

adults at school.<sup>34</sup> Although she calmed down shortly thereafter, two police officers entered her classroom and placed zip tie cuffs around Kaia's wrists.<sup>35</sup> Despite Kaia's pleas to "[p]lease, give me a second chance," they took her to the county Juvenile Assessment Center.<sup>36</sup> Again, she was a first grader, just six years old.<sup>37</sup>

With the rising number of police officers stationed in public schools, these racial disparities in school discipline grow in severity and gravity. In 2015, the United States Department of Justice estimated that there were approximately nineteen thousand police officers stationed in schools throughout the United States.<sup>38</sup> Such use of police officers in schools is more common at schools where the majority of the students are Black.<sup>39</sup> Student behavior that previously warranted a visit to the principal may now result in arrest or referral to the juvenile justice system. Such harsh school punishments disproportionately affect students of color. For example, according to the United States Department of Education, Black students composed only 15% of total student enrollment but composed 31% of student arrests or referrals to the juvenile justice system in the 2015–16 school year.<sup>40</sup>

For those Black and Brown students who have received harsh disciplinary measures, there are long-term consequences. A suspended or expelled student is more than twice as likely to be arrested within the same month as one who has no prior suspension in that month.<sup>41</sup> In addition to increasing the likelihood of future incarceration, juvenile incarceration impedes educational and life opportunities including high

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chronicle.com/story/news/2021/02/03/rochester-ny-police-release-all-video-pepper-spraying-9-year-old-girl/4379698001/ [https://perma.cc/2WSV-WRDH] (nine-year-old Black girl handcuffed and pepper-sprayed by several Rochester police officers).

<sup>34</sup> Onley, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Statement of Int. of the U.S. at 1, *S.R. v. Kenton Cnty*, No.: 2:15-CV-143 (E.D. Ky. filed Oct. 2, 2015), <https://www.justice.gov/opa/file/780346/download> [https://perma.cc/KE2F-7NUG].

<sup>39</sup> Evie Blad, *On-Site Police, Security More Common at Majority-Black Secondary Schools*, EDUC. WK. (Apr. 26, 2018), <https://www.edweek.org/leadership/on-site-police-security-more-common-at-majority-black-secondary-schools/2018/04> [https://perma.cc/M2ZX-AT9A].

<sup>40</sup> U.S. DEP'T OF EDUC., OFF. FOR C.R., 2015–16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 15 (2019).

<sup>41</sup> Kathryn C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. YOUTH & ADOLESCENCE 1110, 1116 (2014).

school graduation rates, physical and mental health,<sup>42</sup> as well as employment, housing, and higher education opportunities.<sup>43</sup> For generations, Black children have learned challenging lessons about democracy and state-sanctioned violence at the doors of the schoolhouse. There is a thread from lessons like the bayonet-wielding soldiers of the Arkansas National Guard who blocked Black students' entry to white schools in the wake of the *Brown* decision<sup>44</sup> to the countless Black students experiencing school violence today.

Yet there have been examples of paths for change. In 2014, the U.S. Department of Education's Office for Civil Rights issued guidance on school discipline to help school districts address the significant racial disparities.<sup>45</sup> The guidance detailed best practices for schools to meet legal obligations under federal civil rights laws and ensure nondiscriminatory discipline measures.<sup>46</sup> In 2018, however, the U.S.

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<sup>42</sup> See, e.g., Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 2 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260153/> [<https://perma.cc/P4KL-XV3H>].

<sup>43</sup> See, e.g., AJMEL QUERESHI & JASON OKONOFUA, LDF THURGOOD MARSHALL INST., LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE (2017).

<sup>44</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958) (challenging Arkansas Governor Orval Faubus's refusal to adhere to the *Brown v. Board of Education* decision to desegregate public schools; following the *Brown* decision, Faubus blocked black students' entrance to Little Rock Central High School with the force of the Arkansas National Guard); see also Epperson, *supra* note 29.

<sup>45</sup> See, e.g., Catherine E. Lhamon & Jocelyn Samuels, *Joint "Dear Colleague" Letter*, U.S. Dep't of Educ. (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [<https://perma.cc/FBZ8-5S39>] [hereinafter *Dear Colleague Letter*]; U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (Jan. 2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/J8XP-NBS9>] (drawing from emerging research and best practices to describe three key principles and related action steps to improve school climate and school discipline.); U.S. DEP'T OF EDUC., DIRECTORY OF FEDERAL SCHOOL CLIMATE AND DISCIPLINE RESOURCES (Jan. 2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-1-directory.pdf> [<https://perma.cc/A6ZP-G669>] (detailing federal technical assistance and other resources on school discipline and climate available to schools and districts); K. DARLING-CHURCHILL ET AL., U.S. DEP'T OF EDUC., APPENDIX 2: COMPENDIUM OF SCHOOL DISCIPLINE LAWS AND REGULATIONS FOR THE 50 STATES, WASHINGTON, D.C., AND PUERTO RICO (2013), <https://www2.ed.gov/policy/gen/guid/school-discipline/appendix-2-compendium-of-laws-and-regulations.pdf> [<https://perma.cc/6Z7G-GBG2>] (comparing the various state laws and regulations related to school discipline).

<sup>46</sup> U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (Jan. 2014), <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/J8XP-NBS9>] (drawing from emerging research and best practices to describe three key principles and related action steps to improve school climate and school discipline).

Department of Education rescinded all such guidance.<sup>47</sup> Without explicit acknowledgment of and attention to such disparities, school districts around the nation are free to continue practices with devastating intergenerational consequences.

What might the hope be for the American contradiction that we see in the disproportionate use of police force against Black and Brown children in schools? The hope lies in truth-telling. The Department of Education's Office for Civil Rights assisted tremendously by cataloging the information to shed light on the truth of the "school-to-prison pipeline" and its harms to more vulnerable students.<sup>48</sup> Armed with this information, it becomes easier to develop and implement policies to address it. In addition, with the advent of social media, there is a growing societal awareness of these harms.

### *B. Summer of Racial Unrest and Reckoning*

Then, the "extraordinary times" descended upon us in 2020. The summer of 2020 was a watershed moment in the exposure of a culture of racially disparate uses of police force in the United States. With the advent of smartphone cameras and social media campaigns, horrific examples of this violence landed in the news feeds of individuals of all races, creeds, colors, and economic backgrounds across the United States and around the world. Throughout American history, there have been countless examples of the law enforcement in the United States killing unarmed Black women and men. Yet, the most widely reported example that summer was the death of George Floyd, an unarmed Black man, killed by a Minnesota police officer who placed a knee on his neck for more than nine minutes.<sup>49</sup> Officers attempted to arrest Floyd for allegedly passing a counterfeit bill.<sup>50</sup> This prompted the largest national and international protest movement in recent history.<sup>51</sup>

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<sup>47</sup> Kenneth L. Marcus & Eric S. Driband, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> [<https://perma.cc/9QPW-8XYH>].

<sup>48</sup> *Dear Colleague Letter*, *supra* note 45.

<sup>49</sup> See, e.g., Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Kneel on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [<https://perma.cc/D9H6-9R35>].

<sup>50</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/48ZF-736G>].

<sup>51</sup> My references are only to those engaged in nonviolent protests because these were plentiful.

While the loudest directives for massive structural and legal change in the movement for Black lives center on dismantling mass incarceration and its attendant racial disparities in criminal justice, often called “the New Jim Crow,”<sup>52</sup> education is an equally vital domain for reform that has critical implications for legal institutions. The heightened exposure of racially disparate use of police force has renewed calls for an anti-racist movement in the educational domain. This is an area with the greatest potential for long-term harm as well as positive transformation.

### III

#### PANDEMIC EDUCATION—COVID-19 AS AN INEQUALITY AMPLIFIER

In the past year, the global pandemic known as COVID-19 wreaked havoc on every aspect of American life. Although the virus first came to the United States in January 2020, it spread with such alarming force that the United States Department of Health and Human Services declared a public health emergency with quarantine orders introduced for international travelers and residents of many states.<sup>53</sup> Most school districts began to close in March to ensure students would not infect one another.<sup>54</sup> By the end of the school year in June, the United States had the highest number of cases and deaths due to COVID-19 of any country in the world.<sup>55</sup> At the start of the new school year, nearly 75% of schools in the United States remained closed for in-person learning.<sup>56</sup>

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<sup>52</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>53</sup> Off. of the Assistant Sec’y for Preparedness & Response, *Determination That a Public Health Emergency Exists*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> [<https://perma.cc/KZN6-QGWH>]; Vivian Lin et al., ‘Scared and Panicked’: Travelers Rush to Avoid Virus Quarantine, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/02/us/coronavirus-airports.html> [<https://perma.cc/VBM8-26QR>].

<sup>54</sup> *A Year of COVID-19: What It Looked Like for Schools*, EDUC. WK. (Mar. 4, 2021), <https://www.edweek.org/leadership/a-year-of-covid-19-what-it-looked-like-for-schools/2021/03> [<https://perma.cc/L9JU-ZACU>].

<sup>55</sup> See, e.g., WORLD HEALTH ORG., CORONAVIRUS DISEASE (COVID-19): SITUATION REPORT – 162 (Jun. 30, 2020).

<sup>56</sup> Megan Ferren, *Remote Learning and School Reopenings: What Worked and What Didn’t*, CTR. FOR AM. PROG. (Jul. 6, 2021), <https://www.americanprogress.org/article/remote-learning-school-reopenings-worked-didnt/> [<https://perma.cc/C2AW-TPKU>].

### A. *Who Does COVID Harm?*

In the United States, as the pandemic continues, the reality of the virus illuminates and exacerbates existing inequalities. In other words, this is not an “equal opportunity” virus. There are significant and alarming racial disparities with respect to which particular communities suffer from COVID-related illness and death. The devastating effects of this virus are particularly apparent among Black and Latinx communities. Rather than serving as a great “equalizer,” the viral pandemic amplifies existing racial inequalities. Evidence reveals that confirmed COVID-19 cases and deaths have been disproportionately higher in communities with larger Black populations,<sup>57</sup> with Blacks affected at a rate three times higher than whites.<sup>58</sup> Early studies found that twice as many people of color under the age of sixty-five suffer COVID-related deaths compared to whites.<sup>59</sup> The contributing factors echo those discussed above that affect Black and Latinx communities, such as higher rates of poverty, higher incidences of overcrowding in neighborhoods, poor air quality, and lack of access to health care.<sup>60</sup> For children in the United States, the racial disparities in COVID-related deaths are even more alarming. Although they compose only 41% of the United States population, the Centers for Disease Control reported that more than 75% of children killed by COVID-19 are Hispanic, Black, and American Indian/Alaskan Native.<sup>61</sup> Forty-five percent of the children killed by

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<sup>57</sup> See generally Rukaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & Biosciences (2020).

<sup>58</sup> *Id.*

<sup>59</sup> Jonathan M. Wortham et al., *Characteristics of Persons Who Died with COVID-19—United States, February 12–May 18, 2020*, CTRS. FOR DISEASE CONTROL (Jul. 17, 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6928e1.htm?s\\_cid=mm6928e1\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6928e1.htm?s_cid=mm6928e1_w) [<https://perma.cc/UD4L-PHLC>] (analyzing 52,000 deaths from mid-February to mid-April).

<sup>60</sup> According to the Centers for Disease Control:

[D]isparities in social determinants of health, such as crowded living conditions, food and housing insecurity, wealth and educational gaps, and racial discrimination, likely contribute to racial and ethnic disparities in COVID-19 . . . incidence and outcomes. . . . [H]igher rates of adverse outcomes among racial and ethnic minorities are likely related to challenges in seeking care for various reasons, including difficulty and delays in accessing health care services because of lack of insurance, child care, transportation, or paid sick leave, and social determinants of health that contribute to higher prevalence of medical conditions.

Danae Bixler et al., *SARS-CoV-2—Associated Deaths Among Persons Aged <21 Years—United States, February 12–July 31, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 15, 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6937e4.htm?s\\_cid=mm6937e4\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6937e4.htm?s_cid=mm6937e4_w) [<https://perma.cc/7UDF-7HKS>].

<sup>61</sup> *Id.*

COVID-19 were Hispanic, followed by 29% of Black children.<sup>62</sup> Again, the root causes of the racial disparity in child deaths from COVID-19 stem from those environmental factors linked to broader and deeply embedded ongoing racial disparities, now more commonly referred to as structural racism—food insecurity, housing insecurity, overcrowding in neighborhoods, differential access to health care due to issues such as childcare, lack of insurance, transportation, or lack of access to sick leave.<sup>63</sup>

In addition, the deleterious economic effects of the pandemic disproportionately harm Black and Latinx communities. In a recent analysis of United States responses to the pandemic, the Commonwealth Fund’s 2020 International Health Policy COVID-19 Supplement Survey, more than half of Latinx and nearly half of Black respondents reported experiencing economic hardship due to the pandemic, compared to 21% of white respondents.<sup>64</sup> Black and Latinx people are also at higher risk of mental health concerns due to the pandemic.<sup>65</sup> Such evidence links directly back to policies and practices that have historically discriminated against communities of color, whose effects we continue to feel deeply today.

### *B. COVID’s Effects on the Education Landscape*

Although all students have suffered under the pandemic, there are some groups who have been especially vulnerable. These include the seven million children with disabilities,<sup>66</sup> five million children with immigrant parents,<sup>67</sup> and children of color.<sup>68</sup> As schools struggle to

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> YAPHET GETACHEW ET AL., BEYOND THE CASE COUNT: THE WIDE-RANGING DISPARITIES OF COVID-19 IN THE UNITED STATES (Sept. 10, 2020) (Economic hardships include “depletion of personal savings, followed by difficulty paying for necessities such as rent or food and borrowing money or taking out a loan to make ends meet.”).

<sup>65</sup> *Id.*

<sup>66</sup> Carol Emig, *COVID-19’s Forgotten Children*, CHILD TRENDS (Mar. 30, 2020), <https://www.childtrends.org/blog/covid-19s-forgotten-children> [<https://perma.cc/V8QZ-5GNE>]; see generally U.S. DEP’T OF EDUC., 41ST ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2019 (Feb. 2020), <https://www2.ed.gov/about/reports/annual/osep/2019/parts-b-c/41st-arc-for-idea.pdf> [<https://perma.cc/EM5Y-FQT6>].

<sup>67</sup> Randy Capps et al., *A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRATION POL’Y INST. (Jan. 2016), <https://www.migrationpolicy.org/research/profile-us-children-unauthorized-immigrant-parents> [<https://perma.cc/RS55-F9HW>].

<sup>68</sup> Emma Dorn et al., *COVID-19 and Student Learning in the United States*, MCKINSEY & CO. (June 1, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our>

educate students amidst the rising death toll in the United States, the impact of the COVID-19 virus sheds a harsh light on existing racial and economic inequalities. As most schools closed their doors and moved to remote learning models, the most economically vulnerable student populations have lacked clear access to education. Indeed, some students lacked any access to education in the early weeks of school closures, as nearly 50% of American schoolchildren live in states that did not require distance learning.<sup>69</sup> For those that mandated remote learning, many students were indeed left behind.<sup>70</sup> As the pandemic began, the landscape of online education in the United States disproportionately disadvantaged low-income, Black, and Latinx students, populations that often overlap.<sup>71</sup>

In Salinas, California, the Garcia sisters sat outside a local Taco Bell to gain internet access for school work, as they had no home access.<sup>72</sup> Low-income families are less likely to have access to the internet.<sup>73</sup> In the several months since the start of the pandemic, while efforts to expand internet access have lessened some disparities, according to the National Center for Education Statistics, more than four million households with students still lack consistent access to a computer and nearly four million lack internet access.<sup>74</sup> Some studies suggest that as many as twelve million students lack access to the internet at home, leaving them adrift in the sea of remote learning.<sup>75</sup> Known as the

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-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime [https://perma.cc/SB4W-MXYS]; Emig, *supra* note 66.

<sup>69</sup> *Coronavirus and Learning: What's Happening in Each State*, EDUC. WK. (July 24, 2020), <https://www.edweek.org/policy-politics/coronavirus-and-learning-whats-happening-in-each-state/2020/04> [https://perma.cc/A9XL-U97L].

<sup>70</sup> Dorn et al., *supra* note 68.

<sup>71</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 24.

<sup>72</sup> *Viral Photo Shows 2 California Girls Studying Outside Taco Bell After Eviction*, ABC7NY (Sept. 4, 2020), <https://abc7ny.com/girls-sit-outside-taco-bell-for-wifi-salinas-eviction-online-school/6407892/> [https://perma.cc/QV44-KPM4].

<sup>73</sup> In a survey of 1,500 families, parents making less than \$25,000 a year were ten times more likely than families making \$100,000 or more to say their children are doing “little or no remote learning.” Anya Kamenetz, *Survey Shows Big Remote Learning Gaps for Low-Income and Special Needs Children*, National Public Radio (May 27, 2020, 12:03 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/862705225/survey-shows-big-remote-learning-gaps-for-low-income-and-special-needs-children> [https://perma.cc/98XL-SW7P].

<sup>74</sup> *4.4 Million Households With Children Don't Have Consistent Access to Computers For Online Learning During the Pandemic*, USAFACTS (Oct. 19, 2020, 8:41 AM), <https://usafacts.org/articles/internet-access-students-at-home/> [https://perma.cc/MEM5-SMS8].

<sup>75</sup> Lauren Camera, *Coronavirus School Closings Expose Digital Divide*, U.S. NEWS & WORLD REP. (Mar. 10, 2020, 5:02 PM), <https://www.usnews.com/news/education-news>

“homework gap,”<sup>76</sup> approximately 17% of students in the United States lack access to computers at home.<sup>77</sup> In addition, a recent study found that 18% of students in the United States lack access to broadband internet at home.<sup>78</sup> This homework gap reflects larger educational barriers for Black and Latinx students and poor students, as they are more likely to be without home computers and home internet access than their white counterparts.<sup>79</sup> Indeed, while income differences account for a portion of the racial divide in digital access, the divide remains even after accounting for income differences.<sup>80</sup> In addition, Black and Latinx schoolchildren are also disproportionately those children who may suffer other consequences due to school closures, such as food insecurity.<sup>81</sup> Prior to COVID-mandated school closures, schools provided approximately fifteen million breakfasts and thirty million lunches daily to students who qualified for free or reduced-price meals.<sup>82</sup> By late March 2020, students lost nearly 170 million meals each week.<sup>83</sup> By September 2020, an estimated 40% of Black

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/articles/2020-03-10/coronavirus-school-closings-expose-digital-divide [https://perma.cc/LRE4-88Q5].

<sup>76</sup> Clare McLaughlin, *The Homework Gap: The ‘Cruellest Part of the Digital Divide,’* NAT’L EDUC. ASS’N (Apr. 20, 2016), <https://www.nea.org/advocating-for-change/new-from-nea/homework-gap-cruellest-part-digital-divide> [https://perma.cc/7RDF-36S8].

<sup>77</sup> Michael Melia et al., *AP: 3 Million U.S. Students Don’t Have Home Internet*, AP NEWS (June 10, 2019), <https://apnews.com/article/smartphones-us-news-ap-top-news-hartford-ms-state-wire-7f263b8f7d3a43d6be014f860d5e4132> [https://perma.cc/5PZD-TZQF].

<sup>78</sup> *Id.*

<sup>79</sup> *Children’s Internet Access at Home*, NAT’L CTR. FOR EDUC. STAT. (May 2020), [https://nces.ed.gov/programs/coe/indicator\\_cch.asp](https://nces.ed.gov/programs/coe/indicator_cch.asp) [https://perma.cc/J9UF-MPYF].

<sup>80</sup> S. DEREK TURNER, DIGITAL DENIED: THE IMPACT OF SYSTEMIC RACIAL DISCRIMINATION IN HOME-INTERNET ADOPTION 3 (2016). Further, the study of racial divide in internet access finds “systemic racial discrimination impacts home-internet adoption in communities of color, because such systemic discrimination impacts income inequality and causes other disparities. Structural discrimination exacerbates market failures in the broadband market, adding additional barriers to internet adoption in communities of color.” *Id.* at 2.

<sup>81</sup> See Lauren Bauer, *About 14 Million Children in the US Are Not Getting Enough to Eat*, BROOKINGS (July 9, 2020), <https://www.brookings.edu/blog/up-front/2020/07/09/about-14-million-children-in-the-us-are-not-getting-enough-to-eat/> [https://perma.cc/YZ4N-284Q] (noting that two nationally representative surveys show higher instances of food insecurity in 2020 than at any point in recent history, with significant issues among households with children).

<sup>82</sup> See Eliza W. Kinsey et al., *School Closures During COVID-19: Opportunities for Innovation in Meal Service*, 110 AM. J. PUB. HEALTH 1635 (Nov. 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7542295/> [https://perma.cc/HE5A-EJH8].

<sup>83</sup> *Id.*

and Latinx children lived in houses experiencing food insecurity.<sup>84</sup> In addition, research shows that children in the highest-poverty school districts were also those most likely to start the year in remote school.<sup>85</sup>

The transition to remote learning due to the COVID-19 pandemic will have lifelong effects for all students, especially for those Black and Latinx students most affected.<sup>86</sup> In addition to the higher COVID-19 cases and deaths among Black and Latinx communities, Black and Latinx children are more likely to suffer greater learning losses and higher school dropout rates as months of remote learning continue.<sup>87</sup> Together with the economic recession the pandemic brought on, any state budgetary cuts to elementary and secondary education are more likely to affect schools with higher Black and Latinx populations.<sup>88</sup> Early studies suggest significant long-term economic devastation may result from these educational hardships at both individual and societal levels.<sup>89</sup> A McKinsey study estimates a combined loss of \$110 billion in future annual earnings for students in K-12 schools; Black and Latinx students, however, are estimated to suffer significantly higher earnings losses than white students.<sup>90</sup> Over a forty-year working period, the estimated individual earnings losses for Black students is

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<sup>84</sup> POONAM GUPTA ET AL., FORTY PERCENT OF BLACK AND HISPANIC PARENTS OF SCHOOL-AGE CHILDREN ARE FOOD INSECURE 4 (2020), [https://www.urban.org/sites/default/files/publication/103335/forty\\_percent\\_of\\_black\\_and\\_hispanic\\_parents\\_of\\_school\\_age\\_children\\_are\\_food\\_insecure.pdf](https://www.urban.org/sites/default/files/publication/103335/forty_percent_of_black_and_hispanic_parents_of_school_age_children_are_food_insecure.pdf) [<https://perma.cc/HP58-B3RU>].

<sup>85</sup> BETHENY GROSS ET AL., GETTING BACK TO SCHOOL: AN UPDATE ON PLANS FROM ACROSS THE COUNTRY 4 (2020), [https://www.crpe.org/sites/default/files/getting\\_back\\_to\\_school\\_brief.pdf](https://www.crpe.org/sites/default/files/getting_back_to_school_brief.pdf) [<https://perma.cc/AWS4-HH3H>]; see also TITILAYO TINUBU ALI ET AL., LOOKING BACK, LOOKING FORWARD: WHAT IT WILL TAKE TO PERMANENTLY CLOSE THE K-12 DIGITAL DIVIDE (2021), <https://www.southerneducation.org/wp-content/uploads/2021/01/Looking-Back-Looking-Forward-Report-01272021.pdf> [<https://perma.cc/6VTF-AW5K>]; Erin Richards et al., *A Year into the Pandemic, Thousands of Students Still Can't Get Reliable WiFi for School. The Digital Divide Remains Worse Than Ever.*, USA TODAY (Feb. 4, 2021, 2:35 PM), <https://www.usatoday.com/story/news/education/2021/02/04/covid-online-school-broadband-internet-laptops/3930744001/> [<https://perma.cc/2BB4-4GFS>].

<sup>86</sup> See, e.g., Nathan Storey & Robert E. Slavin, *The US Educational Response to the COVID-19 Pandemic*, 5 BEST EVID. CHIN. EDU. 617 (2020).

<sup>87</sup> Dorn et al., *supra* note 68.

<sup>88</sup> See, e.g., Kenneth Shores & Matthew P. Steinberg, *Schooling During the Great Recession: Patterns of School Spending and Student Achievement Using Population Data*, AERA OPEN, July–Sept. 2019, at 1, 16 (noting that during the 2008 recession, counties that had the highest employment losses also had school districts that disproportionately served low-income and black populations, and in these districts, annual academic gains dropped twenty-five percent from prerecession levels).

<sup>89</sup> Dorn et al., *supra* note 68.

<sup>90</sup> *Id.*

\$2,186 per year, for Latinx students \$1,809, and white students \$1,348.<sup>91</sup> For the nation, the consequences of the recent educational hardships may be greater, with an estimated future GDP loss of \$173 billion to \$271 billion per year.<sup>92</sup> As noted above, greater educational attainment translates into a host of positive outcomes for society, including reduced crime and incarceration, increased civic and political participation, and better health.<sup>93</sup>

The coronavirus pandemic lays bare and amplifies the inequalities that existed in the education landscape long before the cataclysmic health crisis. Indeed, both the coronavirus and the national protests over race and policing make it much more difficult to ignore these intractable educational inequities. And ultimately, this is a good thing.

#### IV

#### SAVING OUR STUDENTS, SAVING OUR DEMOCRACY

How do we save a nation where structural racism remains such a perniciously destructive force in systems of education and affects those who suffer most from a deadly virus? How do we find avenues to strengthen our fragile republic? While the landscape is admittedly bleak, the domain of education also provides the greatest opportunity for transformative change.

In the midst of the devastation of the pandemic, I remain heartened by a number of countervailing factors. Despite the grim realities of these existing educational injustices, the COVID-19 pandemic has shed a new light on this broken education system that provides an exceptional chance for reimagining education. The pandemic converges with a growing societal awareness of and movement to address intractable racial inequality, as the recent mass protests against racism around the globe have evidenced. In addition, our country has experienced a considerable, widespread movement to examine the ways in which our systems of education and common culture have failed to wrestle with the American contradiction.<sup>94</sup> As our leaders, our

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Note that similar projected studies have been used to detail the loss of earnings for those students whose education was disrupted by World War II.

<sup>93</sup> For a discussion of the benefits of greater educational attainment, see Lia Epperson, *The Promise and Pitfalls of Empiricism in Educational Equality Jurisprudence*, 48 WAKE FOREST L. REV. 489 (2013).

<sup>94</sup> In 2017, Southern Poverty Law Center found that most popular textbooks do not comprehensively cover history of enslavement and white supremacy in American history. KATE SCHUSTER, S. POVERTY L. CTR., TEACHING HARD HISTORY: AMERICAN SLAVERY

teachers, our policymakers, and perhaps even our jurists begin to learn more about the ways in which our education systems have failed to speak the truth of our complicated racial history, their knowledge can inform better policies to unify all those affected. Education is the antidote to the long-term effects of the American contradiction and affects all other aspects of societal opportunities, including health outcomes, employment opportunities, and even levers of criminal justice.

Truthfully, this is not an easy task. We are at a unique time when the constitutional contradiction is blatantly exposed. The devastation in American education is a direct result of our American contradiction and our failure to grapple with the most difficult parts of American history that continue to affect our republic and our democratic institutions. But the coronavirus pandemic and the racial protests of the summer of 2020 provide a measure of tentative hope *precisely because* they make the American contradiction so difficult to ignore. By laying bare existing inequities, the pandemic and protests force more of us to see the overall harms to the body politic and to our institutions of learning. When McKinsey forecasts a GDP loss of \$271 billion due to pandemic education, we are all affected. The cataclysmic events force the following question: how do we take this moment to strengthen our democracy, our republic, and our future?

The path forward does not require unanimity. But it does require enough of us to see this harm and damage. I am hopeful for two reasons. First, as Derrick Bell said, this moment of racial reckoning exposes the myth of equality at the founding of our Constitution.<sup>95</sup> Yet, as we tell the truth about the pernicious and structural effects of racial inequality and its attendant evils in education, an opportunity arises for healing and salvation. As the visionary writer and activist James Baldwin said, “American history is longer, larger, more various, more beautiful, and more terrible than anything anyone has ever said about it.”<sup>96</sup> Here, we are unmasking the myth of historic equality, in “terrible” and brutal ways.<sup>97</sup> We have laid bare the pernicious racial inequality behind the murder of George Floyd. We are acknowledging where democracy has failed. In doing so, we have a unique opportunity to educate the body

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(Maureen Costello ed., 2018), [https://www.splcenter.org/sites/default/files/tt\\_hard\\_history\\_american\\_slavery.pdf](https://www.splcenter.org/sites/default/files/tt_hard_history_american_slavery.pdf) [<https://perma.cc/27W8-5GCV>].

<sup>95</sup> Bell, *supra* note 1, at 7.

<sup>96</sup> James Baldwin, *A Talk to Teachers*, SATURDAY REV., Dec. 21, 1963, reprinted in JAMES BALDWIN: COLLECTED ESSAYS 678, 685–86 (1998).

<sup>97</sup> *Id.*

politic in ways to correct it, with eyes open and information that helps us identify what we see. This past year, we witnessed the growth of a global movement for Black lives. Countless people peacefully mobilized for change and for justice, resulting in a groundswell of interest in the Movement for Black Lives and in anti-racist education. Education—particularly understanding our shared history in the United States—plays a significant part in dismantling the structures of inequality and fostering opportunities for all children. By courageously facing the brutal aspects of American history, we help to ensure that we do not repeat them. We strengthen our institutions of learning and the opportunities for all children by collectively acknowledging historic inequities and their persistent hold on the present. Doing this can create a future with wider possibility.

Second, the coronavirus pandemic casts a spotlight on the ways education is deeply failing the nation's most vulnerable children, which in turn affects all our children. This moment provides an opportunity to fully reimagine education. Armed with such information, local, state, and national policies can address persistent issues.

We have a unique opportunity to reimagine a more equitable public school system that addresses the needs of these most vulnerable student populations (not only students of color but also poor students, students with special needs, and students who are immigrants or children of immigrants). In naming the injustices of racial inequity and the devastation the global health pandemic has caused, exceptional possibilities exist at federal, state, and local levels to transform educational structures in ways that foster holistic learning and increase life opportunities for all children. While the United States Constitution does not include a positive right to education (nor has the United States Supreme Court recognized it as a fundamental right), we are at a unique moment in which opportunities for federal legislative and executive structural reforms in education may elicit long-term positive change. In previous work, I have discussed the long history of federal legislative and executive involvement in education and the capacity for our political branches to maximize the successes of local innovations.<sup>98</sup> With the unshakable spotlight on the need for answers to widening educational disparities, the time may be ripe for greater attention to a

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<sup>98</sup> See, e.g., Lia Epperson, *Legislating Inclusion*, 6 HARV. L. & POL'Y REV. 91 (2012); Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 STAN. J. C.R. & C.L. 213 (2011); Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146 (2008).

form of *cooperative federalism* in which federal and state governments can collaboratively address the persistent disparities. We have long-standing legislation such as the Elementary and Secondary Education Act (reauthorized as NCLB and now ESSA)<sup>99</sup> that may provide accessible ways to ensure more national attention to minimal standards of education, coupled with existing federal legislation focusing on the needs of particularly vulnerable populations, such as students with special needs and English-language learners. In addition, our executive branch has broad capacity for and experience in interpreting and enforcing equality through provisions of the Civil Rights Act, the Equal Educational Opportunities Act, and the Individuals with Disabilities Education Act.

Broadly speaking, governmental policy, funding mechanisms, and public-private partnerships<sup>100</sup> can amplify and replicate the successful strides implemented in some local and state educational systems today. Illustrative examples are below:

- the Arizona governor's proposal to invest in summer learning, longer school days, and tutoring to help students recover lost learning due to COVID<sup>101</sup>
- local initiatives in cities across the United States as well as proposed national legislation that examine best practices to address the school-to-prison pipeline by prioritizing funding for holistic mental health supports for students rather than just increasing law enforcement in schools
- the federal Counseling Not Criminalization in Schools Act,<sup>102</sup> which would establish a \$2.5 billion grant program to replace law enforcement in schools with mental health services to prevent tragic experiences like that of Kaia Rolle in Orlando<sup>103</sup>

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<sup>99</sup> 20 U.S.C. § 6301.

<sup>100</sup> *Public-Private Partnerships Provide Internet Connection for Students*, AM. FED'N OF TCHRS. (Apr. 28, 2020), <https://www.aft.org/news/public-private-partnerships-provide-internet-connection-students> [<https://perma.cc/AKN8-4GSD>].

<sup>101</sup> *Education in the 2021 State of the State Addresses*, FUTUREED (Mar. 10, 2021), <https://www.future-ed.org/education-in-the-2021-state-of-the-state-addresses/> [<https://perma.cc/BMW9-RSY2>].

<sup>102</sup> Counseling Not Criminalization in Schools Act, H.R. 7848, 116th Cong. (2020).

<sup>103</sup> See also Ending Punitive, Unfair, School-Based Harm that is Overt and Unresponsive to Trauma Act of 2019, H.R. 5325, 116th Cong. (2019) (aiming to strengthen data collection on exclusionary discipline practices in schools, eliminate discriminatory use of such policies, and prevent criminalization and pushout of students as a result of educational barriers including failure to recognize and support mental health needs of students).

- expanding funding that helps support distance learning to close the digital divide
- states that deployed funds in partnership with network providers to increase all students' broadband access and secure laptops and iPads for them<sup>104</sup>

From a legal perspective, these levers for change may have the greatest impact if federal legislative and executive branches take a greater role in supporting state efforts to guarantee educational adequacy and ensure equitable funding for schools to pay for support services for students and districts with the greatest needs. In addition, the U.S. Department of Education plays a critical role in information gathering and data dissemination, as seen with the Civil Rights Data Collection project. It may serve as the national repository for the guidance learned from existing best practices of successful educational initiatives across the country.

As the Supreme Court noted in 1923 in *Meyer v. Nebraska*, “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”<sup>105</sup> And as Supreme Court Justice William Brennan opined in *Plyler v. Doe*, “[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”<sup>106</sup> In this moment of unprecedented educational and economic challenge, it has become quite clear that, still, we are not saved. Yet it is also a moment of unprecedented awareness of the complex inequities that burden our education system and a renewed call for systemic, holistic change. The path may not be linear, but avenues for progress and examples of success remain. With courageous certainty, we may find compassion, hope, justice, and mercy to move forward collectively. Out of pandemic education are opportunities in the American social, political, and legal landscape to create more equitable education policies that support all children. After all, education is the equality enforcer, democracy driver, and ultimate domain for reconciliation.

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<sup>104</sup> See, e.g., *State Government COVID-19 Digital Inclusion Response*, NAT'L DIGIT. INCLUSION ALL., <https://www.digitalinclusion.org/state-covid-19-digital-inclusion-response/>.

<sup>105</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>106</sup> *Plyer v. Doe*, 457 U.S. 202, 221 (1982).