

ARTICLES

Education Equity and Brown: Reform, Retrenchment, and Exclusionary School Discipline

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ABSTRACT

Public schools have served as sites of social, political, and legal contestation since their inception in the United States. And, while the pathways of racialized inequalities have arguably waxed and waned, threats of exclusion and segregation—constituted and governed by anti-Blackness—have cast a long shadow on the promise of educational equity. In response to the central provocation of the 2024 Georgetown Journal of Law & Modern Critical Race Perspectives symposium—revisiting Brown v. Board of Education and the struggle for racial equity in education—this Essay seeks to (re)connect the past and present. More directly, through the Critical Race Theory reform and retrenchment dialectic, it attends to the often-overlooked relationship between Brown (violent resistance to integration) and the persistence of physical racial segregation in K-12 classrooms across the country today. By inviting deeper reflection on the oppositional and hierarchical relationship of integration and segregation, this Essay draws on evidence from the historical record in three areas (framing of Blackness, legislation, and empirical data) to centralize how this interlocking dynamic wove an unbreakable fabric of exclusionary school discipline. In approaching Brown in this manner, we aim to elevate two claims. First, the criticalness of identifying exclusionary school discipline as what it truly is and has always been: state-sanctioned legal mechanisms of physical racial segregation functioning under the race-neutral guise of order and safety. As is true in other critiques of Brown, the race-neutral façade cloaking discipline perpetuates narratives of white innocence in the enactment of policies and practices that oppress schoolchildren of color. Second, that exclusionary school discipline legislation—whether deployed in the years following Brown or advanced in the present day—is education retrenchment legislation that dispossesses children of their right to learn. In provoking a reflective conversation of racial equity and Brown, the praxis of Critical Race Theory challenges us to ask, “now what?” and act collectively against renewed forces that seek to further cement norms of exclusion in public education.

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INTRODUCTION

“[S]egregation in the public schools. . . is a manifestation of the evil of racism the depths and pervasiveness of which [the] Court fails even to acknowledge, much less address and attempt to correct.” ~ Derrick Bell¹

As the diverse contributions of the symposium and this companion volume evidence, the political—and increasingly precarious—realities of advancing racial equity in education are undeniable. Whether examined at local, state, or national levels, the seventy-year anniversary of *Brown v. Board of Education*² is one marked by the penetrating stain of contestations over white exclusivity in K–12 public education.³ Within this diverse and interlocking terrain of educational apartheid, this Essay threads across familiar themes in Critical Race Theory⁴ to link past and present legal, political, and social valences of *Brown*. More directly, this Essay cites exclusionary school discipline in a more candid relationship with the decision in *Brown* and

1. CRITICAL RACE JUDGEMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 25 (Bennett Capers et al. eds., 2022).

2. *Brown v. Board of Education*, 347 U.S. 483 (1954).

3. See, e.g., Genevieve Siegel-Hawley et al., *When Public Meets Private: Private School Enrollment and Segregation in Virginia*, 30(2) WASH. & LEE J. OF C.R. AND SOC. JUST. 95, 97 (2024); Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49(4) N.Y. L. SCH. L. REV. 1053, 1060–61 (2005); Dana N. Thompson Dorsey & Gwen D. Roulhac, *From Desegregation to Privatization: A Critical Race Policy Analysis of School Choice and Educational Opportunity in North Carolina*, 94 PEABODY J. OF EDUC. 420, 428, 430–36 (2019).

4. The rich and generative literature of Critical Race Theory “challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.” CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY WRITINGS]. Most directly, this Essay is within the boundaries of what has been categorized as the “reform/retrrenchment dialectic.” Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607 (2011). Additionally, this Essay also draws on Cheryl Harris’s explication of whiteness as property, given exclusionary school discipline’s specific operation in delineating racial space through expressions of white ownership over educational spaces and interests. In other words, in the presence of integration, segregation occurred to create spatial delineations of white superiority in which white students became beneficiaries of inclusion and Black students were denied entry into that property domain. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737–57 (1993).

violent resistance to Jim Crow.⁵ Specifically, we argue that as the promise of integration threatened to end segregated educational spaces, segregationists maintained control through the legal removal of Black students vis-à-vis suspensions and expulsions, thereby preserving the “spatial dimensions”⁶ of white supremacy.⁷ In deploying mechanisms of physical segregation to uphold social and spatial processes of educational inequality, school administrators and teachers concretized not only a baseline of white exclusivity and anti-Blackness in public education, but also exclusionary discipline as routine education policy and practice. Reflecting on the epistemology of anti-Black racism and white rage in education, Benjamin Blaisdell argues that “school-based practices that perpetuate racial disparity become normalized to such an extent that to imagine or enact access to curriculum and instruction in any other way is perceived of as impossible and to even violate the underlying norms of school space, norms which establish current spatial practices as sacrosanct.”⁸ The contemporary record of exclusionary discipline affirms this claim.

Though anchored in an analysis of *Brown* through the lens of Critical Race Theory, this Essay is not intended to be a critique of the opinion, nor an exposition of the rich literature it has produced. This Essay will proceed with an assumption of the reader’s familiarity with both.⁹ Instead, we aim for this work to be additive (and

5. *Resistance to School Desegregation*, EQUAL JUST. INITIATIVE (Mar. 1, 2014), <https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/>; *The Southern Manifesto of 1956*, U.S. HOUSE OF REP.: HIST., ART & ARCHIVES (Mar. 12, 1956), <https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/>; CAROL D. ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 67–97 (2016); ELIZABETH GILLESPIE MCRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY 185–216* (2018).

6. Subini Ancy Annamma, *Mapping Consequential Geographies in the Carceral State: Education Journey Mapping as a Qualitative Method With Girls of Color With Disabilities*, 24(1) QUALITATIVE INQUIRY 20, 20–21 (2017) (arguing that the “spatial dimensions of injustice [work] in tandem with social processes to uphold” white normativity and remove those deemed as not meeting standards of whiteness); see generally CRITICAL RACE SPATIAL ANALYSIS: MAPPING TO UNDERSTAND AND ADDRESS EDUCATIONAL INEQUITY (Deb Morrison et al. eds., 2017) (connecting tenants of Critical Race Theory with geography to examine the racialization of space and inequities).

7. As white students were largely exempted from exclusionary school discipline post-*Brown*, they became the beneficiaries of the racial sequestering of Black students and educational resource hoarding. Katherine E. Wiley, *A Tale of Two Logics: School Discipline and Racial Disparities in a “Mostly White” Middle School*, 127 AM. J. OF EDUC. 163, 163 (2021) (identifying “criminalized sequestering and racial exemption” as two race discipline logics effecting racial discipline disparities in a majority white school).

8. Benjamin Blaisdell, *Cupcakes, White Rage, and the Epistemology of Antiracism*, 19(1) TABOO: THE J. OF CULTURE AND EDUC. 70, 72 (2020).

9. Relative to *Brown*, for example, Critical Race Theory scholars have exposed how the narrow holding yielded an emaciated conception of discrimination that, to this day, continues to shield racialized dispossession and oppression from legal remedies. As illuminated in the seminal work of Derrick Bell, *Brown* is the representation of “the convergence of black and white interests,” rather than a noble judicial stand against the century-long rule of the insidious separate-but-equal dogma. Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 526 (1980). The essential work of critical theory is not limited to legal scholarship. As Angela Harris has highlighted, Critical Race Theory has “mov-[ed] through capillaries within and outside law.” Angela P. Harris, *Foreword: Racial Capitalism and Law* to HISTORIES OF RACIAL CAPITALISM xiv (Destin Jenkins & Justin Leroy eds., 2021). See also Gloria Ladson-Billings, *Just What is Critical Race Theory and What’s it Doing in a Nice Field Like Education?* 11(1) INT’L J. OF QUALITATIVE STUD. IN EDUC. 7, 17–21 (1998) (discussing the relevance of Critical Race Theory to education); see generally Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of*

generative) to the modern boundaries of Critical Race Theory throughout education law and policy, in two ways. First, we contend that the persistence of a race-neutral naming-and-framing system of exclusionary school discipline must be unbound. By historically contextualizing the emergence of existing racialized practices of suspensions and expulsions relative to *Brown*, the foundations of exclusionary school discipline become acutely visible as state-sanctioned legal mechanisms of physical racialized segregation, functioning under the race-neutral guise of order and safety. Second, we join with others deeply interested in explicating the nature and forms of education retrenchment legislation that dispossess children of their right to learn.¹⁰

To distill these claims and capture the full scope of exclusionary practices in K-12 public schools following *Brown*, we draw on a historical record of reports, interviews, and state legislation. As reflected at the close of this Essay, the framing of Blackness by state officials using racialized tropes (including dangerousness and unworthiness), and concomitant legal mechanisms permitting physical racialized segregation, follow students to the present day. To bring the convergence between *Brown*, anti-integration, and segregated discipline into fuller relief, we also present early empirical data and first-hand accounts from school officials and students. Through the voices of these accounts, the shape of anti-Black racism and white spatial control is illuminated as a governing principle of education policy and practice.

I. EDUCATIONAL EQUALITY, EXCLUSION AND BROWN

As a broad body of work has detailed, educational policies, practices, and jurisprudence have fundamentally operated to preserve an educational apartheid grounded in the exclusivity of whiteness in K–12 schools.¹¹ Furthermore, numerous articles

Education, 97(1) TCHRS. COLL. REC. 47 (1995) (arguing “for a critical race theoretical perspective in education analogous to that of [C]ritical [R]ace [T]heory in legal scholarship.”).

10. See, e.g., LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L. J. 2139 (2023) (evidencing how the confluence of the anti-CRT movement and the parental rights movement protects whiteness in education); Janel A. George, *Deny, Defund, and Divert: The Law and American Miseducation*, 112(3) GEO. L. J. 509 (2024) (arguing for a “new framework to categorize laws designed to entrench racial inequality in education as those that seek to: (1) *deny* Black children access to quality education and curriculum; (2) *defund* public schools attended predominantly by Black children and funnel money into segregated all-white schools; and/or (3) *divert* Black educators away from the public education system.”); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28(1) WM. & MARY J. OF RACE, GENDER, AND SOC. JUST. 61, 74–77 (2021).

11. As Dumas contends, “any racial disparity in education should be assumed to be facilitated, or at least exacerbated, by disdain and disregard for the Black. . . [t]hat is to say, these are all policies in which the Black is positioned on the bottom.” Michael J. Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55(1) THEORY INTO PRACT. 11, 17 (2016). See also Harris, *supra* note 4, at 1713 (describing “whiteness” as “a valuable asset that whites sought to protect.”); Clayton Pierce, *W.E.B. Du Bois and Caste Education: Racial Capitalist Schooling From Reconstruction to Jim Crow*, 54 AM. EDUC. RESCH. J. 23S, 38S (2017) (quoting W.E.B. DuBois that “[a] fundamental goal of caste schooling is the need to teach individuals from the white and dark worlds how to understand and *live* as caste subjects as well as the value of social life attached to each”); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988) (“It is not separation *per se* that made segregation subordinating, but the fact that it was enforced and supported by state power, and accompanied by the explicit belief in African-American inferiority.”); Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97(1) TCHRS. COLL. REC. 47, 60 (1995) (“Whiteness

have documented how exclusionary school discipline is highly racialized¹² and rooted in anti-Black¹³ regimes of domination. Notably, analyses of exclusionary school discipline most often begin their historical narratives against the backdrop of the political and legal climates of “tough on crime” policies of the 1980s and 1990s,¹⁴ which culminated in a net of “zero tolerance” policies in schools.¹⁵ The focus of this Essay, however, takes a deeper, nuanced step towards inviting a new view of the resistance to school desegregation in the wake of *Brown* as an earlier inflection point in the genesis of racialized state-sanctioned physical segregation.¹⁶

is constructed in this society as the absence of the ‘contaminating’ influence of blackness. . . the absolute right to exclude was demonstrated initially by denying blacks access to schooling altogether.”).

12. Richard O. Welsh & Shafiqua Little, *Caste and control in schools: A Systematic Review of the Pathways, Rates and Correlates of Exclusion due to School Discipline*, 94 CHILD. AND YOUTH SERVS. REV. 315, 319, 335 (2018); Richard O. Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 REV. OF EDUC. RSCH. 752, 756–60 (2018); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 327–30 (2002); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 92–102 (2011); Daniel Losen et al., *Are We Closing the School Discipline Gap?*, THE CIVIL RIGHTS PROJECT (Feb. 23, 2015), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/>; DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES, U.S. GOV. ACCOUNTABILITY OFF. (Mar. 2018), <https://www.gao.gov/assets/gao-18-258-highlights.pdf>; 2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK, U.S. DEPT. OF EDUC. 3–4 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

13. Dumas, *supra* note 11, at 17. The relationship of exclusionary school discipline to anti-Blackness is not simply understood as an antithesis of personhood and citizenship normatively, but represented through exclusivity in racialized space in which, “in the white spatial imaginary blackness is the antithesis to idealized social space.” Blaisdell, *supra* note 8, at 73. See also Benjamin Blaisdell & Mariama S. Gray, *Disrupting Carcerality in Schools: The Value of Racial Spatial Analysis*, LEADERSHIP & POL’Y IN SCH. 1, 5 (2024) (framing antiblackness and racial spatial control in schools); Connie Wun, *Unaccounted Foundations: Black Girls, Anti-Black Racism, and Punishment in Schools*, 42(4–5) CRIT. SOCIO. 737, 740 (2016) (defining formal anti-Black discipline in schools).

14. See, e.g., Gun-Free Schools Act of 1994, Pub. L. No. 103-227, § 1031, 8001, 108 Stat. 270, 270 (1994) (conditioning school funding on a local policy imposing mandatory expulsion for at least one year on students who bring a weapon to school); see also ACLU, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING, 4–5 (2017), <https://www.aclu.org/publications/bullies-blue-origins-and-consequences-school-policing>. Examples of “tough on crime” policies include “War on Drugs” initiatives, and media representation of youth of color as “superpredators.” *Id.* at 6–7.

15. Zero-tolerance policies prescribing mandatory exclusionary sanctions for infractions culminated in the Gun-Free Schools Act of 1994. Kevin D. Brown et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y. L. SCH. L. REV. 1071, 1083–84 (2009). In response to this Act, “all fifty states and [D.C.]” passed similar zero-tolerance policies into legislation, with many “expand[ing] the scope” of these policies to apply to “violations other than firearm possession,” such as “behaviors that fall loosely under the category of school disruption.” *Id.* at 1083. By 1998, the vast majority of public schools had zero tolerance policies in place for various types of behavior, including drugs, violence, and tobacco. Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50(4) AM. U. L. REV. 1039, 1047–49 (2001).

16. Although the scope of this Essay is limited to policies and practices that are disciplinary *per se*, exclusionary school discipline is only one piece of the larger landscape of racialized resistance to desegregation. For example, the Children’s Defense Fund chronicled patterns of pathologizing Blackness as a form of disability and the removal of Black students from white learning environments during integration. CHILDREN’S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA 102 (1974) [hereinafter CHILDREN OUT OF SCHOOL] (chronicling “widespread belief[s] and fear[s] among many [B]lack parents and school children that special education placement is used against minority children as a means of resegregating them in school districts where courts have ordered desegregation or as a means of punishing them for racial reasons”).

To evidence this (re)narration, this Essay presents brief descriptions of varying yet intersectional modalities of opposition to racial inclusion. First is the framing of Black children as threats to the safety and wellbeing of schools. While not new,¹⁷ tropes and stereotypes purporting to reflect the dangerousness and unworthiness of Black students were deployed by teachers and school officials following *Brown* to maintain the order of newly desegregated schools. Second is legislation. As has been revealed by Critical Race Theorists, race-neutral and color-evasive¹⁸ laws exist as an architectural cornerstone of dispossessive racial orders and are “the product of a deeply politicized choice.”¹⁹

As the new system of court-ordered integration was gradually deployed across the country following *Brown*,²⁰ tropes and stereotypes of Black²¹ students as dangerous and undisciplined became firmly rooted in public schools and shifted educational policy to prioritizing control through exclusion, punishment, and surveillance.²² As evidenced by a 1964 study of the attitudes of Black and white teachers towards the students in a recently integrated school district,²³ the imprint of anti-Black racism cast Black students as a threat, and by extension, the problem.²⁴ Invoking status-framing

17. Steven L. Nelson & Ray Orlando Williams, *From Slave Codes to Educational Racism: Urban Education Policy in the United States as the Dispossession, Containment, Dehumanization, and Disenfranchisement of Black Peoples*, 19 J. OF L. IN SOC'Y 82, 102–03 (2019) (“Black peoples and communities are framed as problems in schools. These problems are not based on generalizable behavior patterns, but they are based on stigmas that a broader, whiter general population has created and attached to Black peoples and blackness.”) (citing Michael J. Dumas & Joseph Derrick Nelson, *(Re)imagining Black Boyhood: Toward a Critical Framework for Educational Research*, 86 HARV. EDUC. REV. 27, 35 (2016)).

18. This Essay uses the term racial- or color-evasiveness rather than colorblind, though the Critical Race Theory literature has long relied on colorblindness to describe racist ideologies, practices, and justifications in law. In using racial evasiveness, this Essay responds to Lissa Stapleton and Liam James’s insightful critique that “[t]he racial ideology of denying the significance of race should not be equated with blindness because it is an inadequate descriptor. Color-blindness, as a racial ideology, conflates lack of eyesight with lack of knowing. By naming this racial ideology as color-evasiveness, we demonstrate the social construction of race and ability while simultaneously confronting the social and material consequences of racism and ableism.” Lissa Stapleton & Liam James, *Not Another All White Study: Challenging Color-Evasiveness Ideology in Disability Scholarship (Practice Brief)*, 33 J. OF POSTSECONDARY EDUC. & DISABILITY 215, 216 (2020).

19. CRITICAL RACE THEORY WRITINGS, *supra* note 4, at xxviii.

20. Over 200 school desegregation hearings were held between 1955 and 1960. S. Poverty L. Ctr., *Brown v. Board: Timeline of School Integration in the U.S.*, LEARNING FOR JUST. (2004), <https://www.learningforjustice.org/magazine/spring-2004/brown-v-board-timeline-of-school-integration-in-the-us>.

21. Our naming of Black students specifically does not aim to erase the experiences of Afro-Latine, Latine, Indigenous, Native American, Asian Pacific Islander, or other students of color who experienced exclusion under white supremacist racial hierarchies delineating them as the non-white other. IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1, 7, 9, 20 (2d. ed. 2006) (discussing the taxonomy of whiteness and oppositional construction); Harris, *supra* note 4, at 1725 (discussing whiteness as property denied to the non-white other).

22. As Kristin Henning described, “[m]unicipal leaders in the North and South claimed that Black children lacked discipline and feared they would bring disorder to their schools.” KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* 127 (2021).

23. David Gottlieb, *Teaching and Students: The Views of Negro and White Teachers*, 37 SOCIO. OF EDUC. 345, 352 (1964).

24. Dumas, *supra* note 11, at 16 (“the Black is constructed as always already problem—as nonhuman; inherently uneducable, or at the very least, unworthy of education; and, even in a multiracial society, always a threat. . .”).

tropes of the New South,²⁵ white teachers in predominantly Black schools, for example, described their students as both “lazy” and “rebellious.”²⁶ In contrast, Black teachers who were interviewed described the same students as “‘fun loving’, ‘happy’, ‘cooperative’, ‘energetic’, and ‘ambitious.’”²⁷ The oppositional characterizations between Black and white teachers extended to their stated opinions on the most pressing educational priorities—white teachers cited “‘student behavior or discipline problems,’” while Black teachers emphasized “‘lack of proper equipment’ and ‘overcrowded conditions.’”²⁸ Nine years later, the Southern Regional Council of Atlanta and the Robert F. Kennedy Memorial of Washington collected extensive interviews documenting the “student pushout”²⁹ problem in four southern states, finding that “‘extraordinarily large and disproportionate numbers” of Black students were suspended or expelled from Southern schools as part of resistance to integration.”³⁰

The following year, in 1974, the Children’s Defense Fund (CDF) released its seminal report documenting popular support for the removal of Black children from schools. The report highlighted public perceptions of school suspensions and removal as “an effective educational tool” that provided “an essential deterrent to growing reports of school violence and disruption,” euphemized as impacting only “a few patently unruly troublemakers who [were] mostly Black.”³¹ Citing an interview with a Black high school educator in Boston, the report observed that “some white teachers see the [B]lack student as the original aggressor and as the source of the continuing threat to school order, even when neither perception is true.”³² Like the white teachers in the 1964 study, school officials constructed narratives of Black student dangerousness to justify the legal necessity for the use of suspensions and expulsions.³³ Negative framing of Blackness was not limited to racial threat analysis, as school officials also invoked racist logics of the blameworthiness of Black students—one administrator stated that “time will calm Black resentment of whites in authority.”³⁴ The Southern Regional Council of Atlanta and the Robert F. Kennedy Memorial of Washington also demonstrated how, in addition to tropes about dangerousness, school officials also invoked paternalistic, white supremacist views of the benefits of and need for discipline. Consistent with white supremacist paternalism of the Jim

25. See HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 3–4 (2019); see also, GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 100–01 (1944).

26. Gottlieb, *supra* note 23, at 352.

27. *Id.*

28. *Id.* at 351.

29. As defined by the Southern Regional Council and the Robert F. Kennedy Memorial, the term “student pushout” describes any “student who through discriminatory treatment is excluded from school.” ROBERT F. KENNEDY MEMORIAL & SOUTHERN REGIONAL COUNCIL, *THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION* vii–viii (1973).

30. *Id.* at 10. The report notes that “continuing *resistance* by educators has helped to create the climate for increased numbers of pushouts.” *Id.* at ix.

31. CHILDREN’S DEFENSE FUND, *SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? A REPORT* 10 (1975) [hereinafter *SCHOOL SUSPENSIONS*].

32. *Id.* at 14.

33. *Id.* at 10.

34. ROBERT F. KENNEDY MEMORIAL & SOUTHERN REGIONAL COUNCIL, *supra* note 29, at 22.

Crow era, a superintendent of a rural Georgia school district argued that “[s]uspensions are a good influence on kids,” “more suspensions will be coming,” and that “the courts have locked schools in and tied our hands.”³⁵ In addition to qualitative data, the Southern Regional Council of Atlanta and the Robert F. Kennedy Memorial of Washington examined quantitative discipline data, where available, finding patterns of racialized segregation and removal.³⁶

II. EXCLUSIONARY SCHOOL DISCIPLINE LEGISLATION

As Janel George has argued, the advancement of educational retrenchment legislation post-*Brown*—e.g., the “deny, defund, and divert” framework—was a goal of Southern public policy and became the “prevailing way in which southern law was crafted and articulated.”³⁷ The same observation can be made in the context of exclusionary school discipline. While some states introduced exclusionary school discipline for the first time post-*Brown*, such as Colorado in 1963,³⁸ other states amended existing laws to strengthen the application of exclusionary school discipline after *Brown*.³⁹ For example, Ohio replaced procedural protections against suspension and expulsion with absolute authority for school officials to suspend or expel students.⁴⁰ Other states, such as North Carolina, augmented the grounds for punishment, which amended its education code to include being “guilty of immoral or disreputable conduct” and being “a menace to the school” as grounds for suspension.⁴¹ The legal

35. *Id.* at 21.

36. B. Drummond Ayres Jr., *Two Rights Groups Charge Resistance to School Desegregation Has Led to Expulsion of Many Blacks*, N.Y. TIMES (Nov. 29, 1973), <https://www.nytimes.com/1973/11/29/archives/two-rights-groups-charge-resistance-to-school-desegregation-has-led.html> (“For example, we know that in Miami blacks account for only 26 per cent of the school population but 71 per cent of those suspended or expelled. In Little Rock, black enrollment is 38 per cent, but black suspensions are about 80 per cent. And in Columbia, S. C., blacks account for something like half the school population but 77 per cent of the suspensions.”).

37. George, *supra* note 10, at 524–25 (defining deny, defund, and divert laws that emerged soon after the decision in *Brown*).

38. Colorado authorized “suspension, expulsion, and denial of admission” for “continued willful disobedience or open and persistent defiance of proper authority,” as well as “behavior which is inimicable to the welfare, safety, or morals of other pupils.” School Attendance Law of 1963, ch. 243, 1963 Colo. Sess. Laws 863, 864.

39. State-level school discipline legislation is especially relevant in light of the Supreme Court’s posture around local control over education post-*Brown*. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (declining to find a fundamental right to education in the federal Constitution and leaving significant control over education to the states). In the absence of any substantial federal oversight or guidance concerning school discipline, states enacted disciplinary laws with significant independence.

40. Prior to 1957, Ohio law provided that “no pupil shall be suspended therefrom except for such time as may be necessary to convene the board of education, nor be expelled unless by a vote of a majority of said board, after the parent or guardian of the offending pupil shall have been notified of the proposed expulsion, and permitted to be heard against the same.” Ohio Rev. Code § 3313.66 (1956). In 1957, Ohio Senate Bill 162 rewrote § 3313.66 to provide that “[t]he superintendent of schools . . . or the executive head of a local school district may suspend a pupil from school not more than ten days. Such superintendent or executive head may expel a pupil from school.” Act of June 10, 1957, Am. S.B. No. 162, 1957 Ohio Laws 104.

41. Act of May 26, 1955, 1955 N.C. Sess. Laws 1593. In 1959, North Carolina amended the law again to empower principals to expel students on those same grounds. Act of May 21, 1959, 1959 N.C. Sess. Laws 480.

regime of exclusion thus amplified over the following twenty years, and by 1974, the vast majority of states had codified the grounds on which a student could be suspended or expelled.⁴² In the absence of state law, several states granted legal authority for local administrators to define grounds for suspension and expulsion.⁴³

To be clear, unlike Slave and Black Codes⁴⁴ that created a separate class of offenses based on race, the text of exclusionary school discipline laws and policies were race-neutral and punished *any* student for vague and highly discretionary categories of behavior.⁴⁵ However, if one examines these laws and their categories of offenses through a Critical Race Theory lens, it is evident that race neutrality exists to function as a disguise against the desire to preserve white exclusivity in educational spaces. Consider the following behaviors cataloged in the 1974 CDF report, each of which legally permitted physical segregation from learning environments: “disruption,” “moral culpability,” “failure to conform,” “presence detrimental to school,” “mental or emotional abnormality,” and “habitual uncleanness.”⁴⁶ In codifying race-coded language as neutral, exclusionary school discipline law and policy transformed racist ideologies into legal mechanisms that affirmed that non-white students warranted exclusion and punishment.⁴⁷

A. Racialized Disparities Data and Lived Experience

In 1968, the U.S. Department of Education began collecting national data through the Elementary and Secondary School Civil Rights Survey “on key education and civil rights issues” in public schools.⁴⁸ Data was collected from 49 states and the District of Columbia at state, county, district, and school levels.⁴⁹ The 1974 CDF report was the first comprehensive report to examine the U.S. Department of

42. CHILDREN OUT OF SCHOOL, *supra* note 16, at 350–56.

43. *Id.* Additionally, in Southern states such as Louisiana, voters passed constitutional amendments enabling “the state[’s use of] police powers to keep schools segregated.” *Segregation in America*, EQUAL JUST. INITIATIVE 28 (2018), <https://segregationinamerica.eji.org/report.pdf>.

44. Nelson & Williams, *supra* note 17, at 104; Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104(4) CORNELL L. REV. 899, 937 (2019).

45. These laws punished exceptionally broad categories of student behavior. *See, e.g.*, Public School Law Revision Act, 1955 S.D. Sess. Laws, ch. 41 § 12 124 (any conduct deemed “insubordinate” or “habitually disruptive”); Act of July 1, 1969, 1969 N.H. Laws 411 (“gross misconduct”); Act of February 19, 1970, 1970 Tenn. Pub. Acts 679 (“immoral or disreputable conduct” and any “conduct prejudicial to good order or discipline”).

46. CHILDREN OUT OF SCHOOL, *supra* note 16, at 350–56.

47. For example, racist tropes of uncleanness have long been prevalent in U.S. history and evidenced in such laws and policies as grooming codes and policies. *See, e.g.*, D. Wendy Greene, *Foreword to the Republication of Title VII: What’s Hair (and Other Race-Based Characteristics) Got to do With it?* 92 U. Colo. L. Rev. 1265, 1266, 1271 (2021). As Cara McClellan argues, “[s]chool discipline thus became a tool for both excluding Black youth from integrated environments and justifying their exclusion through racially coded explanations of Black students as dangerous and threats to the school environment.” Cara McClellan, *Challenging Legacy Discrimination: The Persistence of School Pushout as Racial Subordination*, 105 B.U. L. REV. 1, 37 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4803245.

48. *Civil Rights Data Collection (CRDC)*, U.S. DEPT. OF EDUC., <https://www.ed.gov/laws-and-policy/civil-rights-laws/crdc/civil-rights-data> (last updated Oct. 4, 2024).

49. *CRDC Data Archives: Overview and Documentation: 1968*, U.S. DEPT. OF EDUC., <https://civilrightsdata.ed.gov/archive> (last visited Oct. 14, 2024).

Education's data.⁵⁰ Using quantitative analysis, the report confirmed the racial disparity findings of earlier qualitative studies⁵¹ in the use of suspensions, expulsions, and denials of admission. For example, in the 1972–73 school year, schools in 402 districts across five selected states (Arkansas, Maryland, New Jersey, Ohio, and South Carolina) cumulatively suspended an average of 7.8 percent of their Black students and an average of just 3.9 percent of their white students.⁵² In the following school year, Black students accounted for 65 percent of the suspensions reported in 30 districts across nine states and the District of Columbia, despite comprising only 40 percent of the total students surveyed.⁵³ Subsequent years of collection affirmed these differences in suspension rates based on race.⁵⁴ Racial disparities were evident at the local level as well. Following the Supreme Court's 1971 decision in *Swann v. Charlotte-Mecklenburg*, which required Charlotte-Mecklenburg County, North Carolina to implement a busing program to integrate its schools,⁵⁵ expulsions increased from 25 Black students and 11 white students in the 1968–69 school year to 94 Black students and 14 white students in the 1971–72 school year.⁵⁶ Similarly, as secondary schools in Little Rock desegregated, Black students accounted for an increasing number of suspensions—from 62 percent of all suspensions in 1968–69 to 80 percent of all suspensions in 1971–72.⁵⁷

As the landscape of exclusionary school discipline unfolded post-*Brown*, it was not simply painted by raw numbers. It was reflected in the day-to-day determinations by administrators and teachers across the country to willfully defy *Brown*'s command for racially-inclusive learning environments. Consider, for example, a South Carolina school official's candid characterization of teachers as “trigger-happy with suspensions after desegregation.”⁵⁸ Or, the observation of a member of the council overseeing the implementation of Boston's school desegregation order that there were “tremendous disparities in the rates of suspension as between [B]lack and white students.”⁵⁹ From North Little Rock to Louisiana,⁶⁰ as schools desegregated, “suspensions for ‘defiance’ and ‘disrespect’ shot up along with the number of [B]lack students suspended.”⁶¹ As

50. See generally CHILDREN OUT OF SCHOOL, *supra* note 16.

51. See, e.g., TASK FORCE ON CHILDREN OUT OF SCHOOL, THE WAY WE GO TO SCHOOL: THE EXCLUSION OF CHILDREN IN BOSTON (1970); JACOB REGAL, ET AL., THE EXCLUSION OF CHILDREN FROM SCHOOL: THE UNKNOWN, UNIDENTIFIED, AND UNTREATED (1971).

52. *Id.* at 131.

53. *Id.* at 127–29.

54. Melanie Leung-Gagné et al., *Pushed Out: Trends and Disparities in Out-of-School Suspension*, LEARNING POLICY INSTITUTE VI (Sept. 30, 2022), https://learningpolicyinstitute.org/media/3885/download?inline&file=CRDC_School_Suspension_REPORT.pdf.

55. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 30 (1971).

56. ROBERT F. KENNEDY MEMORIAL & SOUTHERN REGIONAL COUNCIL, *supra* note 29, at 4–5.

57. *Id.* at 2. Black students never comprised more than 42 percent of the secondary students in the jurisdiction.

58. CHILDREN OUT OF SCHOOL, *supra* note 16, at 134.

59. SCHOOL SUSPENSIONS, *supra* note 31, at 64.

60. An administrator in Louisiana confessed, “[i]n 1969 when we in St. Landry Parish first integrated, [B]lack suspended from school outnumbered whites three to one.” ROBERT F. KENNEDY MEMORIAL & SOUTHERN REGIONAL COUNCIL, *supra* note 29, at 3.

61. *Id.* at 18.

an organizer for education reform in the South noted in 1975, “[b]efore, [suspension or expulsion] w[ere] only for serious offenses. . . [b]ut now it’s for the least little thing and the terminology often does have racial overtones.”⁶² In this increasingly exclusionary environment, students felt the precarity of their racial identity. One Black girl reported that after her high school was desegregated in 1970, “[s]ome of the [B]lack students were branded as [B]lack militants and troublemakers by the white administration. There was even what was known as the ‘Black List’ on which were many of these students’ names.”⁶³ As another student described, “[w]hen there is a racial disturbance, there are always the [B]lacks who are kicked out. I know of only one time when a white [student] was suspended for fighting. . . Something needs to be done, because it seems to me as though they just want the [B]lacks out of school anyway.”⁶⁴

B. *From the Past to the Present*

The architecture of today’s exclusionary school discipline legislation, policies, and practices emerged from and is rooted within a visceral anti-Black racist context post-*Brown*. And, while the operationalization of racialized segregation has grown exponentially⁶⁵ in recent decades in K-12 public schools, the historical observations explored *supra* endure today: tropes and stereotypes of Black students as requiring stringent discipline persist,⁶⁶ dramatic racial disparities prevail in the use of suspensions, expulsions, and general discipline,⁶⁷ and states remain dedicated to empowering

62. *Id.* at 20.

63. *Id.* at 16.

64. *Id.* at 15.

65. Throughout the 1980s and 1990s, school districts across the country adopted zero-tolerance regimes, with some mandating suspension and expulsion for “relatively minor” offenses such as disruption. RUSSELL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2, 10 (Ind. Educ. Pol’y Ctr., 2000); see also Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL’Y 585, 589–91, 593 (2009).

66. See, e.g., Kelly Welch and Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57(1) SOC. PROBLEMS 25, 29–41 (2010) (testing for, and finding, the operation of racial threat analyses in schools); Jason A. Okonofua and Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 620–23 (2015) (finding racial stereotypes of Black students by teachers results in negative discipline responses); MONIQUE COUVSON, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 34 (2016); REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 1, 8 (Geo. Ctr. on Poverty and Ineq., 2017) (finding adultification bias beginning as early as age 5 and perception of Black girls as needing less care, nurturing, and being hypersexualized); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85 (2011) (“[S]tudents from African American and Latino families are more likely than their White peers to receive expulsion or out of school suspension as consequences for the same or similar problem behavior.”).

67. On average, Black students lost 30.7 days of instruction during the 2021–22 school year due to suspensions, compared to 8.1 days on average for white students. RAMON T. FLORES & DANIEL J. LOSEN, LOST INSTRUCTION TIME IN CALIFORNIA SCHOOLS: THE DISPARATE HARM FROM POST-PANDEMIC PUNITIVE SUSPENSIONS 8 (The Civil Rights Project, Oct. 2023), https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-instruction-time-in-california-schools-the-disparate-harm-from-post-pandemic-punitive-suspensions/Lost_Instruction_Time_CA_Schools_October_2023.pdf. Between 2021 and 2023, Black students in North Carolina were “over [five] times” more likely than white students to be referred for discipline due to “disorderly conduct.” SAM DAVIS ET AL., THE CONSEQUENCES OF COPS IN NORTH CAROLINA SCHOOLS 4 (ACLU of N.C., 2023), <https://www.acluofnorthcarolina-bts.org/s/20231018-NC-Discipline-Final.pdf>;

teachers and administrators to segregate Black students from their classrooms and schools under banners of safety and order.⁶⁸ For example, despite a significant evidentiary record of the harms of exclusionary discipline and its reproduction of structural inequities,⁶⁹ educators still describe student behavior and discipline as one of the most important issues facing public schools in the United States today.⁷⁰ By mirroring the language used by school administrators in favoring the use of exclusionary discipline post-*Brown*, teachers and state officials continue to frame students as unworthy of being in the classroom. In advancing a bill that required the removal of any K-6 student who “impedes on other students’ ability to learn” and any grade 6-12 student who “interfer[es] with an orderly educational process or obstructs the teaching or learning process,” as well as mandated the suspension of any students removed from the classroom three times in one month,⁷¹ a legislator in West Virginia claimed teachers told him they “needed something to get these kids out of the class [who] are . . . hellbent on raising cain and causing disruption.”⁷²

Similarly, since *Brown*, racial disparities have been a hallmark of exclusionary school discipline. As educational carcerality⁷³ rose in the 1980s and 1990s, it further entrenched racialized segregation from schools through zero tolerance regimes.⁷⁴ Although zero tolerance supposedly targeted a misperceived “epidemic” of school

WALTER S. GILLIAM, EARLY CHILDHOOD EXPULSIONS AND SUSPENSIONS UNDERMINE OUR NATION’S MOST PROMISING AGENT OF OPPORTUNITY AND SOCIAL JUSTICE 4-7 (Sept. 2016), <https://dropoutprevention.org/wp-content/uploads/2016/10/rwjf-early-childhood-expulsions-and-suspensions-UndermineOurNationsMostPromisingAgentofOpportunityandSocialJustice-2016.pdf>.

68. A Texas state senator proposing a new state law that would allow schools to remove students after one incident of disruption reasoned that “not all kids belong in the classroom anymore.” Talia Richman, *Texas Lawmakers Could Make It Easier to Kick Students Out of Class*, THE DALLAS MORNING NEWS (Apr. 13, 2023, 9:00 AM), <https://www.dallasnews.com/news/education/2023/04/13/texas-lawmakers-could-make-it-easier-to-kick-students-out-of-class/> (quoting Senator Charles Perry).

69. See, e.g., Catherine dP. Duarte et al., *Punitive School Discipline as a Mechanism of Structural Marginalization with Implications for Health Inequity: A Systematic Review of Quantitative Studies in the Health and Social Sciences Literature*, 1519(1) ANNALS OF THE N.Y. ACAD. OF SCI. 129, 130, 137–44 (2022) (revealing exposure to punitive school discipline as adversely impacting health); Russell J. Skiba et al., *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47(4) EQUITY & EXCELLENCE IN EDUC. 546 (2014) (“[M]ultivariate analyses [indicate] that . . . out-of-school suspension and expulsions are . . . risk factors for a range of negative developmental outcomes” and “juvenile justice [system] involvement.”).

70. Alicia R. Jackson, *Inherently Unequal: The Effect of Structural Racism and Bias on K-12 School Discipline*, 88(2) BROOKLYN L. REV. 459, 460 (2023) (“Discipline . . . is classified as the third most important legal issue confronting educators.”).

71. S.B. 614, 2024 Reg. Sess. (W. Va. 2024).

72. Brad McElhinny, *Delegates Pass Bill Giving Teachers More Power to Remove Violent or Disruptive Students from Classrooms*, METRONews (Mar. 8, 2024, 4:10 PM), <https://wvmetronews.com/2024/03/08/delegates-pass-bill-giving-teachers-more-power-to-remove-violent-or-disruptive-students-from-classrooms/>.

73. We use the term educational carcerality consistent with critical education scholarship. See Blaisdell & Gray, *supra* note 13 at 1 (defining carceral logics in schools and the resulting system of carcerality).

74. Zero tolerance policies were first implemented to target drugs, gang activity, and weapons, but quickly expanded to impose severe penalties for school disruption. RUSSELL SKIBA ET AL., ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 23–25 (Am. Psych. Assoc., 2006), <https://www.apa.org/pubs/reports/zero-tolerance-report.pdf>. For example, a Pennsylvania law mandating an expulsion for bringing a weapon to school defined “a weapon” so broadly that even “a pencil [had] been considered a weapon for purposes of punishing students.” Klehr, *supra* note 65, at 592.

violence,⁷⁵ such policies amplified the racialized effects of school discipline.⁷⁶ By 2004, the U.S. Department of Education and Office for Civil Rights estimated Black students were 2.84 times more likely to be suspended and 2.47 times more likely to be expelled than white students.⁷⁷ And, despite civil rights reforms at local, state, and national levels increasing since 2008,⁷⁸ the Office for Civil Rights released data in 2020 that indicated that in the 2017–18 school year, Black students accounted for 39 percent of the 1.8 million K–12 suspensions nationwide, despite comprising only 15 percent of the total student population.⁷⁹ The 2017–18 data demonstrates the far reach of exclusion, with Black boys specifically representing 33 percent, 35 percent, and 30 percent, respectively, of all preschoolers suspended once, suspended more than once, and expelled, despite making up less than ten percent of the total preschooler population during that school year.⁸⁰ The same data evidences that Black girls also suffer the segregationist proclivities of American preschools, accounting for 50 percent, 59 percent, and 52 percent, respectively, of all female preschoolers suspended once, more than once, and expelled, despite making up only 18 percent of the female preschooler population in that same timeframe.⁸¹

Though the legislative architecture of exclusionary school discipline of the *Brown* era has been altered in some states,⁸² new political and legislative efforts seek to

75. Although, in the 1990s and early 2000s there was “grave concern that [American] children [were] no longer as safe from intimidation, serious injury, or death as they once were while at school,” principals tended to more commonly cite “less violent behaviors, such as tardiness [reported by forty percent of principals] and absenteeism [twenty-five percent].” SKIBA ET AL., *supra* note 74, at 37–38. Less than ten percent of principals reported incidents involving drugs, gangs, weapons, or physical abuse of teachers. *Id.* at 38.

76. *Id.* at 57.

77. *Id.* at 139.

78. See, e.g., Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281 (2012) (case study analysis of implementation of restorative justice over exclusionary and punitive school discipline); Supportive School Discipline Initiative, https://juvenilecouncil.ojp.gov/sites/g/files/xyckuh301/files/media/document/supportive_school_discipline_initiative_brief.pdf (describing federal plan for action to address school discipline disparities including funding); Anne Gregory, et al., *Good Intentions Are Not Enough: Centering Equity in School Discipline Reform*, *School Psych. Rev.* 1, 2 (literature review of school-wide positive behavioral interventions including randomized controlled trials), <https://www.dupageroe.org/wp-content/uploads/Good-Intentions-Are-Not-Enough-Centering-Equity-in-School-Discipline-Reform.pdf>; Committee for Children, *Recent Trends in State Legislative Exclusionary Discipline Reform*, <https://www.cfchildren.org/wp-content/uploads/policy-advocacy/exclusionary-policy-brief.pdf> (identifying state legislative reforms); U.S. Dep’t of Justice & U.S. Dep’t of Educ., *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014).

79. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: NATIONAL DATA (U.S. Dept. of Educ., 2020), <https://civilrightsdata.ed.gov/profile/us?surveyYear=2017>; see Jackson, *supra* note 70, at 462 (“[s]tructural racism and bias are major contributing factors to disproportionate punishment, which directly impacts students’ access to education”); see also GOV’T ACCOUNTABILITY OFF., K–12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (Mar. 22, 2018), <https://www.gao.gov/products/gao-18-258>.

80. OFFICE FOR CIVIL RIGHTS, *supra* note 79.

81. *Id.*

82. GEO. L. CTR. ON POVERTY & INEQUAL., EXCLUSIONARY SCHOOL DISCIPLINE LEGISLATIVE TRENDS (2020), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2021/04/ESD-Legislative-Trends.pdf>; see also Edwin Rios, *California Students Can No Longer Be Suspended for ‘Willful Defiance’. Could Nationwide Change Be Next?*, THE GUARDIAN (Oct. 14, 2023, 2:00 PM), <https://www.theguardian.com/education/2023/oct/14/california-gavin-newsom-student-suspensions-willful-defiance> (identifying California

reinforce physical racialized segregation in K-12 public schools. Since the start of 2023, 12 states have proposed or passed 22 bills that rescind recently adopted protections against exclusionary school discipline,⁸³ enhance the authority of educators to physically segregate students,⁸⁴ and expand the behaviors subject to discipline.⁸⁵ For example, lawmakers in each of Florida, Oklahoma, and Alabama proposed a “Teachers’ Bill of Rights,” which would codify the authority of teachers to remove certain “disruptive” or “disorderly” students from the classroom.⁸⁶ In 2023, West Virginia authorized mandatory and automatic suspensions for any student removed three times in one month for “behav[ing] in a manner that obstructs the teaching or learning process.”⁸⁷ Texas legislators also proposed a law that would have permitted a school to remove or expel a student after only one incident of “unruly, disruptive, or abusive” behavior.⁸⁸ In 2023, lawmakers in Arizona rolled back a 2021 law that had mandated the consideration of “alternative behavioral and disciplinary interventions” and had established protections against suspension and expulsion for students under seven years old.⁸⁹

CONCLUSION

Since its inception, Critical Race Theory has unapologetically challenged racial progress narratives⁹⁰ and unmasked ostensibly neutral legal mechanisms of subordination.⁹¹ In doing so, it has expanded and provoked dynamic conversational domains linking the historical with the contemporary, boldly exposing legal, social, and spatial mechanisms of subordination. In responding to the provocation of this

as the first to prohibit suspensions for “willful defiance,” of the over 25 states in which such suspensions were allowed).

83. H.B. 2460, 56th Leg., Reg. Sess. (Ariz. 2023); S.B. 1400, 103rd Gen. Assemb. (Ill. 2023); H.B. 3600, 103rd Gen. Assemb. (Ill. 2023); A.B. 285, 82nd Reg. Sess. (Nev. 2023); A.B. 330, 82nd Reg. Sess. (Nev. 2023); S.B. 152, 82nd Reg. Sess. (Nev. 2023).

84. S.B. 157, 2024 Reg. Sess. (Ala. 2024); S.B. 244, 2023 Reg. Sess. (Fla. 2023); H.B. 1035, 2023 Reg. Sess. (Fla. 2023); S.B. 202, 2023 Reg. Sess. (Ky. 2023); H.B. 538, 2023 Reg. Sess. (Ky. 2023); S.B. 865, 2023 Reg. Sess. (Okla. 2023); H.B. 3348, 2024 Reg. Sess. (Okla. 2024); H.B. 3123, 2024 Reg. Sess. (Okla. 2024); H.B. 4033, 88th Leg. (Tex. 2023); H.B. 2890, 2023 Reg. Sess. (W. Va. 2023); H.B. 4776, 2024 Reg. Sess. (W. Va. 2024); S.B. 614, 2024 Reg. Sess. (W. Va. 2024); H.B. 1461, 2023 Reg. Sess. (Va. 2023); H.B. 853, 2024 Reg. Sess. (Va. 2024).

85. H.B. 1262, 2024 Reg. Sess. (Ind. 2024); H.B. 188, 2023 Reg. Sess. (N.C. 2023).

86. The Florida legislature enacted its Teachers’ Bill of Rights, while Oklahoma’s bill died in committee. Both bills proposed nearly identical language, including “the right to control the classroom” and “the right to have disobedient, disrespectful . . . or disruptive students removed.” H. B. 1035, 2023 Leg., Reg. Sess. (Fla. 2023); S.B. 865, 59th Leg., Reg. Sess. (Okla. 2023) (unpassed). The Alabama legislature is currently considering its Teachers’ Bill of Rights, which would codify the authority of teachers to exclude students, including a student who “engages in disorderly conduct,” “behaves in a manner that obstructs the teaching or learning process,” or “willfully disobeys an education employee.” S.B. 157, 2024 Reg. Sess. (Ala. 2024).

87. W. Va. Code § 18A-5-1(c) (2023). H.B. 2890, 2023 Reg. Sess. (W. Va. 2023).

88. S.B. 245, 88th Leg., Reg. Sess. (Tex. 2023) (unpassed).

89. H.B. 2460, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

90. Carbado, *supra* note 4, at 1607–08; *see also* Bell, *supra* note 9, at 530–31.

91. *See, e.g.*, Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 46 (1991); Angela P. Harris, *Racing Law: Legal Scholarship and the Critical Race Revolution*, 52(1) EQUITY & EXCELLENCE IN EDUC. 12, 13 (2019); CEDRIC M. POWELL, POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY 18 (2022).

symposium—to engage *Brown* and the struggle for racial educational equity—this Essay enters the dialogic space of Critical Race Theory reflectively and invitationally. As a reflection of 70 years post-*Brown*, it (re)narrates *Brown*’s formative role in the racialization of space in K-12 schools. Though exclusionary school discipline—more accurately identified as state-sanctioned legal mechanisms of physical racialized segregation—has been most notably traced to and associated with dispossessive carceral zero tolerance regimes of the 1980s and 1990s, its roots extend far deeper. For example, as the historical record illustrates, in the first ten years following *Brown*, the violent oppositional relationship between the promise of integration and the commitment to segregation laid a seemingly unbreakable foundation for modern education policy and practice. It is no simple or casual accident that every state in the country has maintained a legislative scheme allowing for “segregationist spatial arrangements”⁹² despite decades of evidence of racial disparities in all categories of exclusionary school discipline and cycles of reform. As an invitation, we revisit Derrick A. Bell’s query in 1991, “racism is here to stay, what now?”⁹³, to challenge each of us to answer his “now what?” through the praxis of Critical Race Theory. In a time of educational retrenchment across classrooms, schools, school boards, and state legislatures, there is an urgency to simultaneously resist and dismantle segregationist practices and patterns of the past and reimagine a future in which racialized dispossession of education is no longer the accepted norm.⁹⁴

92. Blaisdell & Gray, *supra* note 13, at 1.

93. Derrick Bell, *Racism is Here to Stay: Now What?*, 35 Howard L.J. 79 (1991-1992).

94. Following the “racial reckonings” of 2020 and reflecting on interest convergence, racism, and resistance, Alexis Hoag argued “although I may not see the change for which I advocate, there is value in the struggle against oppression. I will continue to bear witness, amplify stories of injustice, and encourage my students to do the same.” Alexis Hoag, *Derrick Bell’s Interest Convergence and the Permanence of Racism: A Reflection on Resistance*, HARV. L. REV. BLOG (Aug. 24, 2020), <https://harvardlawreview.org/blog/2020/08/derrick-bells-interest-convergence-and-the-permanence-of-racism-a-reflection-on-resistance/>.