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## Getting at the Root Instead of the Branch: Extinguishing the Stereotype of Black Intellectual Inferiority in American Education, a Long-Ignored Transitional Justice Project

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# Getting at the Root Instead of the Branch: Extinguishing the Stereotype of Black Intellectual Inferiority in American Education, a Long-Ignored Transitional Justice Project

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†. Professor of Law, Nova Southeastern University, Shepard Broad College of Law. This article is dedicated to the memory of my father, Dr. Aaron L. Lamar, Jr., who was an exemplary teacher and administrator who embodied the ideals of the pre-integration Black schools of the South. I also thank Professor Mary Beth Parker for her invaluable research assistance, Professor Colleen Murphy for invaluable feedback on an initial draft, and Professor Bryan Fair for his mentorship. I am also thankful to Taylor Bast, Diana Mateo, and Jessica Sears for their editorial, citation, and research assistance and most importantly, to my husband whose love and support sustain me.

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### Introduction

Once a great wrong has been done, it never dies. People speak the words of peace, but their hearts do not forgive. Generations perform ceremonies of reconciliation but there is no end.  
—Paule Marshall<sup>1</sup>

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.  
—Justice Thurgood Marshall<sup>2</sup>

These quotes from two Marshalls—one, a literary giant, and the other, a legal one—highlight the power of collective memory and racial bias to thwart remedial efforts eradicating discrimination. Their lamentations about the difficulties of reconciliation have modern-day application. For example, sixty-five years after the Supreme Court's monumental decision in *Brown v. Board of Education*<sup>3</sup> (*Brown I*), present-day commentators<sup>4</sup> and even a

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1. PAULE MARSHALL, *Epigraph to THE CHOSEN PLACE, THE TIMELESS PEOPLE* (Vintage Contemporaries 1984) (1969).

2. *Milliken v. Bradley*, 418 U.S. 717, 814 (1974) (Marshall, J., dissenting).

3. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

4. *See, e.g.*, SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 208 (2004) (“[T]he idea and vision animating *Brown* could not be farther from the reality of public education today. Indeed, we are not even living up to the repugnant principle established in *Plessy v. Ferguson*.”); Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991, 994 (2004) (“*Brown*’s promise of quality, integrated schools has eluded most of its expected beneficiaries.”); Jerry Rosiek, *School Segregation: A Realist’s View*, PHI DELTA KAPPAN, Feb. 2019, at 8 (“[R]acial segregation has incrementally returned to U.S. schools over the last 30 years.”).

Supreme Court Justice<sup>5</sup> almost unanimously conclude that *Brown I*'s promise of educational equity is as elusive today as it was in 1954. This Article advances a theory about the elusiveness of *Brown I*'s promise using the analytical framework of transitional justice. Transitional justice is extraordinary justice triggered by transitions from repressive political regimes characterized by massive human rights violations to more democratic forms of government.<sup>6</sup> Once triggered, it creates an imperative for comprehensive government sanctioned remedial efforts, such as truth and reconciliation commissions, to eradicate societal stereotypes and biases that justified the massive human rights violations of the predecessor regime.<sup>7</sup>

The Supreme Court's decision in *Brown I* was the beginning of a transitional period in American education. The shift from Jim Crow segregation—a sociopolitical regime that nullified the mandates of the Thirteenth, Fourteenth, and Fifteenth Amendments and their promise of full legal inclusion for Black Americans—was no mundane political transition, but a radical, paradigmatic one triggering transitional justice. However, despite *Brown I*'s transitional character, the Court's mandate to end segregation “with all deliberate speed” announced in *Brown v. Board of Education*<sup>8</sup> (*Brown II*) and its judicially-fashioned remedy of integration did little to describe, to account for, or to establish a legal framework for correcting societal attitudes about Black intellectual inferiority that spawned the adoption of segregation as an educational policy.<sup>9</sup> Consequently, American public schools remain in transition. A perennially transitional system of public education that burdens Black students with the yoke of an insidious stereotype injures all students and threatens the egalitarian ideals of public education. Consequently, extinguishing the stereotype of Black intellectual inferiority in American education remains “a long-ignored transitional justice project.”<sup>10</sup>

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5. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 806 (2007) (Breyer, J., dissenting) (“In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.”).

6. See discussion *infra* Part I.

7. See discussion *infra* Part I.

8. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

9. See discussion *infra* Parts II–IV.

10. Josie Fohrenbach Brown, *Escaping the Circle by Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color*, 6 AFR.-AM. L. & POL'Y REP. 134, 137 (2004) [hereinafter

Given transitional justice's broad remedial focus, changing the law without other efforts to rectify the psychic injuries inflicted by stereotypes and biases leaves victimized communities without an adequate remedy for government-sanctioned wrongdoing.<sup>11</sup> Unlike retributive justice with its focus on punishing individual offenders or restorative justice with its focus on restoring relationships, transitional justice has a much broader remedial focus: societal transformation.<sup>12</sup> To achieve social transformation, successor political regimes adopt a comprehensive agenda of transitional practices to address human rights violations, heal fragmented societies, and regain the credibility of their citizens.<sup>13</sup> Scholars have not traditionally applied transitional justice's broad remedial scope to established democracies, such as Australia, Canada, England, New Zealand, and the United States.<sup>14</sup> Nevertheless, established

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Foehrenbach Brown].

11. See discussion *infra* Section II.B.1.

12. COLLEEN MURPHY, *THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE* 8–10, 22–24, 83, 88–96 (2017); see also Fania Davis & Jonathan Scharrer, *Reimagining and Restoring Justice: Toward a Truth and Reconciliation Process to Transform Violence Against African-Americans in the United States*, in *TRANSFORMING JUSTICE, LAWYERS, AND THE PRACTICE OF LAW* 89, 94, 97 (Marjorie A. Silver ed., 2017) (discussing the differences between restorative and retributive justice, and describing restorative justice as restoring harmony in fractured relationships); Catherine O'Rourke, *The Shifting Signifier of "Community" in Transitional Justice: A Feminist Analysis*, 23 *WIS. J.L. GENDER & SOC'Y* 269, 271, 282 (2008) (discussing generally the use of community-based transitional justice mechanisms).

13. MURPHY, *supra* note 12, at 17, 35; see also Olivia Ensign, *Speaking Truth to Power: An Analysis of American Truth-Telling Efforts Vis-à-vis the South African Truth and Reconciliation Commission*, 42 *N.Y.U. REV. L. & SOC. CHANGE*, 1, 2 (2018) (discussing the various ways that societies use reconciliation in the aftermath of conflict to regain social cohesion and rebuild interpersonal relationships); Matiangai V. S. Sirleaf, *The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 *CARDOZO L. REV.* 2263, 2265 (2014) (discussing generally transitional justice mechanisms and noting the unique characteristics of truth commissions).

14. MURPHY, *supra* note 12, at 31, 76–78; Davis & Scharrer, *supra* note 12, at 89, 108 n.69 (noting the traditional definition of transitional justice and disagreement among scholars about whether its principles apply to societies not experiencing a political transition but that are still fractured by long-standing and pervasive human rights violations); Eric K. Yamamoto et al., *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 *SEATTLE J. SOC. JUST.* 109, 120–25 (2016) (surveying transitional justice initiatives in established democracies); Joanna R. Quinn, *Whither the "Transition" of Transitional Justice?*, 8 *INTERDISC. J. HUM. RTS. L.* 63, 63–66, 75–78 (2015) (noting the traditional conception of transitional justice as excluding democratic societies such as the United States and Canada but discussing the expansion of transitional justice principles by various scholars challenging the assumption that its principles are inapplicable to settled democracies and the ensuing debate over the elasticity of the meaning of transition).

democracies that remain fractured by long-standing, pervasive civil rights violations against historically marginalized groups have wholeheartedly endorsed transitional justice inspired initiatives.<sup>15</sup> Despite the proliferation of these initiatives in other democratic countries, the United States government has taken a piecemeal approach to addressing its history of wrongdoing against Black Americans and other historically marginalized communities, relying on the rule of law as the exclusive vehicle for eradicating stereotypes about Black intellectual inferiority. However, connecting Black Americans' quest for educational equity to the larger struggle for international human rights will bring a fresh perspective to contemporary discussions about the elusiveness of *Brown's* unfulfilled promises and equip education reformers with an arsenal of transitional justice practices to tackle stereotypes of Black intellectual inferiority at the root of systemic inequalities in public education.

This Article builds upon prior applications of transitional justice principles to the desegregation of the United States' public schools in two substantial ways.<sup>16</sup> First, it incorporates normative understandings of transitional justice that have emerged since these initial scholarly insights. Second, it substantiates the validity of the comparison and then moves beyond theoretical considerations to more practical applications. This Article proceeds in four remaining parts. Part I outlines some central transitional justice tenets and their modern-day application to stable democracies. Part II argues that *Brown I* triggered the beginning of

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15. Ensign, *supra* note 13, at 3, 42–44 (discussing various transitional justice initiatives in the United States such as the Tuskegee Syphilis Study and the Greensboro, North Carolina Truth and Reconciliation Commission and noting a recent spike in grassroots models of truth-telling embracing transitional justice principles in the United States); Heather Parker, *Truth and Reconciliation Commissions: A Needed Force in Alaska?*, 34 ALASKA L. REV. 27, 29 (2017) (noting the expansion of transitional justice initiatives to settled democracies such as the United States to acknowledge slavery, racism, and the treatment of various minority populations); Yamamoto et al., *supra* note 14, at 112; *see also* discussion *infra* Section I.B (discussing other notable domestic transitional justice initiatives).

16. *See* Ensign, *supra* note 13, at 3 (noting that the Court's decision in *Brown I* "created a possibility for national dialogue and healing that never took place" but not specifically linking the absence of dialogue to stereotypes of Black intellectual inferiority or to the concept of transitional justice); Foehrenbach Brown, *supra* note 10, at 137–38 (describing the lack of efforts to extinguish the stereotype of Black intellectual inferiority as a "long-ignored transitional justice project," and discussing the nation's failure "to attend to the complicated details of transitional justice[.]" and indicating that "neither the Supreme Court nor lower courts and education policy makers charged with implementing [*Brown*] have devoted adequate attention to the challenge of translating [*Brown's*] legal norm into an operational reality").

a transitional period in American society and its system of public education and then critiques the transitional deficiencies in the Supreme Court's desegregation jurisprudence. The last two sections connect the past to the present. Part III discusses some of the present-day educational consequences of these transitional deficiencies, and the conclusion proposes a preliminary framework acknowledging the legacy and dangers of racial stereotyping in American education.<sup>17</sup>

### I. Transitional Justice Primer: Central Tenets, Prevalent Practices, and Modern-Day Applications

The past is never dead. It's not even past.  
—William Faulkner<sup>18</sup>

Transitional justice did not emerge as a remedial discipline until decades after key sociopolitical flashpoints in American history, such as slavery, reconstruction, and the beginning of Jim Crow segregation.<sup>19</sup> However, one of its central tenets—cultivating a set of social values that will make the recurrence of massive human rights violations virtually impossible<sup>20</sup>—is endemic to societies, such as the United States, that still struggle with racial divisions caused by 250 years of slavery and 90 years of Jim Crow segregation. Transitional justice has its origins in the unification of post-World War II Europe and its more recent application to the political upheavals in Latin America, Africa, and Eastern Europe during the late 1980s and early 1990s after decades of repressive communist rule and massive human rights violations.<sup>21</sup> In transitional societies, the successor regime's goal is to reconcile a society deeply divided by the human rights atrocities committed by the predecessor regime.<sup>22</sup> Reconciliation is inextricably linked to

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17. See discussion *infra* Part III. The broad outline of this initial framework will be developed in this article, leaving a more detailed analysis to a subsequent article.

18. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

19. See discussion *infra* Section I.A (attributing the field transitional justice to New York Law School Professor Ruti Teitel).

20. See James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38 *LAW & SOC'Y REV.* 5, 5 (2004) (discussing the reconciliatory goals of the South African Truth and Reconciliation Committee).

21. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 76 (2003) (describing various phases of transitional justice).

22. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 5 (2002) (describing transitional justice as broader than political revolution and as "a *shift in political orders*"); *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST. (Apr. 25, 2011),

societal transformation.<sup>23</sup> According to noted transitional justice scholar Colleen Murphy, societal transformation is rooted in relationships and it demands a radical overhaul of the basic terms of interaction between citizens, officials, and institutions so that such relationships are no longer structurally unequal.<sup>24</sup> Eric Yamamoto, another noted transitional justice scholar, also emphasizes the relational aspect of reconciliation, remarking that “[i]n practice, repairing the breach—or reconciling—means salving psychological and economic wounds by lifting barriers to liberty and equality in education, housing, medical care, employment, cultural preservation, and political governance.”<sup>25</sup> A major obstacle to societal transformation is pervasive structural inequality which Murphy defines as “the ways in which life prospects for individuals are fundamentally shaped by the institutional rules and norms that govern a society and that shape and constrain individual action.”<sup>26</sup>

Given the relational aspect of reconciliation, societal transformation hinges on the successor regime’s ability to use memory, narrative, and historical accounting to rebuild a shared societal consensus that forms the foundation of a new government.<sup>27</sup> To rebuild societal consensus, the government assumes the responsibility for shaping a national, collective memory of past political repression to discredit the stereotypes, assumptions, and ancient feuds that created the social context that tolerated widespread human rights violations.<sup>28</sup> Consequently, in transitional societies, memory, narrative, and historical accounting are uniquely political ways to regain public trust in a highly fractured society and legitimize the successor regime.<sup>29</sup> Transitional justice scholars have identified several practices that facilitate societal transformation.<sup>30</sup> Common examples include transitional

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<https://www.ictj.org/publication/what-transitional-justice> [https://perma.cc/4NE2-V CQP] (defining transitional justice as “a response to systematic or widespread violations of human rights” that “seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy”).

23. MURPHY, *supra* note 12, at 6, 11; TEITEL, *supra* note 22, at 6.

24. MURPHY, *supra* note 12, at 81, 119, 121, 160.

25. Yamamoto et al., *supra* note 14, at 142.

26. MURPHY, *supra* note 12, at 43, 45.

27. TEITEL, *supra* note 22, at 5, 8 (discussing the important transitional roles that historical inquiry and narrative play in the workings of historical justice).

28. *Id.* at 69–71 (explaining that the foci of shared judgment that form the basis for a new social consensus are expected to emerge through historical accountings and the pivotal role law plays in shaping social memory).

29. *Id.* at 70.

30. See Foehrenbach Brown, *supra* note 10, at 137 (categorizing transitional

legal rules, criminal prosecutions, truth and reconciliation commissions, reparations, apologies, and museums.<sup>31</sup> This section briefly outlines some of the most prevalent transitional justice practices and then explores the expansion of transitional justice principles to stable democracies.

#### A. *Transitional Justice Tenets and Prevalent Practices*

Developing and altering previously existing legal rules is a rudimentary transitional justice practice.<sup>32</sup> Ruti Teitel, a preeminent scholar who authored one of the first published accounts of transitional justice, observed that “[i]n transition, the oft-shared [societal] frameworks—political, religious, social—are threatened; so it is the law, its framework and processes that in great part shapes collective memory.”<sup>33</sup> To transform society, transitional legal rules assume a dualistic character that is simultaneously retrospective and prospective.<sup>34</sup> Transitional legal rules are retrospective because they supply the requisite social context to dismantle laws that the predecessor regime enacted that either facilitated or tolerated human rights abuses.<sup>35</sup> Transitional legal rules are also prospective because, in addition to repudiating these laws, they justify a new political order.<sup>36</sup> This new political order is communicated to the public through transitional narratives embedded in judicial opinions and legislative initiatives that denounce the stereotypes, assumptions, and ancient feuds that led to widespread human rights abuses.<sup>37</sup> Consequently, transitional legal rules are revolutionary; they eradicate previously established precedent, and, according to Teitel, are formulated “in politically

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justice mechanisms into the following categories: “assessment of responsibility for past wrongs, the assembly of a comprehensive historical account of past injustices, the implementation of mechanisms to repair past wrongs, and the development of a workable governmental order and legal framework that reconstitutes the relevant community on just terms”); *What is Transitional Justice?*, *supra* note 22.

31. Sirleaf, *supra* note 13, at 2265 (discussing generally transitional justice mechanisms).

32. MURPHY, *supra* note 12, at 124.

33. TEITEL, *supra* note 22, at 71.

34. *Id.* at 11 (“There is a tension between the rule of law in transition as backward-looking and forward-looking, as settled versus dynamic.”).

35. *See id.* (describing the law in transitional times as a mediator or conduit from a system of illiberal rule to a new social order that is primarily democratic).

36. *See id.*

37. *Id.* at 70–71 (“Transitional historical narratives are produced through varying legal measures, such as the trials of the ancien[t] regimes, or bureaucratic bodies convened for these purposes, and still other legal responses that imply marshaling a factual predicate.”).

controversial areas, where the value of legal change is in tension with the value of adherence to the principle of settled legal precedent.”<sup>38</sup> Due to the controversial nature of transformative legal rules, judges in transitional societies embrace a kind of activism that they might avoid in non-transitional periods.<sup>39</sup>

Although cultivating transitional legal rules is often the first step toward societal transformation, truth and reconciliation commissions (TRCs) have emerged as the dominant transitional justice practice among contemporary transitional societies.<sup>40</sup> TRCs are autonomous, non-judicial, and non-retributive bodies that investigate past human rights abuses and identify patterns of interaction among citizens and societal institutions that promoted the human rights abuses of the predecessor government.<sup>41</sup> The 1995 South African Truth and Reconciliation Committee (SATRC) is the most famous example of a government-sponsored TRC.<sup>42</sup> Headed by Archbishop Desmond Tutu, the SATRC sought to bear witness to human rights violations, record the testimonials of victims, and in some cases, grant amnesty to perpetrators.<sup>43</sup> When it was convened, the SATRC was the largest truth-telling initiative of its kind, resulting in more than 300 staff members, an annual budget of \$18 million, and a 7-year investigatory scope.<sup>44</sup> The SATRC took the testimony of approximately 21,000 victims, received 7,112 amnesty applications, and granted amnesty in 849 cases.<sup>45</sup> The SATRC was premised on historical accounting, the idea that societal transformation is facilitated by forgiveness, and reconciliation through truth-telling.<sup>46</sup> However, the truth proclaimed by the

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38. *Id.* at 11.

39. *Id.* at 23–24.

40. See Patryk Labuda, *Racial Reconciliation in Mississippi: An Evaluation of the Proposal to Establish a Mississippi Truth and Reconciliation Commission*, 27 HARV. J. RACIAL & ETHNIC JUST. 1, 30 (2011) (suggesting that disillusionment with criminal prosecution has resulted in the proliferation of truth-telling initiatives); Sirleaf, *supra* note 13, at 2266–67.

41. MURPHY, *supra* note 12, at 11; Labuda, *supra* note 40, at 17.

42. Ensign, *supra* note 13, at 2; Parker, *supra* note 15, at 28; Sirleaf, *supra* note 13, at 2287.

43. See Parker, *supra* note 15, at 42–43.

44. Rita Lenane, “*It Doesn’t Seem Very Fair, Because We Were Here First*”: Resolving the Sioux Nation Black Hills Land Dispute and the Potential for Restorative Justice to Facilitate Government-to-Government Negotiations, 16 CARDOZO J. CONFLICT RESOL. 651, 676 (2015).

45. Truth Commission: South Africa, U.S. INST. PEACE, <http://www.usip.org/publications/1995/12/truth-commission-south-africa> [https://perma.cc/SE7X-AC4E].

46. Deborah Posel & Graeme Simpson, *The Power of Truth: South Africa’s Truth and Reconciliation Commission in Context*, in COMMISSIONING THE PAST:

SATRC was, according to some critics, a socially constructed, bargained-for political exchange that sacrificed peace for justice.<sup>47</sup> Others criticized the absence of a reconciliatory framework and mechanisms for following up on the commission's reparative directives.<sup>48</sup> However, despite its critics, the SATRC is the paradigmatic transitional justice truth-telling initiative because of its carefully constructed methodology,<sup>49</sup> comprehensive final report, and the clarity with which it defined truth.<sup>50</sup> Sixty-eight countries, including South Korea (2000 and 2005), the Democratic Republic of Congo (2003), Ecuador (2007), Kenya (2008), the Solomon Islands (2008), and Honduras (2009) have modeled their truth-telling initiatives on the SATRC.<sup>51</sup>

### B. *Applying Transitional Justice Principles to Stable Democracies*

Transitional justice inspired initiatives have become popular in stable democracies, such as Canada and the United States. However, unlike the Canadian government, which has explicitly endorsed transitional justice inspired initiatives,<sup>52</sup> the United

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UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 1, 10–11 (2002).

47. See TEITEL, *supra* note 22, at 88–89 (providing a general critique of SATRC as brokering peace for the sake of political expediency and presenting a version of human rights atrocities that was more about political consensus than truth); Ensign, *supra* note 13, at 6 (noting perceived flaws such as the disproportionate representation of White South Africans and the Amnesty Committee's acceptance of the perpetrators' version of events, even when they contradicted the victims' accounts); Labuda, *supra* note 40, at 30 (“In highlighting the identity of perpetrators while obscuring that of beneficiaries, the [SATRC created] a version of the truth which obscures the link between perpetrators and beneficiaries, and thus between racialised power and racialised privilege.”); Teitel, *supra* note 21, at 83.

48. See Yamamoto, et al., *supra* note 14, at 111 (summarizing some of the most salient critiques of the SATRC).

49. Labuda, *supra* note 40, at 2–3.

50. Ensign, *supra* note 13, at 1–8 (distinguishing between the four distinctive kinds of truth promulgated by the SATRC); *see also* Yamamoto et al., *supra* note 14, at 140 (describing the SATRC as a template for subsequent truth-telling initiatives because of the clarity of its moral imperatives, its structure, and its deployment of language and imagery to build a common ground for groundbreaking political action).

51. Sirleaf, *supra* note 13, at 2331 (citing TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 39 (2010)).

52. See Parker, *supra* note 15, at 53–57 (summarizing the work of the Canadian Truth and Reconciliation Commission); *Statement of Apology to Former Students of Indian Residential Schools*, GOV'T CAN. (June 11, 2008), [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi\\_apo\\_pdf\\_1322167347706\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf) [https://perma.cc/JC5S-6QVA].

States government has taken an ambivalent, piecemeal approach to addressing government-sanctioned wrongdoing that normalized physical violence against Indigenous peoples and those of African descent and the psychological, cultural, and educational ramifications of that violence.<sup>53</sup> Although not explicitly invoking the transitional justice moniker, these federally-endorsed reconciliatory initiatives can be easily summarized: (1) delayed, conditional apologies to Blacks for lynchings during the early twentieth century and for the atrocities of slavery and segregation,<sup>54</sup> to Native Hawaiians for a government-endorsed coup of the sovereign Kingdom of Hawaii,<sup>55</sup> and to Native Americans for decades of violence, theft, and mismanagement of tribal lands,<sup>56</sup> (2) a National Museum of African-American History and Culture authorized by Congress after more than 100 years of private sector lobbying,<sup>57</sup> (3) reparation payments to Japanese-American survivors of World War II internment camps,<sup>58</sup> but the denial of

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53. See Yamamoto et al., *supra* note 14 (denoting the large reconciliation chasm that still must be bridged in the United States); Kaimipono David Wenger, *Apology Lite: Truths, Doubts, and Reconciliations in the Senate's Guarded Apology for Slavery*, 42 CONN. L. REV. CONTEMPLATIONS 1, 1 (2009) (discussing the lackluster approach the United States has to public apologies).

54. Yamamoto et al., *supra* note 14, at 121; see also Wenger, *supra* note 53 (noting criticism about the Senate's apology some 144 years after the end of the Civil War and 41 years after the end of Jim Crow and its inclusion of a conspicuous disclaimer clearly foreclosing a right to reparations for slavery).

55. Danny Lewis, *Five Times the United States Officially Apologized*, SMITHSONIAN MAG. (May 27, 2016), <https://www.smithsonianmag.com/smart-news/five-times-united-states-officially-apologized-180959254/> [<https://perma.cc/C5H9-G94W>]. In January 1893, a group of American sugar magnates staged a government-endorsed coup, forcing Hawaiian Queen Lili'uokalani to abdicate and dissolve the Kingdom of Hawaii. *Id.* The dissolution was the precursor to Hawaii's formal annexation by the United States government. *Id.* One hundred years later on November 23, 1993, Congress issued a joint resolution formally apologizing to the people of Hawaii. *Id.*

56. Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 165–66 (2013) (discussing the Senate's apology to Native Americans that was buried in a 2010 Department of Defense Appropriations Act); see also Rob Capriccioso, *A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It*, INDIAN L. RESOURCE CTR. (Jan. 13, 2010), <http://indianlaw.org/node/529> [<https://perma.cc/FS2V-EUUS>] (reporting on an apology given by President Obama to Native Americans in the United States that was not highlighted by the administration).

57. See Wesley Yiin, *Timeline: It Took Over 100 Years for the African American Museum to Become a Reality*, WASH. POST (Sept. 22, 2016), [https://www.washingtonpost.com/entertainment/museums/timeline-it-took-over-100-years-for-the-african-american-museum-to-become-a-reality/2016/09/20/dc080c54-5a8c-11e6-831d-0324760ca856\\_story.html](https://www.washingtonpost.com/entertainment/museums/timeline-it-took-over-100-years-for-the-african-american-museum-to-become-a-reality/2016/09/20/dc080c54-5a8c-11e6-831d-0324760ca856_story.html) [<https://perma.cc/MLT8-FT5S>].

58. Kim D. Chanbonpin, "We Don't Want Dollars, Just Change": *Narrative Counter-Terrorism Strategy, an Inclusive Model for Social Healing, and the Truth*

reparations to Blacks for 250 years of slavery and 90 years of Jim Crow segregation and to Native Americans for the depletion of 96% of their population,<sup>59</sup> (4) two federal prosecutions, delayed investigations,<sup>60</sup> and symbolic legislative efforts in response to the murders of Black Americans after the *Brown* decisions,<sup>61</sup> and (5) a truth-telling initiative redressing wrongdoing against Black male participants in the longest nontherapeutic experiment on human beings in medical history,<sup>62</sup> but a tacit rejection of pleas from

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*About the Torture Commission*, 6 NW. J.L. & SOC. POL'Y 1, 25–29 (2011) [hereinafter *We Don't Want Dollars*] (briefly summarizing the quest for reparations in the United States). In 1988, Congress authorized a \$20,000 reparation payment for the survivors of the federal government's forced internment of Japanese-Americans during World War II. *Id.* See generally Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 54 (making the argument that the United States government should give reparations to African American people).

59. MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N, BEYOND THE MANDATE: CONTINUING THE CONVERSATION 63 (2015), [http://www.maineabanakitrc.org/wp-content/uploads/2015/07/TRC-Report-Expanded\\_July2015.pdf](http://www.maineabanakitrc.org/wp-content/uploads/2015/07/TRC-Report-Expanded_July2015.pdf) [<https://perma.cc/XK9M-METM>].

60. See Labuda, *supra* note 40, at 7–13 (discussing state and federal prosecutions beginning in the early 1990s and extending into the early 2000s for Jim Crow Era murders). The most well-known of these federally-endorsed reconciliatory initiatives are the criminal investigations and prosecutions for the murders of Black Americans resulting from the massive resistance to the *Brown* decisions that began in the late 1980s, well after the deaths of some culpable parties. *Id.*; S. Willoughby Anderson, *The Past on Trial: Birmingham, the Bombing, and Restorative Justice*, 96 CALIF. L. REV. 471, 471 (2008) (“Since 1989, state and national law enforcement authorities have reopened or begun investigations into at least eighteen civil rights-era murders across the South.”).

61. Maureen Johnson, *Separate but (Un)Equal: Why Institutionalized Anti-Racism Is the Answer to the Never-Ending Cycle of Plessy v. Ferguson*, 52 U. RICH. L. REV. 327, 361–62 (2018); see also DEPT OF JUSTICE, THE ATTORNEY GENERAL'S SEVENTH ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007 AND FIRST ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIMES REAUTHORIZATION ACT OF 2016 22–25 (2018) (enumerating an extensive list of Black Americans who were victims of racialized violence); Barbara A. Schwabauer, *The Emmett Till Unsolved Civil Rights Crime Act: The Cold Case of Racism in the Criminal Justice System*, 71 OHIO ST. L.J. 653, 656 (2010) (explaining the history and impact of the Emmett Till Unsolved Civil Rights Crime Act); Ronald Turner, *Plessy 2.0*, 13 LEWIS & CLARK L. REV. 861, 889 (2009) (discussing what he describes as the “murder[s], bombings, beatings, and castrations of those fighting for and seeking relief from the entrenched and enervating system of racial caste and hierarchy”).

62. Tuskegee Syphilis Study Legacy Comm., *Bad Blood: The Tuskegee Syphilis Study in Macon County, Alabama—1932–1972*, U. VA.: HIST. COLLECTIONS CLAUDE MOORE HEALTH SCI. LIBR. (May 1996), <http://exhibits.hsl.virginia.edu/badblood> [<https://perma.cc/83TM-3TPC>]. The forty-year study known as the Tuskegee Study of Untreated Syphilis in the Negro Male withheld treatment for a lethal, highly-contagious disease from hundreds of Black men in the rural South. *Id.*; see also Ensign, *supra* note 13, at 8–20 (discussing the final report of the Tuskegee Syphilis Study Ad Hoc Advisory Panel commissioned in 1973 by the United States Department of Health, Education, and Welfare).

legislators,<sup>63</sup> scholars, and community-based advocacy groups to launch more comprehensive federally-funded reconciliatory initiatives.<sup>64</sup> Furthermore, no federally-endorsed reconciliatory initiatives have comprehensively examined the intergenerational trauma caused by decades of segregation as an educational policy, integration's failure to debunk stereotypes of Black intellectual inferiority, or the modern-day consequences of these reconciliatory failures.<sup>65</sup>

In the absence of federally-endorsed reconciliatory initiatives, educational institutions, corporations, states, and non-profit organizations have launched more comprehensive reconciliatory

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63. See Donna Owens, *Veteran Congressman Still Pushing for Reparations in a Divided America*, NBC NEWS (Feb. 20, 2017, 2:18 AM), <http://www.nbcnews.com/news/nbcblk/rep-john-conyers-still-pushing-reparations-divided-america-n723151> [<https://perma.cc/94F8-SDZC>]. Every year since 1989 until his resignation in 2017, Congressman John Conyers of Michigan proposed legislation

to acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent *de jure* and *de facto* racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.

RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS 201* (2001) (quoting Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 103d Cong. (1993)). After Congressman Conyers's retirement, Congressman Sheila Jackson Lee sponsored the bill. See Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019). On June 19, 2019, Congress recognized Congressman Conyers and Lee's legislative efforts and held a hearing on the subject of reparations for the descendants of slaves in the United States. See P.R. Lockhart, *America Is Having an Unprecedented Debate About Reparations. What Comes Next?*, VOX (June 20, 2019, 3:30 PM) <https://www.vox.com/identities/2019/6/20/18692949/congress-reparations-slavery-discrimination-hr-40-coates-glover> [<https://perma.cc/Z8NL-WUK4>] [hereinafter *Debate About Reparations*].

64. See, e.g., Ensign, *supra* note 13, at 3 (“[T]he United States has never established a formal truth and reconciliation commission, despite its entrenched history of human rights abuses against Black Americans.”); Parker, *supra* note 15, at 35–42 (advocating for the establishment of a truth and reconciliation commission to address state-sanctioned wrongdoing against the Alaskan Native population); Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 519 (2017) (discussing the community-based transitional justice inspired initiatives in Greensboro, North Carolina but noting the absence of “a country-wide comprehensive attempt at Truth and Reconciliation around America’s history of slavery and discrimination”); Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2113 (2005) (discussing unhealed wounds in American society in conjunction with efforts to launch a truth and reconciliation commission for lynching).

65. See CASHIN, *supra* note 4, at IX–XXII (discussing the failure of integration in the United States and its effects).

agendas that include apologies, the removal of confederate imagery, and truth-telling initiatives. Georgetown University,<sup>66</sup> Brown University, the Southern Baptist Seminary,<sup>67</sup> and private sector businesses, such as Wachovia, Aetna, Lehman Brothers, and J.P. Morgan, have apologized for perpetuating and financially benefitting from slavery.<sup>68</sup> Furthermore, beginning in the 1990s and continuing into the early 2000s, several Southern states apologized for slavery<sup>69</sup> and removed confederate imagery from official government buildings, property, and schools.<sup>70</sup> Other Southern states and cities endorsed truth-telling initiatives acknowledging the intergenerational trauma caused by racially-motivated massacres of the early Jim Crow era. Notable examples include the Tulsa Race Riots Commission,<sup>71</sup> Florida's Historical Commission for the Rosewood Massacre,<sup>72</sup> and the Wilmington Race

66. See Alexa Lardieri, *Georgetown Students Vote for Reparations for Slave Descendants*, U.S. NEWS & WORLD REP. (Apr. 12, 2019), <https://www.usnews.com/news/education-news/articles/2019-04-12/georgetown-students-vote-for-reparations-for-descendants-of-slaves> [<https://perma.cc/V42R-VWNG>].

67. See Tom Gjelten, *Southern Baptist Seminary Confronts History of Slaveholding and 'Deep Racism'*, NPR (Dec. 13, 2018, 10:02 AM), <http://www.npr.org/2018/12/13/676333342/southern-baptist-seminary-confronts-history-of-slaveholding-and-deep-racism> [<https://perma.cc/5SG4-TR3H>].

68. Yamamoto et al., *supra* note 14, at 121–22 (identifying a list of major United States corporations that have apologized for the financial benefits incurred from slavery); *Should the US Pay Reparations to Black Americans?*, PBS: POINT TAKEN (May 10, 2016), <https://www.pbs.org/video/point-taken-should-us-pay-reparations-black-americans/#intro> [<https://perma.cc/5CDS-X53L>].

69. See Yamamoto et al., *supra* note 14, at 120–21 n.42 (outlining legislative efforts in Florida, Maryland, North Carolina, Alabama, and Virginia).

70. See generally James Shockley, *Farewell to Dixie: California's Attempt to Eliminate the Confederacy from Public Schools*, 45 J.L. & EDUC. 127 (2016) (examining California's attempt to pass a law eliminating Confederate names from being used to name public schools); Allison M. Mosig, *Hate or Civic Pride? The Speech of Symbols in the United States, Germany and Japan*, 40 SUFFOLK TRANSNAT'L L. REV. 73 (2017) (discussing the question of how to deal with the Confederate Flag in the United States through the lenses of Japanese and German policy concerning Nazi symbols and the Rising Sun Flag).

71. *Tulsa Race Massacre*, HIST., <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre> [<https://perma.cc/228A-LLJY>]. The Tulsa Race Riots Commission was established in 2000 by the State of Oklahoma to acknowledge what has been described as one of the most violent racial clashes in American history. *Id.* The Commission's report found that approximately 100 to 300 people lost their lives during the riot and that more than 8,000 people were made homeless. *Id.* This eighteen-hour-long massacre against the Greenwood community, home to a prosperous business district known as the *Black Wall Street*, was precipitated by a false newspaper report that Black World War I veterans were planning a massive armed revolt to prevent the lynching of a Black man falsely accused of sexually assaulting a White woman. *Id.*

72. See generally Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811,

Riot Commission.<sup>73</sup> Several grassroots community organizations have also launched truth-telling initiatives redressing modern-day social justice issues that stem from the repression of Jim Crow segregation. The Mississippi Truth Telling Commission, established in 2008, is the most ambitious of these grassroots efforts, declaring its intent to become the first state-wide truth commission in United States history to comprehensively examine segregation in Mississippi and its modern-day consequences.<sup>74</sup> Other notable examples include the Greensboro Truth and Reconciliation Commission, the first grassroots community-based TRC, established in 2004 to investigate the 1979 murder of five Black demonstrators by Klansmen and members of the American Nazi Party,<sup>75</sup> the Illinois Torture Inquiry and Relief Commission established in 2009 to provide legal redress for victims tortured by the Chicago Police Department,<sup>76</sup> and the Metro Detroit Truth and Reconciliation Commission established in 2011 to examine the impact of institutional racism in Metropolitan Detroit.<sup>77</sup>

However, only a few transitional justice inspired initiatives have acknowledged the intergenerational psychological trauma caused by Jim Crow segregation or by violent resistance to school

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820–22 (2006) (discussing the Florida legislative mandate that led to a Commission investigating the Rosewood massacre). Rosewood was the only state-endorsed truth-telling initiative that resulted in an apology and an award of reparations of \$2.1 million to be divided among the Rosewood survivors and their descendants. *Id.*; C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 503 (1994).

73. See 1898 WILMINGTON RACE RIOT COMM'N, 1898 WILMINGTON RACE RIOT REPORT (2006), <https://digital.ncdcr.gov/digital/collection/p249901coll22/id/5842> [https://perma.cc/3HVA-BLUY]. In 2000, the North Carolina General Assembly established the commission. *Id.* at 11. The culmination of the commission's work was a 500-page report that was published on May 31, 2006. *Id.* at 1.

74. See Labuda, *supra* note 40, at 19–23 (discussing comprehensively the commission's goals and mandates); Mississippi Truth Project, VIMEO, <https://vimeo.com/mstruthproject> [https://perma.cc/LA5L-WDLA].

75. See Ensign, *supra* note 13, at 20–37 (discussing comprehensively the origins and impact of the Greensboro Truth and Reconciliation Commission); Parker, *supra* note 15, at 58–60.

76. See Vickie Casanova Willis & Standish E. Willis, *Black People Against Police Torture: The Importance of Building a People-Centered Human Rights Movement*, 21 PUB. INT. L. REP. 235, 247–48 (2015) (discussing comprehensively the Illinois Torture Inquiry and Relief Commission's origins and impact); Kim D. Chanbonpin, *Truth Stories: Credibility Determinations at the Illinois Torture Inquiry and Relief Commission*, 45 LOY. U. CHI. L.J. 1085, 1088–91 (2014) (same).

77. See Parker, *supra* note 15, at 60 (discussing the commission's formation and organizational struggles); The Metropolitan Detroit Truth & Reconciliation Commission, FACEBOOK, <http://www.facebook.com/metrodetroittruth> [https://perma.cc/5QAP-N8E9].

desegregation. Scholars have begun studying the impact of intergenerational trauma, finding evidence “that repressing feelings associated with acts of [W]hite racism may be psychologically damaging and lay the foundation for future mental health problems and behaviors symptomatic of post-traumatic stress syndrome.”<sup>78</sup> Dr. Joy DeGruy, a noted scholar on the intergenerational psychological effects of slavery and segregation, notes that “[r]ecent research in the field of epigenetics has revealed that trauma can actually impact an individual’s DNA, and the manifestations of the traumas experienced by prior generations can be passed along genetically to future offspring.”<sup>79</sup> Inspired by empirical evidence about the impact of intergenerational trauma, grassroots community organizations, universities, and museums have launched healing initiatives to create public awareness about its impact in the Black community. To redress the intergenerational psychological trauma of *de jure* segregation, community-based organizations in Minneapolis, Minnesota and Bridgeport and New Haven, Connecticut offer community healing workshops that encourage participants to use music, prayer, and poetry as conduits for emotional healing.<sup>80</sup> Universities have endorsed cross-racial healing initiatives that foster candid and constructive conversations about race and the unfortunate legacy of Jim Crow era segregation.<sup>81</sup> The most notable of these university-sponsored reconciliatory initiatives is the William Winter Institute for Racial Reconciliation, which started at the University of Mississippi.<sup>82</sup> The Welcome Table is the Winter Institute’s flagship healing initiative;

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78. Alma Carten, *How the Legacy of Slavery Affects the Mental Health of Black Americans Today*, CONVERSATION (July 27, 2015), <https://theconversation.com/how-the-legacy-of-slavery-affects-the-mental-health-of-black-americans-today-44642> [<https://perma.cc/D8U4-TTVC>]; see also JOY DEGRUY, POST TRAUMATIC SLAVE SYNDROME: AMERICA’S LEGACY OF ENDURING INJURY AND HEALING 13–15, 100–05 (2005) (describing the author’s theory of post traumatic slave syndrome and associated patterns of behavior).

79. See Adilifu Fundi, 6: “Post Traumatic Slave Syndrome”—Jay-Z and Kanye “Behavior” Fully Explained, RENAISSANCE MAN (May 15, 2019), <https://renaissancemanjam.wordpress.com/> [<https://perma.cc/L2D9-DPPV>] (quoting Joy DeGruy); see also DEGRUY, *supra* note 78, at 124.

80. See Enola G. Aird, *Toward a Renaissance for the African-American Family: Confronting the Lie of Black Inferiority*, 58 EMORY L.J. 7, 18 (2008); *Vision and Mission*, CMTY. HEALING NETWORK, <https://www.communityhealingnet.org/vision-mission/> [<https://perma.cc/C4VH-WTZH>].

81. See, e.g., Office of Diversity and Inclusion: South Carolina Collaborative for Race and Reconciliation, U.S.C., [http://sc.edu/about/offices\\_and\\_divisions/diversity\\_and\\_inclusion/race\\_reconciliation/index.php](http://sc.edu/about/offices_and_divisions/diversity_and_inclusion/race_reconciliation/index.php) [<https://perma.cc/8GHC-ATTG>].

82. See *About the William Winter Institute*, WINTER INST., <https://www.winterinstitute.org/about/> [<https://perma.cc/69PB-WJJU>].

it consists of a series of interactive conversations that equip people from diverse racial and cultural backgrounds with the capacity to have difficult conversations about race.<sup>83</sup> The Welcome Table has become a model for other universities and non-profit community organizations interested in launching community healing initiatives. In 2017, the University of South Carolina launched Welcome Table SC, a series of cross-racial conversations modeled on the Welcome Table program.<sup>84</sup> Welcome Table dialogues also inspired the creation of the Emmett Till Interpretive Center which is housed in the courthouse where the infamous trial of Till's murderers occurred.<sup>85</sup>

Similar transitional justice inspired initiatives commemorating forgotten aspects of Jim Crow segregation through the innovative use of storytelling, interactive media, and visual arts have become popular in several Southern states. In 2018, Equal Justice Initiative launched the National Memorial for Peace and Justice in Montgomery, Alabama, the first national memorial honoring the thousands of Black men, women, and children who "were hanged, burned alive, shot, drowned, and beaten to death by [W]hite mobs between 1877 and 1950."<sup>86</sup> The museum's political message is communicated through an interactive, visual design that forces visitors to empathize with victims and thus gain an unparalleled understanding of the heinousness of the racial terrorism endemic to Jim Crow segregation.<sup>87</sup> Museum visitors are confronted with 800 6-foot-tall suspended steel blocks.<sup>88</sup> Each block represents a county where racial killings occurred, and "[a]s you walk through the memorial, the orientation of the hanging monuments changes from eye level to overhead, evoking the way many lynching victims were hanged, often in public spaces."<sup>89</sup> Jars

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83. *The Welcome Table*, WINTER INST., <http://winterinstitute.org/community-building/the-welcome-table> [https://perma.cc/ENA7-M553].

84. See *Office of Diversity and Inclusion: Welcome Table SC*, U.S.C., [https://sc.edu/about/offices\\_and\\_divisions/diversity\\_and\\_inclusion/race\\_reconciliation/welcome\\_table\\_sc/index.php](https://sc.edu/about/offices_and_divisions/diversity_and_inclusion/race_reconciliation/welcome_table_sc/index.php) [https://perma.cc/QWG9-YXUN].

85. Video of *Our Story*, EMMETT TILL INTERPRETIVE CTR., <http://www.emmett-till.org/> [https://perma.cc/T24Z-4EZ6].

86. *Museum and Memorial Homepage*, EQUAL JUSTICE INITIATIVE, <http://museumandmemorial.eji.org/> [https://perma.cc/36CY-N472].

87. *Id.*

88. Debbie Elliott, *New Lynching Memorial Is a Space 'To Talk About All of That Anguish'*, NPR (Apr. 26, 2018, 5:00 AM), <http://www.npr.org/2018/04/26/604271871/new-lynching-memorial-is-a-space-to-talk-about-all-of-that-anguish> [https://perma.cc/Y58E-Y7QZ].

89. *Id.*

of soil gathered from documented lynching sites and other sites of racially-motivated murders commemorate the victims.<sup>90</sup> Another distinctive feature of the memorial's counterpart, the Legacy Museum, is the way that its organizers encourage racial reconciliation in a manner that connects the past to the present.<sup>91</sup> Officials from counties where the lynchings occurred are encouraged to take replicas of the steel blocks back to their communities and create local memorials that invite community dialogue.<sup>92</sup>

Other reconciliatory initiatives have explored the intergenerational psychosocial trauma caused by violent resistance to school desegregation. In 2011, the Union of Minority Neighborhoods, a Boston grassroots community organization, launched the Boston Busing/Desegregation Project (BBDP), a city-wide effort to redress one of the nation's most overt, violent responses to the *Brown* cases' mandate to desegregate.<sup>93</sup> The BBDP began its innovative work in 2011 with the screening of its film, *Can We Talk?—Learning from Boston's Busing/Desegregation Crisis*.<sup>94</sup> A crucial mandate of its organizers is to honor the experiences of those who lived through the crisis by addressing a pivotal moment in Boston's history, one that continues to negatively impact the educational success of Boston students.<sup>95</sup> The BBDP implements its mandate through screenings of the film, presentations, oral histories, and detailed reports that facilitate empowerment and community action through access to a more nuanced portrait of this pivotal era that goes beyond "simplified sound bites . . . that the crisis was a failed social experiment or the cause of [W]hite flight or middle class flight from public schools."<sup>96</sup> Another equally

90. Erica Wright, *Citizen-Led Coalition Uncovers History of Lynching in Jeffco*, BIRMINGHAM TIMES (Mar. 7, 2019), <http://www.birminghamtimes.com/2019/03/citizen-led-coalition-uncovers-history-of-lynching-in-jeffco/> [<https://perma.cc/WSS9-X5LV>].

91. Elliott, *supra* note 88 (noting the "direct line from slavery to lynching and to issues the country faces today, including mass incarceration").

92. Wright, *supra* note 90; Elliott, *supra* note 88.

93. *About the Boston Busing/Desegregation Project*, NE. UNIV., <http://bpsdesegregation.library.northeastern.edu/about-the-boston-busing-desegregation-project/> [<https://perma.cc/RDE8-V9R8>].

94. *See id.*

95. *See* THE BOSTON BUSING/DESEGREGATION PROJECT, UNFINISHED BUSINESS: 7 QUESTIONS 7 LESSONS 1–2 (2014), <https://bpsdesegregation.library.northeastern.edu/wp-content/uploads/2018/01/7-lessons-bbdp-9-11-14.pdf> [<https://perma.cc/Y8D2-KCUF>].

96. *Id.* at 2 (emphasis removed); *About the Boston Busing/Desegregation Project*, *supra* note 93.

important goal is what its organizers describe as exploring and acknowledging the intergenerational trauma surrounding the crisis and repudiating a national memory of the crisis that “minimizes and excludes the stories of many communities . . . in order to gain a systemic understanding of the era for the diversity of people, then and now, whose interests converge around wanting equity, access, and excellence for all.”<sup>97</sup>

These domestic transitional justice inspired initiatives launched by the diverse group of public and private stakeholders have acknowledged the intergenerational impact of Jim Crow segregation and created awareness about the various ways in which federal, state, and local governments were complicit in endorsing normalized collective wrongdoing and human rights violations rooted in White supremacy. However, even these more comprehensive transitional justice inspired initiatives cannot compensate for the absence of comprehensive federally-endorsed reconciliatory initiatives for many of the reasons outlined by transitional justice scholars, such as inadequate financial resources and a disengaged public, that denies the absence of a larger political and communal context for government-sanctioned human rights abuses.<sup>98</sup> And consequently, reconciliation remains an elusive though potent goal for Black Americans.

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97. THE BOSTON Busing/DESEGREGATION PROJECT, REPORT ON PHASE ONE 5 (2012), <http://bpsdesegregation.library.northeastern.edu/wp-content/uploads/2018/01/BBDP-Year-One-Report-10.5.12.pdf> [<https://perma.cc/7UEH-2WNB>] [hereinafter BOSTON Busing/DESEGREGATION PROJECT].

98. See Parker, *supra* note 15, at 32–33 (discussing generally the limitations of truth and reconciliation commissions); Labuda, *supra* note 40, at 32 (criticizing the absence of communal responsibility as a limitation of truth and reconciliation commissions and other prevalent transitional justice practices); Melia Thompson-Dudiak, *Comparison: Improving How the Legacies of State-Sponsored Segregation in the United States and South Africa Affect Equity and Inclusion in American and South African Higher Education Systems*, 49 CAL. W. INT'L L.J. 163, 201 (2018) (discussing social attitudes towards redressing issues of racial equity in higher education and the general lack of historical consciousness among the public about the context of continued racial inequities in higher education).

## II. Lost in Transition: The Court's Transitional Jurisprudence Replicates the Relational Inequities of Jim Crow by Perpetuating Attitudes of Black Intellectual Inferiority

[A] desegregated society that is not integrated . . . leads to physical proximity without spiritual affinity [and] gives us a society where men are physically desegregated and spiritually segregated, where elbows are together and hearts are apart.<sup>99</sup>  
—Dr. Martin Luther King, Jr.

In the absence of comprehensive federally-endorsed reconciliatory initiatives, the diverse group of previously referenced public and private sector stakeholders aspire to transform the United States from a society that remains fractured by a largely unacknowledged history of government-sanctioned human rights violations into one where elbows and hearts are together and where racial hierarchies are eradicated. But this observation about the saliency of comprehensive federally-endorsed reconciliatory initiatives assumes that transitional justice principles apply to established democracies, such as the United States. The proliferation of transitional justice inspired initiatives in established democracies troubles some scholars who fear that the moniker will become a generic label for any kind of political transition.<sup>100</sup> However, the shift from Jim Crow segregation—a sociopolitical regime that nullified the mandates of the Thirteenth, Fourteenth, and Fifteenth Amendments and their promise of full legal inclusion for Black Americans<sup>101</sup>—was no mundane political transition, but a radical, paradigmatic one triggering transitional justice. Because of segregation's legacy of physical and

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99. Ericka Aiken, *Murder at Freedom's Gate: Poverty, Race, & Education in America*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 31, 38 (2013) (internal quotations omitted) (quoting Dr. Martin Luther King, Jr., Address at Nashville Consultation: An Analysis of the Ethical Demands of Integration (Dec. 27, 1962)).

100. See, e.g., Davis & Scharrer, *supra* note 12, at 108–09, n.69 (noting the traditional definition of transitional justice and considering whether its principles apply to societies not experiencing a political transition but that are still fractured by long-standing and pervasive human rights violations); Yamamoto et al., *supra* note 14, at 120–27 (surveying domestic and international reconciliatory efforts and transitional justice initiatives); Quinn, *supra* note 14, at 63–66, 75–78 (noting the traditional conception of transitional justice and the expansion of transitional justice principles by various scholars challenging the assumption that its principles are inapplicable to settled democracies).

101. Turner, *supra* note 61, at 867–70; *Jim Crow Laws*, HIST., <http://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/KTN6-K638>].

psychological atrocities against Black Americans,<sup>102</sup> social justice advocates have argued that the struggle for civil rights in the United States is comparable to the struggle for international human rights.<sup>103</sup> Malcolm X succinctly summarized the synergy between the two movements, noting that civil rights is “[n]ot just an American problem, but a World problem.”<sup>104</sup> Seizing upon yet another connection between civil and human rights, Josie Foehrenbach Brown alluded to deficiencies in the transition from segregation, observing that “[f]rom the announcement of the *Brown* opinion, we have failed as a nation to attend to the complicated details of transitional justice.”<sup>105</sup> This historical, political, and social context informs the argument advanced in this section that the broad remedial scope of transitional justice applies to the desegregation of American schools. The first sub-section establishes that the criteria identified by noted transitional justice scholars applies to the desegregation of American schools. And the last sub-section critiques the *Brown* cases and key cases in the Court’s desegregation jurisprudence through the lens of transitional justice and then explores some of the modern-day consequences of their transitional deficiencies.

#### A. *Brown I as a Transitional Rule of Law*

*Brown I* was the beginning of a transitional period in American society and in its system of public education. The Court explicitly recognized the ways in which Jim Crow segregation negatively impacted the educational experiences of Black students<sup>106</sup> and implicitly acknowledged how it divested Black parents of the agency to make educational decisions for their children, human rights<sup>107</sup> that are freely available in truly

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102. See discussion *infra* Sections II.A–B.

103. Casanova Willis & Willis, *supra* note 76, at 241 (discussing the 1951 publication of *We Charge Genocide*, the groundbreaking document by W.E.B. DuBois and filed on behalf of the Civil Rights Congress equating the war crimes of Nazi Germany to the evils of Jim Crow segregation in the United States).

104. *Id.* at 240.

105. Foehrenbach Brown, *supra* note 10, at 137.

106. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

107. See Roger J.R. Levesque, *Educating American Youth: Lessons from Children’s Human Rights Law*, 27 J.L. & EDUC. 173, 187–90 (1998) (citing the Universal Declaration of Human Rights and discussing educational rights in human rights law and the broad recognition of not only a right to education but one free from discrimination and an education that is directed to “the full development of the

democratic societies. The Court's recognition of the ways in which segregation stripped Black students of essential educational rights signaled the beginning of the nation's transition from the repressive sociopolitical regime of *de jure* segregated education to a more egalitarian political and educational system.<sup>108</sup> And so, in 1954, the United States was a transitional society adapting to a new sociopolitical order no longer premised on White supremacy.

Murphy has articulated a comprehensive analysis of the sociopolitical conditions that trigger transitional justice.<sup>109</sup> Her analysis rejects superficial political distinctions and instead examines how purportedly democratic societies actually function.<sup>110</sup> According to Murphy, transitional societies function in ways that are profoundly different from truly democratic ones because they exhibit the following four characteristics: pervasive structural inequality, normalized collective and political wrongdoing, serious existential uncertainty, and fundamental uncertainty about authority.<sup>111</sup> The following analysis supports the argument that *Brown I* was a transitional rule of law, and thus substantiates the applicability of transitional justice's broad remedial framework to the desegregation of American schools.

#### 1. Exposing Pervasive Structural Inequalities and the Normalized Collective Wrongdoing of Segregation

*Brown I* revealed the pervasive structural inequalities of Jim Crow school segregation and implicitly repudiated the normalized collective and political wrongdoing inherent in segregation.<sup>112</sup> Segregation is the paradigmatic example of pervasive structural inequality. In transitional societies, pervasive structural

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human personality" (quoting International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.A. 3 Art 13)).

108. See MILDRED WIGFALL ROBINSON & RICHARD J. BONNIE, *Introduction to LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION 4* (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009) (noting that the Court's denunciation of segregation as an educational policy in *Brown I* led to the ultimate rejection of "legally enforced segregation in every area of life" in conjunction with the passage of the Civil Rights Act of 1964).

109. See MURPHY, *supra* note 12, at 38–82 (describing exhaustively the four circumstances of transitional justice).

110. See *id.* at 76–78 (discussing the need for a comprehensive assessment based on the four circumstances of transitional justice before determining whether transitional justice principles apply to established democracies such as the United States).

111. *Id.* at 41.

112. See WIGFALL ROBINSON & BONNIE, *supra* note 108.

inequalities are reflected in the ways that institutions create and endorse practices that deprive their citizens of agency and reciprocity that, in turn, result in inequitable treatment.<sup>113</sup> The severity of these opportunity-stripping practices seriously jeopardizes the legitimacy of societal institutions, creating “a moral imperative to enact structural changes or reform.”<sup>114</sup> Lastly, structural inequalities become pervasive when they cast doubt on the legitimacy of societal institutions, creating a “reason to adopt certain kind[s] of measures to overthrow that order.”<sup>115</sup> Murphy acknowledges that segregation is a classic example of pervasive structural inequality.<sup>116</sup> As an illustration, she uses the example of apartheid in South Africa,<sup>117</sup> a political regime based on racial segregation that was virtually identical to Jim Crow segregation<sup>118</sup> in the United States.<sup>119</sup> One civil rights scholar eloquently captures the extent of the pervasive structural inequalities of Jim Crow segregation, comparing them to apartheid:

Jim Crow was more than the practice of racial segregation; it was an applied ideology of [W]hite supremacy that did not just keep African Americans in a fixed subordinate position in society, it tried to push them further down, if not to eliminate them altogether. Braced by violence, discrimination was built

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113. MURPHY, *supra* note 12, at 44–45.

114. *Id.* at 49.

115. *Id.*

116. *Id.* at 46.

117. *Id.* at 47–48.

118. In the Southern states, Jim Crow laws, the term given to a collection of state and local statutes that legalized segregation, subordinated Black Americans by nullifying the mandates of the Thirteenth, Fourteenth, and Fifteenth Amendments and their promise of full legal inclusion in United States’ democratic society and returning the political and economic structure of the Southern states to an antebellum class structure that resembled slavery. Turner, *supra* note 61, at 867–70; *see also Jim Crow Laws, supra* note 101. Although the Northern states did not inherit a political, social, and economic structure that was as rigidly segregated as those in the South, they shared many of the same beliefs about the moral and intellectual inferiority of Black Americans. *See id.* In *Roberts v. City of Boston*, the Supreme Court of Massachusetts permitted segregation under the state’s constitution. 59 Mass. (5 Cush.) 198, 209 (1849); *In Pursuit of Equality*, SMITHSONIAN NAT’L MUSEUM AM. HIST., <http://americanhistory.si.edu/brown/history/2-battleground/pursuit-equality-1.html> [https://perma.cc/MQ9V-H9PW].

119. Zachary Norris, *Repairing Harm from Racial Injustice: An Analysis of the Justice Reinvestment Initiative and the Truth and Reconciliation Commission*, 94 DENV. L. REV. 515, 517 (2017). *See generally* Benjamin Zinkel, *Apartheid and Jim Crow: Drawing Lessons from South Africa’s Truth and Reconciliation*, J. DISP. RESOL. 229 (2019) (exhaustively comparing apartheid and Jim Crow segregation).

into the legal, political, cultural, economic, social, and educational scaffolding that reinforced [W]hite power and denied African Americans the means to improve their lives, hence the term American apartheid.<sup>120</sup>

Just as apartheid was a political, legal, and economic system of exploitation that divested Black South Africans of agency and reciprocity,<sup>121</sup> Jim Crow segregation created differential opportunities and limited prospects for Black Americans in access to courts, employment, housing, and voting.<sup>122</sup> But nowhere were the pervasive structural inequalities of segregation more evident than in public education.

Because of their ability to shape civic identity, schools are classic examples of the kinds of norm-setting institutions where victims of government sanctioned wrongdoing may lack agency and reciprocity.<sup>123</sup> Southern culture “was erected on the presumption of [B]lack inability,” observed one scholar, and “Black prosperity and success—indeed, [B]lack intelligence—were unimaginable and, thus, justified the disparate funding in education that had led to abysmal schools . . . .”<sup>124</sup> Dr. Kenneth Clark, the renowned psychologist hired by the NAACP legal defense team in preparation for its attack on segregation, observed that in Clarendon County, South Carolina, Black students learned in segregated school environments of extreme deprivation with no running water, no urinals, and no sinks for students, and that their classrooms had no blackboards, maps, globes, auditoriums, or music rooms—facilities that White students enjoyed.<sup>125</sup> Although Blacks comprised 70% of Clarendon County’s population and approximately 6,000 out of the county’s 8,000 school-aged children, the county spent \$100,000 more on the education of its White students.<sup>126</sup> In Delaware, state

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120. ANNE VALK & LESLIE BROWN, *LIVING WITH JIM CROW: AFRICAN AMERICAN WOMEN AND MEMORIES OF THE SEGREGATED SOUTH* 9 (2010); see also Neil G. Williams, *Brown v. Board of Education Fifty Years Later: What Makes for Greatness in a Legal Opinion?*, 36 *LOY. U. CHI. L.J.* 177, 178 (2004) (referring to Jim Crow segregation as American apartheid).

121. Norris, *supra* note 119, at 517; Zinkel, *supra* note 119, at 233–35.

122. VALK & BROWN, *supra* note 120, at 12–13.

123. MURPHY, *supra* note 12, at 44.

124. CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* 54 (2016).

125. PETER IRONS, *JIM CROW’S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* 67 (Penguin Books 2004) (2002).

126. John W. White, *Managed Compliance: White Resistance and Desegregation in South Carolina, 1950–1970*, at 27 (2006) (unpublished Ph.D. dissertation, University of Florida) (on file at [http://etd.fcla.edu/UF/UFE0013899/white\\_j.pdf](http://etd.fcla.edu/UF/UFE0013899/white_j.pdf))

officials “abdicated all responsibility for the education of its African American citizens” and even thwarted efforts by the Black community to generate private, philanthropic resources earmarked for education.<sup>127</sup> Furthermore, at the time of the Court’s decision in *Brown I*, the entire state of Delaware had only one high school for its Black students.<sup>128</sup> Similarly, in Prince Edward County, Virginia, no high school for Black students existed until 1939, although 45% of the county’s population was composed of African Americans, and by 1947, the only high school serving Black students was severely overcrowded.<sup>129</sup> The collective impact of these educational inequities on the life prospects for Black students struggling for a genuine opportunity for an education was devastating, and according to one scholar:

The result of such widespread disparities in funding was that the U.S. educational system, despite the demands of parents and students craving high-quality schools, had deliberately produced a sprawling, uneducated population. In Alabama, Georgia, Louisiana, South Carolina, and Mississippi, with a combined population of 4.7 million African Americans, more than half of all [B]lack adults by the mid-1940s had less than five years of formal education.<sup>130</sup>

As the disparities of Jim Crow segregation dominated every aspect of Black life, Black Americans and their allies felt morally compelled to overthrow it. Dr. King’s justification of civil disobedience during the civil rights movement demonstrates the moral imperative of overthrowing segregation: “An individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.”<sup>131</sup> King’s justification for civil disobedience is echoed by civil rights scholars who frequently use the language of revolution when discussing the urgency for sociopolitical change heralded by *Brown I*. One scholar

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[<https://perma.cc/XS73-4QCZ>].

127. ANDERSON, *supra* note 124, at 68.

128. *Id.*

129. *Id.* at 68–69.

130. *Id.* at 70–71.

131. Katie Winston, *Dr. Martin Luther King Jr., CIV. DISOBEDIENCE*, <http://disobediencivil.weebly.com/dr-martin-luther-king-jr.html> [<https://perma.cc/G8CK-7H2X>].

describes the decision as creating “a chain reaction in society equivalent to that of nuclear fission.”<sup>132</sup> Another described *Brown I* as the “day of reckoning” for segregation and noted the optimism that *Brown I* generated among some in the Black community: “At that moment, it appeared that citizenship—true citizenship—might finally be at hand for African Americans.”<sup>133</sup> When *Brown I* was decided, the United States was a transitional society where Black Americans experienced pervasive structural inequality that limited their agency and reciprocity in every aspect of their lives.

As “the day of reckoning” for segregation, *Brown I* also implicitly repudiated the normalized collective and political wrongdoing of Jim Crow segregation. Murphy defines normalized collective and political wrongdoing as “actions or omissions of particular human beings that result in violations of human rights”<sup>134</sup> perpetrated by state actors against a targeted population.<sup>135</sup> These human rights violations must be political, meaning that they further “political goals or policies . . . about how a given political society should be structured”<sup>136</sup> and become so ubiquitous that they are normalized.<sup>137</sup> Segregation was inherently political because it created a “hierarchy of humanity that placed Whiteness at the top and Blackness at the bottom.”<sup>138</sup> The ubiquity of normalized collective and political wrongdoing during Jim Crow segregation—lynchings,<sup>139</sup> massacres that destroyed autonomous

132. Williams, *supra* note 120, at 178 (quoting Norman C. Amaker, *Life, History and the Constitution in the Struggle for Racial Equality*, in BLESSINGS OF LIBERTY: THE CONSTITUTION AND THE PRACTICE OF LAW 11 (A.L.I./A.B.A. Comm. on Continuing Prof'l Educ. ed., June 1988)).

133. ANDERSON, *supra* note 124, at 74–75. *But see* Brown-Nagin, *supra* note 4, at 998 (discussing the historical ambivalence and hostility to *Brown I* by some in the Black community); Paulette J. Delk, *Training in Alabama*, in LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION 33, 33–34 (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009) (observing that the decision went virtually unnoticed among Black educators in rural Baldwin County, Alabama because of fear of retaliatory terminations).

134. MURPHY, *supra* note 12, at 49–50.

135. *Id.* at 53.

136. *Id.*

137. *Id.* at 55.

138. *Our Story*, CMTY. HEALING NETWORK, <http://www.communityhealingnet.org/our-story/> [<https://perma.cc/B7CZ-B76G>].

139. *See* Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, *Smithsonian Mag.* (Sept. 2016), <http://www.smithsonianmag.com/history/long-lasting-legacy-great-migration-180960118/> [<https://perma.cc/9HQD-7XA4>]. According to statistics from the Smithsonian, “[b]etween 1880 and 1950, an African-American was lynched more than once a week for some perceived breach of the racial hierarchy.” *Id.* Similarly, statistics indicate that “between 1877 and 1950, 4,075 ‘terror

Black communities,<sup>140</sup> the convict lease system,<sup>141</sup> and educational inequalities that left large segments of Black Americans poorly educated<sup>142</sup>—are well documented in the historical record. However, the issue of whether segregation violated the human rights of Black Americans is controversial.<sup>143</sup> Much of the controversy stems from the United Nation’s (UN) failure to hold the United States accountable for its policies of state-sanctioned White supremacy that justified segregation.<sup>144</sup> The UN was founded

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lynchings’ of African Americans occurred in the American South . . .” Ursula Tracy Doyle, *Strange Fruit at the United Nations*, 61 HOW. L.J. 187, 207 (2018) (citing EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 5 (3d ed. 2017); see also DEGRUY, *supra* note 78, at 96 (summarizing failed congressional and presidential efforts to end lynching).

140. 1898 WILMINGTON RACE RIOT COMM’N, *supra* note 73, at 12. Perpetrated by Whites with the assistance of state and local law enforcement authorities, these massacres decimated autonomous, middle-class Black communities, destroying a collective memory of Black educational, economic, cultural, and political autonomy. See *id.* at 11–13, 256 (discussing the impact of the riot on the Black community, the profound lack of political power of the Black community after the riot, and the ways in which it negatively impacted all aspects of Black culture in that community); R. Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy*, 19 PUB. HISTORIAN 25, 28 (1997) (discussing the Florida legislative mandate that led to a Commission investigating the massacre in Rosewood, Florida); *Tulsa Race Massacre*, *supra* note 71 (providing historical context for the eighteen-hour-long massacre against the Greenwood community, home to a prosperous business district known as the Black Wall Street).

141. DEGRUY, *supra* note 78, at 86–88. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (comprehensively examining the practice of convict leasing and other forms of neo-slavery during Jim Crow segregation). Convict leasing was a system of neo-slavery that began in the aftermath of Reconstruction in which Black men, some of whom were falsely accused of criminal activity or charged with crimes as amorphous as vagrancy and changing employers without permission, were leased to businesses and farmers as a condition of their punishment but seldom paid for their work. See *id.* at 53–57; DEGRUY, *supra* note 78, at 66–88. Some historians estimate that “as many as a quarter of all black leased convicts throughout the South died while still under lease.” DEGRUY, *supra* note 78, at 87 (citation omitted). And in Southern states of the former confederacy such as Alabama, “[c]onvict leasing was so successful that by 1898 nearly three quarters of Alabama’s total state revenue came directly from this institution.” *Id.* at 88.

142. See discussion *infra* Section II.B (discussing disparities in funding and infrastructure investment).

143. See generally Doyle, *supra* note 139 (examining extensively the United Nation’s failure to directly condemn Jim Crow segregation); Margaret R. Somers & Christopher N.J. Roberts, *Toward a New Sociology of Rights: A Genealogy of “Buried Bodies” of Citizenship and Human Rights*, 4 ANN. REV. L. & SOC. SCI. 385, 385 (2008) (discussing extensively the “struggles for inclusion and recognition surrounding human rights and citizenship—much of which has been hidden from history (especially African American human rights movements)”).

144. See Doyle, *supra* note 139, at 210. The United Nations was founded “in the wake of the Holocaust, a tragedy which spurred governments to vow that mass atrocities on this scale would never happen again[.]” with the goal of reaffirming

during the throes of Jim Crow segregation; but, although it vociferously condemned South African apartheid in the 1950s, it never denounced segregation in the United States.<sup>145</sup> Instead, it generally referenced the evils of racial segregation and discrimination, unambiguously asserting that these practices violate human rights and fundamental freedoms outlined in the Universal Declaration of Human Rights (UDHR).<sup>146</sup> However, in the context of education, Article 26 of the UDHR describes the right to public education as a human right, recognizes that all children have a right to an education free of bias and discrimination,<sup>147</sup> and provides that “[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”<sup>148</sup> Given the UN’s general denunciation of segregation and racially discriminatory educational practices and specific condemnation of apartheid, Jim Crow segregation violated the human rights of Black Americans. And so, when *Brown I* was decided, the United States was a transitional society characterized by normalized collective and political wrongdoing.

## 2. Creating Serious Existential Uncertainty and Fundamental Uncertainties About Authority

*Brown I* also created serious existential uncertainties about the stability of a sociopolitical order no longer rooted in White supremacy and about the authority of the federal judiciary. In Murphy’s analytical paradigm, serious existential uncertainty occurs when, in the face of “credible attempts to disrupt the status quo overhauling pervasive structural inequality,”<sup>149</sup> officials are uncertain about whether the old political order will return or whether the new, more progressive one will succeed.<sup>150</sup> Victims of normalized collective and political wrongdoing also experience a similar kind of existential uncertainty; they, too, are uncertain about whether the new political order will lead to the elimination of

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“faith in . . . the dignity and worth of the human person [and] in the equal rights of men and women.” *Id.* at 189, 195 (first alteration in original) (quoting U.N. Charter pmbl.).

145. *Id.* at 209–10, 212–14.

146. *See id.* at 211–12 (discussing the requirements of resolution 103(I)).

147. *See* Levesque, *supra* note 107, at 187–90.

148. *Id.* at 190 (alteration in original) (quoting Universal Declaration of Human Rights, G.A. Res. 217 A, (31) GAOR 71, U.N. Doc. A/810 (1948), Art. 26(2)).

149. MURPHY, *supra* note 12, at 70.

150. *Id.* at 68.

structural inequalities or whether the violence and social inequities of the old political order will return.<sup>151</sup> Due to the instability of the new sociopolitical order, individual decision-making becomes extremely difficult.<sup>152</sup> The Court's ruling in *Brown I* was immediately followed by massive resistance,<sup>153</sup> creating existential uncertainties about the success of desegregation and the future of public education. The most infamous, sustained examples of resistance to school desegregation occurred in Virginia, dubbed by one scholar as the "birthplace of Massive Resistance."<sup>154</sup> Virginia Governor James Lindsay Almond closed schools in Charlottesville, Norfolk, and Front Royal in defiance of court orders to desegregate, proclaiming that: "We will oppose . . . with every facility at our command, and with every ounce of our energy, the attempt being made to mix the [W]hite and Negro races in our classrooms."<sup>155</sup> Fearing the eminent desegregation of Virginia schools, local officials in Prince Edward County diverted tax dollars from the public schools into all-White Prince Edward Academy and offered White parents state-funded tuition grants.<sup>156</sup> This pattern of funneling state money to private, segregated schools was replicated all over the state, and, as a result of the diversion of millions of tax dollars, nearly twenty percent of Virginia's public schools closed.<sup>157</sup> The massive closing of public schools in Virginia cast the state into what one scholar described as an "educational apocalypse" with dire repercussions for Black students in Prince Edward County:

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151. *Id.* at 66–67.

152. *Id.* at 68.

153. Turner, *supra* note 61, at 889.

154. ANDERSON, *supra* note 124, at 81.

155. Prince Edward Free Schools Association, HIST. ENGINE, <http://historyengine.richmond.edu/episodes/view/4444> [<https://perma.cc/YUN3-TP4E>]. Other Southern governors took a similar stance of defiance. See RICHARD ROTHSTEIN, ECON. POLICY INST., SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH 2 (2013), <http://www.epi.org/publication/unfinished-march-public-school-segregation> [<https://perma.cc/6XSX-ZAPA>]; Little Rock School Desegregation, STAN.: MARTIN LUTHER KING, JR. RES. & EDUC. INST., <http://kinginstitute.stanford.edu/encyclopedia/little-rock-school-desegregation> [<https://perma.cc/QCX6-4PGA>]. Governor Orval Faubus of Arkansas closed all four of Little Rock's public high schools in the fall of 1958 rather than proceed with desegregation. See *id.* One year later in December 1959, the Supreme Court ordered the school board to reopen the city's high schools. See *id.* In Alabama, Governor George Wallace vowed to defend segregation by defying the court's edict in *Brown I*, proudly proclaiming that "I draw the line in the dust . . . and toss the gauntlet before the feet of tyranny, and I say segregation now, segregation tomorrow, and segregation forever." *Id.* at 2.

156. ANDERSON, *supra* note 124, at 68, 83.

157. *Id.* at 83.

While [W]hite children were educated, 2,700 [B]lack children were locked out. The defiance of Prince Edward County was singular—no other school system remained closed for five years (1959 to 1964) rather than comply with *Brown*. The impoverished but determined African American community managed to send some children away to relatives, but only thirty-five black students were able to attend those out-of-state schools on a full time basis.<sup>158</sup>

The looming threat of violence caused by massive resistance to desegregation and school closures also demonstrates the difficulties of individual decision-making and the existential uncertainties faced by the parents of school-aged children. White parents were faced with a dilemma: acquiesce to the social pressures created by the resistance and remove their children from public schools or allow their children to attend desegregated schools, a choice that was most likely fraught with fear, given centuries-old stereotypes about the moral, social, and intellectual inferiority of Black students and realistic concerns about the potential for violence in newly integrated schools.<sup>159</sup> Black parents faced a similar dilemma: acquiesce to the social pressures created by the resistance and forgo desegregated schools,<sup>160</sup> object to desegregated schools on cultural or social grounds,<sup>161</sup> or exercise the agency and reciprocity promised

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158. *Id.* at 83–84. See generally CHRISTOPHER BONASTIA, SOUTHERN STALEMATE: FIVE YEARS WITHOUT PUBLIC EDUCATION IN PRINCE EDWARD COUNTY, VIRGINIA 2 (2012) (detailing the history of Prince Edward County’s contentious school desegregation). In 1963, the Federal Government intervened, establishing privately funded Free Schools to address the educational deprivations and prepare the Black children of Prince Edward County for the reopening of the public schools. See *Prince Edward Free Schools Association*, *supra* note 155.

159. See, e.g., White, *supra* note 126, at 32–33, 43–46 (discussing the anxieties of White South Carolinians to the threat of school desegregation and threat of violence to prevent desegregation); Virginia’s “Massive Resistance” to School Desegregation, U. VA.’S DIG. RES. FOR U.S. HIST., [http://www2.vcdh.virginia.edu/xslt/servlet/XSLTServlet?xml=/xml\\_docs/solguide/Essays/essay13a.xml&xsl=/xml\\_docs/solguide/sol\\_new.xsl&section=essay](http://www2.vcdh.virginia.edu/xslt/servlet/XSLTServlet?xml=/xml_docs/solguide/Essays/essay13a.xml&xsl=/xml_docs/solguide/sol_new.xsl&section=essay) [https://perma.cc/PKR2-NSFZ] (discussing the promises and risks of school desegregation among Black and White Virginians).

160. See RICHARD J. BONNIE, *What I Learned When Massive Resistance Closed My School*, in LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION 135–38 (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009) (discussing the personal awakening that he experienced as a White student whose Norfolk, Virginia elementary school was closed amidst massive resistance to segregation by Governor J. Lindsay Almond); White, *supra* note 126, at 28–29 (discussing the economic and physically violent reprisals faced by Blacks in Clarendon County, South Carolina after filing legal challenges to school segregation).

161. Brown-Nagin, *supra* note 4, at 993 n.13.

by *Brown I* and risk the physical and psychological violence of White parents and school officials.<sup>162</sup>

Other Southern states enacted less dramatic measures that also created existential uncertainties about the success of school segregation. Under the guise of paternalism, North Carolina Governor Luther Hodges crafted a plan of “voluntary segregation” designed to exploit the fears in the Black community about the potential for massive deculturalization in *Brown I*’s aftermath.<sup>163</sup> “[I]f [B]lacks voluntarily remained in their own schools,” Hodges reasoned, then “they would receive superior facilities and also be able to better preserve their own culture and traditions than if they enrolled their children in school with [W]hites.”<sup>164</sup> Playing into fears and uncertainties about the cultural risks of desegregation, Hodges warned that “if [B]lacks did not voluntarily go to segregated schools . . . then they would be responsible for school closures, robbing their children of educational opportunities in the process.”<sup>165</sup> These subtle delay tactics coupled with the more overt ones of other Southern governors<sup>166</sup> successfully stalled desegregation for a decade, as reflected by statistics indicating that in the decade after *Brown I* only an estimated 2% of Black children in the formerly *de jure* segregated Southern states attended school with White children.<sup>167</sup>

The sociopolitical context in the aftermath of *Brown I* also manifested fundamental uncertainties about the Supreme Court’s authority to end segregation. Although similar to serious existential uncertainty, fundamental uncertainty about authority relates to who has standing to redress government sanctioned wrongdoing and pervasive structural inequities.<sup>168</sup> In stable democracies, “there is widespread social acceptance of the authority of the branches of government, including the judiciary.”<sup>169</sup> However, in transitional

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162. See Charles E. Daye, *Promise and Paradox*, in *LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION* 95, 100–01 (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009) (discussing the anxieties and existential uncertainties faced by Black parents during desegregation).

163. ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 50 (2009).

164. *Id.*

165. *Id.*

166. See ROTHSTEIN, *supra* note 155 at 2; *Little Rock School Desegregation*, *supra* note 155.

167. WIGFALL ROBINSON & BONNIE, *supra* note 108.

168. MURPHY, *supra* note 12, at 74.

169. *Id.* at 75.

societies, multiple sources of authority may operate simultaneously,<sup>170</sup> causing people to “openly question and challenge the new [political order] both as a general matter and in regard to dealing with past wrongs.”<sup>171</sup> After *Brown I*, much of the resistance’s enmity was aimed at the federal judiciary, challenging the authority of the lower federal courts to implement desegregation, shunning and denouncing judges who were perceived as sympathetic to desegregation, and attacking the Court’s authority to invalidate Jim Crow segregation.<sup>172</sup> Faced with this massive resistance from multiple governmental and non-governmental sources—governors, mayors, local school boards, and White parents opposing segregated schools—and the equally massive campaign to sustain the new sociopolitical order by the NAACP, Dr. King, and other champions of desegregation—American society was plagued by fundamental uncertainties about who had the authority to invalidate segregation.<sup>173</sup> The resistance consisted not only of overtly violent groups, such as the Ku Klux Klan, but “respected elements in [W]hite society—governors, legislators, U.S. senators, congressmen, and even more tepidly, the president of the United States.”<sup>174</sup> However, one of the most well-known political attacks on the Supreme Court’s authority came from nineteen Senators and eighty-one House of Representatives members who signed what is popularly known as the Southern Manifesto.<sup>175</sup> Denouncing *Brown I* as an abuse of judicial authority and a violation of the separation of powers and other democratic principles, its signatories grounded their objection in an interpretation of the Fourteenth Amendment that implicitly endorsed segregation, noting that “[t]he very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.”<sup>176</sup> When viewed in its totality,

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170. *Id.* at 72–73.

171. *Id.* at 74.

172. ANDERSON, *supra* note 124, at 80.

173. Sanjay Mody, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793, 815–19 (2002) (noting resistance from governors, mayors, local school boards, and White parents opposing segregated schools—and the equally massive campaign to sustain the new sociopolitical order by the NAACP, Dr. King, and other champions of desegregation).

174. ANDERSON, *supra* note 124, at 75–76.

175. Turner, *supra* note 61, at 889.

176. 102 CONG. REC. 4459–60 (1956). Howard Smith of Virginia, chairman of the House Rules Committee, introduced the Southern Manifesto in a speech on the House Floor. *The Southern Manifesto of 1956*, HIST., ART, & ARCHIVES: THE U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/> [<https://perma.cc/6Z8G-YVZ3>].

the massive resistance to *Brown I* supports the argument that it triggered the beginning of a transitional period in American society characterized by fundamental uncertainty about authority.

*B. The Transitional Deficiencies of Brown I and the Court's Desegregation Jurisprudence*

Because *Brown I* triggered the beginning of a transitional period in American society and in its system of public education, the United States government had an equitable duty to establish a comprehensive remedial framework to repudiate deeply entrenched attitudes and stereotypes about Black inferiority during the desegregation of American schools. However, unlike the South African government's endorsement of transitional justice practices in its transition from apartheid,<sup>177</sup> the United States government underutilized the array of transitional practices at its disposal such as truth and reconciliation commissions, executive and legislative fact-finding initiatives,<sup>178</sup> and museums to redress government sanctioned White supremacy that normalized the human rights violations of Jim Crow segregation. This underutilization caused profound deficiencies in the transition from segregation. DeGruy attributes the South African government's endorsement of the SATRC as a significant factor in defusing some of the animosity, bitterness, and racial division in post-apartheid South Africa.<sup>179</sup> The Federal Government's lack of accountability for slavery and the

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177. CHARLES ABRAHAMS, CORPORATE LEGAL ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES IN SOUTH AFRICA 1 (2008), <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Charles-Abrahams-commentary.pdf> [<https://perma.cc/8EH7-AKXH>]. South Africa became a democratic country on April 27, 1994, resulting in what one legal commentator described as “not only . . . a fundamental change in the political landscape, but . . . a new constitutional legal order unparalleled in the country's history.” *Id.*

178. See Alice George, *The 1968 Kerner Commission Got it Right, But Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <http://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/> [<https://perma.cc/Z852-CTCS>]. Presidential commissions are one example of a fact-finding initiative. See *id.* Of particular note is the Kerner Commission, commissioned by President Lyndon Johnson in 1968 to identify the causes of violent racial riots in 1967 in Detroit and Newark. See *id.* Another notable example of a presidential commission that evoked issues germane to transitional justice was the President's Commission on the Holocaust commissioned by President Jimmy Carter in 1978. See ELIE WIESEL, PRESIDENT'S COMM'N ON THE HOLOCAUST, REPORT TO THE PRESIDENT (1979), <https://www.ushmm.org/m/pdfs/20050707-presidents-commission-holocaust.pdf> [<https://perma.cc/PE5J-DGKQ>]. The commission's task was to investigate the most appropriate way for the nation to honor those who perished in the Holocaust. *Id.* at 1–2.

179. DEGRUY, *supra* note 78, at 20.

neo-slavery of Jim Crow segregation, according to DeGruy, has become pathological. Such denial has allowed this illness to fester for almost 400 years. It is what keeps this country sick with this issue of race.”<sup>180</sup> Acclaimed journalist Ta-Nehisi Coates echoes DeGruy’s observations: “Until we reckon with our compounding moral debts, America will never be whole . . . .What I’m talking about is more than recompense . . . .What is needed is a healing of the American psyche.”<sup>181</sup> DeGruy’s and Coates’s lamentations highlight the difficulty of reconciliation in transitional societies. According to Yamamoto, “[R]econciliation initiated does not signal social healing achieved. Reconciliation is a long-term, multi-faceted political, social, and economic process. It bears potential not only for significant legal and social benefits but also for incompleteness and even regression.”<sup>182</sup> When considered within a conceptual framework of reconciliation that envisions sustained, multi-faceted responses to past human rights abuses, the limited scope of the federally-endorsed transitional justice inspired initiatives referenced in Part II attests to the reconciliatory deficiencies in the nation’s transition from segregation.

The Federal Government’s reliance on the rule of law as the exclusive vehicle for eradicating stereotypes about Black inferiority also attests to the reconciliatory deficiencies in the nation’s transition from segregation. Because of pervasive structural inequalities in transitional societies, “promoting the rule of law is insufficient for restoring or establishing political relationships among equals.”<sup>183</sup> Consequently, changing the law without adequately addressing stereotypes of Black inferiority at the root of Jim Crow segregation left these stereotypes firmly intact in the hearts and minds of the nation<sup>184</sup> and guaranteed a weak transitional framework that ultimately resulted in the

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180. *Id.*; see also DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 16 (1993) (highlighting the hypocrisy of Americans who “have been quick to criticize the apartheid system of South Africa . . . have been reluctant to acknowledge the consequences of their own institutionalized system of racial separation”); Norman C. Amaker, *The Haunting Presence of the Opinion in Brown v. Board of Education*, 20 S. ILL. U. L.J. 3, 7–8 (1995) (“[N]ever in our history as a people have any of us, [B]lack or [W]hite, been ‘neutral’ on the matter of race. It has been, and remains, the great overriding issue throughout all our history, in all our law, in all our institutions.”) (emphasis added).

181. Coates, *supra* note 58.

182. Yamamoto et al., *supra* note 14, at 116.

183. MURPHY, *supra* note 12, at 130.

184. JULIE KAILIN, ANTIRACIST EDUCATION: FROM THEORY TO PRACTICE 42 (2002).

abandonment of integration as an educational policy.<sup>185</sup> Although transitional justice had not yet emerged as a remedial discipline when the *Brown* cases were decided, its emphasis on healing “hearts and minds” to nurture a set of cultural values that would prevent the re-emergence of attitudes of Black inferiority at the root of *de jure* segregation was a familiar concept to the Court, as evidenced by the inclusion of the phrase in its opinion.<sup>186</sup> Furthermore, President Dwight Eisenhower warned Chief Justice Earl Warren, *Brown I*’s author, of the difficulties of supplanting almost ninety years of segregation, supposedly remarking that “law and force cannot change a man’s heart.”<sup>187</sup> Ironically, the challenge of changing “hearts and minds” was one of the central arguments of those who resisted desegregation.<sup>188</sup> The Court’s awareness of the necessity of changing hearts and minds and its subsequent failure to construct a transitional framework for combating the societal notions of Black inferiority is particularly troubling in a case that holds “near sacred status in the annals of [S]upreme [C]ourt jurisprudence.”<sup>189</sup> The discussion that follows explores the transitional deficiencies in the *Brown* cases and in notable cases in the Supreme Court’s desegregation jurisprudence.

1. *Brown I* Perpetuates Stereotypes of Black Intellectual Inferiority and the Relational Inequalities of Jim Crow

In commenting on the significance of the *Brown* cases, one scholar observed that “[i]t is difficult to criticize a case that no longer stands for a legal point, becoming instead a central part of the social mythology of the country.”<sup>190</sup> A central part of that social

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185. WIGFALL ROBINSON & BONNIE, *supra* note 108, at 171, 174; Kevin D. Brown, *Brown v. Board of Education: Reexamination of the Desegregation of Public Education from the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773, 773 (2004); Noah Berlatsky, *White Parents Are Enabling School Segregation—If It Doesn’t Hurt Their Own Kids*, NBC NEWS: THINK (Mar. 11, 2019, 4:35 AM), <http://www.nbcnews.com/think/opinion/white-parents-are-enabling-school-segregation-if-it-doesn-t-ncna978446> [https://perma.cc/7ZTB-FA5T].

186. *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483, 494 (1954).

187. WIGFALL ROBINSON & BONNIE, *supra* note 108, at 1.

188. See Brief of John Ben Shepperd, Attorney General of Texas, Amicus Curiae at 2, 4–5, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), 1954 WL 45721 (arguing that segregation was the public will and that “[n]o individual can be forced against his will to accept, associate, or cohabit with another not of his choosing” and “[c]ompulsion can only arouse resentment, individual discrimination, and . . . violence”).

189. CASHIN, *supra* note 4, at 208.

190. Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665, 665 (1995).

mythology is what these cases have come to symbolize to the dominant culture: the end of racism and legally sanctioned inequity in public schools.<sup>191</sup> And, according to another scholar, “[t]he older *Brown* gets, the more unwilling white society is to explore our history and its connection to modern racism and inequality.”<sup>192</sup> When these sentiments are juxtaposed with the sentiments of others for whom the cases are a source of enduring sadness, disappointment, and even bitterness,<sup>193</sup> an ethos about the elusiveness of educational equity emerges that was eloquently summarized by Cornel West who opined that America was at its best in *Brown I* and at its worst in *Brown II*.<sup>194</sup> These divergent interpretations about the significance of the *Brown* cases attest to their transitional deficiencies. Authored by activist justices with the political agenda of repudiating segregation, *Brown I* is an extraordinary example of a transitional judicial opinion that announced transformative, revolutionary rules that changed America’s legal, cultural, and educational landscape. *Brown I* repudiated *Plessy’s*<sup>195</sup> distinction between the political rights guaranteed by the equal protection clause and the civil and social equality of Black Americans that ignored the reality of the post-reconstruction South that had begun nullifying the mandates of the Thirteenth, Fourteenth, and Fifteenth Amendments and their promises of full legal inclusion for Black Americans.<sup>196</sup> In stark contrast, *Brown I* was a political decision; the Court did not ignore the sociopolitical context of the Cold War or the hypocrisy of

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191. Rosiek, *supra* note 4, at 8.

192. Sharon E. Rush, *Toto, I have a Feeling We Are Still in Kansas*, in *LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION* 43, 43–45 (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009).

193. See, e.g., Foehrenbach *Brown*, *supra* note 10, at 134–35 (noting that the anxiety and distrust among those in the Black community in the aftermath of the *Brown* decisions that “in hindsight . . . appears tragically prescient as we examine the educational fortunes of African-American children since May 17, 1954”); *Brown*, *supra* note 185, at 782–83 (“America is torn between congratulating itself over the obvious progress on race relations . . . and being demoralized over the lack of success.”).

194. See *Brown Commentators’ Roundtable, Day One*, NPR: THE TAVIS SMILEY SHOW (May 17, 2004), <http://www.npr.org/templates/story/story.php?storyId=1898831> [<https://perma.cc/EZ3R-XW7H>]; CASHIN, *supra* note 4, at 208 (“*Brown* is a decision that makes us proud of ourselves.”).

195. *Plessy v. Ferguson*, 163 U.S. 537 (1869).

196. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 90 J. AM. HIST. 92, 109 (2004); Turner, *supra* note 61, at 866–69; *Jim Crow Laws*, *supra* note 101.

endorsing segregation while simultaneously promoting the nation as an exemplar of the liberalizing values of democracy.<sup>197</sup>

However, *Brown I*'s political nature was also the source of its inherent weakness, one that would not be corrected in the Court's desegregation jurisprudence and that ultimately contributed to profound reconciliatory deficiencies in the nation's transition from segregation. *Brown I*'s transitional deficiencies are rooted in the Court's superficial analysis of the stigma rationale that replicated the imbalanced relationships of Jim Crow segregation. In transitional societies, rules of law embedded in judicial opinions are narratives that create a framework for transforming relationships once characterized by pervasive structural inequalities into egalitarian ones where historically marginalized groups are treated, not as outsiders, but encouraged to fully participate as equals in the political community.<sup>198</sup> Eradicating stereotypes is another key function of effective transitional judicial narratives.<sup>199</sup> Unaddressed stereotypes can contribute to pervasive structural inequality, resulting in a diminution of agency and reciprocity among the targeted group that invites ridicule by the dominant society that, if internalized, diminishes that group's ability to meaningfully contribute to society.<sup>200</sup>

Jim Crow segregation was a sociopolitical regime premised on a wide range of stereotypes<sup>201</sup> that purportedly justified the pervasive structural inequalities that subordinated Black Americans in all aspects of their lives.<sup>202</sup> A key aspect of that

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197. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (discussing the desegregation campaign after *Brown* and offering an explanation why desegregation has failed and offering solutions to bring about change). Preeminent civil rights scholar Derrick Bell highlighted *Brown I*'s political nature in what scholars have coined as "the interest convergence theory." *Id.* at 522–28. Critical race scholar Richard Delgado describes Bell's theory as a "materialist analysis which seeks to explain the shifting tides of racial history by reference to underlying conditions such as labor needs, international competition, and the search for profit." Richard Delgado, *The Shadows and the Fire: Three Puzzles for Civil Rights Scholars: An Essay in Honor of Derrick Bell*, 6 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 21, 21 n.3 (2014) (summarizing Bell's theory).

198. MURPHY, *supra* note 12, at 132.

199. *Id.*

200. *Id.*

201. Regina Austin, *Back to Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-Brown Era*, 6 J. APP. PRAC. & PROCESS 79, 81 (2004) ("When *Brown* was decided, it was a core belief of American society that [B]lacks were by nature intellectually, morally, and culturally inferior to [W]hites.").

202. See *supra* Part III.

subordination was Black intellectual inferiority, an ideology premised on pseudo-scientific theories that claimed to conclusively establish the intellectual superiority of White Americans.<sup>203</sup> These pseudo-scientific theories would, according to one scholar, “make race the crucial determinant of human progress or retrogression . . . [and] had the effect of weeding out people of color from the ranks of those considered ‘able’ or ‘intelligent.’”<sup>204</sup> As this stratification of the races based on intellectual ability continued, Black Americans would increasingly become defined as “permanent, degraded outsiders.”<sup>205</sup> These notions of Black intellectual inferiority and outsider status would become deeply engrained into the fabric of American education during slavery and segregation, and consequently “[t]he history of American education is a history of . . . continuous struggle by African-Americans to be educated for first-class rather than for second-class citizenship.”<sup>206</sup>

Theories of Black intellectual inferiority were also engrafted into the Constitution by the Supreme Court’s infamous decisions in *Dred Scott*<sup>207</sup> and *Plessy*<sup>208</sup> that dehumanized and objectified Black Americans.<sup>209</sup> These theories of Black intellectual inferiority would also be engrafted into *Brown I.*<sup>210</sup> Under the Warren Court’s stigma

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203. KAILIN, *supra* note 184, at 29.

204. *Id.* at 31–32.

205. Aird, *supra* note 80, at 11.

206. KAILIN, *supra* note 184, at 33 (citing scholar Theresa Perry).

207. *Dred Scott v. Sanford*, 60 U.S. 393 (1857). In this case, the Court held that Blacks living in the United States could never become citizens. *Id.* at 393. Its decision invalidated the Missouri Compromise and, according to scholars, became the precursor to the Civil War. Andrew Glass, *Supreme Court Decides Dred Scott Case, March 6, 1857*, POLITICO (Mar. 6, 2018, 12:01 AM), <http://www.politico.com/story/2018/03/06/supreme-court-decides-dred-scott-case-march-6-1857-435658> [https://perm.a.cc/LQ49-M56L].

208. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Notably, Justice John Harlan, the lone dissenter in *Plessy*, strenuously disagreed with the majority about the legality of *de jure* segregation. However, even he believed that Whites were the superior race. *Id.* at 559 (Harlan, J., dissenting).

209. See A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney’s Defense and Justice Thurgood Marshall’s Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1705–06, 1708 (1996) (observing the “unspoken pact of convenient myth” between Thurgood Marshall and the Warren Court that ignored the United States’ history and that of the Supreme Court of racial subordination premised on ideologies of Black inferiority and White supremacy).

210. See *Brown*, *supra* note 185, at 785 (arguing that the Court “did not reject the fundamental belief in the inferiority of black people”); Daye, *supra* note 162, at 95, 99 (noting the inherently political nature of the decision and arguing that “[n]either the framers of the equal protection clause nor the Supreme Court ever manifested either an egalitarian ideal or moral or ethical clarity favoring equality in fact for

rationale, Black students were the lone injured parties; according to the Court, “Segregation . . . has a *detrimental effect on the colored children*” that “has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”<sup>211</sup> However, by identifying Black students as the only parties injured by *de jure* segregation, the Court assumed that White students were not injured by segregation and that notions of White supremacy were not injurious to the egalitarian ideals of democracy,<sup>212</sup> assumptions likely grounded in notions of White Supremacy deeply engrained in American society.<sup>213</sup> Given societal attitudes of Black inferiority extant in the larger society and acknowledged in *Brown I*, the Warren Court most likely could not imagine a scenario where White students would derive any benefit from exposure to Black students who society deemed intellectually inferior.<sup>214</sup>

The assumptions at the root of the Court’s stigma rationale perpetuated the outsider narrative inherent in stereotypes of Black intellectual inferiority. The Court’s analysis was framed narrowly; the only relevant inquiry was the intangible consequences of *de jure* segregated schools, not the tangible disparities in funding, infrastructure investment, and low teacher-to-student ratios that plagued pre-integration Black schools.<sup>215</sup> Given the narrowness of its analysis, the Court’s declaration that segregation deprived Black students of “some of the benefits they would receive in a racial[ly]

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black citizens”).

211. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494 (1954) (alteration in original) (emphasis added).

212. See Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMP. POL. & CIV. RTS. L. REV. 73, 92 (2010) (criticizing the opinion for saying “nothing about the invalidity of the myth of white superiority”).

213. *Id.* at 91; *Brown*, *supra* note 185, at 776–79.

214. See IRONS, *supra* note 125, at 148 (discussing Justice Stanley Reed’s comments suggesting his support for notions of White supremacy inherent in Jim Crow segregation); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON MULTICULTURAL SOCIETY 63 (1998) (opining that “[m]ost [W]hite Americans through most of American history simply considered colored Americans inferior and unassimilable”); Austin, *supra* note 201, at 81 (noting that “[w]hen *Brown* was decided, it was a core belief of American society that [B]lack were by nature intellectually, morally, and culturally inferior to [W]hites”).

215. *Brown I*, 347 U.S. at 492–93; Joseph O. Oluwole & Preston C. Green III, *Riding the Plessy Train: Reviving Brown for a New Civil Rights Era for Micro-Desegregation*, 36 CHICANX-LATINX L. REV. 1, 33 (2019).

integrated school system,”<sup>216</sup> suggests that the only remedy for Black students’ stigmatic injuries was proximity to the intangible benefits readily available to White students in their school environment.<sup>217</sup> By casting Black students as outsiders in need of redemption by proximity to White students, the Court’s transitional narrative exacerbated the pervasive structural inequalities of *de jure* segregation, reinforcing the racial hierarchies of segregation where Black Americans were treated as outsiders at the bottom of “a hierarchy of humanity that placed Whiteness at the top and Blackness at the bottom.”<sup>218</sup> Once labelled as psychologically injured outsiders, Black students would be impaired in their ability to fully participate as equals in integrated schools and become vulnerable to overt or covert ridicule by White students, teachers, and school administrators.

Furthermore, *Brown I*’s stigma rationale replicated the imbalanced relationships of Jim Crow segregation by promoting an assimilationist model for desegregation. The history of Black education did not begin in 1954, although that is the date when issues of educational equity most likely entered into the nation’s collective consciousness.<sup>219</sup> Beginning in slavery when teaching Blacks to read was a crime,<sup>220</sup> Whites used education, or the lack thereof, to subordinate Black Americans, a practice that, according to one civil rights historian “remained virtually unchanged well into the twentieth century.”<sup>221</sup> Although the dominant culture used education as a tool of subordination, Black Americans used education as a shield “to lead people toward what was considered their historic responsibility—[building] a better, more just and decent society.”<sup>222</sup> However, this rich tradition of Black education is

216. *Brown I*, 347 U.S. at 494.

217. See Williams, *supra* note 120, at 181, 182–84 (summarizing critiques of the Court’s stigma rationale for its assumptions of Black inferiority) (alteration in original).

218. See *Our Story*, *supra* note 138.

219. See KAILIN, *supra* note 184, at 34 (observing that *Brown I* was “the first time the U.S. government made a formal commitment to include Blacks in the promise of educational equity”); SCHLESINGER, JR., *supra* note 214, at 63 “[T]he cruelty with which [W]hite Americans have dealt with [B]lack Americans has been compounded by the callousness with which white historians have dealt with Black history.”)

220. See *Literacy as Freedom*, SMITHSONIAN AM. ART MUSEUM, <http://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf> [<https://perma.cc/SEY2-UBXZ>] (“After the slave revolt led by Nat Turner in 1831, all slave states except Maryland, Kentucky, and Tennessee passed laws against teaching slaves to read and write.”)

221. ANDERSON, *supra* note 124, at 45.

222. See KAILIN, *supra* note 184, at 35.

often overlooked in the scholarly discourse and in the nation's collective memory.<sup>223</sup> In critiquing the conspicuous absence of scholarly inquiry into the complexities of Jim Crow segregation, historian Tomiko Brown-Nagin observed that “the tendency among scholars . . . is to view the pre-*Brown* period exclusively through the lens of deprivation, as if the Court's stigma rhetoric accurately described the complex reality of human experience during this era.”<sup>224</sup> Historian Vanessa Siddle Walker makes similar observations about narratives of deprivation commonly ascribed to pre-integration Black schools, observing that:

In this national memory, southern African Americans were victims of [W]hites who questioned the utility of providing [B]lacks with anything more than a rudimentary education . . . . The children suffered immeasurably and, the memory assumes, received little of educational value until they were desegregated into the superior [W]hite systems.<sup>225</sup>

Walker argues that “to remember segregated schools largely by recalling only their poor resources presents a historically incomplete picture.”<sup>226</sup> A more complete, historical picture of pre-integration Black schools developed by Walker and scholars such as Faustine Jones, Thomas Sowell, and Adam Fairclough depicts a school environment characterized by high teacher expectations, academic rigor, and psychological support even amidst the disparities in funding, infrastructure investment, and teacher-to-student ratios that characterized the pervasive structural inequalities of Jim Crow segregation.<sup>227</sup> And in the collective

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223. See Thomas Sowell, *Black Excellence—The Case of Dunbar High School*, 35 PUB. INT. 3, 3 (1974) (remarking on the “voluminous outpourings on [B]lack educational pathology” but only the occasional coverage and recognition of the long history of Black educational achievement).

224. Brown-Nagin, *supra* note 4, at 996.

225. VANESSA SIDDLER WALKER, THEIR HIGHEST POTENTIAL: AN AFRICAN AMERICAN SCHOOL COMMUNITY IN THE SEGREGATED SOUTH 1 (1996) [hereinafter Siddle Walker I].

226. *Id.* at 3.

227. See *id.* at 3–6, 215–19 (summarizing the scholarship in the area and broadly outlining general themes of the attributes of educational experiences in pre-integration Black schools); Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43 (2004) (summarizing the scholarship in the area and exhaustively analyzing the benefits and challenges of pre-integration Black schools); Sowell, *supra* note 223, at 6 (discussing a tradition of excellence at Dunbar High School, an academically elite, all-Black public high school in Washington, D.C.).

memories of those educated in pre-integration Black schools, they were cherished institutions whose educational mission was to prevent Black children from internalizing societal attitudes about their intellectual inferiority and to help them cultivate the skills necessary for leading purposeful, meaningful lives even amidst Jim Crow's repression.<sup>228</sup>

But the legacy of pre-integration Black schools was obscured by the Court's stigma rationale. Although acknowledging the "outstanding success in the arts and sciences as well as in the business and professional world" of many Black Americans, the Court did not explicitly attribute these successes to pre-integration Black schools.<sup>229</sup> The absence of historical context contributed to the Court's superficial analysis which assumed that all Black students were monolithic, that they experienced segregation in the same way, and that the dominant culture's attitudes about Black intellectual inferiority were always internalized by Black students.<sup>230</sup> Although some Black children certainly internalized societal attitudes about their intellectual inferiority despite the protective strategies devised by their teachers,<sup>231</sup> all of them did not experience the psychological trauma that segregation was assumed to elicit.<sup>232</sup> And the existence of any psychologically-resilient Black children<sup>233</sup> amidst the repression of Jim Crow segregation is directly attributable to the mission of pre-integration Black schools.<sup>234</sup> When considered within the context of societal attitudes of Black intellectual inferiority, the absence of historical context in *Brown I* suggested that Black students "received little of educational value

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228. Daye, *supra* note 162, at 97, 101–02 (discussing his favorable experiences at a pre-integration Black school in North Carolina); Aiken, *supra* note 99, at 38 (describing pre-integration Black schools as institutions of support and refuge).

229. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 490 (1954).

230. Brown-Nagin, *supra* note 4, at 993–94.

231. Williams, *supra* note 120, at 189–90 (recalling personal angst about his intellectual acumen as a high school student in Atlanta, Georgia, attending a recently desegregated high school, but noting the variety of responses by Black students in reaction to the external messages of Black intellectual inferiority implicit in Jim Crow segregation).

232. *Id.* at 994.

233. IRONS, *supra* note 125, at 69 (discussing the results of Dr. Clark's psychological test and noting that five of the twelve children selected Black dolls instead of White dolls).

234. See also Phoebe Weaver Williams, *Segregation in Memphis*, in *LAW TOUCHED OUR HEARTS, A GENERATION REMEMBERS BROWN V. BOARD OF EDUCATION 123*, 129–30 (Mildred Wigfall Robinson & Richard J. Bonnie, Eds., 2009) (describing efforts by Black teachers to motivate students to learn and thus circumvent Jim Crow's narrative of inferiority).

until they were desegregated into the superior [W]hite systems.”<sup>235</sup> Thus, the legacy of pre-integration Black schools as cherished cultural institutions that anchored the lives of Black students during segregation was obfuscated in the nation’s collective memory.<sup>236</sup> When viewed in its totality, *Brown I* replicated the relational inequities of Jim Crow segregation by implicitly endorsing an outsider narrative, obfuscating the legacy of pre-integration Black schools, and facilitating the adoption of an assimilationist model for school desegregation.

## 2. The Court’s Desegregation Jurisprudence Replicates Relational Inequities and Undermines Integration

The relational inequities of Jim Crow segregation inherent in *Brown I*’s transitional narrative guaranteed a weak transitional framework for desegregation. The Warren Court’s strategy of staking societal transformation on the sympathy of Whites in its effort to redeem psychologically damaged Black children was a weak foundation for societal transformation because it reinforced the “outsider-insider” narrative at the root of White supremacy. *Brown I*’s “outsider-insider” transitional narrative allowed, as Sharon Rush observes, “[W]hite society to continue to function, often subconsciously, on the myth of [W]hite superiority even as it officially and consciously denounced the myth of [B]lack inferiority.”<sup>237</sup> In *Brown II*, the Court exacerbated the relational inequities of *Brown I*’s transitional narrative by crafting a vague remedial framework that left deeply entrenched attitudes about Black intellectual inferiority unaddressed. The Court acknowledged the complexities of fashioning a remedy for “reconciling public and private needs” and recognized the importance of eliminating “a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [*Brown I*].”<sup>238</sup> However, beyond the cryptic “all deliberate speed” language, *Brown II* offered no practical guidance for the transition and no precise methodology for dismantling institutionalized attitudes of White supremacy that spawned ninety years of *de jure* segregated schools.<sup>239</sup> Under this laissez-faire approach to school

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235. *Siddle Walker I*, *supra* note 225, at 1.

236. *Id.*; Fairclough, *supra* note 227, at 47.

237. Rush, *supra* note 212, at 92.

238. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955).

239. Turner, *supra* note 61, at 887–88 (summarizing scholarly criticism of *Brown II*’s remedial framework).

desegregation, it would take ten years before the Court acknowledged the failures of *Brown II*'s remedial formula.<sup>240</sup> However, its nascent desegregation jurisprudence would also replicate the relational inequities of Jim Crow segregation. In *Green v. County School Board of New Kent County*,<sup>241</sup> the Court declared its intent to eliminate the vestiges of *de jure* segregation “root and branch.”<sup>242</sup> However, its exclusive focus on six tangible factors of the school environment such as student assignments, transportation, and facilities as the lodestar of desegregation was at odds with the intangible stigmatic injury of *de jure* segregation identified in *Brown I*.<sup>243</sup> This omission implicitly repudiated the stigma rationale, implying that it was more legal abstraction than a commitment to eliminating stereotypes of Black intellectual inferiority at the root of *de jure* segregation.

Furthermore, once desegregation began in earnest, local school boards implemented integration in ways that replicated the relational inequities of Jim Crow by obfuscating the distinct educational ethos of the pre-integration Black schools and the cultural legacy of Black educators. The initial burst of enthusiasm that some Black educators felt in the immediate aftermath of *Brown I*<sup>244</sup> would morph into the kind of skepticism that ultimately caused legendary educator Dr. Horace Tate to believe that the *Brown* cases promised only a “second-class citizenship.”<sup>245</sup> This second class citizenship would manifest itself in the closing of many pre-integration Black schools<sup>246</sup> and in the termination of thousands of

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240. CASHIN, *supra* note 4, at 207 (noting the ten-year period of delay); *see also* Kimberly Robinson, *Resurrecting The Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 805–06 (2010) (same).

241. *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968).

242. *Id.* at 438.

243. *Id.* at 435.

244. *See* Brown-Nagin, *supra* note 4, at 994, 998 (discussing the deep historical roots of the ambivalence and hostility to *Brown I* by some in the Black community); Fairclough, *supra* note 227, at 53 (extensively discussing the schism among Black educators about the propriety of integration, but noting that most would publicly endorse the NAACP's attack on *de jure* desegregation).

245. VANESSA SIDDLE WALKER, *THE LOST EDUCATION OF HORACE TATE: UNCOVERING THE HIDDEN HEROES WHO FOUGHT FOR JUSTICE IN SCHOOLS* 7 (1996) [hereinafter Siddle Walker II]. Dr. Tate was the head of the 12,000 member Georgia Teachers and Education Association, an influential organization in the educational ethos of pre-integration Black schools. *Id.*

246. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 473 (1992) (noting that the Federal District Court's initial desegregation plan implemented in 1969 closed all of the county's pre-integration Black schools).

Black educators.<sup>247</sup> Historians estimate that between 1954 and 1972 more than 31,000 Black teachers lost their jobs and that a staggering “96% of African-American principals lost their jobs in North Carolina, 90% in Kentucky and Arkansas, 80% in Alabama, 78% in Virginia, and 77% in South Carolina and Tennessee.”<sup>248</sup> Educators who avoided termination were often demoted or given nominal positions.<sup>249</sup> These terminations echoed *Brown Vs* assimilationist narrative by perpetuating the paternalistic belief that “closing [B]lack schools, terminating African-American teachers, and demoting [B]lack principals . . . [were] reasonable sacrifices to increase the quality of education for all students, especially the [B]lack ones.”<sup>250</sup> Some influential members of the NAACP and the Black community expressed similar sentiments, viewing the loss of Black educators as justified by the “onward march of progress.”<sup>251</sup>

This myopic view of progress resulted in the kind of deculturization that North Carolina Governor Luther Hodges and other Southern governors used to thwart desegregation.<sup>252</sup> However, the loss of a distinct educational aesthetic, culturally sustaining educational spaces<sup>253</sup> and a cohort of Black educators was most precipitously borne by Black students.<sup>254</sup> During *de jure* segregation, “public schools acted as agencies of race sentiment and community identity.”<sup>255</sup> The Black community “took ‘ownership’ of schools . . . . These were not only places where students went to learn; these were places that belonged to the community as a source of pride, leadership, development, and acculturation.”<sup>256</sup> Ironically, as Black educators were whittled from the ranks of what would

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247. See WIGFALL ROBINSON & BONNIE, *supra* note 108, at 1; Fairclough, *supra* note 227, at 53.

248. Brown, *supra* note 185, at 786 n.53 (citing historian Samuel Ethridge and testimony from the United States Senate).

249. Fairclough, *supra* note 227, at 50.

250. Brown, *supra* note 185, at 786.

251. Fairclough, *supra* note 227, at 51.

252. See *supra* Section III.B; *Southern Black Educators and Desegregation*, C-SPAN (July 31, 2018), <http://www.c-span.org/video/?448954-1/southern-black-educators-desegregation> [<https://perma.cc/XK9C-SSZ8>] (discussing similar threats made by Georgia Governor Eugene Talmadge).

253. See Fairclough, *supra* note 227, at 54 (observing that many pre-integration Black schools that survived integration were converted into junior high schools and in many states, “schools that had been named for [B]lack teachers or historical figures were given new names”).

254. Daye, *supra* note 162, at 100–01; Culp, Jr., *supra* note 190, at 671.

255. Fairclough, *supra* note 227, at 48.

256. See Daye, *supra* note 162, at 102.

become an increasingly White teaching cadre,<sup>257</sup> their distinct cultural mission of empowerment would be lost in an assimilationist educational model that “viewed [B]lack teachers as inferior and [B]lack schools as ‘too [B]lack’ for [W]hite children.”<sup>258</sup> Fairclough notes that in the Black community “a strong sense of providential mission promoted the belief that God had given educated [B]lacks the duty of redeeming their race” and this providential mission contributed to the belief among educators that “[i]n the hands of the Negro teachers rests the destiny of the race.”<sup>259</sup> For Black teachers, the relational aspects of the pre-*Brown* school environment—quasi-parental relationships with students that included driving students to cultural events, helping them get scholarships, understanding family dynamics, and providing food and clothing when necessary—gave students the confidence to advocate for themselves and their communities, preparing them for the day when Black Americans would acquire the agency and autonomy to assume their rightful role as valuable participants in American democracy.<sup>260</sup> And consequently, Walker describes Black educators as hidden provocateurs who defied the subversive intent of Jim Crow by formulating and implementing educational policies tailored for the unique needs of Black students and for the liberatory goals of the Black community.<sup>261</sup> Given the civic ideals at the heart of their professional identity, Black educators who embraced integration did so with the hope that it would ensure more equitable, agentic educational opportunities for Black students and embody what Dr. King described as: “[Genuine] integration . . . where there is shared power . . . not Negro annihilation.”<sup>262</sup> However, because integration obfuscated the legacy of Black educators within a distinct educational ethos, Black students did not receive a genuine integration but one that “undermin[ed] the position of the [Black] teacher as a mentor, role model, and disciplinarian.”<sup>263</sup> And consequently, during the era of

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257. KAILIN, *supra* note 184, at 43.

258. Culp, Jr., *supra* note 190, at 671.

259. Fairclough, *supra* note 227, at 49–50.

260. *Southern Black Educators and Desegregation*, *supra* note 252.

261. *See id.*; Weaver Williams, *supra* note 234, at 129–30 (describing efforts by Black teachers to motivate students to learn and thus circumvent Jim Crow’s narrative of inferiority).

262. Siddle Walker II, *supra* note 245, at 8 (discussing Dr. King’s remarks to members of the Georgia Teachers and Education Association in 1967); *Southern Black Educators and Desegregation*, *supra* note 252.

263. Fairclough, *supra* note 227, at 44; *see also* Milliken v. Bradley, 418 U.S. 717,

active enforcement of desegregation, the *quid pro quo* for the “progress” of integration was the elimination of a distinct, Black educational ethos and the cultural legacy of Black educators.

As the Court’s desegregation jurisprudence matured, it continued to replicate the relational inequities of Jim Crow by shifting its transitional narrative from one of paternalism and assimilation to one of acquiescence and accommodation, resulting in the resegregation of the nation’s schools and the abandonment of integration as an educational policy. This narrative shift resulted from the Court’s unwillingness to recognize that attitudes about Black inferiority reflected in decades of government sanctioned policies and manifesting themselves in new, more modern social phenomena, such as White flight, housing discrimination, and racially segregated housing patterns were vestiges of the attitudinal remnants of *de jure* segregation. The Court’s acquiescence to new, more modern manifestations of *de jure* segregation began in *Milliken v. Bradley*,<sup>264</sup> a case that civil rights scholars characterize as the death knell for meaningful desegregation.<sup>265</sup> *Milliken* was the first case to comprehensively address the constitutionality of remedial efforts to ameliorate the reemergence of racially isolated schools amid shifting demographics.<sup>266</sup> The Court held that busing students between the predominately White suburban Detroit school districts and the predominately Black inner-city schools to redress *de jure* segregation in Detroit exceeded *Brown II*’s remedial mandate.<sup>267</sup> Although the record established that the State of Michigan and its Board of Education facilitated the White flight that caused racially identifiable suburban schools,<sup>268</sup> the *Milliken* Court nevertheless demanded additional evidence that jurisdictional boundaries were

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725–26 (1974) (noting that findings of the district court that “with one exception . . . defendant Board has never bused [W]hite children to predominantly [B]lack schools. The Board has not bused [W]hite pupils to [B]lack schools despite the enormous amounts of space available in inner-city schools”) (internal citations and quotations omitted).

264. *Milliken v. Bradley*, 418 U.S. 717 (1974).

265. See, e.g., Laura McNeal, *The Milliken Effect: Moral Exclusion Under the Guise of Equity*, 2015 HARV. J. ON RACIAL & ETHNIC JUST. ONLINE, at 1, 4 (2015) (characterizing the case as “a slow retreat from *Brown*’s promise of equality” and “as the catalyst for the demise of school desegregation”); Turner, *supra* note 61, at 898–99 (summarizing scholarly commentary on the case’s deleterious impact on the success of integrated schooling in central cities); CASHIN, *supra* note 4, at 212 (same).

266. *Milliken*, 418 U.S. at 717.

267. *Id.* at 745–47.

268. *Id.* at 726–27.

gerrymandered to thwart desegregation or that the suburban school districts contributed to the *de jure* segregation of Detroit public schools.<sup>269</sup> By refusing to impute attitudes of Black inferiority extant in the larger society and sanctioned by the State of Michigan and its department of education onto suburban school districts despite clear evidence of the segregative impact of those policies, the Court repudiated the Warren Court's stigma rationale. Unlike the Warren Court that placed the blame of Black inferiority on local school boards,<sup>270</sup> Chief Justice Warren Burger absolved the suburban schools districts, casting them as victims while ignoring the stigmatic injuries of state-sanctioned policies of racial isolation at the heart of the constitutional injury recognized in *Brown I*.<sup>271</sup>

The Court's narrative shift toward acquiescence and accommodation would intensify during the 1990s under the leadership of Chief Justice William Rehnquist in a group of cases described by scholars as the "resegregation trilogy."<sup>272</sup> In *Board of Education of Oklahoma City Public Schools v. Dowell*,<sup>273</sup> the Court disregarded irrefutable evidence that the board's neighborhood school assignment policy would result in more than 50% of the city's schools becoming either predominantly Black or White.<sup>274</sup> Touting the benefits of local control and disregarding decades of federal and state sanctioned housing discrimination that facilitated racially segregated neighborhoods,<sup>275</sup> the Court held that the relevant inquiry for dissolving a desegregation decree was whether "the vestiges of past discrimination had been eliminated to the extent practicable,"<sup>276</sup> reasoning that court ordered supervision was "not intended to operate in perpetuity."<sup>277</sup> The last two cases in the

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269. *Id.*

270. See *Brown Commentators' Roundtable, Day One*, *supra* note 194.

271. See McNeal, *supra* note 265, at 17 (characterizing the Court's interpretive shift as transmitting "a symbolic and substantive message that the educational goal of integrated learning environments was no longer a priority on a systematic level, regardless of the documented harms of segregated learning environments").

272. See, e.g., Turner, *supra* note 61, at 899.

273. Bd. of Educ. of the Oklahoma City Pub. Sch., *Indep. Dist. No. 89 v. Dowell*, 498 U.S. 237 (1991).

274. *Id.* at 237.

275. *Id.* at 251 (Marshall, J., dissenting) (remarking that board maintained segregated schools for sixty-five years by "initially relying on laws requiring dual school systems . . . [and] by exploiting residential segregation that had been created by legally enforced restrictive covenants").

276. *Id.* at 250.

277. *Id.* at 248.

resegregation trilogy, *Freeman v. Pitts*<sup>278</sup> and *Missouri v. Jenkins*,<sup>279</sup> also involved the complexities of court ordered supervision amid shifting racial demographics.<sup>280</sup> In *Freeman*, shifting racial demographics created predominantly White schools in the northern area of the county and predominately Black schools in the southern portion.<sup>281</sup> In addressing the county's shifting demographics, the Court acknowledged the relationship between residential segregation and school segregation,<sup>282</sup> the historical record of “[p]ast wrongs to the [B]lack race . . . committed by the State,” and the existence of “stubborn facts of history [that] linger and persist.”<sup>283</sup> But it nevertheless held that the county's racially isolated schools were not vestiges of *de jure* discrimination, reasoning that “though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities.”<sup>284</sup> However, the Court did not explicitly address the county's history of residential segregation and blockbusting<sup>285</sup> alluded to by the district court<sup>286</sup> or provide any historical justification for its conclusion about the absence of a causal link between demographic changes and prior *de jure* segregation. Notably, Justice Souter's concurrence explored alternate ways of establishing the causal connection that were overlooked by the majority, observing that a causal link to *de jure* segregation could be established based on “past school segregation and the *patterns of thinking that segregation creates*.”<sup>287</sup>

The Court's emphasis on the importance of local control amid changing racial demographics was also reflected in *Jenkins*. The desegregation plan at issue in that case sought to remedy the *de jure* segregation in Kansas City public schools by requiring the school board to engage in various initiatives designed not only to improve educational opportunities within the district but to

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278. *Freeman v. Pitts*, 503 U.S. 467 (1992).

279. *Missouri v. Jenkins*, 515 U.S. 70 (1995).

280. *Id.* at 81; *Freeman*, 503 U.S. at 475, 477, 480.

281. *Freeman*, 503 U.S. at 476.

282. *Id.* at 471, 495.

283. *Id.* at 495.

284. *Id.* at 495–96.

285. *Id.* at 467. Blockbusting is a form of housing discrimination that was outlawed by the Fair Housing Act of 1968 that encourages homeowners to sell their property based on fears of an influx of minority residents. 42 U.S.C. § 3604(e) (2018); Jennifer Owens et al., *Social Innovation Microgrants as Catalysts to Community Development in Economically Marginalized Urban Communities*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 352, 357 (2018).

286. *Freeman*, 503 U.S. at 471, 480–81.

287. *Id.* at 507 (Souter, J., concurring) (emphasis added).

increase the overall attractiveness of Kansas City public schools to White students enrolled in suburban school districts.<sup>288</sup> In invalidating the board's proactive pedagogical approach which sought to equalize inner-city schools with their suburban counterparts, the Court reasoned that educational initiatives to increase the public schools' "desegregative attractiveness" violated the *Milliken's* prohibition on inter-district segregation remedies to redress vestiges of *de jure* segregation in a single district.<sup>289</sup> Additionally, according to scholar Kimberly Jenkins Robinson, "[t]he *Jenkins* decision made clear that the Supreme Court would not uphold efforts to make racially isolated schools equal by improving the educational programming in segregated schools and thus effectively abandoned even a return to *Plessy's* 'separate but equal' doctrine."<sup>290</sup>

The collective impact of the *Milliken* decision and the Rehnquist Court's resegregation trilogy was twofold. First, it replicated the relational inequities of Jim Crow by adopting a specious distinction between *de facto* and *de jure* segregation that ignored the causal link between *de jure* segregation and decades of federal and state policies that sanctioned housing discrimination and racially discriminatory lending practices that stripped Black families of mobility and agentic educational opportunities available to their White counterparts. As Lawrence observes, "[t]he injury of segregation is found in its social meaning."<sup>291</sup> The repudiation of segregation means nothing if it results in the same social context at the root of *de jure* segregation: a dichotomy between civil and social equality resulting in a diminution of agency and reciprocity among the targeted group that invites ridicule by the dominant society.<sup>292</sup> Furthermore, the Court's impairment of Black families' associational and mobility interests is premised on untenable assumptions. The Court simply assumed that some degree of racial isolation was permissible as the inevitable result of private choices or societal discrimination, not the inevitable result of decades of federal and state sanctioned racially-defined home lending practices such as mortgage redlining, racially restrictive covenants,

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288. *Missouri v. Jenkins*, 515 U.S. 70, 74–78, 80 (1995).

289. *Id.* at 99–100.

290. Robinson, *supra* note 240, at 834.

291. Charles R. Lawrence, *Unconscious Racism and the Conversation about the Racial Achievement Gap*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 113, 115 (Justin Levinson & Robert J. Smith eds., 2012).

292. Murphy, *supra* note 12, at 131–32.

blockbusting, and federal highway and urban renewal projects that subsidized the development of White suburbs while erecting highway infrastructure that displaced Black households and separated White and Black neighborhoods.<sup>293</sup> However, in *Freeman*, the Court typically reached its conclusions about the absence of a causal link between demographic changes and prior *de jure* segregation without any comprehensive historical justification. In commenting on the specious distinction between *de jure* and *de facto* segregation, noted scholar Richard Rothstein observed that “State action played not a minor, but the major role, more influential than ‘societal discrimination’ or ‘private choices.’ . . . [However,] [t]his argument has rarely been forcefully presented to the courts, partly because the history of state-sponsored segregation has been forgotten, even suppressed.”<sup>294</sup> The absence of a historical record and the difficulties that it poses in school desegregation cases was also acknowledged by Justice Anthony Kennedy who opined that “[t]he distinction between government and private action . . . can be amorphous both as a historical matter and as a matter of present-day finding of fact.”<sup>295</sup> Rothstein’s and Justice Kennedy’s observations are consistent with principles of transitional justice that emphasize the importance of creating a historical record of past government sanctioned wrongdoing and highlight the ways that societal transformation can be thwarted by its absence.

Second, the Rehnquist Court’s resegregation trilogy led to the demise of integration as an educational policy and to a system of public education that is even more racially segregated than it was in 1968.<sup>296</sup> The isolation of Black students within a social context of White resistance to desegregation and racial stereotypes evokes “the story that segregation tells to [B]lack children and to the rest of us . . . in its designation of a superior and an inferior caste.”<sup>297</sup>

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293. See Richard Rothstein, *The Myth of De Facto Segregation*, PHI DELTA KAPPAN, Feb. 2019, at 35, 35 (discussing the history of governmental action in contributing to residential segregation); Jonathan Spader et al., *Fostering Inclusion in American Neighborhoods*, in A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 22 (2018) (ebook).

294. Richard Rothstein, *What Have We—De Facto Racial Isolation or De Jure Segregation?*, 40 HUM. RTS. MAG., no. 3, 2014, at 8–9.

295. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring).

296. IRONS, *supra* note 125, at xiii; Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 322–23 (2015); Rosiek, *supra* note 4, at 8; Turner, *supra* note 61, at 902.

297. Lawrence, *supra* note 291, at 115.

Many of the nation's largest inner-city school districts are almost without exception, non[W]hite and increasingly segregated."<sup>298</sup> Furthermore, according to a 2017 analysis by the UCLA Civil Rights Project, "75[%] [B]lack students attend majority minority schools, while 38[%] go to schools that are less than 10[%] [W]hite."<sup>299</sup> One particularly ominous aspect of the reemergence of racially-segregated schools is the correlation between *de facto* school segregation and an overall decrease in the availability and quality of resources accessible to racially segregated schools serving predominately Black and Latinx students.<sup>300</sup> Racially-segregated, overwhelmingly minority public schools "are characterized by poorer test scores, less-experienced teachers, and fewer resources than the public schools most [W]hite children attend."<sup>301</sup> In addition to these aspects of the school environment, racially segregated schools with high concentrations of minority students often have fewer of the resources that are so vital to college and vocational readiness, such as "college preparation curricula, higher-level science and math courses, or guidance counselors."<sup>302</sup> This convergence of independent factors that result in decreased educational opportunities for minority students in comparison with their White peers is the functional equivalent of *de jure* segregation. As constitutional law scholar Charles Daye so eloquently explains, "[h]ow can *equal protection* not mean *equality in fact*? It takes a lawyer to explain best how things can be legally equal but not equal in any factual sense."<sup>303</sup> The Court's narrow interpretation of its remedial power ensured that the relational inequities of Jim Crow would remain unaddressed and that the nation's system of public education would remain in a perennial state of transition. Consequently, the subtle and not so subtle messages that continue to exist about Black intellectual inferiority some sixty-five years after *Brown* persist in the sub-text of our nation's history, collective memory, and system of public education.

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298. WIGFALL ROBINSON & BONNIE, *supra* note 108, at 6.

299. See Berlatsky, *supra* note 185.

300. See Rosiek, *supra* note 4, 10–11.

301. CASHIN, *supra* note 4, at 202.

302. Thompson-Dudiak, *supra* note 98, at 188.

303. Daye, *supra* note 162, at 99 (emphasis in original).

### III. Jim Crow's Ideology of Black Intellectual Inferiority Haunts a New Generation: Stereotype Threat, Stigma Threat, and the Soft Bigotry of Low Teacher Expectations

Somebody told a lie one day. . . . They made everything Black, ugly and evil.

—Martin Luther King, Jr.<sup>304</sup>

Dr. King's quote alludes to the intransigence of attitudes about Black inferiority that continues to resonate in the nation's consciousness. As demonstrated by the analysis in the preceding section, stereotypes of Black intellectual inferiority were not eradicated during the sociopolitical shift from segregation. Instead, *Brown I's* transitional narrative of paternalism and assimilation, *Brown II's* vague remedial framework, and the Court's narrative shift in the 1990s toward acquiescence and accommodation focused on desegregation without striking at stereotypes of Black intellectual inferiority at the root of segregation. Because of these transitional deficiencies, integration did not remedy decades of racially stereotypical thinking about the ability of Black students. Dr. King's vision of a genuine integration did not occur, and consequently, many Black students find themselves in a double-bind: either marginalized and subordinated within predominately White schools<sup>305</sup> or isolated from their White peers without culturally sustaining educational spaces or the protective strategies for psychological resilience embodied in the legacy of pre-integration Black schools. Professor Charles Lawrence poignantly describes the double-bind that many modern-day Black students experience:

Today, African American students live in a more confusing world. They experience the slights, stereotypes, and exclusions of racism, but civil rights laws have made racial discrimination illegal, and most [W]hite Americans embrace the ideal of racial equality. Yet, these laws have eliminated neither the structures of racism nor the beliefs and practices that whisper stories of inherent inferiority in young people's ears.<sup>306</sup>

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304. Phil Michael, *Dr. Martin Luther King, Jr.—"I'm Black and Beautiful"*, YOUTUBE, (Nov. 2, 2014), <https://www.youtube.com/watch?v=XNCSIWCyvTY> [<https://perma.cc/33D4-KZHV>].

305. DEGRUY, *supra* note 78, at 23; KAILIN, *supra* note 184, at 42.

306. Lawrence, *supra* note 291, at 126.

Consistent with Lawrence's observations, whispers of Black intellectual inferiority manifest themselves in the modern-day phenomena of stereotype and stigma threat.<sup>307</sup> Stereotype threat is a well-documented educational phenomenon first articulated by psychologists Claude Steele and Joshua Aronson. It explains how pervasive negative intellectual stereotypes and a student's awareness of these stereotypes trigger anxiety, fear, and distraction that negatively impact academic performance.<sup>308</sup> According to psychologists, children become aware of others' stereotypes about them between the ages of six and eleven, and thus "by early adolescence, most children have developed knowledge of broadly held stereotypes."<sup>309</sup> Although initially developed to explain impaired performance among Black students in college testing environments, researchers have determined that stereotype threat can be observed in secondary education settings by any group subject to pervasive stereotypes of low academic ability, and triggered by any task capable of confirming a negative stereotype about a group's intellectual ability.<sup>310</sup> These tasks include performance on standardized tests and aspects of academic engagement such as participating in classroom discussions, interacting with peers, or pursuing post-secondary education opportunities.<sup>311</sup> Paradoxically, highly-motivated students who are most invested in academics and whose academic engagement should enhance their performance are most vulnerable to stereotype threat.<sup>312</sup> Stereotype threat "initiates a cascade of events

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307. Racial stereotypes and biases also impact other aspects of the school environment. See Oluwole & Green III, *supra* note 215, at 16–17, 21 (describing the practice of tracking and ability grouping in secondary schools as "rooted in the beliefs of minority inferiority and low intelligence that openly prevailed prior to and in the early twentieth century and more subtly today"); Rosiek, *supra* note 4, at 10 (discussing racial segregation at the classroom level, especially in advanced placement and international baccalaureate classes).

308. Erman & Walton, *supra* note 296, at 312.

309. Clark McKown & Michael J. Strambler, *Developmental Antecedents and Social and Academic Consequences of Stereotype-Consciousness in Middle Childhood*, 80 CHILD DEV. 1643, 1644, 1653 (2009).

310. Robin Nicole Johnson-Ahorlu, "Our Biggest Challenge Is Stereotypes": Understanding Stereotype Threat and the Academic Experiences of African American Undergraduates, 82 J. NEGRO EDUC. 382, 383 (2013).

311. *Id.*

312. Jonathan Feingold, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSP. 231, 240 (2011); Jason W. Osborne & Christopher Walker, *Stereotype Threat, Identification with Academics, and Withdrawal from School: Why the Most Successful Students of*

leading to a self-fulfilling prophecy” that has life-altering academic consequences.<sup>313</sup> For example, some of “[t]he most rigorous estimates suggest that stereotype threat accounts for a substantial proportion of racial achievement gaps.”<sup>314</sup>

Stigma threat is another equally pernicious, but lesser known way that the nation’s schools remain plagued by the attitudinal remnants of Jim Crow segregation. In stark contrast to stereotype threat, stigma threat is the external manifestation of negative racial stereotypes in the school environment.<sup>315</sup> If unchecked, stigma threat results in racially hostile educational environments where Black students and other racial minorities affected by stereotypes of intellectual deficiency feel isolated and unwelcome.<sup>316</sup> Implicit racial bias among teachers, another feature of racially hostile educational environments, “is one of the biggest barriers to closing the achievement gap between [W]hite children and students of color, particularly those who come from low-income homes.”<sup>317</sup> Noted author Verna Myers defines implicit bias as “the stories we make up about people before we know who they actually are”<sup>318</sup> and the term broadly encompasses “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”<sup>319</sup> Americans of every race have implicit biases that can be exacerbated by the absence of racially and culturally diverse life experiences.<sup>320</sup> Demographic data about the paucity of interracial social interactions, the intransigence of attitudes about Black intellectual inferiority, and the shifting racial demographics of the nation’s public schools reveal a system of public education that is conducive to implicit bias.<sup>321</sup> According to one survey, “75[%] of

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*Colour Might Be Most Likely to Withdraw*, 26 EDUC. PSYCHOL. 563, 563, 566–67 (2006).

313. McKown & Strambler, *supra* note 309, at 1646.

314. Erman & Walton, *supra* note 296, at 313.

315. Stacy L. Hawkins, *Mismatched or Counted Out? What’s Missing from Mismatch Theory and Why It Matters*, 17 U. PA. J. CONST. L. 855, 874 (2015).

316. *Id.*

317. *How to Promote Diversity in the Classroom: Recognize and Challenge Implicit Bias*, WATERFORD.ORG (June 28, 2019), <https://www.waterford.org/education/implicit-bias-in-education/> [<https://perma.cc/5ADD-EW3E>].

318. See Shane Safir, *5 Keys to Challenging Implicit Bias*, GEORGE LUCAS EDUC. FOUND. (Mar. 14, 2016), <http://www.edutopia.org/blog/keys-to-challenging-implicit-bias-shane-safir> [<https://perma.cc/3HMT-3GN8>].

319. See *Understanding Implicit Bias*, OHIO ST. U.: KIRWAN INST. FOR STUDY RACE & ETHNICITY (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> [<https://perma.cc/6WHS-CF4P>].

320. See *How to Promote Diversity in the Classroom*, *supra* note 317.

321. See *id.*

[W]hite Americans have entirely [W]hite social networks[—]an experience that results in exaggerated perceptions of difference as well as fear and threat.”<sup>322</sup> Furthermore, a study conducted during the era of the Rehnquist Court revealed that 53% of Whites believed that Blacks were not as intelligent, and another study conducted during the same period revealed that “37[%] of White Americans professed that African Americans are incapable of being motivated to learn.”<sup>323</sup> Paradoxically, although these statistics substantiate the social isolation and existence of attitudinal remnants of Jim Crow segregation among Whites, interracial teacher-student contact is the norm in American public schools.<sup>324</sup> According to statistics from the National Education Association (NEA), “the overall number of non-White students has surpassed 50[%] while White teachers still account for 84[%] of the teaching force in the public school system.”<sup>325</sup> Given these statistics, it follows that some White teachers harbor racial biases that result in the “distorted mental frameworks imposed by segregation . . . [that cause them] to see members of other racial and ethnic groups as images consistent with past ideologies of imposed superiority and oppression rather than as authentic individuals.”<sup>326</sup>

Implicit bias among White teachers is often manifested in what one scholar describes as the “[s]oft [b]igotry of [l]ow [e]xpectations.”<sup>327</sup> In a policy pronouncement encouraging teacher training programs to adopt culturally responsive pedagogical practices, the NEA observed that “non-Black teachers have significantly lower expectations of Black students . . . [that] can unknowingly lead a teacher to change their instructional strategies and/or select resources that do not challenge or develop Black students’ cognitive or analytical skills.”<sup>328</sup> This finding is particularly troubling because empirical research reveals that high teacher expectations are inextricably linked to academic success

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322. See Safir, *supra* note 318.

323. Oluwole & Green III, *supra* note 215, at 21–22.

324. Arthur L. Whaley, *Advances in Stereotype Threat Research on African Americans: Continuing Challenges to the Validity of its Role in the Achievement Gap*, 21 SOC. PSYCHOL. EDUC. 111, 129 (2018).

325. NAT’L EDUC. ASS’N, CONFRONTING IMPLICIT BIAS THROUGH EXEMPLARY EDUCATOR PREPARATION 1 (2018), <http://www.nea.org/assets/docs/23840%20Confronting%20Implicit%20Bias%20Thru%20Exemp%20Teacher%20Prep-v2.pdf> [<https://perma.cc/E9HY-5SS4>].

326. Foehrenbach Brown, *supra* note 10, at 221.

327. Hawkins, *supra* note 315, at 893–94.

328. NAT’L EDUC. ASS’N, *supra* note 325, at 2.

among Black students<sup>329</sup> and that students perform in ways that are consistent with their teacher's expectations.<sup>330</sup> The deleterious impact of implicit bias embodied in these statistics was also reflected in a 2014 study documenting the effects of racial stereotypes on collegiate teacher-student relationships.<sup>331</sup> According to that study, Black students "have higher mistrust of teachers than [W]hite students based on the pervasive stigma of [B]lack intellectual inferiority . . . [that can] trigger a 'social-cognitive barrier . . . that obscures the meaning of constructive feedback and prevents students from learning from it.'"<sup>332</sup> These findings highlighting the importance of trust in teacher-student relationships were substantiated by a 2017 research study which found that a caring attitude "is the dimension of student-professor interactions responsible for positive academic self-concept among African American college students."<sup>333</sup> Acclaimed educator Theresa Perry emphasizes the importance of teachers in affirming Black students' identification with schooling and intellectual work, noting that:

[A] child's belief in the power and importance of schooling and intellectual work can be interrupted by teachers . . . who explicitly or subtly convey a disbelief in the child's ability for high academic achievement, and the child having a rightful place in the larger society—unless a counternarrative about the child's identity as an intellectual being is intentionally passed on to him or her.<sup>334</sup>

Ironically, the counternarrative that Perry references—the cornerstone of the educational ethos of pre-integration Black schools and the legacy of its Black educators—was obfuscated as the *quid pro quo* for the progress of integration and by the adoption of an assimilationist model for school desegregation.<sup>335</sup> Given this

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329. Hawkins, *supra* note 315, at 875, 893–94; Whaley, *supra* note 324, at 128–29.

330. Hawkins, *supra* note 315, at 896.

331. *Id.* at 899 (quoting findings from a research study published in 2014).

332. *Id.* at 898–99 (quoting findings from a research study published in 2014).

333. Whaley, *supra* note 324, at 129.

334. THERESA PERRY ET AL., *YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS* 79 (2003).

335. See *supra* Section II.B.2; see generally Anthony L. Brown, *Counter-Memory and Race: An Examination of African American Scholars' Challenges to Early Twentieth Century K-12 Historical Discourses*, 79 J. NEGRO EDUC. 54 (2010) (comprehensively discussing the use of curriculum writing by early twentieth century Black scholars to challenge narratives of inferiority).

assimilationist model, public schools are a function of White dominant culture.<sup>336</sup> And thus Perry contends that “most of our educational institutions continue to institutionalize ‘[W]hiteness’ as the culture of power.”<sup>337</sup> An institutionalized culture of Whiteness, according to Perry, means that Black students who do not mimic the “subset of those cultural features that represent ‘[W]hiteness’ in the American imagination” will lack cultural capital, the socially inherited cultural competence necessary for academic achievement.<sup>338</sup> These cultural features include a reserved demeanor and the ability to subordinate emotion to reason, constrain physical activity, and present a disciplined exterior.<sup>339</sup> Because Black children without cultural capital manifest characteristics that are at odds with the dominant culture, these differences can trigger differential treatment which may stem from implicit biases about Black intellectual inferiority. Furthermore, without the protective strategies for psychological resilience at the heart of pre-integration Black schools being reinforced by teachers with culturally informed approaches to pedagogy, Black students are at risk for not developing psychological buffers that thwart the detrimental impact of teacher-student interactions tainted by implicit bias.

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336. See Molefi Kete Asante, *The Afrocentric Idea in Education*, 60 J. NEGRO EDUC. 170, 174 (1991) (“[A] ‘Whites-only’ orientation has predominated in education.”) (emphasis added); see also Danielle N. Boaz, *Equality Does Not Mean Conformity: Reevaluating the Use of Segregated Schools to Create a Culturally Appropriate Education for African American Children*, 7 CONN. PUB. INT. L.J. 1, 8–10 (2007) (discussing the Eurocentric focus of American education where “African Americans are only taught to identify their ancestors as slaves, and they learn nothing of the cultures of the tribes from which these slaves descended”).

337. PERRY ET AL., *supra* note 334, at 74.

338. *Id.* at 75.

339. *Id.*

#### IV. Moving Toward Attitudinal Transformation: A Preliminary Framework for Acknowledging the Legacy and Dangers of Racial Stereotyping in American Education

History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again.

—Maya Angelou<sup>340</sup>

The enduring truth of Maya Angelou’s exhortation—acknowledging the injuries caused by the attitudinal remnants of Jim Crow segregation so that they “need not be lived again”—is the equitable mandate of transitional justice. However, the Roberts Court seems unlikely to rectify the transitional deficiencies at the root of the Court’s desegregation jurisprudence given its 2007 ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>341</sup> that invalidated voluntary attempts by school districts to create racially-integrated schools. This decision signaled the Court’s continued ambivalence to the attitudinal remnants of Jim Crow segregation that has resulted in the reemergence of segregated public schools.<sup>342</sup> Consequently, the Court’s unwillingness to acknowledge the relationship between present-day issues of educational inequality and the attitudinal remnants of Jim Crow segregation will likely continue. Absent a radical, transformative paradigmatic shift from the Court—a literal *Brown 2.0*—the Federal Government’s reliance on the rule of law as the exclusive vehicle for eradicating the attitudinal remnants of Jim Crow segregation will continue to perpetuate attitudes of Black intellectual inferiority at the root of contemporary issues of educational inequality.

However, several recent high-profile reconciliatory initiatives reflect the public’s increasing interest in transitional justice practices and its willingness to engage in a national dialogue about the relationship between present-day issues of racial inequality and the legacy of slavery and Jim Crow. Headlines about reparations have dominated news cycles, reinvigorating discussion about an issue that failed to generate any traction when it entered the

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340. BOSTON BUSING/DESEGREGATION PROJECT, *supra* note 96, at 28.

341. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

342. Robinson, *supra* note 240, at 839.

national dialogue during the early and mid-2000s<sup>343</sup> amid the wave of non-federally endorsed transitional justice inspired initiatives outlined in Part II. 2020 Democratic presidential candidates Kamala Harris, Elizabeth Warren, Julián Castro, and Marianne Williamson captured national attention by openly discussing the issue of reparations in their campaigns.<sup>344</sup> Fueled by discourse about the possibility of restitution to the descendants of slaves, Congress held its first hearing on reparations in more than a decade on June 19, 2019, a day of cultural significance in the Black community.<sup>345</sup> This hearing was the culmination of twenty-eight years of legislative activism by former Congressman John Conyers, urging Congress to convene a commission to study “subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans.”<sup>346</sup> But the most dramatic example of the public’s increasing interest in paradigmatic transitional justice practices is the nationally publicized reparations program initiated by Georgetown University students in April 2019, benefitting the descendants of slaves who were sold in 1838 to pay the University’s debts.<sup>347</sup> The students’ demand for reparations is the most recent reconciliatory effort in a larger campaign to force the University to acknowledge its complicity in perpetuating slavery that includes 1960s-style sit-ins and a demand that the administration rename buildings bearing the names of men who orchestrated the sale of slaves.<sup>348</sup> Prominent private sector institutions have also garnered public attention with their efforts to acknowledge the relationship between present-day issues of racial inequality and the legacy of slavery and Jim Crow. In August 2019, *The New York Times*

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343. See *We Don’t Want Dollars*, *supra* note 58, at 25–29 (briefly summarizing the quest for reparations in the United States).

344. See P.R. Lockhart, *The 2020 Democratic Primary Debate over Reparations, Explained*, VOX (June 19, 2019, 9:37 AM), <https://www.vox.com/policy-and-politics/2019/3/11/18246741/reparations-democrats-2020-inequality-warren-harris-cast> [<https://perma.cc/DCH8-JJX2>].

345. June 19th is commonly referred to as “Juneteenth,” a holiday commemorating the date when slaves in Texas learned about the end of slavery. See *Debate About Reparations*, *supra* note 63.

346. Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019); see Owens, *supra* note 63; see also *Debate About Reparations*, *supra* note 63 (noting that after Congressman Conyers’s retirement, Congressman Sheila Jackson Lee sponsored the bill).

347. See Lardieri, *supra* note 66.

348. See Andre Perry, *Voting for Reparations, One Institution at a Time*, HECHINGER REP. (Apr. 23, 2019), <https://hechingerreport.org/voting-for-reparations-one-institution-at-a-time/> [<https://perma.cc/5ZRX-ZYH4>].

launched The 1619 Project, a reference to the year that slaves first arrived in the Americas, with a special 100-page edition of its Sunday magazine.<sup>349</sup> The 1619 Project is ambitious in that it argues 1619 to be our true founding and “aims to reframe the country’s history by placing the consequences of slavery and the contributions of [B]lack Americans at the very center of our national narrative.”<sup>350</sup>

The public’s increasing interest in and awareness of transitional justice practices can be leveraged by education reformers to create a preliminary framework of reconciliatory initiatives that could lead to federally endorsed reconciliatory initiatives acknowledging the intergenerational impact of nine decades of school segregation. This preliminary framework should foster three levels of consciousness that roughly correspond to the transitional deficiencies of the Court’s desegregation jurisprudence: (1) acknowledging attitudes of Black inferiority and White supremacy at the root of *de jure* segregation (historical consciousness), (2) recognizing the cultural and educational legacy of pre-integration Black schools that was obfuscated in the transition from segregation (cultural consciousness), and (3) connecting attitudinal remnants of *de jure* segregation to present-day educational inequalities such as stereotype and stigma threats (stereotype consciousness).

Historical consciousness requires reconciliatory initiatives that create national awareness about forgotten aspects of school desegregation, that present a more comprehensive, inclusive version of that history, and that document the causal connection between the attitudinal remnants of Jim Crow segregation and contemporary issues of educational inequality. Museums, such as the National Museum of African American History and Culture, the National Memorial for Peace and Justice, and the Emmett Till Interpretive Center,<sup>351</sup> could become exemplars for commemorative spaces that begin the process of societal transformation by acknowledging the psychological trauma experienced by children of all races during the desegregation of the nation’s schools and the intergenerational impact of that psychological trauma. For example, community advocates working in conjunction with federal agencies such as the National Park Service, national organizations

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349. Nikole Hannah-Jones et al., *The 1619 Project*, N.Y. TIMES MAG., Aug. 18, 2019.

350. See Jake Silverstein, *Why We Published The 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html> [<https://perma.cc/DTS7-F8BX>].

351. See *supra* Part II.

such as the Alliance of African American Museums, and international organizations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO)<sup>352</sup> could form a coalition to commemorate historic sites related to the Prince Edward Free School Association, the federally-funded educational initiative launched in 1963 by the Kennedy Administration in the wake of the massive resistance to school desegregation that closed all of the public schools in Prince Edward County, Virginia for five years.<sup>353</sup> The Association was “the first federal school set up since the Civil War in the South” and was “a model school system for educationally deprived children, open to all students regardless of color and funded by private donations.”<sup>354</sup> Generating public awareness about this important chapter in the history of school desegregation that has been largely obscured in the nation’s collective memory<sup>355</sup> could also lead to truth-telling initiatives chronicling the lives of the Black students who were educated in Association schools and documenting the intergenerational impact of the lost educational opportunities on an entire generation of Black students in Prince Edward County, Virginia.

These kinds of truth-telling initiatives could also become the impetus for documentary films similar to BBDP’s *Can We Talk?—Learning from Boston’s Busing/Desegregation Crisis*, which could be funded by grassroots community activists, private foundations such as the Andrus Family Fund, whose mission is to empower

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352. With the launching of its Slave Route Project, UNESCO has demonstrated an interest in preserving culturally significant memorial spaces. See *Slave Route*, UNESCO, <http://www.unesco.org/new/en/social-and-human-sciences/themes/slave-route/spotlight/preservation-of-memorial-sites-and-places/> [https://perma.cc/FTQ7-MLD3].

353. See Emanuel Riley, *The Prince Edward County Free School Association*, REDISCOVERING BLACK HIST. (May 19, 2015), <http://rediscovering-black-history.blogspot.com/2015/05/19/prince-edward-county-free-school-assoc/> [https://perma.cc/KR7L-456Q].

354. *The Story of Prince Edward County Schools—Prince Edward County Schools Handout*, PBS: NEWSHOUR (2014), <http://www.pbs.org/newshour/extra/app/uploads/2014/04/Prince-Edward-County-School-Handout.pdf> [https://perma.cc/67B2-8YWQ].

355. See, e.g., Kristen Green, *Prince Edward County’s Long Shadow of Segregation*, ATLANTIC (Aug. 1, 2015), <http://www.theatlantic.com/national/archive/2015/08/segregation-prince-edward-county/400256/> [https://perma.cc/ZS49-7JDV] (documenting the intergenerational impact of the five-year school closure and observing that “[d]ecades later, the impact of those years of missed education can still be felt through the county’s 16[%] illiteracy rate, four points higher than the state average, and 20[%] of the population lives below the poverty level. And the once-closed school district is now a failing system”).

young people of color to community activism,<sup>356</sup> or federal agencies such as the National Endowment for the Arts that provides funding “to sustain artistic traditions of culturally-distinct communities and promote the vitality of those traditions.”<sup>357</sup> These kinds of films have the potential to reach a larger audience and to facilitate truth-telling initiatives in other areas of the country that examine the intergenerational impact of similar educational deprivations that occurred during the decade-long period of overt and often violent massive resistance to school desegregation. Another equally important aspect of historical consciousness is creating a historical record that establishes a causal connection between the attitudinal remnants of Jim Crow segregation and contemporary issues of educational inequality. The same spirit of inquiry that resulted in Congressional hearings on reparations could be leveraged to petition Congress to conduct a similar inquiry into the causal link between decades of federal, state, and local policies sanctioning housing discrimination and racially discriminatory lending practices that was obfuscated by the Rehnquist Court’s specious distinction between *de jure* and *de facto* segregation, one that led to the reemergence of contemporary *de facto* segregated schools.

Although closely related to historical consciousness, culturally conscious transitional justice practices would focus on educating the nation about the distinct Black educational ethos that was obfuscated by an assimilationist model for school desegregation. For example, grassroots community organizers, in conjunction with state and local school boards, could petition Congress to pass a bill funding the preservation of significant cultural and historical sites related to the legacy of pre-integration Black schools. Culturally conscious reconciliatory initiatives should also include the lobbying of state and local school boards, state legislatures, and private education stakeholders such as the NEA for the adoption of a more

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356. See *Who We Empower*, ANDRUS FAM. FUND, <http://affund.org/our-focus/> [<https://perma.cc/8LQ9-K4A7>]. The fund has awarded grants to several community-based organizations that raise awareness of modern-day issues of educational equity such as the School Justice Project which provides advocacy services to “ensure that older, court-involved students with disabilities can access a quality education.” See *Our Mission*, SCHOOL JUST. PROJECT, <http://www.sjpd.org/> [<https://perma.cc/8VMZ-NR7G>]. Another grantee, Race Forward, engages in “systemic analysis and an innovative approach to complex race issues to help people take effective action toward racial equity.” See *About Race Forward*, RACE FORWARD, <http://www.raceforward.org/about> [<https://perma.cc/M5W3-3G7K>].

357. *NEA National Heritage Fellows: Fact Sheet*, NAT’L ENDOWMENT FOR ARTS, <http://www.arts.gov/sites/default/files/Heritage-Fellows-FactSheet-June2019.pdf> [<https://perma.cc/7MM7-HCEV>].

culturally inclusive public school curriculum to redress the cultural and psychological injuries resulting from the adoption of an assimilationist model for school desegregation. This culturally inclusive curriculum should depict a more comprehensive view of the role of Black Americans in American history, not limited to slavery and civil rights, but exploring the cultures and tribes of Africa from which these African-Americans descended. This history should be integrated throughout the school year and taught in a way that presents it as an ongoing narrative of agency, empowerment, and resilience, not stigma, victimization, or cultural deprivation. Curriculum standards developed by states, such as Mississippi<sup>358</sup> and Illinois,<sup>359</sup> requiring that every public elementary school and high school incorporate civil and human rights education into its curriculum, could be used as exemplars for the development of national curricular standards.

Lastly, stereotype conscious reconciliatory initiatives should direct national attention to the attitudinal remnants of Jim Crow segregation that manifest themselves in stereotype threat, stigma threat, and implicit bias. In May 2019, New York City Schools Chancellor Richard Carranza made national headlines when he announced that the city would invest approximately \$20 million in mandatory anti-bias training programs for teachers, administrators, and staff.<sup>360</sup> School districts in cities, such as Long Beach, California and Cleveland, Ohio, have launched similar anti-bias initiatives.<sup>361</sup> Coordinated efforts between private advocacy organizations, such as the NEA and the National Alliance of Black School Educators, the Department of Education, and its Office for Civil Rights, could capitalize on these local efforts by developing a national set of standards that would link anti-bias training to accreditation and licensing for teacher education programs. Furthermore, anti-bias training should be supplemented with some of the historically and culturally conscious transitional practices

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358. MISS. CODE ANN. §§ 37-13-191 to -195 (West 2019).

359. 122 ILL. COMP. STAT. 5/27-20.4 (2019).

360. See Alex Zimmerman & Reema Amin, *NYC's Anti-Bias Training for Educators Is Contentious—And Behind Schedule. Some Advocates Say That's Not a Bad Thing*, CHALKBEAT (May 31, 2019), <http://www.chalkbeat.org/posts/ny/2019/05/31/nycs-anti-bias-training-for-educators-is-contentious-and-behind-schedule-some-advocates-say-thats-not-a-bad-thing/> [https://perma.cc/5A2Y-8YPG].

361. Sarah Schwartz, *Next Step in Diversity Training: Teachers Learn to Face Their Unconscious Biases*, EDUC. WK. (May 14, 2019), <https://www.edweek.org/ew/articles/2019/05/15/next-step-in-diversity-training-teachers-learn.html> [https://perma.cc/LR4M-WCQU].

previously referenced so that teachers are “informed about the history of racism in schools and various creative forms that resistance to racism has taken.”<sup>362</sup>

Stereotype conscious reconciliatory initiatives should also include educating students, parents, and the nation about how stereotypes of Black intellectual inferiority perpetuate pervasive structural inequalities in the nation’s public schools by putting Black and White students on unequal footing in educational environments that purport to be a meritocracy: the belief at the foundation of American education that academic success is not a function of race or social class,<sup>363</sup> but “a matter of motivation and talent and grit.”<sup>364</sup> As previously discussed, stereotypes and implicit biases can be exacerbated by the absence of racially and culturally diverse life experiences and educational environments. Demographic data substantiating the re-emergence of *de facto* racially segregated schools suggests that students would benefit from age-appropriate anti-bias and implicit bias training. Furthermore, education reformers could also create stereotype conscious reconciliatory initiatives that engage students via the innovative use of films, storytelling, and interactive media. Several cable television networks have begun the process of generating public attention about how stereotypes of Black inferiority rooted in Jim Crow segregation manifest themselves in the nation’s public schools. These could serve as exemplars for stereotype conscious transitional justice practices. For example, in 2018, the STARZ network debuted *America to Me*, a ten-part docu-series that poignantly depicts how the attitudinal remnants of Jim Crow segregation manifest themselves in racial divides, stereotypes of Black intellectual inferiority, and the implicit biases of well-meaning teachers at a suburban Chicago high school that is touted as a model of successful school integration.<sup>365</sup> Wyatt Cenac’s *Problem Areas*, an HBO series that explores polarizing topics in contemporary American life, devoted its second season to exploring

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362. Rosiek, *supra* note 4, at 12.

363. See *How to Promote Diversity in the Classroom*, *supra* note 317; see also Maureen T. Hallinan, *Sociological Perspectives on Black-White Inequalities in American Schooling*, 74 SOC. EDU. 50, 50 (2001).

364. Melinda D. Anderson, *Why the Myth of Meritocracy Hurts Kids of Color*, ATLANTIC (July 27, 2017), <http://www.theatlantic.com/education/archive/2017/07/internalizing-the-myth-of-meritocracy/535035/> [https://perma.cc/QWS3-Z36T].

365. See Aisha Harris, ‘*America to Me*’: *What Did the Students Think?*, N.Y. TIMES (Oct. 28, 2018), <http://www.nytimes.com/2018/10/28/arts/television/america-to-me-students-starz.html> [https://perma.cc/RUA3-6GVH].

inequities in the United States' public education system, including the intransigence of stereotypes of Black intellectual inferiority.<sup>366</sup> These kinds of films could also lead to cross-racial healing initiatives between school districts. For example, school districts with large numbers of racially segregated schools could partner with racially diverse school districts or predominately White school districts to launch cross-racial healing initiatives akin to The Welcome Table initiatives highlighted in Part II. These moderated cross-racial student dialogues could also become the impetus for the innovative use of storytelling, interactive media, and the visual arts to challenge students to create self-produced documentaries and podcasts to tell their individual stories and to document the stories of others in their school communities.

### Conclusion

Though deeply flawed, *Brown Is* enduring legacy is its character as a transitional legal rule that “remains a pivotal moment in the struggle for racial justice,” triggering a “movement that overturned Jim Crow in the South and sparked a revolution . . . that transformed America’s social and political landscape.”<sup>367</sup> However, a society and system of public education in perennial transition dishonor *Brown Is* equitable imperative as a transitional legal rule “to face our past squarely, commit the resources necessary to changing the deplorable inequalities of the present, and embrace an underlying commitment to substantive equality.”<sup>368</sup> Furthermore, the Federal Government should demonstrate an undaunted commitment to eradicating stereotypes of intellectual inferiority at the root of Jim Crow segregation that is not premised on altruism or paternalism toward Black Americans but on strengthening democracy so that it lives up to its egalitarian and liberalizing ideals. In his dissent to *Milliken v. Bradley*, Justice Marshall argued that “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”<sup>369</sup> Marshall’s argument invokes the inherently political aspect of

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366. See Anne Branigin, *We’ve Been Talking About Education All Wrong*, Wyatt Cenac Wants to Change That, ROOT (Apr. 5, 2019, 3:00 PM), <http://thegrapevine.the.root.com/weve-been-talking-about-education-all-wrong-wyatt-cena-1833823984> [<https://perma.cc/F5YG-HAD2>].

367. Turner, *supra* note 61, at 909–10 (quoting ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 242 (2005)).

368. See BOSTON BUSING/DESEGREGATION PROJECT, *supra* note 96.

369. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

*Brown I* that is often obscured in contemporary discussions: the threat that *de jure* segregation and its ideology of Black inferiority poses to democratic ideals and to the primary function of public education as preparing students of all races to be good citizens.<sup>370</sup> Consequently, as scholar Jerry Rosiek argues so persuasively, unaddressed stereotypes and attitudes of Black intellectual inferiority are detrimental to the well-being of all students:

[T]hese tacit curricular messages [of inferiority] affect students of all races . . . cast into doubt the familiar story, often taught in schools, of steady progress toward racial justice . . . [but] [p]erhaps most problematically, they normalize racial segregation for all students in these schools and make it easier to accept it in other parts of their lives.<sup>371</sup>

If students of all races begin to accept racial segregation as a normalized part of United States' schools and society, societal transformation will remain elusive, facilitating what Canadian scholars Frances Henry and Carol Tator describe as democratic racism that "further[s] the interests, and increase[es] the power, of the dominant group while maintaining a veneer of democracy."<sup>372</sup> A veneer of democracy perpetuates a *Plessy*-like dichotomy between legal and social equality and creates a separatist world that poses the same threat to authentic democracy as it did in 1954.

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370. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

371. Rosiek, *supra* note 4, at 11.

372. Emil Marmol, *The Undemocratic Effects and Underlying Racism of Standardized Testing in the United States*, CRITICAL INTERSECTIONS EDUC., Winter 2016, at 2.