

Michigan Journal of Race and Law

Volume 25

2020

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Recommended Citation

Najarian R. Peters, *The Right to Be and Become: Black Home-Educators as Child Privacy Protectors*, 25 MICH. J. RACE & L. 21 (2019).

Available at: <https://repository.law.umich.edu/mjrl/vol25/iss1/3>

<https://doi.org/10.36643/mjrl.25.1.right>

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THE RIGHT TO BE AND BECOME: BLACK HOME-EDUCATORS AS CHILD PRIVACY PROTECTORS

Najarian R. Peters*

ABSTRACT

The right to privacy is one of the most fundamental rights in American jurisprudence. In 1890, Samuel D. Warren and Louis D. Brandeis conceptualized the right to privacy as the right to be let alone and inspired privacy jurisprudence that tracked their initial description. Warren and Brandeis conceptualized further that this right was not exclusively meant to protect one's body or physical property. Privacy rights were protective of "the products and the processes of the mind" and the "inviolable personality." Privacy was further understood to protect the ability to "live one's life as one chooses, free from assault, intrusion or invasion except as can be justified by the dear needs of community living under a government of law." Case law supported and extended their theorization by recognizing that privacy is essentially bound up in an individual's ability to live a self-authored and self-curated life without unnecessary intrusions and distractions. Hence, privacy may be viewed as the right of individuals to be and become themselves. This right is well-established; however, scholars have vastly under-theorized the right to privacy as it intersects with racial discrimination and childhood. Specifically, the ways in which racial discrimination strips Black people—and therefore Black children—of privacy rights and protections, and the ways in which Black people reclaim and reshape those rights and protections remain a dynamic and fertile space, ripe for exploration yet unacknowledged by privacy law scholars. The most vulnerable members of the Black population, children, rely on their parents to protect their rights until they are capable of doing so themselves.

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Still, the American education system exposes Black children to racial discrimination that results in life-long injuries ranging from the psychological harms of daily racial micro-aggressions and assaults, to disproportionate exclusionary discipline and juvenile incarceration. One response to these ongoing and often traumatic incursions is a growing number of Black parents have decided to remove their children from traditional school settings. Instead, these parents provide their children with home-education in order to protect their children's right to be and become in childhood.

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INTRODUCTION

This Article offers a thicker privacy perspective that includes a new conceptual framework at the intersections of race, childhood, and home-education. A growing number of Black parents have become home-educators because they have concluded that certain predictable harms that occur in traditional school settings are antithetical to their children's well-being. The conceptual framework presents a mechanism through which law and policy makers may begin to reconsider the epistemology of child privacy protectionism and privacy violations as harmful to children who experience ongoing racial discrimination. This Article proceeds in three parts. Part I examines privacy as the right to be and become firmly rooted in the long-accepted conceptualization of privacy as the right to be let alone. Sub-part A focuses on the jurisprudential history that encompasses the right to be let alone, conceptualized as protection for the individual and their pursuit of self-actualization. Sub-part B examines privacy as boundary and space management. Part II theorizes how Black home-educators as child privacy protectors provide a protective space as a means of self-actualization for being and becoming in childhood. Sub-part A delineates the ways in which the American education system harms Black children. Sub-part B details how Black home educators, in response to this system of racial discrimination that hampers Black children's well-being, intervene to protect their children's privacy. This intervention is defined by three child protectionist practices designed to preserve Black children's right to be and become: preservation of Black childhood, letting Black children self-author their own lives, and insulating Black children from negative distortions. This blended approach centers the right to be let alone, along with other boundary management and self-access limiting measures as described by privacy law scholars. This section makes the case that the right to be let alone is most fitting and appropriate in describing the aspiration of what privacy means to stigmatized and historically disenfranchised people within the specific context of Black childhood in the United States educational system. Part III concludes by offering a nuanced and thicker conceptualization of the meaning of Black parents in the United States from a child privacy protectionist perspective.

I. THE RIGHT TO BE LET ALONE AS THE RIGHT TO BE AND BECOME

A. *The Right to Be Let Alone: The History*

The right to privacy in America began with arguments focused on the person, the tangible home, papers, and other effects that made up physical life, as well as the importance of vague, non-concrete notions of the self and the “inviolable personality.” Samuel Warren and Louis Brandeis published the now famous law review article, *The Right to Privacy*, in 1890.¹ The article encompassed the authors’ bounty from mining and excavating the common law for elements of what eventually became the right to privacy.² Notwithstanding the common law’s focus on corporeal and tangible harms that Warren and Brandeis foresaw as a burgeoning privacy rights analysis, they argued that the “intense intellectual and emotional life, and heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things.” “Thoughts, emotions, and sensations demanded legal recognition.”³ Further, Warren and Brandeis argued that the right to privacy meant the “right to be let alone.”⁴

Warren and Brandeis relied on Judge Thomas Cooley’s Law of Torts in developing their theory of privacy law. While Cooley’s description of the right to be let alone related to the apprehension of an at-

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

2. See *Planned Parenthood v. Casey*, 505 U.S. 833, 926 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Court today reaffirms the long-recognized rights of privacy and bodily integrity. As early as 1891, the Court held that ‘no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of other. . . .’” (quoting *Union Pac. R. Co. v. Bostford*, 141 U.S. 250, 251 (1891))).

3. Warren & Brandeis, *supra* note 1, at 195 (“From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind. . . .”); See also *Olmstead v. United States*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that “[The Framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”). Nearly 40 years later, in *Katz v. United States*, the Court overruled *Olmstead* and adopted Brandeis’ view of privacy. 389 U.S. 347 (1967).

4. Warren & Brandeis, *supra* note 1, at 205 (discussing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1879)).

tempted touching that would result in a tortious injury,⁵ Brandeis and Warren conceptualized privacy harm as a present harm, thus framing the right to privacy as both a protection against that present harm and prevention of future harm. The right to be let alone encompasses both a right to be let alone in the instant moment and a future right to be let alone as one continues to live her life and self-develop. They argued that the purpose of privacy was to protect “the inviolate personality.” Harm to the inviolate personality meant harm to a host of intangible interests such as mental tranquility, human dignity, individuality, and the ability to achieve self-determination.⁶ They also declared that conceptualizing privacy necessarily included grappling with the fundamental importance of what it means to have and to rely on “peace of mind or the relief afforded by the ability to prevent” a future harm, or in the subject case, a future publication of a photo or a story. We might further understand that the future harm of publishing a story or photo as being presented with an incongruent self-perception based on the seer’s interpretation. We might call the result of this incongruence humiliation or an exposure of the self for which privacy provides a protective boundary or shield.

Likewise, Justice Brandeis offered his official view of privacy as a “unitary⁷ concept” as “the right to be let alone” in his dissent in *Olmstead v. United States*.⁸ In *Olmstead*, Justice Brandeis reminded the Court that the writers of the Constitution “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone the most comprehensive of rights, and the right most valued by civilized men.”⁹ The Court eventually overturned *Olmstead* in *Katz v. United States* and recognized that the right to privacy must be considered as a source of protection for

5. COOLEY, *supra* note 4. Warren and Brandeis addressed their alternative reading of Cooley’s “right to be let alone” as privacy and the inviolate personality by what they describe as “the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature,” and foreshadowed that both current and future developments in technology and “business methods call attention to the next step which must be taken for the protection of the person. . . .” See Warren & Brandeis, *supra* note 1, at 195.

6. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 971 (1964).

7. Sheldon W. Halpern, *The Inviolable Personality—Warren and Brandeis after One Hundred Years: Introduction to a Symposium on the Right of Privacy*, 10 N. ILL. U. L. REV. 387, 390 (1990). Halpern argued that, in *Olmstead*, Justice Brandeis synthesized “the disparate aspects of privacy into a unitary concept, referring to a constitutional “right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Id.* at 390.

8. *Olmstead v. United States*, 277 U.S. 438, 478 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

9. *Olmstead*, 277 U.S. at 478.

the intangible interests of individuals.¹⁰ Historically, both the Court's Fourth Amendment and substantive due process protection of privacy¹¹ has mirrored Justice Brandeis' synthesized view of privacy as the right to be let alone. Dissenting in *Time, Inc. v. Hill*, Justice Abe Fortas evoked Justice Brandeis' assessment of the right to privacy as the right to be let alone, as the ability to "live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law."¹²

Privacy was again defined as the right to be let alone by Justice William Douglas in *Doe v. Bolton*, quoting *Kent v. Dulles*, wherein he offered that privacy is essentially bound up in the individual's ability to live a self-authored and self-curated life without unnecessary intrusions and distractions.¹³ The concept of limiting intrusions and distractions connect the right to be let alone to external limited access to one's self as a constitutive element of privacy. Limiting intrusions and distractions, as well as limiting access to one's self seem to confirm that privacy is a boundary that protects against interference from the government as well as the general public.¹⁴ This boundary creates space for the individual self to be and become as explored by a variety of privacy law scholars including Daniel Solove and Julie Cohen.¹⁵

B. *The Right to Be Let Alone: Boundary Management and Space Development*

In *Understanding Privacy*, Daniel Solove argued that privacy as a right to be let alone, "fails to provide much guidance about what privacy en-

10. *Katz*, 389 U.S. at 347.

11. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1101 (2002) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Katz*, 389 U.S. at 350.).

12. 385 U.S. 374, 413 (1967).

13. *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Justice Douglas wrote that "[t]his right to privacy was called by Mr. Justice Brandeis the right 'to be let alone.' That right includes the privilege of an individual to plan his own affairs, for 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'" (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

14. Solove, *supra* note 11, at 1103. (reminding us that Warren and Brandeis' article was published around the same time as E.L. Godkin's popular article *The Rights of the Citizen, IV – To His Own Reputation*, SCRIBNER'S MAGAZINE, July-Dec. 1890, at 65. Therein, Godkin argued that privacy meant "the right to decide how much knowledge of a person's personal thought and feeling" as well as "private doings and affairs," the general public could access, presumably even the government). See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 10–11 (1983).

15. Other privacy scholars such as Anita Allen, Helen Nissenbaum, E. L. Godkin, and Ferdinand Schoeman have similar conceptualizations of privacy.

tails,” because it seems to be too broadly defined.¹⁶ This Article presents the argument that for certain stigmatized groups, the right to privacy, understood as the right to be let alone, is not too broad of a protection but instead a necessary, valuable and sacred right bound to life-preserving negative liberty, even if only in theory. In *Understanding Privacy*, Daniel Solove argued that privacy as a right to be let alone “fails to provide much guidance about what privacy entails.” The limited access to the self,¹⁷ secrecy,¹⁸ control over personal information,¹⁹ personhood,²⁰ and

16. DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 17 (2008). While this might be true in a general context, we might find it more instructive with some updating given the frame within which we discuss privacy here.

17. See Solove, *supra* note 11. Solove describes the limited access to the self as an “individual’s desire for concealment and for being apart from others.” Solove recognizes the close relationship of this concept to the right to be let alone, yet differentiates it from solitude, leaving solitude as a component of limited access to the self. *Id.* at 1102–03 (citing E.L. Godkin, *supra* note 14, wherein Godkin noted that the “right to decide how much knowledge of a person’s personal thought and feeling. . .private doings and affairs. . .the public at large shall have.”). Solove brings similar theorist’s work under the banner of limited access to self through reference to philosopher Sissela Bok, who posits that privacy is “the condition of being protected from unwanted access by others—either physical access, personal information, or attention.” *Id.* at 1103. Hyman Gross’ conception of limited access to self is similar, while Ernest Van Den Haag’s appears to be the most specific, as evidenced by Solove’s description quoting Haag: “Privacy is the exclusive access of a person (or other legal entity) to a realm of his own. The right to privacy entitles one to exclude others from (a) watching, (b) utilizing, (c) invading (intruding upon, or in other ways affecting) his private realm.” *Id.* Solove placed Ruth Gavison’s “neutral concept of privacy” within the “limited access of self” category, noting that Gavison sees privacy as “related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention.” *Id.* at 1104. Privacy, as limited access to the self, according to Gavison, furthers liberty, autonomy and freedom. *Id.* When teaching children about privacy protection at the Institute for Privacy Protection, I decided to use a simplified definition of privacy that paralleled Godkin’s, Bok’s, Haag’s and Gavison’s conceptualizations of privacy as “a set of personal decisions about when we want to share information, why we want to share it, and which people we want to share it with.” I decided to use this definition which is arguably more akin to confidentiality after discussing the technical and legalese definitions that would pose problems of conceptualization and understanding for our targeted 5th grade students.

18. *Id.* at 1149. According to Solove, privacy as secrecy is “violated by the public disclosure of previously concealed information,” specifically, personal facts and personal matters that were the subject of cases such as *Griswold v. Connecticut* and *Roe v. Wade*. *Id.* at 1105–06. Solove warns us that privacy as secrecy is too broad, since according to Kenneth Karst, privacy is more like confidentiality in that it is about our “interest in selective disclosure,” and “control” (according to philosopher Julie Inness), both of which are too narrow to successfully define privacy. *Id.* at 1108–09.

19. *Id.* at 1154. This conception of privacy includes an individual’s ability to control information about herself in terms of acquisition, disclosure, and use. This too is a limited

intimacy²¹ are determined to be individually deficient for either being too broad, vague, or narrow to encompass privacy, according to Solove. Alternatively, Solove advanced his theory of privacy as a pluralistic value that, like a family, encompasses “many distinct yet related things.”²² Rejecting the notion that privacy has a unitary value, Solove argued that privacy’s pluralistic nature is contextual not abstract, and therefore “emerges from the activities that it protects.”²³ Thus, the cause of privacy protection is identified not as a top down endeavor, but instead employs a “bottom-up cultural analysis, using historical, philosophical, political, sociological, and legal sources.”²⁴ In so doing, Solove identified four basic groups of problems or harmful activities that make up his taxonomy of privacy: information collection, information processing, information dissemination, and invasion, all of which have attendant sub-attributes of harm.²⁵

As with Solove, Julie Cohen rejects a unitary definition of privacy based on core principles and centers real world “privacy expectations and behaviors” that are “unruly and heterogeneous.”²⁶ Cohen conceptualizes privacy as “breathing room to engage in the process of boundary management that enable and constitute self-development,”²⁷ and her analyses are based on how we view the nature of the self, and the relationship between the self and others. Here, Cohen’s post-modern perspective of the self entails an ongoing process of development and change, meaning we are rarely the same across space and time. This has important implications for our privacy.²⁸ Like Solove, Cohen recognizes the relational attribute

perspective because privacy is not simply subjective. Rather, it is an issue of “what society deems appropriate to protect,” according to Solove. *Id.* at 1111.

20. *Id.* at 1116. This conception of privacy entails Paul Freund’s term “personhood” “to refer to “those attributes of an individual which are irreducible in his selfhood.” *Id.* This conception of privacy, according to Solove, departs from the others in that it “is constructed around a normative end of privacy, namely, the protection of the integrity of personality” (referencing Edward Bloustein), protects individuality in that it “protects the individual’s interest in becoming, being, and remaining a person” (referencing philosopher Jeffrey Reiman) and privacy as personhood is “defined in terms of the individual’s capacity to choose” (referencing philosopher, Stanley Benn). *Id.* at 1116-17,

21. *Id.* at 1121. This conception of privacy centers “the value of privacy in the development of personal” or “intimate relationships.” *Id.*

22. SOLOVE, *supra* note 16.

23. *Id.* at 98.

24. *Id.* at 102.

25. *Id.* at 103.

26. Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1908 (2013).

27. *Id.* at 1906.

28. See generally JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012).

of privacy and extends the meaning of this element to what she calls “emergent subjectivity.”²⁹

Cohen describes subjectivity as “a function of the interplay between emergent selfhood and social shaping.”³⁰ Breathing room is the space created for play and self-making—both key to innovation and a vigilant citizenry. The privacy invasion of modulation, which Cohen describes as a “mode of knowledge production, designed to produce a particular way of knowing and a mode of governance designed to produce a particular kind of subject,” creates a different type of citizenry. Modulation produces a citizenry that “lacks the wherewithal and perhaps even desire” to work towards realizing “political and social ideals.”³¹ Unchecked surveillance practices, black box technologies, and profit motive applications of Big Data support modulation while privacy can be a mechanism that “furthers. . . human flourishing.”³² Privacy can mean boundary and the “opposite of modulation. Privacy exists to the extent that processes of modulation are gap-ridden, transparent, and incomplete.”³³ Cohen calls for transparency and scrutiny of information processing, because

. . . the self who is the real subject of privacy law and policy is socially constructed, emerging gradually from a preexisting cultural and relational substrate. For this self, privacy performs a function that has nothing to do with stasis. Privacy shelters dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable. It protects the situated practices of boundary management through which the capacity for self-determination develops.³⁴

Cohen imagines a world wherein systems, technologies, and people do not and should not know what they know because of the privacy boundary that keeps them from traversing territory that negatively impacts the citizen who changes over time and space. Bricolage, tinkering, and play have deep implications in Cohen’s theory. Trying new things through practice, play, and the incongruence of everyday life impacts

29. Cohen, *supra* note 26 at 1906.

30. *Id.* at 1911.

31. *Id.* at 1918; See also Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 UCLA L. REV. 655, 660 n.9 (2014) (wherein the authors use citizenship “to invoke an aspirational political (rather than strictly legal) status of belonging to a common civic community.”).

32. Cohen, *supra* note 26, at 1927.

33. *Id.* at 1930.

34. *Id.* at 1905.

how we show up in the world. We experiment and revise as part of our human existence, and this involves behavior that changes within contexts based on our chosen identities and other complexities across space and time. How we are perceived and documented should necessarily take account of selves in flux or becoming, not necessarily fully formed. Hence, the gaps and the spaces created in between without perfect enforcement, law, and policy are some of the spaces that allow for practice and play, and are both essential for innovation as well as for human development. This is most important and relevant for childhood—especially childhood that encounters the barriers of racial discrimination.

Black people's experience with the right to privacy has been inconsistent at best. Black children are disproportionately denied the experience and attendant benefits of child privacy. Foregrounding the essential meaning of privacy as *the right to be and become in childhood* allows for a more nuanced examination of child privacy and the necessary protection of the developing psyche. Exposure to privacy violations cause immense damage with far reaching consequences. While parents have a duty to protect their children, Black parents carry the additional burden of identifying and protecting their children from the predictable harms of racial discrimination.

II. BLACK HOME-EDUCATORS AS CHILD PRIVACY PROTECTORS

In 1975, author Toni Morrison delivered a speech at Portland State University Library entitled *A Humanist View*. Morrison began *A Humanist View* by referring to *The Historical Statistics of the United States* that describes enslaved human persons in the same way as it describes pounds of rice and barrels of turpentine.³⁵ Morrison went on to discuss a historical through-line of crippled intelligence in America, bogged down by the same perspectives from 1775. She characterized racism as distraction with the following quote:

It's important, therefore, to know who the real enemy is, and to know the function, the very serious function of racism, which is distraction. It keeps you from doing your work. It keeps you explaining over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn't shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you

35. Toni Morrison, Lecture at Portland State, "A Humanist View" (May 30, 1975).

dredge that up. None of that is necessary. There will always be one more thing.³⁶

Brandeis and Warren argued that “the inviolate personality” was the purpose of the right to privacy protection under the law. They built this concept on a foundational understanding that privacy was a boundary that protected “peace of mind or the relief afforded to prevent” harm to the inviolate personality. Today, Black parents are doing exactly this—they provide a privacy boundary to preserve their children’s past, present, and future selves who they envision will be unanchored by direct racial discrimination, at least in childhood. Racial discrimination may be explicit or implicit, but the impact can be the same. The targeted child begins to know herself based on how she is treated in school, not as the person she is or that she is becoming absent racial discrimination. Black parents do not home-educate their children for all of the same reasons that White parents do. One of the major goals of Black parents who home-educate their children is to provide “racial protection.”³⁷ Black parent motivations are in response to the widely held and substantiated concern that their children are uniquely vulnerable to a variety of harms emanating from racial discrimination within the school environment; harms that interfere with their children’s right to self-actualize or to be and become themselves.

A. *The American Education System’s Encroachment on Black Children’s Lives*

Black children remain overwhelmingly disinherited in the promise of educational opportunity because they are exposed to harms of overwhelming messages of inferiority, unequal educational opportunities, and disproportionate discipline in the educational system. Black children are deemed as inferior to other students in schools, discriminated against without having access to a reasonable remedy, and are systematically pushed towards the carceral continuum that begins with disproportionate school discipline. These harms create a significant barrier to Black children’s ability to self-actualize.

36. *Id.*

37. See Ama Mazama and Garvey Lundy, *African American Homeschooling as Racial Protectionism*, 43 J. BLACK STUD. 723, 723–48 (2012); See also Ama Mazama, *African-American Homeschool Practices: Empirical Evidence*, 14(1) THEORY RES. & EDUC. 26–44 (2016). For additional discussion on Black Homeschoolers, see GRACE LEWELLYN, FREEDOM CHALLENGE: AFRICAN AMERICAN HOMESCHOOLERS (1996); PAULA PENN-NABRIT, MORNING BY MORNING: HOW WE HOME-SCHOOLED OUR AFRICAN-AMERICAN SONS TO THE IVY LEAGUE (2003); Cheryl Fields Smith & Meca Williams, *Motivations, Sacrifices, and Challenges: Black Parent’s Decisions to Home School*, 41 URB. REV. 369, 369–89 (2009).

1. The Persistent and Pervasive Message of Black Inferiority

Black inferiority was and remains a convenient justification for Black failure at school. In *Brown v. Board of Education*, the Court, citing what it deemed as conclusive “modern social science authority” included in its opinion the observation that “a sense of inferiority affects the motivation of the child to learn.”³⁸ The Court concluded that the impact of inferiority was grave social psychological harm to Black children.³⁹ Schools project expectations of Black inferiority through policies on tracking explained as “ability grouping and placement practices by the court;”⁴⁰ high-stakes standardized tests;⁴¹ exclusion from honors or higher level classes and programs;⁴² and in some cases over-inclusion in special education programs.⁴³ The metrics associated with these policies indicate that Black children are failing at school. The “fear among members of a group of reinforcing negative stereotypes about the intellectual ability of the group,” and deficit discourses—both environmental factors rather than biological factors as some have posited—have been known to negatively impact student self-esteem, and to create anxiety, depression, and disengagement that negatively impacts student’s performance.⁴⁴ Even the message of success entails an underlying perception that Black people must work twice as hard to get half the benefits. Research has shown that the social phenomenon John Henryism is triggered in some Black people who are aware of the overwhelming belief in Black inferiority or the belief gap in Black achievement.⁴⁵ Black students who feel pressure to re-

38. 347 U.S. 483, n.11 (1954); *id.* at 494–95

39. *Id.*

40. See *Simmons ex rel. v. Hooks*, 843 F. Supp. 1296 (E.D. Ark. 1994).

41. See *e.g.*, *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d. 667 (W.D. Tex. 2000); see also *Erik V. v. Causby*, 977 F. Supp. 384 (E.D.N.C. 1997).

42. *Black Parents Workshop v. S. Orange Maplewood Sch. Dist.*, No. 2:18-cv-02726 (D.N.J. filed Feb. 27, 2018).

43. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 538 (7th Cir. 1997).

44. JOSHUA ARONSON, ET AL. *REDUCING STEREOTYPE THREAT IN CLASSROOMS: A REVIEW OF SOCIAL-PSYCHOLOGICAL INTERVENTION STUDIES ON IMPROVING THE ACHIEVEMENT OF BLACK STUDENTS* (2009). For a general discussion about stereotype threat see Steele C.M., *A Threat in the Air: How Stereotypes Shape the Intellectual Identities and Performance of Women and African Americans*, 56 AM. PSYCHOL. 613, 613–29 (1997).

45. William A Smith, Man Hung & Jeremy D. Franklin, *Racial Battle Fatigue and the MisEducation of Black Men: Racial Microaggressions, Societal Problems, and Environmental Stress*, 80 J. NEGRO EDUC. 63, 65–68 (2011). The theory of John Henryism is named after the folktale about the formerly enslaved African American worker John Henry. As the tale goes, John Henry raced a machine that would drive steel pins into railroad tracks. Henry beat the machine but fell dead moments after doing so. Dr. Sherman A. James named his theory after John Henry and used it to describe the high-level coping and behavioral responses some Black people exhibit when faced with psychosocial environmental stressors

spond to these messages do so by engaging in behavior that is exhaustingly self-conscious and sometimes self-defeating. John-Henryism is the descriptor used by social scientists who have studied the reactive self-conscious and sometimes self-defeating behavior exhibited by students who experience discrimination.

2. The Provision of Unequal Educational Opportunities

Since *Brown*, legal challenges launched against tracking,⁴⁶ high-stakes standardized testing,⁴⁷ exclusion from honors or higher level classes and programs,⁴⁸ and in some cases, over-inclusion in special education programs,⁴⁹ have in many ways sought to formally address and eliminate the relentless belief in Black cognitive inferiority in traditional schools. Unfortunately, like *Brown* these cases have not eliminated the layered and pervasive work-product generated by the stigmatization of perceived Black inferiority.⁵⁰ Complicating matters even more, Black children attend underfunded schools⁵¹ with less experienced teachers,⁵² more police

such as chronic discrimination and racism. See James A. Sherman et al., *Socioeconomic Status, John Henryism, and Hypertension in Blacks and Whites*, 126(4) AM. J. EPIDEMIOLOGY 568, 664 (1987).

46. See *Simmons ex rel. v. Hooks*, 843 F. Supp. 1296 (E.D. Ark. 1994).

47. See e.g., *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 667 (W.D. Tex. 2000); see also *Erik V. v. Causby*, 977 F. Supp. 384 (E.D.N.C. 1997).

48. *Black Parents Workshop v. S. Orange Maplewood Sch. Dist.*, No. 2:18-cv-02726 (D.N.J. 2019 filed Feb. 27, 2018).

49. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 538 (7th Cir. 1997).

50. Erving Goffman's typology of stigma is useful here. In *STIGMA*, Goffman presents three types of stigma: 1) abominations of the body or physical deformities, 2) blemishes of individual character such as addiction, mental disorder, and imprisonment, and 3) tribal stigma such as race, nation, and religion all of which Goffman argues may be "transmitted through lineages and equally contaminate all members of a family." ERVING GOFFMAN, *STIGMA* 4 (1963). Conceptually, Black inferiority fits into the third type of stigma.

51. Black children attend more underfunded schools because most states fund schools through property tax revenues. Property tax revenues have historically been lower in Black neighborhoods due to the legacy of discrimination and redlining that artificially segregated Black people and created neighborhoods with suppressed property values based on racist governmental policies. To this day, disparities exist even in the case of poor White schools that receive more funding than poor non-White schools. To put this in perspective, schools with predominantly poor white children receive \$150 less in funding while schools with predominantly Black and Brown children receive \$1650 less in funding than the national average. See *EDBUILDING, NONWHITE SCHOOL DISTRICTS GET \$23 BILLION LESS THAN WHITE DISTRICTS DESPITE SERVING THE SAME NUMBER OF STUDENTS* (2019).

52. ARY SPATIG-AMERIKANER, CTR. FOR AM. PROGRESS, *UNEQUAL EDUCATION FEDERAL LOOPHOLE ENABLES LOWER SPENDING ON STUDENTS OF COLOR* (2012); Juan Perez Jr., Patrick M. O'Connell & Bill Ruthhart; *Chicago School Board Sues State, Alleges*

officers, and fewer counselors.⁵³ Black children are disproportionately denied access to advanced placement and gifted and talented programs,⁵⁴ yet in some cases over-represented in special education classes.⁵⁵

Deficit discourses about Black children create real world consequences that resound throughout their lives. The impact on Black children attending schools wherein they are disproportionately tracked into lower performance categories also means they will be more likely to be suspended, not attend college, enter the juvenile justice system, and have limited employment opportunities.⁵⁶ When Black children are excluded from gifted and talented classes relative to White students, the very real impact is that excluded students miss opportunities to develop and stretch their abilities as young scholars. This exclusion, and modern-day segregation, occur within schools based on consistent patterns and practices.

'Separate and Unequal' Funding, CHICAGO TRIBUNE (Feb. 14, 2017, 9:40 PM), <http://www.chicagotribune.com/news/ct-chicago-school-funding-lawsuit-met-20170214-story.html>.

53. Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L. J. 765 (2017); Maya Lindberg, *False Sense of Security*, TEACHING TOLERANCE, Summer 2015, available at <https://www.tolerance.org/magazine/summer-2015/false-sense-of-security>; Melinda Anderson, *When School Feels Like Prison*, ATLANTIC MONTHLY (Sept. 12, 2016), <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/>; Melinda Anderson, *When Schooling Meets Policing*, ATLANTIC MONTHLY (Sept. 21, 2015), <https://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/>; see also AMIR WHITAKER ET AL., ACLU, COPS AND NO COUNSELORS, HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS, <https://www.aclu.org/report/cops-and-no-counselors>.

54. Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2(1) AERA OPEN 1, (2016); David Card & Laura Giuliano, *Can Universal Screening Increase the Representation of Low Income and Minority Students in Gifted Education?* (Nat'l Bureau of Econ., Working Paper No. 21519, 2015); David Card & Laura Giuliano, *Does Gifted Education Work? For Which Students?* (Nat'l Bureau of Econ., Working Paper No. 20453, 2014); David Card & Laura Giuliano, *Universal Screening Increases the Representation of Low-Income and Minority Students in Gifted Education*, 113(48) PNAS, 13678–83 (2016), available at pnas.org/content/pnas/113/48/13678; Jill Barshay, *Bright Black Students Taught by Black Teachers are More Likely to Get Into Gifted-and-Talented Classrooms*, HECHINGER REPORT (JAN. 19, 2016), <https://hechingerreport.org/bright-black-students-who-are-taught-by-black-teachers-are-more-likely-to-get-into-gifted-and-talented-classrooms/>; Alia Wong, *Why are There so Few Black Children in Gifted Programs?*, ATLANTIC MONTHLY (Jan. 19, 2016), <https://www.theatlantic.com/education/archive/2016/01/why-are-there-so-few-black-children-in-gifted-and-talented-programs/424707/>.

55. U.S. COMMISSION ON C.R., MINORITIES IN SPECIAL EDUCATION (2007); Tori Kearns, Laurie Ford & Jean Ann Linney, *African American Student Representation in Special Education Programs*, 74 J. NEGRO EDUC. 297, 297–310 (2005); Nora Gordon, *Race Poverty, and Special Ed*, BROOKINGS INST. (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/>.

56. Antoine M. Garibaldi, *Educating and Motivating African American Males to Succeed*, 61 J. NEGRO EDUC. 4, 4–11 (1992).

While Black students make up approximately 15-17% of the total student population, they make up “less than 10% of students in gifted and talented education programs” and they make up 53% of classes for “remedial students.”⁵⁷ There are a variety of reasons for the disproportionality, including the fact that Black children are less likely to attend schools with gifted and talented programs. However, this does not explain why Black students within schools where gifted programs exist are “less likely than White students to be identified even when they satisfy criteria for gifted services.”⁵⁸ The exclusion starts in the classroom where students are identified in an environment that is largely deferential to teacher discretion. Teachers are gatekeepers to opportunity for students, and are often the primary entry point of access to gifted programs. However, when teachers are incapable of seeing a child’s intellectual capability due to bias noise, teacher discretion can turn into discrimination. Numerous studies suggest that Black students are better represented in gifted programs that employ greater numbers of Black teachers.⁵⁹ Universal screening for gifted programs, encouragement, and role modeling by Black teachers have been shown to enhance access to these opportunities. However, this is not the reality for most Black students in the United States. As a result, they are also prevented from enjoying the associated life benefits such as better employment, higher wages, better living conditions, better health outcomes, and lower rates of poverty in adulthood.

When schools are filled with more police officers and fewer counselors or school based mental health providers,⁶⁰ the school environment mirrors a criminalized atmosphere, not a place of learning or education. The school becomes a place characterized by suspicion and surveillance starting at the front door. While research does not show comprehensive support that police officers make schools safer, research suggests that school counselors and school based mental health providers improve

57. *Id.*

58. Grissom & Redding, *supra* note 54.

59. *Id.* at 4; Jason A. Grissom, Jill Nicholson-Crotty & Sean Nicholson-Crotty, *Race, Region, and Representative Bureaucracy*, 69 PUB. ADMIN. R. 911, 911–19 (2009); Jason A. Grissom, Luis A. Rodriguez & Emily C. Kern, *Teacher and Principal Diversity and the Representation of Students of Color in Gifted Programs: Evidence from National Data*, ELEMENTARY SCH. J., Mar. 2017, at 1; Kenneth J. Meier & Joseph Stewart, Jr., *The Impact of Representative Bureaucracies: Educational Systems and Public Policies*, 22 AM. R. PUB. ADMIN. 157, 157–71 (1992); Rene R. Rocha & Daniel P. Hawes, *Racial Diversity, Representative Bureaucracy, and Equity in Multiracial School Districts*, 90 SOC. SCI. Q. 326, 326–44 (2009).

60. ACLU, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors> (last visited Nov. 6, 2019).

“school climate,”⁶¹ “school safety,”⁶² “health outcomes,”⁶³ “attendance rates,” “suspension and other disciplinary incidents,”⁶⁴ “academic achievement and career preparation,”⁶⁵ and “graduation rates.”⁶⁶

Furthermore, technology and data management uses may also pose a challenge for child privacy protection and equitable learning opportunities. Technology used in schools is often imbued with bias that disproportionately impacts Black children. Education record data are collected, created, digitized, processed, and transferred with varying and inconsistent oversight and broad discretion. Notwithstanding oft-touted student data privacy rights, the data created and used reflects compounded feedback loops based on data that is far too often not audited for data integrity and accuracy. Data integrity and accuracy is of great concern especially as it pertains to understanding the origins of disparate impact and other forms of racial discrimination. Studies indicate that Black children occupy the bottom rung of most advantageous metrics in traditional school settings, and over-index in the disadvantageous metrics. Dirty data has been found to permeate a wide variety of contexts, where race was found to be the most salient factor in analyses.⁶⁷ While I do not explore this line of inquiry here, in a forthcoming article I examine the intersection of the intervention of child privacy protection, the education record, and the impact of dirty data on algorithmic decision making from an equal protection perspective. Black parents who seek to educate their children outside of these environments want to provide a barrier between their

61. Richard E. Cleveland & Christopher A. Sink, *Student Happiness, School Climate, and School Improvement Plans: Implications for School Counseling Practice*, PROF. SCH. COUNSELLING, (Apr. 20, 2018), at 1.

62. *Id.*; Thomas J. Hernandez & Susan R. Seem, *A Safe School Climate: A Systemic Approach and the School Counselor*, 7 PROF. SCH. COUNSELLING 256, 256–62 (2004); Joseph G. Kosciw, Emily A. Greytak & Elizabeth M. Diaz, *Who, What, Where, When, and Why: Demographic and Ecological Factors Contributing to Hostile School Climate for Lesbian, Gay, Bisexual, and Transgender Youth*, 38 J. YOUTH ADOLESCENT 976, 976–88 (2009).

63. Richard T. Lapan, Norman C. Gysbers & Yongmin Sun, *The Impact of More Fully Implemented Guidance Programs on the School Experiences of High School Students: A Statewide Evaluation Study*, 75 J. COUNSELING & DEV. 292, 292–302 (2011).

64. Richard T. Lapan, Sara A. Whitcomb & Nancy M. Aleman, *Connecticut Professional School Counselors: College and Career Counseling Services and Smaller Ratios Benefit Students*, 16 PROF. SCH. COUNSELLING 117, 117–24 (2012).

65. Lapan, Gysbers & Sun, *supra* note 63.

66. Kevin Tan et al., *The Impact of School Social Workers on High School Freshman Graduation Among the One Hundred Largest School Districts in the United States*, SCH. SOC. WORK J., Spring 2015, at 1–14.

67. Dirty data is “skewed or systemically biased data.” See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218 (2019); Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 192 (2019).

children and the documented harms that are characteristic of many traditional schools. Even when there is no difference in socio-economic status, Black children are harmed disproportionately and experience the opposite of the breathing and maneuvering room that privacy law theory and jurisprudence have deemed essential to the protection of the inviolate personality and self-actualization. This contributes to the concerns and motivations of a growing number of Black parents who have decided to home-educate their children.

3. Disproportionate Exclusionary Disciplinary Action and Introduction to the Carceral Continuum

Black children are not more likely to behave badly or even worse than other children;⁶⁸ yet they are viewed as less innocent⁶⁹ and older⁷⁰

68. See RUSSELL J. SKIBA & NATASHA T. WILLIAMS, THE EQUITY PROJECT AT INDIANA UNIVERSITY, ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 1 (March 2014), available at Indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf (concluding that research has failed to support the common perception that racial and ethnic disparities in school discipline stem from issues of poverty and increased misbehavior among students of color. Racial disparities in discipline are likely to occur at all socio-demographic levels, and a variety of statistical approaches have failed to find evidence that students of color act out at higher rates that could justify differential punishment.); see also Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers' Evaluations of Students' Classroom Behavior*, 77 SOC. EDUC. 267, 267–82 (2004).

69. See Phillip Atiba Goff, Matthew Christian Jackson, Carmen Marie Culotta, Natalie Ann DiTomasso, & Brooke Allison Lewis Di Leone, *The Essence of Innocence*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014); Michael J. Dumas & Joseph Derrick Nelson, *(Re)Imagining Black Boyhood: Toward a Critical Framework for Educational Research*, 86 HARV. EDUC. REV. 27, 33 (2016); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 493, 496 (2004); Edward W. Morris, *"Ladies" or "Loudies"?: Perceptions & Experiences of Black Girls in Classrooms*, 490, 511 (2007); Thalia Gonzalez, Jamilia J. Blake, Rebecca Epstein, *Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders*, 43 URB. REV. 90 (2011); *Blind Discretion: Girls of Color & Delinquency in the Juv. Just. Sys.*, 59 UCLA L. REV. 1502, 1521 (2012); Jamilia J. Blake et al., *The Role of Colorism in Explaining African-American Females' Suspension Risk*, 32 PSYCHOL. Q. 118 (2017); REBECCA EPSTEIN, JAMILIA J. BLAKE, THALIA GONZALEZ, CENTER ON POVERTY AND INEQUALITY, GEORGETOWN LAW GIRL INTERRUPTED, THE ERASURE OF BLACK GIRLS CHILDHOOD, (June 27, 2017). In the 1990's, Black children were described as sub-human mutants, crack babies, and super-predators by liberal and conservatives alike. The crack-cocaine epidemic brought forth what is now recognized as pseudo-social science, but at the time, the bases for law and social policy that enhanced the mass incarceration epidemic disparately impacting Black and Brown communities throughout the United States. The terms and theories developed describing crack babies and super predators have been proven to be false narratives. Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES (Jan. 26, 2009), <https://www.nytimes.com/2009/01/27/health/27coca.html?auth=login-email>

than White children, and are subjected to harsher and more prevalent discipline in schools. Black children are disproportionately disciplined for subjective infractions compared to their White peers.⁷¹ Headlines and smartphone recordings have captured school officials using excessive force against Black children⁷² including using tasers, punching, slapping, choking, dragging down stairs, slamming, and dragging Black children's bodies across classroom floors. School officials have also favored exclusionary discipline to address student behavior subjectively characterized as

(describing the myth of the crack baby); Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html>.

70. A. R. Todd et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?* 27 PSYCHOL. SCI. 384, 384–93 (2016); *Consequences When African-American Boys Are Seen As Older*, NPR (Mar. 19, 2014, 12:04 PM), <https://www.npr.org/2014/03/19/291405871/consequences-when-african-american-boys-are-seen-as-older>; Christopher Ingraham, *Why White People See Black Boys Like Tamir Rice As Older, Bigger and Guiltier Than They Really Are*, WASH. POST (Dec. 28, 2015, 2:24 PM), https://www.washingtonpost.com/news/wonk/wp/2015/12/28/why-prosecutors-keep-talking-about-tamir-rices-size-36-pants/?utm_term=.c360b667dc40.

71. See EDWARD J. SMITH AND SHAUN R. HARPER, *IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES* (2015); Erik J. Girvan et al., *The Relative Contribution of Subjective Office Referrals to Racial Disproportionality in School Discipline*, 32 SCH. PSYCHOLOGY Q. 392, 392–404 (2017); Russel J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317–42 (2002) (describing that amongst other disparities, Black students succumb to exclusionary discipline for subjective reasons such as “disrespect, excessive noise, threat, and loitering.”).

72. Editorial Board, *What if the South Carolina Student Thrown Across a Classroom Had Been White?*, WASH. POST (October 28, 2015), https://www.washingtonpost.com/opinions/what-if-the-south-carolina-student-thrown-across-a-classroom-had-been-white/2015/10/28/f3e9aa56-7da8-11e5-afce-2afd1d3eb896_story.html?utm_term=.93ad85b1c9af; Rebecca Kelin, *More Cops in Schools Means More Black Kids in The Criminal Justice System*, HUFFPOST (Feb. 22, 2018), https://www.huffpost.com/entry/school-to-prison-pipeline_n_5a8ee0afe4b077f5bfec2cf3; Rebecca Klein, *Protecting or Policing: School-Based Police Officers are Paid to Protect Our Kids. But Sometimes They Do More Harm Than Good*, HUFFINGTON POST (Dec. 13, 2016, 7:07 AM), data.huffingtonpost.com/2016/school-police/nasro; Rebecca Klein, *Set to Stun: Children are Being Tasered by School-based Police Officers. No One Knows How Often It's Happening or What Impact It's Having on Students*, HUFFINGTON POST (Aug. 11, 2016, 9:01 AM), <https://data.huffingtonpost.com/2016/school-police/tasers>; Mark Osborne, *Surveillance Video Shows Chicago Police Dragging Female Student Down Stairs, Using Stun Gun*, ABC NEWS (Apr. 12, 2019, 2:50 PM), <https://abcnews.go.com/US/surveillance-video-shows-chicago-police-dragging-female-student/story?id=62351378>; Kyle Spencer & Adam Hooper, *Bullied by the Badge: Thousands of Police Officers Are Now Stationed Inside Public Schools. What Does This Mean For Students?*, HUFFINGTON POST (Aug. 10, 2016, 12:00 PM), <https://data.huffingtonpost.com/2016/school-police/mississippi>.

non-compliant, disruptive, insubordinate, violent, or threatening. As early as pre-school, Black children are vulnerable to stigmatization expressed through over-watching, surveillance, and general suspicion.⁷³ In 2014, the United States Education Office of Civil Rights found that

Black children represent 18% of preschool enrollment, but 48% of preschool children receiving more than one out-of-school suspension; in comparison, white students represent 43% of preschool enrollment but 26% of preschool children receiving more than one out of school suspension.⁷⁴

The same study found that “Black students are suspended and expelled at a rate three times greater than White students. On average, 5% of White students are suspended, compared to 16% of Black students.” Since the 1970s, the racial discipline gap has been documented and consistent across socioeconomic status.⁷⁵ While many of the studies focused on the experience of Black boys, a growing number of studies have begun to focus on Black girls. Black girls are six times more likely to be suspended than White girls.⁷⁶ In 2011–2012, 90 percent of all girls subjected to expulsion in New York were Black.⁷⁷ In Washington D.C., Black girls are 20.8 times more likely to be suspended from schools than White girls.⁷⁸ “Black girls are the only group of girls overrepresented in all discipline categories for which data are collected by the U.S. Depart-

73. WALTER S. GILLIAM, ANGELA N. MAUPIN, CHIN R. REYES, MARIA ACCAVITTI & FREDERICK SHIC, YALE U. CHILD STUDY CENT., DO EARLY EDUCATORS’ IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 1 (Sept. 2016) (“Findings revealed that when expecting challenging behaviors teachers gazed longer at Black children, especially Black boys.”); T. K. Henneman, *Preschool Expulsions: Parental Experiences of Black Boys Who Were Pushed Out or Left Behind* (2004) (unpublished Ph.D. dissertation, Mills College) (on file with author); Melinda D. Anderson, *Even Black Pre-school Teachers Are Biased*, ATLANTIC MONTHLY (Sept. 28, 2016), <https://www.theatlantic.com/education/archive/2016/09/the-high-standard-set-by-black-teachers-for-black-students/501989/>.

74. U.S. DEP’T EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE ISSUE BRIEF NO. 1 (2014).

75. Anne Gregory, Dewey Cornell & Xitao Fan, *The Relationship of School Structure and Support to Suspension Rates for Black and White High School Students*, 48 AM. EDUC. RES. J. 904 (2011).

76. KIMBERLÉ WILLIAMS CRENSHAW, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 16 (2015).

77. *Id.* at 21.

78. NAT’L WOMEN’S L. CENT., DRESS CODED: BLACK GIRLS, BODIES, AND BIAS IN D.C. SCHOOLS 16 (2018).

ment of Education Office of Civil Rights.”⁷⁹ Black girls are stereotyped and penalized as loud, defiant, and aggressive, and are more harshly penalized due to dress codes.⁸⁰ Both Black girls and boys are targeted and harshly disciplined for their hair styles.⁸¹ Braids are penalized but French braids, conceptualized as a hairstyle worn by White female students, are not penalized in schools. Hair discrimination in school comes from the

79. Melinda D. Anderson, *The Black Girl Pushout*, THE ATLANTIC (Mar. 15, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-criminalization-of-black-girls-in-schools/473718/> (quoting Monique W. Morris).

80. See MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2018) (describing how Black girls are constantly targeted by narrow stereotypes that impact the structure of their opportunities in traditional school environments as they succumb to zero tolerance policies and harsh school discipline that often derail their educational trajectories).

81. Faith Fennidy, a student at Christ the King Parish School in Terrytown, Louisiana, was asked to leave school because her hair was braided in extensions. See Julia Jacobs & Dan Levin, *Black Girl Sent Home from School Over Hair Extensions*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/black-student-extensions-louisiana.html>. Black students who wear their hair in braids faced detention and suspension by administrators who claimed their hair violated the school dress code at Mystic Valley Regional Charter School in Boston, Massachusetts. See Kay Lazar, *Black Malden Charter Students Punished For Braided Hair Extensions*, BOSTON GLOBE (May 11, 2017), <https://www.bostonglobe.com/metro/2017/05/11/black-students-malden-school-who-wear-braids-face-punishment-parents-say/stWDIBSCJhw1zocUWR1QMP/story.html>; see also Andre Perry, *Stay Out of My Hair*, HECHINGER REPORT (Mar. 5, 2019), <https://hechingerreport.org/stay-out-of-my-hair/> (arguing that the federal government and the Department of Education, just as New York City did via its Commission of Human Rights, should issue guidance against hair discrimination and begin to sanction schools that penalize Black people for “their hair and hair styles.”). Andrew Johnson, a student wrestler in New Jersey at Buena Regional Highschool was forced to have his dreadlocks cut or face losing his match by Alan Maloney, a referee who was reported to have previously called Preston Hamilton, an African-American referee, a “nigger” in 2016. See Mark Tribble, *Grappling with the N-Word*, COURIER POST (Oct. 4, 2016), <https://www.courierpostonline.com/story/sports/high-school/wrestling/2016/10/04/grappling-n-word/91208864/>; Roman Stubbs, *A Wrestler Was Forced To Cut His Dreadlocks Before a Match*, WASH. POST (Apr. 17, 2019), <https://www.washingtonpost.com/sports/2019/04/17/wrestler-was-forced-cut-his-dreadlocks-before-match-his-town-is-still-looking-answers/>. The stigmatization of Black hair does not end in traditional school environments. Discrimination in the workplace has up until recently been the norm and supported by courts. See the following pieces for additional discussion of Black hair discrimination: Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L. J. 365 (1991); D. Wendy Greene, *Black Women Can't Have Blonde Hair. . . In the Workplace*, 14 J. GENDER RACE & JUST. 405, 430 (2001); D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in The Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333, 368 (2013); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355 (2008); D. Wendy Greene, *Splitting Hairs: The 11th Circuit's Take on Workplace bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017).

combined social practices and social meanings of othering and over-watching the Black body for the purpose of regulation. Over-watching or over-noticing, and the resulting over-regulation has long been part of disproportionate and exclusionary discipline practices. New methods of this long established social practice include surveillance technology. It is nothing short of irony that Black children bear disproportionate burdens of surveillance technology employed in schools in response to school shooting violence.

Following several high-profile mass school shootings in the 1990s and early 2000s, schools implemented a variety of measures under the mandate of school safety and security. Budget lines for metal detectors, resource officers, cameras (some cameras are currently fit with facial recognition programs notwithstanding the low accuracy rate of these technologies for people with darker skin⁸²) body scans, strip searches, and the hiring of police officers as school resource officers⁸³ all either increased or were created primarily for schools where Black and Brown students were the majority. While all of the mass school shootings involved White male student shooters at predominantly White schools, the perceived need and resulting burden of security continues to be overwhelmingly projected onto and concentrated in schools where the student body is made up of mostly non-White children.⁸⁴

82. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RES. 1 (2018) (showing that facial recognition systems accuracy rates for darker-skinned females have error rates of up to 34.7% but only .8% error rates for lighter-skinned males).

83. Matthew T. Theriot, *School Resource Officers and Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 280–87 (2009).

84. For statistics on school security in schools, see Kristen Harper and Deborah Temkin, *Compared to Majority White Schools, Majority Black Schools Are More Likely to Have Security Staff*, CHILD TRENDS (Apr. 26, 2018), <https://www.childtrends.org/compared-to-majority-white-schools-majority-black-schools-are-more-likely-to-have-security-staff>; see also Nikole Hannah-Jones' remarks on surveillance systems and segregated schools, in *How to Make Black Lives Matter At School*, NYPL PODCASTS, (Feb. 17, 2019): "When you have completely segregated systems, our children get conditioned to think that the things they experience in school are normal, and so they don't question why they have metal detectors, because every kid they know goes to school with metal detectors. But when you can see right across the street that those kids aren't having to wait in line in the cold to get through metal detectors. And, often, these metal detectors make kids late. School starts late, they're late to class, it takes away instructional time. When you go in just about any New York City public school, the first thing you see when you go in the door is a police officer, that sets the tone for what the school is supposed to do. And, so I think that that has actually - the segregation makes it very clear what we're trying to do, which is black children are to be contained and controlled and we're going to set the message from the moment you get to the schoolhouse that this is what is to happen inside the school. And, when you think about - when we think about where the most violence occurs, right, and who is going in schools and shooting schools up, and who is going in

Beyond the humiliation, anger, and depression felt by students who experience the onslaught of surveillance and disproportionate school disciplinary sanctions, the alarm and concern about the consequences of disproportionate disciplinary actions, especially those that involve Resource Officers (police officers assigned to public schools), is that it creates and maintains the carceral continuum.⁸⁵ In *Unequal City*, Professor Carla Shedd describes how Black children encounter prison-like practices within public school environments in Chicago.⁸⁶ Stop and frisk,⁸⁷ daily metal detector walk-throughs, body-scans, and camera surveillance of youth within school settings (including a growing number that includes facial recognition) reflect not only criminalization of Black children, but also the unique privacy harms that leave Black children deficient of the breathing and maneuvering room to simply be school-age children. The overreactions to Black children who make mistakes due to fatigue, hunger, irritability, or simply childlike or teen-like behavior is well-

schools and killing multiple children in our schools. Those are not the demographic schools that have metal detectors, that have children being patted down as they're going into class every day. That sets the tone. So, then when the kids get - after standing outside for 20 minutes, they've been patted down, they've been treated like criminals as they're going into institutions that are supposed to educate them, then when they have an attitude in the classroom, we say it's because they don't care. Then, when they automatically are not in the mood to learn or tell them what to do because they've been demeaned before they even enter the building, then we say that they just don't value their education. But the truth is, our schools tell them that we don't value their education and they simply react to that. So, I think, you know, we have segregated schools because the majority of white people want it that way."

85. See MONIQUE W. MORRIS, *AFRICAN AM. POL'Y. FORUM, RACE, GENDER, AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 2* (2012) (explaining the school-to-prison pipeline as a "collection of policies, practices, conditions, and prevailing consciousness that facilitate both the criminalization within educational environments and the processes by which this criminalization results in the incarceration of youth and young adults"); See also Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and The School To Prison Pipeline*, F. PUB. POL'Y, 2009, at 1; David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181 (2015); Artika R. Tyner, *The Emergence of the School to Prison Pipeline*, AM. BAR ASS'N (Aug. 15, 2017), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/june_2014/the_emergence_of_the_school-to-prison_pipeline/. For additional discussion on the history of the use of the term School to Prison Pipeline, see Kayla Crawley & Paul Hirschfield, *Examining the School-to-Prison Pipeline Metaphor*, in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (2018).

86. CARLA SHEDD, *UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE* 17 (2015).

87. See Louis P. Nappen, *The Privacy Advantages of Homeschooling*, 9 CHAP. L. REV. 73, 94 (2005) (arguing that privacy is a challenge in general for children in formal educational environments because "school officials may constitutionally search students if the search is based on reasonable suspicion and is not excessively intrusive. Strip searches, locker searches, and backpack/handbag searches have generally been upheld.").

documented. The overwhelming data indicates that for Black children, these otherwise normal behaviors or expressions common to childhood and human development—including those that are considered disruptive—are disproportionately interpreted as activity worthy of severe punishments that frequently lead to catastrophic life events. These life altering events include being pushed into the juvenile and criminal justice systems. This is why Black home-educating parents intervene and, in so doing, seek to preserve their children's right to be and become.

B. *Black Parent Intervention to Protect Black Children's
Right to Be and Become*

The law requires parents to care for their children's well-being because they are vulnerable and incapable of caring for themselves.⁸⁸ Child developmental research suggests children are active thinkers, constantly constructing and reconstructing their theory of the world.⁸⁹ All children advance their knowledge through natural inclinations aimed at problem solving, play and experimentation, complex reasoning, and memory processes. Bias, discrimination, racially motivated speech acts, and maltreatment cause cognitive harm and trauma in adulthood but are particularly damaging in childhood. These harms are especially insidious when levied in childhood because children lack the cognitive developmental tools that adults have developed to respond to or thwart the impact of such interactions.⁹⁰ Thus, parental protection to prevent exposure to racism in childhood is not only supported by legal precepts but is also rational, and essential to healthy childhood development. Black parent home-educators protect their children's right to be and become by adhering to a series of practices that include: preserving Black childhood; creating breathing space for Black children to flourish; insulating Black children from distortions; and letting Black children self-author their own lives.

1. Preserving Black Childhood

Privacy understood as a means to preserve the inviolate personality means protection for intangible interests associated with self-actualization. Mental tranquility, human dignity, individuality, and the ability to

88. Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U. CAL. DAVIS L. REV. 255, 256 (1979).

89. See generally SUSAN PASS, PARALLEL PATHS TO CONSTRUCTIVISM: JEAN PIAGET AND LEV VYGOTSKY (1st. ed. 2004); JEAN PIAGET, *The Child's Conception of the World* in JEAN PIAGET SELECTED WORKS (1997).

90. See generally HANDBOOK ON RACE, RACISM AND THE DEVELOPING CHILD (Stephen M. Quintana & Clack McKown eds., 2008).

achieve self-determination are the purpose of privacy protection as the right to be and become.⁹¹ In childhood, privacy protection means the right to be a child or to the preservation of childhood. Privacy protected through boundary creation between the child and encroaching mechanisms create space for a childhood free from unnecessary distractions and intrusions. For Black home-educators, this means that the preservation of Black childhood requires a higher level of parenting vigilance that necessarily includes some form of racial protectionism, or protection against the subsequent treatment and consequences of living with racial stigma. Childhood as a liminal stage of human development is a delicate time.⁹² Studies on cognitive development in childhood emphasize the role of interactions with other people and institutions in knowledge construction (both of self and others).⁹³ Black home-educator behavior focused on providing necessary boundaries between their children and traditional systems reflects a norming process based on a perception that racial discrimination and its resulting harms are inevitable consequences of educating one's child in formal educational settings. While substantiated by experience and empirical data, this chosen and rational behavior is arguably also based on the historical fact that there has never been a time in American history wherein the majority of Black children could be reasonably described as having access to equal or equitable educational opportunity. Black children's experiences in traditional school settings have never been free from racial discrimination, notwithstanding the largely celebrated legacy of *Brown*.

Amongst other results, privacy protection under the law has prevented the government from findings of guilt based on overreaching and damaging access to a person's body, and extensions thereof. These protections are deemed fundamental to personhood and citizenship because persons and citizens are deemed to have valued interests in their own constitutions, abilities, self-value, but most important of all, individual dignity and liberty. Our jurisprudence has long held that violation of a person's privacy means to deny them dignity and liberty. The first case to recognize a right to privacy did so through the examination of what the court perceived was a kind of dignity harm to the individual person's "choice as to his manner of life."⁹⁴ In *Pavesich v. New England Life Insurance Co.*, the court's unanimous opinion penned by Judge Andrew Jackson Cobb found in favor of the plaintiff, Paolo Pavesich, exclaiming that the New England Life Insurance Co. had violated Pavesich's "liberty of privacy" by using his image in their advertisements without permission,

91. Bloustein, *supra* note 6.

92. See generally PASS, *supra* note 89; PIAGET, *supra* note 90.

93. PASS, *supra* note 89.

94. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

and thus dragged him into the public eye.⁹⁵ According to the court, the New England Life Insurance Co's nonconsensual use of Pavesich's image—and further distortion that he was a customer—damaged Pavesich in a way that disposed him of his ability to choose his manner of life by exposing him to the “public gaze.”⁹⁶ The court found that the law protected Pavesich and his reputation from this privacy harm through protection of what we might today understand as false light. Conceptually, we might understand racial discrimination as a kind of unrecognized libelous, privacy, and reputational harm that renders a person in a type of false light, procured through a subordinating and othering gaze. We might further understand acts of racial protection as a form of privacy protection, self-determination, and dignity restoration.

Black home-educating parents are motivated to ensure their children are protected from the dominant gaze that stigmatizes Black childhood. Being free from racial discrimination in childhood means that a child will not be made to navigate and respond to incongruent misperceptions about their developing selves. The exposure to adultification is one of the most insidious and incongruent misperceptions ailing Black childhood in schools.⁹⁷ Black children are specifically harmed by adultification because they are perceived to be older, stronger, and less innocent than other children. In fact, Black children are not viewed as children in schools because the fact of their Blackness is interpreted differently than other children's skin color. Perceived Blackness, even in children, triggers reactions that would not otherwise occur. Children notice how they are treated and how their peers are treated. Their observations of fairness in treatment are formative in their development and sense of self and self-acceptance. Seeing themselves and other Black children as targets of unfair treatment brings to mind a norming condition for alienation and rejection.⁹⁸ Providing space away from this harm (or never encountering it in the first place) that is a compounded domino effect, triggered by exposure, treatment, and internalization, is exactly what Black home-educators are motivated to do.

95. *Id.* at 72.

96. *Id.* at 70.

97. Naomi Priest et al., *Stereotyping Across Intersections of Race and Age: Racial Stereotyping Among White Adults and White Children*, PLOS ONE, Sept. 12, 2018 at 2, 11 journals.plos.org/plosone/article?id=10.1371/journal.pone.0201696; see also REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZALEZ, *GIRL INTERRUPTED, THE ERASURE OF BLACK GIRLS CHILDHOOD* (2017); see also Phillip Atiba et al., *The Essence of Innocence*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

98. See Nikole Hannah Jones, *supra* note 84.

a. *Black Home-Educator Experiences and Narratives*

Black home-educators express concern about the need to protect their children from exposure to ongoing racial discrimination beyond the physical harms in schools.⁹⁹ The following selected segments from interviews with Black home-educating parents reveal that they are deeply concerned with preserving their children's self-concept and creating a space that protects it.

SH: *There is this perception that suffering prepares you for the world. If the world is going to be difficult why not create a space away from that for as long as possible?*

TA: *I don't want to raise my children to think something is wrong with being Brown or Black.* (Home-educators SH and AL (sitting nearby SH and TA) shake their heads in agreement).

Immediately, we see that home-educator SH rejects the long held belief that her children should become accustomed to racial discrimination as a fact of Black life beginning in childhood. Instead, she expresses that she is vested in creating and curating a space that is a barrier to this encroachment. Again, this is different from the concerns of White home-educating parents because White home-educating parents do not have the concern that their children will be targets of racial discrimination. Likewise, when TA says *I don't want to raise my children to think there is something wrong with being Brown or Black,*¹⁰⁰ we might understand her concern in a variety of ways—including in a privacy jurisprudence context that acknowledges the harm of a distorting and subordinating gaze that violates a person's "liberty of privacy."¹⁰¹ The socio-historical¹⁰² meaning

99. My interviews with Black home-educating parents were conducted as a preliminary measure to begin to understand their motivations, in addition to the research I had read by Professors Ama Maza and Cheryl Fields Smith. I made contact with Black home-educating parents after following several social media outlets such as podcasts and websites including *Fare of the Free Child* created and hosted by Akilah Richardson and Mater Mae, created by Anthonia Akintunde and Deborah Choi, along with a variety of news articles.

100. *Id.* We might also see a similar concern about how Black children are viewed as deficient in general, which prompts the compliment that AL received about her children. When Black children seen as remarkable generate compliments, it reflects the general deficit-based perception of what Black children are and how they behave. When SH says, "Your children appear to be docile and compliant and for that, you should be applauded? That is problematic," she is rejecting both frames of good Black children must be docile and compliant and that Black children are in general unruly.

101. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 72 (Ga. 1905).

undergirding TA's concern tracks the epistemological and legal assumptions about the relationship between Black people and the dominant culture in American society. What is most evident in TA's statement is that she believes none of this should be up for consideration by her children. Allowing her children to be exposed to the kind of physical and verbal aggressions that are expressive of perceived wrongness due to being Black or Brown is harmful and furthermore, traumatic in childhood. Additionally, to allow her children to be exposed to this does not fit into the goal of ensuring that childhood remains a space safe for children, and that their child-like behavior should be accepted, interpreted, and responded to appropriately.

AL: When people see my children in public spaces and feel the need to tell me how bright and amazing my children are. . . Your children are so well behaved they are so smart! Then they ask what grade are they in? Then there is shock that they are homeschooled—five kids. They ask how do they do that!? The fact that they are not going to white children to say the same things is problematic.

Similar to TA, AL expresses concern about her children's experience with confronting low expectations and resulting speech acts that indicate her children are remarkable and an exception to other Black children. Again, navigating what it means to be presumed as inferior only to be further insulted with a backhanded compliment is not the kind of exposure home-educating parents deem as beneficial for their children. These experiences parallel the kind of exposure and resulting harm from the subordinating and distorting gaze that privacy protection was meant to guard against. In an interview with a homeschooling mother from Georgia, the concern about allowing her children to experience childhood free from the often racial discriminatory encroachment of surveillance or racial profiling seems an impossibility in traditional school settings.

AM: They are watching us more. Infractions are fulfilling stereotypes. . . .

102. In *Understanding Privacy*, Daniel Solove employed what he described as a "bottom up cultural analysis" to derive his pluralistic taxonomy of privacy that included, amongst other values, the right to be let alone, personhood, and limited access to the self. Solove, *supra* note 16, at 9. Moreover, Solove identifies four basic groups of problems or harmful activities that make up his taxonomy of privacy: information collection, information processing, information dissemination, and invasion, all of which when combined with the overlay of Black stigmatization as inferiority support the data findings previously discussed including exclusionary discipline, inequitable penalties, over representation in special education class, under-representation in gifted and talented classes, etc. *Id.*

Here we see home-educator AM recognize that being watched more leads to disparate harm related to racial bias. The over-watching comes from the widely held bias that Black children should be watched more because of the disproven, yet persistent belief that Black children are more likely to misbehave. Home-educators provide the boundaries between these patterns and practices triggered in the imaginations of those who explicitly or implicitly perceive Black children as trouble-makers. Whether these beliefs are explicit or implicit, they are based on racist ideas. Believing that there is something intrinsically important about children being themselves in childhood, Black home-educators counteract the impact of these beliefs by providing a haven for their children's personhood to develop. The haven is recognized as the breathing or maneuvering room in privacy scholarship, and a sense of self supported by underlying principles in privacy jurisprudence. Black parents are concerned that the hegemonic effect of racial stigmatization¹⁰³ projected onto Black children in traditional school settings will create disorientation, confusion, and disorder within their children's self-concepts. They are also concerned that these intrusions will derail their children's natural processes of self-exploration, self-meaning, self-making, and learning. Therefore, they remove their children from the school system to protect their children's natural ability to flourish.

b. *Creating Breathing Room for Black Children to Flourish*

Privacy as a broad, liberal, normative concept is about controlling and shaping information about ourselves, and that is exactly what Black home-educator parents are doing for their children. Here, Black parents who have decided to provide their children with alternative educational opportunities conceptualize their decisions in ways that align with traditional privacy protection theory and jurisprudence. When AL expresses her annoyance with other people commenting on how well-mannered and smart her children are, she is saying that she views these comments not as compliments but as degrading assessments that reveal long-held base misconceptions about Black people in general, punctuated by the surprise when the opposite is encountered. AL, like the other parents interviewed do not want their children to have these damaging encounters that would require processing at a young age, on their own in school. People who comment on how remarkable they perceive Black child achievement to be are engaged in micro-aggressive behavior that centers

103. See generally R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 809 (2004) (citing GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 59 (2002)).

and substantiates harmful and degrading stereotypes. Seeing Black child achievement as exceptional and rare substantiates the insidious belief in Black inferiority.¹⁰⁴ We might further understand these kinds of comments as the equivalent of the “you speak so well” or “you are so articulate” trope many Black people have navigated and/or ignored. Black parents want their children to see themselves as they are—whether achieving or struggling—not as they are projected to be in pathological imaginaries. Accepting the intended projection is understood as a type of cage. In another point in the discussion with TA, she says that Black children should also be mediocre and spoiled and other things that other children are allowed to be. She rejects the desire to be viewed as remarkable, and instead insists that her children have the experience of being and becoming themselves—whatever that may mean for them as individuals. She also rejects the burden of cognitively engaging in the psychological battle to counter the premise of Black inferiority by managing these perceptions. Most importantly, given the privacy protectionist norming, she teaches her children to reject adopting the anxieties of those who may misperceive and devalue her children’s worth and ability.

This boundary making and shaping that occurs at the onset of attempted mischaracterization and projection does not prompt engagement such as John Henryism or stereotype management. It prompts a shielding and turning away from in order to protect the self-concept from absorbing racial discrimination in childhood. Here, we might understand the care-work of Black parents, specifically those who are home-educating, as not simply related to physical space between the school and the home-place, but also between the mental space or psyche, and interiority of Black children targeted by racist thoughts and actions. Furthermore, interactions such as the one that AL describes are contained and quarantined because the family can leave the space immediately whenever they determine it is no longer a healthy space. This immediate response may not be possible in traditional school settings. In traditional school settings, AL’s children may have been the direct target of the micro-aggression and left to manage the encounter without parental guidance in the moment. In this instance, parental intervention provided a barrier to further processing the comment on the part of her children, and it added the lesson of how to turn away from harmful misconception. Home-educating parents see providing as much space as they can to their children to enjoy their lives, notwithstanding the fact that their bodies could still attract ra-

104. A recent search of the phrase “black inferiority” produced 1,078 results on heinonline.org and 2,704 results on jstor.org, while a recent search of the phrase “white inferiority” produced 29 results on heinonline.org and 55 results on jstor.org. Notably, of the 29 results at heinonline.org, only 7 of the results did not include the phrase “non-white inferiority.”

cial discrimination, as valuable and worth protecting. This tracks Cohen's theory of privacy as breathing room.

Bricolage, tinkering, or play have deep implications in Cohen's theory of privacy as breathing room. Trying new things through practice impacts how we show up in the world. We experiment and revise as part of our human existence, and this involves behavior that changes within contexts based on our chosen identities and other complexities across space and time. How we are perceived and documented should take account of selves in flux or becoming, not only as we are fully formed. Our jurisprudence and privacy scholarship have recognized that self-development is made possible through privacy.¹⁰⁵ The gaps and the spaces created without perfect enforcement of law and policy allow for practice and play, and are both essential for innovation—especially in childhood. This is most important and relevant for Black children who face pervasive racial discrimination in the American school system.

Black home-educators providing alternative educational opportunities for their children are examples of the space and gap creators who create and curate the breathing room for their children's self-emergence and self-actualization. These parents create and curate the breathing room as a boundary to anticipated forces that have a history of stultifying the emerging and naturally dynamic self in traditional school settings. Home-educator SH expresses this belief when she responds to AL's story about how her children were deemed exceptional by an onlooker. When AL recounts how the reaction to her children is surprise and a compliment that her children are so well behaved and smart, SH expresses her concerns. SH: *What does that even mean?* (referring to the comments AL received about her children being exceptional as in the foregoing section) *Your children appear to be docile and compliant and for that, you should be applauded? That is problematic.* Here we find Black home-educator SH balking at the notion that children are good if they are *docile and compliant*. SH's concern is that being docile and compliant does not mean that Black children are engaging in behavior that allows them to explore and develop themselves. SH views this perception as grossly shortsighted. It means that other people see AL's children as good, regardless if that means the children are limited in their ability to self-express and explore as part of their educational experiences. Furthermore, if Black children are disproportionately deemed to warrant disciplinary action in many traditional school environments, as substantiated by numerous studies, the concern is that Black children will only be seen as good in such spaces if they are docile and compliant. Some Black children may find it necessary

105. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965). Privacy was found to be fundamental to decision-making for married couples.

to conform to these perceptions in traditional school settings by avoiding bringing attention to themselves including not volunteering to raise their hands to answer questions or seeking higher level classes. This self-shrinking behavior may be supported by both explicit and implicit messages in traditional school settings.

Additionally, the presumptions that burden Black children's structure of opportunities and access to diverse class offerings negatively impact their educational trajectory and their sense of what is possible in traditional schools. Barriers to fair access to gifted and talented classes mean missed opportunities to develop and self-discover through educational exploration and tinkering. Barriers to fair treatment related to disciplinary actions that are largely determined by subjective and discretionary decision makers create negative images of children who are in the processes of self-development and self-formation. Black children avoid these barriers in home-education. Tracking and surveilling school children in school settings through body scans, cameras, metal detectors, and school IDs are also avoided in home-education. The absence of over-surveillance in home-education allows for the kind of exploration in childhood that helps children build their self-confidence and independence. However, in traditional school settings these practices and de facto policies place a disproportionate percentage of Black children on a trajectory away from self-development towards not only modulation, but destruction.

c. Child Privacy Protection in Homeplaces

Professors Cheryl Fields-Smith and Monica Wells Kisura evoked bell hooks' homeplace idiom in their research on Black homeschoolers.¹⁰⁶ Homeplace represents agency and self-determination beyond the limiting environment that Black children experience in traditional school settings. According to bell hooks, homeplace is where "Black people strive to be subjects, not objects, where we can be affirmed in our minds and hearts . . . where we restore ourselves to the dignity denied us on the outside in the public world."¹⁰⁷ Fields-Smith and Kisura conceptualize homeplace, created by Black homeschooling parents for Black children, as "a radical space of self-actualization with the potential for positively impacting the family life and educational outcomes of the black community. This space is made possible through the vehicle of the homeplace, which for black families, is both a private and collectively shared

106. Cheryl Fields Smith & Monica Wells Kisura, *Resisting the Status Quo: The Narratives of Black Homeschoolers in Metro-Atlanta and Metro-DC*, 88(3) PEABODY J. EDUC. 265 (2013).

107. BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 42 (1990).

space.”¹⁰⁸ According to anthropologist Zenzele Isoke, these homeplaces are “political spaces that black women create to express care for each other and their communities, and to re-member, revise and revive the scripts of political resistance.”¹⁰⁹ Additionally, these spaces allow for the flexibility to engage in multicultural environments in ways that traditional school environments are deficient. For example, in Kisura’s study of homeschooling families in Washington, D.C. and Atlanta, Georgia, homeschooling families planned for and expressed the importance of studying abroad at an early age in response to the widespread phenomena of school re-segregation.¹¹⁰ Socialization for Black homeschooling families encompassed “golf courses, tennis courts, swimming pools, and gymnastic centers” and “served as sources of cross-cultural interaction between homeschooled and sometimes private-school children and their parents.”¹¹¹ Thus, for home-educating Black families, homeplace is not just about the home itself. It is about creating and curating experiences beyond the physical locale of the home, and ensuring that those experiences are not tainted by the harmful distraction of racial discrimination. These families remove or avoid childhood racial discrimination and focus on educational experiences anchored in learning, exploration, and self-actualization. Such experiences designed and managed by parents actively exclude deficit thinking and racist definitions, feelings, and perceptions or beliefs about what it means to be Black. Home-educating parents and children avoid policies, patterns, and practices that create the burden of constantly managing misconceptions. When avoided, the time devoted to respond to racial bias and discrimination can be otherwise used to explore interests and tastes developing in childhood.

2. Letting Black Children Self-Author Their Own Lives

Letting Black children self-author their own lives necessarily means providing not only a protected physical space but also breathing room to explore their own beliefs and other intangible interests. Likewise, in *Olmstead v. United States* Justice Brandeis’s dissent reminded the Court that privacy is about protecting the intangible interests of individuals such as their “beliefs, their thoughts, their emotions and their sensations.” We should understand why this is so important in conceptualizing the meaning of privacy and what privacy is for. Privacy ultimately means protec-

108. Fields Smith & Kisura, *supra* note 106, at 266.

109. Zenzele Isoke, *The Politics of Homemaking: Black Feminist Cityscape*, 19(2) TRANSFORMING ANTHROPOLOGY 117, 117 (2011).

110. Fields Smith & Kisura, *supra* note 106, at 278.

111. *Id.*

tion of the individual's ability to self-author their own life. In his dissent, Justice Brandeis described this ability as conceptualized by the writers of the Constitution and preserved by privacy protection as "happiness." In *NAACP v. Alabama*, the Court again recognized the importance of privacy protection in preserving this overarching principle of pursuing one's beliefs through the confidentiality of organizational association.¹¹² Most importantly, the Court maintained that the State of Alabama could not compel the NAACP to disclose its members list because doing so would "constitute an effective restraint on its members' freedom of association" and thus impair "the advancement of beliefs and ideas. . . ."¹¹³ Advancement of beliefs and ideas—especially in childhood—is the bases of becoming, self-authorship, and shaping of a life. Ultimately, home-educating parents expressed that their goal in home-education was to help their children develop a sense of agency in their lives free from racial bias and discrimination in childhood as much as possible. For example, when asked about what her goal is as a homeschooling parent AM said she wanted her children to "make it to adulthood without being broken down at age 8." Other parents expressed that they did not view exposing their children to the racial discrimination in traditional schools as enhancing their children's ability to express agency and self-author their lives. In fact, they viewed the exposure as a barrier.

Black children are vulnerable to the same kind of racial calumny encountered by Black adults, but are perhaps more vulnerable because they are children and have not developed the same faculties or abilities as adults.¹¹⁴ When AM speaks of how she wants her children to grow up as teenagers with their spirits intact she is expressing what it means for Black parents to provide child privacy protection as a means of protecting self-actualization in childhood. Black home-educators acting as child privacy protectors provide cover against what John Stuart Mill described as "the tyranny of the prevailing opinion and feeling,"¹¹⁵ of the broader society. Black home-educators want their children to be and become without the unnecessary and damaging experience of racial discrimination that is often experienced as prevailing opinion and feeling in traditional school settings.

Here, we see Black parents rejecting the perceived value and benefit of exposing their children to the kinds of harms that would negatively

112. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 450 (1958).

113. *Id.* at 460.

114. See *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Haley v. Ohio*, 332 U.S. 596, 599–602 (1948) (respectively recognizing that childhood is a particularly vulnerable time (especially for psychological harm), and that children have different capacities compared to adults especially as it relates to decision making).

115. JOHN STUART MILL, *ON LIBERTY* 9 (1859).

impact their children's self-concept. The commonplace thinking that Black children who are not accustomed to being marginalized racially will not know how to navigate the "real world," is a counterargument to the kind of child privacy protectionist behavior engaged in by Black home-educators. This argument has deep and troubling ties to self-compromising, self-defeating ways, and unhealthy ways of thinking. During slavery, enslaved Africans were forced to undergo a process of acclimation or adjustment called seasoning. Slavers found this necessary as a curative to self-harm and suicidal behavior that enslaved persons resorted to in response to their captivity and treatment. The seasoning process was supposed to modulate the new Africans' behavior and expectations so that they could produce the desirable economic benefits that free labor procured for the international political economy. Seasoning was the method through which newly-arrived Africans were acculturated to accept their enslavement. The process lasted from one to four years.¹¹⁶ Black home-educating parents have decided neither they nor their children will commit themselves to navigate and "get used to" the kind of treatment that exposes them to the harms associated with the damaging mischaracterizations and treatment documented in traditional school settings. Instead, these parents spend their resources providing homeplace¹¹⁷ for their children to be and become themselves. Perhaps the clearest indication of this comes from my interview with AM who shares that her children have no conception of what it means to make people "comfortable" with their presence based on widely held racial norms and biases.

The counter-narratives expressed by Black home-educators about the need to protect their children's ability to be and become tracks traditional theories of privacy protection, particularly those that regard liberty and personal security as essential to self-development and privacy protection as the right to be let alone.¹¹⁸ These counter-narratives from Black home-educators reflect their effort to make and take time for their children's development in ways that are severely limited if not impossible in most traditional school settings.

116. See ELIZABETH M HARCROW, *CANES AND CHAINS: A STUDY OF SUGAR AND SLAVERY* 71 (1982).

117. See Nappen, *supra* note 87, at 74 (stating "Nowhere else do people expect privacy more than in their homes; consequently, most homeschooled students preserve more personal privacy than those who attend public schools.").

118. In *Doe v. Bolton*, Justice Douglass frames the Court's privacy jurisprudence as reflective of liberty that allows for the development and expression of "one's intellect, interests, tastes, and personality."

3. Insulating Black Children from Negative Distortions

In as much as this Article presents and foregrounds a new privacy perspective that Black home-educators are child privacy protectors, it also posits another new proposition in privacy: the boundary Black home-educators create and curate is a boundary between their children and negative distortions. Society does not allow one who is negatively distorted or stigmatized as criminal or inferior to be “let alone.” Since privacy preserves the right to be and become or engage in self-actualization in stigmatized childhood, we might conceive the opposite of this as a form of negative distortion. Inherently defined as problems, stigmatized human persons are presumed to be in need of correction or out of place. Negative distortion makes use of stereotyping, but is not the thing itself. Negative distortion depends on projections by actors who are capable of shaping power relationships by reducing human persons to specific and/or general problems. Thus, a thicker conceptualization of privacy as freedom from negative distortion is useful here. This Article proposes that the relevant type of negative distortion that Black children experience includes two components: 1) the denial or negation of and/or inability to recognize the actual human person or actual attributes of the human person as an individual and 2) a generative condition or force that catalyzes, sustains, and/or nurtures the resulting negative distortion. Mistakes, emotions, preferences, dislikes, facial expressions, and responses to teachers and peers amongst other subjectively defined behavioral determinations are interpreted through a calibrated lens that allows perceptions about Black children to be negatively distorted. This is not new—it is tradition. Black home-educating parents know that these same factors are not interpreted through the same lens with regard to non-Black children.

Black children are uniquely vulnerable to predictable privacy harms, including negative distortions. They are subjected to hyper-surveillance by school actors and attendant technology such as cameras, metal detectors, and body searches; and over-policed through disproportionate discipline including suspensions, expulsions, physical abuse, and other violations of bodily integrity. The decision-making about what kind of treatment is reasonable for Black children in schools is based on a shared history about the meaning of what it means to be Black in America. The alchemy and incantations of racial bias alters the image of the Black child into a person of interest who should be suspected of wrongdoing and the most likely to have actually engaged in the wrongdoing. This is the circular reasoning that perpetuates racial discrimination in schools. Whether implicitly or intentionally, the impact and harm can be the same. A Black child is watched and monitored in a way that other children are not. A Black child’s expression of a range of childlike emotions including irritability, anxiety, and discomfort resulting in any number of infractions are

not viewed as child-like nor behavior external to who the Black child is as an individual. The child-like behavior of Black children is viewed as character evidence.¹¹⁹ Value-laden perceptions about Black children determine that they should be and therefore are watched more, and impact how they are watched qualitatively. The meaning of what one might believe as a result of the watching of a Black child is different from the meaning one might perceive after watching a non-Black child. This type of watching can occur regardless of the race or socio-economic background of the person watching.¹²⁰ That is why the data shows that Black children who engage in the same or similar behavior are penalized more frequently and more harshly than other children. The privacy harm is not simply the violations of unjust searches, monitoring, and bodily integrity when a Black child is strip searched, body scanned, dragged down flights of stairs, or thrown across a classroom by school police officers. The harm is also the necessary condition of negative distortion of what it means to be a Black child who is watched in a qualitatively different way; although perhaps not seen. Black parent home-educators create and curate space for their children to be seen and free from negative distortion.

III. CONCLUSION

In 1995, journalist John McKenzie interviewed a then fourteen-year-old tennis player, Venus Williams, while her father, Richard Williams sat off-camera. At one point in the interview the following exchange happened:

McKenzie: *You think you can beat her?*

V. Williams: *I know I can beat her.*

McKenzie: *You know you can beat her? Very confident.*

V. Williams: *I'm very confident.*

McKenzie: *You say it so easily. . .why?*

119. See George Yancy, *Whiteness and the Return of the Black Body*, 19 J. SPECULATIVE PHIL. 215, 220–22 (2005) (wherein he describes the “semiotic distortion” of the Black body as actor imagined and made real through social construction and a “historically manufactured normative framework.”).

120. While both Black and non-Black people can think in similar ways about Black bodies, there are studies on bureaucratic representation, or the concept that the decision-maker’s race matters in terms of opportunity and distribution in a broad range of contexts including education, government services, and local law enforcement, and that there is enhanced access for Black people if the decision maker is also Black.

V. Williams: *Because I believe it.*

At this point in the interview, Williams' father, Richard Williams interjects and says

R. Williams: *Alright stop right there if you don't mind. And let me tell you why. What she said, she said it with so much confidence the first time, but you keep going on and on and on.*

McKenzie responds with *But we can't keep interrupting. . .*, prompting Mr. Williams to walk over to the reporter, bend his body into the interviewer's personal space as he is sitting, and forcefully state with a raised voice,

R. Williams: *You've got to understand that you're dealing with the image of a 14-year old child. And this child is going to be out there playing when your old ass and me gonna be in the grave! You're dealing with a little Black kid, and let her be a kid! She done answered it with a lot of confidence. Leave that alone!*¹²¹

The now infamous clip is an example of the kind of concern, vigilance and care work arguably unique to Black parenting in America because Black parents carry the heavy burden of having to provide anti-Black racial protection to their children.¹²² What resonated with so many Black people who saw the clip was their own experiences with challenges or questions about their mere presence, ability, aspirations, and confidence in a multitude of spaces.¹²³ Mr. Williams' unrelenting drive to pro-

121. Venus Williams, *Venus Williams: Confidence Can Be Learned*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/venus-williams-self-confidence.html>. Mr. Williams's understanding here is in direct accord with John Holt, educator and early homeschooling proponent, who said that "[a] child's understanding of the world is uncertain and tentative. If we question him too much or too sharply, we are more likely to weaken that understanding than strengthen it. His understanding will grow faster if we can make ourselves have faith in it and leave it alone." JOHN HOLT, *HOW CHILDREN LEARN* 66 (Pitman Pub. Corp. 1969) (1967).

122. Narratives of tiger, helicopter, free range and over-parenting are wholly incapable of contemplating, let alone acknowledging, the significance of what it takes to raise well-adjusted, confident, and high-achieving Black children. The kind of repetitive attempts at interference and attempts to chip away at confidence, healthy self-concept, and other positive behaviors that Black children may exhibit, remains a constant reminder of the difficulty the broader society grapples with when presented with the discord between deeply held presumptions and reality.

123. See Anna Sheffer, *A Throwback Video Has Surfaced of Venus Williams' Dad Defending Her Confidence After a White Journalist Questioned It*, EXPLORE (Aug. 30, 2018, 1:02 PM), <https://hellogiggles.com/news/venus-williams-dad-defending-confidence-throwback-video/>. Additional social media messages shared by African American celebrities such as Gabrielle Union, Kanye West, and attorney and political commentator Angela Rye all

tear his child in the face of what he deemed as an attempt to interfere with and disrupt his child's self-concept of being confident and capable of beating an opponent was also clear. Mr. Williams did not view McKenzie's persistent questioning as a helpful initiatory experience in what would turn out to be a long line of attempts to question, diminish, and in several cases degrade and humiliate both of his daughters' as they pursued an unprecedented ascent in the competitive tennis world and beyond. Instead Mr. Williams stopped the interview.¹²⁴

The prevailing perception of Black parenthood in America is one of deficiency, lack of care, and concern. Relying on deficit analyses rooted in essentialist ideology—constructed and reproduced through ahistorical social frames and discredited behavioral science studies—this prevailing perception persists as a matter of confounding and pathological need. Likewise, legal and socio-political imaginaries consistently fail to consider and respond to Black parenthood in ways that are divorced from distortion and superstition. In contrast, our jurisprudence has long supported the rights of parents to raise and protect their children as they deem appropriate, including making decisions about childhood education and family privacy. From enslavement to present day, Black parenthood has been an exception to that tradition. As a result, Black parents have maintained a largely ignored self-reliant tradition of addressing child privacy protection and educational disenfranchisement dating back to pre-emancipation.¹²⁵ Still, legal scholars fail to understand the epistemological

echoed their support of what Mr. Williams did on behalf of his child. Many of these comments alluded to the commenters' personal experiences.

124. Venus Williams, *Venus Williams: Confidence Can Be Learned*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/venus-williams-self-confidence.html>. See also WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER 188 (2007) (noting Richard and Oracene Williams home-schooled their children Venus and Serena for part of their K-12 education).

125. The unobscured historical record illustrated that well before *Brown*, in 1787 and again in 1790, free Black parents led by Prince Hall petitioned the Massachusetts legislature for separate schools on behalf of their children, notwithstanding the fact that public schools in Boston did not bar the attendance of Black children. Prince Hall is also believed to have drafted Belinda Royall's petition for reparations from her former owner, Isaac Royall's, estate. The petition was presented to the Massachusetts legislature in 1783 and again in 1787. See generally, Roy E. Finkenbine, *Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts*, 64(1) THE WM. & MARY Q., Jan. 2007, at 95-104.; See also CHARLES H. WESLEY, PRINCE HALL: LIFE AND LEGACY (1983).

"By 1790, racial insults and mistreatment had driven out all but three or four black children." Derrick A. Bell Jr., *The Legacy of W.E.B. DuBois: A Rational Model for Achieving Public School Equity for America's Black Children*, 11 CREIGHTON L. REV. 409, 410 (1977). Hall petitioned for an "African" schoolhouse as an alternative to the integrated public schools provided by law in Massachusetts. *Id.*

Shortly thereafter, the Hall family opened a school for free Black children in their home. Black parents continuously organized against the educational disenfranchisement of their

meaning of Black parenthood as child privacy protectors. As a result, none of the previous legal scholarship discussing privacy protection including alternatives to traditional schooling environments centers the motivations, norms, and traditions of Black parenthood. Recognition and study of liminal spaces wherein extra-legal life affirming behavior emerges, is essential to understanding and correcting legal perspectives, because it challenges both subjects and objects of law to see beyond legal stasis. Black parents, including those who are choosing alternative educational opportunities for their children, are rejecting the received wisdom to directly engage both the legal and school systems. Instead these families redirect, leave, or never formally approach these spaces because their attention is elsewhere. This article begins to examine the meaning of what happens elsewhere curated by Black parents engaged in what I argue should be recognized as child privacy protection and a signal to policy and law makers.

This article's primary concern is to consider how Black parents develop privacy protectionist interventions as a necessary means of managing society's and the state's (in schools specifically) modes of engagement with their children, as members of a stigmatized community. Their experiences as child privacy protectors provide an enhanced conceptualization of social practices and social meanings that support their decisions to leave or never approach traditional school environments. Many traditional school environments continue to be characterized negatively because of the racial disparities that result in vast disadvantages to Black children. Exclusionary discipline, academic failure, and introduction to the carceral continuum are some of the most detrimental examples of this. Alternatively, Black home-educators seek to protect their children's right to be and become without being exposed to racial bias and discrimination in childhood.

children pre-emancipation. *Brown* was not the beginning of this process and today, school-age children are just as likely to be segregated as they were in 1954. The piercing reality of *Brown* 65 years later is one of disappointment, as both educational equity and quality have both suffered in its wake. (In 1935, W.E.B DuBois directed his comments on school integration to Black people, warning that ". . .the Negro needs neither segregated nor mixed schools. What he needs is an Education. What he must remember is that there is no magic either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad." W.E.B. Du Bois, *Does The Negro Need Separate Schools?*, 5(4) THE J. NEGRO EDUC., 328, 335.).

